

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

CP D 493 of 2018 : Umaid Ali vs. Election Commission of Pakistan & Others

For the Petitioner : Mr. M. Junaid Farooqui, Advocate

For the Respondents : Mr. Jawad Dero
Additional Advocate General

Mr. S. Haider Imam Rizvi, Advocate for respondent No.5.

Mr. Abdullah Hinjrah, Law Officer Election Commission of Pakistan

Date of Hearing : 30.04.2019 & 15.05.2019

Date of Announcement : 31.05.2019

JUDGMENT

Agha Faisal, J: The petitioner, having been elected as Member and subsequently Chairman of Town Committee under the Sindh Local Government Act, 2013 (“**Act**”), has assailed the order dated 16.01.2018 (“**Impugned Oder**”), issued by the Election Commission of Pakistan (“**ECP**”) in the Case No.27(30)/2017-Law, wherein the petitioner was disqualified from holding office. The content of the Impugned Order is reproduced herein below:

“Arguments already heard. For detailed reasons recorded separately, the application is accepted. The respondent Umaid Ali is disqualified from being chairman/member of Town Committee Kheme Jo Par, District Tharparkar, Notification be issued accordingly and follow up action be taken.”

2. Briefly stated, the facts significant to the present petition are that the respondent no.5 had filed a complaint before the ECP challenging the eligibility of the petitioner to hold office in view of Section 36(1)(i) of the Act. The content of the aforesaid provision is reproduced hereunder:

“36. Disqualifications for candidates as members.- (1) A person shall be disqualified from being elected or chosen as and from being a member of the Council, if –

(i) he is under contract for work to be done or goods to be supplied to a council or has otherwise any direct pecuniary interest in its affairs;”

(Underline added for emphasis.)

ECP conducted detailed proceedings in respect of the aforesaid complaint against the petitioner and came to the conclusion that the petitioner was not entitled to hold office, hence, he was removed vide the Impugned Order.

3. Mr. M. Junaid Farooqui, Advocate appeared on behalf of the petitioner and submitted that the Impugned Order was rendered in disregard of the law. Learned counsel argued that the petitioner had not been engaged by the local council, where he remains member and Chairman. Learned counsel submitted that it was just and proper for evidence to be led / re-evaluated in order to ascertain the veracity of the petitioner’s claim. Learned counsel also challenged the Impugned Order on the basis that the same could not be rendered pursuant to section 36(2)(b) of the Act. It was thus argued that the petition may be allowed and the Impugned Order may be set aside forthwith. The learned counsel relied upon an unreported order of the Honorable Supreme Court dated 18.11.2015 in CP 3390 and 3391 of 2015 in the case of *Saadullah vs. Lutfullah & Others* (“**Saadullah**”) in support of his contentions.

4. Mr. S. Haider Imam Rizvi, Advocate appeared for respondent no.5 and supported the Impugned Order. It was submitted that the ECP conducted extensive proceedings to arrive at the determination contained in the Impugned Order and that no infirmity was demonstrable therefrom. Learned counsel submitted that the provisions of the Act duly enabled the ECP to entertain the complaint of the respondent no.5 and it is apparent from the Impugned Order that the same had been rendered after providing maximum opportunity to the petitioner to state his case. Learned counsel submitted that in presence of specific and a general provision in the same statute to similar effect, reliance was to be made upon the specific provision therein contained in this regard. Learned

counsel relied upon the case of *the State vs. Aziz-ur-Rahman and Others* reported as *PLD 1973 SC 49* and *Al-Jehad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court vs. Federation of Pakistan & Others* reported as *PLD 1997 SC 84* in support of his submission. Learned counsel argued that the power of the ECP to unseat a member pursuant to section 36(2)(b) of the Act has been recognized in the case of *Abdul Latif Vs. Election commission of Pakistan & Another* reported as *2018 CLC 227* ("**Abdul Latif I**") and the said judgment was duly upheld by the Honorable Supreme Court vide its judgment dated 16th November, 2017 in *Abdul Latif Vs. Election Commission of Pakistan & Another* in CP 4355 of 2017 ("**Abdul Latif II**"). It was argued in conclusion that the Impugned Order ought to be upheld and maintained and the present petition merited dismissal forthwith.

5. Mr. Abdullah Hinjau, Law Officer for the ECP submitted that the Impugned Order was delivered in accordance with law and in such regard he sought to rely upon the arguments already advanced on behalf of the respondent 5. In addition thereto, he drew the Court's attention to the nomination form, copy whereof was available on file and submitted that the petitioner had actively concealed the existence of any government contracts as disclosure of the same would have resulted in the rejection of the nomination papers. Learned AAG drew the Court's attention to the comments filed by the respondent no.4 and submitted that the same may be taken as his arguments.

6. We have heard the respective learned counsel and have also considered the documentation to which our surveillance was solicited. It is pertinent to record at the onset that the learned counsel for the petitioner has been unable to persuade the Court that evidence was required to be led or re-evaluated in the Constitutional jurisdiction of this Court in the present facts and circumstances. Therefore, the scope herein is circumscribed to evaluating whether any fundamental right of the petitioner was infringed vide the Impugned Order and whether the ECP was empowered to deliver the Impugned Order in reliance upon the provision of law relied upon therein.

7. The ECP had issued a detailed reasons dated 16.01.2017 wherein the rationale for the Impugned Order was delineated. It may be pertinent to reproduce the operative findings contained therein:

“10. We have heard the arguments of both the parties and perused the record. Some admitted facts came to the notice of the commission, which are mentioned hereunder.

- i) The respondent elected as member, Town committee and thereafter since year 2012 he was a Government contractor with the Relief Department, Government of Sindh for transportation of free relief subsidy wheat to different areas of Tharparkar including Kheme Jo Par and obtained pecuniary benefits in the name of Dhatti One Transport Company Merkot.
- ii) From the documentary evidence, it reveals that since year 2012 until year 2018 contracts were awarded to Dhatti One Transport Company Umerkot bills in millions of rupees were paid to the owner namely, Mr. Umaid Ali Respondent. The latest contract has been awarded to the respondent on 31.08.2017.
- iii) The respondent had received payment of Rs.40,27,450/- vide letter No. Mukh 166 of 2016 Dahli @ Kheme Jo Par, dated 20.09.2016 from the office of Mukhtiarkar (Revenue) Taluka Dahli @ Kheme Jo Par in the name of Dhatti One Transport company Umerkot on account of transportation charges for free relief wheat from government Godown Chachro to various relief centers including Kheme Jo Par whereas he had taken oath of the office of Chairman Town Committee on 30.08.2016.
- iv) During the arguments it is not denied by the learned counsel for the respondent to have received an amount of Rs.40,27,450/- from Government by the respondent.
- v) In terms of Section 36(1)(i) of the Sindh Local Government Act, 2013 the respondent was not eligible to contest the election in 2015 being a Government Contractor.
- vi) The respondent was also involved in the illegal transfer of staff from Town Committee chachro to Kheme Jo Par and payment of double salaries to that staff.

11. That when once this glaring illegality under section 36(1)(i)(j) of the Sindh Local Government Act, 2013 and Article 63(1)(i) of the Constitution come to the notice of the Election commission of Pakistan it cannot shut eyes and cannot allow the corrupt practice to perpetuate, Section 9 of the Election act, 2017. Article 218(3) read with worker Party

Case and other cases of the Honorable Supreme court of Pakistan. The objection of the learned counsel for the respondent qua jurisdiction of the Election commission is dismissed and as discussed above it is held that Election Commission has all and plenary jurisdiction under Article 218(3) of the constitution to look into all activities both prior, on and subsequent to Election Day, that are carried out in anticipation thereof, adhere to standers of justness, fairness, and honest, in accordance with law and free from corrupt practices. Section 36(2) of the Sindh Local government Act, 2013 also empowers the Election commission that if elected member of council is found to have contravened the provisions of sub-section (1) the Commission shall cease forthwith his membership and declare him as disqualified from being a candidate for election to a council for a period of four years.

12. In the light of above discussion, we are of the considered view that respondent violated the provisions of section 36(1)(i) and section 80(2) of the Sindh Local government Act, 2013 and Article 63(1)(i) of the Constitution. It is proved through the documentary evidence that respondent was a government contractor (owner of Dhatti One Transport company Umerkot) and received a huge amount of Rs.40,27,450/- from Government. Being a Government contractor the respondent was not eligible to file nomination papers or take part in the Local Government Election held in 2015 for the seal of Member, Town Committee, Kheme Jo Par and thereafter for the seat of Chairman of the said Town committee. The petition is accepted. According to Section 36(2) of the Sindh Local Government Act, 2013 the election of the respondent as member, Town committee, Kheme Jo Par and thereafter the election of Chairman Town committee, Kheme Jo Par are declared as null and void. His notification as returned candidate is hereby withdrawn and his membership is cancelled. The respondent is also declared as disqualified from being a candidate for election to a council for a period of four years. His election being void, the recovery of salary and other allowances etc. are directed to be made. Office is directed to hold fresh election on the seat of Chairman, Town committee, Kheme Jo Par and thereafter election for the seat of member of concerned ward.

13. Above are our reasons for the short order of even date.”

8. The aforementioned reasons, inter alia, record the petitioner receiving payment in respect of contract/s pertaining to the town committee, where he remains member and chairman, even after having taken oath of office as chairman. It is further demonstrated that the factual narrative documents an admitted position. Our attention was also drawn to the documentary proof, available at page 275 of the Court file,

wherein the observations in the aforementioned reasoning were corroborated. Upon being confronted with this document the learned counsel for the petitioner admitted the same, however, submitted that the payment was not issued by the town committee itself but by a revenue officer of the same jurisdiction. It was sought to be argued by the learned counsel for the petitioner that unless the contract was with the concerned council itself, or payment was made by a functionary of the said council itself, Section 36(1)(i) of the Act would not be attracted.

9. We have already reproduced the pertinent provision of the Act supra and it is clearly stipulated therein that not only could disqualification be predicated in respect of work to be done or goods to be supplied to a council but that such disqualification was also attracted if a person had otherwise any direct pecuniary interest in the affairs of the said council. It is our considered view that section 36(1)(i) of the Act contains two disjunctive segments and that the petitioner has been unable to demonstrate before the ECP that he had no pecuniary interest in the affairs of the committee where he remained member / chairman. The petitioner's reliance upon *Saadullah* is unwarranted as in the said pronouncement the Honorable Supreme Court had determined that the petitioner therein had not been under contract with the council nor did he have any direct pecuniary interest in its affairs. In the present case, the petitioner has been unable to discharge the burden, before the ECP, that he had no pecuniary interest in the affairs of the relevant town committee where he remained member / chairman.

10. The Law Officer of the ECP had raised very pertinent issue with regard to non-disclosure of the relevant contract by the petitioner in his nomination form. The copy of the nomination form available on file makes no reference to any contract relevant to the present proceedings and pertinently no receivable in such regard is declared in the assets component of the said nomination form. The learned counsel for the petitioner has admitted this nondisclosure, however, has failed to substantiate any rationale in respect thereof. The determination of the factual controversy has been elaborated in the reasons for the Impugned Order and no infirmity in such regard has been demonstrated before us.

11. The last issue to consider is whether the ECP was empowered to rely upon the provisions of Section 36 of the Act to unseat the petitioner. In such regard it is observed that the aforesaid section expressly states that the person shall be disqualified from being elected or chosen and or from being a member of the council if the disqualifications prescribed in the said provision are attracted. This clearly demonstrates that the phrase “being a member” signifies that a person who is subsisting as a member can be disqualified by the ECP under the provisions of Section 36(2)(b) of the Act, constituent whereof is reproduced herein below:

“36. Disqualifications for candidates as members.....

(2) Whoever-

(a)

(b) Having been elected as a member of a Council or is a holder of an elective office of the council is found by the Election commission to have contravened the provisions of sub-section (1) shall cease forthwith to be an elected member or to hold the office of such member and stand disqualified from being a candidate for election to a council for a period of four years.”

The honorable Islamabad High Court was seized of the similar matter in the case of *Abdul Latif I*, wherein the applicability of Section 36(2)(b) was upheld. The pertinent findings of the Court are reproduced hereunder:

“24.The case at hand concerns the question as to whether the petitioner was disqualified to contest the local body elections in terms of Section 36(1)(i) of the Sindh L.G. Act. Section 36(2)(b) of the said Act clearly confers jurisdiction on the Election Commission of Pakistan to disqualify any person having been elected as a Member of the Council or is a holder of an elective office of the Council if found by the Election Commission to have contravened the provisions of Section 36(1) of the said Act. In view of the said express conferment of jurisdiction by Section 36(2)(b) of the said Act on the Election Commission to give a finding on whether an elected member of a Council had contravened the provisions of section 36(1) of the said Act, the objection of the petitioner's learned counsel to the jurisdiction of the Election Commission to disqualify the petitioner, is not sustainable.....

26. As regards the contention of the learned counsel for the petitioner that the only way the petitioner's election could have been challenged was through an election petition before the election tribunal, it is my view that since respondent No.2 had not contested elections for the seat of Member, Municipal Committee

Gambat, he could not have filed an election petition before the election Tribunal. In this regard, Section 46 of the Sindh L.G. Act is reproduced hereinbelow:-

"46. Election petition.- (1) Subject to this Act, an election to an office of a council shall not be called in question except by an election petition.

(2) A candidate may, in the prescribed manner, file an election petition before the Election Tribunal challenging an election under this Act." (Emphasis added)

27. The words "subject to Act" in Section 46 (1) of the Sindh L.G. Act saves the authority of the Election Commission under Section 36 (2) of the said Act to give a finding that a person elected as a member of a Council had contravened the provisions of section 36 (1) of the said Act. Such a finding against an elected member results in such a member ceasing to be an elected member. The words "a candidate may" in Section 46 (4) of the said Act implies that only a candidate who had contested elections against the Member whose election is challenged can file an election petition before an election Tribunal.

28. In view of the above, I have no hesitation in holding that the respondent No.1/Election Commission did have the jurisdiction under section 36(2)(b) of the Sindh L.G. Act, 2013, to give a finding that a person elected as a Member of a Council having contravened the provisions of section 36(1) of the said Act shall cease to be an elected Member and stand disqualified from being a candidate in an election to a Council for a period of four years. I do not find any jurisdictional infirmity in the decision of respondent No.1 that the petitioner having contravened the provisions of section 36(1)(i) of the Sindh L.G. Act, ceased to be an elected Member of the Municipal Committee Gambat. Therefore, this petition is dismissed with no order as to costs.

12. *Abdul Latif I* was assailed before the Honorable Supreme Court in *Abdul Latif II* and the Honorable Supreme Court was pleased to maintain the judgment of the Islamabad High Court. The pertinent observations are reproduced herein below:

"5. The Commission had concluded that the petitioner was not qualified to contest elections, in view of clause (1) of subsection (1) of section 36 of the Act, and consequently had rightly deseated him in terms of clause (b) of subsection (2) of section 36 of the Act and the order of the commission was upheld by the High Court. Both the said order and judgment are well reasoned and do not call for any interference."

The honorable Supreme Court has already upheld the efficacy of Section 36(2)(b) of the Act and maintained that a member was liable to be unseated thereunder subject to the prescriptions therein contained.

The ratio of *Abdul Latif II* is binding upon us and squarely applicable to the facts and circumstances of the present case.

13. In view of the reasoning and rationale herein contained we are of the deliberated view that the petitioner has failed to make out a case, hence, the present petition, along with pending applications, is hereby dismissed with no orders as to costs.

J U D G E

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*Farooq PS/**