

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Constitutional Petition No. D-1015 of 2019

Present:

**Mr. Justice Abdul Maalik Gaddi
Mr. Arshad Hussain Khan**

Petitioner: Mohammad Abbas Mahar, *through*
Mr. Ghulam Shabir Dayo Advocate.

Respondents 1 to 4: The Appellate Tribunal Sindh at Sukkur,
Chief Election Commissioner,
Islamabad, Provincial Election Commissioner,
Karachi and Returning Officer of By-Election-
2019 of NA-205 (Ghotki-II) *through*
Mr. Muhammad Mahmood Khan Yousfi,
Deputy Attorney General along with Mr. Aijaz
Anwar Chohan Director (Election) Karachi Mr.
Rana Abdul Ghaffar Regional Election
Commission/DRO.

Respondent No.5 : Bangul Khan, *through*
Mr. Haq Nawaz Talpur assisted by M/s.
Muhammad Asad Ashfaq and Ali Raza Baloch,
Advocates

The State : *Through* Mr. Agha Athar Hussain,
Additional Advocate General.

Date of hearing : 11.07.2019

JUDGMENT

ARSHAD HUSSAIN KHAN, J.- The petitioner through instant petition has challenged the order dated 18.06.2019, passed by Returning Officer Bye-Election 2019 NA-205, Ghotki-II, whereby the nomination paper of respondent No.5 for contesting the forthcoming Bye-Election from the constituency NA-205, Ghotki-II, has been accepted and order dated 25.06.2019 passed by learned Election Appellate Tribunal, whereby the Election Appeal No.06 of 2019 filed by the petitioner against the aforesaid order of the Returning Officer, has been dismissed.

2. Briefly, the facts of the case are that the petitioner being the voter of the constituency NA-205, Ghotki-II, had raised objections to the nomination form of respondent No.5 to contest the Bye-Election 2019 from the constituency viz. NA-205, Ghotki-II, at the time of scrutiny before the Returning Officer (respondent No.4). The Returning Officer after hearing the counsel for the parties and getting himself satisfied with the reply placed before him by the respondent No.5 in respect of the objections raised by the petitioner, accepted the nomination of respondent No.5, vide its order dated 18.06.2019. The said order was subsequently challenged by the petitioner before the learned Election Appellate Tribunal, through Election Appeal No. S-06 of 2019, however the said Election Appeal was also dismissed by the Appellate Tribunal vide order dated 25.06.2019. Hence this petition.

3. Upon notice of the present petition respondent No.5 filed objection/counter affidavit to the petition wherein while supporting the impugned orders he controverted the facts and allegations leveled in the memo of petition. He also raised preliminary objections with regard to the maintainability of the present petition. Whereas respondent No.4/Returning Officer, Bye-Election 2019 filed para-wise comments, *inter alia*, stating that the order of this court shall be implemented.

4. During the course of arguments, it is, *inter-alia*, contended by the learned counsel for the petitioner that the petitioner upon coming to know that respondent No.5 filed nomination form as a candidate to contest the by-election of the constituency, raised substantial issues, details whereof are mentioned in para No.3 of the memo of petition, before the respondent No.4 (Returning Officer), however, respondent No.4 failed to consider the said objections in true perspective and accepted the nomination form of respondent No.5. The petitioner challenged the said order of the Returning Officer before the learned Election Appellate Tribunal, through election Appeal No.06 of 2019 however, the learned Election Appellate Tribunal also failed to consider documents available on record and passed the judgment impugned in the present proceedings. It is further contended that the orders impugned in the present proceeding are not sustainable in law and liable to be set-aside as the Returning Officer as well as the learned Election Appellate Tribunal while passing the impugned orders have failed to appreciate the facts as well as law and have incorrectly applied the provisions of the Election Act, 2017.

Learned counsel submits that both the forums below have failed to consider the material fact that respondent No.5 has concealed the actual facts in respect of his huge expenses on numerous foreign trips and source of income while filing his nomination form. It is also contended that the learned Appellate Tribunal, *inter alia*, also failed to consider the fact that previously in Election Appeal No. S-70 of 2018 the Election Tribunal had approved the order of the then Returning Officer rejecting the Nomination paper of the brother of respondent No.5 and held that the gift executed by his brother in favour of present respondent No.5 was dubious and said order was subsequently upheld upto the Honourable Supreme Court of Pakistan, hence respondent No.5 is also disqualified to contest the present bye-election as he was involved with his brother in manipulating documents and as such the disqualification of his brother to contest the election would also apply on respondent No.5 permanently, in terms of Article 62 (1) (f) of the Constitution of Pakistan. It is also contended that the Honourable Supreme Court in its various pronouncement observed that consequence of mis-declaration will be penal and constitutional. Per learned counsel, it is settled law that the person either directly or indirectly involved in any concealment of the property are equally responsible and both of them are said to be dishonest. It is further contended that both the forums below while passing the impugned orders have also failed to consider the material fact that land measuring 2030 Acre of Mehar Livestock Farm Khangarh, District Ghotki belonging to Federal Government was allotted to the father of respondent No.5 but as the lease money was not paid and the time of lease had expired and was not renewed subsequently resulting which it was ordered to resume the land by concerned Mukhtiarkar, however respondent No.5 and his brother (Sardar Muhammad Bux Khan Mahar) by misusing their powers and authority continued to occupy and cultivated the said land causing huge losses to the Government exchequer. Per learned counsel, since respondent No.5 has wrongly and illegally supported the false plea taken by his brother Sardar Muhammad Bux Khan Mahar to cover up his misdeeds and so also in collusion with him have retained the Government Land therefore, the nomination form of respondent No.5 is also liable to be rejected. It is also contended that despite substantial objections raised by the petitioner, the nomination form of respondent No.5 was accepted by the respondent No.4 vide its order date 18.06.2019 which order was subsequently upheld by the learned Appellate Election Tribunal. Lastly argued that the impugned orders passed by the Returning Officer and the

Appellate Tribunal may be set-aside with the direction to the Returning Officer to reject the nomination form of respondent No.5.

5. On the other hand, learned counsel for respondent No.5 during his arguments has contended that present petition is not maintainable as the Article 199 is subject to Article 225 of the Constitution of Pakistan, which bars the adjudication of election disputes, including the pre-election matters like the present one, except by way of an Election Petition filed before the Election Tribunal constituted under the Election Act, 2017 and the Election Rules, 2017. Per learned counsel the present petition even otherwise is not maintainable, as it involves disputed question of facts which cannot be decided without recording evidence and such exercise cannot be gone into in writ jurisdiction of this court. It is also contended that the petitioner has failed to point out any illegality and irregularity in the impugned order which could warrant interference by this Court in its constitutional jurisdiction by way of a writ of certiorari. Per learned counsel, the allegations leveled against respondent No.5 are frivolous and scandalous in nature which have no nexus in any manner with respondent No.5. It is also argued that the petitioner is seeking rejection of the nomination form of respondent No.5 on the touchstone of Article 62 of the Constitution of Pakistan on the ground that since his brother's (Sardar Muhammad Bux Khan Mahar) earlier nomination form was rejected on the ground that the gift executed in favour of present respondent No.5 was found invalid owing to its non-registration, therefore the nomination form of present respondent is also liable to be dismissed. Per learned counsel there was/is no declaration in terms of Article 62 and 63 of the Constitution, 1973 by a Court of competent jurisdiction was passed either against respondent No.5 or his brother (Sardar Muhammad Bux Khan Mahar), which could entail penal consequences of rejection of the nomination form of respondent No.5. It is further contended that the petitioner through the instant petition is also seeking a declaration to the effect that respondent No.5 is not *Sadiq* and *Ameen*. Per learned counsel, the Honourable Supreme Court of Pakistan, time and again, has held that only a Court of Plenary jurisdiction, that is, the Court vested with powers of to record evidence can issued such a declaration. This Court under its constitutional jurisdiction whilst adjudicating a writ of certiorari is not empowered to entertain disputed questions of fact nor record any evidence. It is further contended that the objections raised by the petitioner were duly replied to by respondent No.5 before the Returning Officer and thereafter before the learned Election Appellate

Tribunal. Per learned counsel both the forums below after getting themselves satisfied with the reply of respondent No.5, rejected the objections of the petitioner through the orders impugned in the present petition. Per learned counsel the petitioner is only dragging respondent No.5 into the frivolous litigation to disturb the democratic process of the by-Election in NA-205 Ghotki-II. It is also contended that the letters of Mukhtiarkar, relied upon by the petitioner, are bogus and managed documents produced subsequent to scrutiny process held by the learned Returning Officer as such the same are liable to be discarded. It is further argued that nomination form of brother of respondent No.5 to contest the General Election 2018 from PS-20, Ghotki-I, was found defective, hence it was rejected. Though said order was challenged by the brother of Respondent No.5 yet he failed to succeed and rejection order was upheld upto the Honourable Supreme Court, however, neither this court nor the Honourable Supreme Court of Pakistan ever declared the brother of respondent No.5 disqualified to contest any other election. It is further contended that said defect since has been rectified therefore, respondent No.5 filed his nomination form to contest the by-election, 2019. Which was validly accepted by the Returning Officer. Lastly, contended that the impugned orders are well-reasoned and addressed each and every point raised by the petitioner and as such the same do not warrant any interference by this court in its writ jurisdiction and thus the instant petition may be dismissed with exemplary costs. Learned counsel in support of his arguments has relied upon the cases of Ali Gohar Khan Mahar v. Election Commission of Pakistan through Secretary and 2 others (2014 CLC 776), Mohammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others (2015 SCMR 233), Government of Pakistan through Secretary, Ministry of Interior and Narcotics Control (Interior Division) Board, Islamabad v. Muhammad Yasin, Sub-Inspector No.525-L, Wapda Anti-Corruption, Lahore and another (PLD 1997 Supreme Court 401), Muhammad Hanif Abbasi v. Imran Khan Niazi and others (PLD 2018 Supreme Court 189), Khawaja Muhammad Asif v. Muhammad Usman Dar (2018 SCMR 2128), Imran Ahmed Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member, National Assembly, Prime Minister's House Islamabad and 9 others (PLD 2017 Supreme Court 265), Imran Ahmed Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan (PLD 2017 Supreme Court 692) and Muhammad Hanif Abbasi v. Imran Khan Niazi (PLD 2018 Supreme Court 295)

6. Learned Deputy Attorney General for the Election Commission of Pakistan while opposing the impugned orders has supported the petition. Whereas the learned Additional Advocate General Sindh have mainly contended that the orders impugned are within the four corners of law and as such do not warrant any interference by this court in its constitutional jurisdiction, further the Returning Officer as well as Election Tribunal have rightly rejected the objections raised by the petitioner and accepted the nomination form of respondent No.5; and, that there is no illegality or any jurisdictional defect in the impugned orders, passed by both the forums below. Lastly, he prays that the petition may be dismissed with costs.

7. We have considered the submissions of learned counsel for the petitioner, respondent No.4, learned Deputy Attorney General as well as Additional Advocate General Sindh and have gone through the material placed on record.

8. From the perusal of the record it appears that the petitioner challenged the nomination form of respondent No.5, on the grounds that he while filing his nomination has concealed the fact about expenses incurred in his foreign trips and since the nomination form of his brother namely Sardar Muhammad Bux Khan to contest the general election 2018 from PS-20 Ghotki-I, was rejected as the gift executed by Sardar Muhammad Bux Khan in favour of present respondent No.5 was found invalid on account of its non-registration, therefore, he is also disqualified and ineligible to contest the present bye-election. Record further transpires that the petitioner raised similar objections before the Returning Officer upon which respondent No.5 submitted his reply whereafter the Returning Officer heard the counsel for the parties and getting himself satisfied with the reply, while rejecting the objections of the petitioner, accepted the nomination paper of respondent No.5 vide its order dated 18.06.2019. The petitioner challenged the said order through Election Appeal No. S-06 of 2019 before the learned Election Appellate Tribunal. The learned Appellate Tribunal after hearing the counsel for the parties and considering the material available on record dismissed the appeal vide its order dated 25.06.2019. Relevant portion of the said order for the sake of ready reference is reproduced as under:

“8. Insofar as the merits of this case are concerned, the Appellant relies upon order dated 25.06.2018 passed in Election Appeal No. S-70 of 2018 whereby the rejection of nomination papers of the brother of respondent No.4 was upheld and subsequently was maintained up to the level of Hon'ble Supreme Court. At the very outset, it needs to be appreciated that the present respondent No.4 was not a party to those proceedings, and therefore, it would be highly unfair to disqualify respondent No.4 on this ground alone. It is settled law that nobody should be condemned unheard, whereas, even otherwise the proceedings in that case were summary in nature in respect of acceptance and/or rejection of the nomination papers of brother of Respondent No.4, and therefore, he cannot be saddled with the adverse findings in the said order. The Appellant has made an attempt to have respondent No.4 disqualified on this ground alone which is devoid of any merits. Therefore, this Tribunal is of the view that no case is made out on behalf of the Appellant; hence, the Appeal is hereby **dismissed.**”

9. A perusal of the election laws envisages that where the objection to seek rejection of nomination paper of a candidate has failed before the Returning Officer or before the Election Tribunal constituted to hear Election Appeals before the elections or the time to throw such challenge has gone by, the stage to challenge the candidature of a contesting candidate at pre-polling stage comes to an end. After the elections, the rival candidate may choose to file an election petition before the Election Tribunal to challenge the candidature of an elected member for non-compliance with the provisions of elections laws.

10. Insofar as the other objections with regard to collusion, committing fraud, caused loss to Government exchequer, misusing of power and authority are concerned the same can only be determined after recording evidence and such exercise cannot be gone into writ jurisdiction of this court. It is well settled that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this Court may exercise its constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to

foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court/forum below is concerned, this Court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259).

10. In the backdrop of the above discussion we have examined the impugned orders, passed by the Returning Officer and the learned Election Tribunal, and find that both the impugned orders are legal, unexceptionable and apt to the facts and circumstances of the case. The learned Election Tribunal has dismissed the Election Appeal of the petitioner, after taking into consideration all the objections of the petitioner.

11. In view of what has been stated above, we are of the considered view that the Returning Officer and the learned Election Tribunal by rejecting the objection of the petitioner have not committed any illegality and the impugned orders dated 18.06.2019 and 25.06.2019, passed by them, which do not suffer from any illegality or any jurisdictional defect, call for no interference in exercise of jurisdiction by this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Accordingly, the instant petition, being devoid of merit is dismissed with no order as to costs alongwith the pending application.

JUDGE

JUDGE

SUKKUR

Dated: 16.07.2019