

**SENATE APPELLATE TRIBUNAL, SINDH  
HIGH COURT OF SINDH AT KARACHI**

Election Appeal 03 of 2021

*Qadir Khan Mandokhail ASC*

vs.

*Election Commission of Pakistan & Others*

For the Appellant : Mr. Rasheed A. Razvi, Advocate  
Mr. Tahmasp A. Razvi, Advocate  
Mr. Abbas Rasheed Razvi, Advocate  
Mr. Nabeel Ahmed Khan, Advocate  
Mr. Afab Aman, Advocate

For the Respondents : Barrister Moiz Ahmed  
  
Mr. Abdullah Hinhrah,  
Law Officer - ECP  
Mr. Niaz Ahmed,  
Deputy Director - ECP

Date of hearing : 23.02.2021

Date of announcement: 23.02.2021

**JUDGMENT**

**Agha Faisal, J.** The present appeal has been filed assailing the Order of the learned returning officer ("RO") dated 18-02-2021 ("Impugned Order"), whereby the nomination form of the respondent no. 3 was accepted with respect to candidature for election to the Senate, from the Province of Sindh. It is considered illustrative to reproduce the Impugned Order herein below:

"Mr. Fesal Vaweda filed his nomination paper for election to Senate from Sindh Province for General Seat. The scrutiny of the said nomination paper was held on 18-02-2021 at 12:00pm. The following objectors filed objections against the above referred nomination:

1. Mr. Noor Hayat Advocate
2. Mr. Muhammad Salman Khan Advocate
3. Mr. Qadir Khan Mandokhail Advocate
4. Mr. Prof. M. Masood Khan Advocate
5. Mr. Akhlaq Khan Advocate
6. Mr. Mehmood Hussain Advocate
7. Mr. Javed Khalid Raan Advocate

Mr. Qadir Khan Mandokhail, ASC objected to the nomination form of Mr. Fesal Vaweda contesting candidate and challenged the status of his Nationality & that Mr. Fesal has not mentioned in his affidavit about the renunciation of his US Citizenship. Mr. Prof. M. Masood Khan Advocate also objected that Mr. Fesal Vaweda is not Saadiq & Ameen, therefore his form is liable to be rejected.

3. The Learned Counsel for the candidate contended the eligibility of objectors, referring to section 112 (1 & s) of the Election Act 2017, the contents whereof are reproduced below:-

“112. Scrutiny – (1) the candidates their proposers and seconders, and agent authorized in writing in this behalf by each candidate, may attend the scrutiny of the nomination papers and the Returning Officer shall give them reasonable opportunity for examining all the nomination papers”.

(2) Returning Officer shall, in the presence of the persons attending the scrutiny under sub-section (1), examine the nomination papers and decide any objection raised by any such person to any nomination”.

4. The counsel of candidate Mr. Fesal Vaweda objected that neither the Qadir Khan representing any Candidate, nor he is authorized by proposer or seconder, therefore, according to law M. Qadir Khan cannot object to the nomination of candidature of Mr. Fesal Vaweda.

5. However, in the interest of justice, both sides were heard & after examination of available record, I am of the opinion that the objections raised by above referred objectors merit no consideration as provided under section 112 (1 & 2) *ibid* and the same are therefore, dismissed. After examining the nomination paper filed by Mr. Fesal Vaweda, I am of the view that he qualifies to contest the Senate elections from Sindh Province for General category. His nomination papers are therefore, accepted.”

### *Respective arguments*

2. Per appellant’s learned counsel, the Impugned Order was untenable; hence, ought to be set aside. The appellant’s plea was predicated primarily on the grounds that the respondent had concealed dual nationality in an earlier election, General Elections 2018, hence was not *Sadiq and Ameen*; that he had concealed necessary particulars, in respect of his renunciation, in the affidavit submitted in respect of the current election; and lastly that the copies of the certificate of loss of nationality of United States and the document on oath renouncing the citizenship of the United States are dated 22.06.2018 (approved on 25.06.2018) (“Renunciation Documents”), whereas, corresponding affidavit for the 2018 election was dated 11.06.2018; hence, admittedly amounting to an actionable act of concealment.

3. The respondent no. 3’s learned counsel supported the Impugned Order and submitted that it merited no interference in appeal. The defense of the Impugned Order was rested on the basis that the respondent is a citizen of Pakistan and has never acquired nationality of any other country, since his renounced United States citizenship was acquired by birth<sup>1</sup>; reference was made to paragraph 4 of the present appeal, wherein the reproduced order of the RO in the 2018 election demonstrates that at the relevant time the respondent had provided a copy of his earlier United States passport which was demonstrably cancelled and punched<sup>2</sup>. The relevant provisions of law were pointed out to suggest that no particulars of renunciation were required to be stated in the present nomination form and that the documentation

<sup>1</sup> A copy of birth certificate issued by St. Joseph Hospital Chicago Illinois has been placed on record.

<sup>2</sup> A copy of the Order sheet dated 18.06.20178, passed by RO/ADJ-VIII Karachi West is placed on record.

submitted during the last election withstood scrutiny, hence, the respondent was considered eligible to contest. In conclusion it was submitted that the requirement of Article 62(1)(f) of the Constitution stipulates that a declaration, in respect of a person not being *Sadiq* and *Ameen*, has to be given by a court of law and the necessary inference could not be deemed to include the RO.

4. This Tribunal has considered the arguments articulated by the learned counsel and surveyed the law / record to which its attention was solicited. The question hereby framed for determination is whether the Impugned Order can be sustained under the law, as articulated vide the Election Act 2017 (“Act”) and the rules, the Election Rules 2017 (“Rules”), made there under.

#### *Ambit of the law*

5. This tribunal is constituted<sup>3</sup> to adjudicate appeals with respect to the acceptance or rejection of candidature, in respect of senate elections, by a learned returning officer<sup>4</sup>. The appeal is required to be decided summarily<sup>5</sup> and announcement of fixation thereof, *inter alia* via the media, is deemed to be sufficient notice of the date and time so appointed<sup>6</sup>. The domain of this determination is enunciated per section 113(3)<sup>7</sup> of the Act.

6. There is a myriad of guidance from the Superior Courts with regards to consideration of the eligibility of candidature in such pre-electoral matters; *inter alia* that it may be inopportune to disenfranchise a candidate at the pre-electoral stage as it would deprive him of candidature, even if subsequently found to be qualified<sup>8</sup>; matters requiring detailed inquiry / evidence could better determined in post-election proceedings<sup>9</sup>; and in the presence of a plausible

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<sup>3</sup> 113 (1) A candidate or an objector may, within the time specified by the Commission, file an appeal against the decision of the Returning Officer rejecting or, as the case may be, accepting a nomination paper to the Tribunal constituted for the purpose consisting of a person who is a Judge of a High Court, appointed by the Commission in consultation with the Chief Justice of the High Court concerned.

<sup>4</sup> 105. For the purpose of an election to the Senate, the Commission shall appoint a Returning Officer for each Province, ... and shall also appoint such number of Polling Officers to assist the Returning Officer as it may consider necessary.

<sup>5</sup> 113 (2) An appeal filed under sub-section (1) shall be summarily decided within such time as may be notified by the Commission and any order passed on the appeal shall be final. Although Rule 100(5) of the Rules contemplates a discretionary inquiry. Per *Akhtar Zaman Maghlani J (as he then was)* in *Nawabzada Mir Balach Khan Marri vs. Mir Mohabbat Khan Marri & Others* reported as *PLD 2003 Quetta 42*.

<sup>6</sup> 113 (4) Announcement of the day and time appointed for the hearing of an appeal under this section over the radio or television or by publication in the newspaper shall be deemed to be sufficient notice of the day and time so appointed.

<sup>7</sup> 113(3) If, on the basis of information or material coming to its knowledge by any source, a Tribunal constituted under sub-section (1) is of the opinion that a candidate whose nomination paper has been accepted is a defaulter of loans, taxes, government dues and utility expenses or has had any loan written off or has willfully concealed such fact or suffers from any other disqualification from being elected as a Member of the Senate, it may, on its own motion, call upon such candidate to show cause why his nomination papers may not be rejected, and if the Tribunal is satisfied that the candidate is actually a defaulter or has had a loan written off or suffers from any disqualification, it may reject the nomination paper of the candidate.

<sup>8</sup> Per *Qazi Muhammad Farooq J (as he then was)* in *Waqas Akram vs. Dr. Muhammad Tahirul Qadri & Others* reported as *2003 SCMR 145*; Per *Ajmal Mian J (as he then was)* in *Ghulam Mustafa Jatoi vs. ADJ / RO NA 158 Naushahro Feroze & Others* reported as *1994 SCMR 1299*; Per *Akhtar Zaman Maghlani J (as he then was)* in *Nawabzada Mir Balach Khan Marri vs. Mir Mohabbat Khan Marri & Others* reported as *PLD 2003 Quetta 42*.

<sup>9</sup> Per *Ajmal Mian J (as he then was)* in *Rafiq Haider Khan Leghari vs. Election Tribunal & Others* reported as *PLD 2003 Quetta 42*.

explanation for any non-disclosure, acknowledgment whereof would not have entailed ineligibility, candidature may not be denied<sup>10</sup>.

*Application of the law to the present lis*

7. In the present facts and circumstances, it is an admitted fact that there is no allegation of the respondent being a dual national presently; for the purposes of 2021 Senate election. The entire case of the appellant, is that in view of the allegation pertaining to 2018 General Election, a declaration may be given by this Tribunal declaring the respondent to not be *Sadiq* and *Ameen*, as requisite per Article 62(1)(f) of the Constitution.

8. The appellant rests his entire case upon the *alleged* Renunciation Documents; however, remained unable to satisfy this Tribunal as to where the said *copies* of the relevant documentation were obtained. The Law Officer of the ECP has categorically stated that the said documents were not procured therefrom and the learned counsel for the respondent no. 3 has outright denied the authenticity of the said documentation. It would follow that this matter, in the very least, requires to be subjected to the anvil of evidence and no summary declaration merits being issued in such regard.

9. A bare perusal of Article 62(1)(f) demonstrates that it requires that a declaration in respect of being *Sadiq* and *Ameen* be rendered by a court of law. The RO could not be considered a court of law, hence, could not have given such a declaration in any event. This Tribunal is primarily constituted to assail the orders of the RO and it would be inopportune to denigrate the Impugned Order upon *alleged* non-judicious exercise of jurisdiction, not vested therein.

10. The august Supreme Court has deliberated at length in such regard in the *Bhayo Case*<sup>11</sup> and it is considered appropriate to reproduce the illumining observations herein below:

"5. The upshot of the said judgment is that a disqualification under Article 62(1)(f) of the Constitution can only be imposed by or under a declaration made by a court of law. By such prescription Article 62(1)(f) creates a lawful, transparent and fair mechanism for an election candidate to contest an allegation that he is disqualified under one or more of the grounds listed in the said Constitutional provision. Accordingly, in the case reported as *Sardar Yar Muhammad Rind v. Election Tribunal Balochistan, Quetta and others* (PLD 2020 SC 137) this Court held that a judicial declaration disqualifying a candidate under Article 62(1)(f) of the Constitution must necessarily be based on oral or documentary evidence. In the case reported as *Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif* (PLD 2017 SC 265), the learned Judge speaking for the majority elaborated that even an Election Tribunal can only disqualify a candidate when its declaration is issued on the basis of evidence before it. Such a requirement is implicit in Article 10A of the

<sup>10</sup> Per *Amir Hani Muslim J (as he then was)* in *Murad Bux vs. Karim Bux & Others* reported as 2016 SCMR 2042; *Illahi Bux Soomro vs. Aijaz Ali Jakhrani & Others* reported as 2004 CLC 1060.

<sup>11</sup> Per *Umar Atta Bandial J* in *Allah Dino Khan Bhayo vs. Election Commission of Pakistan & Others*, reported as PLD 2020 SC 591.

Constitution which makes both due process and fair trial a fundamental right in lawful judicial proceedings. Thus the determination of a dispute relating to a right or liability, the recording of evidence including the right of cross-examination, a hearing of the arguments of the parties and a reasoned judgment are essential attributes of a court of law (ref. Tariq Transport Co., Lahore v. Sargodha Bhera Bus Service (PLD 1958 SC (Pak) 437) and Mollah Ejahar Ali v. Government of East Pakistan (PLD 1970 SC 173).

6. It is evident that the summary finding given by the Returning Officer against the review petitioner in the year 2007 did not comply with the requirement laid out in Article 62(1)(f) of the Constitution as amended in the year 2010, namely a declaration by a court of law. This is because a Returning Officer does not record evidence in his proceedings which are summary in nature. His finding, unless set aside, is therefore valid only for the corresponding election. In these circumstances, the doctrine of *res judicata* would also be inapplicable to the finding of the Returning Officer because although the said finding remained unchallenged, the same was given without the recording of evidence including the right of cross-examination. His finding thus lacked the attributes of a declaration given by a court of law. (ref: Roshan Ali Buriro v. Syed Murad Ali Shah (2019 SCMR 1939). Both these conditions: one that evidence is recorded before a court of law and two, that a finding given by such court is based on the evidence on record, are essential for a finding with binding effect to be governed by *res judicata* (ref: Section 11 of the Code of Civil Procedure, 1908 and Muhammad Saleem Ullah v. Additional District Judge, Gujranwala (PLD 2005 SC 511).

7. According to settled law, the amended provision of Article 62(1)(f) is effective prospectively from the date of its enforcement. This provision governs all disqualification claims that arise after its promulgation in the year 2010. In the present case, disqualification of the petitioner was sought in the general election held in 2013 when a declaration by a court of law was necessary to attract the Constitutional disqualification. On the other hand, the finding given by the Returning Officer in the present case was rendered in 2007 prior to the amendment in Article 62(1)(f) of the Constitution. Such a finding was not a verdict given after a trial by a court of law; namely, for the purposes of this case, an Election Tribunal or a Court of plenary jurisdiction. Since the forum of the Returning Officer lacks the attributes of a court of law therefore the electoral disqualification imposed on the review petitioner under Article 62(1)(f) of the Constitution ceased to be effective after the 18th Amendment. The said impact of the 18th Amendment went unnoticed in our judgment under review dated 09.07.2013 thereby constituting an error apparent on the fact of the record.”

11. The law appears settled that the proceedings for declaration of a person as being dissonant with the requirements of *Sadiq* and *Ameen* ought to be conducted before a court of law, which definition does not include an RO, and the said proceedings are required to *inter alia* include leading of evidence, cross examination and arguments. It is an admitted fact that no such proceedings, with respect to the respondent, have been concluded as of date.

12. This Tribunal, constituted at the pre-electoral stage, is established to consider objections against a decision of an RO. A plea assailing the denial of consideration of matters not within the RO's jurisdiction cannot be sustained by this Tribunal. In appreciation of the guidance of the august court, this Tribunal is of the deliberated view that the grounds invoked to impugn the order under consideration could not be considered before this Tribunal, being of summary nature at the pre-electoral stage; however, such allegations may be agitated before the court of law of competent jurisdiction.

### *Conclusion*

13. In view of the reasoning and rationale herein contained, this Tribunal is of the considered view that this appeal is devoid of merit, hence, the same is hereby dismissed.

14. The office is hereby instructed to convey a copy hereof to the learned returning officer, in *mutatis mutandis* application of Rule 54(5) read with Rule 100(6) of the Rules, forthwith.

JUDGE

Khuhro/PA