

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Before:

Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

CP No.D-4164 of 2021

Directions

For orders as to the maintainability of the petition.

16.09.2021

M/s. Abdul Wahab Baloch and Faran Sardar, Advocates for the petitioner

AHMED ALI M. SHAIKH, CJ.- The Petitioner, by invoking the extraordinary Constitutional Jurisdiction of this Court under Article 199 of the Constitution, seeks following relief(s):-

“a. to declare the respondent No.3 not eligible for holding membership of the Provincial Assembly by declaring the notification of the Election Commission of Pakistan as the member of the Provincial Assembly as null and void because same is based on misrepresentation and fraud.

b. To issue direction to the to the (sic) respondent No.1 Election Commission of Pakistan to de-notify the respondent No.3 from the seat of the Member of the Provincial Assembly and to issue direction to take action against the respondent No.3 by instituting the criminal proceeding against the respondent No.3 and earned benefit from the respondent in later (sic) and spirit Judgment of the Hon’ble Supreme Court reported in PLD 2012 page No.1089 (Syed Mahmood Akhtar Naqvi versus the Federation of Pakistan).

c. To restraint the respondent No.3 from their functions on the basis of the Member of the Provincial Assembly tills the disposal of this petition.

d. Cost of the petition”

2. The Petitioner Haleem Adil Shaikh is a Member of the Provincial Assembly of Sindh, elected under the banner of the Pakistan Tehreek-e-Insaf, whereas the Respondent No.3, Syed Murad Ali Shah, hails from the Pakistan Peoples Party and is presently the Leader of the House in that legislature and the incumbent Chief Minister of the Province.

3. Briefly, the backdrop to the Petitioner's challenge to the edibility of the Respondent No.3 is that in the case reported as Syed Mahmood Akhtar Naqvi versus Federation of Pakistan PLD 2012 SC 1054 ("**Naqvi's case**"), the Honourable Supreme Court declared certain parliamentarians having dual nationality, as named therein, disqualified from being members of Majlis-e-Shoora (Parliament) and Provincial Assembly in terms of Article 63(1)(c) of the Constitution, and in compliance with certain directions issued by the Apex Court in the matter, the Election Commission of Pakistan wrote a letter to the Secretaries of National Assembly and the four Provincial Assemblies on 24.09.2012, directing them to obtain a declaration on oath from all members of the Assemblies regarding their dual nationality. It is said that instead of submitting the declaration as required on the format prescribed by the Election Commission, the Respondent No.3, elected from PS-73 Jamshoro-cum-Dadu (the "**Constituency**") in the General Election of 2008, tendered his resignation on 30.11.2012, which was accepted by the Speaker of the Assembly very same day. Thereafter, on 22.01.2013 the Respondent No.3 submitted his nomination papers as a candidate for the bye-election in respect of the Constituency, declaring on oath that he possessed the required qualification and did not hold the citizenship of any foreign state/country. Following acceptance of his nomination papers, an objector, namely Roshan Ali Burrero (the "**Objector**"), filed Appeal No.02/2013 before the Election Tribunal and in terms of the order passed in said Appeal the Respondent No.3, on 31.01.2013, submitted following affidavit:-

"In compliance of the order passed by the Honourable Tribunal dated 30.1.2012 in election appeal 02/2013 and in addition to the declaration already filed with Returning Officer (copy attached), I Murad Ali Shah S/o Sayed Abdullah Shah having National Identity Card No.42301-9192595-1 filing Nomination paper for election to a seat from PS-73 Jamshoro-cum-Dadu do hereby declare on oath that I am not disqualified under Article 63(1)(c) of the Constitution of the Islamic Republic of Pakistan."

4. The Petitioner has alleged that this was a false statement made on oath by the Respondent No.3 and on the basis of such false affidavit he contested and won the bye-election and was notified as the Returned Candidate for the Constituency by the Election Commission through Notification dated 21.02.2013.

5. Thereafter, for the General Elections 2013, the Respondent No.3 again submitted his nominated papers from the Constituency once again giving incorrect information that he was not disqualified under Article 63(1)(c) of the Constitution. The Returning Officer, on challenge from the Objector, rejected the nomination papers, against which Election Appeal No.35 of 2013 was preferred, which too met with the same fate. Against such concurrent findings, the Respondent No.3 preferred CP No.D-1589 of 2013 before this Court, which was allowed by a learned Full Bench vide Order dated 18.04.2013, accepting his nomination papers. Against that Order, the Objector preferred Civil Petition No.549 of 2013, which was allowed by the Honourable Supreme Court of Pakistan vide order dated 02.05.2013, holding that the ratio decidendi of Naqvi's case (Supra) was fully applicable. Paragraph 4 of the said Order is reproduced hereunder:-

“4. We have heard the learned counsel and have gone through the relevant facts and circumstances, including the orders passed by the Returning Officer and the Election Appellate Tribunal. There is no cavil with the proposition that at the time when the petitioner submitted his nomination papers and thereafter, there is no Certificate of Renunciation issued by the Canadian Government, therefore, for all intent and purposes the petitioner is holding dual citizenship therefore, he is not qualified to contest the election on the ratio decidendi in the Judgment of Syed Mehmood Akhtar Naqvi's which is fully applicable on the facts of the instant case.”

6. Proceeding with his submissions on the Petition at hand, learned Counsel for the Petitioner raised a two-fold submission, firstly that the Respondent No.3 was disqualified under Article 63(1)(c) of the Constitution from being an elected member of the Provincial Assembly in light of the principle laid down by the Honourable Supreme Court in Naqvi's case (Supra) and secondly that he suffered from lack of qualification in terms of Article 62(1)(f) of the Constitution on account of filing of false affidavit and was liable to be disqualified for life. Learned counsel was also heard on the point of maintainability of the Petition in view of an unreported Order dated 23.01.2019 passed by the Honourable Supreme Court in Civil Petition No.3632 of 2018, being the case titled Roshan Ali Buriro versus Syed Murad Ali Shah and others.

7. We have heard the learned counsel for the Petitioner and with his able assistance perused the material available on record and the Orders/Judgments of the Honourable Supreme Court of Pakistan.

8. In these proceedings the Petitioner is seeking disqualification of the Respondent No.3 and initiation of proceedings under the relevant law in terms of the observations made by the August Supreme Court of Pakistan in its Order dated 02.05.2013 in Civil Petition No.549 of 2012 filed by the Objector, as well as on the touchstone of Article 62(1)(f) on the ground that the aforementioned affidavit sworn by him was false.

9. For ready reference Article 62(1)(f) of the Constitution is reproduced hereunder:-

“62. Qualifications for membership of Majlis-e-Shoora (Parliament).- (1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shora (Parliament) unless:

- (a) he is a citizen of Pakistan
- (b)
- (c)
- (d)
- (e)
- (f) he is sagacious, righteous, non-profligate, honest and ameen, **there being no declaration to the contrary by a court of law;** and
- (g)” (emphasis given)

10. Bare reading of the above provisions of Article 62(1)(f) reveals that for declaring a candidate disqualified from being elected or chosen as a Member of the Parliament or the Provincial Assembly there must be a declaration from a Court of Law. The Honourable Supreme Court in the case of Samiullah Baloch versus Abdul Karim Nausherwani (PLD 2018 SC 405) observed that disqualification of an election candidate or a holder of elected office under sub-clause (f) to Article 62(1) of the Constitution comes into existence when he is declared by a Court of law to lack any of the qualities mentioned therein. Additionally, we have noted that subsequent to the proceedings before the Honourable Supreme Court in Civil Petition No.549 of 2012, the very Objector had then preferred CP No. D-4653 of 2018 before this Court on 14.06.2018, seeking declaration that Respondent No.1 (Respondent No.3 herein) was not qualified to be elected in Bye-Election for the Constituency because he was holding dual nationality contrary to the provisions of Article 163(1)(c) of the Constitution.

11. Furthermore, perusal of the contents of Petition No. D-4653 of 2018 and the Petition in hand reveal that the pith and substance, rather composition of paragraphs in the two Petitions, is virtually identical, with only certain changes in numbering. That Petition was dismissed by a learned Division Bench of this Court vide Judgment dated 20.07.2018, and while dealing with the renunciation of dual nationality by the Respondent, Murad Ali Shah, it was observed in paragraph No.12 that:-

“From a perusal of the record, it would be seen that admittedly, the Respondent No.1 is a Resident of Pakistan by his birth, and thus he is a citizen of Pakistan. Moreover, the Respondent No.1 had moved an application dated 29.09.2012 for renunciation of his Canadian Citizenship under Section 9 of the Canadian Citizenship Act, 1985. Sub-section (1) of Section 9 of the Act *ibid* provides a citizen may, on application, renounce his citizenship if he... is a citizen of a country other than Canada and sub-section (3) thereof envisages that where an application for renunciation is approved, the Minister shall issue a certificate of renunciation to the applicant and the applicant ceases to be a citizen after the expiration of the day on which the certificate is issued or such later day as the certificate may specify. It is also an admitted position that the requisite certificate under the Provisions of Section 9(3) of the Canadian Citizenship Act, 1985 regarding renunciation of Respondent No.1’s Canadian citizenship has been issued on 18.07.2013, and, thus manifestly the Respondent No.1 ceased to be a Canadian citizen right from 19.07.2013, therefore, the disqualification contained in Article 63(1)(c) could not apply to the Respondent No.1 in the Bye-Election, 2014. And in such view of the matter, the nomination paper of Respondent No.1 for a Member of Provincial Assembly from the constituency PS-73 Jamshoro-cum-Dadu was accepted by the Returning Officer by rejecting the objections raised by the Petitioner against the nomination of the Respondent No.1. Record reflects that the petitioner had filed Election Appeal No.02 of 2014 against the acceptance of nomination papers of the Respondent No.1 by the Returning Officer before the Appellate Tribunal and upon filing of counter affidavit alongwith series of documents including the aforesaid certificate dated 18.07.2013 relating to renunciation of his Canadian Citizenship by the Respondent No.1, the petitioner withdrew from his Election Appeal No.02 of 2014, which was dismissed as withdrawn vide order dated 10.11.2014. The respondent No.1 has since completed his tenure on completion of Sindh Assembly’s term on 28.05.2018.”

12. Against the said Judgment of this Court, the Objector preferred Civil Petition No.3632 of 2018, as aforementioned, which was dismissed by the Honourable Supreme Court vide order dated 23.01.2019, with it being observed that:

“9..... In the present case, the only declaration against the respondent under Article 62(1)(f) of the Constitution was given in summary proceedings by the Returning Officer on 06.04.2013. As already noted above, no evidence was recorded by the Returning Officer to sustain his finding nor he recorded reasons for invoking disqualification under Article 62(1)(f) of the Constitution. He is not a Court of law but a statutory forum of limited jurisdiction. Therefore, the condition that only a Court of law can issue a declaration of disqualification under Article 62(1)(f) of the Constitution is not met in the present case. Moreover, the learned Election Tribunal has not declared the respondent, directly or indirectly, to lack any of the qualities mentioned in Article 62(1)(f) of the Constitution. Although the Judgment of this Court dated 02.05.2013 resurrected the order of the Returning Officer, we do not consider that the said order passes the test of effectiveness laid down in **Sami Ullah Baloch’s case** (ibid) for declaring a disqualification under Article 62(1)(f) of the Constitution. This Court has held there that:

“32. Secondly, on the other hand, a candidate for election who has committed misconduct falling within the terms of Article 62(1)(f) of the Constitution, in particular, misrepresentation, dishonestly, breach of trust, fraud, cheating, lack of fiduciary duty, conflict of interest, deception, dishonest misappropriation, etc, as declared by a Court of civil jurisdiction has on the Islamic and also universal criteria of honesty, integrity and probity, rendered himself unfit to hold public office.... It is in such circumstances that a person declared to be dishonest or in breach of his trust or fiduciary duty or being non-righteous or profligate must suffer the burden of that finding of incapacity or as long as the Court decree remains in force....”

10. No finding in terms of the wrongs identified above in the quoted text is recorded in the order dated 06.04.2013 by the Returning Officer. As such, the said order is ineffective to impose a disqualification under Article 62(1)(f) of the Constitution. Accordingly, the respondent does not suffer from a lifetime bar under Article 62(1)(f) of the Constitution as contended by the learned counsel for the petitioner. Therefore, the respondent was eligible to contest the General Election of 2018.”

13. In view of the above quoted findings of the Honourable Supreme Court, which in terms of the Article 189 of the Constitution carry binding effect, it is crystal clear that the bar contained in Article 62(1)(f) of the Constitution is not attracted in the instant case.

14. Even otherwise, the grant of relief in writ jurisdiction is a matter of discretion where the bona fides of the petitioner can be tested to see if he has come with clean hands. The Honourable Supreme Court, vide the Order dated 23.01.2019 in Civil Petition No.3632 of 2018 observed in paragraphs 4 and 8 as follows:

“4. We asked learned counsel as to why the petitioner has abandoned his statutory remedy of appeal against the acceptance of the respondent’s nomination paper and instead petitioned the learned High Court. However, learned counsel did not give any answer to that query. **It is apparent that the petitioner nurtures a motive for disqualifying the respondent who is a political opponent whom the petitioner has repeatedly sought to eliminate him from the electoral contest.**”

8. Turning now to the petitioner’s switchover of his proceedings from remedies under the Election Act, 2017, to a Constitutional Petition before the learned High Court. That is a serious defect but may arguably be justified for seeking a decree by a Court of law that meets the requirement of Article 62(1)(f) of the Constitution. However, from the background that has already been recounted, we consider that the writ petition filed by the petitioner was actuated by personal political rivalry and not by public interest. Accordingly it lacked the petitioner’s bonafides. In this regard, **Kamal Hussain vs. Sirajul Islam** (PLD 1969 SC 42) has held:

“.....any person and not necessarily an aggrieved person can seek redress from the High Court against the usurpation of a public office by a person who is allegedly holding it without lawful authority..... **But the grant of relief in wit jurisdiction is a matter of discretion, wherein it is quite legitimate on the part of the High Court to test the bona fides of the relator to see if he has come with clean hands. A writ of quo-warranto in particular is not to issue as a matter of course on sheer technicalities on a doctrinaire approach.**”

In the light of the said law, the petition under Article 199 of the Constitution was not maintainable before the learned High Court.” (emphasis added)

15. Here too, in light of the Petitioner's own self-professed affiliations, there is admittedly political rivalry between him and the Respondent No.3, hence, as was the case with the Objector, his bona fides also come into question.

16. So far as prayer (b) regarding initiation of criminal proceedings, etc against the Respondent No.3 in terms of Naqvi's case (Supra) is concerned, the same is also misconceived. Against the order dated 20.09.2012 followed by detailed judgment dated 17.10.2012 passed in Constitution Petition No.05 of 2012 (reported as PLD 2012 SC 1089), Petitioners Dr. Ahmed Ali Shah and others filed review Petitions. The Honourable Supreme Court vide unreported Order dated 02.05.2018 while disposing of the Review Petitions, reviewed and modified its short order dated 20.09.2012 and the detailed Judgment delivered on 17.10.2012. In paragraphs 10 and 11 of the said Order the Honourable Supreme Court observed that:-

"10. We have also gone through the declarations required to be submitted with Form-I i.e. nomination paper under the RoPA. We are persuaded to hold that there was no column in the said Form requiring disclosure of foreign nationality/dual citizenship and there was no conscious effort, *mens rea* or guilty intent on the part of the petitioners to conceal or withhold such information, defraud and deceive the competent authorities and receive and retain ill gotten gains..... It is also clear that no sooner did the petitioners hear about the initiation of proceedings and the legal position as enunciated by this Court most of them tendered their resignations and approached this Court with such information

11..... However, in the facts and circumstances of the present cases we have not found *mens rea*, guilty intent or intention to default, deceive or withhold the information which was required to be disclosed knowing that if disclosed such information would debar them from contesting elections for the Parliament (Majlis-e-Shoora)/Provincial Assemblies. The direction issued for criminal prosecution for corrupt practices under the provisions of RoPA and Pakistan Penal Code and return of salaries and perquisites received by the petitioners many years ago has appeared to us to be rather harsh in the peculiar and specific facts and circumstances of these cases."

17. For the foregoing reasons, the captioned Petition hereby stands dismissed.

Chief Justice

Judge