

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. No. D – 2647 of 2022.

Before:

Mr. Justice Khadim Hussain Tunio
Mr. Justice Zulfiqar Ali Sangi

For the Petitioner: Barrister Jawad Ahmed Qureshi &
Mr. Osama Yousuf Parhyar, Advocates for
petitioner.

For the Respondents
No. 1& 3: Mr. Allah Bachayo Soomro, Addl. A.G.
Sindh, Mr. Ashfaque Nabi Qazi, Assistant
Attorney General for Pakistan and Mr.
Zaheer Abbass Advocate / Law Officer,
ECP.

For the Respondent No. 2 Nemo

Date of hearing. 19.07.2022.
Date of order. 21.07.2022.

ORDER

ZULFIQAR ALI SANGI, J.- Through this petition the petitioner assailed order dated 23.06.2022, passed by the District Judge/Appellate Authority, Tando Allahyar in Election Appeal No.61 of 2022, wherein the order passed by the Returning Officer Union Council Khokhar 24, Tando Allahyar whereby he has accepted the Nomination Form of Respondent No.2 was upheld while dismissing the Election Appeal filed by the petitioner.

2. Brief facts of the petition are that the respondent No.2 filed his nomination papers for the elections of Sindh Local Government Elections 2022, Phase-II for the post of member District from Union Council Khokhar-24, Tando Allahyar. It is alleged that on 19.06.2022, the petitioner raised objections before the Returning Officer and prayed for the rejection of the nomination papers of respondent No.2, on the ground that the respondent No.2 is not a registered voter or resident of the said Union Council and that the respondent No.2 also failed to furnish no objection certificates from HESCO, Sui Gas and WASA. The objections were rejected by the Returning Officer and the respondent No.2 was allowed to contest the elections, against which the petitioner filed an Election Appeal under Section 225 of Election Act, 2017 read with Rule 54 of the Election Rules and Rule 18(5) of the Sindh Local

Government Act, 2013, before the learned District Judge/Appellate Authority, Tando Allahyar, which was also dismissed vide order dated 23.06.2022. After the appeal was dismissed the petitioner prefers this petition.

3. Learned counsel for the petitioner has contended that the respondent No.2 is not a registered voter or resident of Union Council Khokhar-24 Tando Allahyar; that the respondent No.2 is a defaulter in payment of electricity, water and gas consumption charges bills of HESCO, WASA and Sui Gas respectively; that the respondent No.2 has also concealed the fact that he has criminal record and such FIR has been registered against him; that the respondent No.2 also concealed the assets and not declared the same in his form of declaration of assets attached with nomination papers; that the respondent No.2 is also defaulter of the Income Tax Department (FBR) as such the department issued him notices to file return. Lastly, he has submitted that in view of such facts and circumstances the respondent No.2 is not an eligible person to contest the elections and therefore, the nomination papers submitted by the respondent No. 2 may be rejected. In support of his contentions he has relied upon the cases titled as ***Murad Bux v. Kareem Bux and others (2016 SCMR 2042) and the order passed by this Court Bench at Sukkur in Constitutional Petitions No. D-622 of 2022.***

4. On the other hand Mr. Allah Bachayo Soomro, Addl. Advocate General, Sindh, Mr. Ashfaqe Nabi Qazi learned Assistant Attorney General for Pakistan assisted by Mr. Zaheer Abbass Law Officer Election Commission of Pakistan collectively argued that the petitioner has not filed any proof in support of his contentions and have fully supported the order passed by the returning officer who accepted the nomination papers of the respondent No.2 which was upheld by the Election Appellate Authority in appeal filed by the petitioner. Lastly, they prayed that the petition filed by the petitioner may be dismissed.

5. We have heard learned counsel for the petitioner, learned Addl. Advocate General Sindh and learned Assistant Attorney General for Pakistan as well as Mr. Zaheer Abbass, Law Officer for the Election Commission of Pakistan and perused the material available on record with their able assistance.

6. The main contention of the learned counsel for the petitioner is that the respondent No.2 is not a registered voter of the constituency where from he wishes to contest the election, therefore his nomination

papers are to be rejected has no force as the Respondent No.2 wishes to contest the election of Member District Council from Union Council Khokhar-24, Tando Allahyar and on scrutiny it established that his proposer and seconder are from the same constituency where from he wishes to contest the election. This issue has already been decided by this Court in C.P No.D-644 of 2022 vide order dated 24.06.2022, wherein it was held that:-

“under Section 37 of the Act a person contesting for the District Council membership, may contest the election from any Union Council of the District and the person contesting for the membership of Town Committee or Municipal Committee may contest the election from any Ward of the respective Committee provided that his proposer and seconder are registered voters of the concerned Union Council or Ward as the case may be.”

7. As regards to the contentions of learned counsel for the petitioner that the respondent No.2 is bound by law to declare the entire assets which he holds at the time of filling nomination papers in the declaration form. The contention supports from the decision of this court at Sukkur Bench in case of **Saeed Ahmed and others C.P No.D-622 and others of 2022**, wherein this court after considering the relevant provisions of law and the Judgments of the Apex court has held in para No 17 and 19 that “17. A perusal of the above mentioned cases cited and relied upon by learned counsel for the petitioners shows that the Forms prescribed in the Rules of 2015 incorporating the specific declaration of assets on solemn affirmation by the candidate at the time of filing the nomination were not pointed out to the Court nor was it argued therein that such declaration, being a part and parcel of the prescribed Forms, was mandatory. Resultantly, the effect of non-submission of such declaration at the time of filing the nomination was not argued in any of the said cases and thus it was not considered, discussed and or decided therein. Therefore, the cited cases cannot be applied in the instant petitions as the above point / objection has been specifically agitated herein. It may be noted that in Aitbar and another (supra) it was held by the learned Division Bench of this Court that the contesting candidate was indeed required to submit complete and correct nomination papers along with annexures as required under the law and rules, and accordingly he was directed to file complete and true declaration of his assets before the Returning Officer only for the reason that the non-disclosure of a small piece of land by him was found not to be a deliberate act of concealment of

assets. Thus, in terms of Proviso (ii) to Sub-Rule (3) of Rule 18 of the Rules of 2015, the defect was not of a substantial nature. Whereas the non-disclosure of assets in the instant cases was deliberate and the defect was of a substantial nature as discussed above.” “19. In view of the above discussion, we hold that a candidate contesting the Local Government Elections under SLGA is required to disclose / declare his assets on solemn affirmation in the prescribed form at the time of filing his nomination papers which requirement is mandatory, and in case of noncompliance of this mandatory requirement, his nomination papers would be liable to be rejected.” In the case in hand the petitioner had not produced any documentary evidence which shows that which property was not disclosed and was concealed by the respondent No. 2 while filling his nomination papers. The documents annexed with the memo of petition which includes the registered sale deed and copies of Deh Form-II in favour of the respondent No.2 reflects that the same are in respect of the plot No. 39 (1900) Sq. ft, from which an area of 1000 Sq. ft was purchased by the respondent No. 2 and on assessment of declaration form attached with the nomination papers found such property is declared at Sr. No.1 as such we find no substance in the contention of the petitioner’s counsel.

8. Another contention of learned counsel for the petitioner is that the respondent No.2 is a defaulter of HESCO, SUI-GAS and WASA and has not produced the No-Objection-Certificates of the respective departments along with his nomination papers. On perusal of Section 60 (2) (a) of the Election Act, 2017, it reflects that “a declaration that he has consented to the nomination and that he fulfils the qualification specified in Article 62 and is not subject to any of the disqualifications specified in Article 63 for being elected as a member.” However, Article 63 (1) (o) of the Constitution of the Islamic Republic of Pakistan, 1973 provides that “A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:- (o) he or his spouse or any of his dependent has defaulted in payment of government dues and utility expenses, including telephone, electricity, gas and water charges in excess of ten thousand rupees, for over six months, at the time filing his nomination papers; or”. The petitioner has not produced any bill of the HESCO, SUI-GAS or WASA which may suggest that the respondent No. 2 at the time of filing his nomination papers was a **“defaulter”** for over six (06) months and the amount was over ten thousand nor any of the above departments objected the nomination form of the respondent No.2 on that ground. Further the respondent

No.2 has submitted the certificates of the different banks alongwith his nomination papers which reflect that he is not a defaulter of any of those banks nor obtained any loan facility.

9. Turning to the contention of learned counsel for the petitioner that the respondent No.2 has not disclosed in the affidavit (Declaration and oath by the person nominated) attached with the nomination papers about the FIRs registered against him which fact alone is sufficient to disqualify him from contesting the elections. Copies of different FIRs are annexed with the petition which contemplate that the same are pertaining to the years 2004, 2007 and 2014, no any evidence is produced by the petitioner that the respondent No.2 was convicted in any of the FIR nor submitted any proof which suggest that any criminal case arising out of these FIRs is pending trial. Even if the respondent No.2 has disclosed this information regarding the registration of FIRs or pendency of criminal cases in his affidavit, he would not have been declared disqualified from contesting the election. Where the explanation of a party contesting the election is plausible in regard to non-disclosure of any fact in the affidavit, it cannot be denied the right to contest for elections. However, if the party has willfully made a false and or incorrect statement in the affidavit sworn in with the nomination papers concealing material particulars in order to avoid **disqualification**, then non-disclosure of such material particulars would have exposed him to disqualification. As against this if non-disclosure about even pendency of a criminal case has been made, for which the Petitioner has offered a reasonably plausible explanation, then the affidavit could not be considered as a false or incorrect declaration. In the present case no such proof is brought on record by the petitioner that any case is pending against the respondent No.2. The Honourable Supreme Court in case of **Murad Bux v. Kareem Bux and others (2016 SCMR 2042)**, has held as under:-

It is well settled that the provisions of disqualification of a candidate are to be strictly construed. In the case in hand, the disqualification of the Petitioner is not an issue. The only issue is the non-discloser of the pending criminal case in the affidavit before the Returning Officer and whether such non-disclosure would be construed as concealment of 'material particulars'. We, in the backdrop of these facts, are of the considered view that the non-disclosure of a fact which otherwise, if disclosed, could not debar the Petitioner from contesting the election, cannot be made a ground to preclude the Petitioner from contesting the election.

In the case in hand there is no any evidence that any criminal case arising out of the said FIRs produced by the petitioner is pending before

any court against the respondent No.2. Even the person who being convicted challenged his conviction and his appeal has not been decided finally by the appellate court he cannot be debarred from contesting the elections. It was held by this Court at Sukkur Bench vide order dated: 10-08-2005 in case of **Akbar Ali and another v. District Returning Officer/ Appellate Authority/ District and Session Judge, Noushero Feroze and another** that “As to the merits of the case although section 152 (1) of the Ordinance provides that a candidate for Election of the Local Bodies shall stand dis-qualified if he has been sentenced for more than three months for any offence under any law and a period not less than five years since his release have passed, it would be seen that this section would only be attracted in case if the sentence has been finally confirmed by highest Court in appeal or has attained finality due to efflux of time. If this would not be the case, the result would be patently unjust since if the petitioner No.1 is ultimately acquitted in appeal the clock would not set back. For the forgoing reasons, we would therefore allow the petition and direct that the petitioner be allowed to contest the election. However if the petitioner No. 1 is convicted by the ultimate forum or otherwise his conviction if affirmed, the rival candidate would have all rights to move the appropriate forum for his dis-qualification.” Further the Election Tribunal Punjab in case of **Sikandar Hayat Khan Bosan v. Syed Yousaf Raza Gillani and another (2008 CLC 240)**, has held as under:-

7. We have considered the arguments advanced by learned counsel for the parties and perused the relevant record on the question of conviction. Prima facie, the contentions of learned counsel for respondent No.1 are well-founded. There is no denial of the fact that, respondent No.1 was convicted and sentenced by Accountability Court-I, Rawalpindi. The said conviction and sentence awarded by the Accountability Court, Rawalpindi has been challenged in two criminal appeals; which are admitted for regular hearing and are still awaiting decision and verdict of this Court on the same, as to whether the conviction and sentence awarded to respondent No.1 is in accordance with law or otherwise. Since the matter of guilt or innocence of respondent No.1 is sub judice and in terms of section 430, Cr.P.C. and the decision of this Court will be the final determination of his guilt or otherwise, hence, for the time being, he cannot be considered a convict within the meaning of Article 63(h) of the Constitution of Islamic Republic of Pakistan, 1973 and Clause (r) of subsections (1)(a) of section 99 of the Representation of the People Act, 1976. Pendency of appeal is always considered to be continuation of the trial, meaning thereby that conviction or sentence awarded to a person, will be considered to be the final, subject to the decision of the Appellate Court in terms of section 430, Cr.P.C. Even otherwise, conviction and sentence awarded to respondent No.1 by Accountability Court No.1, Rawalpindi/Islamabad, vide order dated 18-9-2004 in Reference No.39 of 2001, has been suspended by a Division Bench of this

Court on 5-10-2006 in Writ Petition No.122 of 2006, thus, he cannot be considered to be a convict for the purpose of section 99(1A) of the Representation of the People Act, 1976 and Article 63(h) of the Constitution. The order of suspending the conviction and sentence was not challenged by the prosecution, therefore, the same still holds the field.

In the case of **Muhammad Arshad v. Returning Officer and others (2006 YLR 48)**, it was held as under:-

5. Prima facie the contentions of the learned counsel for respondents are well-founded. Since the matter of guilt or innocence of respondent Ghulam Farid is sub judice before this Court and it is the decision of this Court in terms of section 430, Cr.P.C. which will finally determine his guilt or otherwise, hence for the time being he cannot be considered as disqualified within the meaning of section 152(1) of the above Ordinance. However, a remedy has also been provided in the above mentioned section itself whereby in case an elected member of a Local Government or holder of elective office of Local Government is found by the Chief Election Commissioner to have contravened the provisions of subsection (1) of the said Ordinance i.e. enumerating qualifications for candidate of elective member or holder or such office, he shall seize forthwith to be the elective member or to hold the office as such and stand disqualified from being a candidate for election of a Local Government for a period of four years. This remedy has been provided as an inbuilt mechanism for catering such-like situation. Hence, in case if respondent Ghulam Farid is elected and his appeal is subsequently dismissed maintaining his conviction and sentence, during his holding such office he cannot only be removed from said office but also shall stand disqualified from being a candidate for election for Local Government for a period of four years.

10. We have also perused the affidavit (Declaration on oath) furnished by the respondent No. 2 with the nomination papers and found in its para VI and VII which reveals that **VI.** Have never been convicted by a court of competent jurisdiction for an offence involving moral turpitude or misuse of power or authority under any a period of three years has elapsed since my release; or (see section 36(f) SLGA, 2013). **VII.** Have never been convicted of an offence involving activities prejudicial to the ideology, interest, security, unity, solidarity, peace and integrity of Pakistan, unless a period of three years has elapsed since my release (See section 36 (g) SLGA, 2013). Since no criminal case is pending against the respondent No.2 (as per material available in the file) which may be the reason for respondent No. 2 not to disclose the same in the affidavit.

11. Learned counsel for the petitioner placed on record some notices issued under section 114 (4) of the “**Income Tax Ordinance, 2001**” issued by the Authority under the “**Ordinance, 2001**” and submitted that the respondent No.2 is also a defaulter of FBR and his

nomination papers are liable to be rejected has also no force as after the notices if a person is not filling the returns within time then he will be proceeded under section 121 of the "*Ordinance, 2001*" and is liable to be penalized under section 182 of the "*Income Tax Ordinance, 2001*" who has also a remedy to challenge such decision of the Authority under section 127 of the "*Ordinance, 2001*". No such proceedings were initiated against the respondent No. 2 by the FBR, therefore he cannot be declared as defaulter of the Income Tax Department (FBR).

12. In view of the above discussion we are of the view that the nomination papers of the respondent No.2 were rightly accepted by the Returning Officer and therefore, the said order was rightly upheld by the Appellate Authority as a result thereof this petition is meritless and is hereby dismissed.

JUDGE

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