

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Election Appeal No. 122 of 2024

Date	Order with signature of Judge
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1. For order on CMA No. 541/2024 (Granted)
2. For order on CMA No. 542/2024 (Exemption granted)
3. For hearing of main case

Date of hearing and order: 08.1.2024

Mr. Sikandar Ali Kolachi along with Mr. Jawed Jabbar Kolachi advocate for the appellant
Mr. G.M Bhuto Assistant Attorney General along with
Mr. Sarmad Sarwar Assistant Director (Law) Election Commission of Pakistan

ORDER

Adnan-ul-KarimMemon, J Appellant Mrs. Rukhsana Kausar through instant election appeal has called into question the order dated 30.12.2023 passed by the Returning Officer, NA-211- Mirpurkhas I, whereby the nomination papers were rejected on the ground that she failed to produce rent agreement being a tenant and other pitty points.

At the very outset, learned counsel for the appellant submitted that the appellant had not concealed anything in her nomination papers however she appeared before the Returning Officer and disclosed that she was a dependent upon her husband hence the appellant could not fill the requisite column. He, therefore, prayed for setting aside the impugned order.

The learned Assistant Attorney General assisted by the learned law officer representing the Election Commission of Pakistan has waived the notice of this appeal due to paucity of time, however, they have opposed this appeal on the analogy so put forward by the Returning Officer.

I have heard the learned counsel for the parties and perused the record with their assistance.

The question involved in the present appeal is whether the rejection of the nomination papers of the appellant is justified under the election law. Whether the defect as pointed out by the learned Law Officer is substantial or curable?

Primarily, Articles 62 and 63 of the Constitution reveal that one deals with the qualifications of a person to be elected or chosen as a member of Parliament while the other deals with disqualifications of a

person not only from being elected or chosen but also from being a member of Parliament. If a candidate is not qualified or is disqualified from being elected or chosen as a member of Parliament in terms of Articles 62 and 63 of the Constitution, his nomination could be rejected by the Returning Officer or any other forum functioning in the hierarchy. But where the returned candidate was not, on the nomination day, qualified for or disqualified from being elected or chosen as a member, his election could be declared void by the Election Tribunal constituted under Article 225 of the Constitution. While election of a member whose disqualification was overlooked, illegally condoned or went unquestioned on the nomination day before the Returning Officer or before the Election Tribunal, could still be challenged under Article 199(1)(b)(ii) of the Constitution of Pakistan, 1973 as was held by the Supreme Court in the cases of Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore (PLD 1970 SC 98) and Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1054). However, disqualifications envisaged by Article 62(1) (f) and Article 63(2) of the Constitution because of words used therein have to be dealt with differently. In the former case, the Returning Officer or any other fora in the hierarchy would not reject the nomination of a person from being elected as a Member of Parliament unless a court of law has given a declaration that he is not sagacious, righteous, non-profligate, honest and Ameen. Even the Election Tribunal, unless it proceeds to give the requisite declaration based on the material before it, would not disqualify the returned candidate where no declaration, as mentioned above, has been given by a court of law. The expression “a court of law” has not been defined in Article 62 or any other provision of the Constitution but it essentially means a court of plenary jurisdiction, which has the power to record evidence and give a declaration based on the evidence so recorded. Such a court would include a court exercising original, appellate, or revisional jurisdiction in civil and criminal cases. But in any case, a court or a forum lacking plenary jurisdiction cannot decide questions of this nature at least when disputed. In the latter case when any question arises whether a member of Parliament has become disqualified it shall be dealt with only by the Election Commission on a reference from the Speaker of the Parliament in terms of Articles 63(2) and 63(3) of the Constitution.

Insofar as the not appending the rent agreement with the nomination papers prima facie is no ground to reject the nomination papers as such the contention of the learned law officer appears to be not

justified to non-suit the appellant on the aforesaid analogy. As under section 62(9) of the Elections Act,2017, the Returning Officer shall not reject a nomination paper on the ground of any defect that is not substantial and may allow such defect to be remedied forthwith and failure on the part of the returning officer to allow rectifying and amending any infirmity within his/her nomination form as provided in Section 62 (9 (d) (ii) of the Elections Act 2017 violates the law.

The above-discussed essential element of disqualification about non-declaration of an asset within the ambit of Article 62(1)(f) of the Constitution has also been recognized in the judgment of the Supreme Court in the case of *Muhammad Hanif Abbasi v. Imran Khan Niazi* (PLD 2018 SC 189) and in the present, there is no such declaration against the appellant as such the findings of the Returning Officer that the information provided by the appellant appears to be false is an erroneous decision on the part of Returning Officer which is set at naught, for the simple reason that the Returning Officer has limited jurisdiction.

For the aforesaid reasons, this appeal is allowed. The impugned order dated 30.12.2023 passed by the Returning Officer, NA-211 Mirpurkhas-I, is set aside and the Returning Officer is directed to include the name of the appellant in the list of contesting elections for NA-211 Mirpurkhas-I.