ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Election Appeal No.118 of 2024

Date	Order with signature of Judge

For hearing of main case

Date of hearing and order: 06.1.2024

Mr. Siraj Ahmed Mangi advocate for the appellant
Mr. G.M Bhuto Assistant Attorney General along with
Mr. Sarmad Sarwer Assistant Director (Law) Election Commission of Pakistan

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ORDER

Adnan-ul-KarimMemon-J Appellant Muhammad Sher Khan has called in question the order dated 29.12.2023 passed by the Returning Officer NA-235 Karachi East-I by which his nomination paper has been rejected on the ground that the proposer of the appellant is not a voter of NA-235 Karachi East-I, therefore, the nomination paper of the appellant has been rejected.

It is, inter alia, contended by learned counsel for the appellant that the nomination form of the appellant was rejected only on the ground that proposer of the appellant is not a voter of NA-235 Karachi East-I; that the nomination form was submitted on 22.12.2023 after completing all legal formalities, but after passing of seven days, the Returning Officer / respondent No.3 rejected the nomination form on 29.12.2023 without calling, hearing and verification of the objection; that the appellant provided all data and completed all legal formalities, however, respondent No.3 rejected the nomination paper on the ground that the proposer of the appellant is not a voter of the same constituency, which act of the appellant is not willful and deliberate, hence the impugned order is liable to be set aside; that the impugned order clearly reflects that there is no any illegality or deficiency found in nomination papers of the appellant; that due to the impugned order, the appellant deprived to contest the elections, which is sheer injustice with him and voters of the area. Learned counsel further contends that rejection of the nomination paper of the appellant violates the fundamental rights of the appellant as such the findings of the Returning Officer is perverse and liable to be set aside. He, therefore, prayed for setting aside the impugned order dated 29.12.2023.

The learned Assistant Attorney General assisted by the learned law officer representing the Election Commission of Pakistan has opposed this appeal.

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 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.

The main theme of the arguments of the appellant is that because of some confusion prevailing on account of the delimitation of constituencies and finalization of the list of different constituencies, the contesting candidates due to inadvertence, filed their nomination forms through proposers and seconders belonging to the other constituencies than that of the constituencies in which the appellant wanted to contest the elections, resulting into that cancellation of her nomination forms by the Returning Officers. It has been further argued that such a defect is not substantial and could be cured by the Returning Officers in terms of the 2nd proviso to sub-section (9) (d) of Section 62 of the Elections Act 2017. According to learned Counsel for the appellant, such defect could not be cured in time before the Returning Officer as the appellant was not aware of the legal position, therefore, that may be allowed to be cured by this Court by setting aside the impugned order with the directions to the Returning Officer to allow the appellant to remove such defect by bringing other proposers and/or seconders, as the case may be, of the same constituency as a substitution of the earlier proposers and/or seconders, where after the nomination forms of the appellant may be accepted.

From the plain reading of Section 60 (1) of the Elections Act 2017, it appears that the voter, who proposes or seconds the name of a duly qualified person to be a candidate for an election of a member of the National Assembly or Provincial Assembly, as the case may be. It further appears that upon receipt of the nomination paper of the candidate duly proposed and seconded by the voters of the same constituency, the Returning Officer shall assign a serial number to every nomination paper and endorse on the nomination paper the name of the person presenting it, and the date and time of its receipt, and inform such person of the time and place at which he shall hold scrutiny and shall cause to be affixed at a conspicuous place in his office, a notice of every nomination paper received by him containing the particulars of the candidate as shown in the nomination papers, it is not that a candidate 'files' his nomination paper and merely mentions the names of proposer and seconder as a formality, which is the essence and foundation of the whole process. Thus, if the

nomination is duly made by the proposer and seconder of a candidate it is only then that the nomination paper is received by the Returning Officer. Thus, in the circumstances, a defect to the proposer and/or seconder, not being a voter of the same constituency, would go to the core of his qualification, to be a proposer or seconder, as the same was the only qualification required of such person and the same was not amenable to rectification. Provisions, as discussed supra, are mandatory and the defect is substantial, however, at the same time, it is vehemently urged that due to all of a sudden change in the delimitation process the constituencies changed and the appellant claims that he was not aware of such changes as no notice was given to the aggrieved parties to change their voter list from such constituencies, therefore, he cannot be deprived of to contest election to bring the prosper and seconder of such constituency within reasonable time which factum could be left to the discretion of the Returning Officer to remedy the same under the law.

The proposal seems to be reasonable, to let the Returning Officer facilitate the appellant to bring his Proposer and Seconder of the same constituency from which he wanted to contest the ensuing election within two days the Returning Officer shall facilitate the appellant in this regard and will not create bottlenecks in his endeavor to contest the election without resistance on his part. However, it is made clear that the qualification and disqualification in terms of the ratio of the judgment passed by the Supreme Court in the case of *RANA MUHAMMAD TAJAMMAL HUSSAIN v. RANA SHAUKAT MAHMOOD* (**PLD 2007 Supreme Court 277**) shall remain intact which could be taken care of by the Election Tribunal to be constituted under section 140 of the Election Act 2017 after completion of first Phase of the Election.

The Appeal stands disposed of in the above terms.

JUDGE

Zahid/*