

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Election Appeal No.233 of 2024

Date	Order with signature of Judge
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1. For order on CMA No.601/2024 (Urgency granted)
2. For order on CMA No.602/2024 (Exemption granted)
3. For hearing of main case

Date of hearing and order: 08.1.2024

Mr. Muhammad Athar Ismail advocate for the appellant
Mr. G.M. Bhutto, Assistant Attorney General
Mr. Sarmad Sarwar, Assistant Director (Law), Election Commission of Pakistan

ORDER

Adnan-ul-Karim Memon, J. Appellant Gulab Khan has called in question the order dated 26.12.2023 passed by respondent No.1 / Returning Officer NA-234 District Korangi Karachi by which his nomination paper has been rejected on the ground that the candidate/appellant has declared five dependents without declaring his source of income and details of income in the affidavit submitted. FBR has also declared him as a non-filer. This gives the impression that the information given in the declaration/affidavit is either false or incorrect.

It is, inter alia, contended by learned counsel for the appellant that the scrutiny was conducted on 26.12.2023 the appellant was declared as cleared and no kind of objection was raised by respondent No.1 at the time of scrutinizing the nomination papers; that the appellant is serving as laborer with M/s Best Build Associates and his monthly salary is Rs.35,000/-, which is a non-taxable income; that no FBR report or any litigation of tax evasion or punishment reported against the appellant. Learned counsel contends that the complaint was made by one candidate namely Raja Rifaqat Adil wherein he leveled false and baseless allegations against the appellant. 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 are perverse and liable to be set aside. He, therefore, prayed for setting aside the impugned order dated 26.12.2023.

Learned Assistant Attorney General as well as the Assistant Director (Law) on behalf of the Election Commission of Pakistan is present in Court and waived notice of this election 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 learned counsel for the parties and perused the record with their assistance.

From the findings of the Returning Officer, I have concluded that no material concealment or misstatement on this behalf in the nomination paper has been proved. It may be observed here that the process for General Elections, 2024 is in progress, under Article 225 of the Constitution, this Tribunal cannot endorse the viewpoint of the Returning Officer on the analogy so put forward by him, which is without any legal justification, in terms of law laid down by the Supreme Court in the cases of *Ghulam Mustafa Jatoi V/S Additional Sessions Judge, 1994 SCMR 1299* and *Election Commission of Pakistan V/S Javaid Hashmi & others, PLD 1989 SC 396*.

Progressing further on the subject issue, principally, the appeal against the scrutiny order passed by the Returning Officer is of a summary nature, as this Tribunal can pass an order within the specified period, thereafter, the proceedings stand abated and the order of the Returning Officer is deemed to have become final. Needless to mention that under Section 63 of the Election Act, 2017 no fact-finding inquiry is to be made and/or evidence is to be recorded which is only permissible before the Election Tribunal under Section 140 of the Elections Act 2017 after the completion of First Phase of Election.

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. Additionally, Sub-section (9) of Section 62, provides for the rejection of nomination papers on one of four grounds: (9)(a) the candidate is not qualified to be elected as a member, (b) the propose or the seconder is not qualified to subscribe to the nomination paper; (c) any provision of section 60 or Section 61 has not been complied with or the candidate has submitted a declaration or statement which is false or incorrect in any material particular; or (d) the signature of the proposer or the seconder is not genuine. 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 facts and reasons, I have concluded that the finding of the returning officer requires immediate interference. This Appeal is allowed along with the listed application. The order dated 26.12.2023 passed by respondent No.1 / Returning Officer NA-234 District Korangi Karachi is set aside the Appellant is allowed to contest the election without interruption.

JUDGE