ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Election Appeal No.196 of 2024

Date	Order with signature of Judge

1. For hearing of CMA No.511/2024
2. For hearing of main case

Date of hearing and order: 08.1.2024

Mr. Sanaullah Soomro, advocate for the appellant
Mr. G.M Bhuto Assistant Attorney General along with
Mr. Sarmad Sarwar Assistant Director (Law) Election Commission of Pakistan

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ORDER

Adnan-ul-KarimMemon, J Appellant Nawab Ali Brohi through instant election appeal has called in question the order dated 28.12.2023 passed by the Returning Officer, PS-75 Thatta-I, whereby it is alleged that Net Assets 2023 (Rs.135000) as per affidavit of the appellant did not match with Net Assets (Rs.240608) as per Assets/Liabilities Form, which violates Article 62 of the Constitution of the Islamic Republic of Pakistan, 1973, hence, the nomination paper of the appellant was rejected.

At the very outset, learned counsel for the appellant submits that the appellant has not concealed his assets willfully as he is medical rap and attached the salary slip with nomination papers but neither the Returning Officer provided the opportunity of hearing to him nor resolved the objection. Learned counsel further submits that the Returning Officer has rejected the nomination form based on the amount of net assets, while during scrutiny clerical error and formal defect were not cured by respondent No.3, though under Section 62(9)(d)(ii), the Returning Officer is empowered to correct the same but the said defect was not cured. He, therefore, prayed for setting aside the impugned order. The question involved in the matter is whether the reason assigned by the Returning Officer is substantial or curable under the law.

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 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 liabilities and the rejection of the nomination papers of the appellant are concerned, again the contention of the learned law officer appears to be not justified as the FBR has no grievance at all if the appellant is allowed to contest the ensuing election and therefore, this objection appears to be misconceived. In the present case, it appears that the Returning Officer was not properly advised, and failed into a grave error by disqualifying the appellant on a minor defect on the premise that the appellant failed to show his liability in his statement of assets and liabilities on the date when he filed his nomination paper. The reasons assigned by the Returning Officer are not sufficient to disallow the appellant to contest the election for the simple reason that participation in elections is a constitutional right, subject to inherent disqualification under the law, which is not the case at hand, therefore at this stage, the appellant has made out a case for grant of relief as provided under the law enabling him to contest the election without resistance.

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.

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. However, at the same time under the election law, the contesting candidates needed to incorporate details of bank transactions from December 8, 2023, or bank statements that would be used for election expenses. It is only a material defect or omission in the declaration of assets, if willfully, knowingly, or deliberately made that can result in the rejection of the nomination papers.

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.

Adverting to the reasoning of the Returning Officer, the Supreme Court in the case of *Khawaja Muhammad Asif v. Muhammad Usman Dar* [**2018 SCMR 2128**] has held that the provisions of election laws are designed to facilitate the general public to know what assets the contesting candidates own, what liabilities they owe before they are elected, and what variation has taken place in their assets and liabilities on a year on year basis after being elected. Hence the election laws require every contesting candidate to file his or her statement of assets and liabilities and when elected required to declare his/her assets and liabilities every year with the Election Commission. In case an asset not declared by an elected member comes to light, his details of assets and liabilities would help in ascertaining whether concealment was intended to cover some wrongdoing. The whole purpose behind seeking details of assets and liabilities under the election laws is to discourage persons from contesting elections for a seat in the Parliament or a Provincial Assembly who have concealed assets acquired through some wrongdoing. Simultaneously it also aims at those members as well who hitherto may have held untainted records, be discouraged from indulging in corruption and financial wrongdoings after entering upon their office. Hence whoever contests an election for a seat in the Parliament or a Provincial Assembly, is mandatorily required by law to be forthright in declaring all the assets that he/she owns and all liabilities he/she owes. However, all non-disclosures of assets cannot be looked at with the same eye as no set formula can be fixed about every omission to list an asset in the nomination paper, make a declaration of dishonesty, and impose the penalty of disqualification. It is well-settled law that any plausible explanation that exonerates, inter alia, the misdeclaration of assets and liabilities by a contesting candidate should be confined to unintended and minor errors that do not confer any tangible benefit or advantage upon the contesting candidate. Where assets, liabilities, earnings, and income of the contesting candidate are camouflaged or concealed by resorting to different legal devices including benami, trustee, nominee, etc. arrangements for constituting holders of title, it would be appropriate for a learned Election Tribunal to probe whether the beneficial interest in such assets or income resides in the elected or contesting candidate to ascertain if his/her false or incorrect

statement of declaration is intentional or otherwise. There is a public interest object behind the statutory prescription for obtaining the said statements and declaration. It is to ensure integrity and probity of contesting candidates and therefore all legislators.

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 28.12.2023 passed by the Returning Officer, PS-75 Thatta-I, is set aside and the Returning Officer is directed to include the name of the appellant in the list of contesting elections for PS-75 Thatta-I.

JUDGE

Shafi*