

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Const. Petition No. D-70 of 2024
(Attique Rahman Phulpoto v. Federation of & others)

Const. Petition No. D-71 of 2024
(Zubair Uddin v. Federation of Pakistan & others)

Present:-

**Mr. Justice Muhammad Iqbal Kalhoro &
Mr. Justice Arbab Ali Hakro**

M/s Sohail Ahmed Khoso and Abdul Qadeer Khoso, Advocates for petitioners in both petitions along with petitioners.

Mr. Khan Muhammad Sangi, Advocate files power on behalf of respondents No.8 & 9 (FBR) in both petitions, present along with Syed Tahir Hussain Shah, Assistant Commissioner, Inland Revenue, RTO, Sukkur.

Mr. Safdar Ali Bhatti, Advocate has filed power on behalf of respondents No.10 in both petitions along with respondent No.10.

Mr. Zeeshan Haider Qureshi, Law Officer of Election Commission of Pakistan along with Jawad Ali (Additional Deputy Commissioner-I, Khairpur/Returning Officer NA-202, Khairpur-I) and Muhammad Ali (Assistant Commissioner, Khairpur/Returning Officer PS-26, Khairpur).

Mr. Dareshani Ali Haider 'Ada', Deputy Attorney General.

Mr. Liaquat Ali Shar, Additional Advocate General Sindh and Mr. Ali Raza Baloch, Assistant Advocate General Sindh.

Date of Hearing & Order: **23-01-2024**

ORDER

MUHAMMAD IQBAL KALHORO, J:- By means of these two petitions, petitioners have challenged the candidature of respondent No.10/Imam Bux Phulpoto to contest upcoming election both as a Member Sindh Assembly against PS-26 district Khairpur and a Member National Assembly (Majlis-e-Shoora) against NA-202 district Khairpur on the grounds, amongst others, that he did not disclose all the relevant facts in his nomination papers for both the seats and is defaulter in payment of tax due against him for the year 2017-2018; that he did not fulfill qualification, as articulated under Article 62 and is further disqualified under Article 63 of the Constitution, as he has failed to mention liability of tax in Form-B of nomination papers; that his nomination forms were rightly rejected by learned Returning Officer holding that despite time

given to respondent No.10 to make good of tax liability, he failed to do so and had instead produced an order of Commissioner (Appeals) Inland Revenue, Sukkur staying proceedings of assessment order dated 07.06.2023 against him, which being passed by a quasi-judicial forum, cannot be made a basis to avoid payment; that plea of respondent No.10 that he had no knowledge of tax liability outstanding against him is in fact an afterthought and a blatant lie, as the documents of FBR show that he was duly served with notices sent to his email, mobile phone etc.; that his stance before the Returning Officer and Appellate Tribunal pleading lack of knowledge comes within the definition of dishonesty and therefore he is not a fit person to contest election and be elected. In support of his contentions, he has relied upon cases reported as Abdul Ghafoor v. R.O and others (**2013 SCMR 1271**) and an unreported judgment dated 09.01.2024, passed by Divisional Bench of this Court in C.P.No.D-88 of 2024 etc. Learned AAG has supported his arguments.

2. Learned DAG has, however, submitted that proceedings before FBR are only for effecting recovery of tax liability from respondent No.10 and as per circular dated 05.10.2022, when the matter is pending before the department either in assessment proceedings or in appeal, coercive measures against the defaulter cannot be taken.

3. Learned counsel for ECP has supported the impugned order. Learned counsel for FBR has admitted that since appeal before the Commissioner (Appeals) Inland Revenue, Sukkur regarding tax liability of respondent No.10 is pending, he cannot be declared as defaulter in payment of tax, or compelled to pay the tax liability.

4. Learned counsel for respondent No.10 submits that respondent No.10 has been adjudicated liable to pay tax against his role as Honorary Chairman in the Managing Committee of Rok Co-operative Housing Society Ltd., which he had left in August, 2020. This tax liability is not against the person of respondent No.10 but against his office as the Chairman of Co-operative Society which otherwise has been paying taxes regularly and that appeal against assessment order has been heard and reserved for order. He has, however, supported the orders of the Tribunal allowing appeals of respondent No.10 against orders of Returning Order rejecting his nomination papers.

5. We have heard the parties and perused material available on record and taken guidance from the case law relied at bar. In the assessment order passed by Deputy Commissioner Inland Revenue, Sukkur, respondent No.10 has been adjudicated to be liable to pay Rs.14,927,983/-. Section 2 of sub-section XXIII of the Election Act, 2017 defines government dues and utility expenses as rent, charges of rest houses or lodges or other accommodation owned by any Government or a body owned or controlled by any Government but shall not include the government dues and utility expenses the recovery of which has been stayed by any order of a **Court or Tribunal**. Sub-section XXXVIII of the said provision defines tax as a tax levied by any Government, but shall not include taxes the recovery of which has been stayed by a **Court or Tribunal**. It is obvious that none of government dues, utility charges and taxes can be counted or considered against a candidate to declare him ineligible to contest the election if such liability has been stayed by any Court or Tribunal.

6. The stay by Court or Tribunal means that original proceedings finally determining liability have already been decided by departmental hierarchy and are pending adjudication for confirmation or otherwise either before the Court or Tribunal, which has meanwhile stayed the proceedings. The urge of learned counsel for petitioners and learned AAG that since appeal filed by respondent No.10 is pending before the Commissioner (Appeals) Inland Revenue, Sukkur that is a quasi-judicial forum, any stay granted by it would not be considered as stay given by the Court or Tribunal and hence its benefit would not be extended to the candidate. Such argument is completely lopsided and does not take into consideration underlining object behind such formulation, which essentially postulates that even if a candidate has been adjudicated finally by the department to be defaulter in payment of tax liability etc., but his case is pending either before the Court or Tribunal, the next forum, and it has granted stay against the order passed by the tax hierarchy determining conclusively his liability, such order would not come in his way insofar as his right to contest the election is concerned. Herein, even the departmental hierarchy has not made a final decision in regard to alleged tax liability of respondent No.10 and the matter is pending in appeal. It is settled that an appeal against original proceedings marks its continuation, and unless decided, no liability etc.

in terms of impugned order either can be attached or any recovery proceedings initiated against the debtor/ defaulter.

7. Learned Returning Officer while rejecting the nomination forms of respondent No.10 failed to take into account such scheme of law and purpose behind enactment of aforesaid provisions and proceeded to reject the forms in haste. Further, non-mention of such liability by respondent No.10 in Form-B of his nomination forms *ipso facto* does not qualify a disqualification unless it is shown that such non-disclosure by him was a result of dishonest intention or meant to avoid making good of liability in accordance with law. Section 62(9)(d)(ii) of the Election Act, 2017 casts a duty upon Returning Officer to not reject nomination papers on the ground of any defect, not of substantial nature, and may allow any such defect to be remedied forthwith. Sub-section 10 of the said provision of law further lays down that notwithstanding anything contained in subsection 9 where a candidate deposits any amount of loan, tax or government dues and utility expenses **payable by him**, of which he is unaware at the time of his nomination papers, such nomination papers shall not be rejected on the ground of default in payment of such tax or government and utility expenses (**emphasis supplied**).

8. We have already defined above “government dues”, “utility expenses” and “taxes” payable by the candidate, which will not be counted and considered as liability against him if it has been stayed by any Court or Tribunal. Meaning thereby the same have been conclusively determined by the department and have, however, been stayed by either of above forums, when challenged. The thrust of above provision of law is that it is only when government dues, utility expenses, loan or taxes are found payable by a candidate which he, despite a chance given, fails to deposit, his nomination papers would be liable to be rejected. Keeping in view this formulation, it is easy to infer that nothing of the charges as defined above is payable by respondent No.10. And therefore, rejection of his nomination forms on the ground of default is not justified. Learned counsel for petitioners or learned AAG have miserably failed to show that tax liability determined by FBR in terms of assessment order dated 07.06.2023 is final and payable in law by respondent No.10 after filing of appeal and stay in it granted by

the Commissioner (Appeals) Inland Revenue, Sukkur. The said liability would be payable in law by respondent No.10 only when he has, at least, departmentally been adjudicated to owe such amount to the government. Here even the department is still in the process of making a final decision against respondent No.10. So far only an *ex-parte* assessment order dated 07.06.2023 has been passed calculating an amount of Rs. 14,927,983/- outstanding against him, which he has for the time being to the extent of stay successfully challenged. No one has disputed that even in the event of his failure to succeed in appeal, respondent No.10 will have a remedy to challenge such order before the Appellate Tribunal and then before this Court in case of his failure before the Appellate Tribunal. At this preliminary stage of ongoing process to make assessment of his tax liability by FBR, which is amenable to challenge before various forums, he cannot be declared as in default of government dues, tax etc., and deprived of right of contesting upcoming election on both seats, as detailed above.

9. It may also be noted that petitioners had not filed any objections to the candidature of respondent No.10 at the time of scrutiny of his nomination papers under section 62(i) of the Election Act, therefore, their locus standi to challenge the order of Election Appellate Tribunal in favour of him is under heavy shadow. The nomination papers of respondent No.10 were not rejected on any objection raised by any of the voters of the constituency but by the Returning Officer on his own motion considering him as a defaulter in payment of government taxes. Even in appeal before the Election Appellate Tribunal against such order by respondent No.10, the petitioners did not file any application to be made as party under section 63 of the Election Act and opposed appeal in any form. At this belated stage, in our humble view, petitioners lack competency to challenge the order of the Election Appellate Tribunal.

10. In view of above discussion, we have found no illegality in the order of the Election Appellate Tribunal dated 08.01.2024 encapsulating valid reasons and reference to the relevant provisions of law in favour of respondent No.10. This being the position, we find no merits in these petitions and accordingly dismiss the same.

11. Nonetheless, before parting with this order, we may observe that in case, appeal (reserved for judgment) filed by respondent No.10 before the Commissioner (Appeals) Inland Revenue, Sukkur fails, and unless such order is stayed by any Court or Tribunal, the Election Commission would be competent to, and shall, take action in accordance with law against respondent No.10 to ensure payment of tax liability by him before notifying him as a returned candidate in case he has won the election. But in case his appeal is decided against him after the election and he is notified as returned candidate after winning the election, still the Election Commission would be competent to take action against respondent No.10 under the relevant provisions to ensure payment of tax liability by him, until and unless such order is challenged and is stayed by any Court or Tribunal.

Office to place a signed copy of this order in captioned connected matter.

JUDGE

JUDGE

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