

## IN THE HIGH COURT OF SINDH, KARACHI

### ELECTION APPEAL NO.63 OF 2024

Dr. Fahmida Mirza Wife of Dr. Zulfiqar Ali Mirza

V/s.

Returning Officer and others

### ELECTION APPEAL NO.64 OF 2024

Dr. Zulfiqar Ali Mirza

V/s

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### ELECTION APPEAL NO.65 OF 2024

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### ELECTION APPEAL NO.66 OF 2024

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### ELECTION APPEAL NO.67 OF 2024

Dr. Zulfiqar Ali Mirza

V/s

Returning Officer and others

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Appellant : Through Mr. Malik Naeem, advocate.

Official Respondents : Through Mr. Gul Faraz Khattak, Asstt: Attorney General, Mr. Hakim Ali Shaikh, AAG Sindh. Mr. Abdullah Hanjrah, Deputy Director (Law) ECP.

Respondent-4 : Through Syed Hamid Ali Shah Advocate

Respondent-5 : Through Mr. Haider Waheed Advocate.

Date of hearing & order : 08.01.2024

**ARSHAD HUSSAIN KHAN J.**, At the request of learned counsel for the parties all the above Election Appeals are taken up together as common question of fact and law are involved.

Through Election Appeal No.63 [Dr. Fahmida Mirza], the appellant has challenged the order dated 30.12.2023, passed by the Returning Officer of NA-223 Badin-II, whereby nomination papers of the appellant were rejected while taking into consideration the Objections raised by the contesting candidate namely; Sajjad Ali.

2. Pursuant to the notice counsel for respondent No. 5 filed reply /objections.

3. Counsel for the appellant submits that the Returning Officer has failed to consider the documents annexed with the nomination papers and without applying his mind rejected the same through the impugned order, which is in violation of Article 62 and 63 of the Constitution, Sections 231 and 232 of the Election Act, 2017, and the judgments of this Court as well as the Supreme Court. He further submits that the Returning Officer has failed to consider the fact that the appellant has not obtained any loan from any bank or financial institution in her own name or in the name of her spouse and / or any of her dependents. He further submits that the letter dated 25.12.2023 issued by the State Bank of Pakistan read with its subsequent letter dated 1.1.2024 makes it clear that the loans were obtained by the companies and not by the appellant herself or her spouse or any of her dependents. He further submits that both the companies namely; *Pangrio Sugar Mills Ltd and Mirza Sugar Mills Ltd* are public listed companies and the appellant and her spouse collectively hold merely 12.7% of the shares, therefore, they cannot be construed to be owner of the companies and neither can such loan be construed to be the loan obtained by them in their personal capacity. He further submits that since the loan were not obtained by the appellant or her spouse or any of her dependents as such the appellant's nomination papers cannot be rejected under Article 63(n) of the Constitution and Sections 231 and 232 of the Election Act 2017. He further submits that the Returning Officer has failed to appreciate even the judgment dated 17.10.2023, passed by this Court in Suit No.B-24 of 2003 and decree dated 29.11.2023, prepared pursuant thereto which makes it clear that the liability of the directors including the appellant arises out of personal guarantee submitted by her and not pursuant to any loan obtained by her in her personal capacity. He further submits that the impugned order is also violative of the judgment of the Supreme Court of Pakistan reported as *Ghulam Mustafa Jatoi vs. Additional District and Sessions Judge* [1994 SCMR 1299]. Learned counsel while referring to the said judgment submits that the personal guarantee submitted by the appellant cannot be construed to be a loan under Article 61(n) of the Constitution and the rejection of the nomination papers in view thereof is illegal and liable to be set aside. He further submits that the Returning Officer has also failed to appreciate that similar objections were raised in the past, however, the full bench of this Court vide judgment dated 11.02.2008,

passed in C.P. No.2531/2007 has held that this does not make the Appellant ineligible to contest election. It is also contended that if it is assumed that the decree dated 29.11.2023, passed in Suit No.B-24/2003 is construed as liability against the appellant, however, not mentioning the same in the nomination papers cannot be termed as concealment on the part of the appellant as the decree was passed on 29.11.2023. Whereas the appellant was required to mention the liability up to 30.06.2023, hence this cannot be held a material miss declaration on the part of the appellant.

4. Counsel appearing on behalf of respondent No.5 while refuting the arguments of the learned counsel for the appellant submits that the appellant has willfully concealed the material liability viz. personal guarantee dated 15.1.2001, to secure financial facility from MCB for her companies / business Mirza Sugar Mills Limited. He while referring to a judgment of this Court dated 17.10.2023 passed in Suits No.B-30/2003 and B-24/2003 submits that the appellant is one of the parties in the above suits, which was decreed on 17.10.2023 in favour of the bank. He while referring to paras 27,28 and 29 of the said judgment, submits that the default of payment from 28.5.2003 was considered. He further submits that the suit was decreed inter alia against the present appellant jointly and severally. Learned counsel while referring to the judgment of the Supreme Court of Pakistan reported as PLD 2016 SC 689 submits that the financial liability cannot be equated with default irrespective of any default relating to financial obligation, liability gets created the moment a person takes upon himself the obligation to settle the same in future. He further submits that the appellant not only incurred a financial liability but also defaulted on the same on 28.05.2003. He further submits that in a full bench judgment dated 11.02.2008 of this Court, passed in C.P. No.2521/2007 against the nomination of the appellant on the basis of default of a personal guarantee, the Court held that *“In any case, her application is still pending for satisfaction of the decree which “technically saved her” as defaulter. Had the Respondent No.1 [Dr. Fehmida Mirza] failed to file such an application before the executing court, the result would have been definitely different..... The guarantor is liable to pay the loan and in that sense the arguments of the learned counsel for the petitioner have some force.* He further submits

that the judgment passed by this Court in Suits No.B-24 and 30 of 2003 has not been appealed till date as such it has attained finality. Learned counsel in support of his contention has relied upon the cases reported as PLD 2016 SC 689, PLD 2003 Lahore 106, PLD 2003 Lahore 169, PLD 2008 Lahore 134, PLD 2008 SC 326, 2013 CLC 1310, PLD 2013 Lahore 509, 2013 CLC 1512, PLD 2003 Lahore 165.

5. Learned counsel for respondent No.4 MCB while referring to the letter of guarantee dated 15.1.2001, annexed with the memo of appeal executed inter alia by the present appellant and the undertaking executed by the appellant dated 16.1.2001 submits that the guarantee and the undertaking were issued by the appellant in respect of obtaining financial assistance from the respondent bank MCB wherein she was chairperson and the chief executive of Mirza Sugar Mills Ltd as such the guarantee and undertaking were executed by her in personal capacity. He further submits that since now the competent court has passed the decree in favour of the bank, inter alia, against the present appellant in respect of the loan obtained by her as such she is a defaulter and cannot contest the election, therefore, the Returning Officer has rightly rejected her nomination papers.

6. Learned Assistant Attorney General and the representative of the ECP while adopting the arguments of respondents 4 & 5 supported the impugned order and seek dismissal of the present appeal.

7. I have heard the learned counsel for appellant, respondents No.4 & 5 and learned AAG as well as representative of the ECP, perused the record and considered the relevant law.

8. From perusal of the record, it appears that the nomination papers of the appellant were rejected on the basis of the objections raised by the Objector. Record further shows that in the instant case the appellant did not mention the liability in the nomination papers whereas inter alia against the present appellant the suit filed by MCB has been decreed by the competent court for an amount of Rs.219,784,952/- plus costs of funds jointly and severally including the present appellant vide judgment dated 27.10.2023. This fact was not mentioned by the appellant in the column of liability, verification and in the affidavit submitted by the appellant in her nomination papers as such this fact alone is sufficient to conclude that the appellant is not qualified to contest the election as the

decree against the present appellant till date remained unjustified. In the present case, the appellant is claiming that she is only the guarantor and as such does not fall within the mischief of Article 62 and 63 of the Constitution. Under the law, the liability of a guarantor is co-extensive with that of the principle debtor. The Supreme Court of Pakistan in the case of *Khayal Ahmed vs. Election Tribunal Punjab, Lahore and others* [PLD 2008 SC 326] inter alia has held as under :

*“5. There is no denial to the fact that in the column regarding liabilities in the nomination papers filed by the petitioner neither any liability has been shown nor decree for recovery of Rs.69,51,598 passed on 15.5.2007 against petitioner and others has been mentioned. Though at the time of filing of nomination papers execution application for the said decree filed by respondent No.4 (Crescent Leasing (Cres Lease) Leasing Corporation was pending. Thus requirements of section 12(2) of the Act, 1976, have not been complied with by the petitioner, as such his nomination papers were rightly rejected by all the forums below. Moreover, the liability of guarantor/surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract as envisaged in Section 128 of the Contract Act, 1872. They are jointly and severally liable to pay the outstanding amount to the creditor. A guarantor cannot shirk from the liabilities incurred by him. The learned counsel has failed to point out any question of law of public importance warranting interference by this Court in the impugned judgment, which is maintained accordingly, the petition being devoid of force is dismissed and leave to appeal refused.”*

9. The Supreme Court of Pakistan in the case of *Ch Muhammad Yousaf Kaselia vs. Peer Ghulam Mohy-ud-Din Chishti and others* [PLD 2016 SC 689] while dealing with the same issue inter alia has held as under:

*“5. It is of utmost importance, that a contesting candidate must disclose the assets that he owns and the liabilities that he owes in his nomination form. The disclosure of liabilities is more important than disclosure of assets. It is important for the reason that while holding public office, in case the liability incurred prior to the election is liquidated, he could be called upon to explain the source from which the liability was liquidated; that is, whether the same was liquidated from his personal sources of income or that he had misused the authority of the public office in any manner that contributed to the liquidation of the liability. Therefore, non-disclosure of any liability is to be met with penal action in the same manner as non-disclosure of any asset. We are not impressed by the argument of the appellant's counsel that provisions of subsection (1) of Section 12 of the Representation of the People Act, 1976 are to be read with subsection (c) of section 12 of the said Act. Subsection (c) of Section 12 speaks about disclosures, either of any write off or of default that remains*

unpaid for more than a year, of any financial obligation towards a bank, financial institution, co-operative society or corporate body whereas subsection (f) speaks about disclosure of assets and liabilities. A financial liability cannot be equated with default committed with regard to any financial obligation. A financial liability is incurred the moment an obligation is created to discharge the same, which by efflux of time either has already become due or is to fall due sometime in future. Therefore, irrespective of any default relating to a financial obligation, liability gets created the moment a person takes upon himself the obligation to settle the same in future. In the present case, a financial obligation of 70 million rupees towards a bank did exist at the time of filing of the nomination form which ought to have been disclosed by the appellant irrespective of the fact that the same had not become due but he failed to do so, thereby incurring the penal consequences of non-disclosure”.

10. A full bench of the Lahore High Court in the case reported as *Rashid vs. Returning Officer Nankana Sahib* [PLD 2013 Lahore 509] while interpreting Article 63(1)(n) of the Constitution, inter alia, has held as under:

“8. What is then the cut off date for the deposit of unpaid loan to avoid the mischief of disqualification under Article 63(1)(n) or the last date for curing the said disqualification? First, parallel can be drawn with Article 63(1)(o) of the Constitution that also deals with similar disqualification regarding government dues and utility expenses. In the said Article disqualification is attracted when the default in the payment of government dues or utility expenses subsists for over a period of six months till the time of filing of nomination papers. The importance of the time of filing of the nomination papers cannot be over emphasized. It is the entry point for a candidate to step into the electoral process and in the wisdom of the Constitution the candidate must not only be qualified but must also be free from any taint of disqualification at this initial stage. Similarly Article 63(1)(n) also crystallizes if the loan remains unpaid till the time of filing of the nomination papers. Any payment made after filing of the nomination papers does not cure this constitutional disqualification. Reading the time of the "filing of the nomination papers" as the cut off date in both the above constitutional disqualifications advances a harmonious interpretation of the constitution and avoids the possibility of discrimination in the application of the above Articles, which carry similar objectives and purposes”.

11. I have examined the nomination papers submitted by the appellant to contest the election and find that the appellant did not mention in her nomination papers about the financial liability by way of the aforesaid decree dated 29.11.202, passed by this Court against her in Suit No.B-24 of 2003 for a huge amount in the capacity of a guarantor and the same

is still unjustified. Moreover, admittedly no appeal against the said judgment and decree has been preferred till date.

12. In view of the above discussion and keeping in view the dictum laid down by the Supreme Court of Pakistan in the aforementioned cited cases, I am of the opinion that the appellant has failed to justify her instance in the present appeal, which is accordingly dismissed.

**ELECTION APPEALS  
64,65,66 & 67 of 2024**

These Appeals filed by Dr. Zulfiqar Ali Mirza [spouse of Fahmida Mirza] challenging the order dated 30.12.2023, passed by the concerned Returning Officers whereby his nomination papers for contesting National and Provincial Assemblies were rejected on the ground that he has failed to mention the financial facility availed by the company [Mirza Sugar Mills], which is mainly owned by him and his spouse and further he has also failed to disclose about the judgment and decree passed in Suit Nos. B-24 and B-30 of 2003 against the company and the spouse Fahmida Mirza. Since the subject matters of the present appeals are identical and the same as that of Appeal No.63 [above] as such in view of the above order, these Appeals are also dismissed.

**JUDGE**