

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

C.P No. D- 504 of 2020

Present:-

Mr. Justice Abdul Maalik Gaddi

Mr. Justice Adnan-ul-Karim Memon

Petitioner. : Syed Noor Ali Shah through Barrister
Zamir Hussain Ghoomro, Advocate.

Respondents No.1 & 2. : Through Mr. Aslam Pervaiz Khan, Asst.
Attorney General for Pakistan along with
Mr. Amir Hussain Shah District Election
Commissioner Tharparkar R.O Umerkot &
Mr. Kanwar Shujat Ali Election Officer,
Hyderabad.

&

Mr. Allah Bachayo Soomro, Addl. Advocate
General, Sindh.

Respondents No.3 & 4 : Through Mr. Jan Ali Junejo, Advocate

Date of hearing. : 03.09.2020
& decision.

J U D G M E N T

ABDUL MAALIK GADDI, J:- This Constitutional Petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is directed against the judgment dated 16.03.2020 passed by the learned Appellate Tribunal in Election Appeal No.01 of 2020, whereby an appeal preferred by the petitioner against the order dated 09.03.2020 passed by the Returning Officer, Bye-Election PS-52 Umerkot-II, was dismissed.

2. Briefly the facts of the case are that the petitioner had filed his nomination papers to contest the forthcoming bye-election 2020 for a Member of Provincial Assembly Sindh from the constituency PS-52 Umerkot-II. The Returning Officer after hearing the parties' counsel and examining the record had rejected the nomination papers of the petitioner vide order dated 09.03.2020 on the grounds that the petitioner has concealed the F.I.R registered against him in his nomination papers, and the petitioner has also concealed his income of salary received by him as Chairman District Council Umerkot in the year 2017 and 2018 in his nomination papers, as the petitioner had received honorarium of Rs.9,62,581/- from 30.08.2016 to

31.08.2018 as Chairman District Council Umerkot. Having felt aggrieved by the order dated 09.03.2020 of the Returning Officer, the petitioner had filed Appeal before Appellate Tribunal which was dismissed through judgment dated 16.03.2020. Now the petitioner has come before this Court by impugning the above said order and judgment and prayed that his nomination paper rejected by two forums below may be restored.

3. Mr. Zamir Hussain Ghomro, learned counsel for the petitioner has mainly contended that the petitioner is not a previous convict; that the petitioner was not aware about the F.I.R registered against him bearing Crime No.79 of 2017 at PS Hali Road lodged by complainant Mst. Saba alias Asma; that as and when petitioner came to know about the registration of the said F.I.R, he approached to the trial Court wherefrom he has been acquitted of the charge u/s 265-K Cr.P.C as the complainant did not support the case of prosecution and no appeal against the acquittal order has been filed by the prosecution so far, therefore, according to him, the said order has attained finality; that Returning Officer as well as Appellate Tribunal erred in law while rejecting the nomination paper filed by the petitioner on the ground that the petitioner has concealed the fact that an F.I.R had been lodged against him; that the petitioner has submitted plausible explanation through reply in respect of non-disclosure of pendency of criminal case against him in his nomination paper; that Returning Officer as well as Appellate Tribunal has wrongly considered the honorarium which was received by the petitioner being Chairman District Council as salary; that the petitioner had no intention to conceal the honorarium received by him during the period 2017 and 2018, if he had any intention, he would not have disclosed the honorarium which was received by him in the year 2019 in the column of source of income; that there was no need to mention in nomination paper in respect of honorarium amount received by the petitioner; that it is the right of every citizen of Pakistan to contest the election and such right could not be denied on any flimsy / technical ground; therefore, he prayed for restoration of nomination paper of the petitioner by allowing this petition and set-aside the impugned order and judgment. In support of his contention, he has relied on the cases (1) **SHEIKH MUHAMMAD AKRAM v. ABDUL GHAFOOR & 19 others** [2016 SCMR 733], (2) **TARIQ HUSSAIN v. SARFARAZ AHMED & four others** [2013 CLC 1620], (3) **HAJI GHULAM HUSSAIN v. RETURNING OFFICER ZILLA**

COUNCIL, BAHWALPUR & two others [1998 MLD 1948], (4) RAI HASAN NAWAZ v. THE ELECTION COMMISSION OF PAKISTAN and others [2013 CLC 1101], and (5) AGHA QURBAN ALI & others v. ELECTION COMMISSION OF PAKISTAN THROUGH CHIEF ELECTION COMMISSIONER and others [2020 CLC 01].

4. Conversely, Mr. Jan Ali Junejo, Advocate representing the respondents No.3 and 4 while supporting the impugned order and judgment passed by the two lower forums has contended that the petitioner is a nominated accused in the case emanating from F.I.R No.79 of 2017 for offences under section 367(i), 365-B, 452, 109, 337-J PPC, registered at Police Station Hali Road Hyderabad on the complaint of Mst. Saba alias Asma daughter of Muneer Ahmed Birhmani; that petitioner is Chairman District Council Umerkot, but he has concealed such material fact in his nomination papers and affidavits; that the petitioner has not declared his entire assets and the petitioner has also shown contradictory cost of the immovable properties in his nomination papers and affidavits therefore, his case does not fall within the definition of 'Sadiq and Ameen'. Lastly, he while relying upon the objections filed by him on behalf of respondent No.3 submitted that Returning Officer as well as learned Appellate Tribunal has rightly observed / held that petitioner is not entitled to contest the election.

5. Mr. Aslam Pervaiz Khan, learned Asst. Attorney General for Pakistan while adopting the arguments so advanced by learned counsel for the respondents No.3 & 4 has submitted that petitioner has suppressed the material facts in his nomination papers with regard to non-disclosure of the criminal case registered against him as well as non-disclosure of income / honorarium so received by him during the year 2017 and 2018 as such his case falls within the meaning of mis-statement and false information, eliminating him from contesting the election, therefore, he prayed for dismissal of this petition.

6. Mr. Allah Bachayo Soomro, learned Addl. Advocate General, Sindh has supported the case and claim of the petitioner and submitted that the petitioner is not previous convict and information provided by him in his nomination paper was good enough to accept his nomination paper, but both the lower forums did not consider

these aspects of the case and the case of the petitioner does not fall within the embargo of any law.

7. We have assiduously heard the arguments advanced by learned counsel for the parties and meticulously perused the record with their able assistance. After careful perusal of the record, we have observed that the questions which require consideration by this Court are as under:

- i. Whether non-disclosure of pendency of criminal case by petitioner in his nomination form was intentional and entails disqualification?
- ii. Whether non-disclosure of honorarium amount received by petitioner being Chairman District Council in the year 2017 and 2018 in his nomination papers was intentional and entails penal consequences?

8. So far as the question No.1 is concerned, it need not be said that the nomination papers requires disclosure of criminal case which is pending six months prior to the submission of the nomination papers. The initial onus was upon the respondents to establish that the petitioner had knowledge about the pendency of criminal case against him and he had intentionally / deliberately made false declaration in his nomination papers. The petitioner has submitted that he had no knowledge regarding registration of a criminal case against him and therefore, he has not mentioned the fact in the nomination papers.

9. It is the stance of the petitioner that he came to know about the pendency of criminal case against him for the very first time when this objection was raised by respondents before Returning Officer and having got the knowledge, he immediately approached to the concerned Court viz. 2nd Additional Sessions Judge, Hyderabad from where now he has been acquitted of the charges u/s 265-K Cr.P.C vide order dated 21.04.2020, as the complainant of the case filed an affidavit wherein she has disclosed that the petitioner was not her culprit and has falsely been implicated by the police. In this regard certified copy of the acquittal order has been produced by the petitioner. It is noted that no appeal has been preferred against the said acquittal order thus the same has attained finality. On the query put by this Court learned counsel for respondents did not controvert the above factual position regarding acquittal of the petitioner.

10. It goes without saying that involvement of a candidate in a criminal case is not sufficient to restrain him from contesting the election until and unless he has been convicted in the said criminal case. Mere involvement in any F.I.R cannot form basis of passing judgment on character of a person, qualification / dis-qualification referred to Article 62 & 63 of the Constitution of Islamic Republic of Pakistan, 1973, cannot be proven or disproven by reference to an F.I.R alone.

11. As regard to the non-disclosure of the criminal case by petitioner, as stated above, the initial burden was upon the respondents to prove the petitioner's knowledge about the pendency of said criminal case; however, the respondents have failed to prove the same. Admittedly, the petitioner was not convicted in the said crime and he would only stand to gain if he did not mention in his nomination form about the criminal case in which he had been convicted which may have entailed his disqualification. Meaning thereby, even if the petitioner had disclosed this information regarding pendency of a criminal case in his nomination papers before Returning Officer, he would not have been declared disqualified from contesting the election. In the case titled as **MURAD BUX v. KARIM BUX** & others reported in [[2016 SCMR 2042](#)] wherein the Honourable Supreme Court of Pakistan has observed as under:

“As against this if non-disclosure about pendency of a criminal case has been made, for which the petitioner has offered a reasonably plausible explanation, then the affidavit could not be considered as a false or incorrect declaration. It is well settled that the provision of disqualification of a candidate are to be strictly construed. In the case in hand, the disqualification of the petitioner is not an issue. The only issue is the non-disclosure of pending criminal case in the affidavit before Returning Officer and whether such non-disclosure would be construed as concealment of material particulars. We in the backdrop of these facts are of the considered view that non-disclosure of a fact which otherwise, if disclosed, could not debar in petitioner's form contesting the election, cannot be made a ground to preclude the petitioner from contesting the election”.

12. Similar view was taken by Honourable Supreme Court in the case titled as **SHEIKH MUHAMMAD AKRAM v. ABDUL GHAFOOR** & 19 others reported as [[2016 SCMR page 733](#)], wherein it has been held as under:

“10. Admittedly, the appellant did not disclose that the said criminal case was pending against him in his nomination papers. The said case against the appellant was one of rash and, according to complainant of the case, the complainant had been injured. The offence for which the appellant was

charged carried a maximum prison term of two years. The complainant of the case however, resiled from his own complaint and the appellant secured his acquittal. Would the non-disclosure of this case (lodged u/s 337-F read with Section 279 PPC) be fatal to the candidate of the appellant?

11. It may however be mentioned that a candidate is not disqualified to contest elections merely because a criminal case is pending against him. Non-disclosure of a pending case cannot be equated with the non-disclosure of a criminal case in which a person has been convicted and one which may entail his disqualification”.

13. In view of the dictum laid down in the case laws cited *supra* as well as plausible explanation furnished by petitioner with regard to non-disclosure of a case against him, we have no hesitation to hold that findings given by Returning Officer and the Tribunal in this regard are unjustified and not sustainable under the law.

14. Now comes to the next question i.e. whether non-disclosure of honorarium amount received by petitioner being Chairman District Council in the year 2017 and 2018 in his nomination papers was intentional and entails penal consequences?

15. It is the standpoint of the petitioner that he did not conceal his any asset in the nomination papers; that non-disclosure of the honorarium amount received by him in the year 2017 and 2018 is un-intentional and a bonafide / innocent mistake and he did not get any benefit by non-disclosing the said amount; that if he had any malafide intention in concealing the honorarium amount received in the year 2017 and 2018, he would not have mentioned the honorarium received by him in the year 2019 in his nomination papers.

16. In the case in hand there is no denial to the fact that petitioner being Chairman District Council had got honorarium in the year 2017 and 2018, however, he did not disclose the same in his nomination papers. Law on the subject has elaborately been developed till now and in the recent pronouncement of Honourable Supreme Court, certain criteria have been laid down in order to invoke the Article 62 & 63 of the Constitution of Islamic Republic of Pakistan, 1973. Element of dishonesty is an essential element of disqualification under Article 62-1(f) of the Constitutional as held in the case of **MUHAMMAD HANIF ABBASI v. IMRAN KHAN NIAZI & OTHERS** [*PLD 2018 Supreme Court page 189*] wherein the

Honourable Supreme Court has emphasized that dishonesty cannot be attributed with reference to any alleged design, intention, scheme, background or impropriety *mens-ria*. In the case of **ILLAHI BUX SOOMRO v. AIJAZ HUSSAIN JAKHRANI & 7 OTHERS** [2004 CLC page 1060] wherein it has been observed that if the explanation given by a party is plausible, the Court should not deprive such party from contesting the election. However, if the party has willfully made a false statement in the affidavit sworn with the nomination paper concealing material particular in order to avoid disqualification, then the Tribunal would not travel deep into the explanation, once it is established that the disclosure of such material particular would have exposed him to disqualification.

17. Having perused the above cited case laws it can be deduced that mere non-disclosure of any particular asset does not ipso-facto render a person to be dishonest unless it is established that such non-disclosure / concealment is baked with dishonesty, malafide intention in order to avoid disqualification. In the above backdrop the question which needs determination here is whether petitioner has concealed the honorarium amount received by him in the year 2017 and 2018 in order to gain any benefit, the answer is plumb “No”, for the reason that if he had disclosed his honorarium amount received by him in the year 2017 and 2018 in his nomination papers, he would not have been disqualified.

18. We have gone through the material on record but did not find anything which indicates that the petitioner had deliberately concealed the said honorarium in his nomination papers. We do not see any advantage accruing to the petitioner in not disclosing the said honorarium amount. Learned counsel for respondents No.3 and 4 contended that any error or omission in the declaration form by candidate for election incurs his disqualification under Article 62(1)(f) of Constitution posits a wide proposition of law, if at all, this may have limited relevance where the context involves corruption or money laundering in State office, misappropriation of public property or public funds accumulation of asset beyond known means or abused of public office or authority for private gain. There is no involvement of public property or funds, abused of public office and authority, corruption or breach of fiduciary duty in the instant case.

19. It is by now well settled that it is the credibility of the explanation that matters as to whether non-disclosure of an asset carries with it element of dishonesty or not. The test of honesty with regard to non-disclosure of asset and liability is to be applied, in that context alone and certainly not in a case where non-disclosure of clean asset is only inadvertent omission. In this regard we are supported with case law reported as Rai Hassan Nawaz v. Haji Muhammad Ayub [PLD 2017 Supreme Court 70], wherein it has been held as under:

“8. We, therefore, observe that any plausible explanation that exonerates, inter alia, mis-declaration 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 an elected or contesting candidate. Where assets, liabilities, earnings and income of an elected or contesting candidate are camouflaged or concealed by resort 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 in order to ascertain if his false or incorrect statement of declaration under Section 12(2) of the ROPA is intentional or otherwise.

20. After considering the entire material on record we are of the view that the forums below have failed to appreciate the actual position in this matter and have wrongly proceeded while rejecting the nomination papers of the petitioner. So far as the contention of respondents No.3 and 4 that petitioner is a Chairman of District Council Umerkot therefore, he cannot contest the election being in services of Pakistan. We are not impressed with this contention which seems to be misconceived. In this regard, in the case titled as **AGHA QURBAN ALI & OTHERS v. ELECTION COMMISSION OF PAKISTAN THROUGH CHIEF ELECTION COMMISSIONER & OTHERS** [2020 CLC page 01] authored by one of us (Abdul Maalik Gaddi-J:) wherein it has been observed as under:

“16. It is the matter of fact that respondent No.4 is elected the member / chairman of Sindh Local Government but was not appointed / employed by Local Government as such in our view his position does not come in the definition of the “Service of Pakistan” as envisaged under Article 260 of the Constitution of Pakistan, 1973. The post of mayor / chairman or any council has not been declared by the Provincial or Federal Government or any Court of law, being the “Service of Pakistan” but are out of definition provided under Article 260 of the Constitution of Pakistan, 1973.

17. It is pertinent to mention here that firstly, it must be established that the office in question i.e. service of Pakistan is an office of

profit, controlled by the Provincial Government, having authority to appoint and remove the Chairman. This admittedly is not the position as the contesting candidates are firstly elected representatives, and secondly, after their Election as member of the District Council or Town Committee, they have been further elected as Chairman by the elected members and can only be removed from such post through a no confidence motion, as provided in law”.

21. Result of the above discussion is that this petition is allowed. The order of Returning Officer dated 09.03.2020 whereby nominating papers of the petitioner were rejected and judgment dated 16.03.2020 whereby the appeal filed against such rejection was dismissed by Appellate Tribunal, are set-aside. Consequently, the nomination papers filed by the petitioner for election i.e. Bye-Election PS-52 Umerkot-II is hereby restored and the petitioner is allowed to contest the said election.

22. This petition was allowed by us after hearing the learned counsel for the parties in open Court through our short order dated 03.09.2020 and above are the detailed reasons thereof.

JUDGE

JUDGE

Hafiz Fahad