

Judgment Sheet
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

Writ Petition No.108-P/2024 with IR

Babar Azeem Afridi

Versus

Election Commission of Pakistan and 4 others

JUDGMENT

Date of hearing **11.01.2024**

Petitioner by: Barrister Syed Mudasser Ameer &
Barrister Ahmad Shah Afridi

Respondents by: M/s. Mohsin Kamran Siddiqui & Syed
Sikandar Hayat Shah, Advocates

IJAZ ANWAR, J. Because of community of facts and question of law involved in the instant and the connected ***WP 109-P/2024*** filed by the same petitioner, we intend to decide both these petitions through this consolidated judgment.

2. Facts of both the writ petitions are that, Mr. Sajid Iqbal “(*respondent No.5*)” is an elected Mayor of Tehsil Gumbat, District Kohat. He is desirous to contest the upcoming General Elections, from the constituencies of PK-90 Kohat-I and NA-35 Kohat, as such, filed his nomination papers to the concerned Returning Officers “(*respondent No.3*)” where the petitioner being

✓

registered voter of PK-90 Kohat filed his objections over the nomination papers of respondent No.5. Pursuant to the objections so raised, respondent No.3 rejected the nomination papers of respondent No.5 vide respective orders dated 29.12.2023. As against that, respondent No.5 filed two **Election Appeals No.13 & 14-P/2024** before the Election Appellate Tribunal, Peshawar, which were allowed vide consolidated judgment & order dated 06.01.2024; hence, the petitioner, having no other efficacious, speedy and alternate remedy, filed the instant and the connected writ petitions before this Court.

3. Notices of both the writ petitions were issued to the respondents, and record was requisitioned. Pursuant to notice, the respondents appeared before this Court through their learned counsel whose arguments were heard at considerable length, and with their valuable assistance, the record carefully gone through.

4. Perusal of the record would reveal that respondent No.3 rejected the nomination forms of respondent No.5 vide his orders dated 29.12.2023 for the following reasons:

- i. *Hit by dual membership clause of LG 2019*

- ii. *ACE Kohat FIR No.3 dated 16.12.2023 not declared hence, hit by Section 62(9)(c) of Election Act, 2017. (ACE Report attached)*
- iii. *Police (DPO) report is placed on record (att)*
- iv. *Applicant is at liberty to agitate higher competent forum for redressal of grievance.*

5. The learned Appellate Election Tribunal, while setting aside the orders of respondent No.3, allowed the respective appeals of respondent No.5 and held that; *“bar contained in Section 85 of the Khyber Pakhtunkhwa Local Government Act, 2013 cannot be equated with the disqualification as contemplated by Article 63(1)(p) of the Constitution of the Islamic Republic of Pakistan, 1973”.*

6. In these writ petitions, the only ground which was vehemently argued by the learned counsel for the petitioner, and responded by the counsel representing respondent No.5 is, as to whether dual membership clause of Khyber Pakhtunkhwa Local Government Act, 2013 *“(KPLGA, 2013)”* would be applicable to disqualification of the respondent to contest the General Election, 2024. Section 85 of the KPLGA, 2013 being relevant in the controversy is reproduced as below: -

85. *Bar against dual membership.---A
1[Chairman] 2[Deleted] or member of a
local council may contest election for any*

political office after resigning from his respective existing office before filing of his nomination paper.

The corresponding provision in the Punjab Local Government Act, 2013 “**(PLGA, 2013)**” is Section 28(1) being relevant is also reproduced in view of the fact that this section of law remained under discussion and much case law has been developed on this point.

28. Bar against dual membership.– (1) A Mayor, a Deputy Mayor, a Chairman or a Vice Chairman may contest election for any other political office after resigning from the office of the Mayor, Deputy Mayor, Chairman or Vice Chairman.

(2)

(3).....

(4)

(5)

Likewise, Sections 231 and 232 of the Election Act, 2017 deal with the qualifications and disqualifications of a person to be elected or chosen or to remain as a member of the Majlis-e-Shoora (Parliament)/provincial assembly. These sections of law provide that in addition to these sections, qualifications/disqualifications enumerated under Article 62 and 63 of the Constitution of the Islamic Republic of Pakistan, 1973 “**(The Constitution)**” shall be applicable. Apart from the above, the Constitution being

the supreme law has specifically provided so, as such, it will be having an overriding effect.

7. Article 62 of the Constitution provides qualifications for membership of Majlis-e-Shoora (Parliament) while Article 63 of the Constitution provides disqualification for membership of Majlis-e-Shoora (Parliament). Article 63(1)(p) of the Constitution being relevant to the case of the petitioner is, therefore, reproduced for ease of reference.

63. (1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if—

(a) to (o).....

(p) he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.

Explanation.— For the purposes of this paragraph “law” shall not include an Ordinance promulgated under Article 89 or Article 128.

8. Admittedly, at the time when respondent No.5 submitted his nomination papers for PK-90 Kohat-I and NA-35 Kohat was an elected Mayor of Teshil Gumbat, District Kohat, and S. 85 of the KPLGA, 2013 ibid

clearly provides that Chairman or member of a local council may contest election for any political office after resigning from his respective existing office before filing of his nomination paper which provide bar against dual membership, and such bar has been recognized under Article 63(1)(p) of the Constitution, if there is any such disqualification under any provincial or federal law. This issue was earlier taken up in the case of *Fozia Khalid vs Election Appellate Tribunal and others "PLD 2018 Lahore 895"* wherein the Hon'ble Lahore High Court held as follows:

(a) Punjab Local Government Act (XVIII of 2013)---S. 28(1)---Bar against dual membership---Time frame within which a resignation should be tendered by the Mayor, Deputy Mayor, Chairman or Vice Chairman in order to contest elections for any other political office, in terms of the bar contained in S.28 (1) of the Punjab Local Government Act, 2013---Bye-elections for seat of Provincial Assembly---Nomination papers, rejection of---Sitting Chairperson of District Council/petitioner filed nomination papers for bye-election of a Provincial Assembly seat, without tendering resignation from post of Chairperson---Election Tribunal rejected the nomination papers of the petitioner in terms of the bar contained under S.28(1) of the Punjab Local Government Act, 2013 ("the 2013 Act")---Plea of petitioner that S.28(1) of the Act, was not a precondition to the filing of nomination papers and that the petitioner was not

required to tender her resignation from post of Chairperson until the last date for withdrawal of candidature and publication of revised list of contesting candidates for Provincial Assembly seat---Validity---Spirit behind the bar imposed on dual membership in terms of S.28(1) of the Act was that the holders of specific positions being Mayor, Deputy Mayor, Chairman and Vice Chairman should not be allowed to contest for any other political office due to the nature of their post---Said officials sat at the highest level in the local government and were in a position to use the resources from their offices, including their staff for campaigning purposes and could influence the election process---Mandate of S.28(1) of the Act was to prevent a single person from holding office whilst contesting for another political office as it was necessary to ensure that an office holder should dedicate his or her time to their official duties and not towards personal advancement---Such bar ensured that office holders did not unfairly leverage their present position against other candidates or that they maintained public offices as a fall back---Bar contained in S.28(1) of the Act became applicable when a Mayor, Deputy Mayor, Chairman and Vice Chairman decided to contest another political office, in the present case being the bye-election, at the stage of filing the nomination papers---Impugned order of Election Tribunal rejecting nomination papers of the petitioner contained no illegality---Constitutional petition was dismissed accordingly.

Syed Sarfraz Hussain Shah v. Additional District and Sessions Judge/Returning Officer and 16 others PLD 2008 Kar. 64 ref.

(b) Punjab Local Government Act (XVIII of 2013)---S. 28(1)---Bar against dual membership---"Resign to run", principle of---Scope---Pre-requisite for a Mayor, Deputy Mayor, Chairman or a Vice Chairman to resign from his/her office before contesting election for any other political office---"Resign to run" principle was premised on encouragement to run for public office and to make the process of election more competitive---Said principle created a level playing field and ensured that a person holding public office did not divert its resources for personal advancement, and it was also a check on those holding public office and ensured that they did their jobs and could account for the time spent in office---Public resources and functions were safeguarded and the sanctity of the election process was maintained.

9. Feeling aggrieved of the said judgment, the petitioner of that petition filed **Civil Petition No.2044-L of 2018** before the august Apex Court but, the same was dismissed vide order dated 27.9.2018. Similarly, the larger bench of the Hon'ble Balochistan High Court in case of *Ghulam Akbar Lachi and others vs. Returning Officer for NA 270 "PLD 2003 Quetta 1"*, while placing reliance on Article 63(1)(p) of the Constitution held that person who had been disqualified from being elected under any law for the time being in force, would be disqualified from contesting the elections. As the candidate was disqualified by virtue of proviso to S. 15

read with S. 25 of National Accountability Bureau Ordinance, 1999, therefore, his nomination papers were rightly rejected by the Returning Officer. Recently, the Hon'ble Islamabad High Court in case of ***Zahid Naseem and others vs. Election Commission of Pakistan and others "2019 CLC 830"*** exactly in same situation held that;

13. The 'resign to run' principal is premised on encouragement to run for public office and to make the process of election more competitive. It creates a level playing field and ensures that a person holding public office does not divert its resources for personal advancement. It is also a check on those holding public office and ensures that they do their jobs and can account for the time spent in office. Public resources and functions are safeguarded and the sanctity of the election process is maintained."

14. The Hon'ble Supreme Court, vide order dated 27.09.2018, passed in Civil Petition No.2044-L/2018, upheld the said judgment dated 14.09.2018 of the Hon'ble Lahore High Court. The Hon'ble Supreme Court held, in effect, that the nomination papers filed by a Mayor, Deputy Mayor, Chairman or Vice-Chairman of a local government/local council, to contest elections to the Provincial Assembly of the Punjab without resigning from such office, were liable to be rejected.

10. The reasoning put forward by the Hon'ble Election Appellate Tribunal, Peshawar, to the effect that Election Act, 2017 being federal law shall have preference over S. 85 of the KPLGA, 2013, is not tenable because Article 63(1)(p) of the Constitution itself recognizes that a person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force, and any law includes the provincial law as well. Similarly, Sections 231 and 232 of the Election Act, 2017 also made specific reference to Article 62 & 63 of the Constitution, suffice it to say that the Constitution being mother of all laws is to prevail. Being so, we are of the view that since respondent No.5 didn't resign as Mayor of Tehsil Gumbat District Kohat at the time of submission of nomination papers for contesting the upcoming General Election, as such, the bar contained in S. 85 of the KPLGA, 2013 read with Article 63(1)(p) of the Constitution would be equally applicable to him. Thus, respondent No.3 i.e. returning officer(s) have rightly

rejected the nomination papers of the respondent No.5 by way of their respective orders dated 29.12.2023. Therefore, the impugned judgments & orders rendered by the learned Election Appellate Tribunal, Peshawar, dated 06.01.2024 are not tenable in the eye of law. Accordingly, the same are struck down.

11. These are the reasons of our short order of even date, which is reproduced as under: -

"For the reasons to be recorded later, this as well as the connected writ petition No.109-P/2024 are allowed. The impugned judgement and order of the Election Appellate Tribunal, Peshawar dated 06.01.2024 passed in Election Appeals No. 13 and 14-P/2024 is set aside and order of the Returning Officer dated 29.12.2023 is restored. The respondent No.5 stands disqualified in terms of the order of Returning Officer to contest General Elections, 2024 from constituencies PK-90, Kohat and NA-35 Kohat."

Announced:
11.01.2024

JUDGE

JUDGE

Nazir

(DB)

Hon'ble Mr. Justice Ijaz Anwar, J
Hon'ble Mr. Justice Syed Arshad Ali, J