

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

29/19

**PRESENT:**

MR. JUSTICE UMAR ATA BANDIAL  
MR. JUSTICE MUNIB AKHTAR  
MR. JUSTICE YAHYA AFRIDI

(AFRI)

**4. CIVIL PETITION NO. 3632 OF 2018**

(On appeal from the judgment/order dated 20.7.2018 of the High Court of Sindh, Karachi passed in C.P. No.D-4653/2018).

**Roshan Ali Buriro** ... .. Petitioner(s)

**Versus**

**Syed Murad Ali Shah and others** ... .. Respondent(s)

For the petitioner(s) : Mr. Hamid Khan, Sr. ASC  
Mr. M. Waqar Rana, ASC

Respondent(s) : Not represented.

Date of hearing : 23.01.2019

**ORDER**

**UMAR ATA BANDIAL, J.** A Division Bench of the learned High Court has by its impugned judgment dated 20.07.2018 dismissed the constitution petition filed by the petitioner seeking a writ of *quo warranto* on the ground that no disqualification of the respondent No.1 ("**respondent**") under Article 63(1)(c) and 62(1)(f) respectively of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**") is made out on record for holding dual nationality.

2. The petitioner is a political opponent of the respondent. He had previously filed objections to the candidature of the respondent in the General Elections of 2013. The respondent was disqualified by the Returning Officer on 06.4.2013 from contesting that election on the ground of concealing his dual nationality as a Canadian citizen. He was thereby disqualified under Article 62(1)(d) and Article 62(1)(f) of the Constitution. The appeal filed by the respondent was dismissed by the Election

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Tribunal on 16.4.2013 but solely on account of his disqualification under Article 63(1)(c) of the Constitution. A full Bench of the learned High Court set aside the respondent's disqualification on 18.4.2013. However, on a petition filed by the petitioner, this Court restored the respondent's disqualification on 02.5.2013 in terms of the judgment of the learned Election Tribunal dated 16.04.2013 and the order dated 06.04.2013 by the Returning Officer.

3. Some three months later, on 18.7.2013, the respondent was issued a certificate of renunciation of citizenship by the Canadian Government. Accordingly, he filed his nomination paper for the General Election of 2018 against which the petitioner again filed an objection. This objection was rejected by the Returning Officer on 14.6.2018. Although the petitioner had a right of appeal against that order under Section 63 of the Election Act, 2017, he did not pursue the same and instead filed a writ petition before the learned High Court which has been dismissed by the impugned judgment on 20.7.2018.

4. We asked learned counsel as to why the petitioner had abandoned his statutory remedy of appeal against the acceptance of the respondent's nomination paper and instead petitioned the learned High Court. However, learned counsel did not give any answer to that query. It is apparent that the petitioner nurtures a motive for disqualifying the respondent who is a political opponent whom the petitioner has repeatedly sought to eliminate him from the electoral contest.

5. Learned counsel has not disputed the political rivalry between the parties but submits that the judgment of this Court reported as ***Sher Alam Khan vs. Abdul Munim and others*** (PLD 2018 SC 449), holds that upon receipt of information from any source, a Constitutional Court may at any stage call upon an elected legislator to substantiate his qualification to occupy his elected office. Since the order of the Returning Officer dated 06.4.2013 and of the learned Appellate Tribunal dated 16.4.2013 had been upheld by this Court in its judgment dated 02.5.2013,

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therefore, the order of the Returning Officer disqualifying the respondent, *inter alia*, under Article 62(1)(f) of the Constitution could be enforced for the imposition of a permanent disqualification through a writ of *quo warranto*.

6. We have heard the learned counsel for the petitioner and have gone through the material on record.

7. We notice that the order of the Returning Officer dated 06.04.2013 is summary in nature. No evidence was recorded in the said proceedings nor does the order give any reasons for disqualifying the respondent under Article 62(1)(f) of the Constitution. On the other hand, the learned Election Tribunal made a declaration against the respondent only under Article 63(1)(c) and none under Article 62 of the Constitution. In terms of the law laid down by this Court in its judgment reported as *Maharunnisa vs. Ghulam Sughran* (PLD 2016 SC 358), the order dated 06.04.2013 by the Returning Officer merged into the order of the learned Election Tribunal dated 16.04.2013. The disqualification imposed on the respondent by the Returning Officer under Article 62(1)(f) of the Constitution therefore did not survive.

8. Turning now to the petitioner's switchover of his proceedings from remedies under the Election Act, 2017 to a Constitutional Petition before the learned High Court. That is a serious defect but may arguably be justified for seeking a decree by a Court of law that meets the requirement of Article 62(1)(f) of the Constitution. However, from the background that has already been recounted, we consider that the writ petition filed by the petitioner was actuated by personal political rivalry and not by public interest. Accordingly it lacked the petitioner's *bona fides*. In this regard, *Kamal Hussain vs. Sirajul Islam* (PLD 1969 SC 42) has held:

“... any person and not necessarily an aggrieved person can seek redress from the High Court against the usurpation of a public office by a

person who is allegedly holding it without lawful authority. ... But the grant of relief in writ jurisdiction is a matter of discretion, wherein it is quite legitimate on the part of the High Court to test the *bona fides* of the relator to see if he has come with clean hands. A writ of *quo warranto* in particular is not to issue as a matter of course on sheer technicalities on a doctrinaire approach."

In the light of the said law, the petition under Article 199 of the Constitution was not maintainable before the learned High Court.

9. Be that as it may, in **Sami Ullah Baloch and others vs. Abdul Karim Nousherwani and others** (PLD 2018 SC 405) we have held that that the disqualification of an election candidate or a holder of elected office under Article 62(1)(f) of the Constitution comes into existence when he is declared by a Court of law to lack any of the qualities mentioned in clause (f) of Article 62(1) of the Constitution. In the present case, the only declaration against the respondent under Article 62(1)(f) of the Constitution was given in summary proceedings by the Returning Officer on 06.04.2013. As already noted above, no evidence was recorded by the Returning Officer to sustain his finding nor he recorded reasons for invoking disqualification under Article 62(1)(f) of the Constitution. He is not a Court of law but a statutory forum of limited jurisdiction. Therefore, the condition that only a Court of law can issue a declaration of disqualification under Article 62(1)(f) of the Constitution is not met in the present case. Moreover, the learned Election Tribunal has not declared the respondent, directly or indirectly, to lack any of the qualities mentioned in Article 62(1)(f) of the Constitution. Although the judgment of this Court dated 02.5.2013 resurrected the order by the Returning Officer, we do not consider that the said order passes the test of effectiveness laid down in **Sami Ullah Baloch's case** (ibid) for declaring a disqualification under Article 62(1)(f) of the Constitution. This Court has held there that:

"32. Secondly, on the other hand, a candidate for election who has committed misconduct falling

within the terms of Article 62(1)(f) of the Constitution, in particular, misrepresentation, dishonesty, breach of trust, fraud, cheating, lack of fiduciary duty, conflict of interest, deception, dishonest misappropriation, etc. as declared by a Court of civil jurisdiction has on the Islamic and also universal criteria of honesty, integrity and probity, rendered himself unfit to hold public office. ... It is in such circumstances that a person declared to be dishonest or in breach of his trust or fiduciary duty or being non-righteous or profligate must suffer the burden of that finding of incapacity or as long as the Court decree remains in force. ..."

10. No finding in terms of the wrongs identified above in the quoted text is recorded in the order dated 06.04.2013 by the Returning Officer. As such, the said order is ineffective to impose a disqualification under Article 62(1)(f) of the Constitution. Accordingly, the respondent does not suffer from a lifetime bar under Article 62(1)(f) of the Constitution as contended by the learned counsel for the petitioner. Therefore, the respondent was eligible to contest the General Election of 2018.

11. In the circumstances, we do not find any merit in this petition which is dismissed and leave to appeal is refused.

Islamabad  
23.01.2019  
Irshad Hussain /\*

I have approved my  
dissenting note.

**NOT APPROVED FOR REPORTING.**

**YAHYA AFRIDI, J.** I have had the privilege of reading the judgment of my learned brother in advance. With utmost respect to my esteemed colleague, I cannot bring myself to agree with the reasoning rendered therein in maintaining the impugned decision of the Sindh High Court, Karachi.

2. It all started when the nomination papers of Syed Murad Ali Shah ("the private respondent") for contesting the election to the Sindh Provincial Assembly from PS-73 Jamshoro were rejected by the Returning Officer *vide* his order dated 06.04.2013, in terms that:

"In view of above dictums of Honourable Supreme Court of Pakistan, I am of the considered view that Article 62 its clause (d) & (f) of Constitution of Islamic Republic of Pakistan are not satisfied by Syed Murad Ali Shah and thereby he is not found qualified to file nomination form at present, for General Election 2013, therefore, the form is rejected."

3. Aggrieved of the above-stated order, the private respondent challenged the same before the Sindh Election Tribunal, Karachi ("**Tribunal**"), but it bore no positive reprieve to him, and the same was rejected *vide* order dated 16.04.2013, in terms that:

"That as noted above, the admitted position is that the certificate required in terms of section 9(3) of the Canadian Act is yet to be issued on the Appellant's application of renunciation of citizenship. It follows that the Appellant has not ceased to be a Canadian citizen within the meaning, and for purposes, of Article 63(I)(c). The bar contained therein continues to apply to him and he is therefore disqualified from being elected as a member of the Sindh Assembly. His nomination papers could not have been accepted and therefore no interference with the order of rejection is called for."

7

4. Still aggrieved, the private respondent impugned the above decision of the Tribunal in the Constitutional jurisdiction of the Sindh High Court, which was accepted by a full bench *vide* order dated 20.07.2018, in terms that:

"We would, therefore, allow the petition and set aside the impugned order. It hardly needs any mentioned that the Petitioner's nomination papers are liable to be accepted, however, at the insistence of the learned counsel for the Petitioner we may observe so.

The petition along with the pending application stands disposed of in the foregoing terms."

5. The above decision was challenged by the present petitioner before this Court, which was accepted *vide* order dated 02.05.2013, in terms that:

"Thus, for the foregoing reasons, this petition is converted into an appeal and is allowed. The impugned order dated 18.04.2013, passed by the learned High Court under Article 199 of the Constitution is set aside. Consequently, **the orders of the Returning Officer dated 06.04.2013** and of the Election Appellate Tribunal dated 13.04.2013, **are restored**. The petitioner is also held entitled for the cost throughout."

(emphasis provided)


6. Before I proceed further, it would be important to note that this Court in the above order, *inter alia*, revived two orders. The first one being the order passed by the Returning Officer dated 06.04.2013, disqualifying the private respondent under clauses (d) and (f) of sub-article (1) of Article 62 of the Constitution of Islamic Republic of Pakistan, 1973 ("**the Constitution**"); while the second being the order of the Tribunal dated 13.04.2013, disqualifying him under clause (c) of sub-article (1) of Article 62 of the Constitution.

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7. Now to the judgment rendered by my learned brother. The principle of merger has been applied in declaring that the order of the Returning Officer dated 06.04.2013 merged into the order of the learned Election Tribunal dated 16.04.2013, and thus, it was held that the disqualification imposed on the private respondent by the Returning Officer under Article 62 (1) (d) and (f) of the Constitution, therefore, did not survive. With profound respect to my learned brother, it appears that the decision of this Court dated 02.05.2013, wherein the disqualification of the private respondent under clauses (d) and (f) of sub-article (1) of Article 62 of the Constitution declared by the Returning Officer was expressly revived, escaped his kind attention. I would have most certainly agreed with the reasoning of my learned brother had this Court not expressly revived the order of the Returning Officer. In view of the clear revival of the order of the Returning Officer, the effect of its declaration cannot be diminished. Thus, it can be argued that the declaration of disqualification of the private respondent for not being *ameen* under clauses (d) and (f) of sub-article (1) of Article 62 of the Constitution was, in effect, made by this Court, and not the Returning Officer alone. This being so, the disqualification of the private respondent, having been revived by this Court *vide* order dated 02.05.2013, appears to have fulfilled the test of effectiveness of disqualification laid down in **Samiullah Baloch's case (PLD 2018 SC 405)**, and thus, the same could be argued to be permanent.

8. I am in complete consonance with my learned brother regarding the general principles governing the maintainability of a constitutional petition in the face of an alternative remedy available to the petitioner under Election laws, and where his *bona fide* was also questionable. However, an exception to the above principles has been






carved for cases of public representatives by this Court in **Sher Alam Khan's case (PLD 2018 SC 449)**, which has also been followed in **Raja Shoukat Aziz Bhatti's case (PLD 2018 SC 578)**, wherein a duty was cast upon the Constitutional Courts to be very vigilant in cases of disqualification of public representatives. The Court observed that:

"Consequently, where a disqualified or unqualified person slips through the cracks sneaks into the Majlis-e-Shoora or the Provincial Assemblies, his presence in the said House can always be challenged through exercise of the Constitutional jurisdiction of this Court under Article 184(3) of the Constitution and before the learned High Court under Article 199 of the Constitution by way of a Writ in the nature of *quo warranto*. Even where a matter comes before this Court regarding the qualification or disqualification of a Member of the Majlis-e-Shoora or the Provincial Assemblies otherwise by way of proceedings other than under Article 184(3) of the Constitution, this Court not only has the jurisdiction to convert such proceedings to proceedings under Article 184(3) of the Constitution but is bound to do so, as to permit an unqualified or disqualified person to continue to defile and desecrate the Majlis-e-Shoora or the Provincial Assemblies and masculate as a chosen representative of the people would amount to frustrating the other way, it would perhaps constitute a failure to protect and preserve the Constitution.

Thus, we find ourselves tumble to decline the prayer of the Petitioner to examine the merits of the case so as to determine on the basis of the material available on record whether Respondent No. 1 was qualified or disqualified from being a Member of the Provincial Assembly, Khyber Pakhtunkhwa. Any refusal on our part to avoid or evade such an exercise would constitute a departure from the law as laid down by this Court and perhaps would even amount to a betrayal of the Constitution. Hence, we convert these proceedings into *Suo Motu* proceedings under Article 184(3) of the Constitution."

9. Without rendering any comments on the principle laid down in the above case, it can be observed that the intent of the said principle, as it presently stands, is clear: matter of a disqualified or unqualified public representative has to be addressed and checked, even if it requires the invoking of *Suo Motu* jurisdiction of this Court under Article 184 (3)



10

of the Constitution. In view of the *ratio* in **Sher Alam Khan's case (supra)**, as followed in **Raja Shoukat Aziz Bhatti's case (supra)**, not deciding the disqualification of the private respondent for not being *ameen*, under clauses (d) and (f) of sub-article (1) of Article 62 of the Constitution, on the touchstone of maintainability of the petitioner's constitutional petition before the Sindh High Court would not be legally correct.

10. I am of the view that serious constitutional issues require to be addressed, *inter alia*:

- I. Whether the disqualification of the private respondent under clauses (d) and (f) of sub-article (1) of Article 62 of the Constitution was passed by a court of law or otherwise.
- II. Whether the disqualification of the private respondent, if any, would be permanent or otherwise in terms of the test laid down in **Samiullah Baloch's case (supra)**.
- III. Whether the lack of *bona fide* on the part of the petitioner in invoking the Constitutional jurisdiction of High Court under Article 199 of the Constitution and having an alternative remedy under the election laws rendered the petition maintainable or otherwise.
- IV. Whether the disqualification of the private respondent could be ignored by this Court, keeping in view the dicta laid down in **Sher Alam Khan's case (supra)** and **Raja Shoukat Aziz Bhatti's case (supra)**.

11. Accordingly, for the reasons stated hereinabove, leave of this Court be granted to consider and address the issues stated above.

Islamabad, the

23<sup>rd</sup> of January 2019

20/3/19

**ORDER OF THE BENCH**

By majority of two to one (Yayha Afridi, J. dissenting),  
this petition is dismissed and leave to appeal is refused.

Islamabad,  
23.01.2019.

*Irshad Hussain /*

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**NOT APPROVED FOR REPORTING.**