

2003 M L D 222

[Election Tribunal N.-W.F.P.]

Before Tariq Parvaz Khan, J

UMAR AYUB KHAN ---Appellant

versus

**RETURNING OFFICER NA-19, N.-W.F.P., DISTRICT HARIPUR/ADDITIONAL
DISTRICT AND SESSIONS JUDGE, HARIPUR and another---Respondents**

Election Appeals Nos.9 and 10 of 2002, decided on 13th September, 2002.

(a) Representation of the People Act (LXXXV of 1976)---

---Ss.8-A [as inserted by Chief Executive's Order No.17 of 2002], 12, 14(3)(5-A) & 99(1)(cc)---Filing of detailed Marks Certificate instead of Bachelor. Degree---Acceptance of nomination papers by Returning Officer---Validity---No objection as to genuineness of Detailed Marks Certificate had been taken except that instead of detailed marks the Bachelor Degree should have been produced---Respondent produced original Bachelor Degree before Tribunal, which was verified from the concerned University---Law required that candidate should be a Graduate---Such qualification could be proved on the basis of any evidence to the satisfaction of Returning Officer, having power to accept or reject nomination paper on any ground mentioned in S.14 of the Representation of the People Act, 1976---Returning Officer had power under S.14(3)(ii) of the Act to allow a candidate to remedy any defect in nomination paper at the time of scrutiny---Tribunal under S.14(5-A) of the Act could take material into consideration for reaching at correct and just conclusion---Respondent was, held, to be a Graduate and was not suffering, from such disqualification.

(b) Representation of the People Act (LXXXV of 1976)---

---Ss.12 & 14(3)(c)---Declaration of assets filed by respondents on the basis of "Goshwara Malkiat" issued by Patwari and verified by Tehsildar---Such declaration was at variance with "Goshwara Malkiat" filed with objection petition---Returning Officer accepted nomination papers of respondents---Validity---Respondents had not shown their agricultural land on the basis of their assessment, but on the basis of documents provided to them by Patwari---If Patwari had later on rectified any mistake committed by him, respondents could not be penalized for such act of Patwari---Rejection of nomination papers was a penalty, which could only be imposed, if an offence was committed or law violated---Section 14 of the Act would apply, when false statements had been made with mens, rea, but not otherwise---Mere existence of defect in nomination paper not of substantial nature and defect, which could be remedied, should not be made ground for rejection of nomination papers---Returning Officers could ask respondents to file fresh "Goshwara Malkiat"---Election Tribunal dismissed appeals in circumstances.

Abbas Khan and others v. Appellate Authority District and Sessions Judge, Attock and others 2002 SCMR 398 and Zulfiqar Ahmad v. Returning Officer Writ Petition No. 168 of 2001 distinguished.

(c) Representation of the People Act (LXXXV of 1976)---

---Ss.12(2) (a to f) & 14(3)(c)---Declaration of assets---Nomination papers, rejection of---Scope---Statement made by a nominee on the basis of a document supplied to him by a Government functionary, if not correct, but was corrected, later on, would not be made basis for denying a guaranteed fundamental right to a contesting candidate, which could not and should not be the spirit of law.

d) Representation of the People Act (LXXXV of 1976)---

--Ss.12 & 14(3)(c)---Nomination papers, rejection of ---Scope and traditions---Rejection of nomination papers filed in violation of S.12 of the Act in all cases would be against all norms of justice---Rejection of nomination papers was a penalty, which could be imposed, if an offence was committed or law violated---In both such cases, there should be presence of mens rea alongwith act---Where in a particular case, false statements were made but with mens rea, the provisions of S.14(3)(c) of the Act would be applicable, but not otherwise.

Haji Ghulam Basit for Appellant (in both Appeals).

Muhammad Zahid, Civil Moharrir of A.S.J.I, Hairpur/Returning Officer N.A. 19 for Respondent No. 1 (in both Appeals).

Abdul Samad Khan for Respondent No.2 (in Appeals No.9 of 2002).

Khalid Rehman for Respondent No.2 (in Appeal No.10 of 2002).

Date of hearing: 13th September, 2002.

JUDGMENT

In view of ensuing General Elections which are to be held on 10th October, 2002, Umar Ayub Khan appellant as well as respondent Syed Muhammad Sabir Shah and respondent Shehr Yar Khan have filed their nomination papers for contesting election to the seat of National Assembly of Pakistan for the Constituency NA-19 Haripur.

2. This order shall dispose of two Appeals bearing Nos.9, of 2002 and 10 of 2002 because appellant in both the appeals is common and the point of law involved in both the appeals is also the same except that ground of objection against Shehr Yar Khan respondent is also that he is not a graduate as required under the law.

3. Two Hon'ble Judges of this Court Mr. Justice Abdul Raul Lughmani and Mr. Justice Ejaz Afzal Khan had been notified as members of the Election Tribunal envisaged under section 14(5) of the Representation of the People Act, 1976 (hereinafter referred to as the Act).

These two appeals came up for hearing before the Hon'ble Tribunal but on 11-9-2002 the two Hon'ble Members agreed to disagree, and therefore, I have been appointed as third member of the said Tribunal by virtue of Notification No.F.2(17)/2000-Cord. dated 12th September, 2002.

4. Brief facts of the case are that nomination papers filed by the two respondents were objected to by the appellant before Returning Officer through applications dated 26-8-2002 on the ground that both the respondents have filed incorrect declaration of assets and that respondent Shehr Yar Khan has not submitted Bachelor Degree and instead has filed Detailed Marks Certificate which would not be the compliance of statutory provisions as contained in section 12 and, therefore, their nomination papers are liable to rejection under section 14(3) of the Act.

5. The documents appended with Appeal No.9 of 2002 against acceptance of nomination papers of Syed Muhammad Sabir Shah, he with his nomination papers has filed list of assets regarding agricultural land duly signed and attested by Patwari Halqa and Tehsildar according to which he owns 177 Kanals, 8 Marlas of land whereas 'Goshwara Malkiat' filed with the objection application by the appellant regarding agricultural land in the name of Syed Muhammad Sabir Shah respondent shows that respondent owns 197 Kanals, 8 Marlas again signed and verified by the Patwari Halqa as well as Tehsildar.

Similarly, in case of Shehr Yar Khan respondent he has filed his nomination papers and with that filed 'Goshwara Malkiat' showing agricultural land as 40 Kanals, 7 Marlas but the one filed by appellant with his objection application shows that Shehr Yar Khan respondent is owner of 14 Kanala, 14 Marlas. Both the 'Goshwara Malkiat' are duly signed and verified.

It is pertinent to note here that 'Goshwara Malkiat' given to Syed Muhammad Sabir Shah is dated 22-8-2002, given to Shehr Yar Khan is dated 21-8-2002 whereas obtained by the appellant in respect of both is dated 26-8-2002.

6. Through Ordinance No. XXXVI of 2002 dated 31-7-2002 sub-section (cc) to section 99(1) has been inserted in the Act. The main section deals with qualifications and disqualifications and it provides that a person shall not be qualified to be elected or chosen as a member of an Assembly unless:--

"99(1)(cc) he is at least a Graduate, possesses a bachelor's degree in any discipline or any degree recognized as equivalent thereto by the University Grants Commission under the University Grants Commission Act, 1974 (XXIII of 1974), or any other law for the time being in force;"

Similarly through Chief Executive Order No. 17 of 2002 dated 24-6-2002 section 8A has been inserted which is reproduced below for convenience: .

"8A. Educational qualification for a member of Majlis-e-Shoora (Parliament) and a Provincial Assembly. ---Notwithstanding' anything contained in the Constitution of the Islamic Republic of Pakistan, 1973, the Senate (Election) Act, 1975 (LI of 1975), the Representation of the People Act, 1976 (LXXXV of 1976), or any other law for the time being in force, a person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) or a Provincial Assembly unless he is at least a Graduate possessing a bachelor degree in any discipline or any degree recognized as equivalent by the University Grants Commission under the University Grants Commission Act, 1974 (XXIII of 1974) or -any other law for the time being in force."

7. It was argued on behalf of the appellant that production of Detailed Marks Certificate in proof of graduation degree would not be sufficient because in his view under section 99(1)(cc) it is required that a candidate 'should be at least a Graduate and then there is a "comma" before the word starts with "possesses a bachelor's degree in any discipline" whereas there is express omission of "comma" in section 8A of Order 17 of 2002.

8. As for objection to the qualifications of Shehr Yar Khan is concerned, he has filed. Detailed Marks Certificate and has also produced the original today in Court. No objection to the genuineness of Detailed Marks Certificate is taken except that instead bachelor., degree should have been produced.

I for my own satisfaction through Registrar of this Court, today verified and it is confirmed from the Office of Controller of Examination, Peshawar University, Peshawar that under Roll NoJ3379 for the year 1990 (Annual) Muhammad Shehr Yar Khan has appeared and has passed Bachelor of Arts. Otherwise too, law requires that candidate should be a 'Graduate'. Such qualification is to be proved/established on the basis of any evidence but to the satisfaction of the Returning Officer because it is within the power of Returning Officer to, reject or accept a nomination paper on any ground mentioned in section 14 of the Act.

Under section 14(3)(ii) of the Act it is the authority of the Returning Officer to allow a candidate to remedy any defect in the nomination paper at the time of scrutiny. Under subsection (5A) of section 14 even the Tribunal can take material into consideration for reaching a correct and just conclusion.

On the basis of above I hold that Muhammad Shehr Yar Khan is a Graduate and is not suffering from this disqualification.

9. Now reverting to the main objection regarding filing of incorrect assets by both the respondents.

10. Under section 12 of the Act what is required by a nominee while filing nomination papers has been described. It is in this section that a candidate filing nominations shall on solemn affirmation made and sign--- by him, under subsection (f) of the section file a statement of his assets.

Under section 14 of the Act scrutiny of the nomination papers is held. by the Returning Officer and the Returning Officer is authorised under subsection (3) clause (c) of the section to reject the nomination papers if he is satisfied that provision of section 12 has not been complied with or, there are submitted false or incorrect declaration or statement in any material particular.

11. Learned counsel appearing for the appellant has vehemently argued that provision of section 12 of the Act are mandatory and similarly the provision of section 14 i.e. it is obligatory on a candidate to comply with all the requirements of section 12 and it is also mandatory that the Returning Officer shall reject the nomination if such nomination papers are not in compliance with provision of section 12. Learned counsel in this regard has referred a judgment of the august Supreme Court of Pakistan reported in 2002 SCMR 398 (Abbas Khan and others v. Appellate Authority District and Sessions Judge, Attock and others) and argued that it was ruled in the cited judgment that when there were omissions in the nomination papers such would be certainly fatal where the actual assets of the candidate are at variance with his declared assets.

Learned counsel has similarly relied on an unreported judgment of this Court delivered in Writ Petition No. 168 of 2001, in case of Zulfiqar Ahmad v. Returning Officer, decided on 20-6-2001 and states that under somewhat similar law i.e. BNPS Local Government Election Ordinance, 2000 under section 14 of the Ordinance (ibid), where a candidate has filed list of assets and there was inconsistency between assets actually owned and declared, the omission was held to entail disqualification regardless of whether the omission was deliberate or unintentional.

It is also argued that now at a belated stage when the Tribunal was seized of appeals rectified 'Goshwara Malkiat' has been filed by Syed Muhammad Sabir Shah showing agricultural land in, his ownership as 197 Kanals, 8 Marlas which is a proof that he admits filing of incorrect assets.

12. Learned counsel appearing for respondents i.e. Syed Muhammad Sabir Shah and Muhammad Shehr Yar Khan, have opposed the contentions and submitted that where on application of the respondents the concerned Revenue Officer has issued them 'Goshwara Malkiat' and if it was later found to be not correct, for the mistake, fault and omission of a government functionary the respondents should not be denied their constitutional right to contest election. They argued that in absence of any mala fide, a bona fide mistake shall not fall within the purview of penal provision of sections 12 and 14 of the Act.

13. I have the honour and privilege to go through the proposed opinion of the two Hon'ble Judges where Mr. Justice Abdul Rauf Lughmani is of the view that the omission is fatal and he has allowed appeals whereas Justice Ejaz Afzal Khan has taken a different view.

As third member of the Tribunal and because of difference of opinion between the two Hon'ble Members I have applied my independent mind to the legal proposition and I am of the humble view that the opinion of Hon'ble Mr. Justice Ejaz Afzal Khan appears to be correct interpretation of statutory provisions. My reasons for agreeing with Mr. Justice Ejaz Afzal Khan are that I agree with his reasoning and in addition I would add that judgment delivered by a Division Bench of this Court in Writ Petition No.168 of 2001 on facts is distinguishable from the facts of the case of both the respondents. In the cited judgment the nominee therein failed to declare his owning of share of house which had devolved on him on the death of his father. He would

definitely know and even otherwise by operation of law after the death of his father his heir i.e. son would become the owner. In these two appeals none of the respondents have shown their agricultural land on the basis of their own assessment but on the basis of "Goshwara Malkiat" provided to them by Patwari Halqa concerned. Such Patwari had prepared and worked out agricultural land in their names and if some mistake was committed by him which he had later rectified, and even if it was not rectified none of the respondents could be punished for the act of others i.e. Patwari which was not the case as for Writ Petition No. 168 of 2001 is concerned.

The case of Abbas Khan (supra) is also distinguishable not only on facts but because the language of section 14 of Pakistan Local Government Elections Ordinance, 2000 and similarly section 14 of BNPS Local Government Elections Ordinance, 2000 is not couched in the same manner as the language of section 12(f) of the Act. The law under consideration before the august Supreme Court of Pakistan and before a Division Bench of this Court was different than the one which is applicable to the instant appeals i.e. section 12(f) of the Act.

14. If the submissions of the learned counsel for the appellant are taken as valid i.e. violation of section 12 while filing nomination papers should in all cases be visited by rejection of nomination papers; it would be against all norms of justice because rejection of nomination papers is a penalty and a penalty can only be imposed if an offence is committed or law violated. In both the cases there should be presence of "mens rea" alongwith act. Where in a particular case false statements are made but with mens rea, the application of section 14 (3)(c) would be applicable but not otherwise.

It is, therefore, that section 14 of the Act itself contains subclause (d)(ii) whereunder the Returning Officer could not reject a paper on ground of any defect which is not of substantial nature and may allow that any such defect to be remedied forthwith. This clearly shows that intent of the Legislature that mere existence of a defect in nomination papers unless it is of a substantial nature and a defect which can be remedied should not be made ground for dismissal of nomination papers. In the instant case if there was an objection raised by the appellant on the assets of the two respondents, the Returning Officer could have asked the two respondents to get fresh 'Goshwara Malkiat' as it was within the power of the Returning Officer, and if this process had been followed, the appellant would have no objection left and there would not have been filed any appeal.

15. In these two appeals because document filed with the nomination papers, and documents filed with objection petitions were issued by Patwari verified by Tehsildar, it was a question of disputed fact which can only be finally determined after recording of evidence. It is, therefore, that the law makers were conscious that at the stage of scrutiny in certain eventualities such position may arise, therefore, while enacting section 68 of the Act, the Tribunal seized of election petition has been empowered to declare the election of the returned candidate to be void if it is _satisfied that nomination of the returned candidate was invalid or the returned candidate was not, on the nomination day, qualified for, or was disqualified from being elected as a member.

16. There is yet another aspect of the case i.e. a distinction is to be made between "declaration" and "statement". Under section 12(2) and under its paras. (a), (b), (c) and (d) a candidate is to

take a declaration whereas under paras. (e) and (t) he is to make a statement. It is, therefore, that in the nomination form a candidate is not only to make a 1 declaration on affidavit followed by verification but on page 7 of the nomination forms one would find that there is a verification column to the effect that whatever is stated in the nomination forms regarding assets etc. is correct and complete to the best of knowledge and belief (underlining is made for emphasis). This clearly demonstrates that a statement made by a nominee with reference to assets on the basis of a document supplied to him by a Government functionary if not correct and which is corrected later on shall not be made basis, for denying a guaranteed fundamental right to a contesting candidate which cannot and should not be the spirit of law.

17. The upshot of my above discussion is that both the appeals are i devoid of force and are, therefore, dismissed.

S.A.K./640/P

Appeal dismissed.