

Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.235025/2018

Fozia Khalid Vs Election Appellate Tribunal, etc

J U D G M E N T

Date of Hearing	14.09.2018
Petitioner By:	Mr. Muhammad Shahzad Shaukd, Mr. Tahir Munir Malik, Mr. Taha Asif and Rana Imran, Advocates.
Respondents By:	Mian Sultan Tanvir Ahmad and Hafiz Mubshar Ullah, Advocates for Respondent No.3. Mr. Nasar Ahmad and Mr. M. Javaid Kasuri, DAGs.

Ayesha A. Malik J: Through this petition, the Petitioner has challenged order dated 12.9.2018 passed in Election Appeal No.354-A of 2018. It may be noted that the instant petition is fixed as urgent, for today. Counsel for Respondent No.3, Mian Sulan Tanvir Ahmad is present before the Court as are Mr. Nasar Ahmad and Mr. M. Javaid Kasuri, DAGs. Since the parties present before the Court have no objection to the request of the Petitioner to the case to be heard in its entirety, given the urgency in the matter, we proceed to decide the issues raised in this Petition.

2. The basic facts are that the Petitioner is the sitting Chairperson of District Council, Toba Tek Singh. While holding the office of Chairperson, she filed nomination papers for the Bye-Election of the Provincial Assembly in PP-118, Toba Tek Singh-I. Objections were filed by Respondent No.3 against the nomination papers on the ground that she is barred under Section 28 (1) of the Punjab Local Government Act, 2013 (“**PLGA**”) to contest the Bye-Election as she has not tendered her resignation from the post of Chairperson, District Council, Toba Tek Singh. The Returning Officer rejected the objections vide order dated 3.9.2018 on the ground that the matter has been decided in Election Appeal No.6 of 2018 titled “*Al-Haaj Azhar Iqbal Satti v. Returning Officers and others*” and since scrutiny has to be conducted in terms of Articles 62 and 63 of the Constitution of Islamic

Republic of Pakistan, 1973 (“**Constitutions**”) and Section 231 of the Elections Act, 2017 (“**Elections Act**”), the Petitioner is qualified and allowed to contest the Bye-Election. Against this order, Respondent No.3 filed an Election Appeal before the Election Tribunal which was allowed and the order of 3.9.2018 was set aside. Consequently, the nomination papers filed by the Petitioner were rejected. Being aggrieved by the order dated 12.9.2018, the Petitioner is now before this Court essentially on the ground that Section 28 of the PLGA is not a precondition to the filing of nomination papers and that the Petitioner is not required to tender her resignation until the last date for withdrawal of candidature and publication of revised list of contesting candidates. As per the schedule provided for the Bye-Election, the last date of withdrawal of candidature is 15.9.2018, hence the urgency in the matter.

3. Mr. Muhammad Shahzad Shaukat, counsel for the Petitioner argued that the impugned order has treated Section 28 (1) of the PLGA as a precondition to the filing of the nomination papers. Learned counsel argued that in terms of Section 2 of the Elections Act a *candidate* is a person whose name is proposed and seconded for election to the Assembly or the Senate and a *validly nominated candidate* is a candidate whose nomination papers have been accepted. A *contesting candidate* is a validly nominated candidate who has not withdrawn his candidature. Learned counsel argued that in terms of these definitions, the Petitioner was a validly nominated candidate as her nomination papers were accepted and since she was not a contesting candidate, she had the right to withdraw her candidature on 15.9.2018 or tender her resignation as the case may be. Learned counsel argued that Section 28 (1) of the PLGA, allows a Mayor, Deputy Mayor, Chairman or Vice Chairman to contest the election for any political office after resignation from the aforesaid office. The option of *may contest* means that the Petitioner has the right to contest elections once she becomes a contesting candidate. Therefore, in terms of Section 28 (1) of the PLGA she must tender her resignation before becoming a contesting candidate. It is the case of the Petitioner that she had the option to tender her resignation by or

before 15.9.2018 being the last date for withdrawal of candidature meaning thereby that the order of the Returning Officer was in accordance with law and the Appellate Tribunal failed to appreciate this point. Learned counsel placed reliance on the judgment dated 25.6.2018 passed in Election Appeal No.6/2018 titled “Al-Haaj Azhar Iqbal Satti v. Returning Officer and another”, judgment dated 12.9.2018 passed in WP No.231135/2018 titled “Muhammad Riaz v. Appellate Authority” and “Rana Salman Mahmood Khan v. Returning Officer and another” (2008 CLC 316).

4. On behalf of Respondent No.3, it is argued that the bar contained in Section 28 (1) of the PLGA is applicable at the time of filing nomination papers as the purpose of the bar is to prevent a person holding office of Chairman or Vice Chairman, Mayor or Deputy Mayor from participating in the election and influencing the election on the basis of their being office holders of the local government. Learned counsel further argued that in such cases the office holder as mentioned in Section 28 (1) of the PLGA can exert influence over the electoral process, which will defeat the entire election process. He also argued that in this case, the Petitioner is travelling on official duty and the instant Petition has been filed by her husband and that she has not tendered her resignation to date whilst she seeks the opportunity to tender her resignation by 15.9.2018 without being present in person. Learned counsel argued that once the scrutiny process is over and the Petitioner being the Chairperson of District Council, Toba Tek Singh is declared fit to contest the election, there is no further mechanism under the Elections Act on the basis of which it can be determined whether or not the Petitioner tendered her resignation before publication of the list of contesting candidates. Consequently if the relief claimed by the Petitioner is allowed those who are barred under Section 28 of the PLGA may very easily contest the elections rendering the purpose of Section 28 (1) of the PLGA as redundant.

5. In rebuttal, learned counsel for the Petitioner explained that the Petitioner is out of the country on official duty and has issued a special power of attorney in favour of her husband to file the instant petition. The

original special power of attorney was produced before the Court. He also showed a copy of the resignation prepared by the Petitioner, which he stated is being presented to the Court to show the bona fides of the Petitioner that in the event she is allowed to contest the election she will tender her resignation immediately. Learned counsel stated that he can also provide an undertaking before this Court that the Petitioner will tender her resignation, if the Court allows the instant petition.

6. Mr. Nasar Ahmad, DAG supports the contentions raised by the learned counsel for the Petitioner. He argued that the right to participate in elections is a fundamental right and the PLGA cannot curtail this right by reading the bar in Section 28 (1) of the PLGA as a precondition for filing nomination papers.

7. We have heard the learned counsel for the parties at length. The basic issue before the Court is the time frame within which a resignation should be tendered by the Mayor, Deputy Mayor, Chairman and Vice Chairman in order to contest elections for any other political office, in terms of the bar contained in Section 28 (1) of the PLGA. For ease of reference Section 28 of the PLGA is reproduced below:-

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) A member of a local government, other than the Chairman of a Union Council, may contest election for any other political office without resigning from the membership of the local government but any such member shall not simultaneously hold more than one office.

(3) If a member of a local government is elected to any other political office, on the notification of election of that political office, his seat as member of the local government shall become vacant.

(4) If a Chairman of a Union Council is elected as the Mayor or a Deputy Mayor, or as the Chairman or a Vice Chairman of the District Council, he shall cease to be the Chairman of the Union Council and the seat of the Chairman of the Union Council shall stand vacated.

(5) Nothing in this section shall apply to bar a member of a local government to contest the election of Mayor, Deputy Mayor, Chairman or Vice Chairman of a local government or a member of an Authority.

The Section calls for resignation by the names of the office in the local government scheme in the event that the holder of such office opts to contest elections of any other political office. The spirit behind the bar imposed on

dual membership is 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. They sit at the highest level in the local government and are in a position to use the resources from the mentioned offices, including their staff for campaigning purposes and can influence the election process. The mandate of Section 28 (1) of the PLGA is to prevent a single person from holding office whilst contesting for another political office as it is necessary to ensure that an office holder should dedicate his or her time to their official duties and not towards personal advancement. The bar ensures that office holders do not unfairly leverage their present position against other candidates or that they maintain public offices as a fall back.

8. In terms of the judgments relied upon by the learned counsel for the Petitioner, two of the judgments are by the Election Tribunal in which it is stated that the use of the expression '*may contest election*' does not include the stage of filing of nomination papers and a person is considered to be contesting the election once they become a contesting candidate as defined under the law. In another case in WP No.231135/2018, the Court considered the bar contained in Section 28 of the PLGA and while relying on 2008 CLC 316 (*supra*) the Court finds that mere filing of nomination paper is not sufficient for the purpose of being qualified to contest the election and it is only after the nomination papers are accepted that a validly nominated candidate, who has not withdrawn his candidature, is ready to contest the election. There is no cavil to the fact that every person has a right to contest elections and that this being a fundamental right can only be reasonably curtailed. The legislature was mindful of the fact that the named office holders in Section 28 of the PLGA exert power and influence at the local government level and have a large amount of resources available to them. Therefore, in order to prevent any influence over the electoral process it is required that they resign from their office prior to contesting the election. We find that the word *contest* is not a defined term in the PLGA and should therefore be given its plain meaning, which is to compete and engage in

competition. In this case, the competition is the election process and to contest the election means to participate in the election process. The election schedule for the Bye-Election dated 17.8.2018 reveals that the election process started when public notice was issued by the Returning Officer on 27.8.2018 and ends on the polling day being 14.10.2018. The entire process as per the schedule is a step by step procedure towards the holding of the Bye-Election. For the purposes of a candidate the schedule reflects the stages at which the candidate will participate in order to contest the election. The august Supreme Court of Pakistan in “*Muhammad Khan v. Obaidullah Jan Babat and others*” (PLD 2016 SC 492) has already declared that elections stand for a step by step process towards a certain result and is a continued process consisting of a series of steps which are to be taken at different stages as per the schedule contained in the notification published in the official gazette. Hence as per the plain meaning a candidate who ‘*may contest*’ in the elections means that a candidate take part in the step by step process leading upto the polling date.

9. The Petitioner before the Court seeks interpretation of the word ‘*may contest*’ to be read in conjunction with the defined term *contesting candidate* under Section 2 (xiii) of the Elections Act. The meaning given to *contesting candidate* in the Elections Act is specifically for the purposes of giving meaning to the provisions of the Elections Act contained in Sections 64, 65, 66, 67 and 68 which set out the process where a validly nominated candidate can withdraw its candidature prior to his or her name being published in the list of contesting candidates. A contesting candidate for the purpose of Elections Act is one who has not withdrawn his or her candidature, who is allotted an election symbol under Section 67 of the Elections Act and is named in the list of contesting candidates. Therefore, the fact that a validly nominated candidate can withdraw its candidature under Section 65 of the Elections Act does not create a right in favour of the Petitioner to contest the election whilst holding office of Chairperson, District Council, Toba Tek Singh simply because she has the right to withdraw her candidature under Section 65 of the Elections Act. The Petitioner is required to file her

nomination papers with all necessary declarations which will include her decision to resign from Chairperson, District Council, Toba Tek Singh. The Returning Officer at the stage of scrutiny must consider the bar contained in Section 28 of the PLGA because a Mayor, Deputy Mayor, Chairman and Vice Chairman cannot participate in the election process while retaining the named office. The entire process of participating and contesting election is for the benefit of the voter and the intent of Section 28 of the PLGA is to create a level playing field to all candidates who participate in the election. In this regard, we are fortified by the view given in “Syed Sarfraz Hussain Shah v. Additional District and Sessions Judge/Returning Officer and 16 others” (PLD 2008 Karachi 64).

10. We are of the opinion that the bar contained in Section 28 (1) of the PLGA becomes applicable when a Mayor, Deputy Mayor, Chairman and Vice Chairman decides to contest a political office, in this case being the Bye-Election, at the stage of filing the nomination papers. In terms of Section 60 of the Elections Act, a candidate shall file its nomination papers with a declaration that he fulfills the qualifications specified in Article 62 and is not disqualified under Article 63 of the Constitution for being elected as a member. Every nomination paper is delivered to the Returning Officer who shall make the nomination along with annexures open to inspection by the public. In terms of Section 62 of the Elections Act any voter of the constituency may file objections to the candidature at the time of scrutiny. The Returning Officer shall decide upon the objections raised and may either of his own motion or upon any such objection conduct a summary enquiry and reject the nomination papers if he is satisfied that a candidate is not qualified to be elected as a member. The purpose of the scrutiny process and the right of filing an objection is to give the voter the chance to participate and ensure that all candidates who participate in the election are qualified and have made full disclosure under the law. It ensures that the voter is informed at the time when the vote is cast and that all relevant information is available to help the voter make an informed decision. After the scrutiny process if a candidate’s nominations papers are accepted, there is no further

scrutiny of the candidates as the name of the candidate is published in the list of contesting candidates, provided that the candidate has not withdrawn his or her nomination papers. Thereafter a candidate will be able to contest the election as the process is completed by allocation of election symbol and polling takes place on the polling date. If a candidate holding dual office is not required to resign at the time of filing nomination papers and it is left to choice that he or she may tender resignation once they become a contesting candidate, there is a very strong risk that such a candidate may contest the election without resigning. In such a scenario the candidate who happens to be Mayor, Deputy Mayor, Chairman or Vice Chairman will effectively contest the election whilst holding office, which goes against the spirit of Section 28 of the PLGA. It also means that the factum of dual membership is left unchecked since a candidate will of its own vocation either tender resignation or not. The outcome is that not only does this complicate the election process and subject it to disputes and challenge but it also means that the purpose of the bar contained in Section 28 of the PLGA is totally defeated.

11. We also find that if the issue of dual membership is left unchecked prior to the elections and it is questioned after the elections it will render the candidate disqualified under the Elections Act. When confronted with this question, learned counsel for the Petitioner informed the Court that if, at all, such a situation arises then the objection can be taken post-election and the matter can be looked into at that point. However, we are not satisfied with this response as it means that a person, who could not have contested the election in the first case, contested the election without fulfilling the requirements of Section 28 of the PLGA. It also means that if any objection is made post-election on this issue, the candidate stands to be disqualified for holding dual membership. If dual membership is a disqualification in the post-election scenario it stands to reason that it is a disqualification in the pre-election scenario.

12. Another aspect of this issue is the burden placed on the election process and the voter, simply because the holder of the offices mentioned in

Section 28 of the PLGA has to make a choice and where the decision involves the risk of loosing the present office. If the holders of the barred offices do not resign before filing nomination papers, they can be declared successful in the elections for the other political office. This means that the candidate is able to exercise his or her choice after going through the entire election process. If the candidate is successful they resign from the present office and if unsuccessful they go back to their present office. In all situations the issue is one of personal choice and the risk attached with such choices. A candidate cannot use the offices named in Section 28(1) of the PLGA as a fall back position in the event that he or she is not successful in the run for some other public office, in this case the Provincial Assembly. We are of the opinion that the Petitioner has the right to choose between either offices and cannot require the entire process to bear the burden of her 'risk'. Time and again we have been informed by her counsel that she will resign if she can contest the Bye-Elections. In this regard, we are of the opinion that a wrong precedent cannot be set to comply with the wishes of one candidate.

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. In view of the aforesaid, we find no illegality in the impugned order. Petition stands **dismissed in limine**.

(MASUD ABID NAQVI)
JUDGE

(AYESHA A.MALIK)
JUDGE

Approved for reporting

JUDGE

JUDGE