Form No: HCJD/C-121

ORDER SHEET

LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No. Writ Petition No.222534 of 2018

Fawad Ahmed ***Versus*** *Election Appellate Tribunal, Rawalpidi, etc.*

S. No of order /proceedings	*Date of order of proceeding*	*Order with signature of Judge, and that of Parties or counsel, where necessary*
	05.7.2018.	*Mr. Ahsan Bhoon, Advocate for the petitioner* *Ch. Umer Hayat, Advocate/Director Legal Election Commission of Pakistan* *Syed Fakhar Haider Kazmi Advocate for the respondent No.2.* *The grievance voiced by the petitioner in the present constitutional petition is that respondent No.1 vide order dated 27.6.2018 allowed the election appeal filed by respondent No.2 and disqualified the petitioner from contesting General Election, 2018 from NA-67-Jhelum-II.* *2. Briefly, the facts necessary for the disposal of this petition are that the petitioner and respondent No.2 along-with other candidates filed their nomination papers for NA-67-Jhelum-II. Respondent No.1, filed objection petition and leveled certain allegations of suppressing material facts regarding avocation, income, evasion of income tax, making mis-declaration, incomplete affidavit, etc;. The Returning Officer did not entertain the objection petition as the nomination papers of the petitioner were accepted prior to objection petition. Respondent No.2 filed Election Appeal No.07/2018 in terms of section 63 of the Election Act, 2017, dismissed being incompetent by respondent No.1 vide order dated 20.6.2018. Thereafter, Election Appeal No.14 of 2018 was filed by respondent No.2 against the petitioner, allowed vide order dated 19.6.2018. Hence, this petition.*

3. Learned counsel for the petitioner made the following submissions:

(i) that the impugned order was nullity in the eye of law as second appeal was not maintainable;

(ii) that Election Tribunal enjoys vast powers under section 63(4) of the Election Act, 2017 to scrutinize a matter but the learned Appellate Tribunal not issued show cause notice to the petitioner;

(iii) that the appeal filed by the petitioner could not have been treated as knowledge of the Appellate Tribunal as no show cause notice has been issued to the petitioner calling upon him to show cause why his nomination papers may not be rejected;

(iv) that the appeal itself was incompetent;

(v) that there was no provision in Election Act, 2017 regarding successive petitions;

(vi) that petition of respondent No.2 was time barred on the day of scrutiny, thus, appeal was not maintainable;

(vii) that the appellate authority misconceived and misconstrued the criterion to disqualify a person from becoming the member of "Majlas-i-Shoora" as envisaged under Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 231 of the Election Act, 2017;

(viii) that all the objections regarding candidature of the petitioner were mere oral assertions and respondent No.2 never provided any evidence to substantiate his claim;

(ix) that the Appellate Tribunal cannot be equated with a Court of law having jurisdiction to make a declaration in summary proceedings;

(x) that there was no mandatory requirement that a fresh account shall be opened under section 60(2) (b) of the Election Act, 2017;

(xi) that power of review can only be exercised if specifically provided by statute, thus, Suo Moto review of the earlier order by the appellate forum was illegal as after pronouncing judgment dated 20.6.2018, it became functus officio;

(xii) that complicated and disputed questions of facts cannot be decided while holding summary proceedings;

*4. Conversely, learned counsel for respondent No.2 maintained the validity of the impugned order by submitting that principle of res-judicata was not attracted in this case. To augment his contention, learned counsel relied upon "Miss Sumaeea Zareen Versus Selection Committee, Bolan Medical College, Quetta and others" **(1991 SCMR 2099).** Adds, there was sufficient material on the file that the petitioner submitted incorrect, incomplete and false affidavit concealing material particulars regarding assets/accounts, thus, the impugned order was unexceptionable.*

5. We have heard the learned counsel for the parties and have also perused the record.

6. We first deal with the legal objections raised by the learned counsel for the petitioner regarding maintainability of the appeal. It is true that under section 63 of the Election Act, 2017, only a candidate/objector can file appeal. However, under section 63(4), the tribunal on the basis of information or material brought to its knowledge may call upon the candidate to show cause why his nomination papers may not be rejected and if the tribunal is satisfied that the candidate actually suffers from any disqualification, it may reject the nomination papers. The contentions of the learned counsel for the petitioner appears to be correct that mere issuance of the notice of appeal is not

sufficient and in substantial compliance of the provisions of law, show cause notice is necessary which was not issued by the tribunal to dispose of the reference neither numbered as such nor disposed of. In the reported case of "Haji Khuda Bux Nizamani V. Election Tribunal & Others" ***(2003 MLD 607),*** *it was observed as follows:*

> ***"The second objection, however, appears to have more merit. It is no doubt correct that substantial compliance with the principles of natural justice was effected when notice of the appeal was given to the petitioner. Nevertheless with profound respects it ought to have been kept in view that the Honourable Supreme Court has consistently held that when notice to a party is required by way of an express provision of law as distinguished from a mere principle of natural justice strict compliance ought to be made and mere substantial compliance might not be sufficient. We are constrained to record these observation in view of the fact that adequate documentary material did not appear to come to the notice of the learned Tribunal in the absence of a proper show cause notice"***

7. It has been provided under section 63(2) of the Election Act, 2017 that any order passed in appeal shall be final. The law allows a losing party to have their case reviewed by Higher Court which is known as appeal and is a request to a higher Court to review the decision made in a lower Court to determine whether any legal errors were made during the original proceedings. It is a statutory right. No right of second appeal or review is provided under Election Act, 2017, thus, the appeal filed by respondent No.2 was incompetent and the order of the learned Appellate Tribunal is thus, liable to be set aside being illegal as the learned Appellate Tribunal became functus officio after decision of Election Appeal No.07/2018.

8. In this case Election Appeal No.07 filed by respondent No.02 was dismissed by the learned

Appellate Tribunal on 20.6.2018.Thereafter, another Election Appeal No.14/2018 was filed, allowed by the learned Appellate Tribunal on 25.6.2018. It is often said that litigants only get one kick at the can and cannot be tried again later with a better pair of boots. As general rule, once a judge has rendered a final decision, he is barred for reopening, varying or retracting his decision. He cannot do so because, having pronounced judgment--provided that there is no reservation of any kind in the judgment- judge is said to be functus officio. (Latin for "having performed one's office") and is divested of jurisdiction over the matter. If the decision is wrong or otherwise, unsatisfactory, the recourse for the aggrieved party is to the next forum as prescribed by the law. With regard to an officer or official body it means without further authority or legal competence because the duties and the functions of the original, "functous officio" commission have been fully accomplished.

When used in relation to a Court, it may also means whose duties or authority has come to an end. Once a Court has passed a valid order after a lawful hearing, it is functus officio and cannot re-open the case. The United States Supreme Court in " Bayne V. Morris" 68 US (One-Wall) provided the following definition of the doctrine:

> ***"Arbitrators exhaust their powers when they make final determination on the matter submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end"***

The doctrine of functus officio has been firmly in place for well over a century, uncertainty remains as to when a decision is considered final so as to trigger the doctrine. Traditionally, formal entry of a judgment, as clear sign of finality, is necessary,

such that each is not functus officio before the judgment is entered. Justice Sopinka put it crisply in "Chandler V. Alberta Association of Architects" (1989)2 S.C.R 848) "The rule applied only after the formal judgment had been drawn up, issued and entered.

Most recently, in He v. Furney, (2018) O.J No.1618 (S.C.J), Justice Partick Monahan declared himself functus officio even though his order had yet to be entered. He reasoned: "I do not attach any particular significance, for purpose of the functions officio doctrine, to the requirement that Court orders be 'entered'. The entering of Court order is purely administrative matter performed by the Registrar. As Justice Thomas Cromwell (as he then was) explained in Nova Scotia Government and General Employees Union V. Capital District Health Authority ***(2006 NSCA 85)*** *"once a tribunal has completed its job, it has no further power to deal with the matter. Here, I have issued an endorsement and signed the order dismissing the appeal. There is nothing further for me to do, thus, I am functus officio. The timing of the entering of the order by the Registrar does not require my involvement and, in my view, cannot determine and define my jurisdiction.*

The functus officio is the principle in terms of which the decisions of tribunals/Courts are deemed to be final and binding once they are made. They cannot, once made, be revoked by the decision maker. Both the granter and receiver of rights know where they stand. The doctrine supports fairness and certainty. If a Court could continually entertain applications to amend its decisions then appellate record, would be subject to change, as would the litigants relative legal positions, making for

breeding grounds for Choas Finality lends credence to the validity of the judicial decision. A decision that at the mercy of the judge's change of heart after it is made is uncertain and unreliable and by extension lacks validity. Moreover, the doctrine of functus-officio enables effective administration of justice by ensuring a stable case for appellate review.

9. A review of the record demonstrates that the nomination papers were accepted by the Returning Officer. The objection petition filed by respondent No.2 was not entertained as the nomination papers have already been accepted. The appeal earlier filed by respondent No.2 was dismissed on 20.6.2018 with the observations that the objection petition before the Returning Officer was filed after the acceptance of the nomination papers of the petitioner and that respondent No.2 failed to establish his locus standi to file the appeal, dismissed being incompetent. Thereafter, respondent No.2 filed the second appeal, allowed by the Appellate Tribunal vide order dated 25.6.2018 whereby the petitioner was disqualified in terms of Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, 1973 on the basis of summary proceedings. In a recent judgment titled "Imran Ahmad Khan Niazi Versus Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others" ***(PLD 2017 SC 265),*** *the Court observed as under:*

> ***"However, disqualification envisaged by Article 62(1) (f) and Article 63(2) of the Constitution in view of words used therein have to be dealt with differently. In the former case the Returning Officer or any other fora in the hierarchy would not reject the nomination of a person from being elected as a member of Parliament unless a Court of law has given a declaration that he is not sagacious, righteous, non-profligate, honest***

and ameen. Even the Election Tribunal, unless it itself proceeds to give the requisite declaration on basis of the material before it, would not disqualify the returned candidate where no declaration, as mentioned above, has been given by a Court of law. The expression " a Court of law" has not been defined in Article 62 or any other provision of the Constitution but it essentially means a Court of plenary jurisdiction, which has the power to record evidence and give a declaration on the basis of the evidence so recorded. Such a Court would include a Court exercising original, appellate or revisional jurisdiction in civil and criminal cases. But in any case a Court or a forum lacking plenary jurisdiction cannot decide questions of this nature at least when disputed."

The learned Appellate Tribunal declared the petitioner being not sagacious without any evidence and the facts and circumstances of this case does not attract disqualification as per criterion laid down in Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973.

10. For the foregoing reasons, this petition is allowed and the impugned order of respondent No.1 dated 27.6.2018 is hereby set aside.

(SAYYED MAZAHAR ALI AKBAR NAQVI) JUDGE

(SARDAR AHMED NAEEM) JUDGE

*irfan**

APPROVED FOR REPORTING

Judge

*irfan**