

BEFORE THE HON'BLE CHIEF ELECTION COMMISSIONER OF PAKISTAN
ISLAMABAD

Case No. 17(1)/2010-Law

- In re: 1. **REFERENCE UNDER ARTICLE 63(2) READ WITH SECOND SCHEDULE BY VIRTUE OF ARTICLE 41(3) OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973 FOR RESCRUTINY OF THE CANDIDATES OF THE PRESIDENTIAL ELECTION, 2008 IN COMPLIANCE OF THE JUDGMENT PASSED BY LARGER BENCH OF THE HON'BLE SUPREME COURT OF PAKISTAN IN C.P. NO. 76 TO 80 OF 2007 AND 59/2009 AND CIVIL APPEAL NO. 1094/2009; AND**
2. **APPLICATIONS FOR IMPLEADMENT AS PARTY TO THE ABOVE REFERENCE FILED BY (1) WAHEED AHMED KAMAL (2) MUHAMMAD ASHFAQ CHAUDHARY AND (3) SYED MAHMOOD ALI.**

Moulvi Iqbal Haider, Advocate & Chairman,
Awami Himayat Tehreek, Pakistan, C-333,
Block-6, F.B. Area, Karachi.

....Petitioner

Versus

1. Asif Ali Zardari, Holding Office of the President of Islamic Republic of Pakistan, President House, Islamabad.
2. Saeeduzzaman Siddiqui, Former Chief Justice of Pakistan, Candidate of Presidential Election 2008, nominated by PML(N), PML House, Gulberg Lahore.
3. Mushahid Hussain Syed, Candidate of Presidential Election 2008, Nominated by PML (Q), PML House, Margalla Road, Islamabad.
4. Federation of Pakistan, through Secretary Ministry of Law, Justice & Parliamentary Affairs, Government of Pakistan, Pakistan Secretariate, Islamabad.

....Respondents.

For the Petitioner:	In Person
Other applicants:	Present in person
Date of hearing:	25.02.2010

ORDER

The petitioner has made the instant petition seeking re-scrutiny of the nomination papers of the candidates of the Presidential Election, 2008, specifically of respondent No. 1 Mr. Asif Ali Zardari on the ground that such nomination papers were accepted when the National Reconciliation Ordinance, 2007 (hereinafter called the NRO, 2007) was conditionally operative, which has now been finally declared by the Hon'ble Supreme Court of Pakistan as *void ab initio*, therefore his nomination be rejected as the respondent No.1 Mr. Asif Ali Zardari was disqualified under Article 63(2)(3) read with Articles 5, 25, 50, 62 and 63 of the Constitution of the Islamic Republic of Pakistan, 1973.

2. Brief facts of the case are that the Presidential Election was held on 6th September, 2008 wherein respondents No. 1 to 3 filed their Nomination Papers, which were scrutinized on 28.8.2008 and all were found to be proper, hence they were allowed to contest election for the office of the President of Pakistan under Article 41(3) read with Second Schedule to the Constitution of Pakistan. It is alleged by the petitioner that the Nomination Papers of the respondents were accepted provisionally subject to the decision of the Supreme Court in respect of the cases wherein *vires* of NRO, 2007 were challenged before the Apex Court. The petitioner has contended that he could not file objections to the Nomination Papers in view of the restraining order dated 12.10.2007 in C.Ps.No. 76 to 80/2007 passed by a Bench of the Apex Court headed by Mr. Justice Iftikhar Muhammad Chaudhary. The petitioner has argued that now NRO, 2007 has been declared to be *void ab initio*, consequently all matters have re-opened, hence under Article 41(3) read with Second Schedule to the Constitution Nomination Papers of the respondents be re-scrutinized as the same were accepted provisionally subject to the final decision of the Apex Court. The petitioner has further alleged that the respondent No. 1 Mr. Asif Ali Zardari, President of Pakistan was not eligible/qualified to contest Presidential Election 2008 being convict of Swiss Court and subordinate courts of Pakistan, consequently, his Nomination Papers on re-scrutiny would be liable to be rejected on account of his said disqualifications. The petitioner argued that in view of the interim order, dated 12.10.2007, no one could have raised objection to the filing of Nomination Papers by respondent No. 1 Mr. Asif Ali Zardari to contest Presidential Election, 2008 of his being one of the beneficiary of NRO,

2007. The petitioner has further contended that by virtue of Article 41(3) of the Constitution, "A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly" and that respondent No. 1 Mr. Asif Ali Zardari, being not qualified in terms of Articles 62 and 63 of the Constitution of Pakistan, was not eligible to contest election for the office of President of Pakistan. The petitioner urged that the decision of the Supreme Court of Pakistan in terms of Article 189 of the Constitution is binding on all other courts in Pakistan and on all executive and judicial authorities throughout Pakistan. The petitioner alleged that respondent No. 1 Mr. Asif Ali Zardari was not qualified as a member of the National Assembly to be elected as President at the time of acceptance of his Nomination Papers for election to the office of the President of Pakistan.

3. It may be clarified that on receipt of the Reference/Petition, notice was issued to the petitioner alone to examine the question of maintainability of the petition in the first place.

4. I have heard the petitioner in person at length, who has reiterated his submissions stated in the petition and have perused the photostate copies of documents minutely subsequently filed by him, though the same are neither certified nor authenticated. The Nomination Papers for Presidential Election 2008 were invited on 26.08.2008 and scrutiny as per schedule was held on 28.8.2008. I may point out that on 28.8.2008, the restraining order dated 12.10.2007 stood suspended/recalled by order, dated 27.02.2008 passed by another Bench of the Supreme Court in C.Ps.No. 76 & 77/2007, therefore, on the day of scrutiny of nomination papers no restraint order was in operation, preventing the petitioner, even if he be deemed to have *locus standi*, from making such objection with regard to the alleged disqualification of respondent No. 1 Mr. Asif Ali Zardari. In the circumstances, the contention of the petitioner has no force and merit that he could not raise the said objection because of the restraining order, dated 12.10.2007 passed by the Apex Court, which in fact was not operative on the date of scrutiny i.e. 28.8.2008. In fact, there is nothing on record to suggest that the petitioner had filed any objection against respondent No. 1 Mr. Asif Ali Zardari with regard to latter's disqualification, who, even otherwise, being not one of the candidates for the office of the president, was not

competent to raise any objection in that regard. The petitioner himself admitted that he had not filed any objection at the relevant time. I have examined the record, it appeared that nomination papers of the respondents were neither accepted provisionally nor conditionally as alleged by the petitioner but all respondents were validly nominated as candidates. Thereafter polling took place as per paragraphs 10-17 of the Second Schedule and the former Chief Election Commissioner determined the result of election as per paragraph 18 of Second Schedule and as per paragraph 21 of Second Schedule, after poll, counted the votes, where the respondent No.1 secured 481 votes, out of 678 votes, when former Chief Election Commissioner announced the result as per paragraph 21 of the second schedule to the Constitution of Pakistan.

5. The petitioner has urged that the respondent No. 1 Mr. Asif Ali Zardari was disqualified for membership of Majlis-e-Shoora, therefore, he could not become a candidate for the office of President, though he has not produced any authenticated evidence on record in respect of Mr. Zardari's disqualification to prove the same. Even if it is assumed that said respondent was disqualified under Article 63 of the Constitution of Pakistan when clauses (2) and (3) thereof read as under:

“(2) If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, within thirty days from raising of such question refer the question to the Chief Election Commissioner.”

“(3) Where a question is referred to the Chief Election Commissioner under clause (2), he shall lay such question before the Election Commission which shall give its decision thereon not later than three months from its receipt by the Chief Election Commissioner.”

In the circumstances, the instant Reference on account of disqualification of respondent No.1 Mr. Asif Ali Zardari cannot be entertained by the undersigned, as the said question could only be raised before the Speaker, who in his/her capacity as such, could refer the question to the Chief Election Commissioner for decision not later than three months from the date of its receipt by the latter. No such Reference has been referred to the undersigned as required under clause (2) of Article 63 of the Constitution by the Speaker of the National Assembly. Consequently, the undersigned will have no jurisdiction to proceed further in the matter.

6. I have also gone through the documents filed by the petitioner and observed that except photocopy of the order, dated 12.10.2007 passed in C.Ps.No. 76 to 80/2007, rest of the documents are photocopies of press releases, list of cases, and reports as published in different newspapers. None of the photocopy of documents indicate that respondent No. 1 Mr. Asif Ali Zardari was ever convicted by any court of Pakistan or foreign court, as such no authenticated document has been placed on record to indicate/prove the conviction of respondent No. 1 Mr. Asif Ali Zardari. Mere fact that certain facts were published in the press or photocopies have been taken from the internet would not by itself prove the conviction or alleged disqualification of respondent No. 1 Mr. Asif Ali Zardari. Even the filing of the cases or pendency thereof itself would not amount to conviction or disqualification of any kind stated in Article 63 of the Constitution.

7. It may be pointed out that under the law previous conviction could be proved only by producing certified true copies of the judgments or extract from the judgments or by any other reliable documentary evidence of such conviction as required under the provisions of Section 511 of Criminal Procedure Code and Section 102 of Qanun-e-Shahadat Order, 1984. Mere allegations either oral or in the print media could not be substitute of proof of conviction as required under the law.

8. It may further be observed that by virtue of Article 41(2) of the Constitution of Pakistan a person shall not be qualified for election as President unless he is qualified to be a member of National Assembly, therefore, in the said case the ingredients/particulars as required by Article 62 are to be proved as required by law not by way of only allegations as per photostat copies of print media produced by the petitioner. There is no finding of any competent court of law holding the respondent No.1 to be suffering from disqualifications as mentioned in Article 63 of the Constitution. The issue that respondent No.1 became disqualified after the decision of Supreme Court of Pakistan in the NRO case from being member of the National Assembly, consequently not qualified to be a candidate for the office of the President of Pakistan, the said question shall be referred by the Speaker or, as the case may be, the Chairman of the Senate within 30 days from the raising of such question to the Chief Election Commissioner. The alleged disqualification having taken place after the decision

of the Supreme Court as argued by the petitioner could not be considered unless such question is referred by the Speaker or as the case may be the Chairman of the Senate to the undersigned, therefore, the present petition would not be maintainable.

9. I may state that election to the office of the President was held under Article 41(3) read with Second Schedule to the Constitution. Clause (6) of Article 41 envisages that, "validity of the election of the President shall not be called in question by or before any court or other authority." Sub-rule (5) of Rule 5 of the Presidential Election Rules, 1988 also says that at the time of scrutiny, the decision of the Returning Officer accepting or rejecting the nomination paper shall be final. Sub-rule (2) of Rule 5 *ibid* says that the Returning Officer shall, in the presence of persons attending the scrutiny under paragraph 5 of the Schedule, examine the nomination papers and decide any objection raised by any such person to any nomination. There being no objection at the time of scrutiny by anyone and nomination papers of the respondents having been validly accepted and polls having been held under the law in the month of September, 2008, the results announced soon thereafter could not be allowed to be challenged now in the year 2010 on the flimsy, fake and fabricated grounds. The respondent No.1. Mr. Asif Ali Zardari, was declared to have been duly elected President. The validity of election could not be called in question in any manner by or before any Court or other authority what so ever, considering also that the petitioner being not one of the validly nominated candidates for the Presidential office, secondly, having not raised any objection at the time of scrutiny of nomination papers cannot be allowed to challenge decision of the Returning Officer on the nomination papers, now in the year 2010 on the flimsy, fake and fabricated grounds. Legally speaking the allegations levelled are to be proved strictly in accordance with law. The presumption supposition and implications cannot be a substitute of proof.

10. In the circumstances, as no prima facie case having been made out by the petitioner, consequently this petition being not maintainable, is dismissed in *limine*.

11. As regards the applications for impleadment as party filed by M/s Waheed Ahmed Kamal, Muhammad Ashfaq Chaudhary and Syed Mahmood Ali, grant of their request was dependent on the acceptance of the Reference/Petition filed by Moulvi Iqbal Haider. Since the same has been dismissed for want of merit as well as for want of jurisdiction, the above applications have become infructuous and are disposed of accordingly. However, applicant Waheed Ahmed Kamal complained that he was not provided a copy of the order passed on his nomination papers on 28.8.2008 and has requested for the supply of the same now. Office is directed to supply a copy of the order to the applicant on payment of usual fee.

(Justice ® Hamid Ali Mirza)
Chief Election Commissioner of Pakistan

Announced on _____
At ECP Secretariat, Islamabad.