

**BEFORE THE ELECTION COMMISSION OF PAKISTAN**

**PRESENT:**

MR. JUSTICE ® QAZI MUHAMMAD FAROOQ, CHAIRMAN  
MR. JUSTICE NASIM SIKANDAR, MEMBER  
MR. JUSTICE AHMED KHAN LASHARI, MEMBER

**REFERENCE UNDER ARTICLE 63(2) OF THE  
CONSTITUTION, RECEIVED FROM SPEAKER  
PROVINCIAL ASSEMBLY OF SINDH, REGARDING  
DISQUALIFICATION OF MR. MUKESH KUMAR  
CHAWLA, MPA .**

**REFERENCE NO.III OF 2007**  
(F.No.17(3)/2007-Law)

**Mr. Amar Lal**

**Versus**

**Mr. Mukesh Kumar Chawala, MPA**

**Present**

For the Petitioner: Mr. Naveel Keshave, ASC.  
For the Respondent: Mr. Suresh J. Jethanand, Advocate  
Mr. Mukesh Kumar Chawala, MPA  
(in person).  
Dates of hearing 1,9 & 29.8.2007; 5 & 12.9.2007

**ORDER**

**MR. JUSTICE ® QAZI MUHAMMAD FAROOQ, CEC:** This Reference under Article 63(2) of the Constitution involves the question of disqualification of the respondent Mr. Mukesh Kumar Chawla who had secured a seat in the Provincial Assembly of Sindh, in the General Elections 2002, as a nominee of the Pakistan Peoples Party Parliamentarians for the seats reserved for non-Muslims.

2. The question of disqualification of the respondent has been referred by the Speaker, Provincial Assembly of Sindh on the basis of a qualification-related allegation made by one Amar Lal in an application submitted on 23.6.2007. The allegation is twofold. First, that the respondent was not qualified to be elected as a member of the Provincial Assembly of Sindh for want of the requisite educational qualification and, secondly, the graduation certificate pressed into service by him at the crucial time was false being in respect of one Mukesh Kumar Chawla s/o Bhagwan Das Bansri.

3. The allegations were refuted by the respondent in his written statement wherein certain preliminary objections were also raised. The main preliminary objection related to non-maintainability of the Reference on the ground that the so-called disqualification, which in fact was a qualification, pertained to pre-election period and was not incurred by the respondent after his election. Another noteworthy preliminary objection was to the effect that the matter was hit by the principle of *res judicata* as the petitioner had filed an election petition which was dismissed by an Election Tribunal at Karachi and the appeal filed by him in the Supreme Court had also met the same fate on 8.8.2007.

4. The averments of the parties were embodied in the following issues:-

- (1) Whether the Reference is not maintainable?
- (2) Whether the decision of the Supreme Court in Civil Appeal No.1322 of 2005 is final and Reference is hit by the principle of *res judicata*?
- (3) Whether Reference is barred under Articles 13 and 225 of the Constitution of Pakistan and Section 26 of General Clauses Act?

- (4) Whether the degree annexed to the nomination paper is of a person other than the respondent?
- (5) Whether the respondent is disqualified from being a Member of the Provincial Assembly, Sindh for want of educational qualification as contemplated under Article 8A of the Conduct of General Elections Order, 2002?
- (6) To what relief, if any, the petitioner is entitled?

5. When the case came for hearing on 5<sup>th</sup> September, 2007 it was declared through an order that Issues No. 1 to 3 shall be treated as preliminary issues and the Reference was adjourned for arguments on the preliminary issues. None of the parties questioned the order and the learned counsel for the parties were heard at length on the appointed date.

6. The learned counsel for the respondent did not press preliminary issues No.2 and 3 but vehemently contended that the Reference was not maintainable as it did not relate to any disqualification incurred by the respondent after becoming a member of the Provincial Assembly of Sindh and was entirely based on a qualification envisaged by Article 8A of the Conduct of General Elections Order, 2002. He vociferously denied the allegation that at the time of filing of nomination papers a false educational certificate was submitted by the respondent. It was further contended that the matter in issue had attained the status of a past and closed transaction as an election petition filed by the respondent in respect thereof was dismissed by an Election Tribunal at Karachi on 13.9.2005 and Civil Appeal No.1322 of 2005 arising therefrom was dismissed by the Supreme Court of Pakistan on 8.8.2007. He lastly contended that it has already been held in References No. 1 and 2 titled *Dr. Sher Afgan Khan Niazi vs Imran Khan* and *Dr. Muhammad Farooq Sattar and others vs Imran Khan* that a

Reference based on qualifications is not maintainable. Reliance was also placed on *Ayatullah Dr. Imran Liaquat Hussain vs Election Commission of Pakistan* (PLD 2005 SC 52).

7. The learned counsel for the petitioner on the other hand contended at the outset that the Reference was maintainable as it pertained to a continuing disqualification. He next contended that the respondent cannot make any mileage from the decision of the Election Tribunal as well as the judgment of the Supreme Court of Pakistan as the election petition was disposed of on a technical ground and not on merits. He further contended that the matter was covered by Article 63(1)(s) of the Constitution as the respondent was disqualified from being elected as a member of the Provincial Assembly under Article 8A of the Conduct of General Elections Order, 2002 which was still in force. He lastly contended that by producing a false certificate of graduation the respondent had committed cheating and impersonation and as such was not entitled to sit in the Assembly on moral grounds.

8. Having considered the rival contentions of the learned counsel for the parties, we have come to an irresistible conclusion that the Reference is not maintainable. The reasons leading to the conclusion are not far to seek. The educational qualification prescribed under Article 8A of the Conduct of General Elections Order, 2002 being a qualification pure and simple forms a part of 'qualifications' contemplated under the Constitution and the law and cannot be equated with a disqualification within the import of Article 63 of the Constitution. The Reference is thus essentially based on a qualification and not a disqualification particularly when it is by now fairly settled that lack of qualification is not a disqualification. We have already

held in the Reference titled *Sher Afgan Khan Niazi vs Imran Khan* (Reference No.1 of 2007) that a sitting member of an Assembly can be unseated only on the basis of a disqualification listed under Article 63 of the Constitution. Needless to add that clause (s) of Sub-Article (1) of Article 63 of the Constitution is confined to disqualifications under any law for the time being in force and cannot be stretched to include the qualifications contained therein.

9. We are also convinced that only that Reference under Article 63(2) of the Constitution is maintainable which relates to a disqualification incurred by a sitting member subsequent to his election as a member. The view gets support from the words “has become disqualified from being a member” used in Article 63 (2) of the Constitution which is worded thus:-

“(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”.

10. A plain reading of the aforementioned words leaves no manner of doubt that it refers to accrual of a disqualification after the election.

11. The view is further reinforced by the observations made in *Ayatullah Dr. Imran Liaquat Hussain vs Election Commission of Pakistan* (PLD 2005 SC 52) with regard to the mode to oust a member of the Parliament or a Provincial Assembly. The observations read as under:-

“In the same wake of events we have adverted to the provisions embodied under Article 63 which hardly renders any assistance to the case of petitioner and provides mode to oust a member of the Parliament if he incurs disqualification subsequent to his election as member. The

Speaker of the National Assembly or the Chairman of the Senate as the case may be, may make a reference to the Election Commission for decision of the question as to whether a member who had suffered disqualification ceased to hold his office or not”.

12. We may also advantageously refer to a judgement of the Supreme Court of India in the case of *Election Commission India vs Saka Venkata Rao* (AIR 1953 SC 210) wherein a similar question of disqualification of a sitting member of Madras Legislative Assembly was involved. In that case the words “has become subject to any of the disqualifications mentioned in cl.(1) of Article 191” used in Article 192 of the Constitution of India, which deals with disqualification of a sitting member of a House or the Legislature of a State, have been interpreted as follows:-

“Not only do the words “becomes subject” in Art. 190(3) and “has become subject” in Art. 192 (1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in Art.190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and farfetched construction and cannot be accepted”.

13. The contention of the learned counsel for the petitioner with regard to continuance of a disqualification has substance only to the extent of an adverse decision rendered against a sitting member by an Election Tribunal in a pending election petition. In the present case the Election Tribunal has

dismissed the election petition filed by the petitioner and the appeal arising therefrom has also been dismissed by the Supreme Court of Pakistan and as such the matter agitated in the Reference falls within the ambit of a past and closed transaction. As regards the morality based contention it will suffice to say that moral grounds cannot alter a provision of the Constitution. Preliminary issue No.1 is, therefore, decided in favour of the respondent and preliminary issues No.2 & 3 are decided against him as not pressed. As a result, the Reference is dismissed.

14. Hereinabove are the reasons for the short order dated 12.9.2007 whereby the Reference was dismissed.

(Justice ® Qazi Muhammad Farooq)  
Chief Election Commissioner

(Justice Nasim Sikandar)  
Member, Election Commission

(Justice Ahmed Khan Lashari)  
Member, Election Commission

Islamabad, the  
12<sup>th</sup> September, 2007.