IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE SAJJAD ALI SHAH

CIVIL APPEAL NO.467 OF 2015
(On appeal from judgment dated 18.2.2015, passed by the Election Tribunal, Rawalpindi in EP No.242/2013/RWP/11/2013)

Malik Shakeel Awan ... Appellant

Versus

Sheikh Rasheed Ahmed and 21 others ... Respondents

For the Appellant : Mr. Muhammad Ilyas Sheikh, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent No.1 : Mr. Abdur Rashid Awan, ASC with
Mr. M.S. Khattak, AOR

Date of Hearing : 20.03.2018

JUDGMENT

SH. AZMAT SAEED, J.- This Civil Appeal under Section 67(3) of the Representation of the People Act, 1976 is directed against the judgment dated 18.02.2015 of the Election Tribunal, Rawalpindi, whereby the Election Petition i.e. EP No.242/2013/RWP/11/2013 filed by the present Appellant challenging election of Respondent No.1 has been dismissed.

2. After having read the order authored by my learned brother Qazi Faez Isa, J., I find myself unable to append my signatures of concurrence thereto. It has been suggested that the decision of the instant Appeal be deferred till the questions as raised and enumerated by him are finally adjudicated by the Full Court. Such exercise, if undertaken, is unlikely to be completed before the proposed General Election of 2018. Election disputes both at the stage of scrutiny of the Nomination Papers and subsequently agitated through proceedings before the Election Tribunals, the learned High Courts and this Court are an integral part of the election process both legally and politically. If the course of action as suggested by my learned brother Qazi Faez Isa, J., is followed then all the election disputes which will inevitably crop up before the Returning Officers, Tribunals and the High Courts or this Court would also not be adjudicated upon till the decision of this Appeal as such election disputes too, more often than not revolve around the questions raised. In such circumstances, the very validity of the proposed General Elections of 2018 would become questionable and the acceptance of its result by the participants almost impossible. In fact, the entire

electoral process would be put at risk with repercussions too grave even to be contemplated let alone articulated herein.

3. Even otherwise, the present *lis* pertains to the validity of a judgment of the Election Tribunal challenged through the instant Appeal under Section 67 (3) of the Representation of the People Act, 1976 (RoPA) while through the question raised a very wide net has been cast encompassing also the jurisdiction of this Court under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 as well as the impact of various provisions relating to qualifications and disqualifications of Members of the Parliament and the Provincial Assemblies. Several of the questions raised obviously do not arise at the *lis* at hand, while the others have been answered definitively by this Court in its various judgments.

4. In our legal system, law evolves brick by brick and from judgment to judgment. If the judgments pertaining to electoral disputes rendered by this Court are carefully read, objectively understood and the ratio thereof correctly identified, it would be clear and obvious

that principles of law, in this behalf, appear to have been settled and consistently applied to the facts of each individual case. The difference in outcome, if any, is the result of difference in the facts of each case. Such principles of law do not require any further clarification on hypothetical considerations. The confusion, if any, is not in the judgments.

5. This Court, for that matter any court, seized of a *lis* is required to decide the same rather than to embark upon an academic exercise. We cannot shy away from adjudicating upon the *lis* that comes before the Court without attempting to ascertain and identify the principles of law as developed through the interpretative process of the previous judgments of this Court and apply the same to the facts of the case.

6. Be that as it may, the primary and elemental question pertaining to electoral disputes, the various jurisdictions which can be invoked for the settlement thereof and the matters relating to qualification and disqualification of the Members of the Parliament and the Provincial Assemblies came up before this Court in the case of Sher Alam Khan v. Abdul Munim and others (Civil Petition No.3131 of 2017) wherein this Court after

examining the law as laid down by this Court, *inter alia,* in the judgments reported as (1) Muhammad Jibran Nasir and others Vs. The State and others (PLD 2018 SC 351), (2) Muhammad Hanif Abbasi v. Jahangir Khan Tareen and others (PLD 2018 SC 114), (3) Muhammad Hanif Abbasi v. Imran Khan Niazi and others (PLD 2018 SC 189), (4) Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (PLD 2017 SC 265), (5) Khawaja Muhammad Asif v. Federation of Pakistan and others (PLD 2014 SC 206), (6) Mian Najeeb-ud-Din Owaisi and another v. Amir Yar Waran and others (PLD 2013 SC 482), (7) Malik Iqbal Ahmad Langrial v. Jamshed Alam and others (PLD 2013 SC 179), (8) Air Marshal (Retd) Muhammad Asghar Khan v. General (Retd) Mirza Aslam Baig, Former Chief of Army Staff and others (PLD 2013 SC 1), (9) Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1089), (10) Muhammad Azhar Siddiqui v. Federation of Pakistan and others (PLD 2012 SC 774), (11) Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad

and others (PLD 2012 SC 132), (12) Shahid Orakzai v. Pakistan through Secretary Law, Ministry of Law, Islamabad (PLD 2011 SC 365), (13) Muhammad Rizwan Gill v. Nadia Aziz and others (PLD 2010 SC 828), (14) Nawabzada Iftikhar Ahmad Khan Bar v. Chief Election Commissioner Islamabad and others (PLD 2010 SC 817), (15) Syed Fakhar Imam v. Chief Election Commission of Pakistan and others (PLD 2008 SC 730), (16) Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473), (17) Miss Benazir Bhutto v. Federation of Pakistan and others (PLD 1988 SC 416), (18) Farzand Ali v. Province of West Pakistan (PLD 1970 SC 98), (19) Muhammad Akram v. DCO, Rahim Yar Khan and others (2017 SCMR 56), (20) Ch. Muhammad Ashraf Warraich and another v. Muhammad Nasir Cheema and others (2016 SCMR 998), (21) Jamshoro Joint Venture Ltd. and others v. Khawaja Muhammad Asif and others (2014 SCMR 1858), (22) Allah Dino Khan Bhayo v. Election Commission of Pakistan, Islamabad and others (2013 SCMR 1655), (23) Muhammad Khan Junejo v. Federation of Pakistan through Secretary, M/o Law Justice and Parliamentary Affairs and others (2013 SCMR 1328), (24) Abdul Ghafoor Lehri v. Returning

Officer, PB-29, Naseerabad-II and others (2013 SCMR 1271), (25) Muddasar Qayyum Nahra v. Ch. Bilal Ijaz (2011 SCMR 80), (26) Suo Motu Case No. 10 of 2009 (Complaint regarding establishment of Makro-Habib Store on playground) (2010 SCMR 885), and (27) Bartha Ram v. Lala Mehar Lal Bheel and another (1995 SCMR 684), held as under:

> "27. An overview of the afore-quoted provisions of the Constitution, as interpreted by this Court through its various juridical pronouncements referred to and reproduced herein above leads to an irresistible and irrefutable conclusion that our Constitutional dispensation is erected upon the democratic principle that the authority vest with the people of Pakistan can only be exercised through their chosen representatives. Such authority, including the power of law making and control over the public exchequer is to be conferred upon the chosen representatives by way of trust and the trust can only be reposed upon those who are worthy thereof.
>
> 28. In the above context, the qualification and disqualification of persons, entitled to act as the chosen representatives of the people and to act on their behalf as Members of the Majlis-e-Shoora and the Provincial Assemblies are set forth in the Constitution itself, more particularly, in Articles 62 and 63 thereof as well as other sub-Constitutional legislation. An elaborate process and procedure has been prescribed by law to filter out those who are disqualified or not qualified to contest the elections to the Majlis-e-Shoora and the Provincial Assemblies as is apparent

primarily from the provisions of ROPA of 1976. With regard to pre-election disqualification, such process includes objections before the Returning Officer at the time of filing of the Nomination Papers, an application to the ECP under Section 103-A of ROPA of 1976. And subsequently, an Election Petition before the Election Tribunal established under Article 225 of the Constitution. If no objection is raised or challenge thrown or relevant proceedings initiated before the appropriate forum at the appropriate time, the disqualification of a candidate is not cured nor an abscent qualification acquired.

29. Consequently, where a disqualified or unqualified person slips through the cracks sneaks into the Majlis-e-Shoora or the Provincial Assemblies, his presence in the said House can always be challenged through exercise of the Constitutional jurisdiction of this Court under Article 184(3) of the Constitution and before the learned High Court under Article 199 of the Constitution by way of a Writ in the nature of *quo warranto*. Even where a matter comes before this Court regarding the qualification or disqualification of a Member of the Majlis-e-Shoora or the Provincial Assemblies otherwise by way of proceedings other than under Article 184(3) of the Constitution, this Court not only has the jurisdiction to convert such proceedings to proceedings under Article 184(3) of the Constitution but is bound to do so, as to permit an unqualified or disqualified person to continue to defile and desecrate the Majlis-e-Shoora or the Provincial Assemblies and masqulate as a chosen representative of the people would amount to frustrating the Constitutional provisions. In such an eventuality, if this Court looks other way, it would perhaps constitute a failure to protect and preserve the Constitution.

> Thus, we find ourselves unable to decline the prayer of the Petitioner to examine the merits of the case so as to determine on the basis of the material available on record whether Respondent No.1 was qualified or disqualified from being a Member of the Provincial Assembly, KPK. Any refusal on our part to avoid or evade such an exercise would constitutes a departure from the law as laid down by this Court and perhaps would even amount to a betrayal of the Constitution. Hence, we convert these proceedings into Suo Motu proceedings under Article 184(3) of the Constitution."

7. The questions raised by and large have been answered in the aforesaid judgment, which was challenged in review through Civil Review Petition bearing No.106-P of 2018, which was dismissed vide judgment dated 05.06.2018 by a Bench of this Court of which my learned brother Qazi Faez Isa, J., was also a Member. Perhaps thereby endorsing the law as enunciated in the judgment without the necessity of hearing by a Full Court. In all fairness, it must be mentioned that the review was dismissed after the order was scribed by my learned brother.

8. The observations of Asif Saeed Khan Khosa, J., with regard to the perceived lack of clarity in Article 62(1)(f) of the Constitution in the case reported as Ishaq Khan Khakwani and others v. Mian Muhammad Nawaz Shairf and others (PLD 2015 SC 275) have been quoted

as a foundation for some of the questions posed in the order. Suffice it to say, much water has flowed under the bridge and this aspect of the matter has been dealt with by Asif Saeed Khan Khosa, J., himself in the judgment of this Court reported as Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Miniser of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (PLD 2017 SC 265). After reproducing the same observations in his note at page 417, paragraph 116, it was laid down as follows:

> "116. It may be true that the provisions of Article 62(1)(f) and the likes of them had been inserted in the Constitution through an amendment by an unrepresentative regime of a military ruler but at the same time it is equally true that all the subsequent democratic regimes and popularly elected Parliaments did nothing either to delete such obscure provisions from the Constitution or to define them properly so that any court or tribunal required to apply them may be provided some guidance as to how to interpret and apply them. Be that as it may the fact remains that the said provisions are still very much a part of the Constitution and when they are invoked in a given case the courts and tribunals seized of the matter have no other option but to make some practical sense of them and to apply them as best as can be done. Before application of those provisions to real cases it is imperative to understand as to why such provisions were made a part of the Constitution and where do they stand in the larger design of the Constitution."

9. The issues pertaining to the interpretation of Article 62(1)(f) of the Constitution has been adjudicated upon in the aforesaid judgment primarily via the majority view which was also reflected in the judgment passed in Civil Petition No.3131 of 2017, where-against a Civil Review Petition, as stated earlier has been dismissed by a Bench of which my learned brother Qazi Faez Isa, J., was a Member.

10. With regard to the exercise of jurisdiction by this Court under Article 184(3) of the Constitution, some hesitation has been noticed due to the absence of provision of appeal against a judgment passed thereunder. A settled principle of interpretation of the Constitution has been enunciated by my learned brother (Qazi Faez Isa, J.) himself in his note in the case reported as District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401) wherein he held as follows:

> "81.(3)(b) Effect should be given to every word, paragraph, clause and article of the Constitution and redundancy should not be imported thereto."

11. Thus, we cannot read a right of appeal into the Constitution against a judgment/order passed by this Court under Article 184(3) by adding a provision to the Constitution. We also cannot decline to exercise our

jurisdiction under the said Article i.e. 184(3) merely because no appeal is provided for. Such interpretation would render the said Article redundant and a surplusage which is not permitted while interpreting the Constitution.

12. The question pertaining to the length of time for which a declaration or finding by a Court of Law that the person is not qualified in terms of Section 62(1)(f) of the Constitution shall ensure has also been answered in no uncertain terms by a five member Bench of this Court vide judgment dated 13.04.2018 passed in Civil Appeal No.233 of 2015 titled Sami Ullah Baloch v. Abdul Karim Nosherwani.

13. Where a misstatement or an inaccuracy or concealment is established, the candidate/member would always have the opportunity to offer an explanation. Such explanation may or may not be found acceptable. Such is the ratio of the judgment of this Court rendered in the case reported as Sheikh Muhammad Akram v. Abdul Ghafoor and 19 others (2016 SCMR 733). In the said case, an Election Petition filed before the Election Tribunal. In the proceedings, it stood established that a criminal case registered against the candidate was not

mentioned in his Nomination Papers as required. Such candidate offered an explanation which was accepted by this Court by way of the aforesaid judgment which is incidentally authorized by my learned brother Qazi Faez Isa, J., and I too was a Member of the said Bench. The said view i.e. in case of concealment, discrepancy and misstatement in the Nomination Papers an explanation thereof may be given by the candidate/member, which may or may not be accepted by the court. And only, if such explanation is found tenable no penal consequences would follow. The question of "strict liability" does not arise with regard to misstatements in the Nomination Papers. Such view was also followed in the judgments of this Court reported as Muhammad Siddique Baloch v. Jehangir Khan Tareen and others (PLD 2016 SC 97) and Muhammad Hanif Abbasi v. Imran Khan Niazi and others (PLD 2018 SC 189). No departure has been made by this Court in the cases reported as Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (PLD 2017 SC 265) and (PLD 2017 SC 692). In the aforesaid case, the concealment of assets in the Nomination Papers filed by

the Respondent in the said proceedings was established through an admission. At no point of time any explanation was offered, in this behalf. Therefore, the question of accepting or rejecting such explanation did not arise. Even in the Review Petition, no explanation was offered. However, an oblique reference in hypothetical term was only made. This aspect of the matter was dealt with and adjudicated upon by this Court in the judgment passed on such review reported as Mian Muhammad Nawaz Sharif and others v. Imran Ahmed Khan Niazi and others (PLD 2018 SC 1). Reference, in this behalf, may be made to para 11 of the said judgment. The relevant portion thereof is reproduced hereunder:

> "11. The argument that the omission to disclose assets could possibly be unintentional in the circumstances of the case would have been tenable had the petitioner been a novice or a new entrant in business and politics. But where he has been neck deep in business and politics ever since early 80s' it is unbelievable that he did not understand the simple principle of accounting that his accrued and accumulated salary of six and a half years was his asset and liability of the company he was an employee of. Even otherwise, this argument cannot be given much weight when it has not been pleaded by the petitioner that the omission to mention the asset was accidental, inadvertent or unintentional. …"
>
> (emphasis supplied)

Why no explanation was given or attempted to be given will always remain a mystery.

14. The distinction between an offence contemplated by Section 9 sub-section (v) of the NAB Ordinance, 1999 for possession of assets beyond known sources of income and the lack of qualification in terms of Article 62(1)(f) of the Constitution arising from the concealment of assets in the Nomination Papers is rather obvious. The proceedings before the Accountability Court under the NAB ordinance are criminal in nature unlike the proceedings which may result in a declaration that a person is not honest on account of concealing of assets in his Nomination Papers. The *fora* in which the proceedings are initiated are distinct. The former commence in the Accountability Court while the latter would arise from a Tribunal established under Article 225 of the Constitution in the High Court or in this Court in its Constitutional jurisdiction. The consequences are also distinct and different. A person found guilty of an offence under Section 9 of NAB Ordinance would be convicted for a term of imprisonment and disqualified while in the latter case a person, if elected, would be de-seated and may also be held not to be qualified.

15. However, more critical difference is that while in proceedings under the NAB Ordinance, if it is proved that a person owns property or assets it is for such person to answer the question as from which lawful pecuniary resources such assets were acquired. In the eventuality, it is discovered that an asset or assets have not been mentioned in the Nomination Papers and owned by the candidate or his dependants, the question required to be answered is totally different. He is expected to explain why such assets were not mentioned in the Nomination Papers (not how such assets were acquired). The requirements of the two provisions should not be intermingled. This distinction, in this behalf, was kept in view by this Court while adjudicating upon in the case reported as Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (PLD 2017 SC 265). It was established, in fact, admitted, that the assets owned were not mentioned in the Nomination Papers and no explanation, in this behalf, was offered, hence, the provisions of Article 62(1)(f) of the Constitution were held to be attracted. As regard to the source of funds for the

acquisition of assets allegedly held by the Respondents directly or indirectly that matter was referred to proceedings under the NAB Ordinance.

16. The law as laid down by this Court in this behalf i.e. with reference to Article 62(1)(f) of the Constitution is unequivocal consistent and well established. It is the said principles of law which would require to be applied for a fair adjudication of the *lis* at hand.

17. Adverting now to the facts of the instant case, the main thrust of the contentions of the learned counsel for the Appellant was that Respondent No.1 had deliberately concealed his immovable property i.e. agricultural land in his Nomination Papers. It was his case that Respondent No.1 had declared his holdings to be 983 Kanals 17 Marlas while it has been established on record through cogent evidence that the said Respondent owned 1049 Kanals and 13 Marlas in Village Raman, Tehsil Fateh Jang, District Attock as is evident from Ex.P-1 *Goshwara Malkiet* pertaining to the ownership of Respondent No.1 in the said Village. Reference, in this behalf, was also made to Ex.P-2. The defence, in this behalf, put forward by the said Respondent was that

there was only an inadvertent discrepancy in the Nomination Papers regarding the land holding as a result of a miscalculation.

18. With the help of the learned counsel, we have examined the evidence produced by the parties. The Nomination Papers filed by Respondent No.1 was brought on record as Ex.P-4. It was tendered into evidence on behalf of the present Appellant and is an admitted document. The said Nomination Papers Ex.P-4 consists of 96 pages. At page 4 against item No.14, the said Respondent has declared his land holding as 968 Kanals and 13 Marlas for the year 2012 and 983 Kanals and 17 Marlas approximately for years 2010-2011. The details of such agricultural land are given at page 79 of the Nomination Papers. With regard to the land holding in Village Raman, the date of purchase of each parcel of land and the quantum thereof has been specified (There is reference to agricultural land claimed to have bought and sold in another village which is not the subject matter of the dispute as raised by the Appellant). The details of the land purchased and the date of such purchase by Respondent No.1 given at page 79 of the Nomination Papers are as follows:

Land Measuring		Date of purchase
Kanals	Marlas	
71	05	29.5.1986
128	17	29.5.1986
199	18	03.5.1986
101	18	05.7.1986
427	16	28.02.1996
110	15	29.3.1997
08	04	18.6.1998
33	04	04.10.1999
Total 1081	 17	

19. A simple mathematical exercise reveals that as per the details provided by Respondent No.1 in his Nomination Papers at page 79, he owns 1081 Kanals and 17 Marlas of land and in the grand total it has been incorrectly mentioned as 983 Kanals and 17 Marlas. This error appears to have crept into the printed Nomination Papers. The miscalculation between the area of agricultural land owned by Respondent No.1 scribed in the printed form and as mentioned item wise in the details at page 79 of the Nomination Papers is self-evident. As per the details, Respondent No.1 has perhaps declared a little more land than as alleged by the

Appellant, thus, it can hardly be accused of concealing any asset especially as a portion of the land appears to be undivided share in various Khasra Numbers as is evident from the documents Ex.P-1 and P-2 produced by the revenue staff who entered the witness box on behalf of the Appellant. In the circumstances, the explanation offered appears to be reasonable and logical. Consequently, the conclusion drawn by the Election Tribunal that there was no concealment of agricultural land in the Nomination Papers filed by Respondent No.1 is based upon a correct and judicious appreciation of the evidence available on the record and in accordance with the law as laid down by this Court. Hence, no exception can be taken to such finding.

20. The Appellant also questioned the property i.e. House No.40, Sector-A, Golf City, Expressway, which respondent claimed to have acquired from Bahria Town. The said property is mentioned the Nomination Papers. The payments made for acquiring the same is also not disputed. Only issue raised by the Appellant is that its correct market value has not been disclosed in the Nomination Papers. In support of such contentions, the learned counsel for the Appellant referred to the

statement of PW-7 an employee of Bahria Town. As noted above, the amount paid by the said Respondent for the said property is not disputed by either the Appellant or PW-7. Such consideration finds mention in the Nomination Papers. PW-7 stated that the other allottees paid a higher price for the similar properties but no document in support of such contention was produced by him. The payments by other purchasers would be a matter of record but the same was concealed from the Election Tribunal by PW-7. Furthermore, no document public or private evidencing any contemporaneous transaction of property in the vicinity disclosing the consideration has been produced in evidence by the Appellant. Nothing from the record of the Sub-Registrar of documents, in this behalf, is available. No person who entered into any such transaction of sale of property in the same area entered the witness box to prove or disprove the value of such property. In this view of the matter, it cannot be held that Respondent No.1 made any misstatement regarding the value of the said property, the ownership of which has been mentioned in the Nomination Papers along with the consideration paid therefor. In the circumstances, the finding by the learned

Election Tribunal that there is no misstatement, in this behalf, with regard to the aforesaid House in the Nomination Papers is borne out from the record. No ground for interference with such findings has been made out by the learned counsel for the Appellant.

21. A half-hearted attempt was made by the learned counsel for the Appellant to dispute the income and sources thereof as mentioned by Respondent No.1 in his Nomination Papers. Such income is reflected in the Income Tax Returns of the said Respondent which are also available on the record and appended with the Nomination Papers as well as for earlier financial years produced by the Appellant himself wherein the source of income is set fourth. The Appellant could not through evidence disprove the declaration made by the Respondent in this behalf. No moveable asset or bank account or source of income other than as disclosed in the Nomination Papers has been proved in evidence by the Appellant. In this view of the matter the learned Election Tribunal rightly held that no material concealment or misstatement, in this behalf, in the Nomination Papers has been proved.

22. Some allegations with regard to the conduct of the election on the day of the election and thereafter were raised before the learned Election Tribunal but not proved and not pressed before us during the course of hearing of this Appeal.

23. In view of the above, no exception can be taken to the findings returned and judgment delivered by the learned Election Tribunal while dismissing the Election Petition filed by the Appellant. Consequently, this Appeal must fail and is dismissed accordingly.

Judge

Judge

'APPROVED FOR REPORTING'
*Mahtab H. Sheikh/**

Announced on _____ at _____

Judge

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE SAJJAD ALI SHAH

CIVIL APPEAL NO. 467 OF 2015
(On appeal from the judgment dated 18.02.2015 of the Election Tribunal, Rawalpindi passed in EP No.242/2013/RWP/11/2013)

Malik Shakeel Awan. ***... Appellant***

VERSUS

Sheikh Rasheed Ahmed and others. ***... Respondents***

For the Appellant	:	Mr. Muhammad Ilyas Sheikh, ASC. Syed Rifaqat Hussain Shah, AOR.
For Respondent No. 1	:	Mr. Abdur Rashid Awan, ASC. Mr. M. S. Khattak, AOR.
Date of Hearing	:	March 20, 2018.

JUDGMENT

Qazi Faez Isa, J. This appeal assails the judgment of the Election Tribunal, Rawalpindi ("**the Tribunal**") dated February 18, 2015 whereby the Election Petition filed by the appellant was dismissed.

2. The appellant challenged the election of Sheikh Rasheed Ahmed (respondent No. 1), who won the National Assembly seat from NA-55, Rawalpindi-VI by getting 88,627 votes against the appellant's 75,306 votes. The elections were held on May 11, 2013. The appellant through his Election Petition assailed the candidature of Sheikh Rasheed Ahmed on a number of grounds, including that he had on solemn affirmation misdeclared his source of income and the bank profit earned by him, suppressed his total agricultural land holding

and misdeclared the value of his house. The other grounds taken in the Election Petition and in this Appeal were not pressed before us.

3. Mr. Muhammad Ilyas Sheikh, the learned counsel representing the appellant, states that the Nomination Form filed by Sheikh Rasheed Ahmed, on the basis of which he contested elections, is dated March 28, 2013 and was submitted to the returning officer on April 2, 2013. The disclosure as required to be made in serial 12, 14 and item 4 of the Nomination Form, the "Statement of Assets and Liabilities" and the document attached thereto titled "Details of Immovable Assets" is contrary to the facts. To understand the learned counsel's contentions it would be appropriate to reproduce the same:

"**12.** The income tax paid by me during the last three years is given hereunder:

Total Income	**Source of Income	Tax Year	Total Income Tax Paid
3134761/-	PROFIT/PROPERTY	2010	Rs. 316341/-
3075048/-	"	2011	Rs. 307349/-
2248089/-	"	2012	Rs. 224883/-

Note I: Attach copies of income tax returns of the years mentioned above.
**If more than one sources of income, attach detail."

"**14.** The agricultural income tax paid by me during the last three years is given below:

Tax Year	Land Holding K M	Agricultural Income	Total Agricultural Income Tax Paid
2010	983-17 (APPROX)	-NIL-	-NIL-
2011	983-17 "	-NIL-	-NIL-
2012	968-13 "	-NIL-	-NIL-

Note II: Attach copies of agricultural tax returns of the last three years mentioned above."

STATEMENT OF ASSETS AND LIABILITIES
ASSETS

ASSETS	Cost of Assets	Remarks
4. IMMOVABLE PROPERTY Open plots, houses, apartments, under construction properties, agricultural property, etc. (attach location, description, built up area and present market value of the house/apartment in which you are presently living).	Rs.16,773,500/-	DETAILS ATTACHED

DETAILS OF IMMOVABLE ASSETS		
S.No.	ASSETS	VALUE
1	D-267, Al-Rashid Market, Sarafa Bazar, Rawalpindi	1,655,500
2	House No. 40, Sector-A, Golf City, Bahria Town	10,200,000
3	Land Village Rama, Tehsil Fateh Jhang, District Attock	3,768,000
4	House, Farm, Shed etc, Fateh Jhang, District Attock	800,000
5	Tractor Trolly etc	350,000
TOTAL		**16,773,500**

According to the learned counsel, Sheikh Rasheed Ahmed in his Nomination Form disclosed that he owned 968 *kanals* and 13 *marlas* of agricultural land in the year 2012, which was a false declaration, as he owned 1081 *kanals* of land ("**the agricultural land**"). He also made a false declaration of his House No. 40, situated in Sector-A of Golf City, Bahria Town ("**the said house**") by mentioning its value to be ten million and two hundred thousand rupees even though its value at the time of its sale was forty eight million rupees.

4. That with regard to the matter of the discrepancies in the payment of income tax the learned counsel refers to documents, however, from these documents it is difficult to establish the allegation.

5. To support his contention with regard to the agricultural land the learned counsel refers to the *Goshwarah Haqeeqat* (Exhibit P-1) and *Jamabandi* (Exhibit P-2) for the years 2008-09 which show the respondent No.1's agricultural land holding to be 1049 *kanals* and 13 *marlas*. These two documents were produced through the witness (PW-8) Basharat Ali, Patwari of *Halqa Rama, Tehsil* Fateh Jhang, District Attock. PW-8's predecessor Babar Khan, Patwari, had earlier come to give evidence before the Tribunal and had produced Exhibit

R-1 showing the respondent No. 1's land holding, but before he could be cross-examined he was transferred. Exhibit R-1 shows respondent No.1's agricultural land holding in the said *halqa* to be 1038 *kanals* and 8 *marlas*. He submits that even if Exhibit R-1 which respondent No. 1 admits is accepted, then too the respondent No. 1 in his Nomination Form had shown his agricultural land holding to be 968 *kanals* and 13 *marlas* whereas admittedly it was 1038 *kanal* and 19 *marlas*, therefore, he had not disclosed 70 *kanals* and 6 *marlas* of his agricultural land. The learned counsel refers to the affidavit-in-evidence (Exhibit P9) of the appellant, the relevant portion whereof is reproduced hereunder:

> "Respondent No. 1 owned agricultural land measuring 1049 Kannals 13 Marlas in *Mouza Ramma* Tehsil Fateh Jang District Attock however as per details attached/appended/mentioned in his nomination papers he declared land measuring 963 Kannals 13 Marlas. In this way he concealed 81 Kannals of land situated in the said Mouza. Respondent No. 1 himself declared his ownership, in his Wealth Statement, in the said Mouza as 1068 Kannals 08 Marlas as on 30-06-12 and land measuring 1083 Kannals 12 Marlas as on 30-06-11 whereas in his nomination papers he concealed his said ownership and declared as 968 Kannals 13 Marlas as on 30-06-12 and 983 Kannals as on 30-06-11."

The learned counsel submits that neither Basharat Ali (PW-1) nor the appellant (PW-8) were cross-examined on their testimony of the agricultural land holding of respondent No. 1 and thereby the fact of nondisclosure of the said agricultural land was deemed to be admitted by respondent No. 1. The learned counsel further states that respondent No. 1 in paragraph 14 of his affidavit-in-evidence (Exhibit R/3) stated that he owned 1081 *kanals* and 17 *marlas* of land, therefore, admittedly respondent No. 1 did not disclose 113 *kanals* and 4 *marlas* of land. The relevant portion from the affidavit-in-evidence of respondent No. 1 is reproduced hereunder:

> "14. The Deponent owned and possessed land measuring 1081 kanals 17 marlas located at Mozia Rama, Tehsil Fateh Jang District Attock. The Deponent never concealed the ownership of the said property either in his returns filed before the tax department or in the nomination papers. Due to miscalculation the area has been shown as 968 kanals 13 marlas. If it is calculated correctly it comes 1081 kanals 17 marlas. The election Petitioner failed to examine the nomination papers seriously and not only stated wrongly in his election petition but also falsely deposed through Exhibit P/9 regarding the said land."

The appellant's counsel states that in his cross-examination respondent No. 1 also admits that he had not mentioned his entire agricultural land holding in his Nomination Form, the relevant portion whereof is reproduced hereunder:

> "It is correct that I did not mention my total owned land measuring 1080/1090 Kanals in my nomination papers. Volunteered, that during the counting of measurement of land before the RO [Returning Officer] there was no calculator and for the first time in the nomination papers, the RO desired the exact measurement of land and there might be some mistake occurred in the nomination papers, however, the details of total land was attached. It is incorrect to suggest that my volunteered portion is incorrect, false and afterthought."

That the appellant's learned counsel submits that in view of the referred to documents, the evidence and the admission of respondent No. 1, it is incontrovertibly established that respondent No. 1 misdeclared his agricultural land holding in the Nomination Form. The learned Presiding Officer of the Tribunal had also come to the conclusion that respondent No. 1 had not disclosed his entire agricultural land, but, according to the learned counsel, the learned Presiding Officer had illegally discounted it by holding, that "*the difference in the measurement of agricultural land mentioned in the*

documents above by no stretch of imagination amounts to concealment of assets".

6. That as regards the said house the learned counsel for the appellant states that respondent No. 1 did not purchase the said house for Rs.10,200,000/-, as shown in his Nomination Form, but instead for Rs.48,000,000/-. He refers to the testimony of Sheikh Amjid, General Manager (Operations) of Bahria Town, Rawalpindi (PW-7) who produced the attested copy of "*Allotment Certificate*" issued by Bahria Town (Pvt.) Limited which shows that Bahria Town (Pvt.) Limited had allotted the said house to respondent No. 1. This witness testified that, "*the market value of the said house at the time of booking was Rs.48,000,000/- and now the market value of this house is more than Rs.60,000,000/-*". The learned counsel states that respondent No. 1 however took the plea that he had paid only ten million rupees and its balance price was adjusted by giving 15 *kanals* and 4 *marlas* of his agricultural land to Bahria Town (Pvt.) Limited, however, when he was asked whether a sale deed was registered with regard to the said 15 *kanals* and 4 *marlas* of agricultural land or whether its transfer was effected by the Revenue authorities by mutation or otherwise, respondent No. 1 stated that, "*this was his* [Bahria Town (Pvt.) Limited] *responsibility to transfer this land and if I am not going to transfer, the allotment of my house shall automatically be cancelled*". But, respondent No. 1 did not produce any document to support his contention that the allotment of his house would be cancelled. In response to the question about the market value of his agricultural land, respondent No. 1 answered that it was Rs.3,768,000/-, and as mentioned in the Nomination Form, therefore, the learned counsel states, that if this value is accepted it

would mean that the said 15 *kanals* and 4 *marlas* was worth just a few thousand rupees and shown to be two hundred thousand rupees in his Nomination Form, however, such value was false as the price of the said house was forty eight million rupees, and it is unbelievable that it was purchased for about one fifth of its price. With regard to the said house, the learned Presiding Officer of the Tribunal had held that, "*even if there is a difference of price, it cannot be said to be a case of concealment of asset as respondent No. 1 had declared ownership of the said house*". The learned counsel states that the Nomination Form requires both the declaration of the asset as well as its "value" and the learned Presiding Officer could not have discarded one component thereof, and in doing so committed a material illegality.

7. Mr. Ilyas Sheikh, the appellant's learned counsel, refers to section 12(2)(a) and (f), section 78(3)(d), and section 99(1)(f) of the Representation of the People Act, 1976 ("**ROPA**") and Article 62(1)(f) of the Constitution to support his case for the disqualification of respondent No. 1. Reliance was also placed upon the following cases: Muhammad Rizwan Gill v Nadia Aziz (PLD 2010 Supreme Court 828), Shamuna Badshah Qaisarani v Muhammad Dawood (2016 SCMR 1420), Muhammad Ahmad Chatta v Iftikhar Ahmad Cheema (2016 SCMR 763), Muhammad Yousaf Kaselia v Peer Ghulam Mohy-ud-Din Chishti (PLD 2016 Supreme Court 689), Imran Ahmed Khan Niazi v Mian Muhammad Nawaz Sharif (PLD 2017 Supreme Court 265) ("**Panama Papers-I**"), Imran Ahmed Khan v Muhammad Nawaz Sharif (PLD 2017 Supreme Court 692) ("**Panama Papers-II**") and Muhammad Nawaz Sharif v Imran Ahmed Khan Niazi (PLD 2018 Supreme Court 1) ("**Panama Papers-III**"). The learned counsel states

that the recent judgments of this Court and particularly those in the Panama Papers' cases hold that the court may look at any material which comes before it and if the material suggests that a candidate has not disclosed all his assets in the Nomination Form he be disqualified and declared not to be honest/*ameen* in terms of section 99(1)(f) of ROPA and Article 62(1)(f) of the Constitution and thereby attract permanent disqualification. And, the nondisclosure and misdeclaration of assets was not excusable by respondent No. 1 who, as per his own showing, was an old hand in politics having been a member of the National Assembly, "for six times consecutively". The learned counsel states that the appellant's case is better than the facts of the Panama Papers' cases wherein the elected person had denied the receipt of salary, but which was deemed to have become his asset. In the present case respondent No. 1 admits that he had not disclosed all of his agricultural land, and had falsely declared that he had given away 15 *kanals* and 4 *marlas* of land as part-payment for the purchase of the said house. The learned counsel concludes by stating that the respondent No. 1 himself was one of the petitioners in the Panama Papers' cases (Constitution Petition No. 30 of 2016) therefore he cannot expect to be judged by a different standard himself.

8. Mr. Abdur Rashid Awan, the learned counsel representing respondent No. 1, relies upon the impugned judgment of the Tribunal which, according to him, is based on a correct assessment of facts and conforms with the legal principles enunciated by this Court. He states that the Election Petition did not specifically mention the agricultural land which was not disclosed nor the correct value of the said house in paragraph 14 but simply alleged that properties had

been concealed by respondent No. 1 in his statement of assets. The appellant only made these specific allegations in his affidavit-in-evidence, which, according to the learned counsel, was not a part of the pleadings. As regards the agricultural land the learned counsel took two fold pleas, firstly that the document titled "Details of Agricultural Land" provides the complete particulars of the agricultural land but a mistake in calculation was committed in clause 14 of the Nomination Form, and, alternatively, that, if at all nondisclosure is established it was a *bona fide* mistake and cannot be equated with a misdeclaration entailing disqualification and/or attracting the disqualification contemplated by section 99(1)(f) of the ROPA and/or Article 62(1)(f) of the Constitution. He next states that no advantage would accrue to respondent No. 1 in not disclosing all his agricultural lands nor would he gain an advantage by not showing the real value of the said house. The learned counsel states that judgments in the Panama Papers' cases are not applicable to appeals filed under section 67(3) of the ROPA because the Panama Papers' cases arose out of a petition directly filed before this Court under Article 184(3) of the Constitution.

9. We have heard the learned counsel for the parties and with their assistance examined the available record and the referred to cases.

10. The learned counsel for the appellant has not been able to satisfy us with regard to the alleged discrepancies in the payment of income tax and bank profit earned by respondent No. 1. Therefore, it would not be appropriate for us to declare that respondent No. 1 had provided incorrect information regarding his income tax on the basis

of mere inference nor will it be appropriate to enable the appellant to make out his case by recording additional evidence before this Court.

11. That with regard to the agricultural land and the said house Issue No. 9 was framed by the Tribunal: "*Whether the respondent No. 1 concealed the facts of his properties in the declaration of assets against the provisions of the Constitution of the Islamic Republic of Pakistan*". As regards the matter of agricultural land there is un-rebutted evidence that respondent No. 1 owned more land than shown by him in his Nomination Form which respondent No. 1 admits to be 113 *kanals* and 4 *marlas* or 70 *kanals* and 6 *marlas* as per Exhibit R-1 which land was not disclosed by him in his Nomination Form. The document titled "Details of Agricultural Land", referred to by the learned counsel representing respondent No. 1, also does not help him because therein respondent No. 1's land holding is shown to be 968 *kanals* and 13 *marlas* so the plea of miscalculating is not sustainable. It is however entirely possible that this nondisclosure was an oversight by respondent No. 1 particularly when there appears to be no benefit or advantage accruing to him on account of such nondisclosure.

12. As regards the value of the said house, the General Manager (Operations) of the Bahria Town (Pvt.) Limited had mentioned that at the time of booking the price of the said house was forty eight million rupees, however, admittedly Bahria Town (Pvt.) Limited received a payment of only ten million rupees and, if the respondent No. 1 is to be believed, 15 *kanals* and 4 *marlas* of land, as consideration thereof. However, the said 15 *kanals* and 4 *marlas* of land admittedly still stands in the name of respondent No. 1; there is no sale deed, sale agreement, exchange deed or any other kind of agreement to support

the story put forward by respondent No. 1. Moreover, neither respondent No.1 nor Bahria Town (Pvt.) Limited informed the Revenue authorities about the purported sale/transfer/exchange of the 15 *kanals* and 4 *marlas* of agricultural land despite the fact that respondent No. 1 had acquired the said house in the year 2011, well before the evidence in the case was recorded by the Tribunal. The said Allotment Certificate (Exhibit P-8) does not mention the price of the said house nor that it was issued in part exchange for 15 *kanals* and 4 *marlas* of agricultural land. Respondent No. 1's Nomination Form and Details of Immovable Assets also did not disclose this. There is yet another aspect to consider, Bahria Town (Pvt.) Limited is a corporate entity, and the accounts of every company are required to be audited and submitted to the concerned authorities. If Bahria Town (Pvt.) Limited had actually acquired 15 *kanals* and 4 *marlas* of land it needed to be disclosed, but not a single document in this regard was produced nor did the representatives of the company testify that the company had disclosed such land in its official records. However, the Sales Executive and Finance Manager referred to Exhibit R-2 an undated letter written by them, but there is no signature of respondent No. 1 on Exhibit R-2, despite there being a place for the "Buyer: Sheikh Rasheed Ahmed" to sign it. In the absence of respondent No. 1's signature Bahria Town (Pvt.) Limited would not be able to hold respondent No. 1 to this alleged sale. The question also arises why would a limited liability company act in this unconventional manner and contravene the laws governing it? Whether respondent No. 1 did not have the requisite 'white money', that is money duly declared to the income tax authorities, or he was given the said house at almost one-fifth of its price as a political favour, and the part-exchange of agricultural land was just a sham

explanation to conceal the truth, would require us to delve in the realm of conjecture, which we consciously do not want to. We are however clear that there is sufficient evidence on record to establish that respondent No. 1 misdeclared the value of the said house in his Statement of Assets, the correct value of which was not less than forty eight million rupees.

13. That having determined that respondent No. 1, did not disclose all his agricultural land and misdeclared the value of the said house in his Nomination Form the consequences of such nondisclosure and misdeclaration need consideration. If the principle or rule of strict liability is applicable respondent No. 1 will have to be disqualified. But, if the strict liability rule is not applicable then the consequences of the said nondisclosure and misdeclaration need to be explored further. However, in cases where the nondisclosure or misdeclaration gives an illegal advantage to a candidate then such nondisclosure or misdeclaration would terminate his candidature, and if he has been elected to his disqualification and consequent removal. For example, if a person was convicted of an offence under the National Accountability Bureau Ordinance, 1999 ("**the NAB Ordinance**") but his Nomination Form did not disclose his conviction or give an earlier date of his conviction to mislead that the ten year period of disqualification (section 15 of the NAB Ordinance) had already expired; such a misdeclaration or nondisclosure would violate the NAB Ordinance as it would enable an unqualified person to participate in the elections. Similarly, a person who isn't yet 25 years of age, which is the minimum age to contest National Assembly elections (Article 62(1)(b) of the Constitution and section 99(1)(b) of the ROPA), misdeclares his date of birth to falsely show himself to be

25 years of age or older; such a person too merits removal because he was not competent to contest. However, a misdeclaration where, for instance, the candidate who is 26 years old mistakenly mentions his age as 25 years, such misdeclaration did not overcome or disregard a law which prohibited his participation in the elections and therefore it could be categorized as inconsequential. In the case of Sheikh Rasheed Ahmed the misdeclaration made by him apparently did not offend any law, in that if he had disclosed his entire land holding and had shown the value of the said house to be forty eight million rupees he would still be able to contest the elections.

14. There are judgments of this Court which apply the principle or rule of strict liability and hold that any nondisclosure or misdeclaration results in disqualification; Panama Papers-II and III evidently advocate this principle or rule. A member of the National Assembly, who was subsequently elected by a majority of the members of the National Assembly to be the Prime Minister, was disqualified as a member of the National Assembly and, consequently, as the Prime Minister, because he did not disclose the income said to have been earned by him as he had a work permit (*Iqama*) of Dubai, United Arab Emirates the issuance of which was conditional on the *iqama* holder being paid a salary, therefore, irrespective of whether he actually received a salary, it was sufficient to constitute his "earnings" and then deemed to have become his asset, the nondisclosure whereof was held by this Court to constitute misdeclaration and, hence, as a consequence he was disqualified in terms that, "*he is not honest in terms of section 99(1)(f) of the ROPA and Article 62(1)(f) of the Constitution*". Even though it was not held by this Court that the candidate suffered from any inherent disqualification and if he had disclosed his said salary/asset he

would have been disqualified. Panama Paper-II and III, therefore, clearly apply the strict liability principle, however, they did not follow other judgments of this Court which held that misdeclaration or nondisclosure would only result in disqualification if the nondisclosure or misdeclaration circumvented a legal disability or disqualification: Muhammad Siddique Baloch v Jehangir Khan Tareen (PLD 2016 Supreme Court 97) and Sheikh Muhammad Akram v Abdul Ghafoor (2016 SCMR 733), which will be discussed in paragraph 18 hereinbelow after discussing the Panama Papers' cases.

15. In Panama Papers-I the learned Ejaz Afzal Khan, J, had discussed the scope of Article 62 of the Constitution and section 99 of the ROPA with regard to the disclosure and accounting of a candidate's assets, as under:

> "A reading of Article 4 of the Constitution would reveal that no person shall be compelled to do that which the law does not require him to do. While a reading of Article 62 and 63 of the Constitution and Section 99 of the ROPA would reveal that none of them requires any member of Parliament to account for his assets or those of his dependents even if they are disproportionate to his known means of income. Section 12(2)(f) of the ROPA requires him to disclose his assets and those of his spouse and dependents and not the means whereby such assets are acquired. Where none of the provisions of the Constitution or the Act dealing with disqualification requires a member of Parliament to account for his assets and those of his dependents, even if they are disproportionate to his known means of income, how could this Court on its own or on a petition of any person under Article 184(3) of the Constitution require him to do that, and declare that he is not honest and ameen if he does not account for such assets." (at pages 485-6)
>
> "… disqualifications 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 the 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." (at page 490SS)

In the same case another learned member of the Bench Sh. Azmat Saeed, J, had held that:

> "25. In the above backdrop to hold that an MNA, who may (or may not) own an undeclared property yet his explanation for the source of the funds for acquiring such property, though legally irrelevant, is not acceptable, hence, such MNA is disqualified, is a legal absurdity under the laws of the Islamic Republic of Pakistan." (at page 524)
>
> "30. Before the said provisions can be pressed into service, there must be a declaration by Court of law. At the risk of stating the obvious, it may be clarified that the Courts of law are concerned with the matters of law not morality. There can be no manner of doubt that the term "honest" as employed in Article 62(1)(f) refers to legal honesty, an objective concept and not mere moral or ethical honesty, which is subjective. The Courts have never wandered into the realm of morality, in this behalf." (at page 525)
>
> "36. In all the aforesaid cases, the applicability of Article 62(1)(f) of the Constitution was considered. In no case, any person was disqualified under the said Article in the absence of an established and proved breach of a legal obligation or violation of a law. In no case, the question of Article 62(1)(f) was even seriously considered in the absence of at least specific allegations of breach of a legal obligation or violation of law. No judgment of this Court has been cited at the bar where a person has been disqualified under Article 62(1)(f) for being dishonest where such alleged dishonesty did not offend against the law or involve a breach or non-fulfillment of a legal obligation." (at page 527)
>
> "37. Such is the true and obvious import of Article 62(1)(f) of the Constitution, as has been consistently without any exception interpreted and applied by this Court. Article 62(1)(f) of the Constitution cannot be permitted to be used as a tool for political engineering by this Court nor should this Court arrogation unto itself the power to vet candidates on moral grounds, like a Council of Elders as is done in a neighbouring Country. Under our Constitutional dispensation, Pakistan is to be governed by the Representatives chosen by the people and not chosen by any Institution or a few individuals." (at page 528)

Ijaz ul Ahsan, J, after elaborately and competently setting out the applicable legal provisions stated that only "a Court or Tribunal of competent jurisdiction" could determine whether a candidate had submitted a "statement of assets and liabilities which is found to be false in material particulars," as under:

> "In terms of Section 42-A(4) of the RoPA if a member submits the statement of assets and liabilities which is found to be false in material particulars, he may be proceeded against under Section 82 of the RoPA for committing an offence of corrupt practice. If found guilty by a Sessions Judge under Section 94 of the RoPA, such member is punishable with imprisonment for a term which may extend to three years or with fine which may extend to Five Thousand Rupees or with both. In case, it is established in a Court or Tribunal of competent jurisdiction that a candidate has concealed any of the assets required to be disclosed under the statement of assets and liabilities in his Nomination Papers or his Annual Statement of Assets and Liabilities, the same may constitute basis for his disqualification inter alia under the provisions of Articles 62 and/or 63 of the Constitution." (at page 638)

16. Panama Papers-I had set up a joint investigation team (JIT) to investigate whether respondent No. 1 therein held properties and companies abroad in his own name or through others (*benami*) and the source of funds utilized for purchase of such properties. In Panama Papers-II after considering the report submitted by the JIT the learned Ejaz Afzal Khan, J, on behalf of the Court determined as under:

> "It has not been denied that respondent No. 1 being Chairman of the Board of Capital FZE was entitled to salary, therefore, the statement that he did not withdraw the salary would not prevent the un-withdrawn salary from being receivable, hence an asset. When the un-withdrawn salary as being receivable is an asset it was required to be disclosed by respondent No. 1 in his nomination papers for the Elections of 2013 in terms of section 12(2)(f) of the ROPA. Where respondent No. 1 did not disclose his aforesaid assets, it would amount to furnishing a false declaration on solemn affirmation in violation of the law mentioned above, therefore, he is not honest in terms of section 99(1)(f) of the ROPA and Article 62(1)(f) of the Constitution of the Islamic Republic of Pakistan." (at page 710)

However the principles enunciated by his lordship in Panama Papers-I were not discussed. Some may contend that the aforesaid observations in Panama Papers-I are at variance with Panama Papers-II and III.

17. Panama Papers-III was a judgment on the review petition filed against the judgment of Panama Papers-II. This judgment too was only authored by the learned Ejaz Afzal Khan, J, who held that:

> "…we could not have shut our eyes when an asset of the petitioner arising out of IQAMA (work permit) having surfaced during the investigation of the case and admitted by him to be his in no uncertain terms, was not found to have been disclosed in his nomination papers in terms of Section 12(2)(f) of ROPA." (at page 19)

The aforesaid conclusion was arrived at by referring to a number of judgments: Hassan Nawaz v Haji Muhammad Ayub (PLD 2017 Supreme Court 70), Mehmood Akhtar Naqvi v Federation of Pakistan (PLD 2012 Supreme Court 1089), Sadiq Ali Memon v Returning Officer (2013 SCMR 1246). The learned Ejaz Afzal Khan, J, stated that the judgments of this Court cited by the other side were "distinguishable on facts and law"; the said cited judgments included the judgments in Muhammad Siddique Baloch v Jehangir Khan Tareen (PLD 2016 Supreme Court 97) and Sheikh Muhammad Akram v Abdul Ghafoor (2016 SCMR 733). The judgments in the cases Hassan Nawaz and Sadiq Ali Memon, which were relied upon in Panama Papers-III, were cases in which candidates were suffering from an inherent disqualification to contest elections because they were holding the nationality of another country.

18. The cases of Muhammad Siddique Baloch and Sheikh Muhammad Akram were stated in Panama Papers-III to be

"distinguishable" however it was not elaborated how they were distinguishable and why the legal principle enunciated therein was not applicable. The principle enunciated in the case of Muhammad Siddique Baloch is reproduced below:

> "29. At this juncture, it is important to emphasize that in cases involving a finding of fact about the disqualification of a returned candidate in election matters, such finding must be based on affirmative evidence and not on presumptions, inferences and surmises…For that reason and the and the serious consequences that follow a finding of disqualification under Article 62(1)(f) of the Constitution, an additional evidentiary safeguard is adopted by the Court, namely, that any reasonable hypothesis available in the recorded evidence to avoid the disqualification of the returned candidate ought to be adopted by the Court of law." (at page 119T and U)

Another three member Bench of this Court in the case of Sheikh Muhammad Akram which involved a candidate who did not disclose a pending criminal case against him was not disqualified because this nondisclosure did not give the candidate any advantage. The changes made to Article 62(1)(f) of the Constitution pursuant to the Eighteenth Amendment to the Constitution, whereby the declaration in respect of matters contained therein was required to be made by a court of law, was also noted. The relevant portions from the judgment are reproduced hereunder:

> "…a candidate is not disqualified to contest elections merely because a criminal case is pending against him. Non-disclosure of a pending case can not be equated with the non-disclosure of a criminal case in which a person has been convicted and one which may entail his disqualification. Incidentally, no one objected to the appellant's candidature when he submitted his nomination papers. If such an objection had been taken, the appellant could have provided the requisite information of the said pending criminal case, as required by paragraph 4 (above) of the Nomination Form and resolved the matter, as the Returning Officer is required to provide the candidate an opportunity to, 'allow any such defect to be remedied forthwith' if he deems that such defect is not of a 'substantial nature' as per proviso (ii) to subsection (3) of section 14 of the Act.

> However, no objection was raised and this defect in the nomination paper was not remedied and the appellant was allowed to contest the elections. The people of the constituency elected the appellant from a field of 21 candidates. Would the electorate, or sufficient number of them to change the result, not have voted for him if they knew about the pendency of the said case?" (at page 743)
>
> "The appellant had also not lied to gain a benefit to which he was not otherwise entitled to, i.e. to be able to contest elections, therefore, the disqualification contained in Section 99(1)(d),(e) and (f) of the Act, which were the same as those contained in Article 62(1)(d),(e) and (f) of the Constitution would not be attracted. It may also be observed that the stipulation requiring a candidate to be '*sagacious, righteous and non-profligate and honest and ameen'* contained in Section 99(1)(f) of the Act was the same as contained in Article 62(1)(f) of the Constitution prior to the Eighteenth Amendment. However, (after the Eighteenth Amendment) the said provision has been changed and to now attract the disqualification there must be a declaration by a court. Article 62(1)(f) now reads as follows:
>
> > "*he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law.*"
> > (at page 745)
>
> "16. The mandate given by the electorate must not be interfered with on hyper-technical grounds. Unfortunately, the Hon'ble Tribunal thought otherwise, as it not only set aside the election of the most popular candidate chosen by the people to represent them, but did so for factors wholly extraneous to the law." (at page 747)

Panama Papers-III also did not discuss the aforequoted principles expounded in Panama Papers-I (paragraph 15 above).

19. After the Panama Papers-II and III the case of Muhammad Hanif Abbasi v Imran Khan Niazi (PLD 2018 Supreme Court 189) was decided by another three member Bench of this Court where the strict liability rule was also not followed:

> "Arithmetical accuracy in reconciling amounts and events is not required in such a case of misdeclaration of assets. Only a coherent account of the sources of funds, their application and movement should be shown by reference to consistent and reliable evidence, even though it may suffer from gaps…" (at page 284)

20. Once the facts of a case have been ascertained the applicable law is applied to arrive at a decision. However, when the facts are clear but different benches of this Court, comprising of the same number of judges, have taken divergent views the matter needs urgent resolution. Another question which requires determination is whether the matter of nondisclosure or misdeclaration is to be treated differently if the case is heard by the Supreme Court in its appellate jurisdiction (section 67(3) of the ROPA) from a case heard by this Court in its extraordinary original jurisdiction (Article 184(3) of the Constitution). There is yet another matter which needs to considered and conclusively settled.

21. Article 184(3) of the Constitution states that only matters of "*public importance with reference to the enforcement of the Fundamental Rights*" can be attended to by this Court when exercising powers thereunder. When a question of public importance with reference to the enforcement of the Fundamental Rights arises, this Court (under Article 184(3) of the Constitution) can pass an order of the nature mentioned in Article 199 of the Constitution. However, when a High Court passes an order under Article 199 of the Constitution it can be appealed before this Court (under Article 185 of the Constitution), but when this Court exercises jurisdiction under Article 184(3) of the Constitution the order can not be assailed in appeal. Precedents of this Court have held that the right of appeal is a substantive right and not one of mere procedure (*see,* Manzoor Ali v United Bank Limited, 2005 SCMR 1785, Muhammad Azhar Siddiqui v Federation of Pakistan, PLD 2012 Supreme Court 774 and Pakistan Defence Officer's Housing Authority v Jawaid Ahmed, 2013 SCMR

1707). In the case of Pakistan Defence Officer's Housing Authority a five member Bench of this Court held, that:

> "The right of appeal is a substantive right…Would it be a fair trial if an accused is shorn off his right of appeal? Would the deprivation of right of appeal not amount to judicial sanctification of all the orders passed by the departmental authorities awarding various penalties to the employees and would it not be violative of the fundamental right to a "fair trial and due process" as ordained in Article 10A of the Constitution?" (paragraph 57, pages 1746K and 1747L and M)

22. When hearing the review petition in Panama Papers-III this Court was cognizant that no appeal is provided for against an order passed under Article 184(3) of the Constitution. This Court therefore held that greater care and circumspection is required to be exercised:

> "The argument that much greater care has to be exercised in upholding the order disqualifying the petitioner in terms of section 99(1)(f) of ROPA and Article 62(1)(f) of the Constitution when no appeal lies against it is more of an apprehension as we being conscious of our duties have dealt with this case with much greater care and circumspection in the judgment under review and while hearing and deciding this petition for review." (at page 23)

However, one can as of right file an appeal against a judgment or order which can not be done in a review petition. Moreover, unlike an appeal the parameters of a review petition are circumscribed. The constraints imposed by Order XXVI of the Supreme Court Rules of 1980 govern a review petition and provide that a judgment or order may be set aside only on very limited grounds, such as an error apparent on the face of the record. An appeal however is not bound by these constraints. A review petition is required to be heard by the same judges (as far as practicable) who had passed the judgment/order under review, however, an appeal is never heard by the same judges.

23. In Panama Papers-I Article 62(1)(f) of the Constitution, which provides that an adverse declaration with regard to a person's sagacity, righteousness, profligacy, honesty and whether or not he/she is *ameen*, must be declared by a court of law, which was expounded to mean a court of "plenary" or "competent" jurisdiction (paragraph 15 above) which suggests the exclusion of the Supreme Court when exercising its extraordinary original jurisdiction under Article 184(3) of the Constitution. The question therefore arises whether a person can be disqualified under Article 62(1)(f) of the Constitution by this Court in exercise of its jurisdiction under Article 184(3) of the Constitution? Another important matter which requires consideration is whether disqualification under Article 62(1)(f) of the Constitution is for the duration of the assembly, in respect whereof elections are held, or is permanent? The scope of Article 225 of the Constitution, which specifically deals with election disputes, also needs to be considered and whether on the principle of the specific excluding the general this Article excludes resort to Article 184(3) of the constitution in respect of individual election disputes. And, to what extent, if at all, can an election dispute be categorized as a matter of "public importance" and which particular Fundamental Right stands infringed, which needs "enforcement"? It would not be fair to one or other of the contesting parties herein if we decide this case at this stage because in doing so we would be preferring one set of views to another and not on the basis of a clear declaration of law, which is bound to give rise to misgivings. It is therefore all the more necessary that the questions which have arisen be thoroughly examined and answered.

24. When divergent views are expressed by different benches of the same number of judges of this Court the matter needs early resolution and all the more so when, "*Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts of Pakistan*" (Article 189 of the Constitution). The applicable test with regard to elections and the qualification-disqualification of candidates is indeterminate and has serious repercussions, which assume criticality in an election year. The terms of the National and the four provincial assemblies will conclude in a few months and general elections will be held. Confusion would result when returning officers throughout the country apply different Supreme Court decisions in accepting or rejecting candidates' Nomination Forms. And confusion will be further perpetuated when, after the elections have been held, election petitions are filed before election tribunals designated to hear and decide them in the absence of a clear legal pronouncement on the subject. Matters would then come up before this Court in its appellate jurisdiction and possibly too in its extraordinary original jurisdiction under Article 184(3) of the Constitution. Legal uncertainty may undermine the credibility of the electoral process, embitter political adversaries, encourage political commentators and the public to cast uncalled for aspersions on the returning officers, the election tribunals and possibly on this Court as well if the interpretation of the law favourable to a party is not applied. We must make every effort to dispel any impression that different persons are treated differently. Justice must not only be done but be seen to be done too. Every endeavour therefore should be made to resolve the prevailing legal uncertainty. The eligibility of members of Parliament

should be "decided in accordance with one single and definite measure".

25. We therefore request the Hon'ble Chief Justice to constitute a bench, preferably the Full Court, since every judge of this Court has heard election disputes and acquired invaluable knowledge which will undoubtedly better help to decide the following questions of law, which have arisen in this appeal, and which will also arise in other cases:

Q.1. Does every nondisclosure or misdeclaration in the Nomination Form result in the disqualification of a candidate or only those whereby one has circumvented some inherent legal disability to participate in an election?

Q.2. If a petition does not disclose the particular facts, on the basis of which disqualification is sought, can these be considered when subsequently disclosed in the affidavit-in-evidence of the petitioner or which may otherwise be discovered during the hearing before the tribunal/court?

Q.3. Does Article 225 of the Constitution exclude the application of Article 184(3) of the Constitution to election disputes?

Q.4. If the answer to the foregoing question is in the negative, then is an election dispute regarding an individual's qualification or disqualification a matter of "public importance" which requires the "enforcement" of a Fundamental Right and if so can it be determined under Article 184(3) of the Constitution?

Q.5. If the answer to the foregoing question is in the affirmative, are the procedural and evidentiary rules governing election petitions and appeals under the ROPA the same as those governing petitions under Article 184(3) of the Constitution?

Q.6. Does the "court of law" mentioned in Article 62(1)(f) of the Constitution include the Supreme Court when exercising jurisdiction under Article 184 (3)?

Q.7. If a candidate is disqualified on account of nondisclosure or misdeclaration does such disqualification subsist only till the next elections or is it permanent?

26. Some of the aforesaid questions were also formulated by this Court in the case of Ishaq Khan Khakwani v Mian Muhammad Nawaz Sharif (PLD 2015 Supreme Court 275, at pages 283-4) however the case was decided on facts, and the questions remained unanswered. One of the seven learned members of the Bench observed, that:

> "It is with this in view and in order to avoid controversy as to the meaning of Article 62(1)(f) and 63(1)(g) of the Constitution and the terms 'honest' and 'ameen' used therein, that the foregoing questions must be adjudicated to provide guidance through precedent. Such precedent can ensure that constitutional questions and challenges as to the qualifications/disqualifications and eligibility of members of Parliament are decided in accordance with one single and definite measure; otherwise there can be vastly divergent and differing approaches which could be taken by various returning officers or election tribunals as per their reading and understanding of the Constitution. This in turn has the potential of leading to and rendering any election controversial bearing in mind that there are 1070 constituencies and if, based on past statistical data, there are on average 10 candidates in each constituency, there will be more than 10,000 aspirants for elected office in the National and Provincial Assemblies who will require scrutiny and evaluation on the touchstone of Articles 62 and 63 of the Constitution. In the last general elections cases did come up where contradictory and inconsistent

> decisions were handed down by Returning Officers for want of guidance through precedent." (at page 291)
>
> "4. The question as to which Civil Court will have jurisdiction to make the declaration or conviction envisioned by Articles 62 and 63 will also need to be decided... ."

Another distinguished member of the Bench repeated the prescient warning he had issued decades earlier:

> "...the vague, uncertain, obscure and conflicting terminology used in different provisions of Articles 62 and 63 of the Constitution...is bound to confuse the electorate at large, hound the candidates and their voters, embarrass the Returning Officers at the time of scrutiny of nomination papers, confound the Election Tribunals and become a nightmare for the lawyers and Courts in the years to come."

27. We are aware that most probably by the time the aforesaid questions are answered the tenure of the present National Assembly would be over. However, the determination of these questions is long overdue and must not be delayed further and should be settled finally.

28. Since the aforesaid questions require interpretation of the Constitution and the ROPA, notices be given to the Attorney-General for Pakistan, the Advocate-Generals of the four provinces and the law officer representing the Islamabad Capital Territory, all of whom should submit in writing their respective answers to the questions and support their answers with reasons. Notices be also issued to the Chief Election Commissioner and the Election Commission of Pakistan.

29. This appeal be listed for hearing after the aforesaid questions, and any other which the Court hearing the matter may deem necessary to formulate, have been answered.

I disagree. I have written my separate judgment dismissing the appeal.

JUDGE

JUDGE

I agree with the judgment of my Ld brother Sheikh Azmat Saeed J. dismissing the appeal.

JUDGE

Bench-IV
ISLAMABAD
April 5, 2018
(M. Tauseef)

Announced in open Court at Islamabad on ____________, 2018.

Judge

'Approved for Reporting'

ORDER OF THE BENCH

This Civil Appeal i.e. CA No.467/2015 (Malik Shakeel Awan v. Sheikh Rashid Ahmed etc.) is hereby dismissed by a majority of two to one, with Qazi Faez Isa, J's holding that first the matter be referred to a Bench comprising of the Full Court to decide the questions of law identified and enumerated by him.

Judge

Judge

Judge

Announced on _____
At _____

Judge