JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.4179 of 2022
Shandana Gulzar Khan
Versus
Election Commission of Pakistan and others

Dates of Hearing:	**20.02.2023, 22.02.2023 and 04.04.2023.**
Petitioner by:	**Barrister Atif Rahim Burki along with petitioner in-person.**
Respondents by:	**Barrister Gohar Ali Khan, Advocate for respondent No.4.** **Ms. Bushra Rasheed, Senior Law Officer and Mr. Zaigham Anees, Law Officer, E.C.P.**

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioner, Shandana Gulzar Khan, assails the order dated 04.10.2022 passed by the Election Commission of Pakistan (**"ECP"**) whereby her nomination papers for election as a Member of the National Assembly against a seat reserved for women from the Province of Khyber Pakhtunkhwa (**"KPK"**) were rejected and it was declared that the next person on the list of priority submitted by the Pakistan Tehreek-i-Insaf (**"PTI"**) be considered to fill the said seat.

2. The petitioner was one of the seven women candidates belonging to PTI who were elected as members of the National Assembly against seats reserved for women from the Province of KPK. On 11.04.2022 the petitioner, along with all other members of the National Assembly belonging to PTI, tendered her resignation in furtherance of a decision taken by PTI. After her resignation was accepted by the Speaker of the National Assembly, the ECP de-notified her as a member of the National Assembly. Thereafter, the ECP issued a schedule for election for the one vacant seat reserved for women in the National Assembly from the Province of KPK. In the list of candidates submitted by PTI to the ECP, the petitioner's name was mentioned at serial No.1. After the petitioner's nomination papers were accepted by the Returning Officer, her name was included in the list of

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candidates issued by the Returning Officer. On 02.09.2022, the Provincial Election Commissioner sent documents, including the return of election expenses in respect of the petitioner, to the Secretary, ECP. The ECP did not notify the petitioner as a member of the National Assembly. Instead the ECP issued notice to the petitioner and initiated proceedings to determine whether she could have participated in the election process for a seat in the National Assembly which fell vacant due to her resignation. These proceedings culminated in the order dated 04.10.2022 which has been assailed by the petitioner in this petition. After the filing of this petition the ECP, vide notification dated 15.11.2022, declared Mst. Roheela Hamid / respondent No.2 as the returned candidate on the seat reserved for women in the National Assembly from the Province of KPK which had fallen vacant due to the resignation tendered by the petitioner.

3. This petition was first taken up for hearing on 07.11.2022. After this Court expressed the view that the petition was not maintainable due to the non-impleadment of necessary parties, i.e. Mst. Roheela Hamid and PTI, learned counsel for the petitioner sought some time to implead them as parties. On 14.11.2022, an amended memorandum of parties was filed showing Mst. Roheela Hamid as respondent No.2 and PTI as respondent No.4.

4. Along with the writ petition, the petitioner has also filed an application for the suspension of the ECP's order dated 04.10.2022. Vide order dated 15.11.2022, this Court directed ***status quo*** to be maintained. On 18.11.2022, the ECP issued notification recalling its earlier notification dated 15.11.2022 whereby respondent No.2 had been declared as the returned candidate.

5. This Court had also required the petitioner to submit an undertaking to the effect that in the event the writ petition is allowed, she would not resign and would complete her tenure as a member of the National Assembly. This undertaking was required since it was at that time PTI's policy for its members not to sit in the National Assembly and this Court wanted to ensure that the proceedings in this petition are not reduced to a simple academic

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exercise. Through application (C.M. No.411/2023), the petitioner brought on record her undertaking that in case the instant petition is allowed, she would not resign again and would perform her Constitutional duties of being an elected member against a seat reserved for women in the National Assembly from the Province of KPK.

6. On 13.12.2022, the Additional Secretary General, PTI tendered appearance and submitted that PTI had decided to support the prayer sought by the petitioner. On the said date, respondent No.2's husband, Hameed ul Haq, had also appeared but thereafter appearance on behalf of respondent No.2 was not tendered on any date of hearing. Respondent No.2 has also not assailed the ECP's notification dated 18.11.2022 withdrawing the earlier notification dated 15.11.2022 whereby respondent No.2 was declared as the returned candidate on a seat reserved for women in the National Assembly from the Province of KPK.

7. Messrs Atif Rahim Burki and Gohar Ali Khan, learned counsel for the petitioner and PTI respectively, were in unison on their submission that there was no provision in the 2017 Act or rules made thereunder which debarred or disqualified the petitioner from being elected to the National Assembly against the seat vacated by her due to her resignation; that the ECP did not have the jurisdiction to reject the petitioner's nomination papers after they had been accepted by the Returning Officer; that the ECP had misinterpreted the provisions of Section 104(4) of the 2017 Act; that the petitioner is not disqualified under Article 63 of the Constitution from being elected to the National Assembly after having resigned as a member of the said Assembly; that if the legislative intent was to prohibit a woman candidate from being re-elected to the seat in the National Assembly from which she had resigned, there would have been an explicit provision to the said effect in the 2017 Act; that election laws have to be strictly construed and any disability or disqualification not explicitly provided therein cannot be read into such laws; that resignation of a member of the National Assembly cannot be equated with disqualification; that the word "occur" used in Section 104(4) of

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the 2017 Act refers to "occurrence of a vacancy" whereas the word "thereafter" used in the said provision refers to the period "after exhaustion of list;" and that the interpretation placed by the ECP on Section 104(4) and (5) of the 2017 Act is flawed. Learned counsel for the petitioner and PTI prayed for the writ petition to be allowed in terms of the relief sought therein.

8. On the other hand, Ms. Bushra Rasheed, Senior Law Officer, ECP tendered appearance along with Mr. Zaigham Abbas, Law Officer and submitted that the order dated 04.10.2022 passed by the ECP does not suffer from any legal or jurisdictional infirmity; that any seat in the National Assembly that falls vacant on account of death, resignation or disqualification of a member cannot be filled through a bye-election by the same very person who had resigned or had been disqualified; that there is no impediment before the petitioner to be a candidate from a general seat or for a seat reserved for women in the next general elections; that in the bye-election process, PTI had given a list of three candidates for the election of one vacant seat for women in the National Assembly knowing full well that the petitioner was not qualified to be re-elected; and that if the petitioner is notified as a member of the National Assembly, she is likely to resign once again. The Senior Law Officer, ECP prayed for the writ petition to be dismissed.

9. I have heard the contentions of the learned counsel for the petitioner and PTI as well as the representatives of the ECP and have perused the record with their able assistance.

10. Article 51(1) of the Constitution provides that there shall be 342 seats of members in the National Assembly, including seats reserved for women and non-Muslims. Article 51(3) specifies *inter alia* that seats be reserved for women in the National Assembly from each of the Provinces and the Federal Capital. As per the said Article, eight seats are reserved for women in the National Assembly from the Province of KPK. Article 51(6)(b) provides that each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under Article 51(3). Article 51(6)(d) mandates that members of the seats

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reserved for women which are allocated to a Province under Article 51(3) shall be elected in accordance with law through a proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly. As per the proviso to the said Article, the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of publication in the official Gazette of the names of returned candidates.

11. The total number of seats secured by PTI in the National Assembly from the Province of KPK after the general elections of 2018 were such that women candidates belonging to PTI could be elected against seven out of eight seats reserved for women.

12. Election to reserved seats in the National Assembly is dealt with in Chapter VI of the Elections Act, 2017 (**"the 2017 Act"**). Section 104(1) of the said Act provides *inter alia* that for the purpose of election to seats reserved for women in an Assembly, the political parties contesting election for such seats shall, within the period fixed by the ECP for submission of nomination papers, file separate lists of their candidates in order of priority for seats reserved for women with the ECP or as it may direct, with the Provincial Election Commissioner or other authorized officer of the ECP, who shall forthwith cause such list to be published for the information of the public. Section 104(4) provides that if, at any time, the party list is exhausted, the political party may submit a name for any vacancy which may occur thereafter and the provisions of *inter alia* Section 104(1) shall, as nearly as possible apply, to fill such vacancy. Section 104(5) provides *inter alia* that where a seat reserved for women in an Assembly falls vacant as a result of death, resignation or disqualification of a member, it shall be filled by the next person in order of preference from the party's list of candidates submitted to the ECP under Section 104(1).

13. During the process of elections to the National Assembly in 2018, the petitioner's name was mentioned at serial No.4 in the list of candidates submitted by PTI to the ECP pursuant to Section

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104(1) of the 2017 Act for the election against seats reserved for women in the National Assembly from the Province of KPK. On 11.08.2018, the ECP issued a notification publishing six names of the returned candidates belonging to PTI for the seats reserved for women in the National Assembly from the Province of KPK. The petitioner was one of the candidates who was declared as a returned candidate for such reserved seat. Since the list submitted by PTI had been exhausted on the issuance of the said notification dated 11.08.2018, for the seventh seat PTI submitted a list containing the name of a single candidate for election to the said seat. On 20.08.2018, the seventh candidate from PTI was also declared as a returned candidate for the seat reserved for women in the National Assembly from the Province of KPK. In this way, there were seven women members of the National Assembly from PTI against seats reserved for women in the National Assembly from the Province of KPK.

14. In April 2022, PTI took a decision that all its members in the National Assembly would resign. The petitioner was one of the members who submitted her resignation on 11.04.2022. Notification dated 13.04.2022 issued by the National Assembly Secretariat shows that 123 members of the National Assembly belonging to PTI had tendered their resignations to the Speaker of the National Assembly, and consequently their seats had become vacant in terms of Article 64(1) of the Constitution. The resignations were accepted *en masse* but piecemeal by the Speaker. Although all seven women members of the National Assembly from the Province of KPK belonging to PTI had resigned, the Speaker just accepted the petitioner's resignation. After the petitioner's resignation was accepted, the National Assembly Secretariat, on 28.07.2022, issued a notification declaring that the petitioner's seat in the National Assembly had become vacant with effect from 11.04.2022. On 29.07.2022, the ECP issued a notification de-notifying the petitioner as a member of the National Assembly.

15. Article 224(6) of the Constitution provides that when a seat reserved for women or non-Muslims in the National Assembly or a

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Provincial Assembly falls vacant on account of death, resignation or disqualification of a member, it shall be filled by the next person in order of precedence from the party list of the candidates to be submitted to the ECP by the political party whose member has vacated such seat provided that if at any time the party list is exhausted, the concerned political party may submit a name for any vacancy which may occur thereafter.

16. Section 104(4) and (5) of the 2017 Act convey the same legislative intent as the one behind Article 224(6) of the Constitution. For the purposes of clarity, Section 104(4) and (5) are reproduced herein below:-

> ***"104. Party lists for reserved seats.—***
>
> ***(4) If, at any time, the party list is exhausted, the political party may submit a name for any vacancy which may occur thereafter and the provisions of sub-sections (1), (2) and (3) shall, as nearly as possible, apply to fill such vacancy.***
>
> ***(5) Where a seat reserved for women or non-Muslims in an Assembly falls vacant as a result of death, resignation or disqualification of a Member, it shall be filled in by the next person in order of precedence from the party's list of candidates submitted to the Commission under sub-section (1)."***

17. The list of women candidates submitted by PTI to the ECP in the year 2018 stood exhausted with the election of seven women members from KPK. Upon such exhaustion, there was no woman candidate from PTI remaining on the said list, who could be declared to have been elected as a Member of the National Assembly on the seat vacated by the petitioner due to her resignation. Therefore, the ECP, on 05.08.2022, issued a notification pursuant to Article 224(6) of the Constitution read with Section 104(4) of the 2017 Act setting out the election schedule to fill the one vacant seat reserved for women in the National Assembly from the Province of KPK.

18. As per the schedule issued by the ECP, the nomination papers were required to be filed with the Returning Officer by PTI candidates between 10.08.2022 to 13.08.2022. The last date for scrutiny of the nomination papers was 17.08.2022 whereas 29.08.2022 was fixed as the date for the publication of the list of contesting candidates.

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19. In the list submitted on 12.08.2022 by PTI to the ECP pursuant to Section 104(4) of the 2017 Act, the petitioner's name was at serial No.1. She submitted her nomination papers to the Returning Officer within the deadline of 13.08.2022. It is not disputed that her nomination papers were accepted after having been scrutinized by the Returning Officer. On 29.08.2022, the Returning Officer published the petitioner's name in the list of contesting candidates. The said list shows the petitioner's name at serial No.1 and that of Roheela Hamid / respondent No.2 at serial No.2. Vide letter dated 02.09.2022, the Provincial Election Commissioner sent documents including the return of election expenses in respect of the petitioner to the Secretary, ECP. In the said letter, the petitioner was described as the *"returned candidate against 01 vacant post reserved for women in National Assembly of Pakistan from Khyber Pakhtunkhwa quota."*

20. The ECP did not issue a notification declaring the petitioner as a returned candidate. Instead, it issued notice for a hearing to the petitioner and on 04.10.2022 passed an order rejecting the petitioner's nomination papers and holding that the re-submission of the petitioner's name did not appear to be appropriate and justified in the eyes of the law. In arriving at this conclusion, the ECP interpreted Section 104(4) of the 2017 Act such that where a seat reserved for women in the National Assembly is vacated as a result of death, resignation or disqualification of a member, that member cannot contest in the bye-election to such seat. For the purposes of clarity, the ratio in paragraph 4 of the ECP's order is reproduced herein below:-

> ***"So far as re-submission of name in case of resignation is concerned, particular word "thereafter" is used after a word "occur" in sub section (4) of section 104 of the Act ibid, which lead us to say that after occurrence of vacancy due to resignation of a person, the name of same person due to which occurrence of vacancy took place can also not be given in next list of priority during same tenure of Assembly, if not dissolved."***

21. As mentioned above, Section 104(5) of the 2017 Act provides *inter alia* that where a seat reserved for women in an Assembly falls vacant as a result of death, resignation or disqualification of a member, it shall be filled in by the next person

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in order of preference from the party's list of candidates submitted to the ECP under Section 104(1). The ECP has emphasized on the words "thereafter" and "occur" in Section 104(4) of the 2017 Act in support of its conclusion that a member who resigns from his or her seat in a legislature cannot contest the bye-election to the seat vacated by him or her. The language of Section 104(4) is plain and simple and needs no interpretation of a scholarly nature. It clearly permits a political party to submit a name of a candidate for election to a seat reserved for women where a vacancy arises after the exhaustion of the list submitted by the party earlier. It does not place any fetter on a political party from nominating the same person on whose resignation a vacancy had occurred in the Assembly from being a candidate in the bye-election or the election to such vacant seat. It may be mentioned that Mr. Imran Khan, the Chairman of PTI, also resigned in April 2022 as a member of the National Assembly but his nomination papers were accepted by the Returning Officer and he was permitted to contest bye-elections in October 2022 not just in one but several National Assembly constituencies.

22. Now, a dead person can obviously not contest an election. As regards a person who is disqualified, the question whether he or she contest a bye-election would depend on the nature of the disqualification. Article 63 of the Constitution enumerates certain disqualifications which are of a permanent nature and others which are cured either by efflux of time or where the cause for disqualification is removed. For instance, a person who is declared by a competent Court to be of an unsound mind would be disqualified permanently in terms of Article 63(1)(a) unless a competent Court subsequently declares him otherwise, but a person who is convicted of an offence involving moral turpitude and sentenced for imprisonment for a term of not less than two years is disqualified under Article 63(1)(h), but such disqualification stands removed on the lapse of five years after his release.

23. It is an admitted position that resignation of a member of a legislature does not entail disqualification in terms of Article 63 of

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the Constitution from being re-elected, whether in a bye-election or in the next general elections. In the case of Mirza Tahir Beg Vs. Syed Kausar Ali Shah (PLD 1976 S.C. 504), the Hon'ble Supreme Court held as follows:-

> ***"The opening words of clause (1) of Article 63 leave no manner of doubt that it refers to both pre-election and post-election disqualifications resulting from or suffered as a legal consequence of a member's own act or omission or other supervening relevant circumstance. It would be entirely a misnomer to equate resignation of a member with the "disqualification" suffered by him under Article 63. It can scarcely be controverted that a resigning member may again seek re-election from the same constituency. This some times happens when a member resigns on question of principle, but at the same time seeks to vindicate the principle. The matter is therefore referred to the electorate, which in a modern democracy is the final arbiter. If on other hand a member has suffered disqualification under Article 63 he will be disqualified from seeking election so long as he remains under the disqualification."***

24. Through the impugned order dated 04.10.2022, the ECP has rejected the petitioner's nomination papers after they had been duly accepted by the Returning Officer. The Senior Law Officer, ECP could not point out any provision in the 2017 Act which empowered the ECP to reject nomination papers of a candidate after they had been accepted by the Returning Officer. The power to reject nomination papers is that of the Returning Officer during the process of scrutiny of the nomination papers. This is provided in Section 62(9) of the 2017 Act. The said Section enumerates the eventualities and grounds on which the Returning Officer (not the ECP) may reject the nomination papers of a candidate. Resignation from a seat in the legislature is not one of the enumerated grounds on which the nomination papers of a candidate can be rejected. In the case of Muhammad Salman Vs. Naveed Anjum (2021 SCMR 1675), the Hon'ble Supreme Court has held in an unequivocal term that *"there is no power or jurisdiction inherent in the Commission itself in terms of Article 218(3) to consider the qualification / disqualification of a candidate / member, whether as an independent, standalone issue or as part of an election dispute."* In the said report, it was also held that the Parliament did not confer jurisdiction in terms of Section 103AA of the Representation of People Act, 1976 (which is in *pari materia* to

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Section 9 of the 2017 Act) on the ECP to consider the qualification or disqualification under Articles 62 and/or 63 of a candidate for election as a member of the legislature.

25. By rejecting the petitioner's nomination papers, the ECP has, in effect, held that she is disqualified from being a candidate in the election. Only those people can be debarred from contesting elections to the legislature who are either disqualified in terms of Article 63 of the Constitution or are not qualified under Article 62. A disability from being a candidate in an election has to be explicitly provided by law. Such a disability cannot be implied by adoption of unorthodox tools of statutory interpretation. In the case of Muhammad Afzal Munsif Vs. Iftikhar Ahmad (PLD 1984 Karachi 76), the Hon'ble Mr. Justice Ajmal Mian (as he then was) speaking for the Hon'ble High Court of Sindh held that in the absence of any expressed disqualification, a candidate's nomination papers could not be rejected on the ground that it appeared in two electoral rolls. Additionally, in the case of Muhammad Mujtaba Abdullah Vs. Appellate Authority (2016 SCMR 893), it was held that *"election laws more particularly disqualification provisions to disenfranchis[e] a candidate, thus depriving him of a valuable right of franchise guaranteed under the Constitution are to be strictly construed [and] any ambiguity is to be resolved in favour of the candidate who could be permitted to participate in the election process."*

26. The ECP, in its order dated 04.10.2022, also took the view that since in the list submitted by PTI during the election process in 2018 the petitioner's name was at serial No.4, she could not have been placed at serial No.1 in the list submitted subsequently when elections were being held to the single seat reserved for women in the National Assembly from the Province of KPK. In this regard, paragraph 7 of the ECP's order dated 04.10.2022 is reproduced herein below:-

> ***"7. It is quite surprising that respondent on one hand has tendered her resignation and on the other hand her name is again placed in third list of priority at Serial No. 1 to fill the seat which occurred due to her resignation by declaring her again as a returned candidate on same seat. As discussed above that the name of Ms. Shandana Gulzar Khan was placed at Serial No. 4 of***

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> ***the first list which was submitted by PTI, who was elected on the reserved seat, therefore, the same list once exhausted could not be altered in garb of fresh list to bring her at Serial No. 1 in third list. In such view of the matter, we are of the considered view that interpretation of above proviso of Article 224 (6) of the Constitution read with section 104 (4) and (5) of the Act ibid in such a mode and manner is mockery to law."***

27. Indeed the proviso to Section 104(1) of the 2017 Act provides that the list submitted by a political party shall not be subject to change or alteration either in the order of priority or through addition of new names in the list or omission of any name after expiry of the date of submission of nomination papers. As mentioned above, the list submitted by PTI during the election process in 2018 had mentioned the petitioner's name at serial No.4 and it is not disputed that the said list stood exhausted in 2018 when seven women members belonging to PTI were declared as members of National Assembly against seats reserved for women from the Province of KPK. After the exhaustion of the said list, if a bye-election was to be held due to the death, or disqualification or resignation of any member who had earlier been elected, PTI would perforce have to submit a new list. Where the list submitted by a political party is exhausted (as was the case when all candidates in the list submitted by PTI during the election process in 2018 were declared elected), Section 104(4) of the 2017 Act permits a political party to submit a name for filling a vacancy which may occur after the exhaustion of the earlier list. The names of women candidates in the new list and the order of their priority are to be of a political party's choosing, provided the candidates are qualified under Article 62 and not disqualified under Article 63 of the Constitution from contesting election. The ECP does not have the power to insist that a candidate who was a certain serial number in the earlier exhausted list has to be at the same serial number in the new list. Section 104(4) does not in any manner obligate a political party to submit a new list of candidates in the same order of priority as in the list submitted during the process of general elections. There is no provision in the 2017 Act or the rules made thereunder that obligates a political party to retain the same preference or priority

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in the new list which is submitted after the exhaustion of the earlier list. What was prohibited by the proviso to Section 104(1) of the 2017 Act was for a political party to alter the list or the order of priority of candidates in the list after the submission of the nomination papers. It is an admitted position that during the election process in 2018 or in the election process to the single seat reserved for women from the Province of KPK in the National Assembly conducted in 2022, the lists submitted by PTI were not altered in any manner after they were submitted to the ECP. For the ECP to hold that PTI could not *"in garb of fresh list"* have brought the petitioner from serial No.4 in the earlier list submitted in 2018 to serial No.1 in the new list submitted in 2022, is, in my opinion, untenable and not supported by any provision of law.

28. In view of the above, the instant petition is allowed; the impugned order dated 04.10.2022 passed by the ECP is set-aside and it is declared that the ECP did not have jurisdiction to reject the petitioner's nomination papers after they had been accepted by the Returning Officer and her name mentioned in the list of candidates published pursuant to Rule 56(1) of the Election Rules, 2017. It is also declared that the petitioner is entitled to be notified as a returned candidate against the single seat reserved for women from the Province of KPK in the National Assembly. Therefore, the ECP is directed to forthwith notify the petitioner as a returned candidate against the single seat reserved for women from the Province of KPK in the National Assembly. Since this Court has already held that the ECP did not have the jurisdiction to reject the petitioner's nomination papers, it is not necessary to remand the matter to the ECP.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 17.04.2023.

(JUDGE)

APPROVED FOR REPORTING

*Ahtesham**

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