

BEFORE THE ELECTION COMMISSION OF PAKISTAN

PRESENT:

Mr. Sikandar Sultan Raja,	Chairman
Mr. Nisar Ahmed Durrani,	Member
Mr. Shah Mohammad Jatoi,	Member
Mr. Babar Hassan Bharwana,	Member
Mr. Justice (R) Ikram Ullah Khan,	Member

Case No. 12(5)/2022-Law.

In re: REFERENCE ON THE QUESTION OF DISQUALIFICATION OF MR. IMRAN AHMED KHAN AS MEMBER OF NATIONAL ASSEMBLY UNDER ARTICLE 63(2) OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

1. Mr. Mohsin Nawaz Ranjha, MNA, NA-89.
2. Mr. Agha Hassan Baloch, MNA, NA-206.
3. Mr. Salah Uddin Ayubi, MNA, NA 263.
4. Mr. Ali Gohar Khan, MNA, NA-103.
5. Mr. Syed Rafi Ullah Agha, MNA, NA-236.
6. Mr. Saad Waseem Shaikh, MNA, NA-137.

.....Applicant/Petition

Versus

Mr. Imran Ahmed Khan, MNA, NA-5

.....Respondent

For the Petitioner No. 1, 4 & 6	:	Khalid Ishaq Advocate Supreme Court along with petitioner No. 6 In-person.
For the Petitioner No. 3	:	Mr Kamran Murtaza, Sr. ASC
For the Petitioner 2 & 5	:	Nemo
For the Respondent	:	Barrister Ali Zafar, Sr ASC along with Mr. Gohar Ali Khan, ASC
Date of Hearing	:	19-09-2022

ORDER

SIKANDAR SULTAN RAJA, CHAIRMAN:- Brief Facts of the case are that a



reference for disqualification of Mr. Imran Ahmed Khan (MNA), under Article 63(2) of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred as the Constitution) has been forwarded by the Speaker National Assembly to this Commission for exercise of its jurisdiction under Article 63(3) of the Constitution therein. The Reference was forwarded by the Speaker of National Assembly through Additional Secretary (LEGIS) on 02. Aug.2022 and was received by the Secretary Election Commission on 04.08.2022. The reference in question was moved before the Speaker by 6 members of National Assembly on account of alleged concealment of gifts received by Mr. Imran Khan from foreign countries as Prime Minister of Pakistan, which are part of Tosha Khana

2. On receipt of reference from the Speaker, notices were issued to the petitioners (MNA's) and Mr. Imran Khan and matter was fixed for hearing on 18.08.2022. Counsel for the Respondent Mr. Imran Khan submitted written reply on 07.09.2022 and matter was adjourned for arguments on 19.09.2022.

3. Today Mr. Khalid Ishaq, ASC, appeared on behalf of petitioner No. 1, 4 & 6 and argued the matter at length. He submitted that respondent did not disclose gifts and precious items which he has acquired from the foreign countries in the statement of assets and liabilities filed before the Election Commission of Pakistan from the year 2017-2021. He added that the list attached with the reference clearly shows the nature of gift items which included flower vase, watches, cufflinks, decoration pieces and other precious jewelry items etc. which according to Tosha Khana procedure and rules 6(i) can be retained if the price of the item is less than Rs. 30,000/- (Thirty Thousand Only) and where the valued amount is more than thirty thousand can be retained subject to deposit of 50% of the valued amount of the gift received. He added that Election Commission of Pakistan is the proper forum and has jurisdiction to decide the matter. He in support of his arguments placed reliance upon the Judgement of Hon'ble Supreme Court reported as 2022 SCMR 1454. He further argued that there are two separate stages of disqualifications, one is pre-election disqualification and the other is post-election disqualification during the tenure of the house to which he has been lawfully elected and notified. He elaborated that for the

st type of disqualification a complete mechanism, procedure and provisions are



available in the Elections Act, 2017 starting from the scrutiny under Section 62 of the Elections Act, 2017 and then filing of Election Petition and Complaint in term of Article 225 of the Constitution and chapter 10 of the Elections Act, 2017. He further added that in case of second situation for disqualification after being notified as a member, special mechanism is provided under Article 63(2) and 63(A) of the Constitution. He argued that Clause 2 of the Article 63 provides the mechanism for determining whether a person is disqualified from elected or chosen and from being a member of Majlis-e-Shoora (Parliament). He further elaborated that if any question arises whether a member of Parliament has become disqualified, the Speaker or the Chairman shall refer the question to the Election Commission of Pakistan. He extended his arguments and submitted that the jurisdiction under Article 63(2) and Article 63(A) is a special and exclusive jurisdiction of this Commission. He argued that the Commission in terms of Section 3 and 4 of the Elections Act, 2017 can regulate its own procedure and the powers and jurisdictions of Election Commission cannot be confined. In support of his arguments he has placed reliance on the judgment passed by the August Supreme Court of Pakistan in Muhammad Salman's case 2021 SCMR 1675 and 2022 SCMR 42. He further added that Election Commission of Pakistan is not a court of law, however, in various instances the Honorable Supreme Court of Pakistan has upheld the orders passed by the Commission under Article 62(1)(f) of the Constitution. He while referring the judgment in Panama Case titled as "Imran Khan vs. Mian Muhammad Nawaz Sharif" reported in PLD 2017 SC 265 argued that the August Court while considering a question regarding the question of Article 62(1)(f) and 63(2) of the Constitution observed that the expression, 'court of law' has not been defined under Article 62(1)(f) or any other provision of the Constitution but it essentially means a court of plenary jurisdiction which has the power to record evidence and on the basis of recorded evidence can pass an order, if, the question is not disputed. He added that in the subject matter the respondent has not denied receiving of gifts nor there is a disputed question to resolve. He extended that Election Commission of Pakistan (ECP) can record evidence and give declaration on the basis of said evidence. He also added that respondent has admitted the non-disclosure of Tosha Khana assets in his reply submitted before the Commission on 07.09.2022. He while concluding the arguments prayed for issuance of order for disqualification of respondent on the basis of concealment of facts, assets and liabilities in the earlier submitted reports of assets and liabilities before the Commission. In support of his arguments he also placed

reliance on the judgments of Apex Courts i.e 2019 SCMR 1939, PLD 2020 SC 137, PLD 2013 SC 482, Faisal Vawda's case, 2019 SCMR 1684, PLD 2010 SC 828, PLD 2010 SC 817, PLD 2013 SC 482, 2018 SCMR 2128, PLD 2018 SC 578 and PLD 2018 SC 449.

4. Learned counsel for the Respondent Barrister Ali Zafar, Sr. ASC appeared and argued the matter in detail. At the very outset he argued that the Speaker National Assembly has made the decision of the reference moved by Ali Gohar Khan, ASC and 5 other MNA's. While reading the decisions of the Speaker he added that the Speaker has invoked Article 63(2) of the Constitution and has given the decision on two grounds. He elaborated that according to Speaker the First ground of his decision is that the respondent has deliberately concealed the assets relating to Tosha Khana gifts in the statements of 2017-2018 and 2018-2019 under Section 137 of the Elections Act, 2017 and the second ground is that the respondent is disqualified under Article 62(1)(f). He also added that the Speaker has also reflected in his reference that the respondent has shown the gifts in the income tax returns for the year 2020-21. He while raising the preliminary objections contended that the Election Commission of Pakistan cannot make declaration under Article 62(1)(f) of the Constitution. He also argued that no question involved under Article 63(1), therefore according to him no reference can be initiated under Article 63(2) of the Constitution. He also elaborated that the concealment under Section 137 of the Elections Act, 2017 cannot be a question in a reference under Article 63. He also argued that Scrutiny of Assets and Liabilities cannot be under taken after 120 days after filing of statements before the Commission. The counsel submitted to elaborate his legal submissions one by one. In support of his first legal objection he added that a person is liable to be disqualified under Article 62(1)(f) if there is a declaration by a court of law that a person is not Honest and Ameen. He extended his arguments and contended that the August Supreme Court of Pakistan has interpreted Article 62(1)(f) in many judgments. He further argued that when there is no declaration from a competent court of law the Speaker has no power and jurisdiction to refer any matter for disqualification to the Commission. He also added that no such declaration of any court of law is produced before the Speaker nor the Election Commission of Pakistan (ECP) in the instant matter. In support of his arguments he has placed reliance on the judgments PLD 2015 SC 275 at 290, PLD 2018 SC 405 at para (23) and (35), PLD 2020 SC 591 at para

(4,5,6&7), PLD 2017 SC 265, 2019 SCMR 1936, PLD 2018 Sindh 263, 2021 SCMR 1675 at para (25, 27, 28 & 41), PLD 2018 SC 449 and PLD 2018 SC 578. He further argued that ECP is not a court of law and cannot declare a person to be dishonest under Article 62(1)(f) of the Constitution. In addition to his arguments he referred to Article 175 of the Constitution that court of law means Supreme Court, High Court and the Courts which are sub-ordinate to and controlled by the High Courts. He elaborated that ECP is a constitutional body and not a court of law. He has placed reliance on PLD 2018 Sindh 263, 2021 SCMR 1675, PLD 2020 SC 591, PLD 2018 SC 449 and PLD 2018 SC 578. In response to his second legal objection that no question under Article 63(1) is involved, therefore no reference can be initiated under Article 63(2), he added that after 18th amendments in the Constitution, qualifications and disqualifications of the members have been changed and previously, according to him, there were about 26 qualifications and disqualifications and now there are only 7 qualifications under Article 62 and 16 disqualifications under Article 63(1)(a) to (p). He extended his arguments that when a question arises under Article 63(1)(a) to (p), it can be referred by the Speaker to the Election Commission and the Commission is required to answer it. He argued that Article 63(2) becomes applicable only when the grounds specified in (a) to (p) are applicable. In support of his arguments, he has placed reliance on PLD 2005 SC 52 at para (7) PLD 2012 SC 774 at para (40), PLD 2017 SC 265, PLD 2017 Sindh 464 and PLD 2018 Sindh 263. He contended that none of the question as contained in Article 63(1)(a) to (p) are involved in the instant matter. He also added that the Commission cannot take cognizance in the matter. In support of his third legal objection which is that the concealment under Section 137 cannot be a question for under Article 63(2) in a reference, he elaborated his arguments and added that the Speaker cannot raise a question regarding violation of Section 137 of the Elections Act, 2017. He also argued that the Speaker has exclusive jurisdiction under Article 63(2) only in respect of grounds mentioned in Article 63(1)(a) to (p). He further added that the provisions of Section 137 of the Elections Act, 2017 cannot be read into Article 63(1)(a) to (p) of the Constitution. In support of his arguments he placed reliance on para 25 of the judgment, titled Muhammad Salman reported in 2021 SCMR 1675. He further argued that Section 137 is a standalone provision under the Elections Act, 2017 which has to be read with Rule 137 of the Election Rules, 2017 and the ECP on its own motion or information received, after scrutiny, may file a complaint of corrupt practices to the Sessions Judge. He also added that the complaint



is to be decided by the court after due trial which cannot be done by ECP. He also submitted that the provisions of Article 63 of the Constitution and Section 137 of the Elections Act, 2017 are not the same and cannot be part of each other. In support of his fourth legal objection that scrutiny cannot be under taken after 120 days, he submitted that there is a limitation of 120 days in the Elections Act, 2017 for scrutiny of assets and liabilities by the Commission which is also observed by the Supreme Court in Nida Khoro case reported in PLD 2019 SC 1684. He elaborated that the limitation of 120 days has expired and he further added that the Commission has become functus-officio and cannot take further objections. He further submitted that there is no provision in law for re-opening of the matter after expiry of 120 days' limitation. In support of his arguments he has placed reliance on PLD 2018 SC 189 Hanif Abbasis case and 2018 SCMR 2128 Khuwaja Asif's case. He further placed reliance on PLD 2018 SC 1276, PLD 2019 SC 201, 2013 SCMR 1246 and PLD 2017 SC 70. He while referring the above mentioned judgments has added that failure to disclose an asset is not an automatic disqualification but it has to be deliberated, intentional and for some ulterior motives. While referring to the legal objections the counsel added that noting has been concealed and the facts about the gifts and statements of assets have been submitted before the Commission. He argued that the list of gifts attached by the petitioners with the reference is an un attested document upon which the Speaker has relied without seeking disqualification. He further elaborated that the gifts governed by Tosha Khana procedure which applies to all including President, PM, MNA's, Ministers, Judges etc. and it is the requirement that all gifts are reported to Tosha Khana. He submitted that as per rule 6(i) and gifts valued less than Rs. 30,000/- (Thirty Thousand Only) can be retained by the recipient and gifts valued more than Rs. 30,000/- (Thirty Thousand Only) can be taken upon deposit of 50% of the valued amount. He elaborated that during the financial year 2018-2022, 58 gift items were received by the Prime Minister and Begum Prime Minister. He argued that year wise detail of gifts received and then in that respect year wise declaration in statements of assets is attached with the reply. He extended that in the financial year 2018-2019, respondent received 31 gifts from which 4 gifts were retained upon deposit of amount. He further added that these gifts were sold before June, 2019 so there was nothing to declare in the statement. He further added that if an asset is not in hand there is no obligation to mention that asset in the statement. In support of this argument he has placed reliance on the judgment PLD 2018 SC 189



and 2018 SCMR 2128. He further elaborated that the sale value was declared in the statements filed by the respondents and was deposited in Bank Account of Alfalah Bank and the same was declared in Income Tax Returns for Tax Year 2019. He also added that the sale and purchase of the gift items is also declared in income tax returns for the year 2019 filed on 09.12.2019 in which purchase amount is declared as Rs. Twenty-One Million under Code 5088 and sale value of Rs. Fifty-Eight Million under Code 5028 for which 9.5 Million tax was paid. He also extended his arguments and submitted that the amount was declared in the statement on 31.12.2019 by referring financial year 2018-19. The counsel for the respondent added that 9 gifts were received in this financial year 2019-20, from which 3 gifts were retained upon deposit. He submitted that these 3 gifts were worth Rs. 1,719,700/- (One Million Seven Hundred Nineteen Thousand Seven Hundred Only) and these being small gifts, were not mentioned in the statement of assets and liabilities but its cost on purchase was declared in the income tax returns which came to Eight Million with Code 7087. In respect to the gift items received during financial year 2020 and 2021, the counsel argued that 12 gifts were received out of which 5 gifts were retained upon deposit which were mentioned with the name of precious items in the statement of assets filed on 27.12.2021. The counsel added that nothing has been concealed during the year 2020-21 by the respondent. The counsel further submitted that entire reference is based on malafide intentions, political motivation and baseless character assassination and he also added that the documents attached with the reference are forged and photo copies and cannot be placed reliance on it. The counsel while concluding his arguments prayed for rejection of the reference.

05. In rebuttal to the arguments made by the counsel for the respondents Mr. Khalid Ishaq, ASC representing the petitioner while placing reliance upon the judgments passed by the Apex Courts submitted that the arguments advanced by the counsel for the respondent are based on presumptions and he has admitted that the gifts were sold out by the respondents. However, he argued that the detail of amount and purchase and sale receipts are not presented before the Commission. He also argued that the Commission has exclusive jurisdiction to entertain the matter referred by the Speaker under Article 63(2) of the Constitution. While discussing the jurisdiction of the Commission the counsel added by referring Article 63(1)(p) that the bear reading of the provisions of Article 63(1)(p) clarifies that the disqualification occurs under any



other law which he submitted that in the instance case is the Elections Act, 2017. He further elaborated that concealment of assets can be inquired by the Commission and such concealment is defined under Section 167 of the Elections Act, 2017. Thus while concluding his arguments he submitted that it has direct nexus with the disqualification mentioned under Article 63(1) of the Constitution. He further submitted that the respondent is stopped by his own conduct and actions as while deciding the objections raised on the nomination papers of the respondents for which he in his reply categorically admitted that the jurisdiction in respect of Tosha Khana issue is that of this Commission and the Returning Officer cannot look into the matter. He argued that it is well settled law that one who approbates cannot be allowed to reprobates. In support of his arguments, he placed reliance on the judgment passed by the August Supreme Court, reported as 2022 SCMR 1454. He prayed for decision of reference in accordance with law.

06. Arguments heard from both the parties and record perused.

07. Before discussing the details of the case, we deem it appropriate to refer to the relevant Provisions of the Constitution and law which are reproduced below; Article 63(2)(3), 218(3) of the Constitution of Islamic Republic of Pakistan and Relevant Provisions of the Election Act, 2017. Section 3, Section 4(2)(3), Section 137, Section 167, Section 173, Section 174, Section 190, Section 231, Section 232.

Article 63(1) of the Constitution Provides as under:-

Disqualifications for membership of Majlis-e-Shoora (Parliament)

63(1) *A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if*

(a) to (o).....

(p) *he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.*

(2) *If any question arises whether a member of the Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within thirty days and if he fails to*



do so within the aforesaid period it shall be deemed to have been referred to the Election Commission.

(3) The Election Commission shall decide the question within ninety days from its receipt or deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant.

Article 218(3) of the Constitution Provides as under: -

(1).....

(2).....

(3) It shall be the duty of the Election Commission 4[Omitted] to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

Relevant Provisions of the Elections Act, 2017.

Section (3) Procedure of the Commission. — (1) In the performance of its functions, and duties and exercise of its powers, the Commission shall regulate its own procedure.

Section (4) Power to issue directions. — (1) The Commission shall have the power to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document.

(2) Any such direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court.



(3) Anything required to be done for carrying out the purposes of this Act, for which no provision or no sufficient provision exists, shall be done by such authority and in such manner as the Commission may direct.

137. Submission of statement of assets and liabilities. — (1) Every Member of an Assembly and Senate shall submit to the Commission, on or before 31st December each year, a copy of his statement of assets and liabilities including assets and liabilities of his spouse and dependent children as on the preceding thirtieth day of June on Form B.

(2).....

(3)....

(4) Where a Member submits the statement of assets and liabilities under this section which is found to be false in material particulars, he may, within one hundred and twenty days from the date submission of the statement, be proceeded against for committing the offence of corrupt practice.

167. Corrupt practice. — A person is guilty of the offence of corrupt practice if he—

(a) is guilty of bribery, personation, exercising undue influence, capturing of polling station or polling booth, tampering with papers, and making or publishing a false statement or declaration;

173. Making or publishing a false statement or declaration. — A person is guilty of making or publishing a false statement or declaration if he makes or publishes a false statement or submits false or incorrect declaration in any material particular—

(a).....

(b).....

(c).....

(d) in respect of statement of assets and liabilities or any liability with regard to payment of loans, taxes, government dues and utility expenses.

174. Penalty for corrupt practice. — Any person guilty of the offence of corrupt practice shall be punished with imprisonment for a term which may

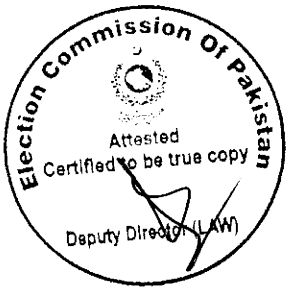


extend to three years or with fine which may extend to one hundred thousand rupees or with both.

190. Cognizance and trial. — (1) *Notwithstanding anything contained in any other law but subject to section 193, an offence under this Chapter shall be tried by the Sessions Judge and any aggrieved person may, within thirty days of the passing of the final order, file an appeal against the order in the High Court which shall be heard by a Division Bench of the High Court..*

08. The following questions are formulated for decision of the question referred by the Speaker under Article 63(2) of the Constitution through the instant Reference;

1. Whether the Commission has the jurisdiction to entertain the matter referred by the Speaker under Article 63(2) of the Constitution?
2. How many gifts were received, retained and sold out by the Respondent during the financial year 2018-19?
3. Whether the amount of sold out gift items has been mentioned in the statement of assets and liabilities submitted by the respondent and whether the figures are in line with the bank statements of financial year 2018-19?
4. How many gifts were received by the respondent in financial year 2019-20 and what is the effect of non-disclosure of gift items/amount in the statement of assets and liabilities?
5. What is the effect of disclosure of cost value of the gift items in the FBR, in financial year 2019-20 and its non-disclosure in the statement of assets and liabilities by the respondent before the Commission?
6. How many gifts were received, retained and sold out by the Respondent during the financial year 2020-21?
7. Whether the amount declared by the respondent in financial year 2020-21 is in accordance with the requirement of Form-B or not?



09. In response to Question No. 1, it is on record that the Counsel for the Respondent in his reply and subsequently during the course of his arguments raised objection qua the jurisdiction of the Commission on the following grounds;

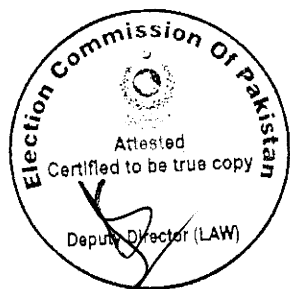
- i. That the commission has no jurisdiction to re-open the matter regarding statement of assets and liabilities after expiry of 120 days as mentioned in Section 137 of the Elections Act, 2017.
- ii. That the Commission has no jurisdiction to adjudicate upon the question of the disqualification of the Respondent under Article 62(1)(f) the Constitution.
- iii. That no Question of disqualification of the Respondent under Article 63(1) (a-p) of the Constitution has arisen, Hence, the Commission has no jurisdiction under Article 63(3) to decide the matter of disqualification.

10. In response to the above raised objections, it is pertinent to mention that the Honorable Supreme Court of Pakistan in the case titled as "Muhammad Salman vs. Naveed Anjum" and others reported as 2021 SCMR 1675 held that; -

"Now, the Constitution itself confers a jurisdiction on the Commission with regard to the disqualification of member of the federal and provincial legislatures. This is contained in clause (2) and (3) of Article 63(read, as appropriate, with Article 113), which provide as follows;

"(2) If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within 30 days and should he fail to do so within the aforesaid period it shall be deemed to have been referred to the Election Commission."

(3) The Election Commission shall decide the question within 90 days from its receipt are deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant"



11. The August Supreme court in the case of “Imran Khan vs. Mian Muhammad Nawaz Sharif” reported in PLD 2017 SC 265 has held that the hierarchy for pre-election disqualification and post-election disqualification is provided in the Constitution and the Election laws. The Apex court while dealing with the question of qualification and disqualification of Member of the Parliament has observed as follows;

“ The next question emerging for the consideration of this Court is what are the fora provided by the Constitution and the law to deal with the questions emerging from Articles 62(1)(f) and 63(2) of the Constitution. To answer this question we will have to fall back upon Articles 62 and 63 of the Constitution. A careful reading of the said Articles would reveal that the one deals with qualifications of a person to be elected or chosen as a member of Parliament while the other deals with disqualifications of a person not only from being elected or chosen but also from being a member of Parliament. If a candidate is not qualified or is disqualified from being elected or chosen as a member of Parliament in terms of Articles 62 and 63 of the Constitution, his nomination could be rejected by the Returning Officer or any other forum functioning in the hierarchy. But where the returned candidate was not, on the nomination day, qualified for or disqualified from being elected or chosen as a member, his election could be declared void by the Election Tribunal constituted under Article 225 of the Constitution. While election of a member whose disqualification was overlooked, illegally condoned or went unquestioned on the nomination day before the Returning Officer or before the Election Tribunal, could still be challenged under Article 199(1)(b)(ii) or Article 184(3) of the Constitution of Pakistan, 1973 as was held in the cases of Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore (PLD 1970 SC 98) and Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1054). However, 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

