

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR,
JUDICIAL DEPARTMENT
W.P No. 206-P of 2023.

Jaffar Shah

Vs

The Secretary Local Govt. Election & Rural
Development Department, Khyber Pakhtunkhwa &
others

For the petitioner: Mr. Noor Muhammad
Khattak, Advocate

For the Respondents: Mr. FazliMola, A.A.G.,
alongwith respondent No.6
in person.

Date of hearing: 23.04.2024

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. The instant constitutional petition is the offshoot of a complaint the petitioner had filed against the Secretary of his Union Council (respondent # 2) for declining to issue the death certificate of his brother Muhammad Tahir Shah. The petitioner had preferred the complaint before the Khyber Pakhtunkhwa Right to Public Services Commission (respondent # 1), which, though by its (impugned) order dated 29.12.2022 directed the issuance of the requisite death certificate, but imposed a fine of Rs. 20,000/- upon the petitioner. The reason the respondent # 1 mentioned in its impugned order was that the petitioner had filed a false and frivolous complaint against the respondent # 2. The petitioner voiced his grievance only to the extent of imposition of the fine by the respondent # 1.

2. The background of the conflict germane to the above facts is that the brother of the petitioner had passed away in the Rahman

Medical Institute, Peshawar. According to the relevant document prepared in the Rahman Medical Institute, the brother of the petitioner breathed his last on 17.04.2022. The petitioner mentioned the aforesaid date in his application for the grant of death certificate. Later, Ms. Rabia Bibi, the widow of the petitioner's brother, also submitted a similar application in which she mentioned 17.07.2022, as the date of the death of her husband. Evidently, due to two different dates of the death, the respondent # 3 refused to issue the death certificate. Feeling aggrieved, the petitioner approached the Director General, Local Government, Election and Rural Development Department (respondent # 3) for taking action against the respondent # 2. The inaction on the part of the respondent # 2 prompted the petitioner to file the complaint before the respondent #2, which passed the impugned order.

3. In his para-wise comments, the respondent #1 stated that both the applications were submitted by the petitioner himself with different dates of the death of his late brother. This fact, he added in the comments, was considered an act of fraud on the part of the petitioner.

4. Arguments heard. Record perused.

5. The sole point for determination by us is that whether the impugned order of the respondent # 1 is amenable to judicial review in our constitutional jurisdiction. The first test is the availability of *jurisdiction* to the respondent # 1. In other words, whether the authority suffered with jurisdictional defect. Jurisdiction, as may be understood in light of the landmark judgment in *Zia-ur-Rehman*¹ (1973), is "a right" of an authority (including a court and/or tribunal) to decide a certain subject matter in a particular case as also the power and the manner in which it is exercised by an authority, and the person in whose respect such power is exercisable.

6. Next, to be seen is that the jurisdiction must be exercised according to law. In *Syed Hadi Ali* (1956)², the court held: "[t]he point to be decided always is whether the order (including one within the

¹*The State V. Zia-ur-Rehman* (PLD 1973 SC 49).

²*Syed Hadi Ali v The Government of West Pakistan and other* (PLD 1956 (W.P.) Lahore 824).

discretion) is within the power that has been granted” by the law. The Court emphasized, “it is not possible to support the proposition that in respect of purely executive acts, the discretion of the executive is not subject to any consideration of justice, reason and fair play.” In a nutshell, an impugned order shall not suffer with *procedural defect*.

7. Then, the impugned order must have been passed by affording an opportunity of *fair hearing* (Latin: *audi alteram partem*. English: Let the other party be heard as well). In the 1966 *Abdus Saboor*³, the Supreme Court ruled that it is a duty of every decision making body, notably an administrative authority, as the case is in the present petition, to act fairly and justly by applying the principles of natural justice provided it is not specifically freed from the clutches of this principle.

8. While examining a decision of the Federal Land Commission in the 1983 *Gul Bibi*, the Supreme Court held that the High Court should not sit in judgment as a court of appeal over the decision of the statutory tribunals simply that the High Court is of the view that it is wrong.⁴ However, the Court maintained, the High Court may exercise judicial review if the decision is not “*based on evidence, or arrived at as a result of misreading of evidence* [.]” The principle expounded from this ruling is that an impugned order shall be free of any *adjudicatory defect*. For further clarity of the nature of the judicial review as not synonymous to the appellate power of the High Court, guidance may also be sought from *Mir Abdul Baqi Baluch* (1968).⁵ The Court held:

What the Court is concerned with is to see that the executive or administrative authority had before it sufficient materials upon which a reasonable person could have come to the conclusion that the requirements of law were satisfied. It means that an impugned order shall not unreasonable.

³*Abdus Saboor v. Karachi University and Controller of Examinations, Karachi University* (PLD 1966 Supreme Court 536).

⁴*Federal Land Commission v. Mst. Gul Bibi and other* (1983 SCMR 818).

⁵*Mir Abdul Baqi Baluch v. (1) The Government of Pakistan through the Cabinet Secretary, Rawalpindi [5 others]* (PLD 1968 Supreme Court 313).


9. The 2014 *Asif Fasihuddin Khan Vardag*⁶, is not only a relatively recent case on the subject, but sets out the above tests in a more nuanced manner. The Supreme Court observed that the basic test for judicial review is to find out:

Whether there is any infirmity in the decision making process. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or it is actuated with mala fides.

10. We shall now advert to the applicable law in and facts of the case in hand. Section 20 of the Khyber Pakhtunkhwa Right to Public Services Act, 2014, is the applicable provision of the law:

20. Punishment for frivolous complaints.---(1) Any person, whose Appeal complaining against an alleged non-provision of public service within stipulated time or alleging any deficiency therein, is rejected by the Appellate Authority and while deciding so, the Appellate Authority is also of the view that his complaint was false, frivolous or vexations and if such order is upheld by the Commission also, the complainant shall be served by the Commission, with a show cause notice, requiring him to submit his reply within a period of fifteen (15) days of show cause in writing that why he shall not be prosecuted for filing a frivolous complaint.

(2) If the Commission is satisfied, upon receiving the reply to show cause notice and hearing the parties that the complaint so filed was false and frivolous, it may proceed to fine the complainant for an amount up to Rupees fifty (50) thousand.

 11. The above provision confers jurisdiction on the respondent # 1 to punish a frivolous complaint. The impugned order, thus, passes the jurisdictional test. However, it fails to pass the remaining tests. It simply states that the petitioner filed the second application for the grant of the death certificate, a view that is not supported from the available record. Needless to say, a bare perusal of the second application demonstrates that it was filed by the widow of the late brother of the petitioner. It is also silent on whether the Director General (respondents # 5) also found the complaint as frivolous. It follows that the respondent failed to appreciate that it has the power under section 20 only if the respondent# 5 also has found the complaint

⁶*Asif Fasihuddin Khan Vardag v. Government of Pakistan* (2014 SCMR 674).

as frivolous. Lastly, it is bereft of having served a show cause notice on the petitioner, another patent legal requirement per section 20. In short, the respondent # 1 failed to understand the law which governs its decision making power, and to demonstrably enforce it. We could not find anything in black and white that the respondent # 1 issued show cause notice to the petitioner and gave him an opportunity of hearing. The comments are also silent in this regard. It can be safely concluded that the impugned order suffers with, to quote from *Asif Fasihuddin Vardag* case, *arbitrariness, illegality, irrationality and procedural impropriety...* (also called the Wednesbury unreasonableness principle, pronounced by the United Kingdom Court of Appeal in the 1948 *Associated Provincial Picture Houses Ltd v Wednesbury Corp*⁷). Even otherwise, we are not convinced that the petitioner has committed any fraud by filing two different applications with different dates of death of his late brother as in the application he filed he mentioned the correct date of the death, which was 17.04.2022, the one that which the Rehman Medical Institute certified in its report.

12. As sequel to our above discussion, we have reached to the conclusion that the impugned order is not sustainable in the eyes of law. Hence, we allow the instant constitutional petition and set aside the impugned order dated 29.12.2022 to the extent of para iv & v, with direction to the respondents to issue to the petitioner/widow death certificate of the late Muhammad Tahir Shah forthwith, if not already issued.

Announced
23.04.2024
Zia*


JUDGE


JUDGE

(DB) Hon'ble Mr. Justice S M Attique Shah, J. & Hon'ble Mr. Justice Dr. Khurshid Iqbal, J.

⁷*Associated Provincial Pictures Houses Ltd v. Wednesbury Corp* [1948] 1 KB 22, 230.