

*JUDGMENT SHEET*

**IN THE PESHAWAR HIGH COURT,  
PESHAWAR.**

JUDICIAL DEPARTMENT

**W.P No. 784-P/2014 with C.Ms-327,328 and 329/2014.**

*JUDGMENT*

Date of hearing \_\_\_\_\_ 09-06-2014 \_\_\_\_\_

Appellant(s)/Petitioner (s) Peshawar University Teachers  
Association (PUTA)

Respondent (s) Govt. of Khyber Pakhtunkhwa through  
Chief Secretary.

**YAHYA AFRIDI. J:-** Peshawar

University Teachers, Association (“PUTA”)

through its General Secretary and three others seek

the Constitutional jurisdiction of this Court praying

for:

*“It is, therefore, respectfully  
prayed, that on acceptance of  
this writ petition the concerned  
respondents may be directed to  
act in accordance with law and  
the decision taken by the Chief  
Minister dated 24.2.2014 may  
be declared illegal, without  
jurisdiction and without lawful  
authority besides being  
malafide for political  
consideration and arbitrary.  
The concerned respondents  
may be restrained from taking*

*any step towards handing over the above mentioned property of the University of Peshawar to any other University or organization and may also be restrained from meddling in the peaceful possession of the property of the University of Peshawar at Azakhel Payan”.*

2. The brief and essential facts leading to the present petition are that the Syndicate of the University of Peshawar (“**University**”) in December of 2003 approved the establishment of Centre of Plant Biodiversity, which included setting of a Botanical Garden in Azakhel, Nowshera (“**Centre**”); the Higher Education Commission in order to support the University in its efforts to establish the Centre sanctioned a grant of Rs.37.861 Millions; the District Government, Nowshera, leased 83 acres of land to the University (“**leased area**”) for the establishment of the Centre vide lease deed dated 16.12.2005 (“**Agreement**”); the execution of the Agreement

was witnessed by the general public and also the then Chief Minister of the Province; the Provincial Government decided to take back from the University part of the leased area and to transfer 200 kanals thereof to Technical University and 298 kanals to Air University and thereby leaving to the University only 180 kanals of leased area for the Centre and its future development; that the summary regarding the taking back part of the leased area and transferring the same to the Private Universities was approved by the worthy Chief Minister, Khyber Pakhtunkhwa on 24.2.2014; that in pursuance thereof, the Revenue Department of the Provincial Government initiated the process of demarcation of the leased area to the Universities, as ordered and approved by the worthy Chief Minister; that aggrieved of the said action taken, the petitioners have sought the indulgence of this Court in Constitutional jurisdiction.

3. During the proceedings of the present petition, numerous applications were filed for placing on record the letters of various Departments of the Provincial Government confirming the decision of the worthy Chief Minister and the steps taken in pursuance thereof.

4. The respondent Government was put to notice. The worthy Advocate General appeared on behalf of the Respondent-Government departments and took up a preliminary objection regarding the maintainability of the present petition in view of the lack of legal standing of the petitioners to invoke the Constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 (“*Constitution*”). It was further contended that even on merit, the worthy Chief Minister has taken an appropriate step as the University despite being provided the leased area for a decade could not utilize more than 77 kanals

of the leased area and further that for the future development of the Centre, the University has been left 180 kanals. It was also brought to the attention of the Court that the part of the leased area taken back from the University would be utilized for education purposes and hence the decision of the worthy Chief Minister was “*bona fide*” and needed to be supported, as establishment of two Universities in the area would complement the Socio Economic Development of the people and, thus, also assist the University in pursuing its aim of developing the Centre.

5. The worthy counsel for the petitioners denied the contentions of the worthy Advocate General and maintained that the petition was in fact maintainable and that the petitioners have the “*locus standi*” to invoke the Constitutional jurisdiction of this Court being “*aggrieved*” of the impugned decision of the worthy Chief Minister

and in this regard contended that 'PUTA' was a registered Organization, with specific mandate of ensuring the welfare of the Teachers and the University, while the remaining petitioners were members of the Syndicate, the Governing Body of the University, which was the custodian of all properties, including the leased area of the University.

6. When the worthy counsel representing the University was asked to take a specific stance, he was unable to commit. However, after seeking fresh instructions, contended that University would not be "*aggrieved*" if the petition is accepted and the prayer of the petitioners is allowed.

7. This response so made on behalf of the worthy Vice Chancellor representing the University was not taken positively by the Court. It was noted that the University being represented by the Vice Chancellor was rather evasive in his

stance, especially when the valuable rights of the University were being affected. The worthy counsel justified the said response of the worthy Vice Chancellor of the University on the ground that the “*competent authority*” under section 23 of the University of Peshawar Act, 2012 (“**Act**”) mandated the Syndicate, to be the custodian of properties of the University and not the Vice Chancellor.

8. Valuable arguments of the learned counsel for the parties heard and the record perused.

9. There is no doubt that the law on ‘*standing*’ to invoke the writ jurisdiction of a High Court under Article 199 of the Constitution, which was previously strictly viewed, has with time developed to be more liberally construed. It is noted that as far as an “*aggrieved*” person, seeking a writ of “*Quo-Warranto*” or “*Habeas Corpus*”, the “*locus standi*” of the said person is not

decisive ‘**qua**’ the maintainability of the petition, so filed. It is only in regard to the writ of “*Mandamus*”, “*Prohibition*” and “*Certiorari*”, that the “*locus standi*” of the person seeking the same would be relevant and crucial in regarding the maintainability of the petition.

10. The present petition, as drafted, was seeking issuance of a writ of “*Prohibition*”, restraining the respondents from acting against the mandate of law, and also seeking a “*Mandamus*” to be issued, directing the Government to act in accordance with law. Surely, the “*locus standi*” of a person demanding from the Court, the issuance of writ in the nature of “*Mandamus*” or a “*Prohibition*” to the respondents officials performing the functions of the State, require “*standing*” under a law expressly vesting right in the said person to demand the same and for the respondents officials performing the functions of the State to be bound



by the clear provisions of an expressed provision of the law.

11. Though approval of the summary by the worthy Chief Minister regarding the transfer of part of the leased area was challenged seeking “*Certiorari*” to declare the same to be illegal and without lawful authority, yet the Court was not sure, whether said approval was the **final** order or otherwise. However, during the proceedings of this case, the worthy Advocate General was asked whether a definite decision regarding the matter has been made by the Government or otherwise; the worthy Advocate General committed that the decision of the worthy Chief Minister was **final** but for the restraining orders passed by this Court, the formal notification in this regard could not be issued. This clear stance taken by the worthy Advocate General expands the scope of the instant petition from seeking not only writs of

“*Mandamus*” and “*Prohibition*” but also that of “*Certiorari*”.

12. A Constitutional Court, while hearing a petition may, considering the circumstances and the development, which take place during the proceedings, can mould the relief so sought, if the facts of the case so warrant. In similar circumstances, the apex Court in *Salahudin’s* case (PLD 1975 SC 244) clearly approved the moulding of the relief. This liberal view has been consistently approved and followed by the superior Courts of our Jurisdiction in “*Israr Hussain’s* case (2014 PLC (C-S) 300 (Lahore High Court)), “*Dr. Muhammad Sadiq Saleem’s*” case (2008 PLC (C-S) 25 (Lahore High Court)), “*Aslam’s* case (2005 CLC 759 (Karachi)), “*Messrs Facto Belarus Tractors Limited Karachi’s* case (PLD 2006- Karachi-479).

13. Now, when we view the preliminary objection raised by the worthy Advocate General regarding the “*locus standi*” of the present petitioners, “*qua*” the maintainability of the petition, when the University has not questioned the decision of the Chief Minister, it is noticed that petitioners would surely come within the scope of an “*aggrieved*” persons envisaged in Article 199 of the Constitution. It is noted that the traditional view of restraining “*busy bodies*” to seek writs from Courts of law has by now taken a drastic change. The issue of “*standing*” of the person, being “*aggrieved*” of a decision, is not to be narrowly or strictly viewed. In fact, the phenomenon of “*whistle blowers*” and socially active and aware citizens voicing their concern regarding the action and inaction of the executive, has now developed, as a recognized criteria of “*standing*”. His lordship **Sh.Azmat Saeed, J,**

while voicing the views of the apex Court in “Habibullah Energy Limited’s case, (PLD 2014 SC 47) after tracing the string of earlier judgments of the apex Court, concluded that:

*“An overview of the judgments reproduced or referred to herein above leaves little room for doubt that it is now a well-settled principle of law that all public functionaries must exercise public authority, especially while dealing with the public property, public funds or assets in a fair, just, transparent and reasonable manner, untainted by mala fide without discrimination and in accordance with law, keeping in view the Constitutional Rights of the Citizens. This would hold true even in the absence of any specific statutory provisions setting forth the process in this behalf. Therefore, it is not really relevant whether the transaction in question was governed by the Ordinance, 2000 or the Rules, 2004 or neither. It is an equally well settled principle of law that such actions of public functionaries are always subject to Judicial Review.*

*No doubt while exercising its jurisdiction, the Superior Courts neither sit in appeal over the administrative actions nor interfere on account of inconsequential deviations, as has been observed in Dr. Akhtar Hassan Khan's case (supra). However, where the administrative authority acts in a discriminatory manner and action fails the test of reasonableness, transparency and / or is otherwise unjust and unfair or suffer from mala fide, the Courts not only are vested with the jurisdiction to set aside such action but any failure in such an eventuality to exercise the power of Judicial Review, when invoked, would make the Court a party to such unreasonable, unfair, mala fide and illegal action.”*

His lordship **Jawad S. Khawaja, J**, in his additional note in the said case, has gone to the extent of equating the obligations of the Government officials, to that of their fiduciary

duty to the “*people*” under the Constitution, in

terms that:

*“6. At this point, it is important to note that not all decisions by state functionaries are to be subjected to an exacting judicial oversight. This is because the principal, (the people), has in fact vested state agencies with discretionary power of an administrative nature. Such delegation of authority by the principal is essential to the efficient functioning of the government. However, given the possibility of the agent’s deliberate or negligent deviation from the best interests of the beneficiary, the court will enforce fiduciary obligations under certain circumstances. A breach of the duty of loyalty, such as in the case of a self-dealing transaction or one involving conflict of interest, will trigger heightened scrutiny by the court. Further, if public officials fail to exercise the duty of care that is expected of a prudent manager, the court will assess the underlying action or transaction to ascertain whether the state functionaries have breached their fiduciary obligations*

*to the people of Pakistan.”*

.....

.....

*“12. In conclusion, I would reiterate that the basis of discretionary power of state functionaries is the delegation of authority by the principal, the people of this country. The State’s legal authority is derived from this fiduciary relationship. If the State or its instrumentalities deviate from their fiduciary obligations, the underlying authority of the State to administer and enforce the law is thereby eroded. If this happens, the citizens, as legal subjects of the state, can no longer be expected to obey the law since the state itself has reneged on its public fiduciary duties. We, therefore, cannot condone violations of public fiduciary duties, because doing so will lead to an erosion of the basis of the state’s legal authority and the rule of law.”*

14. Keeping in view the “*ratio decidendi*” of the aforementioned judgment, the “*locus standi*” of the present petitioners to seek writ of “*Certiorari*”

for declaring the decision of the worthy Chief Minister to take back part of the leased area given to the University for the Centre would surely meet the threshold of being “*aggrieved*”, within the purview of Article-199 of the Constitution, especially when the petitioner No.1 is a registrar elected body of Teachers of the University, while the others three petitioners are not only members of the Syndicate of the University, but are also teachers in various Departments of the University, imparting education of Environmental Sciences.

15. Before parting with this judgment, no doubt the Syndicate has been vested, under section 13 of the Act, to determine matters relating to the property of the University, but, the silence and inaction of the worthy Vice Chancellor, in view of the powers vested in him under subsection-3 of section-11 of the Act to take up matters, even where it was beyond his mandate, was surely a



matter of great concern of this Court. Much was expected from the worthy Vice Chancellor, when the valuable rights of the University were being taken by the Executive Authority of the Province.

16. In view of his deafening silence and conspicuous inaction of the worthy Vice Chancellor, the initiative taken by the petitioners in filing the instant petition is highly appreciated and should be encouraged.

17. Now, moving on to the impugned decision of the worthy Chief Minister, it is noted that the issue relates to a contractual obligations entered between the two parties; the District Government, Nowshera, and the University. Lest this Court passes any definite findings on the rights and obligations of the parties under the Agreement, so as to prejudice the respective claims of the parties, suffice it to state that the decision of the worthy Chief Minister was unilateral and without the

consent of the University. This action on the part of the worthy Chief Minister exercising his discretion, without considering the stance of the University, clearly violated the cardinal principle of “*natural justice*”.

18. Accordingly, for the reasons stated hereinabove, this Court holds as under:

- (i) That the action of the worthy Chief Minister dated 24.2.2014 without providing any “*hearing*” to the University and the steps taken in pursuance thereof is illegal and without lawful authority,
- (ii) Direct the Vice Chancellor of the University of Peshawar to place the proposal of the worthy Chief Minister before the Syndicate of the University for a decision; the

meeting of the Syndicate be convened within a period of fifteen days, if not earlier from the date of receipt of this order; that the Syndicate should deliberate upon the stance taken by the worthy Chief Minister, in particular, the non-utilization of the land transferred to it for environmental purposes and his decision to withdraw a part thereof for the establishment of Universities in the leased area. In case, the Syndicate decides not to consent to the proposed withdrawal of part of the leased area, it should render its reasons in writing for taking the said decision.

(iii) Direct the Government of Khyber  
Pakhtunkhwa and the University of  
Peshawar and all its official and  
authorities to abide by the law and  
proceed in accordance therewith.

These are the reasons of our short order  
dated 9.6.2014.

No order as to costs.

**J U D G E**

**J U D G E**

**Announced:**  
09.06.2014  
(K.Ali)

**W.P N0-784/2014.**

Arguments in the case were heard on 9.6.2014 and order was announced on the same date, the judgment was finalized on 14.6.2014, which was sent to the Hon'ble 2<sup>nd</sup> Judge for signature, and finally the case was sent to the office on 18.6.2014.

Submitted please.

Private Secretary,

**Add: Registrar (Judicial)**