

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

WRIT PETITION NO.3380/2014

Dr. Kamran Jahangir.
VERSUS
Chancellor, Shifa Tameer-e-Millat University, etc.

Petitioners by : **Mr. Muhammad Anwar Mughal, Advocate.**
Respondents by : **M/S. Abdul Shakoor Paracha, Raja Saim-ul-Haq Satti and**
Riffat Hussain Malik, Advocates
Date of Hearing : **27-02-2015.**

ATHAR MINALLAH, J.- The Shifa Tameer-e-Millat University Act, 2012 was notified in the Official Gazette on 06-03-2012 (hereinafter referred to as the “*Act of 2012*”). The respondent No.3 (hereinafter referred to as the "University") is the creation of Section 3 of the Act of 2012. Its powers are enumerated in Section 4 while Chapter-3 provides for the officers of the University. The Chancellor of the University is elected by the “Chancellor Election Council” from amongst its members by a two-third majority. The composition of the “Chancellor Election Council” is provided under Section 8 of the Act of 2012. Section 10 provides for the appointment, qualifications and other requirements of a Vice-Chancellor. The University has been declared to be a *body corporate* having perpetual succession and a common seal. It may sue and may be sued by its name. Chapter-4 of the Act of 2012 provides for the authorities namely, the Senate, Syndicate and the Academic Council.

2. The petitioner was appointed as Vice-Chancellor of the University vide order dated 25-06-2013. On 25-06-2014, he received an Email from the Chancellor’s office informing him of his 'release from service'. The said Email

dated 24-05-2014 has been assailed before this Court by invoking its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the “*Constitution*”).

3. At the very outset, the learned counsel for the respondents raised a preliminary objection regarding the maintainability of the petition. The learned counsel has stressed that the University is not a 'person' for the purposes of Article 199 of the Constitution. He relied on a recent judgment of a Division Bench of this Court titled as “Miss Summara Nayaz vs. FOP through Secretary Establishment Division & 3 others”, passed in *I.C.A. No.501 of 2014* dated 22-01-2015. The learned counsel has argued that the respondent/University is a private institution and does not satisfy the test of a “person” for the purposes of Article 199 of the Constitution.

4. Conversely, the learned counsel for the petitioner has contended that the instant petition is maintainable in the light of the law laid down by the august Supreme Court in “Pakistan Defence Officers Housing Authority and others versus Lt. Col Syed Jawaid Ahmed and others”, *2013 SCMR 1707*. He stated that the University, being the creation of a statute, is amenable to the jurisdiction of this Court under Article 199 of the Constitution, despite the fact that the Federal Government has no control over it.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The respondent No.3 i.e. the University, being a private entity, is not in dispute. It is also admitted that neither any funds are received by the University from the Federal Government nor does the latter have any management control over it. It is not enough for invoking the jurisdiction of this Court under Article 199 of the Constitution that the entity against whom a writ has been sought has been established by an Act of Parliament. The said entity

also has to satisfy the test of being a “person”, as provided under Article 199 of the Constitution. Article 199 of the Constitution specifically refers to a “person”, and the expression is defined in sub Article 5 thereof. This Court in a recent judgment titled “Miss. Summara Nayaz vs. Federation of Pakistan through Secretary Establishment Division and 3 others” vide its judgment dated 22-01-2015, in I. C A No. 501 of 2014, declared another University, also established under an Act of Parliament, as not falling within the purview of the expression of a “person”. The Division Bench came to its conclusion after examining the precedent case law. It would, therefore, be beneficial to reproduce the relevant portions of the said judgment as follows :-

“Under Article 199 of the Constitution, the jurisdiction of the High Court can be invoked on the application of any aggrieved party against ‘person’ performing the functions in connection with the affairs of the Federation, a Province, or a Local Authority. For the sake of brevity, the provisions of Article 199 of the Constitution are reproduced below and are as follows:-

“Jurisdiction of High Court.—(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law, ---

(a) on the application of any aggrieved party, make an order,--

(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a Local Authority, to refrain from doing anything

he is not permitted by law to do, or to do anything he is required by law to do; or

- (ii) *declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or*

(b) *On the application of any person, make an order ---*

- (i) *Directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or*

- (ii) *Requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or ---*

In this behalf in Article 199 (5) 'person' is defined as follows:-

“Person” includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or Tribunal, other than the Supreme Court, a High

Court or a Court or Tribunal established under a law relating to the Armed Forces of Pakistan; and- - -.

The Hon'ble Supreme Court of Pakistan has time & again tried to define the concept of 'person' for the purposes of maintainability of a petition under Article 199 of the Constitution, against different Statutory Corporations or other Corporate and Juridical persons. In this regard in *PLD 2002 SC 326*, the Hon'ble Supreme Court of Pakistan held that Aitchison College falls within the definition of 'person' under Article 199 (5) of the Constitution. In another case titled "Pakistan International Airlines Corporation Vs. Tanweer ur Rehman" reported as (*PLD 2010 SC 676*), the Hon'ble Supreme Court of Pakistan laid down an exhaustive test to determine whether any entity falls within the definition of a 'person', performing functions in connection with the affairs of the Federation etc. and observed as follows:

"Now let us see what is meant by the expression 'performing functions in connection with the affairs of the Federation'. The expression clearly connotes governmental or State functions involving an element of exercise of public power. The functions maybe the traditional police functions of the State, involving the maintenance of law and order or they may be functions concerning economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Generally, these functions are to be performed by persons or agencies directly appointed, controlled and financed by the State; either by Federation or a Provincial Government. On the other hand, private organizations or

persons, as distinguished from Government or Semi-Government agencies and functionaries, cannot be regarded as a person performing functions in connection with the affairs of the Federation or a Province, simply for the reason that their activities are regulated by laws made by the State. The primary test must always be:--

- (i) whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power;*
 - (ii) whether the control of the organization vests in a substantial manner in the hands of Government; and*
 - (iii) whether the bulk of funds is provided by the State.*
- If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province, otherwise not.”*

The Lahore High Court in the case titled “Anoosha Shaigan Vs. Lahore University of Management Sciences through Chancellor and others’, reported as (*PLD 2007 56*), also laid down elaborate criteria for the determination of the status of ‘person’ for the purposes of Article 199 *ibid* and observed as follows:

“Under Article 199(a)(i) of the Constitution of Islamic Republic of Pakistan, 1973 a writ of mandamus can be issued to a person performing functions in connection

with the affairs of the Federation, a Province or local Authority. Thus, it cannot obviously be issued to some, who does not fall within the purview of the “person” defined in the Article to mean:--

“(5) ‘person’ includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or Tribunal, other than the Supreme Court, a High Court, or a Court or Tribunal established under a law relating to the Armed Forces of Pakistan.”

The word “control” appearing in the aforementioned definition is also quite significant and it is not restricted to the financial control of the “Government over a body but the executive control as well; it does not necessarily mean the financial control over the bodies that are under the dominative control of the Federal or Provincial Government, which are amenable to the jurisdiction under Article 199 of the Constitution. Thus, the judgement of the Honourable Supreme Court reported as Aitcheson College Lahore through Principal V. Muhammad Zubair and another PLD 2002 SC 326, cited by the learned counsel for the petitioner, is distinguishable from the captioned case, as the dominating control in Aitcheson College is (1) taken over under MLO (2) Governor of the Punjab is the President of the Board (3) there are Provincial Secretaries on the Board and Corp. Commanders (4) it is the Special

Institution under the Provincial Rules of Business and (5) on account of the above, it is permissible to transfer the Government servants to the Aitcheson College.

In order to ascertain the fundamental question involved in this case, whether a person who has been impleaded as the respondent in a constitutional petition under Article 199, is a “person” within the definition reproduced above, in my view, the following judgements are quite important.

In Maqsood Ahmed Toor and 4 others v. Federation of Pakistan through the Secretary to the Government of Pakistan, Ministry of Housing and Works, Islamabad and others 2000 SCMR 928 at page 933, the primary test, which was held must be applied to ascertain the above issue is, whether the functions entrusted to the Organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power; whether the control of the Organization vests in a substantial manner in the hands of Government and the bulk of the funds is provided by the State.”

“On account of the above case law, I am of the considered view that the absolute control over the management of a body/an organization by the Federation etc., is a condition most important for declaring it to be a “person” performing its functions in connection with the affairs of the Federation etc; the Federation etc. should have a complete domination to do and undo whatever it decides in running the affairs of such a body and should have the

exclusive, complete and final authority to take the vital policy decisions. Such control must be absolute, unfettered, unbridled and exclusive, besides, the State must also have the financial control of the Organization; the power of hiring and firing the employees thereof appointing and removing the management body meant for running the routine affairs of the Organization. But from the Presidential Order of 1985, though the President is the Chancellor of the LUMS, but this is notional and more with the status of a Patron-in-Chief; in practical terms except for the nomination of the persons on the Board or the Council, he does not have the administrative or policy-making control, which is the authority of the Board of Trustees and the Council of LUMS, which manages its affairs. It has been rightly pointed out by the respondent's counsel that the funds to LUMS are not being provided by the Government on regular basis, those are generated by the LUMS itself either from the fees or the donations and maybe occasionally in the nature of donation, the government also contributes, but this contribution cannot be held to be within the concept of "financial control" of the Organization. The judgements cited by the learned counsel for the petitioner, in the light of the catena of judgements from the respondent's side which have been discussed above, not only are distinguishable, rather do not apply to the facts and circumstances of the present case."

The review of the above case law indicates that the test relevant for the determination of the status of a ‘person’, performing functions in connection with the affairs of the Federation etc., is “the administrative and financial control of the Federation over the entity in question.”

7. In the light of the above, the respondent No.3 i.e. the University is not a “person” within the context of Article 199 of the Constitution, particularly when it is admitted that the Federal Government has neither any financial nor administrative and management control over it. A plain reading of the provisions of the Act of 2012, reaffirms that the University is not under the control of the Federal Government or a Provincial Government. The satisfaction of the test laid down for a “person” is a pre condition for this court to assume jurisdiction under Article 199. The said test is obviously not fulfilled by the University in the present case. There is no force in the argument of the learned counsel for the petitioner, that the creation of the University through an Act of the Parliament is sufficient for this Court to assume its extraordinary jurisdiction under Article 199 of the Constitution. Accepting this argument would render the use of the expression "person" and its definition meaningless, rather, redundant. As a corollary, it is not enough for this Court to assume jurisdiction against any body politic or corporate merely because it has been established through an Act of the Parliament. For the 'body politic' or 'corporate' to be amenable to the jurisdiction under Article 199, it simultaneously has to be a “person”, as defined in Sub Article 5 thereof. The University is indeed a 'body politic' or 'corporate' but not a “person”, as defined in Article 199(5) of the Constitution and, therefore, is not amenable to the jurisdiction of this Court. Moreover, it cannot be read into the provisions of Article 199 that an entity established by an Act of the Parliament shall be amenable to the jurisdiction of this Court despite the Federal or Provincial governments having no control over it.

8. An argument can be raised that 'person' has a nexus with 'performance with the functions in connections with the affairs of the Federation, a Province or a local authority'. Moreover, that the definition of 'person' in Article 199(5) is not exhaustive and, therefore, a juridical person created through an Act of Parliament will automatically become amenable to the jurisdiction of the Court despite the enactment not providing for financial or administrative control. Functions in connection with the affairs of the State are expansive. Education and health obviously are two such functions. The language of the Act of the Parliament reflects the legislative intention. The wisdom of the Parliament is indeed not amenable to judicial review nor can be questioned. If the Parliament in its wisdom creates a juridical person through the legislative process and does not provide for the control of the Government over it, then obviously it is intended not to bring it within the ambit of a 'person' in the context of Article 199 of the Constitution. Thus 'control', financial or administrative, is a crucial test for a 'person' and not the instrumentality through which it has been created.

9. The learned counsel for the petitioner has relied on “Pakistan Defence Officers Housing Authority and others versus Lt. Col Syed Jawaaid Ahmed and others”, 2013 SCMR 1707. The said landmark judgment infact has conclusively interpreted the expression “person” in the context of jurisdiction under Article 199 of the Constitution. The three pronged “function test” laid down in “Pakistan International Airlines vs. Tanweer-ur-Rehman”, PLD 2010 SC 676 has been affirmed for determining whether a “person” will be amenable to the jurisdiction under Article 199 of the Constitution. In Para 22 of the judgment the said test has been reproduced as follows:-

- (i). *“Whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power;*

- (ii). *Whether the control of the organization vests in a substantial manner in the hands of Government; and*
- (iii). *Whether the bulk of funds is provided by the State.”*

It was above “function test” which was applied in case of the statutory bodies to determine whether they were to be treated as a “person” or not. It is obvious that the test (i) is subject to (ii) or (iii). On the touchstone of the “function test” the University is not a “person” for the purposes of Article 199 of the Constitution.

10. It is also noted that the employment of the petitioner was of a contractual nature, as the terms and conditions were governed by the contract dated 25-06-2013. It is the case of the petitioner that his appointment on the basis of a contract was ultra vires the provisions of Section 11 of the Act of 2012. It is strange that the petitioner, at the time of accepting the employment, or till he was “released”, had not raised any objection and had accepted the terms and conditions of the contract.

11. The High Court's exercise powers and jurisdiction under Article 199 of the Constitution in rare and exceptional cases when the relief is being sought against an educational institution. In case of educational institutions, Courts are conscious of the doctrine of in 'loco parentis', Latin for 'in the place of a parent'. It relates to a presumption that an educational institution is the best judge of the interests of the students and ought to be allowed to act as it may deem appropriate. This doctrine has been upheld by the august Supreme Court in “The University of Dacca versus Zakir Ahmed”, PLD 1965 SC 90. It was observed that ‘—we are not unmindful of the necessity of maintaining discipline in educational institutions or other institutions or departments where the maintenance of discipline is essential for the orderly conduct of the institution or department concerned, nor are we unmindful of the fact that persons in charge particularly of educational institution must be given full authority to correct those

placed in their charge in the same manner as a parent or guardian would be able to do". The law was later resonated in the judgement of "Ahmed versus Vice Chancellor University of Engineering and Technology", ***PLD 1981 SC 464***. The Courts, therefore, show restraint while interfering in the administrative matters and decisions of an educational institution. This self restraint in the case of educational institutions is to safeguard and protect the autonomy, independence and sanctity of an educational institution. It is also to ensure that the discipline of the students, and authority of the faculty, is not eroded. In the case before this Court, the petitioner served the University for a considerable time. Resorting to litigation by a faculty member or officer of an educational institution, and making the latter stand before the Court in an adversarial position, is certainly not desirable. Such litigation erodes and undermines the authority and prestige of an educational institution, and inevitably has adverse effects on the impressionable minds of the students enrolled in such institutions. The jurisdiction of this Court under Article 199 of the Constitution is equitable and discretionary in nature. Even if the petitioner would have been successful in making out a case in favour of maintainability of the petition, yet this Court may not have exercised its discretionary jurisdiction, so as to uphold the authority and prestige of the educational institution i.e. the University.

12. For what has been stated above, the present petition is not maintainable under Article 199 of the Constitution as the University is not a "person" as in the context of Article 199. The petition is, therefore, accordingly dismissed.

(ATHAR MINALLAH)
JUDGE

Approved for reporting.

JUDGE

*Asif Mughal**