

Form No: HCJD/C.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

ICA No.501 of 2014

Miss Summara Nayaz

Vs

FOP through Secretary Establishment Division & 3 others.

Appellant's by: **Mr. Muhammad Shoaib Shaheen,**
Advocate

Respondents by: **Mr. Rehan-ud-Din Khan, Adv.**
Malik Faisal Rafiullah, DAG.

Date of Decision: **22.01.2015.**

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Aamer Farooq, J.- Through the instant Intra Court Appeal, the appellant has assailed order dated 09.07.2014, passed in Writ Petition No.3263/2014.

2. The facts leading to filing of the present appeal are that the appellant was appointed as an Assistant, on 02.09.2007, in International Islamic University, on adhoc basis. Her term of employment was renewed from time to time and was lastly renewed on 18.06.2010. On 06.01.2011, the appellant was appointed as Lady Warden in BPS-17, on adhoc basis, in the same department. On 26.06.2014, the appellant received a letter from respondents No.2 to 4 stating therein that her term of service shall cease with effect from 30.04.2014. The appellant feeling aggrieved of the above mentioned letter filed Writ Petition (W.P.3263 of 2014) which was dismissed vide order dated 09.07.2014 by learned Single Judge in Chambers.

3. The learned counsel for the appellant submitted that the appellant has been discriminated inasmuch as, the service of other employees was regularized but the appellant's was not. It is further submitted by the learned counsel for the appellant that prior to appointment in BPS-17, the appellant was working as Assistant in BPS-14 and was a regular employee and therefore, had lien on that post.

4. During the course of arguments, learned counsel for the appellant was confronted with the proposition whether respondent No.2, namely, International Islamic University is a "**person**" within the meaning of the word as provided in Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (The Constitution). On this question, learned counsel for the appellant placed reliance on case titled "Aitchison College, Lahore through Principal Vs. Mohammad Zubair and another" reported as (*PLD 2002 SC 326*) to substantiate that respondent No.2 is a 'person' for the purposes of Article 199 of the Constitution.

5. On the other hand, learned counsel for the respondents No.2 to 4 defended the impugned order and submitted that the appellant was an employee, on adhoc basis, and respondents No.2 to 4 decided not to renew the 'term of her service'. He further submitted that the appellant has no lien on the post of Assistant on which she was working prior to being appointed as Lady Warden in BPS-17 and that respondent No.2 is not a 'person' as provided in Article 199 of the Constitution, therefore, the present ICA is not maintainable.

6. 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 —***

7. 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- - -.

8. The Hon'ble Supreme Court of Pakistan has time & again elucidated 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 Aitcheson 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 the 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."

9. The Lahore High Court in the case titled "Anoosha Shaigan Vs. Lahore University of Management Sciences through Chancellor and others' reported as (*PLD 2007 568*) also laid down an elaborate criteria for 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."

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

11. Respondent No.2, namely, International Islamic University is the creation of International Islamic University Ordinance, 1985 (the Ordinance). The University is established under Section 4 of the Ordinance, by virtue of which it is given the status of a *Body Corporate* by the name of International Islamic University having perpetual succession and a common seal and by the same name, can sue and be sued. The President of Islamic Republic of Pakistan is the Chancellor of the University by virtue of Section 9 *ibid* and has the power to appoint Pro-Chancellor under Section 11 of the Ordinance. The other salient officer of the University includes the Rector who is appointed by the Chancellor under Section 12 and the President of the University is appointed by the Board of Trustees. Management of the University has two tier set up. The Supreme Body of the

University is Board of Trustees as provided in Section 17 of the Ordinance and second Authority/Body is the Board of Governors which under Section 21 of the Ordinance functions under the guidance of the Board of Trustees. The examination of above provisions of the Ordinance show that some Members of the Board of Trustees are ex-officio and include the office bearers of certain overseas Universities. Likewise, in the Board of Governors a significant number of persons are nominated by the Board of Trustees and the scholars appointed by Pro-Chancellor. The University, under Section 31 of the Ordinance, generates funds from any source including transfers from the Trust, fees, donations, bequests, endowments, contributions and grants. The above provisions make it clear that the Federation has little or almost no control i.e. administrative as well as financial, over the affairs of respondent No.2. The case of Aitcheson College, supra, is distinguishable inasmuch as the Governor Punjab is Chairman of the Board of Governors which also include ex-officio members. The Board, in the case of Aitcheson College, has a direct role in the affairs of the educational institution. Therefore, in light of the test laid down by Honourable Supreme Court of Pakistan as well as Lahore High Court, in the cases mentioned above, it is held that respondent No.2 is not a 'person' carrying the affairs of Federation etc. as the Government/Federation has no administrative or financial control over it.

12. In view of above, the instant appeal is dismissed as respondent No.2 and its functionaries do not fall within the definition of the 'person' for the purposes of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

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Approved for reporting.