JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

W.P. NO. 2394/2020

Muhammad Anwar
Vs.
Federal Urdu University through Registrar, etec

Petitioner by : **M/s Muhammad Sohail Khurshid and Mr. Hasnain Muzaffar, Advocates.**

Respondents by : **Mr. Atta Ullah Hakim Kundi, Advocate. (Respondent No.1)**
Mr. Talat Abbas Khan, Advocate. (Respondent No.3)
Mr. Tariq Mahmood Khokhar, Addl. A.G.
Syed Nazar Hussain Shah, AAG.
Mohammad Nadeem Khan Khakwani, AAG.

Date of hearing : **08.03.2021**

LUBNA SALEEM PERVEZ, J. Petitioner [Muhammad Anwar] has filed the instant petition challenging the appointment of Respondent No.3 (Professor Rubina Mushtaq, Department of Zoology) as Associate Professor and then as Professor alleging that she is ineligible and incompetent for the post as she did not possess the required qualification and necessary experience. The petitioner has sought the following prayers:-

> *"It is further prayed that impugned appointments of Respondent No.3 may kindly be declared unlawful, illegal and void ab initio due to non-fulfillment of qualification and experience and Respondent No.3 may also be restrained from performing her duties as Professor.*
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> *It is also prayed that Respondent No's 1, 2 &4 may graciously be directed to fill the impugned post in accordance with criteria laid down by the Respondent No.1&4.*
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> *It is also prayed that Respondent No.1 and 4 may kindly be directed to produce relevant record and list of recognized Journals by HEC for the purpose of Publications of research paper."*
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> *Any other relief which this honorable court deems fit may also be granted in the best interest of justice.".*

2. Learned counsel for the Petitioner contended that the instant petition has been filed as public interest litigation to highlight the corruption,

nepotism favoritism and malpractices in the educational institution. He submitted that respondent No.3 applied for the post of Associate Professor in the Federal Urdu University of Arts, Sciences and Technology (*hereinafter referred to as* ***University***) in the year 2009 and was appointed as Professor in the year 2010. She was nominated by the Senate of the University as Acting Vice Chancellor on 18-08-2020; vide notification F.No. 3-13/2020-IC-II; that her appointment as Associate Professor in the year 2009 was in violation of requisite criteria laid down by Higher Education Commission *(hereinafter referred to as the* ***H.E.C****)* as well as prescribed in the Federal Urdu University of Arts, Sciences and Technology Ordinance, 2002 *(hereinafter referred to as the* ***Ordinance, 2002****)* and Rules made thereunder. The petitioner submitted that since, Respondent No.3 is not eligible for the post, therefore her appointment may be declared as unlawful and illegal by issuing writ of quo warranto.

3. On the other hand, learned Additional Attorney General submitted that the present writ petition is not maintainable as the instant petition is in the nature of writ certiorari and mandamus for the reason that the petitioner is seeking quashment of appointment letters of respondent No.3 and seeking directions for the University, Selection Board and H.E.C; that only aggrieved person may seek prayer for issuance of writ certiorari and mandamus under Article 199(1)(a)(ii) of the Constitution; that the post of Associate Professor and Professor is not a "Public Office" therefore, this petition is not maintainable even as a writ quo warranto; that vide prayer No.3 the petitioner is seeking production of record of journals of HEC to verify the publication and research papers of Respondent No.3 which exercise is beyond the jurisdiction of this Court as it pertains to determination of fact; that the petition has been filed with malafide intention, hence is liable to be dismissed as not maintainable.

4. Learned counsel for Respondent Nos.1 & 2 submitted that the petition is not entertainable as no question of fundamental right of the petitioner is involved; that this Court cannot be moved as a fact finding forum while exercising constitutional jurisdiction under Article 199; that the rules and regulation of the University are non-statutory and on this score alone the petition is liable to be dismissed; that respondent No.3 was

appointed as an Associate Professor in the University in 2009 and, therefore, the instant petition is also liable to be dismissed being hit by principle of laches. He submitted that as per advertisement dated 15.02.2009, the required qualification for appointment of Associate Professor and Professor was holding of a Ph.D. Degree by the candidate in the relevant subject from the University recognized by H.E.C and since, Respondent No.3 applied for the post of Professor of Zoology and she has the required experience and qualification, she was appointed on merit. The allegation of corruption, nepotism and favoritism are therefore is illogical and based on malafides. He submitted that respondent No.3 is not a "public office holder", therefore, the instant writ petition is not maintainable as for the purposes of issuance of writ quo warranto under Article 199(1)(b)(ii) of the Constitution as the person against whom the writ quo warranto is been sought should be a "public office holder". Learned counsel referred the cases of *"Muhammad Iqbal vs. National Database Registration" (2011 MLD 541)* and cases of Indian jurisdiction titled as *P.S. Venkataswamy Setty versus University of Mysore and others and Kundan Singh versus The State of U.P. through Prin. Secretary Medical Education Lko and others and B. Singh versus Union of India (UOI) (2004 (3) SCC 363).*

5. Learned counsel for Respondent No.3 submitted that the petition is not maintainable as has been filed after 11 years of her appointment in the university thus hit by laches; that the petitioner is not an aggrieved person but a trouble maker and has not filed this petition in the interest of public at large but acting as a proxy of someone else and therefore, this petition is liable to be dismissed with cost.

6. Arguments heard, record perused.

7. Learned counsel for the respondents in common has raised the question of maintainability of this petition and also raised objections with regard to laches and malafides of the petitioner as well as involvement of factual controversies in the petition.

8. The petitioner has claimed to have filed this petition as public interest litigation against respondent No.3 as writ of quo warranto challenging her appointment is against the statute of the university i.e.

Ordinance, 2002 and Rules / Regulations made thereunder and by ignoring the required experience and qualification necessary for the post of Professor.

9. It has now been well settled and well established principle that writ of quo warranto is issued against the person, who holds a "public office" without any lawful authority, thus, holding of a public office illegally and unlawfully in any manner is an essential element for invoking provision of Article 199(1)(b)(ii) of the Constitution to grant writ of *quo warranto*.

10. It has been urged by the learned counsel for the respondents that post of Professor or Associate Professor is not a "public office" for the purposes of Article 199(1)(b)(ii) of the Constitution. The term "Public Office" has been discussed by the Hon'ble Supreme Court in the case titled ***Salahuddin and 2 others vs. Frontier Sugar Mills & Distillery Ltd. (PLD 1975 SC 244)*** wherein the Hon'ble apex Court has observed as under:-

> *"The term 'public office' is defined in Article 290 of the Interim Constitution as including any office in the Service of Pakistan and membership of an Assembly. The phrase 'Service of Pakistan' is defined, in the same Article, as meaning any service, post or office in connection with the affairs of the Federation or of a Province and includes an All-Pakistan Service, any defence service and any other service declared to be a Service of Pakistan by or under Act of the Federal Legislature or of a Provincial Legislature but does not include service as a Speaker, Deputy Speaker or other member of an Assembly. Reading the two definitions together, it becomes clear that the term 'public office', as used in the Interim Constitution, is much wider than the phrase 'Service of Pakistan', and although it includes any office in the Service of Pakistan, it could not really refer to the large number of the posts or appointments held by State functionaries at various levels in the hierarchy of Government.*
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> *A public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached . . . The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of government, either executive, legislative or judicial, to be exercised by the holder for the public benefit Unless his powers are of this nature, he is not a public officer".*

11. Learned counsel for the respondents also relied on the case of Indian Jurisdiction titled as ***"Kundan Singh vs. The State of U.P***" decided by High Court of judicature at Allahabad (Lucknow Bench) wherein, it has been held that:-

> *"Considering the judicial pronouncements with regard to "Public Office" which would, fall under the scrutiny of the Court's while exercising the discretionary power of issue a writ of quo warranto would be the offices created by the Constitution or any statute and such offices should have a fixed tenure apart from being conferred some portion of the sovereign power of the Government.*
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> *Needless to say that the post of Professor is missing from the officers of the University. Professors of the University clearly do not exercise any Government functions nor are vested with the power or charged with the duty of acting in execution of enforcement of the law. They are merely employees under a statutory body, and therefore, cannot in any sense be described as public offices in respect of which a writ of quo warranto would lie.".*

12. The Ordinance 2002 was thus, gone through, according to which the University has been created through Ordinance, 2002 promulgated by the President on 13.11.2002, which consists of person's mentioned in Section 3(2); the University has been given status of body corporate having perpetual seal u/s 3(3) and powers to acquire, hold, lease, sell, or otherwise transfer moveable and immoveable property. It has also given academic, financial and administrative autonomy as well, vide section 3(4) of the Ordinance 2002. The University *inter alia* has been vested with powers to constitute Professorships, Associate Professorships, Assistant Professorships and Lectureships and any other posts and to appoint persons thereto vide section 4(xviii); and vide section 2(u) of the Ordinance 2002 the definition of the "teachers" include Professors, Associate Professors, Assistant Professors and Lecturers engaged whole-time by the University or by a constituent or affiliated college and such other persons as may be declared to be teachers by Regulations. The teachers are appointed and governed by Employees Service Rules framed under section 26 read with section 4(iv) of the Ordinance, 2002 framed and promulgated with the approval of Syndicate of the University. The Professors, Associate Professors, Assistant Professors and Lecturers, being academic staff, appointed by the University only to impart education and ancillary activities, as such, have not been placed in the list of Officers of the University, vide section 7 of the Ordinance 2002. Careful analysis of all these provisions clearly shows that the Professors / Associate Professors simply are the employees of the University and governed by non-statutory Employees Service Rules, thus, in my opinion the holder of the post of

Professors / Associate Professors of a University cannot be said to be "holding a public office" as defined in the case laws referred supra.

13. The next contention of the learned counsel for Respondent No.3 is that the petition is hit by laches. Record revealed that Respondent No.3 joined the University as Professor through competitive process in the year 2010 in pursuance of advertisement published in the newspaper dated 15.02.2009. The contention of the respondent has considerable force, that the petitioner all of a sudden after a period of more than 10 years of the appointment of respondent No.3 has filed this petition without any valid and plausible reason for not agitating the appointment at the relevant time. The petition is thus hit by laches for inordinate and explained delay.

14. Learned counsel for the respondents also has strongly objected to the locus standi and the malafide of the petitioner for filing this petition. Careful perusal of the documents and record of the case revealed that the Senate headed by the Chancellor of the University vide its 43rd meeting held on 18.08.2020 decided to appoint respondent No.3 as Acting Vice Chancellor of the University. Soon thereafter, this petition was filed whereby the appointment of respondent No.3 as Professor was challenged. Another petition bearing W.P No. 2736 of 2020 was subsequently filed by the same petitioner whereby he challenged the notification F.No. 3-13/2020-IC-II dated 17.09.2020 issued to notify Respondent No.3 as Acting Vice Chancellor, for a period of six (6) months or till the appointment of permanent Vice Chancellor whichever is earlier. The said petition was dismissed by this Court vide judgment dated 11.11.2020 and the appeal bearing I.C.A No. 376/2020 filed against the said judgment by petitioner was also dismissed *in limine*, vide order dated 22.12.2020. It has been admitted by the learned counsel for the petitioner that the order passed in ICA has not been further assailed before the Hon'ble Supreme Court. The fact of consecutive filing petitions against respondent No.3 clearly indicate that these petitions have not been filed with bonafide purpose or for the interest of general public as claimed by the petitioner but the provision of Article 199 of the Constitution has thus been used prima facie against Respondent No.3 when she was nominated as acting Vice Chancellor. In this regard, a judgment of the Hon'ble Lahore High Court titled as

"Muhammad Iqbal vs. National Database Registration" (2011 MLD 541) has been referred by respondent whereby the petitions filed by the petitioner seeking quo warranto were dismissed holding that the relief in quo warranto is not granted as a matter of course, the conduct and motives of the person seeking such writ should also be taken into consideration. The relevant paragraph from the judgment is reprod uced below:-

> *7. In the matters of writ petitions seeking the issuance of a writ of quo-warranto, the grant of relief of a writ of quo warranto is not a matter of course and the conduct and motives of the petitioner can be looked into by this Court when such a prayer is submitted. I am fortified in this context by the following case-law:*
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> *(i) In Aziz-ur-Rahman Chowdhury v. M. Nasir Uddin, etc. (PLD 1965 Supreme Court 236), the Honourable Supreme Court of Pakistan held at page-247 that the remedy of writ of quo warrnato is not a writ of course. The Court from which a writ was sought was entitled to inquire into the conduct and the motives of the appellant for such a writ.*
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> *(ii) In another judgment reported as Muhammad Liaquat Munir Rao v. Shams-ud-Din and others (2004 SCMR 489), the Honourable Supreme Court of Pakistan examined this aspect after discussing the previous case-law in the following manner in paragraphs Nos.9 and 10 at pages 729,730 which paragraphs are reproduced below:--*
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> *"(9) The question of conduct of a writ petitioner and the delay in filing a writ of quo warranto was considered in a number of cases. In the Full Court judgment in Federation of Pakistan v. Haji Muhammad Saifullah Khan and others (PLD 1989 SC 166 at page 218) the relevant observations made in earlier case of Dr. Kamal Hussain and 7 others v. Muhammad Sirajul Islam and others (PLD 1969 SC 42) were reproduced as under:--*
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> *"Under Article 98(2)(b) "any person and not necessarily an aggrieved person can seek redress from the High Court' against the usurpation of a public office by a person who is allegedly, holding it without lawful authority." On that account it cannot be doubted that Mr Siraj-ul-Islam did have the locus standi to file the petition. But the grant of relief in writ jurisdiction is a matter of discretion, wherein it is quite legitimate on the part of the High Court to the test bona fides of the relator to see if he has came with clean hands. A writ of quo warranto in particular is not to issue as matter of course on sheer technicalities on a doctrinaire approach. In the present case, considering all the circumstances I cannot escape the feeling that Mr. Siraj-ul-Islam is not entirely playing his own game, for high altruistic motives, and that he has instituted the writ petition not so much for the vindication of any public right or the redress of a public wrong as to redeem the discomfiture of the defeated candidates, and to*

fight their battle on another front which some of them had already waged by the process of the election petitions within its limitations. The delay has occurred in the filing of the petition which has not been satisfactorily explained is not without effect on the grant of this discretionary relief".

In M.U.A. Khan v. M. Sultan and another (1981 SCMR 74), this Court dealt with the issue in the following words:

"Before parting with the case, we cannot help remarking that the petition instituted by the present appellant, does indeed appear to be an extension of the litigation commenced against the respondent by an official of his own Department. The appellant does not appear to have been motivated by any sense of public duty and it is accordingly a matter of some regret "

The observations made in, the case of M.U.A Khan (supra) apply, with equal force, to the facts and circumstances of the present case. In Ghulam Rasool v. Muhammad Hayat (PLD 1984 SC 385) a polling agent of a losing candidate for the election of Zila Council had filed a writ of quo warranto against the successful candidate. This Court took the view that such a person should be deemed to be acting not probono publico but for the benefit of a losing candidate and issuance of writ was declined. In the case of Azizur Rahman v. M. Nasiruddin and others (PLD 1965 SC 236), it was held that a writ of quo warranto was not a writ of course and the Court was entitled to inquire into "conduct and motives" of applicant and to refuse the writ where information laid was of a vexatious nature. In the case of Syed Ali Raza Asad Abidi v. Ghulam Ishaq Khan, President of Pakistan and another (PLD 1991 Lahore 420), a learned Division Bench of the Lahore High Court had dismissed a writ of quo warranto on the ground of lathes also where the inordinate delay of more than three years in filing the same was not explained.

(10) In Halsbury's Laws of England, 4th Edition, 1989, Volume 1(1), at page 372 para. 274, it is stated that:--

"an information in the nature of quo warranto was not issued, and an injunction in lieu thereof would not be granted, as a matter of course. It was in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case. The Court would inquire into the conduct and motives of the applicant, and the Court might in its discretion decline to grant a quo warranto information where it would be vexatious to do so."

15. Thus, the conduct, motive and intention of the person and the purpose of filing petition are of immense importance required to be looked into for issuing writ of *quo warranto* as held in authoritative pronouncement of Hon'ble Apex Court. By applying the said test to facts and circumstances of the instant writ petition, it revealed that the petition has not been instituted as probono for public interest, but for malafide intentions against respondent No.3.

16. Regarding clause 3 of prayer clause of the petition, whereby the petitioner is seeking directions for the University and the HEC to produce all the record and list of recognized journals by HEC wherein the research papers of respondent No.3 have been published. I am of the opinion that this is an attempt to dispute the research papers published in journals. Moreover, the calling of record of University and HEC for ascertaining the research publications requires probe into facts and in view of the settled principle, that the High Courts are not a fact finding forums thus should not involve in thrashing out the facts of the case while sitting in the constitutional jurisdiction under Article 199 of the Constitution.

17. In view of the foregoing discussion, it is held that Respondent No.3, being a Professor of the University is not a Public Office holder; the petition is hit by the principles of laches; has not been filed with bonafide intentions as prima facie it has been filed to target the Respondent No.3 for assigning her charge of Acting Vice Chancellor by the Senate and lastly it is not filed in the interest of general public, therefore, for the reasons discussed above the present petition, is hereby ***dismissed,*** accordingly.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on _____

JUDGE

Approved for Reporting
Blue Slip added.