



IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

C.P. No.D-266 of 2013

PRESENT:

Mr. Justice Naimatullah Phulpoto,
Mr. Justice Salahuddin Panhwar,

Petitioner : Athar Abbas Solangi, advocate (in person).

Respondent: The Province of Sindh & others
Through Mr. Mr. Abdul Hamid Bhurgari, Addl. A. G,
assisted by Mr. Ameer Ahmed Narejo, State Counsel
alongwith Mr. Muhammad Saleem Shaikh, Assistant
Engineer, for XEN, Education Works, Larkana and
Colonel (R) Iftikhar Hussain, Principal Cadet College,
Larkana.

Date of hearing : 20.05.2014.

ORDER

SALAHUDDIN PANHWAR, J.- Through instant Constitutional Petition, the

petitioner has invoked Constitutional jurisdiction of this Court and prays as under :

- a) *That this Honourable Court may graciously be pleased to restrain the respondents No.1 to 5 from purchasing the private land for establishment of Girls Cadet College when government land is already not only available but offered by the Board of Governors Cadet College Larkana, for the purpose free of costs.*
- b) *That this Honourable Court may kindly be pleased to restrain the respondents No.4 and 5 from inviting Tenders for the construction work of Girls Cadet College at Garhi Khuda Bux where no government land is available for the said purpose.*
- c) *That this Honourable Court may kindly be pleased to direct the respondents No.1 to 6 for establishment of Girls Cadet College Larkana at the location near existing Boys Cadet College Larkana as found feasible by the Technical Committee of P & D Department in its meeting held on 3rd November 2009 where 150 acres land is provided by respondent No.6 free of costs.*



2. The petitioner/advocate has *inter-alia* contended that he filed C.P.No.D-1432/2010 on same subject matter whereby directions were issued to the Secretary Education that he shall take into consideration all factors, pleaded in the petition, and also to seek advice and consult Principal of Cadet College Larkana; officials respondents in spite of available government land near Airport, very feasible for establishment of Girls Cadet College have decided to establish the said college at Garhi Khuda Bux by acquiring the private land which is against spirit of judgment passed by this Court. It is further contended that no proper consultation was made, hence decision of government regarding establishment of Girls Cadet College at Garhi Khuda Bux is completely against the law and such act is designed to oblige their favorites by acquiring their land at high costs. Lastly the petitioner/learned advocate has relied upon the cases of Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 Karachi 408, Al-Jehad Trust v. Federation of Pakistan PLD 1996 Supreme Court 324, Al-Jehad Trust v. Federation of Pakistan PLD 1997 Supreme Court 84, Shahid Orakazi v. Pakistan PLD 2011 SC 365.

3. On the other hand learned Addl. A. G, while refuting the above contention, raised by the petitioner, has contended that instant petition is not maintainable under the law as summary regarding Cadet College, passed by worthy Chief Minister, Sindh is completely within the spirit of judgment passed by this Court, hence no illegality is committed; instant petition is not maintainable; it is settled law that policy decision cannot be disturbed in writ jurisdiction. Learned Addl. A. G has relied upon the cases of Zamir Ahmad Khan v. Government of Pakistan 1978 SCMR 327, Abdul Haque v. State PLD 1996 SC 1.

4. After careful consideration of contentions raised by counsel for respective parties and meticulous examination of available record, it is surfaced that earlier on this very issue the petitioner had filed C.P.No.D-1432/2010 (re: Athar Abbas v. Province of Sindh and others) before this Court which was decided on merits,



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therefore, before addressing the merits of the instant petition it would be just and proper to examine the judgment dated 19.7.2012 of this Court passed in earlier petition so as to see the applicability of *Res Judicata* as it is settled principle of law that doctrine of *Res Judicata* has got its application even in writ jurisdiction. Reference can be made to the case of *Mirza Ahmed Yaqoob v. Chief Settlement Commissioner Lahore* and another reported in PLD 1965 SC 254, case of *Muhammad Saleemullah and others v. Additional District Judge Gujranwala and others* reported in PLD 2005 SC 511 and case of *Ghulam Akbar Lang v. Deewar Ashique Hussain Najari and others* reported in 2012 SCMR 366. Thus, keeping in view this legal position we have scanned earlier petition and judgment passed by this Court, which reveals that parties and subject matter are same and such controversy was decided after complete adjudication by this Court. With regard to the contention that respondents have not consulted with Principal Cadet College Larkana and its Board of Governors, it would be conducive to refer the relevant portion of that judgment :

Consequently, this petition is disposed of in the following terms:-

1. *That the Secretary, Education and Literacy Department, shall take into consideration all the factors pleaded in the petition and the documents placed before this Court (some of the factors stated above) and thereafter put up a well considered summary clearly laying down his recommendations on the basis of the material available. He should seek advice and consult Principal of Cadet College, Larkana, its Board of Governors and such other persons as he may consider qualified and competent to provide necessary advice*
2. *After the summary put up, it shall be considered and decided in accordance with the law.*
3. *Till such time such final decision is made no further steps for setting up of the Girls College shall be taken.*
4.
5.

From perusal of earlier judgment with above direction, it is patent that while adjudicating all the issues on merits this Court has categorically mentioned that ***"Secretary, Education and Literacy Department, shall take into consideration all the***

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factors pleaded in the petition and the documents placed before this Court (some of the factors stated above) and thereafter put up a well considered summary clearly laying down his recommendations on the basis of the material available. He should seek advice and consult Principal of Cadet College, Larkana, its Board of Governors and such other persons as he may consider qualified and competent to provide necessary advice.”

5. It is further matter of record that pursuant to the judgment passed by this Court summary for establishment of Shaheed Benazir Bhutto Cadet College Larkana was floated to Chief Minister Sindh which is available at page 87, which reflects as under :

“9. In compliance of directions of the Honourable Court, the Department approached the Principal, Cadet College Larkana / Board of Governors, Executive Engineer, Education Works Division, Larkana vide letter No.. EDU&L/P&D/ADDL:DIR-I/C. Garhi Khuda Bux/Lrk/2012/1357 dated 24.9.2012 for seeking their comments / recommendations according to the decision of Honourable Court.

10. The Executive Engineer, Education Works Division, Larkana and the Principal Boys Cadet College Larkana furnished their recommendations as under :

i. **The views / comments of the Executive Engineering, Education Works Division, Larkana (Annexure-IV).**

- That the land of the boys Cadet College Larkana where a new Girls Cadet College is offered to be constructed is worst of its kind, water logged, saline, marshy with low bearing capacity, unfertile, with high water table, low lying. The construction on the very soft soil will definitely require a very huge amount with wide and deep foundation, excessive cost of earth filling and a heavy cost of maintenance with no chances of development of landscape.

ii. **The views / comments of the Board of Governor's/Principal, Cadet College ,Larkana (Annexure-V).**

- The consultants (M/s ESSOI-AAR Karachi, Ph.D in structure) – one of the renowned architects / consultants of Pakistan – who had already worked on so many projects of District Larkana such as ZA Bhutto Masoleum at Garhi Khuda Bux, Naudero House at Naudero, SZABIST School and College Larkana, have confirmed that the;

Geology and geotechnical condition of the Larkana District, specially Garhi Khuda Bux and existing area of Cadet College Larkana, are almost same.

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The area is not earthquake prone area, and even if it had been of such geological condition, the soil is not sensitive and will not be subject to liquefaction, and the area has no any geological fault.

The area of and around Cadet College Larkana is very much suitable for any kind of construction; the imposing structure of Cadet College Auditorium Swimming Pool, Hostels, and the Model School are constructed on the same soil, and none of its buildings has shown any sign of distress.

Further, two more mega projects are currently under construction on the same soil at Larkana – Moen-Jo-Daro Road, i.e. SBB Medical University and Qaid-e-Awam Engineering University Certainly, these mega – projects are not being built without sound soil – testing procedures.

11. It has been observed that they have based their recommendations on the report of same Consultant, who provided conflicting reports to them, so the same was forwarded to the Commissioner, Larkana for his comments specially on land issue which is as under.

Regarding the same point the report of Principal, Cadet College, Larkana claims that there is no issue of land and that the quality of land in the whole Larkana District is same, XEN, Education Works, Larkana and the Principal have shown reports of same consultant i.e. ESS-I-AAR which are contradictory.

12. The Commissioner, Larkana Division responded to our correspondent by positively supporting the location at Garhi Khuda Bux being less developed as compared to area having cadet college, Airport, university and other Institutions, however opined that Technical Committee of Planning & Development Department may also be tasked to assess technical feasibility of the project so far as location is concerned (Annexure-VI).

13. The scheme viz. "Establishment of Shaheed Benazir Bhutto Girls Cadet College, at Garhi Khuda Bux, Larkana" was included in the ADP 2010-11 at G. Sr. No.1297 approved by the Sindh Assembly in its budget sessions and also reflected in the current year ADP 2012-13 at G. Sr. No.1792, may have admissions of Girl Cadets from the adjacent districts of upper Sindh and southern Punjab besides some bordering districts of Balochistan Province, therefore, in view of position explained in preceding paras the Honourable Chief Minister, Sindh may like to pass appropriate orders for the location of college."

6. While scanning this, it reveals that summary based on conflicting views of experts, is yet pending for final decision of competent authority. Moreover it is surfaced that respondent No.6 (Principal Cadet College), in his comments has categorically, mentioned that : "The Board of Governors Cadet College Larkana

decided to provided following facilities for the Shaheed Benazir Bhutto Girls Cadet College in the largest interest of an educational institution for girls:-

- a. 150-acre land free of cost, estimated to cost Rs.100.0 million
- b. Infrastructure and administrative support till the SBBGCCL was established/start functioning.
- c. Principal Cadet College Larkana to look after all the functions and take all necessary steps for PC-I plan, implementations, etc. from the Federal and provincial government.
- d. Faculty support so that when SBBGCCL was ready it could start functioning immediately.

7. It is noteworthy to mention here that purpose, object and need of the Girls College is not disputed but a good decision of the Government to provide the 'girls'; a cadet college could not be dressed up due to the litigation pending since 2010, even, not a single brick could be laid at the site during such period. Needless to add that had such delay not occasioned number of girls, without any limitations of colour, caste or area, could have availed education from the proposed Girls College. Moreover, in policy matters it should never be the choice but the feasibility and object of the scheme which matters. Since, it is not an individual to question the policy matter (s) or decision of the Government but it is the Government itself unless it is shown or established that such move is entirely illegal or based on some malafide or result of excess of jurisdiction and authority. We shall take advantage of the case of Dossani Travels (Pvt) Ltd v. Travels Shop Pvt. Ltd. PLD 2014 Supreme Court 1, whereby Honourable Supreme Court has held as under :

"....Mala fide is a question of fact and has to be specific and not vague in absence of which an order passed or policy framed by the competent authority cannot be annulled on this ground alone. In Dr. Akhtar Hassan Khan v. Federation of Pakistan (2012 SCMR 455), dilating on mala fide as a ground for judicial review, this Court at page 486 held as follows:-

"The allegations of mala fides and of the impugned exercise being collusive are questions of fact requiring factual inquiry. It is by now a well established principle of judicial review of administrative action that in absence of some unrebuttable material on record qua mala fides, the Court would not annul the order of Executive Authority which otherwise does not reflect any illegality or jurisdictional defect. In Federation of Pakistan v.


Saeed Ahmed Khan (PLD 1974 SC 151), this Court was called upon to dilate upon the mala fides as a ground for exercise of power of judicial review of administrative action and the Court observed as follows :--

"Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity, and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.

"Mala fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to be benefit oneself."

Without prejudiced to above it is evident from the record that this court in earlier judgment has left the discretion upon the Government and authority to decide the fate of summary regarding establishment of college, within the parameters, as laid down in judgment. Keeping in view the given circumstances, we are of the considered view that instant petition *inter alia* falls within the ambit of *resjudicata*, ~~as well as~~ ~~in the~~ ~~case of~~, when manifestly summary is yet pending for decision.

8. For the foregoing reasons, instant petition was dismissed by our short order dated 20.05.2014. Office is directed to send facsimile copy of instant order to all concerned.


 Judge^s 21/5/2014

 Judge