

JUDGMENT SHEET**PESHAWAR HIGH COURT,
PESHAWAR*****(Judicial Department)*****W.P. No. 151-P/2021****JUDGMENT**Date of hearing: **04.08.2021****Petitioners:- (Abdul Wakeel & 5 others) by Mr. Saleem Shah Hoti, Advocate.****Respondents: - (Govt: of KPK & others) by Mr. Sardar Ali Raza, Addl: A.G. and Mr. Nazeer Ahmad, Advocate for respondents No. 7, 12 & 13.**

WIQAR AHMAD, J.- Petitioners are aggrieved of order dated 17.12.2020 of the learned Advocate General Khyber Pakhtunkhwa, whereby he has recalled the sanction earlier granted to the petitioners on 04.08.2020 under sections 91, 92 of the Code of Civil Procedure, 1908 (hereinafter referred to as "***CPC***").

2. Petitioners had applied for grant of sanction to bring a suit in respect of protection and recovery of public property, as claimed in the application. Said application had been sent by the learned Advocate General Khyber Pakhtunkhwa to Deputy Commissioner Peshawar for inquiry and report. After submission of report and considering the opinion of learned Assistant Advocate General

sanction was accorded under sections 91, 92 CPC for institution of the suit on 04.08.2020. The petitioners filed a suit before the learned civil Court on 06.08.2020. Said suit was pending before the Court of learned Civil Judge Peshawar wherein the respondents (some of the defendants) had also filed their written statement, when the learned Advocate General Khyber Pakhtunkhwa passed the impugned order dated 17.12.2020, again on the basis of report of Additional Deputy Commissioner Peshawar and a second opinion of an Additional Advocate General and thereby the earlier granted sanction was withdrawn. Feeling aggrieved from said order, the petitioners have filed the instant writ petition with the following prayer;

“It is, therefore, prayed that on acceptance of this writ petition, the impugned office order No. 11647/AG, dated 17.12.2020 of respondent No. 2 may very graciously be declared as illegal, coram-non-judice and without jurisdiction and the office order No. 8358/AG, dated 04.08.2020 may kindly be restored.”

3. The learned counsel for petitioners submitted during the course of his arguments that once learned Advocate General Khyber Pakhtunkhwa have granted sanction under sections

91, 92 CPC he had become *functus officio* and left with no powers of recalling his earlier order. He next contended that powers of the Advocate General were subject to judicial review of this Court and same has also been calling for interference of this Court.

4. The learned Addl: Advocate General submitted in rebuttal that the Advocate General has got powers to recall his earlier order, under section 21 of the General Clauses Act, 1897 and that thus the impugned order had been passed with lawful authority and not questionable on any score.

5. Private counsel for respondents No. 7, 12 & 13 referred to earlier litigation on same disputed property in order to substantiate his assertion that the petitioners who had been plaintiffs before the learned civil Court had brought the suit with *malafide* intention and for harassing the respondents and contended that in such circumstances the learned Advocate General had rightly revoked the earlier granted sanction.

6. We have heard arguments of learned counsel for the parties, learned Addl: A.G, for official respondents and perused the record.

7. Perusal of record reveals that the learned Advocate General had granted sanction to the petitioners after satisfying himself by calling for report of the Deputy Commissioner Peshawar. The Deputy Commissioner Peshawar had submitted his report after a summary inquiry, wherein the allegations of petitioners had been found tenable. Then the learned Advocate General, after obtaining an opinion of an Assistant Advocate General of his office granted sanction to the petitioners for institution of the suit on 04.08.2020. As stated earlier, the suit was also instituted and same was still pending when the respondents moved another application whereupon report of the Deputy Commissioner Peshawar was called and this time a different report was submitted by the Additional Deputy Commissioner concerned, opposing the plea and stance of the petitioners. Thereafter the learned Advocate General called for an opinion of Additional Advocate General and recalled the earlier granted sanction vide the impugned order dated 17.12.2020.

8. The Advocate General has been entrusted with the responsibility by sections 91 and

92 of the Code of Civil Procedure, 1908, which are reproduced hereunder for ready reference;

Section 91, Public nuisances; -

“In the case of a public nuisance the Advocate General, or two or more persons may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

Section 92, Public Charities.-

(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained may institute a suit, whether contentious or not in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the (Provincial Government) within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree-

- (a) Removing any trustee;*
- (b) Appointing a new trustee;*
- (c) Vesting any property in a trustee;*
- (d) Directing accounts and inquiries;*

- (e) *Declaring what proportion of the trust-property or of the interest therein, shall be allocated to any particular object of the trust;*
- (f) *Authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;*
- (g) *Settling a scheme; or*
- (h) *Granting such further or other relief as the nature of the case may require.*
- (2) *No suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.”*

9. Section 93 provides that the powers entrusted to Advocate General by sections 91 & 92 CPC may be exercised by Collector with the previous sanction of the Provincial Government, or by such other officer as the Provincial Government may appoint in this behalf. The nature of powers to be exercised under sections 91 or 92 CPC are administrative in nature as held by Rajasthan High Court in the case of **Shrimali Lal Kasliwal vs. Advocate General** reported as *AIR 1955 Raj 166*. These powers are neither judicial nor quasi-judicial in its nature. Exercise of such powers neither require hearing of both the parties, nor any other factual inquiry is needed for the purpose of determination of

rights, as no such rights are determined in these proceedings. While granting sanction the Advocate General can only satisfy himself whether consent for institution of a suit should be given or not. After the consent is given and when the suit is instituted, the process of determination of rights begins. Then it is for the civil Court to determine the rights or obligations in the suit so instituted. The nature of powers to be exercised by Advocate General under sections 91 and 92 CPC or by other administrative officers under section 93 CPC, (after previous sanction of the Provincial Government) are therefore administrative in nature. Such powers are divested of the character of judicial or quasi-judicial proceedings as held by a Division Bench of Allahabad High Court in the case of **Swami Shantanand Saraswati vs. Advocate General. U.P. Allahabad** reported as *AIR 1955 All 372*. In the entire Code of Civil Procedure, no power of review or reconsideration of a sanction granted by the Advocate General has been provided. Such orders made by Advocate General have not been appealable before any forum nor does a revision lie there-against. This also sufficiently establishes that the legislature has never intended these powers to be exercised as judicial or quasi-

judicial powers. The jurisdiction provided for review under section 114 CPC cannot be exercised by Advocate General for review of an order made under sections 91 and 92 of CPC, as such powers can only be exercised by the Court which passed the decree or made the order and only a Court may make such an order of review, which fact is clear from clause (c) of sub-section (1) of section 114 CPC.

10. Contention of the learned Additional Advocate General that the Advocate General or an administrative officer has got the power to revoke his earlier granted sanction — by making resort to the powers entrusted in administrative authorities by section 21 of the General Clauses Act, 1897 (hereinafter referred to as “*the Act*”) – is also ill conceived. Said section being relevant is reproduced hereunder for ready reference;

“21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules, or bye-laws -
Where, by any (Central Act) or Regulations, a power to (issue notifications) orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and condition (if any), to add to, amend, vary or rescind any (notifications), orders, rules or bye-laws so (issued).

11. The locus poenitentiae for recall of an order available to Advocate General under section 21 of the Act was no more available to him the moment suit was instituted before the civil Court. When the Advocate General grants sanction for institution of a suit and the suit is instituted then decisive steps are taken and vested rights (of prosecuting the suit before the civil Court for redressal of the grievance) are acquired by the party in whose favour such sanction is granted. When decisive steps are taken and valuable rights are acquired then the locus poenitentiae cannot be exercised by the authority as held by Hon'ble Supreme Court of Pakistan in the case of **Pakistan through the Secretary Ministry of Finance vs. Muhammad Himayat Ullah Faruki** reported as *PLD 1969 Supreme Court 407*. Relevant findings of the august Court, given in said respect, are reproduced hereunder for ready reference;

“There can hardly be any dispute with the rule as laid down in these cases that apart from the provisions of section 21 of the General Clauses Act, locus poenitentia, i.e., the power of receding till a decisive step is taken, is available to the Government or the relevant authorities. In fact, the existence of such a power is necessary in the case of all authorities empowered to pass orders to retrace the wrong steps taken by them. The authority that has the power to make an order has

also the power to undo it. But this is subject to the exception that where the order has taken legal effect, and in pursuance thereof certain rights have been created in favour of any individual, such an order cannot be withdrawn or rescinded to the detriment of those rights.”

12. In a recent judgment of the Hon’ble Supreme Court of Pakistan given in the case of “Government of the Punjab Education Department through Secretary Higher Education, Punjab and others versus Muhammad Imran and others” reported as 2019 SCMR 643 exceptions to the principle of locus poenitentiae was restated after a survey of the existing case law, in the following words: -

“Keeping in view the above deliberation, it is noted that there is a judicial consensus on the issues in hand in terms that;

- i) The Authority which can pass order is entitled to vary, amend, add to or to rescind the same under section 21 of the General Clauses Act, 1897;*
- ii) The jurisdiction to recall the earlier order is based on the principle of locus poenitentiae;*
- iii) There is an exception to the principle of locus poenitentiae vesting power in an authority to recall its earlier order: if in pursuance of the order passed by the authority, an aggrieved person*

takes decisive steps, and changes his position;

- iv) None can retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority is illegal, void or without lawful authority. In such circumstances, it would not matter, even if decisive steps have been taken by the person in pursuance of the illegal order passed by the authority. However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority cannot be recovered from him unless the benefiting order was obtained by the person through fraud, misrepresentation or concealment of material facts.*

13. In the present case there has been no substance before the Worthy Advocate General that the earlier order had either been obtained on the basis of some fraud or was void and without lawful authority. The earlier order had also been based upon an inquiry conducted through the office of Deputy Commissioner Peshawar as well as opinion of an Assistant Advocate General of the office of Advocate General, Khyber Pakhtunkhwa and no allegations of committing any fraud by the petitioners has been indicated while passing the subsequent order or brought before this Court during hearing of the case. The earlier order was also not

illegal, void or without lawful authority as at the relevant time the Advocate General had been possessing the authority under sections 91 as well as 92 of CPC. We are therefore convinced that at the time when the learned Advocate General entertained application of the respondents, during pendency of the suit and recalled his earlier order, he had been divested of the locus poenitentiae for recalling same.

14. Another aspect of the case is that when consent is granted and suit is instituted then the provisions of CPC regulating the progress of suit becomes applicable, stage to stage. Nowhere in CPC it has been provided that progress of the suit shall be subject to consent or pleasure of the Advocate General or that he may terminate such proceedings at his will. If the powers of the Advocate General to withdraw his consent in a pending suit, are conceded, it would carry the effect of allowing the Advocate General to terminate the proceedings at any stage whether it is fixed for final arguments or order of the Court and even at the stage of a pending appeal in the suit. Such a power would vest the Advocate General or an

administrative officer authorized under section 93 CPC to interfere in the judicial proceedings and to cause its termination before the civil Court and even before the appellate Court, be that a High Court of the province. Resolving the matter in this way would naturally produce absurd consequences. This is cardinal principle of interpretation of statutes that such interpretation cannot be placed upon provision of a statute which produces absurd consequences. A Para from a leading authority on the subject i.e. **“Maxwell on Interpretation of the Statutes”** (Twelfth Edition by P.St. J. Langan) may be quoted here with benefit;

“All intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available. Where to apply words literally would defeat the obvious intention of the legislation and produce a wholly unreasonable result. We must do some violence to the words and so achieve that obvious intention and produce a rational construction.”

In the case of **Muhammad Hashim Khan vs. Major Fazal Ellahi Khan** reported as **PLD 1959 (W.P.) Quetta 1**, the Hon’ble High Court has held that there has always been a presumption against absurdity in statutes. Almost similar view has also been expressed in the case of **Sheikh Abdul**

Majid and others vs. Bhudar Chandra Ghosh and others reported as *PLD 1964 Dacca 756*, where the Hon'ble High Court has held that a Court could presume that legislature had not intended the absurdity. The principle of presumption against absurdity occurring in the language of a statute, has also been upheld by the Hon'ble Supreme Court of Pakistan in the case of **Khalid Qureshi and 5 others vs. United Bank Limited I.I. Chundrigar Road, Karachi** reported as *2001 SCMR 103*.

15. As a corollary to the reasons given above and on allowing of the instant constitutional petition, the impugned order dated 17.12.2020 is declared to be without lawful authority, null, void, ineffective upon rights of the parties and resultantly set aside. It is however expected that the learned civil Court would not hesitate in imposing costs at the final conclusion of the suit, in favour of the successful party. Such costs should be sufficient to compensate the other party for the costs incurred and inconvenience borne on account of the litigation to which they have been subjected. For this purpose, both the parties, if so advised, may submit schedule of their costs incurred on the litigation before the

learned civil Court. In case, the learned civil Court is not persuaded to award costs, it shall give plausible reasons in respect thereof.

16. With these observations, the instant constitutional petition stands dispose of.

ANNOUNCED

Dt: 04.08.2021

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