

**HIGH COURT OF AZAD JAMMU AND KASHMIR**

Writ Petition No.1096/2020.  
Date of institution 07.09.2020.  
Date of decision 28.02.2023.

Syeda Ayesha Gillani D/o Syed Saleem Gillani, R/o Eid Gah Road,  
Mohallah Dherian Bambian, Muzaffarabad, Azad Jammu and  
Kashmir.

....Petitioner

**Versus**

1. Principal, Poonch Medical College, Rawalakot, Azad Jammu and Kashmir.
2. Dr. Muhammad Akram, Head of Physiology Department, Poonch Medical College, Rawalakot, Azad Jammu and Kashmir.
3. Dean, Faculty of Health and Medical Science, University of Health Sciences, Khayber-e-Jamia Punjab, Lahore.
4. Vice Chancellor, University of Health Sciences, Khaybar-e-Jamia Punjab, Lahore.

.....Respondents

**WRIT PETITION**

**Before:- Justice Syed Shahid Bahar, J.**

**PRESENT:**

Syed Faisal Gillani and Syed Abdul Basit Gillani, Advocates for the Petitioner.

Muhammad Amir Sharif Qureshi, Advocate/ Legal Advisor for respondent No.1.

**Judgment:**

Through the titled writ petition filed under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974, infra relief has been solicited by the petitioner:-

*“it is respectfully prayed that the Hon’ble Court by accepting this writ petition, may direct the respondents to grant the petitioner with five marks which she needs to pass her practical/viva voce examination and protect her professional educational career and save her life from getting destroyed by this high handedness of theirs.*

*In the alternate, this Hon'ble Court may kindly direct the respondent No.1, 3 and 4 to change the examiner of Physiology and allow the petitioner with the special chance to appear in her practical/ viva voce of Physiology examination again.*

*Any other relief deemed fit and appropriate in the circumstances of the case may also kindly be granted."*

2. Succinct facts of the case as per petitioner's version are that the petitioner is 1<sup>st</sup> Class State Subject of Azad Jammu and Kashmir and she is student of second professional MBBS at Poonch Medical College, Rawalakot AJ&K. The petitioner contends that she failed her practical/viva voce of the Physiology in her final/fourth chance by five marks, despite passing theory of Physiology and viva voce of all other modules due to unknown personal grudges and apparent bias of respondent No.2 against her. The petitioner contends that she belongs to a poor family, her father is an unemployed man and a patient of heart disease and his heart bypass has also been done in near past, he has educated the petitioner throughout in the very difficult financial circumstances, living hand to mouth for the prosperous future of his children. The petitioner avers that during last three years of her life including second professional year of MBBS she has been suffering severe kidney disease in the form of renal stones and has been operated thrice for the same and due to this sickness, her MBBS studies were adversely affected to greater extent, making her unable to participate and perform in best of the manners. Alleges that after the

result, the petitioner's father submitted multiple applications to the respondent No.1, respondent No.2 and respondent No.4 for gracing the petitioner with five marks in her viva voce to pass the module and protect the educational career of his daughter, but no positive response has been shown by the respondents. The petitioner further alleges that as per the rules of Pakistan Medical and Dental Council, she has no more chance to pass his viva voce. Petitioner contends that in her previous three chances she always passed the viva voce of this particular module with good marks, but in this final chance when she was successful in passing the theory/written exam her viva voce was failed due to five marks by respondent No.2, even when the internal examiner has 20 marks on his/her discretion for favouring any student in case/she needs them in extraordinary circumstances, however, respondent No.2 due to apparent bias and acute personal grudges only gave 1 mark out of 20 marks to the petitioner. The petitioner further alleges that respondent No.2 has developed acute personal grudges against the petitioner for unknown reasons and penalized the petitioner on consecutive chances by failing her in written exams and when she passed her written exam, she was failed in her *viva voce*.

3. Written statement has been filed on behalf of respondents wherein the claim of the petitioner has been negated in toto and further averred that the submission of the petitioner cannot be entertained as the same is against the rules and regulation of

University of Health Sciences and many judgments of the superior courts.

4. M/s Syed Faisal Gillani and Abdul Basit Gillani Advocates, submitted written arguments on behalf of the petitioner wherein they reiterated the facts and grounds narrated in the petition and vehemently contended that the respondent No.2 treated the petitioner in a discriminated manner and intentionally did not allow 05 marks to her and failed her in viva voce of exam of Physiology, due to which the petitioner has suffered a lot and her future career went into darkness. The learned counsel prayed that by accepting this writ petition, the respondents may be directed to grant the petitioner with five marks which she needs to pass her practical/viva voce examination and protect her professional educational career and save her life from getting destroyed by this high handedness of theirs. In the alternate, this Hon'ble Court may kindly direct the respondent No.1, 3 and 4 to change the examiner of Physiology and allow the petitioner with the special chance to appear in her practical/ viva voce of Physiology examination again.

5. In reply, Muhammad Amir Sharif Qureshi, the learned Legal Advisor for respondent No.1 contended that request of the petitioner cannot be entertained as the same is against the rules and regulations of University. He further contended that University of Health Sciences Lahore conducts examinations under a uniform set of rules, regulation and policies that are developed by the

University Authorities such as Academic Council, Syndicate and Board of Governors through consultative process, while the University of Health Sciences Lahore has abolished the policy for award of grace marks vide order dated 25.07.2006. The learned legal Advisor staunchly contended that the petitioner has failed to pass the exam within provided chances, hence, she has left no chance accordingly to relevant policy, rules and regulations and she is not entitled to claim any more chance. Finally, the learned Legal Advisor prayed for dismissal of the writ petition.

6. I have considered the written arguments submitted by the parties and gone through the case.

7. As adumbrated above, it reveals from pleaded stance of the petitioner as well as from the record that the petitioner has leveled serious allegations against respondent No.2, Dr. Muhammad Akram, Head of Physiology Department Poonch Medical College by arraying him as respondent by name. In this regard, Para No.9, 10 and ground B are self-speaking, it is useful to reproduce Para No.9, 10 and ground B herein below:-

9. That the petitioner in her previous three chances, has always passed the viva voce of this particular module with good marks, but in this final chance when she was successful in passing the theory/written exam her viva voce was failed due to five marks by the respondent No.2 even when the internal examiner has 20 marks on his/her discretion for favouring any student in case he/she needs them in extra ordinary circumstances. However, respondent No.2 due to

apparent bias and acute personal grudges only gave the petitioner 1 out of those 20 marks.

10. That the respondent No.2 has a history of discriminate, cruelty, biasness, illegal profiteering (by forcing students to buy books written by him) and developing acute grudges against the students on the basis of religious school of thought. The multiple complaints were made against him for failing the students for abovementioned reasons in 2015, when he was head of physiology department at Mohtarma Benazir Bhutto Shaheed Medical College in Mirpur.”

B. That respondent No.2 has developed acute personal grudges against the petitioner for unknown reasons and penalized the petitioner on consecutive chances by failing her in written exams and when she passed her written exam, she was failed in her viva voce. Now the petitioner has no chance to continue her medical education and if she is not given special chance/opportunity, the petitioner will suffer an irreparable loss, hence, the respondents are liable to be directed to change examiners of Physiology i.e. respondent No.2, in case she is not granted five marks and is being allowed for special chance to give her viva voce again to save her career.”

Admittedly father of petitioner filed numerous applications to the respondents for dispensation of administrative justice but the respondents instead of deciding the same in judicious manner in either way left over the same by making inordinate procrastination. Verbatim of one of the applications addressed to Vice Chancellor is given as infra:-

## ”بخدمت جناب وائس چانسلر صاحب

عنوان :- درخواست برآمد نظر ثانی نتیجہ پریکٹیکل Physiology سیکنڈ ایئر ایم بی بی ایس سیشن

جناب عالی!

معاملہ عنوان الصدر میں تحریر خدمت ہے کہ مظہر کی دختر سیدہ عائشہ گیلانی پونچھ میڈیکل کالج آزاد کشمیر میں باقاعدہ طالبہ حیثیت سے زیر تعلیم ہے۔ سالانہ نے زیر نومبر 8459 سیشن اکتوبر نومبر 2019 کو ایم بی بی ایس سیکنڈ ایئر کے امتحان میں تحت ضابطہ امتحان میں شامل ہوئی۔ مظہر کی دختر نے جملہ مضامین کے پرچہ جات اور پریکٹیکل ماسوائے پریکٹیکل Physiology کے پاس کیے۔ فیل شدہ پریکٹیکل میں بھی فقط پانچ نمبروں کا سامنا ہے۔ سالانہ کا یہ چوتھا اور آخری چانس تھا۔ اس نتیجہ کی روشنی میں دختر طلبہ کا جملہ تعلیمی کیریئر ختم ہو جانے کا امکان ہے۔ اس سے قبل ازیں بھی جناب پرنسپل صاحب میڈیکل کالج پونچھ کے حضور میں درخواست اور خود بھی ملا ہوں اور درخواست بھی پیش کر رکھی ہے۔ لیکن حضور نے درخواست پر کوئی کارروائی یا جواب نہیں دیا ہے۔ سائل نے جناب پرنسپل صاحب کے کہنے پر متعلقہ ایچ او ڈی صاحب کو بھی درخواست زیر نمبر 11/12/2019 پیش کی ہے۔ مظہر ایک سفید پوش اور بے روزگار شخص ہے۔ بڑے مشکل حالات میں بیٹی کے جملہ تعلیمی اخراجات برداشت کر کے یہاں تک پہنچایا ہے۔ متعلقہ ایچ او ڈی صاحب نے پریکٹیکل میں پانچ نمبروں کی کمی سے طلبہ کا مستقبل تباہی کے دھانے پر پہنچا دیا۔ مظہر دل کے عارضے میں مبتلا ہے۔ اوپن ہرٹ سرجری بھی ہو چکی ہے۔ زیادہ دوڑ دھوپ کے قابل بھی نہیں۔ بذریعہ درخواست استدعا ہے کہ انسانی ہمدردی کے تحت سالانہ طلبہ کو پریکٹیکل میں پانچ نمبروں کی نرمی برتی جائے اور طلبہ مذکورہ کے نتیجے پر نظر ثانی فرمائی جائے تاکہ سالانہ کا مستقبل محفوظ رہ سکے۔ قبل ازیں متعلقہ کالج میں پیش کردہ درخواست کی عکسی نقول لف ہذا ہے۔ مظہر انتہائی عاجزی سے متمسک ہے کہ خصوصی نرمی فرماتے ہوئے دختر کے نتیجے میں پانچ نمبروں کی کمی کو درگزر فرماتے ہوئے کامیاب فرمایا جائے۔ مظہر کا خاندان اس مہربانی کے لیے عمر بھر دعا گو رہے گا۔

العارض

دستخط

سید سلیم گیلانی والد سیدہ عائشہ گیلانی

تحریر 06-07-2020

طالبہ سیکنڈ ایئر ایم بی بی ایس میڈیکل کالج

پونچھ راولا کوٹ آزاد کشمیر

فون نمبر: 0302-9860950

0312-6854115

It is worth mentioning that father of the petitioner is a heart patient belonging poor strata who hardly manages to make ends meet. While in juxtaposition the respondents in their written reply have failed to controvert the allegations leveled by the petitioner. It is useful to reproduce Para No.9, 10 and ground B of the written statement as under:-

“9. As already explained supra that the allegations of petitioner against respondent No.2 is an afterthought as no complaint to this effect was submitted to this University prior to commencement of examination. The only purported grievance was submitted by petitioner

after declaration of the result. The petitioner submitted four applications seeking revision of her result but she raised the issue of biased conduct of internal examiner (respondent No.2) in only one dated 21.07.2020. It is reiterated that all the applications were submitted after declaration of result.

10. Already explained supra.

B. Already explained supra in para 9.”

9. Reply given in the above paras is totally evasive. No specific affidavit or even generally an affidavit in support of the written statement has been filed by the respondents. Thus, law is very much clear on the subject that evasive denial or rigmarole amounts to admission of the fact narrated by the petitioner. The respondents have referred the judgment of Hon’ble Supreme Court of Pakistan dated 27.01.2006 titled “University of Health Sciences Lahore and others vs. Sheikh Nasir Subhani and others” as well as decision of the Lahore High Court titled “Miss Sana Mussarat Vs. University of Health etc.” dated 15.05.2007 and case titled “Muhammad Mudassar Yaqoob vs. Vice Chancellor etc.” decided by Lahore High Court vide Judgment dated 31.12.2008 and prayed for dismissal of the writ petition. The respondents also referred the Judgment of Hon’ble Supreme Court of AJ&K titled Secretary Health and another Vs. Muhammad Latif Butt” decided on 16.08.2021 in Civil Appeal No.68 of 2020. With due regard and respect to the Judgment of the Apex Court all the referred cases are distinguishable.



petitioner. Petitioner is simultaneously asking for 02 relief in extraordinary jurisdiction conferred under Article 44 of AJ&K Interim Constitution, 1974, we cannot sit over to the such like decision of the University authorities in a way to allow grace marks as it is simply prerogative of the relevant authorities but simultaneously if any sort of mala-fide, bias or infringement of constitutionally fundamental guaranteed rights is appearing on part of the official quarter, definitely, the High Court can come to rescue to the aggrieved person.

12. No cavil to the proposition that, in academic matters universities are the best judges to interpret rules and regulations framed by the university authorities, but in a case where malafide is attributed and allegation of serious nature are leveled against a person who stands on rival side in the line of respondents, that too, no explanation or rebuttal is on record on his behalf, thus, in such like eventuality, indulgence and interference in extraordinary constitutional jurisdiction is obligatory.

13. Silence on part of the respondent transpires that something is fishy in the bottom.

**Acquum et bonum est lex legum**

Maxim denotes that what is equitable and good is the law of the laws

14. Right to acquire knowledge and complete studies in accordance with law and set policies is attached to the constitutional guaranteed fundamental right No.1.

15. Writ petition is supported by an affidavit while no counter affidavit has been filed by the official respondents, thus, as per law averments made in the petition particularly regarding mala-fide are safely taken as true.

It has been held by the Hon'ble Supreme Court in the case titled M Sharif vs. Mirza Fazal Hussain 1993 SCR 88(B) as infra:-

“Affidavit is considered sufficient in a writ petition prima-facie proof and if not rebutted by cogent evidence it becomes conclusive proof.”

Same view has been taken in Public Health Engineering Division and another vs. Aurangzeb Khan 2008 SCR 590 (F) as infra:-

“---Petitioner filed an affidavit in support of contents of writ petition---There was no rebuttal of affidavit --- Held: it becomes conclusive proof --- Fact of ownership proved by defendant --- There was no need of further proof.”

16. Thus, as per law affidavits are taken as sufficient proof in writ petition but same has not rebutted from other side then it is conclusive proof of the averments made in the petition.

17. The respondents by not paying heed to the submissions of the petitioner attempted to hamper her educational career. Fundamental right 1 of the petitioner has visibly violated, hence, aid of the Court cannot be refused. Ready reference in this regard is **PLD 2004 Lah. 376.**

18. The august Supreme Court of Pakistan while dilating upon identical proposition in the case titled *Vice Chancellor Lahore vs. Mrs. Ruhi Farzana 1996 SCMR 263* held as under:-

“Even in administrative matters it is not the sole discretion of the authority to pass orders in any manner as it likes, it must follow the rules and principles of justice and equity so that even the person against whom order has been passed should not stamp it as malafide and a result of bias or malice.”

19. Thus, in light of the foregoing reasons, I allow the alternate prayer No.2 of the writ petition and direct the respondents No.1, 3 and 4 to do needful quo redressal of the grievance of the petitioner in light of the application tendered by father of petitioner by arranging denovo special chance to the petitioner for the purpose of appearing her in practical viva voce in Physiology examination under supervision of any other examiner other than respondent No.2, i.e. Dr. Muhammad Akram, to ensure that there may not be any bias or mala-fide. (Petition stands allowed partially).

Muzaffarabad,  
28.02.2023.

**JUDGE**