JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 3370/2022

Liaqat Ali Khan, Principal PACE College, Rawalpindi Cantt.
Vs.
Federal Board of Intermediate & Secondary Education through its Chairman & others

PETITIONER BY:	Mr. Ajmal Raza Bhatti, Advocate.
RESPONDENTS BY:	Ch. Imtiaz Ahmed, Advocate for respondents No.1 to 4. Mr. Mahmood ul Hassan, Superintendent (Legal), FBISE, Islamabad.
DATE OF HEARING:	20.12.2022.

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BABAR SATTAR, J.- The petitioner is aggrieved by order dated 02.08.2022, pursuant to which his college (i.e. PACE College) has been disaffiliated from the Federal Board of Intermediate & Secondary Education, Islamabad ***("Board")***, by the Director (Affiliation & Quality) of the Board (i.e. respondent No.3).

2. The learned counsel for the petitioner stated that the impugned order had been passed in breach of the guarantee under Article 10-A of the Constitution as no hearing was convened before the impugned order was passed. He further stated that the impugned order was without lawful authority as pursuant to Section 8(2)(f) of the Federal Board of Intermediate and Secondary Education Act, 1975 ***("Act")***, the Board is vested with power to withdraw affiliation with the prior approval of the Federal Government and in the instant matter no approval was solicited from or granted by the Federal Government. He further submitted that a show notice dated 20.07.2022 was issued by

the Director (Affiliation & Quality) of the Board, who was also the officer who issued the impugned order for disaffiliation of the petitioner's institute dated 02.08.2022. And Director (Affiliation & Quality) of the Board was vested with no authority under the Act to either issue a show cause notice or order the disaffiliation of the institution as such power was vested in the Board of Governors of the Board, which could withdraw affiliation granted to an institution only with the prior approval of the Federal Government. He further submitted that under the Regulations prescribed by the Board for purposes of conducting examinations it was the Superintendent appointed by the Board, who had control over the examination papers and not the management of the institution appointed as an examination center. And thus, to the extent that there was any allegation that exam papers had been released illegally, it was for the Board to investigate the Superintendent and invigilators appointed by the Board and not the management of the institution appointed by the Board as an examination center.

3. The learned counsel for the Board submitted that complaints had been received by the Chairman of the Board that the papers for Pakistan Studies and English had been prematurely released and the questions and answers in relation to such exam papers were circulated in a WhatsApp group created and managed on behalf of the petitioner. He submitted that the Chairman of the Board had ordered an inquiry and the statements of a few students and members of the staff had been recorded, which reflected that the WhatsApp group had been created by the petitioner, who in complicity with the

Superintendent of the examination center had exam papers released fifteen minutes ahead of the beginning of the examination and the teachers affiliated with the petitioner's institute provided answers to such papers, which were circulated in the WhatsApp group for the benefit of students of the petitioner's institute. He submitted that the petitioner had sought provisional affiliation with the Board on 19.12.2009 and such affiliation was last extended on 16.01.2019. He submitted that pursuant to clause 1.2(g) of the Regulations under Chapter-1 for the Affiliation of Institutions, provisional affiliation could be granted on an academic year basis, which expired automatically at the end of the academic year. Further, regulation 1.2(j) of the said Regulations provided that a provisionally affiliated institution could be considered for disaffiliation under sub-clause (5) if it failed to curb any malpractice during the conduct of Board examinations (theory/practical), and under sub-clause (8) if it worked against the normal norms, conduct or interests of the Board. Under clause 1.2(n) of the Regulations under Chapter-1 for the Affiliation of Institutions the grant of provisional affiliation fell within the domain of the Chairman of the Board and the grant of permanent affiliation fell within the domain of the Board of Governors of the Board. He submitted that as the Chairman of the Board was the competent authority to grant provisional affiliation, provisions of the Act read together with (a) clause 1.2(n) of the Regulations under Chapter-1 for the Affiliation of Institutions and (b) Section 21 of the General Clauses Act, 1897, vested in the Chairman of the Board the power to disaffiliate an institution that had been granted provisional affiliation. And for

such purpose no approval was required from the Board of Governors of the Board or the Federal Government.

4. Notices were also issued to respondents No.5 and 6, who were members of the Board of Governors of the Board. Respondent No.5 submitted through a written response that he visited the examination center created at the petitioner's institution (PACE College) and met with the Superintendent and the examination team appointed at such examination center and found that they had complied with all the codal formalities according to the Board's Regulations for Conduct of Examinations. He further submitted that the question of cancellation of affiliation of the petitioner's institute was not placed before the Board of Governors of the Board and no permission had been sought from the Federal Government for such purpose either, which was against the provisions of Section 8 of the Act. Likewise, respondent No.6 also filed his response stating that it was not the principal of an educational institution identified as an examination center who was responsible for conduct of examinations, but the Superintendent and invigilators appointed by the Board for the administration and conduct of examinations. And the principal of the institute identified as an examination center had no ability to interfere with the conduct of the examinations or release of exam papers. He supported the contents of the memo of the petition and submitted that no unfair means or malpractice was observed during the examination, which was conducted at the petitioner's institute.

5. The first question before this Court is who is authorized to order withdrawal of affiliation granted by the Board to a

college. Section 8 of the Act enumerates the powers and functions of the Board and Section 8(2)(f) of the Act vests in the Board the power to *"withdraw affiliation if it is satisfied after inspection carried out under clause (h) that the standards of management and instruction in an institution justify withdrawal, provided that the affiliation shall not be withdrawn without the prior approval of the Federal Government."* Section 8(2)(h) of the Act further vests in the Board the power to cause the inspection of the institutions applying for affiliation. Section 11 of the Act deals with the appointment, powers and duties of the Chairman of the Board. Section 11(4) of the Act states that the Chairman of the Board is obliged to ensure that the provisions of the Act and regulations are faithfully observed. Section 11(5) of the Act provides that *"if an emergency arises out of the administrative business of the Board which, in the opinion of the Chairman, requires that immediate action should be taken, the Chairman may take such action as he deems necessary and shall report the action taken to the Federal Government and to the Board as its next meeting for approval."* Section 9 of the Act details the powers of the Federal Government, which can order inspections for purposes of oversight of the affairs of the Board and the examinations conducted by it. And where the Board does not take any action to the satisfaction of the Federal Government, it may issue any directions to the Chairman of the Board for compliance.

6. The provisions of the Act reflect that the Board is a collegiate body, which is vested with the authority to undertake collective decision-making pursuant to Section 8 of the Act. The

Chairman of the Board is vested with ministerial functions, such as those of calling to order the meetings of the Board and administrative and executive functions to carry out the directions of the Board and/or the directions of the Federal Government. In case of any emergency, the Chairman of the Board is vested with authority under Section 11(5) of the Act to act without prior consent of the Board of Governors of the Board, but subject to the condition that such action is to be placed before the Board of Governors and the Federal Government for approval immediately after such action has been taken.

7. Section 17 of the Act vests power in the Board to frame regulations and Section 17(2)(d) of the Act speaks of framing of regulations specifying the conditions for affiliation of institutions and the withdrawal of affiliation. It has been argued on behalf of the Board that it is pursuant to such provision that the Board has framed regulations, which have defined affiliation as 'provisional affiliation' and 'permanent affiliation'. Under regulation 1.2 of the Regulations the power to grant permanent affiliation is vested in the Board of Governors and the power to grant provisional affiliation is vested in the Chairman of the Board.

8. It was the position of the Chairman of the Board that as the power to grant provisional affiliation is vested in the Chairman, the power to recall such affiliation is also vested in the Chairman of the Board in view of Section 21 of the General Clauses Act, 1897. The contention is misconceived. It is settled law in view of Article 4 of the Constitution that a statutory authority can only exercise such power as vested in it under provisions of a statute, and the authority can only be exercised

in such manner as provided in the statute. The Act, as discussed above, vests authority to grant affiliation and recall affiliation and to conduct inspections for purposes of affiliation, in the Board of Governors of the Board and not the Chairman of the Board. The Chairman of the Board is vested with authority to carry out the decisions of the Board of Governors and in case of a decision by the Board of Governors to withdraw the affiliation granted to a college, Section 8(2)(f) of the Act provides that such decision requires the prior approval of the Federal Government. Thus, the power to grant and withdraw affiliation is vested in the Board of Governors and the withdrawal of affiliation is further subject to prior approval by the Federal Government. The Power to enact regulations in exercise of authority under Section 17 of the Act cannot transcend the provisions of the Act. Section 17(2)(d) of the Act speaks of the authority vested in the Board of Governors to prescribe conditions for affiliation of institutions and withdrawal of affiliation. Such power has been vested in the Board of Governors for the purpose of structuring the discretion vested in the Board of Governors to grant and withdraw affiliation under Section 8(2)(f) of Act. The authority to prescribe the criteria for exercise of a power relates to the manner of exercise of such power and cannot be confused with the power itself or the power-wielder. In exercise of authority under Section 17(2)(d) of the Act the Board can frame regulations identifying the criteria on the basis of which the power to grant or withdraw an affiliation is to be exercised. But in exercise of such authority regulations cannot be framed to usurp any power vested in the Board of Governors or in the Federal Government to authorize the recall of affiliation and vest

such power in the Chairman of the Board. Any provisions of the Regulations that are in conflict with provisions of the Act cannot pass legal muster and would have to be read down for being ultra vires the statute as while exercising delegated authority, the delegatee cannot undermine the provisions of the statute that delegates such authority.

9. The provisions of the Act do not distinguish between provisional and permanent affiliation. While it would appear to logic that a process may be setup for an institution seeking permanent affiliation to be granted provisional affiliation as a provisional step towards permanent affiliation, one must also bear in mind that at the heart of such affiliation process would be the future of the students inducted in a college that is provisionally affiliated. A college affiliated with the Board can offer education services for purposes of the secondary school emanation and the higher secondary school examination and the instructions for each such examination spread over a couple of years at least. Where students have been inducted by a college that has been granted one year provisional affiliation in relation to a certificate examination the instructions for which spread over two years, what would happen to the students enrolled at the college if its affiliation is discontinued after a period of one year? In the instant case, the provisional affiliation of the petitioner's college according to the respondents has continued since 2009. It appears that by enacting Regulations and creating a distinction between provisional and permanent affiliation, the Board of Governors of the Board has instituted a scheme for affiliation that is not envisaged by provisions of the Act. And

further, for purposes of grant of affiliation on provisional basis, the exclusive power has been retained by the Chairman of the Board and not even by the Board of Governors of the Board, even though the provisions of the Act confer no such power on the Chairman to either grant affiliation or withdraw affiliation. Section 8 of the Act explicitly provides that grant and withdraw affiliation is a power vested in the Board of Governors and no regulation can therefore be framed that falls foul of the explicit requirement of Section 8 of the Act. While it appears to this Court that the regulations being relied by the Board are not in consonance with provisions of the Act, this Court need not render a definitive judgment in this regard in view of the law laid down by the august Supreme Court in ***Lahore Development Authority through D.G. and others vs. Ms. Imrana Tiwana and others (2015 SCMR 1739)***, wherein it was observed that where the decision of a case can be rendered on narrower grounds, a Court need not rule on the legality of a statutory instrument.

10. In the instant case, the show cause notice and the impugned order have been issued by the Director (Affiliation & Quality) of the Board, who is vested with no authority under the Act to issue such show cause notice or the impugned order. Even if it can be argued that the show cause notice and the impugned order for withdrawal of affiliation was issued by the Director (Affiliation & Quality) on the direction of the Chairman of the Board, the Chairman of the Board is also vested with no authority to issue the impugned order as the power to withdraw affiliation is vested with the Board of

Governors of the Board and is to be exercised after grant of prior approval from the Federal Government in accordance with Section 8(2)(f) of the Act after ordering an inspection for such purpose under Section 8(2)(h) of the Act. For these reasons alone, the show cause notice as well as the impugned order dated 02.08.2022 are coram non judice and without lawful authority and liable to be set-aside for being without jurisdiction.

11. Further, a perusal of the impugned order reflects that it is not a reasoned order. The ground for withdrawal of affiliation as mentioned in Section 8(2)(f) of the Act is that the standards of management and instructions in the institutions justify such withdrawal. In the instant case, the charge brought against the petitioner and his institution is that the petitioner was involved in facilitating cheating at his institution that was notified as an examination center. A perusal of the General Rules of Examination placed on record by respondent No.1 reflects that the conduct of the examination falls within the domain of the Board that notifies centers of examination and makes available required facilities to the Superintendent of examination and the invigilation staff appointed by the Board. Further, clause 1.17(h) of the Regulations under Chapter-1 of the General Rules for Examination provides that no school or college is to be established as an examination center for its own students for theory papers. It is therefore beyond comprehension as to how the students enrolled with the petitioner’s institute were sitting in the examination within the institute where they were enrolled in view of the requirement that no college is to be established as an examination center for its own students. The Board has also

placed nothing on record to explain what action was taken against the Superintendent of examination, who was responsible for maintaining secrecy of the examination and for distributing papers at the examination center at a fixed time upon commencement of the examination, if exam papers were in fact unlawfully released to the petitioner ahead of time. Even the manner in which the investigation has been carried out purportedly on the direction of the Chairman of the Board seems perfunctory. There appear to be no application of mind as to how examination papers were actually released ahead of time, how they were solved within a period of ten and fifteen minutes before the examination and how the answers were then circulated amongst the students within such a short period of time, especially given that the examination center was under the control of the Board and the students were not allowed under the Regulations to take electronic devises inside the examination center. Thus, even in the event that the Chairman of the Board was vested with authority to withdraw affiliation afforded to a college on provisional basis, the logical response to the allegation of cheating at an examination center would be to change the examination center in exercise of powers of the Board to conduct examinations before seeking to withdraw the affiliation of a college notified as an examination center. Even if the impugned order was not devoid of jurisdiction it could not be deemed just, fair and reasonable within the meaning of Section 24 of the General Clauses Act, 1897.

12. For the aforementioned reasons, this Court finds that the impugned order dated 02.08.2022 is coram non judice.

Consequently the instant petition is **allowed** and the impugned order dated 02.08.2022 is ***set-aside*** for being devoid of legal authority. As noted above, this Court also notes that the Regulations framed by the Board for purposes of affiliation and disaffiliation in exercise of authority under Section 17 of the Act may not be in consonance with Section 8 read together with Sections 9 and 11 of the Act.

13. Let a copy of this judgment be sent to the Secretary, Ministry of Federal Education and Professional Training, Islamabad, to ensure that (i) the delegated authority vested in the Board under Section 17 of the Act has not been exercised in a manner that is in breach of provisions of the Act, (ii) appropriate conforming changes are brought about within the Regulations so that the authority vested in the Board as a collegiate body is not usurped by the Chairman, and (iii) provisional affiliation is not used as an alternative to permanent affiliation such that it jeopardizes the educational interests of students and keeps the sword of Damocles hanging over provisionally affiliated institution.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 04.01.2023.

JUDGE

Approved for reporting

A. Rahman Abbasi.