

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C.P.No.D-1084 of 2006

Date

Order with signature of Judge

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Abdul Maalik Gaddi

Mr. Hussain Farooq Shaikh.....Petitioner

Versus

Dow University of Health

Sciences & another.....Respondents

02.03.2017

Ms. Naheed A. Shahid, Advocate a/w Petitioner.

Mr. Asim Mansoor Khan, Advocate for Respondent No.1.

Mr. Sibtain Mehmood, A.A.G. for Respondent No.2.

Muhammad Ali Mazhar, J: This petition has been brought to challenge the action depriving the petitioner from scholarship seat of Pakistan Technical Assistance Program (PTAP). The petitioner has also prayed for directions to grant admission to the petitioner in the first year MBBS under PTAP and refund the amount of fee paid by the petitioner under Self-finance Scheme.

2. The learned counsel for the petitioner argued that the petitioner in the year 2005 applied for admission in MBBS first year. Since he was dual national so being a foreign student and qualified Associate Degree Program (ADP) from USA, he was called upon to provide Equivalence Certificate from IBCC. The Inter Board Committee of Chairman, Government of Pakistan, Ministry of Education,

Islamabad issued equivalence certificate to the petitioner whereby his foreign qualification as Associate Degree Program from USA was considered equivalent to Higher Secondary School Certificate in Group Pre-Medical commensurate to 904 marks out of 1100. Being qualified and eligible for admission in MBBS, the petitioner applied to the Government of Pakistan, Ministry of Economic Affairs & Statistics (Economic Affairs Division) for admission in MBBS as a foreign national under Pakistan Technical Assistance Program (PTAP). Simultaneously, the petitioner also applied for admission in MBBS through Self-finance Scheme for the Session 2005-2006. On 12.04.2006 the Assistant Chief, Ministry of Economic Affairs & Statistics (Economic Affairs Division), Government of Pakistan informed the petitioner that he has been selected provisionally for admission in MBBS against one seat reserved for foreign students under PTAP but this offer was provisional and subject to the eligibility as may be determined by the Institution concerned in terms of laid down criteria as well as verification of educational antecedents by the concerned institution.

3. The petitioner vide email dated 14.04.2006 made a request to send the nomination for completing the required formalities. One more email was received to the petitioner from Mr.Tassaduq Hussain in connection with the petitioner's request for PTAP seat and he was offered PTAP seat in Dow Medical found vacant due to non-reporting of one student. The same person again issued a letter on 15.04.2006 to the Secretary Health Department, Government of Sindh with the same subject i.e. "Admission of Foreign Students (Replacement) under Pakistan Technical Assistance Programme (Session 2005-2006) with the request that the previous nominee was "Chirau Warakan Mwamlol" (Kenyan) but the latest nominee was the petitioner with the

name of institution Dow University of Health Sciences, Karachi. Despite this letter, a notice was issued to the petitioner on 21.04.2006 by Professor Salahuddin Afsar, Principal & Chairman Selection Board (Admission), Dow Medical College, Karachi regarding admission in first year MBBS class under foreign national seat, self-finance scheme Academic Session 2005-2006 and the petitioner was directed to deposit the fee in the accounts department whereas Mr. Tassaduq Hussain wrote a letter to the Vice Chancellor, Dow University of Health Sciences, Karachi on 10.06.2006 in which he stated that the Embassy of Palestine in Islamabad has approached this Division for admission of their already nominated student Mr. Nail Mahmud Safi Hasasna (Palestinian national) in Down University College under the reserved quota seats, while petitioner Hussain Farooq Shah (Pakistan origin) was earlier nominated for self-finance scheme by this division who later on shifted to Pakistan Technical Assistance Program (PTAP). He has approached this Division that the University is not granting him admission against PTAP so a request was made to the Vice Chancellor Dow University of Health Sciences to consider both the cases and outcome be intimated to the Ministry of Economic Affairs & Statistics, Government of Pakistan. The learned counsel for the petitioner further argued that the petitioner was deprived unlawfully despite all necessary sanctions and due to this mala fide objectives of respondent the petitioner had to bear heavy cost and for completing MBBS on self-finance scheme rather than PTAP seat, the petitioner paid U.S. \$ 30,000.

4. On the contrary, the learned counsel for respondent No.1 argued that the petitioner was not on open merit seat. Being American national he was nominated by the Economic Affairs Division under self-finance scheme as such he did

not appear in the NTS exam. It was further contended that in compliance of the Economic Affairs Division's letter dated 22.02.2006 the respondent No.1 offered admission to the petitioner on 22.03.2006 and also reminded him on 21.04.2006 to deposit the fee within 48 hours otherwise the offer will be cancelled. It is further averred that the petitioner missed the crucial time for studies including the requirement of 75% of attendance in lectures, tutorials and practical laid down by PMDC to make eligible a student to sit in the examination. The petitioner also submitted an undertaking on 30.05.2006 that he would not be able to fulfill the PMDC mandatory requirement of attendance for appearing in the exam of 2005-2006, so he may be allowed to appear in the first year professional MBBS exam in the next Academic Session i.e. 2006-2007. The learned counsel pointed out paragraph 17 of the comments that the petitioner became successful in getting his category of admission changed from Economic Affairs Division (EAD) but he exceeded the condonable limit of shortage in attendance i.e. 90 days from the commencement of the Session. The University had already issued admission letter to the petitioner under self-finance scheme and the change of category letter was received by the University through Health Department, Government of Sindh on 08.05.2006 when the permissible limit of 90 days had already expired.

5. The petitioner has made various prayers in this petition and most of them have become infructuous as now admittedly he has already completed the entire course under self-finance scheme and he is qualified MBBS so at this stage no directions can be issued for entertaining his case in the scholarship program which claim has already become over by efflux of time. In one prayer, the petitioner has requested for the directions against the respondent No.1 to

refund the amount to the petitioner paid by him under Self-finance Scheme.

6. Be that as it may, though the petition is pending since 2006 but the minutiae of the petition do show unequivocally that disputed questions of facts have been raised in this petition and various documents have been filed to show that the petitioner was entitled for admission in the scholarship program, while the respondents have filed documents to show that though he succeeded to change the category of admission but he himself failed to fulfill other formalities within 90 days. It is also matter of fact that the petitioner has already appeared and passed his final examination so most of the prayers have become infructuous and at this stage no relief can be awarded with retrospective effect when the entire academic session has become over and the petitioner has already passed the MBBS examination. It is also stated that the petitioner paid fee in the sum of U.S. \$ 30,000.00 under self-finance scheme so he wants refund in the constitutional jurisdiction where complicated and disputed questions have been raised by the respondent No.1 in their defence. Whether the petitioner has availed the offer within 90 days or not or he was deprived with mala fide intention requires evidence. The petitioner's counsel took the plea that the petitioner approached and gave his consent within the stipulated period of time but he was not considered on the contrary some other student Kaish Warish Ansari (foreigner) was considered despite paying fee late on 05.06.2006.

7. The complicated questions of fact cannot be resolved under the constitutional jurisdiction. Under the constitutional jurisdiction, this court has no jurisdiction to embark upon an exercise to determine intricate, contested

and complicated question of facts. Resolution of such like controverted issue is ordinarily left to proper forum and indulgence in such exercise would have effect of preempting and enforcing upon jurisdiction vested in competent court. Where equally efficacious, adequate and alternate remedy is straight forwardly accessible to the petitioner the constitutional jurisdiction cannot be exercised. Reference can be made to a judgment authored by one of us (Muhammad Ali Mazhar-J) reported in **PLJ 2012 Karachi 69 “Mumtaz Ali Jehangir v Province of Sindh”**. The apex court in the case of **“State Life Insurance Corporation v Pakistan Tobacco Company”**, reported in **PLD 1983 S.C. 280** held that controverted question of facts adjudication of which possible only after obtaining all types of evidence in power and possession of the parties can be determined only by courts having plenary jurisdiction in matter and on such ground constitution petition was incompetent. In another judgment reported in **2011 SCMR 279 “Anjuman Fruit Arhtian v. Deputy Commissioner Faisalabad”**, again the apex court held that disputed question of fact could not be decided in constitutional jurisdiction. High Court rightly declined to exercise its constitutional jurisdiction in view of various controversial question of fact which could only be resolved on the basis of evidence which could not be recorded in exercise of constitutional jurisdiction.

8. After arguing the matter to a considerable length, the learned counsel on instructions of the petitioner agrees to file a suit for recovery in the civil court in accordance with law. Let the petitioner file the civil suit for recovery of fee subject to all just exceptions. The petition is disposed of accordingly alongwith pending application.

Judge

Judge