

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry

C.P. No. D-5570 of 2018

[Muneem Khan and others v. Registrar Pakistan Nursing Council and others]

- Date of hearing : 28-09-2018
- Date of Decision : 15-11-2018
- Petitioners : Muneem Khan and 4 others through Muhammad Sahib Khan, Advocate.
- Respondent No. 1 : Pakistan Nursing Council through Mr. Muhammad Zahid Khan, Assistant Attorney General for Pakistan.
- Respondents 2-4 : Secretary Health, Government of Sindh and 2 others through Mr. Ghulam Shabbir Shah Additional Advocate General Sindh alongwith Dr. Jamal-ud-Din, Additional Secretary Health, Government of Sindh and Ms. Khair-un-Nisa, Controller Sindh Nursing Examination Board.

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. This petition under Article 199 of the Constitution of Pakistan, 1973, prays for the issue of the following writs to the Sindh Nurses Examination Board (Respondent No.4):

“a. To direct the respondent No.4 to hold/arrange special annual examination for the students of the petitioners colleges as per decision of the board of directors of the authority of respondent No.1 dated 5/6 April, 2018 to save the future of the students of nursing schools of the petitioners from being spoiled.

b. To direct the respondent No.4 to issue enrollment as well as admit cards to the students of the petitioner and thereby arrange the funds for holding special examination as per orders of respondent No.1 dated 5/6 April, 2018 and 30.04.2018 and meanwhile further direct the respondent No.4 to withhold the results of annual examination session 2017 held by the respondent No.4 on 8th April 2018 till conducting of special annual examination as per order of

the respondent No.1 dated 5/6 April, 2018 and to announce result of both the schedule as well as special annual examination simultaneously.

c. To direct the respondents jointly and severally not to disturb/create hurdles in the peaceful study of the students of the colleges of the petitioners already having pre-registration with the authority of respondent No.1.

d. Any other relief"

2. The Petitioners are persons operating Institutes of Nursing Education in Sindh in the private sector. These Institutes prepare students for examination towards certification and diplomas in General Nursing. Under Section 12 of the Pakistan Nursing Council Act, 1973 (PNC Act), the Pakistan Nursing Council (PNC) accords recognition to such Institutes on being satisfied after an inquiry that the Institute fulfills the requirements of the PNC. Per Section 15 of the PNC Act, the effect of PNC's recognition is that a person possessing a qualification recognized by the PNC shall be entitled to be enrolled in the Register maintained by the PNC, and such person then becomes eligible for employment for the purposes of Section 23 of the PNC Act which stipulates as follows:

"23. Prohibition of Employment of Unregistered Nurses, etc.:

(1) No hospital, asylum, infirmary, dispensary or lying in hospital maintained or aided by the Federal Government or a Provincial Government or a local authority shall employ therein any person as nurse, midwife, health visitor or nursing auxiliary unless such person-

a) is registered in the register; or

b) is a trainee at an institution recognized for the purpose by the Council and is certified by the head of that Institution to have already received sufficient training to be able to perform his duties safely and satisfactorily."

3. Section 11 of the PNC Act provides for a Nursing Examination Board for each Province and reads as follows:

"11. Provincial Nursing Examination Board:

(1) The Provincial Government shall constitute a Provincial Nursing Examination Board consisting of such persons as the

Provincial Governments may, in consultation with the Federal Government appoint.

(2) The functions of Boards shall be to confer, grant or issue diplomas, licenses, certificates or other documents stating or implying that the holder, grantee or recipient, thereof has acquired a qualification in nursing, midwifery, health visiting, public health nursing or auxiliary nursing and to desiring to obtain such qualifications.

(3) A Board shall conduct its proceedings in such manner as may be prescribed."

The Board constituted by the Government of Sindh under Section 11 of the PNC Act is the Sindh Nurses Examination Board (the SNEB). The Respondent No.2, Secretary Health, Government of Sindh is *ex officio* Chairman of the SNEB, while the Respondent No.4 is Controller of Examination of SNEB.

4. In exercise of its Regulation-making power under Section 26 of the PNC Act, the PNC has framed Regulations also for regulating Nursing Educational Institutions. Under such Regulations "*All nursing education is to take place in PNC approved schools of nursing and their affiliated teaching hospitals*" (Regulation No.1); "*Any institution intending to start Nursing Education School should approach the Pakistan Nursing Council for prior approval*" (Regulation 9.1); "*All students are required to be enrolled with their respective Provincial Nursing Examination Board through their respective institutions within 2 months after their admission*" (Regulation No.3.5); A student is permitted three (3) chances to pass a Board examination, i.e., one (1) regular chance and two (2) supplementary chances (Regulation No.3.7).

The academic session for some programs in General Nursing commence in September and some commence in March. The annual Board examination is due after 12 months. The academic session for a Diploma in General Nursing commences in September.

After admitting a student for a program in General Nursing, recognized Institutes are required to send a list of the students admitted by them to the PNC for pre-registration. The list of pre-registered students is then forwarded to the SNEB for enrollment.

In the absence of pre-registration by the PNC, the SNEB does not enroll a student for examination.

5. In addition to requiring a Nursing Education Institute to obtain prior recognition from the PNC, the PNC also restricts each recognized Institute to a certain number of students/seats depending on the capacity (faculty, training infrastructure etc.) of each Institute. The batch of students inducted by the Petitioners 1 to 4 in 2016 was over and above the number of seats fixed by the PNC in that, the Petitioners 1, 2 and 4 had over-inducted 10 students each, the Petitioner No.3 had over-inducted 30 students, while the Petitioner No.5 had commenced operations and inducted 45 students without obtaining the prior recognition of the PNC. Therefore, the SNEB refused to enroll such students of the Petitioners for the annual examination that were due in 2017 (which were eventually held in April 2018). The fate of such students remained in the doldrums from the end of 2016 to April 2018 during which time they had completed the first year of their program. Eventually, on the representation of the Petitioners, and of Institutes in similar circumstances, the PNC convened a meeting of its members on 5th-6th April 2018 (23rd Session) to decide the fate of students who had been over-inducted in various recognized Institutes and of students who had been inducted in unrecognized Institutes.

6. The decision of the PNC taken in its meeting of April 2018 (23rd Session) that was communicated in the same month to Institutes such as the Petitioners 1 to 4, i.e., Institutes recognized by the PNC but who had over-inducted students, was as follows:

“Implementation of Council’s Decision (23rd Session 2018)

I am directed to convey the following decision taken in PNC Council’s meeting held on 5th - 6th April 2018 under the chairmanship of Mr. Faheem Abbas, Director Nursing Balochistan for information and effective implementation accordingly:

S#	AGENDA ITEM # 07	DECISION(S) OF PNC COUNCIL MEETING
01	Penalty for : • Over-induction made by recognized institution	<u>Policy for this year only for recognized institution which made over-induction:</u> • Penalty of Rs. 25,000/- per over-inducted student • Pre-registration will be issued after taking penalty by PNC from institution with warning that this would not be happened again

In accordance with the decision mentioned above, it is to elaborate that a Special Exam has been arranged by PNC through Sindh Nursing Examination Board Karachi for students of recognized institutions, who were over-inducted without approval of PNC.

Your institution is, therefore, directed to provide the "list of over-inducted students" with prescribed penalty in shape of Demand Draft and in the name of "Pakistan Nursing Council" till 17.04.2018 positively.

sd/-
Registrar PNC

Copy for information

1. The Secretary Health Sindh
2. The Director Nursing Sindh Karachi
3. PS to the DG M/o NHR&C Islamabad
4. Controller NEB Sindh Karachi
5. Daily File"

7. The decision of the PNC that was communicated to Institutes such as the Petitioner No.5, i.e., Institutes who had inducted students without obtaining prior recognition from the PNC, was as follows:

"Implementation of Council's Decision (23rd Session 2018)

I am directed to convey the following decision taken in PNC Council's meeting held on 5th - 6th April 2018 under the chairmanship of Mr. Faheem Abbas, Director Nursing Balochistan for information and effective implementation accordingly:

S#	AGENDA ITEM # 07	DECISION(S) OF PNC COUNCIL MEETING
01	Penalty for : • Running of Un-recognized institutions and making induction	<u>Policy for this year only for institution which made induction in 03 years General Nursing Diploma and 01 year Specialty without approval of PNC:</u> • Penalty Rs. 50,000/- per student to be imposed • Pre-registration will be issued after taking penalty • Re-inspection would be conducted by PNC. If institution fails to get recognition status after inspection,

		<p><i>their inducted students will be shifted to other recognized institution. Name of such institutions would be displayed on PNC official website and advertisement would be published in leading newspaper regarding their recognition status.</i></p> <ul style="list-style-type: none"> • <i>NOTE: This permission is for ONE TIME and for already inducted batches keeping in view of the last year for General Nursing Diploma as per HEC decision.</i>
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In accordance with the decision mentioned above, it is to elaborate that a Special Exam has been arranged by PNC through Sindh Nursing Examination Board Karachi as ONE TIME WAIVER for students of un-recognized institutions who were inducted without approval of PNC.

Your institution is, therefore, directed to provide the "list of enrolled students" with prescribed penalty in shape of Demand Draft and in the name of "Pakistan Nursing Council" till 17.04.2018 positively.

sd/-
Registrar PNC

Copy for information:

1. *All Secretaries Health (Punjab, Sindh, KPK & Balochistan)*
2. *All Directorate of Nursing (Punjab, Sindh, KPK & Balochistan)*
3. *PS to the DG M/o NHR&C Islamabad*
4. *Controller NEB Sindh Karachi*
5. *Daily File"*

8. Learned counsel for the Petitioners submitted that the aforesaid letters issued by the PNC show that as regards recognized Institutes such as the Petitioners 1 to 4 who had over-inducted students, a penalty of Rs. 25,000 per over-inducted student was imposed by the PNC; and as regards un-recognized Institutes such as the Petitioner No.5, a penalty of Rs. 50,000 per student was imposed by the PNC; and all such Institutes were categorically informed by the PNC that if they paid the penalty, a Special Examination would be conducted by the SNEB for their affected students.

9. Learned counsel for the Petitioners further submitted that pursuant to the aforesaid decision of the PNC in its 23rd Session 2018, the Petitioners paid to the PNC the penalty imposed, and all affected students of the Petitioners were issued pre-registrations by

the PNC in the months of April and May 2018. Consequently, vide letter dated 09-05-2018 the PNC called upon the Controller SNEB to conduct the Special Examination as decided in PNC's meeting of April 2018 (23rd Session) and the PNC provided to the SNEB a list of 435 students of 10 Institutes, which included the petitioners, for whom the Special Examination was to be held. However, vide letter dated 23-05-2018, the SNEB declined to hold the Special Examination.

10. Faced with the refusal of the SNEB to hold the Special Examination, some of the aggrieved Institutes, which seem to include some of the petitioners as well, made a complaint to the Ombudsman for the Province of Sindh before filing the instant petition. On 01-08-2018 the Ombudsman for the Province of Sindh decided the complaint and recommended to the Chairman SNEB that the Special Examination should be held at the earliest as per the decision of the PNC. Per the comments of the Controller SNEB, he submitted a detailed response to the Ombudsman to explain why the recommendation of the Ombudsman for holding a Special Examination cannot be implemented. Though the comments of the SNEB do state that a representation was made by the SNEB against the Ombudsman's decision to the Governor Sindh (under Section 32 of the Establishment of the Office of the Ombudsman for the Province of Sindh Act, 1991), nothing has been placed on the record to substantiate that. There is also nothing to show whether the Ombudsman took any further action for the implementation of his recommendation. Learned counsel for the Petitioners submitted that it is in these circumstances that the petitioners pray for a writ to the SNEB to hold the Special Examination as decided by the PNC.

11. The PNC obviously supports the petition. The learned Assistant Attorney General invited our attention to the comments of the PNC which state that it was the proposal of the Controller SNEB that formed the basis of PNC's decision of April 2018; that the

Controller had committed during PNC's meeting that after the PNC charges penalty from the delinquent Institutes, the SNEB would arrange a Special Examination for the affected students of such Institutes; and that it was in this backdrop that the PNC made a one-time exception keeping the future of the students in mind and allowed for a Special Examination on the condition of a penalty.

12. The petition is opposed by the SNEB. The learned Additional Advocate General Sindh, along with the Additional Secretary Health, Government of Sindh and the Controller SNEB, contended as follows: that though the Controller SNEB, who was present in PNC's meeting (the 23rd Session) as an observer, had suggested penalizing Institutes that violated the PNC Act and Regulations, she had not proposed a Special Examination for the students of such Institutes; that the minutes of PNC's meeting do not mention the holding of a Special Examination and it was the Registrar PNC who deliberately misquoted PNC's decision to the Institutes; that the PNC Act and Regulations do not envisage a Special Examination, and the holding of such an examination for delinquent Institutes will set a bad precedent; and that since the aggrieved students were pre-registered by the PNC only in 2018, their annual examination will become due in September next. In addition, comments filed by the Controller SNEB submit that this petition is barred by reason of Section 29 of the Establishment of the Office of the Ombudsman for the Province of Sindh Act, 1991.

13. We take up first the contention of the Controller SNEB that since the Petitioners had already availed a remedy under the Establishment of the Office of the Ombudsman for the Province of Sindh Act, 1991, they are barred by reason of Section 29 of the said Act from invoking the writ jurisdiction of this Court in respect of the same matter. It is indeed strange that on the one hand the Controller SNEB objects to the jurisdiction of this Court to hear a matter decided by the Ombudsman in favor of the Petitioners, while on the

other hand the Controller refuses to implement that very decision of the Ombudsman which does not seem to have been set aside by the Governor on a representation under Section 32 of the said Act. Be that as it may, Section 29 of the Establishment of the Office of Ombudsman for the Province of Sindh Act, 1991 reads as follows:

“29. Bar of jurisdiction.- No Court or other authority shall have jurisdiction;

(1) to question the validity of any action taken, or intended to be taken, or order made, or anything done or purporting to have been taken, made or done under this Act; or

(2) to grant an injunction or stay or to make any interim order in relation to any proceedings before, or anything done or intended to be done or purporting to have been done by or under the orders or at the instance of the Ombudsman.”

It will be seen that the decision of the Ombudsman having been passed in favor of the Petitioners, this petition is not brought for any of the purposes set-out in Section 29 of the Establishment of the Office of Ombudsman for the Province of Sindh Act, 1991. The validity of the recommendation of the Ombudsman has not been assailed before us, nor has any injunction/order been sought in relation to the recommendation of the Ombudsman. Therefore, the question before us is not one of Section 29 of the said Act, but whether the decision of the PNC to hold a Special Examination was lawful and requires to be implemented.

14. Coming to the opposition of the SNEB to the holding of a Special Examination, the letter dated 19-04-2018 addressed by the SNEB to the PNC, which was SNEB’s first response when the PNC called upon it to hold the Special Examination, shows that the SNEB had not disputed the decision to hold the Special Examination. Rather the SNEB acknowledged the same by asking the PNC to provide the budget for the Special Examination from the penalty collected from the Institutes. It appears that the matter of the budget for the Special Examination became an issue between the PNC and the SNEB. By letter dated 30-4-2018, the PNC contended that since

the Special Examination was approved by the PNC on the proposal given by the Controller SNEB in the meeting, the budget should also be met by the SNEB from the examination fee received from students. It appears that such exchange between the PNC and the SNEB lead the SNEB to decline the holding of the Special Examination in in the following manner:

*"The Registrar
Pakistan Nursing Council
Islamabad.*

23-05-18

Subject: Special Examination for the students who are inducted / over inducted in unrecognized / recognized institutions.

Ref: -

I have honour to inform here that the under reference letter was put up on file before the Secretary Health Govt of Sindh / Chairman of Sindh Nurses Examination Board regarding Special Examination and it was decided that :-

"There is no need of Annual Special Examination for those institutes which were got recognized when the last Annual Examination Session September 2017 was held. As such their candidates may appear in the next scheduled Annual Examination after recognized".

Submitted for kind information and record.

*Controller
Sindh Nurses Examination
Board Karachi"*

The aforesaid refusal by the SNEB to hold the Special Examination is not premised on the contention that the PNC had never approved the Special Examination in its meeting, but that students who were accorded recognition by the PNC only recently and after the annual examination has already been held, do not deserve a Special Examination. Therefore, SNEB's contention that the Special Examination was refused because it had never been approved in PNC's meeting of April 2018, appears to be an afterthought. To-date, none of the 18 members of the PNC who participated in that meeting, including the Special Secretary Sindh, have ever disputed the factum that the PNC had decided to hold a Special Examination.

15. The decision taken by the PNC in its meeting of April 2018 (23rd Session) manifests that its purpose was to regularize all students of the batch of 2016 belonging to recognized Institutes who had been over-inducted into the Institutes, and to give recognition to unrecognized Institutes so as to regularize their students of the batch of 2016. Indeed there was no point in doing so if the students were being made to wait for the next year for their annual examination; hence the decision to hold a Special Examination for them. As stated by the PNC, the decision to hold a Special Examination was by way of a one-time exception keeping the future of the students in mind and on the condition of a penalty.

16. We have also gone through the PNC Act and the Regulations that were placed before us. While it is correct that the PNC Act and the Regulations do not expressly provide for a Special Examination, but it is also correct that the PNC Act and Regulations do not expressly prohibit a Special Examination should the PNC so deem just and expedient. In other words, the decision to hold the Special Examination was a discretion exercised by the PNC as regulator of Nursing Education Institutes. Nothing has been placed before us to suggest that the regulator exercised such discretion unjustly or unfairly. That being the case, there is no reason for us to question the wisdom of a decision taken by an authority that was otherwise competent to do so. Therefore, none of the arguments and explanations advanced by the SNEB for not implementing PNC's decision to hold the Special Examination, have any force.

17. There is yet another reason to question SNEB's impugned refusal to hold the Special Examination. The Regulations framed by the PNC for the Functioning of Provincial Examination Boards that were placed before us show that the Board of SNEB comprises of eight (08) members of which the Chairman is only one, and that at least three (03) members apart from the Chairman are required for a quorum to take a decision at a meeting of the Board. But SNEB's

letter dated 23-05-2018 reproduced in para 14 above, suggests that the decision not to hold the Special Examination was taken only by the Secretary Health, Government of Sindh acting *ex officio* as Chairman SNEB as opposed to the Board of SNEB. Therefore, SNEB's decision not to implement PNC decision of April 2018 is also without lawful authority.

18. For what has been discussed above, we direct the Sindh Nursing Examination Board to conduct the Special Examination as decided by the Pakistan Nursing Council in its meeting of April 2018 (23rd Session 2018) for the 435 students whose list had been forwarded by the Pakistan Nursing Council to the Sindh Nursing Examination Board under cover of the former's letter dated 09-05-2018. Such Special Examination shall be conducted within 30 days.

The petition is disposed off accordingly along with pending applications.

JUDGE

JUDGE

Karachi

Dated: 15-11-2018