

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI**

**C.P. No.D-243 of 2019**

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**Order with signature of Judge**

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**Before: Muhammad Ali Mazhar and Agha Faisal, JJ.**

Baqai Medical University & another ..... Petitioners

Versus

Government of Pakistan & others.....Respondents

Date of hearing 18.02.2019

Mr. Afnan Saiduzzaman Siddiqui, Advocate for petitioners along with Mr. Iftikhar Ahmed, Principal of Baqai Medical College.

Mr.Sohail H.K. Rana, Advocate for respondent No.2 (Pakistan Medical and Dental Council)

Mr. Ishrat Zahid Alavi, Assistant Attorney General.

Dr.Abdul Rahman Rajput, Deputy Director, Admission Cell, Jinnah Sindh Medical University, Karachi.

**Muhammad Ali Mazhar, J.** The petitioners have challenged the decision of Pakistan Medical & Dental Council (**PM&DC**) dated 27.12.2018, whereby the admission/intake of the students in the Petitioner No.2 Institution for the Session 2018-19 was suspended with further directions to the Admitting University of the Sindh, (JSMU) not to forward the list of students.

2. The controversy initially arose when the first inspection was carried out on 10<sup>th</sup> April, 2018 and in pursuance of that inspection, the petitioners were informed certain deficiencies vide letter dated 14.5.2018 which are reproduced as under:-

1	<b>Baqai teaching hospital at present needs a lot for making it worth teaching status.</b>
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2.	<b>Number of beds in Fatima Hospital needs increase with improvement of facilities</b>
3.	<b>Moreover it needs to be patient friendly and student facilitator.</b>
4.	<b>Specialties are required in Fatima Medical Hospital.</b>
5.	<b>Physiology department lack faculty for so long.</b>

3. The response to above letter was sent by the petitioners on 18.5.2018 which is available on record at page 245. However, after submitting this reply the petitioners were informed by PM&DC on 13.7.2018 that though the comprehensive inspection of the college was conducted on 10<sup>th</sup> April, 2018, however the matter was placed before the Executive Committee of the Council in its meeting held on 19.5.2018 which decided that the fresh inspection will be carried after two months. The text of the decision of the Council was also reproduced in the same letter which reads as under:

**“The Executive Committee after having deliberate discussion upon perusing the inspection recommendation made by the inspection team and considering complete merits of the case unanimously decided that the college will be re-inspected after two months to verify if the college has rectified the deficiencies”.**

4. Again on 19<sup>th</sup> December, 2018, inspection was carried out and the outcome was intimated to the petitioners vide letter dated 21<sup>st</sup> December, 2018 in which various deficiencies were revealed and the petitioner was called upon to submit their reply within a week for consideration of Executive Committee/Council. The petitioner submitted their reply on 28.12.2018 and addressed each deficiency para wise for consideration but before considering the reply, the PM&DC sent the Impugned Letter on 27.12.2018, whereby reference of inspection conducted on 19.12.2018 was allude to and the decision of the Executive Committee was intimated to the petitioners. For the ease of convenience, the relevant text of the letter is reproduced as under:-

**“Keeping in view complete merits of the case, after perusing the matter and having deliberate discussion unanimously decided that the admission/intake of the College for session 2018-19 shall remain suspended/stopped and Admitting University of Sindh Province (Jinnah Sindh Medical University, Karachi) will informed not to admit students. The Executive Committee further decided that the college will intimate the PMDC regarding fulfillment of deficiencies. The college shall apply to PMDC for inspection for next year admissions. The inspection of the college will be carried out on new purple proforma 2018.”**

5. After receiving this letter, the petitioners presented this Constitutional Petition on 14.01.2019 and pleaded that the Impugned Letter had been served without consideration of their reply. It was further asserted that in the reply, the petitioners expressly demonstrated that the deficiencies identified had been virtually addressed and rectified. During pendency of this petition they again submitted current status/progress for the consideration of this Court. The statement reflects in pointers, the deficiencies indicated by PMDC on the strength of second inspection and the rejoinder of the petitioner with the current status. The statement dated 01.02.2019 sought to demonstrate the improvements and efforts made for rectifying the shortcomings and flaws by the petitioners which were also narrated by the petitioners in the reply dated 28.12.2018 to the PMDC.

6. The learned counsel for the petitioners argued that in the inspection the petitioners secured 641.85 marks. He further argued that the petitioner Institution is operating for last 32 years and various batches of students have been passed out from the same college. The principal of college with the permission of the court addressed that so far as the deficiencies pointed out in the hospital, all deficiencies have been cured and alleviated. Some new equipment have also been purchased i.e. 04, Anesthesia Machines with Ventilators, 05, Electro Cautery Machines, Lapro Scope Tower, TURP

equipment, 05, new surgical sets and the hospital is also equipped with the capacity of more than 500 beds which is located in the vicinity of college. He further informed us that 09, new incubator units have been purchased and 01, Psychiatric Ward has also been established. So far deficiency pointed out in the Anatomy Department, the principal of the petitioner No.2 submitted that the Mortuary Refrigerator has been repaired and it was creating problem due to low voltage and as a backup they have also installed Formalin Tank which caters the requirement. The principal of the petitioner No.2 further informed us that for physiology and pharmacology departments, more than 15 applications for Associate Professors and Assistant Professors have been sent to PM&DC for according their registration. He further informed us that the total marks for the said professors comes to 239 but due to pendency of their applications with PM&DC for registration, only 181 marks have been given to the Institution in this realm and range. Had the registration of all Associate Professors and Assistant Professors accorded by PMDC within time, approximately 60 more marks could have added in the total marks/score of the petitioner No.2. So far as the shortage of 02, Professors in the department of Pharmacology and Radiology, the principal submitted that they are making all best efforts to remove this deficiency also and he was very confident that vacant positions will be filled soon. He further pointed out that in Surgery Department there was deficiency of 02, Assistant Professors which deficiency has also been put to rest. He further stated that the matter of Pathology Department has already been referred to PM&DC for registration and so far as ENT Department is concerned 02, Assistant Professors are already there without any deficiency. With regard to the deficiency of 04, Resident Medical Officers (RMOs) is concerned, the Principal replied that three RMOs are

already performing their duties and 02 more have been appointed. The Inspection Committee asked for their registration with PM&DC but according to Principal of the Petitioner No.2, PM&DC has not prescribed any procedure for registration of RMOs, however, the principal agreed to comply with this condition also if PM&DC will provide Application Form for their registration.

7. The learned counsel for the petitioner further argued that all best possible efforts have been made for removal of deficiencies in accordance with instructions and guidelines of the PM&DC and at present nothing is lacking. He suggested that PMDC may be directed to carry out fresh inspection so that the petitioners may demonstrate the removal of all deficiencies, he also made a request that in the meanwhile, the petitioners may be allowed to admit students for the Session 2018-2019 and the Admitting University may be directed to send the list of students who have applied for admission on merits. In order to safeguard and protect the interest of the students, he pointed out that the petitioner No.2 has also submitted an affidavit duly signed by its Principal. Paragraph 5 and 6 of the affidavit are reproduced as under.

**“5. That the petitioner No.2 through this Affidavit submits that all of the above stated position as also elucidated through a detailed reply which was furnished on the 28<sup>th</sup> December, 2018 to the Respondent No.2, by the Principal of Petitioner No.2, is true and not contrary to any of the officially stated positions taken before the PM&DC or before this Honourable Court.**

**6. The petitioner No.2 submits that they are in conformity with the requirements of the PM&DC Ordinance and if the requirements are not fulfilled the Respondent No.2 can revoke the admissions which in accordance with the 2019 Ordinance is the purview of the Ministry. Nevertheless, PM&DC in accordance with the 1969 Ordinance if it subsists can revoke the admissions of 2018-19 of the Respondent No.2 and the fees can be refunded to the students' subject to the exclusion of non-refundable fees under the University rules”.**

8. The learned counsel for the PM&DC argued that earlier inspections were carried out in terms of Medical Council Ordinance, 1962, however, on 08.01.2019, Pakistan Medical and Dental Council Ordinance, 2019 has been promulgated which has repealed the 1962 Ordinance. He further argued that the Council has not been constituted so far under the new law by the Prime Minister of Pakistan. Learned counsel also referred to Section 34 of the Ordinance, 2019 which provides that the Prime Minister of Pakistan by Notification shall establish Medical Tribunal which shall exercise jurisdiction under this Ordinance. Under Section 35 of the Ordinance, 2019 the jurisdiction and power of Medical Tribunal is provided which includes the powers to try the cases of all contravention punishable under Section 32 as well as the cases of any person aggrieved by an act cognizable under this ordinance who may file a complaint to the Medical Tribunal. He further referred to Section 39 of the Ordinance, 2019 and argued that on promulgation of this Ordinance, all matters are abated which are within the jurisdiction of Medical Tribunal, therefore, this petition is liable to be abated. He further argued whether the deficiencies exposed in last inspection report have been removed or not? This can only be examined by the Council which is a regulatory body and no fresh inspection can be carried out unless Council is constituted by the Prime Minister of Pakistan.

9. The learned Assistant Attorney General endorsed the arguments of learned counsel for the PM&DC that the Council has not been constituted by the Prime Minister in the new law therefore, the inspectors cannot be appointed. He also conceded that Medical Tribunal is not functional.

10. Heard the arguments. Under Section 21 of the Medical Council Ordinance, 1962, the Executive Committee could appoint such number of medical or dental inspectors as it may deem requisite to attend at any or all of the examinations held by medical or dental institutions in Pakistan for the purpose of granting recognized medical or additional medical, or dental, qualifications or in respect of which recognition has been sought. According to Sub-section (2), the inspectors appointed in this section required to form a comprehensive report about the facilities for training in the institution and under sub-section (3), it was provided that the Executive Committee shall forward a copy of any such report to the medical or dental institution concerned and shall also forward a copy with the remarks of such medical or dental institutions thereon to the Council. However, under Section 22 of Medical and Dental Council Ordinance, 1962, the power of withdrawal of recognition was vested in the Federal Government on the recommendation of Council but the Council could have stopped the further intake of the students and forward a summary of its findings to the medical or dental institution with an intimation of the period within which the medical or dental institution may submit its explanation to the Council, however, if the council is not satisfied with the explanation it could have recommended to the Federal Government for closure of institution. On 05.01.2019, the Pakistan Medical and Dental Council Ordinance, 2019 has been promulgated. In Section 22 of the new law also, the Council may approve the list of inspectors to inspect the facilities for training available at the medical or dental institution. The inspector appointed under this section shall form a comprehensive report on the prescribed format about the facilities for training in the institution, however, the President shall forward a copy of report to the medical or dental institution for its remarks and

shall forward a copy with the remarks of such medical or dental institution thereon along with its recommendations to the Council. The withdrawal of recognition is provided under Section 23 of Pakistan Medical and Dental Council Ordinance 2019 wherein it is provided that if the Council is not satisfied with the explanation or where no explanation is submitted within the stipulated time, then on expiry of that period, it shall recommend to the ministry for closure of the institution subject to the conditions that students who are enrolled in such medical or dental institution during the period it was recognized by the Council shall not suffer any loss in terms of the period of education already undertaken and remaining period to be undertaken by them.

11. We also asked the learned counsel for the PMDC whether the Medical Tribunal has been constituted or not? He frankly conceded that no Medical Tribunal has been constituted. Since Medical Tribunal is neither constituted nor functional at the moment, therefore, we cannot nonsuit the petitioners on this ground unless and until the Medical Tribunal is constituted and starts functioning. Learned counsel for the PMDC also articulated that the Regulatory Authority has already conducted an inspection and unless the new inspection is carried out it could not be possible to ascertain whether all the deficiencies as stated by the Principal of the petitioner and learned counsel for the petitioner have been rectified or not. He has also referred to the judgment of the apex court in the case of Pakistan Medical and Dental Council and others Vs. Ziauddin Medical University (PLD 2007 SC 323) to amplify his contention that PMDC is the authorized regulatory body. He further submits that once the Executive Council is constituted by the Prime Minister of Pakistan, the Inspectors will be appointed for the purposes of inspection and



then fresh inspection will be carried out by the Council in view of the provisions contained in Ordinance, 2019.

12. It is an admitted position that on receiving the letter of PMDC on 21.12.2018, the petitioner sent their response within a week to Ms. Sara Rubab Nasir, In charge Inspection, PM&DC on 28.12.2018 but before considering their reply, the PMDC on 27.12.2018, imposed the restrictions not to admit/intake the students for the Session 2018-19. No doubt, the PMDC is a Regulatory Authority in the case in hand both in old and new law but due process is also prerequisite that needs to be respected at all stratum. In our Constitution, right to fair trial is a fundamental right. This constitutional reassurance envisaged and envisioned both procedural standards that courts must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe. On insertion of this fundamental right in our Constitution, we ought to analyze and survey the laws and the rules/regulations framed thereunder to comprehend whether this indispensable right is accessible or deprived of? In case of stringency and rigidity in affording this right, it is the function rather a responsibility of court to protect this right so that no injustice and unfairness should be done to anybody. The proactive role of the court must alone prove that this right is not confined only within the precincts of the Constitution but in actuality and for all practicality it exists to do good to the people. The right to a fair hearing and or trial necessitates that no one should be penalized by the decision upsetting and afflicting his right or legitimate expectations unless he is given prior notice of the case, a fair chance to answer it and a fair opportunity to explicate/present the case. The right to a fair trial means that general public and commonalities can be sure that process

will be fair and certain which is the finest method of detaching and disengaging a guilty from an innocent thereby protecting against injustice. **Ref: M/s.Inbox Business Technologies Ltd. versus Pakistan & others, (2018 PTD 621).** The honourable Supreme Court in the case of **Warid Telecom (Pvt.) Limited v. Pakistan Telecommunication Authority, (2015 SCMR 338)** held as under:

**"b. Constitution of Pakistan. Article 10A. Fundamental Rights. Whenever adverse action was being contemplated against a person a notice and/or opportunity of hearing was to be given to such person. Said principle was a fundamental right under Article 10A in the Constitution. However, both the requirements of a notice and providing an opportunity of a hearing may also be dispensed with in certain type of cases e.g. where such requirement would cause "more injustice than justice" or it was not in the "public interest".**

**"The Indian Supreme Court in the case of Karnataka Public Service Commission v. B. M. Vijaya Shankar (AIR 1992 Supreme Court 952) stated that, when meeting the requirement of notice and providing an opportunity of hearing will cause "more injustice than justice" or it is not in the "public interest" the same may be withheld. It will be useful to reproduce the following portion from the said judgment:--**

**(4) Was natural justice violated? Natural justice is a concept which has succeeded in keeping the arbitrary action within limits and preserving the rule of law. But with all the religious rigidity with which it should be observed; since it is ultimately weighed in balance of fairness, the courts have been circumspect in extending it to situations where it would cause more injustice than justice. Even though the procedure of affording hearing is as important as decision on merits yet urgency of the matter, or public interest at times require, flexibility in application of the rule as the circumstances of the case and the nature of the matter required to be dealt may serve interest of justice better by denying opportunity of hearing and permitting the person concerned to challenge the order itself on merits not for lack of hearing to establish bona fide or innocence but for being otherwise arbitrary or against rules. Present is a case which, in our opinion, can safely be placed in a category where natural justice before taking any action stood excluded as it did not involve any misconduct or punishment."**

**Another case from the India in a similar vein is the case of Union of India v. J. N. Sinha (AIR 1971 Supreme Court 40) where it was held, that:--**

**"As observed by this Court in Kraipak v. Union of India, AIR 1970 SC 150, "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it." It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred**

**should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."**

13. The Principal of the petitioner No.2 pointed out that various deficiencies have already been rectified which are already mentioned supra. He further stated that the letters for registration of the faculty members have already been submitted to PM&DC for their registration which are awaited without any justification. He further stated that various equipment have been replaced with new setup. The petitioners have also submitted an affidavit in which they have assured that if they fail to fulfill the requirements or any lapses are found in the next inspection they will be liable to refund the fee of the students. Further in the Ordinance, 2019, Section 23 fully covers the situation wherein it is clearly provided that for protecting the rights of the students the Council may approve the scheme which may include management of the medical or dental institution being handed over to an interim committee, administrator or persons appointed by the Council with the approval of the Ministry and in the event of closure, the students who are enrolled in such medical or dental institution during the period it was recognized by the Council shall not suffer any loss in terms of the period of education already undertaken and remaining period to be undertaken by them.

14. It is manifest from the Impugned Letter that it was issued without considering the reply of the petitioners. If PMDC wanted to take unilateral action without affording opportunity to defend the petitioners, then there was no purpose of calling upon the petitioners to submit the reply. In the absence of having considered the submissions of the petitioner and or verification thereof the Impugned Letter appears to be pre-

mature. It is also ground reality that there are merely 1,800 seats for medical education available in the Province of Sindh for which thousands of the students sat in the assessment tests for the period under consideration. The cavalier manner in which the Impugned Letter was issued has the effect of reducing the already diminutive space. Being a Regulatory Authority even in old law it was the responsibility and onerous duty of PMDC to provide fair opportunity to defend before taking such a drastic action of suspending the intake of new students for the first MBBS professional this year. The learned counsel for the PMDC averred that post dissolution of the old council and prior to the constitution of the new council, PMDC is unable to inspect the petitioner to verify whether the improvements demonstrated from the record are fact. This is quite obvious that no inspection can be carried out at this stage due to non-availability of new council but at one fell swoop, on this administrative ground and inability of respondents, the petitioners cannot be oppressed.

15. The learned counsel for PMDC referred to the case of **Pakistan Medical and Dental Council versus Ziauddin Medical University & others (PLD 2007 Supreme Court 323)**. No such issue involved herein. This case is quite distinguishable to the facts of the case in hand which is somewhat obvious from the issues dilated upon by the apex court in the above case such as (i) What is the nature and import of the concept of recognition of a medical qualification as contemplated in section 11 of the Pakistan Medical and Dental Council Ordinance, 1962? (ii) What is the nature of 'consultation' with the Council by the Federal Government, which the law requires the latter to have before passing an order under various provisions of the Ordinance? (iii) Whether every Chartered University having a medical faculty is entitled

to representation in the Pakistan Medical and Dental Council in terms of section 3 of the Ordinance? (iv) Whether the teaching staff of each Medical and Dental Institution in Pakistan is entitled to representation in accord with section 3 (f) of the Ordinance? (v) Whether the Pakistan Medical & Dental is empowered to ask for information, make queries, issue directions and take other steps prescribed in law to carry out the purposes of the Ordinance?

16. As a result of above discussion, we dispose of this petition with the directions to the petitioners to apply to the PMDC for inspection within three months from the date hereof and the said inspection shall be conducted by PMDC in accordance with the law and in due consideration of the submissions of the petitioners. In the meanwhile the admitting University is directed to send the list of merits for admission in petitioner No.2 college in line with its entitlement thereto prior to the Impugned Letter.

17. In the event that the petitioner is found fail in complying with the prescribed requirements that off course be evaluated by PMDC, then the petitioner No.2 shall be responsible to refund the entire fees of all students and the PMDC may have recourse in terms of Section 23 of the Ordinance, 2019 for the purpose of protecting the rights of existing students. The petition is disposed of accordingly.

**Judge**

**Judge**