

IN THE HIGH COURT OF SINDH AT KARACHI

C P D 507 of 2019

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

Dow University of Health Sciences
vs.
Federation of Pakistan & Others

For the Petitioner: Mr. Haider Waheed, Advocate
Mr. Shahzeb A Khan, Advocate
Mr. Muneem Masood, Advocate

For the Respondent Nos. 1 & 2: Mr. Ishrat Zahid Alvi
Assistant Attorney General

For the Respondent No. 4: Mr. Sohail H.K. Rana, Advocate
Mr. Anwaar Alam
Officer in Charge Karachi

Date of Hearing: 07.03.2019

Date of Announcement: 07.03.2019

JUDGMENT

Agha Faisal, J: The present petition was filed assailing the decision of the Executive Committee of the Pakistan Medical and Dental Council (“**PMDC**”) communicated vide notice dated 11.01.2019 (“**Impugned Notification**”), whereby the petitioner was sought to be derecognized.

2. Mr. Haider Waheed, Advocate submitted that the petitioner, being a constituent of the Dow University of Health and Sciences, is a dental college engaged imparting undergraduate and postgraduate dental education. It was submitted that the petitioner was established in the year 2012 and has been admitting 50 students per year and that till date two batches, comprising of 200 students, have already passed out after

obtaining the degree of Bachelors of Dental Surgery. Learned counsel demonstrated that the petitioner is also affiliated with the Ruth K.M. Pfau Civil Hospital, Karachi to enhance the learning of its students in general medicine, general surgery, oral and maxillofacial surgery. Learned counsel submitted that the petitioner's facilities cater for students seeking education in oral diagnosis, periodontology, operative dentistry, endodontic, prosthodontics, orthodontics and oral and maxillofacial surgery. Per learned counsel, a notice for inspection dated 09.11.2018 was served upon the petitioner by the PMDC. However, one day prior to the date of inspection, another notice was served thereupon wherein the entire assessment criteria of the inspection was unilaterally and unjustifiably varied. It was contended that the inspection was conducted and a report thereof was prepared by the PMDC wherein the purported shortcomings of the petitioner were highlighted and the petitioner was given a period of one week within which to submit a reply in regard of the observations therein contained. Learned counsel demonstrated from the record that a reply was in fact submitted to the PMDC within the designated time, however, without consideration of the same the Impugned Notification was delivered strangulating the very functioning of the petitioner. Per learned counsel the inspection conducted was on the wrong parameters, however, notwithstanding the same the observations contained in the inspection report were contrary to the ground realities and the same was pointed out to PMDC vide the petitioners reply. Learned counsel further submitted that notwithstanding the forgoing the petitioner has incorporated substantial enhancements and improvements and as a consequence thereof it has crossed the quantified threshold prescribed for the institutions imparting medical instructions. The learned counsel stated that while the petitioner

remained ready for any inspection, it was imperative that the Impugned Notification be set-aside or suspended in the least in the interim period so that the functioning of the petitioner and the future of its students is not impaired.

3. Mr. Sohail Hayat Khan Rana, Advocate appeared on behalf of the PMDC, the respondent No.4 herein, and submitted that the present petition was not maintainable as it agitated disputed questions of fact. Learned counsel acknowledged the documentation arrayed by the petitioner, in support of its contention that the inspection report was incongruent with the ground reality, but submitted that it could only be deduced that such information was not made available at the time that the inspection was being conducted. Per learned counsel the all legal proceedings with regard to the functioning of medical Institutions were required to be agitated before the medical tribunals prescribed under the Pakistan Medical and Dental Council Ordinance, 2019 (**“2019 Ordinance”**) and therefore the invocation of the writ jurisdiction by the petitioner was misconceived in any event. It was thus concluded that the present petition was not maintainable and even otherwise devoid of merit, hence, may be dismissed forthwith.

4. We have considered the arguments of the respective learned counsel and have also appreciated the law and documentation arrayed before us. Prior to deliberating upon the arguments submitted before us it is imperative for us to consider an issue not identified by the respective learned counsel, i.e. whether the Impugned Notification was issued within the confines of the applicable law.

5. The Impugned Notification sought to withdraw the recognition of the petitioner and as such was issued consequent upon the decision of the Council of the PMDC. In order to determine the legal sanction it may be appropriate to consider the relevant provision of the Medical and Dental Council Ordinance, 1962 ("**1962 Ordinance**") as the same was in force at the time that the Council took its decision. Section 22 of the 1962 Ordinance deals with the withdrawal of recognition and it may be pertinent to reproduce the content herein below:

"22. Withdrawal of recognition. (1) If a recognized institution is violating provisions of this Ordinance and regulations made thereunder or the facilities for training for the courses of study or standard of examination in the institution to obtain a recognized medical or dental qualification, additional medical or dental qualification, training for house job or internship or foundation year or in a continuous professional development opportunity providing organization has deteriorated to an extent that the standard of proficiency required from candidates at any examination held for the purpose of granting such qualification is not such as to secure to persons holding such qualification the knowledge and skill requisite for the efficient practice of medicine or dentistry, the Council may stop further intake of students in the institution and forward a summary of its findings and its intent 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 and may request for a hearing before the Council if it so desires."

(2) If the Council is not satisfied with the explanation then it shall make a recommendation to the Federal Government for closure of the institution to which shall include a scheme for adjustment of students in other recognized institutions of the corresponding public or private sector, as the case may be.

(3) On recommendations of the Council, the Federal Government may, by notification in the official Gazette, direct that an entry shall be made in the First, Third, Fifth, Sixth or Seventh Schedule, as the case may be, against the said medical or dental or a postgraduate institution and qualification granted by it, hospital or continuous professional development opportunity provider declaring that it shall be a recognized medical, dental or additional medical or dental qualification, institution, hospital and continuous professional development opportunity provider only before the date of notification."

6. It is prima facie apparent from a bare perusal of the said section that the Council had no unilateral power to withdraw the recognition accorded to an institution and it is manifest from the Impugned Notification that the provisions of section 22 were not in fact complied with prior to the issuance thereof. We confronted the learned counsel for the PMDC with this issue and he submitted that the provisions of the 2019 Ordinance, and not the 1962 Ordinance, are required to be considered in order to determine the validity of the Impugned Notification since the said law is that which is presently in force. The provision of the 2019 Ordinance *para materia* to the law cited supra is Section 23 thereof, content whereof is reproduced herein below:

23. Withdrawal of recognition. (1) When upon report by the Committee or the Inspector appointed under section 23 or from any other source it appear to the Council that:

(a) that a recognized institution is violating provisions of this Ordinance or, rules or regulations made thereunder, or

(b) the courses of study and standard of examination to be undergone in, or the proficiency required from candidates at any examination held by any University or medical or dental institution, or.,

(c) the staff, infrastructure, equipment, accommodation, training and other facilities for instruction and training provided in such medical or dental institution or in any college or other recognized institution, or

(d) that facilities for training for house job or internship or foundation year in a continuous professional development opportunity providing organization has deteriorated to an extent that the standard of proficiency required from candidates at examination held for the purpose of granting such qualification additional qualification is not such as to secure to persons holding such qualification the knowledge and skill requisite for the efficient practice of medicine or dentistry.

the Council shall prepare and issue its findings in writing.

(2) The Council shall forward to the medical or dental institution, summary of its findings with the proposed action to be taken against such medical or dental institution with an intimation of the period, which shall not be less than fifteen days, within which the medical or dental institution may submit its explanation to the

Council and may request for a hearing before the Council if it so desires.

(3) If the Council is not satisfied with the explanation or, where no explanation is submitted within the stipulated time then on the 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:

Provided that for purposes of protecting the rights of existing students, the Council may approve a scheme which may include the 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.

(4) On the recommendation of the Council, the Ministry may, by notification in the official Gazette, direct that an entry shall be made in the First, Third, Fifth, Sixth or Seventh Schedule, as the case may be, against the said medical or dental or a postgraduate institution' and qualification granted by it, hospital or continuous professional development opportunity provider declaring that it shall be a recognized medical, dental or additional medical or dental qualification, institution, hospital and continuous professional development opportunity provider only before the date of notification:

Provided that the Ministry, within thirty days, may require the Council to reconsider its recommendation. Where Council after reconsideration uphold its earlier recommendation the Ministry shall issue the notification as provided under subsection (3).”

7. Even though it is our view that it would be the 1962 Ordinance that had to be taken into account for determination of the validity of the Council's decision, as that was the law in force at the relevant time, but even if we consider the parallel provision in the 2019 Ordinance it is observed that the Council is devoid of any powers to unilaterally derecognize an institution. The prescribed methodology required to be applied in order to derecognize an Institution is apparent from the reproduction of the statutory provisions hereinabove, therefore, reiteration of the same is eschewed herein for the sake of brevity.

8. Notwithstanding our view that the Impugned Notification appeared to have been issued otherwise in accordance with the provisions of

either the 1962 Ordinance or the 2019 Ordinance, we consider it appropriate to also address the controversy in the light of the arguments advanced before us by the respective learned counsel.

9. Our attention was drawn to the inspection notice dated 09.11.2018 wherein it was stated that the eligibility criteria shall be that contained in the Regulations 2012. The date of inspection was advised in the very same notice, however, just a day prior to the upcoming inspection another notice was served upon the petitioner by the PMDC wherein the earlier letter was withdrawn and the petitioner was informed that the inspection shall be undertaken in conformity with the eligibility criteria prescribed by the Regulations, 2018. This last minute alteration of the assessment criteria was notwithstanding the fact that Regulation 12 (of the Regulations, 2018) prescribed that the existing recognized institutions were given three years within which to conform to the prescriptions so notified. The assessment upon the Regulations 2018 criteria was a marked departure from the past practice and no justification for the said divergence was ever advised to the petitioner or to this Court. In this context it may be appropriate to advert to a judgment of the Honorable Supreme Court in the case of *Radaka Corporation & Others vs. Collector of Customs & Another* reported as 1989 SCMR 353 wherein Nasim Hussain Shah J. (as he then was) had maintained that where the departmental practice had followed a particular course it would be extremely unfair to make an unsubstantiated departure therefrom disturbing rights that may have accrued.

10. Notwithstanding the unsubstantiated variance in the assessment criteria, it is also borne from the record that the inspection report had

directed the petitioner to note deficiencies and observations as pointed out therein and furnish their response in such regard within a week. The said reply was in fact furnished and it is demonstrated from a bare perusal of the Impugned Notice that it was not even considered prior to issuance of the Impugned Notice. The response submitted gave detailed comments with respect to the observations pointed out in the inspection report and submitted that the same were predominantly contrary to the facts. We have considered the statement of the petitioner dated 17.01.2019, available at page 1271 of the Court file, wherein 19 facilities stated to be present at the premises of the petitioner have been listed, along with photographic / documentary corroboration, in respect whereof the inspection report had observed that they were absent and hence the score awarded in such regard was zero. It was demonstrated by the learned counsel for the petitioner that if just the existence of these facilities was taken into account the aggregate score of the petitioner would increase by 79 points. Another statement, available at page 1267 of the Court file points to similar situation where facilities available on ground were not taken into account in the inspection report. It was submitted that just by consideration of the same the incremental score of 56.5 would be added to the total score of the petitioner. Further similar documentation is available on the record, including that contained on page 1269 of the Court file, which shows that the aggregate score of the petitioner would merit a substantial increase if the same had been considered by the PMDC. It is in respect of these purported facts, represented by the documentation referred to supra, that the learned counsel for the PMDC had submitted that if such was the case then there could have been no justification for the same not having been taken into account by the relevant inspectors.

Notwithstanding the forgoing our attention was drawn to another statement, available at page 1307 of the Court file, wherein it was demonstrated that around 60 faculty members have been registered with the PMDC since the date of the Impugned Notification. It was submitted that these registrations are admitted facts as the registration referred to was conferred by the PMDC itself and even if this alone is added to the aggregate score of the petitioner the said score rises by over 94 points. It was submitted that in addition thereto another 23, or thereabouts, registrations of faculty members are pending with the PMDC, and while the petitioner cannot be penalized if decisions in respect thereof are delayed by the PMDC, such registrations would further enhance the picture in so far as the petitioner is concerned. We have noted from the Impugned Notification that the petitioner was awarded a score of 680 out of 1000 whereas the threshold prescribed by the PMDC for sanction of PMDC is required to be 750. Even if all other improvements and enhancements are disregarded for the moment it would appear that merely by accounting for the faculty registrations, undertaken by PMDC itself in the recent past, the resultant score would take the petitioner comfortably across the aforesaid threshold. The learned counsel for the petitioner has categorically submitted that it is ready and willing to be inspected at any time by the PMDC so that the corroborated facts can be verified. It was further submitted that the petitioner shall be liable if the representations are found to be unsubstantiated and shall also refund any fees that it may have obtained from students in the meanwhile.

11. Learned counsel for the PMDC has however conveyed PMDC's inability to conduct an inspection at the present time upon the premise that the 2019 Ordinance has recently been promulgated and the

inspectors, pursuant thereto, have yet to be appointed. The provision of inspection is contained in section 22 of the 2019 Ordinance and it is considered prudent to reproduce the content herein below:

“22. Inspection: (1) The Council shall approve a list of inspectors and the President shall commission such number of medical or dental inspectors from the approved list, as he may deem appropriate, to inspect the facilities for training available at the medical or dental institutions and attend at any or all of the examinations held by medical or dental institutions in Pakistan recognized under this Ordinance for the purpose of granting recognized medical or dental or additional medical or dental qualifications.

(2) Inspectors appointed under this section shall form a comprehensive report on the prescribed format about the facilities for training in the institution and shall not interfere with conduct of any examination and shall report to the Council on the standard of the inspected examination which they attend and on the courses of study and facilities for teaching provided by the medical or dental institution inspected for different stages leading up to examinations and on any other matters in regard to which the President or the Council may require them to report.

(3) The President shall forward a copy of any part of such report to the medical or dental institution concerned for its remarks and shall forward a copy, with the remarks of such medical or dental institution thereon along-with its recommendation, to the Council.

(4) (1) The Council may authorize any of its officers or its inspectors to enter the premises of a medical or dental college or institution or other such institution for purposes of inspection.

(2) A medical or dental college or institution or other recognized institution shall, at all reasonable times, be open for inspection by an authorized officer under sub-section (1) and the medical or dental college or institution or other recognized institution shall provide such officer every assistance and facility in performance of his duties.

(3) The authorized officer shall, within forty-eight hours of the inspection, submit his inspection report to the President or the Council.

(4) The Council may authorize any of its officers to undertake investigation, in the manner it may prescribe, in any matter with regard to its functions and to seek any specific information, from any person, which the Council may deem useful in order to enable it to determine and dispose of such matter including seizing of any record as may be deemed necessary by the Council for such investigation.”

12. Per learned counsel for PMDC, the council referred to in Section 22 of the 2019 Ordinance has not been constituted as of yet and it is only when the said Council comes into existence that the President shall be elected and thereafter the President shall commission the inspectors, who shall be empowered to conduct the inspection on behalf of the PMDC.

13. It has become obvious that the reply of the petitioner to the inspection report was never considered by the PMDC and that at present the PMDC remains incapacitated to revisit the issue and ascertain the factum for itself. This issue came up before a Division Bench of this Court in *Baqai Medical University & Another vs. Government of Pakistan & Others (CP D 243 of 2019)* decided on 18.02.2019 (“**Baqai Medical**”) and it was maintained as follows:

“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.”

14. We have further advised by the learned counsel for the PMDC that no medical tribunal has been constituted as of date and in view of this fact the petitioners could not be nonsuited and precluded from seeking relief before this Court. Reliance is placed in such regard upon *Baqai Medical* and an earlier Division Bench judgment of this Court in *Shaheed Mohtarma Benazir Bhutto Medical College Lyari vs. Province of Sindh & Others (CP D 8774 of 2018)* decided on 08.02.2019 (“**Lyari Medical**”). The judgments in *Lyari Medical* and *Baqai Medical* had consistently maintained that in the presence of the irregularities having been demonstrated in the process carried out by the PMDC, compounded with the fact that the PMDC was incapacitated to verify the factual position and / or address the irregularities so identified, the burden in such regard could not be placed upon the students of this country desirous of obtaining a medical education.

15. In view of the reasoning and rationale herein contained, we had set-aside the Impugned Notification and disposed of the petition vide our short order dated 07.05.2019, content whereof is reproduced herein below:

“For the reasons to be recorded later the impugned letter is set aside. The petitioners shall apply to the Pakistan Medical & Dental Council (PMDC) for inspection within three months from the date hereof and the said inspection shall be conducted by the PMDC in accordance with the law and in due consideration of the submissions of the petitioners. 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.

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 petitioners shall also submit an affidavit to the Registrar, PMDC in which they will undertake that in case they will fail to fulfill the requirements as required to be fulfilled within the threshold of PMDC’s rules and regulations and

the law, they will return the entire fees to the students. This petition is disposed of accordingly.”

16. These are the reasons for our afore-stated short order.

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Karachi.

Dated 11th March, 2019.

*Farooq PS/**