ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Present:-
Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Yousuf Ali Sayeed.
Mr. Justice Agha Faisal.

Constitution Petition No.D-949 of 2022
Pakistan Medical Commission

Versus

Province of Sindh & others

Dates of hearings : 16.03.2022, 17.03.2022 & 18.03.2022.
Date of order : 18.03.22.
Date of reasons : 24.03.2022.

M/s. Zeeshan Abdullah and Adnan Abdullah Advocates for the Petitioner.
Mr. Khalid Jawed Khan Attorney General of Pakistan.
Mr. Salman Talibuddin Advocate General Sindh.
Mr. Khaleeq Ahmed DAG.
Mr. Irfan Ahmed Memon DAG.
Mr. Muhammad Anwar Alam, Officer Incharge PMC.
Mr. Obaidur Rehman Advocate for Respondent.
Mr. Haider Waheed, Advocate for Respondent No.3.

O R D E R

Muhammad Iqbal Kalhoro, J: - Petitioner, M/s. Pakistan Medical Commission **(the Commission)**, has challenged a decision of the Sindh Cabinet in a meeting dated 2.12.2021 lowering benchmark for Medical & Dental Colleges Admission Test **(MDCAT)** from 65%, laid down by the Commission, to 50% for admission in private and public medical colleges & universities in province of Sindh, and consequent four notifications dated 07.12.2021 and 31.12.2021, among others, directing the universities to initiate admission process in MBBS and BDS by considering the candidates having attained 50% score in MDCAT 2021 as qualified, on the grounds, mainly, of being unconstitutional and issued in violation of the Pakistan Medical Commission Act, 2020 **(PMC, Act)** and the regulations framed thereunder.

2. The cause of action, as stated, leading to filing of this petition is grant of admission in both the aforesaid disciplines by the universities ostensibly in compliance of impugned notifications to

students with score not less than 50% (but may be less than 65%) in MDCAT. Learned counsel for petitioner in order to indicate fragility, in law, of the impugned action and notifications has, in the main, relied upon certain provisions of PMC, Act and Articles 97, 137, 167 and 168 of the Constitution besides entries 11 and 12 in Part II of the Federal Legislative List. Further, in order to support his contentions, has relied upon the case law reported in PLD 2018 Sindh 391, PLD 2021 Sindh 256.

3. Learned Advocate General Sindh too to contest petitioner's case referred to provisions of PMC Act besides certain papers downloaded from internet on the subject of admission in law in foreign countries in his arguments. But, mostly, what he tried to impress was imperfectness and incongruity of the said law with quality and syllabus of pre-medical education being imparted in each province. He also urged that there is no rationale in fixing 65% score as a benchmark for admission in medical colleges & universities. The law is discriminatory, totally oblivious of disparity of education available in each province, has set down 65% score as minimum qualification for admission without an apparent rationale. As per section 10 of said law- **Composition of National Medical and Dental Academic Board-** one vice-chancellor or dean of a public medical university and one vice-chancellor or dean of the medical faculty of a private university or college nominated by each provincial government from amongst the universities located in the respective province are to be included as members in such Board. But the Commission neither approached the provincial government for this purpose (and due to this fact) nor has the Sindh government forwarded any such nomination. Destitute of such legal requirement, composition of the Board is illegal and any recommendation by it for fixing the criteria of 65% marks for admission, etc. is, by natural corollary, void *ab initio* and unsustainable in law.

4. He next argued that there was no meaningful consultation, as required under PMS Act, by the Commission with the Sindh government for setting up the Board. Nor any feedback for proposing any recommendation or framing rules or regulations or syllabus for the test was either sought from it. The whole process is drenched with discrimination and if the policy of the Commission is followed by the Sindh Government, the local students, who may have not achieved the requisite standard but still

are competent and have recorded score of 50% or above in the test, would be deprived of their right to education in their own province. Entry no.11 is not related to medical or legal education but to medical and legal profession and is therefore unrelated to the issue. Education including higher education has become the sole domain of the province after 18th amendment and it is for the province to decide which criteria or benchmark suits its educational conditions and thus be applied for admission in its colleges & universities. In terms of rule 14 (1) (c) of the Federal Rules of Business the regulations framed under this law, required to be taken up with the Law, Justice and Human Rights Division first for approval since has not been done in this case have no binding effect. He, by referring to Article 184(1) of the Constitution, also emphasized that as the dispute is between two governments- federal and provincial- this court has no jurisdiction under Article 199 to decide it. The petitioner, if so wishes, may approach, under Article 184(1), the Honorable Supreme court for this purpose.

5. Learned Attorney General of Pakistan, present on court notice, submitted that in the proceedings filed by the Commissions, *vires* of PMC, Act, 2020 cannot be called into question. Further, the Commission cannot be equated with the federal government to attract the scheme under Article 184 (1) of the Constitution. In any case, such vista is available to the Sindh government to take the issue, on the grounds as urged by its principal law officer here, to the Honorable Supreme Court for a decision. Learned counsel for respondent no.3, Jinnah Sindh Medical University, did not add much to what has already been argued and did not seem to dispute either the fact that his fate was anchored with the decision about legality or otherwise of the impugned notifications.

6. We have considered the case of parties in the light of available record, relevant provisions of PMC, Act and the articles of the Constitution which they cited in hearing of the case to shore up their case respectively. Before we start dilating upon merits of the case, we intend to see whether contention of learned AG Sindh, dismissive of maintainability of the petition, is sustainable or not. What exactly he stated is that the Commission is the federal government and the issue involves a dispute between it and the provincial government. As such, only the Supreme Court, under Article 184 (1), has the jurisdiction to decide the same, and not this court under article 199 of the Constitution. In the case of **Messers Mustafa**

Impex, Karachi and others Vs. the Government of Pakistan and others (PLD 2016 SC 808), the Honorable Supreme Court has defined the federal government by referring to Article 90 of the Constitution to mean the Prime Minster and the Ministers i.e. the Cabinet as a whole. And further declared definition thereof in the Pakistan Telecommunication (Re-Organization Act), 1996 as Ministry of Information Technology and Telecommunication relied upon in that case, as *ultra vires*. In view of such clear-cut inference, the contention that the Commission is equal to the federal government is misconceived and unsustainable. In fact, the Commission has been defined u/s 3 of PMC, Act: it is a body corporate having perpetual succession and a common seal, with power to hold and dispose of property, to enter into contracts and can in the said name sue and be sued. This definition of the Commission, in view of definition of the federal government laid down in *ibid* case law, has practically put to rest the objection, raised by learned AG Sindh, over maintainability of this petition. We, therefore, uphold maintainability of the petition.

7. We may note here that previously a challenge to *vires* (termed here by AG Sindh as imperfectness or incongruousness) of the said law was mounted before a division bench of this court in the case reported as **PLD 2021 Sindh 256**. The bench, after a comprehensive discussion, declared sections 4 and 18 and Admission Regulations framed u/s 8 (2) (l) of PMC, Act as *intra vires*- despite noting, in detail including the concerns raised by learned AG Sindh here, non-compliances of certain provisions thereof relating to formation of the bodies to supervise implementation of the said law, and despite showing qualms over syllabus selected for formation of questions in MDCAT. We have respectfully read the judgment, and since in the course of arguments, it was informed that it is currently under scrutiny in appeal before the Honorable Supreme Court, we do not find any reason to proceed to either agree or disagree with or add anything into it for deciding the issue. For, we strongly feel, on the basis of *lis* here, that the issue of *vires* of the said law is not before us in *sensu stricto* but it is the authority of the Sindh government (Cabinet) to make a decision on the issue, *prima facie* not within its domain, and issuance of notifications for implementation thereof. It is noted, there is ostensibly no provincial law, *pari materia* or otherwise, to PMC, Act, empowering the Sindh government to regulate admission in medical colleges etc. in the province post 18th amendment. And, as per entries no. 11 & 12 in Part II of Federal Legislative

List, the federal government is competent to frame a law(s) to either maintain or raise standards in institutions for higher education which, in our view, must, as a necessary implication, *a priori*, include a decision to find as to who is eligible to ultimately join the given profession, as without such determination any scheme to attain what is desired thereunder would be merely illusory, at best.

8. Learned AG Sindh, however, contended that aforesaid entries with subject as **legal, medical and other professions;** & **standards in institutions for higher education and research, scientific and technical institutions** do not regulate entry (admission) in the colleges etc. of a province but only the relevant profession and it still lies within province of a province to chalk out a scheme under residuary jurisdiction aligning with its own educational conditions. We however are not persuaded by such pedantic description of the entries. It is a settled proposition that the entries in the legislative list are to be interpreted liberally, assigned the widest meaning, and should not be read in a narrow sense. The purpose is to correlate with nature of the subject and cover all ancillary and subsidiary aspects of the matter which with a small effort can be perceived to be part of the subject. The words in the entries, it is often urged, are not to be construed in isolation and independent of the context in which they have been spoken and synthesized. While interpreting, it is said, the courts are required to construe the entries broadly in a manner to reconcile with the exigencies and requirements of the society which is on a constant course of a change, so that no aspect of the subject is left from legislation. It is also understood, the entries do not confer any legislative power, and they merely outline the subjects a particular legislature is competent to legislate on. And, that proposition, in any case, does not presuppose, or entail a recourse, imposing any restriction on the legislature to legislate on a particular feature of the subject, not articulately set down in the entry but can be said to be reasonably comprehended by it, as long as it does not transgress or encroach upon the power of the other legislature on the subject, or violate the fundamental rights of a person. For, the legislative power is subject to constraints provided in the Constitution itself. In the case of **Government of Sindh and others Vs. Dr. Nadeem Rizvi and others (2020 SCMR 1)**, the argument of Sindh government, raised in identical context, was that health

and hospitals have never been either in Federal or Concurrent Legislative List, and have always remained within residuary list within the domain of the provinces. This contention, on the basis of liberal interpretation of relevant entries, was turned down and the federation was allowed to keep its domain over Jinnah Postgraduate Medical Centre, and other hospitals- the bone of contention- situated in the province, which were held by it before 18th amendment.

9. Further, when we look at the aim and purpose underlined in PMC, Act that is to mean pith and substance: **to provide for the regulation and control of the medical profession and to establish a uniform standard of basic and higher medical education** against the subject matter in entries no 11 & 12 do not find it suffering from any apparent legislative incompetency. The words legal, medical and other professions in entry no.11 followed by entry no.12 speaking of maintaining and/or raising the level in the institutions imparting higher education are self-explanatory and leave no room for any ambiguity in regard to power of federation to legislate on any feature of the subject. Before the 18th amendment, entry in regard to medical, legal and other professions was in the Concurrent List, and therefore the executive authority relating to it was with each province which they could exercise to the extent as provided under Article 137, while the federation was having such authority only to the extent as contemplated under Article 97 of the Constitution. But, post 18th amendment abolishing the Concurrent List, the executive authority over the subject has completely shifted in favour of the federation rendering the provinces completely off the grid on the subject.

10. For favour of above view, a reference could be made to the case of **Naila Maqbool Laghari and others Vs. Government of Sindh (PLD 2018 Sindh 391)**. In this case also, the issue of admission test (MDCAT) in MBBS and BDS was before this court. Over holding of the test and the contents thereof, certain questions arose leading to setting up of an enquiry committee by the Health Department Government of Sindh. Acting on its initial report, the Chief Minster Sindh by a notification cancelled the test and directed it to be held afresh which was challenged by the students for and against. After

an elaborate discussion surveying the relevant law on the point and constitutional provisions to ascertain authority of the province, if any including executive, over the subject, the notification was quashed and declared to be without a lawful authority and of no legal effect. The only difference, we have found in the present case and the referred case, of course apart from factual one, is that the test in that case was conducted under the Pakistan Medical and Dental Council Ordinance, 1962 **(the Ordinance, 1962)**, the predecessor of PMC, Act.

11. The constitutional scheme in regard to issue can be further understood by looking at Part V of the Constitution starting from Articles 141 prescribing extent to which parliament or a provincial assembly can make a law on subjects falling within their respective domain. Then, Article 142 proceeds to distinguish the subjects falling within either the federal or the provincial legislative competence. And defines, subject to the Constitution, parliament has exclusive power to make laws with respect to any matter in the Federal Legislative List plus all matters pertaining to such areas in the federation as are not included in any province. A provincial assembly has power to make laws with respect to any matter not enumerated in the Federal Legislative List. Both parliament and a provincial assembly have power to make laws with respect to criminal law, criminal procedure and evidence. The main object of this provision, it seems, is to underline parameters to guide both the federal and provincial legislatures to exercise their respective legislative authority within. Parliament to have exclusive authority on subjects, topics and activities enumerated in the Federal Legislative List and matters incidental or ancillary thereto. Whereas, the provincial legislature to have legislative competency on subjects, topics, and activities not mentioned in Federal Legislative List, in addition to the matters relating to criminal law, criminal procedure and evidence.

12. In a case where both the federal and provincial legislatures have made a law on the same subject claiming concurrent jurisdiction and there is a conflict between them. Then, per Article 143, to the extent of any repugnancy between the two laws, the federal law shall prevail. Quite often, while interpreting

this provision, it has been said that whenever a law is framed on a particular subject, a presumption of legislative competence and legitimacy is attached to it. And where the validity of a law is questioned, and two interpretations are possible, the one upholding the law has always to be preferred and adopted. The courts have been advised, in such circumstances, to lean in favour of upholding the constitutionality of the legislation instead of striking it down as unconstitutional. And to save rather than to destroy the law until and unless the law is shown to have violated fundamental rights of a person or has been enacted in a flagrant disregard to legislative competence of other legislative. None of them, as elaborated above, is true in the present case. Neither, the province has the legislative competence over the subject, namely, medical and matters incidental or ancillary to it, which has all along been within domain of the federation evidenced from the Ordinance, 1962, nor post 18th amendment the provinces have retained the executive authority over it. Nevertheless, we may remind here, this discussion and the view rendered as a result are purely in reply to arguments of learned AG Sindh, noted above, on the point and to the extent as agitated by him, knowing well that the *vires* of the said law are under challenge before the Honorable Supreme Court and are to be finally decided there.

13. Now to controversy raised by the petitioner over legality of impugned notifications, learned AG Sindh, as noted above, although tried to show imperfectness and incongruity of PMC Act on the ground of disparity of quality of education in the provinces discriminating the students having studied a different syllabus than asked through MDCAT. And the difference in the criteria of admission- not prescribing the test- for foreign students or for the local students who somehow get admission in foreign colleges etc. but later on switch to universities in Pakistan. Plus raising contention that the questions selected in the test for reply were either from federal course or the course being taught in Punjab to which a student of other province is not familiar. But, be that as it may, PMC, Act, as it is, holds the field and has not been challenged before us to justify scrutiny of these points in the first instance. And, secondly, the question is, while the law is in operation, whether its

alleged imperfectness or non-compliance of certain provisions can be construed to confer an executive authority on a provincial government to disregard it and act contrary to what is provided therein. Learned AG Sindh, despite his effort, indeed, could not enlighten us with any of provisions in the Constitution envisioning so, nor, after disappearance of executive authority to the provinces over the subject, otherwise available under Article 137, post 18th amendment, such an opinion can be approved. The weakness or imperfectness or non-compliance in true letter and spirit of certain provisions of PMC, Act, as we have discussed above in Para no. 7, has already been noted by this court in the case reported as **PLD 2021 Sindh 256** and certain recommendations made. There is no need for us to harp on it once again, when in spite of such apparent lacunas, the law was held as *intra vires* the Constitution, and more so when its *vires* are not what we have been called upon to adjudicate on. Then, quite strangely, the Sindh government has only objected to fixing of benchmark (65%) to attain in the test to become eligible to admission, and has otherwise expressly no issue to the whole mechanism employed for conducting the test, selecting procedure and syllabus for framing the questions, etc. This we find rather paradoxical and unsustainable, as on the one hand it has questioned legitimacy of the law as a whole on the ground of having residuary jurisdiction over the matter, and on the other hand has invoked the same law for selecting students for admission by reducing pass marks to 50%.

14. Irrespective of how the Sindh government has approached the matter and taken decision in this regard, the constitutional scheme envisaging obligations of the provinces in certain cases is quite clear under Articles 148 and 149 of the Constitution. These provisions enjoin the provinces to exercise executive authority in a manner as to secure compliance with federal laws which apply in the province. The federation has to regulate a situation that has arisen in which it is to be considered as to how the federal law shall be made applicable in the province so that desired results are achieved and the law is made effective in true sense. It is however mandatory for the provinces to exercise their executive authority in a manner as to be fully compliant with the federal law, and not in a

way to either impede or prejudice the federal law or the executive authority being exercised thereunder by the federation. This view of the matter has been explained in the case of **Mohtrma Benizir Bhutto and another Vs. President of Pakistan and others (PLD 1998 SC 388)**. Hence, no room is left, in the light of these provisions, and for foregoing discussion, for the provinces to chart their own course on the subject, sans legislative and executive authority, in defiance of a federal law standing the field whilst, and act contrary to it.

15. A CMA No.6669/2022 has been filed by Fatima Jinnah Dental College under Order 1 Rule 10 read with section 151 CPC seeking permission to be impleaded as respondent. Learned counsel has stated, in the main, that the applicant is a private college and is necessary party to be heard, as in terms of impugned notifications, has granted admissions to the students, and that its commercial interest thus is involved. We do not find these submissions convincing enough to allow application. Applicant or for that matter any other private college or university that has granted admission to the students on the basis of impugned notifications, in our view, is not a necessary party. Their fate is anchored with the decision over a question about legality of the impugned notifications, which they have acted upon on their own, to be examined purely in the context of the Constitution and the relevant law. If they stand, they stand. If they fall, they fall. Because, their right, if any, is not independent but rooted in the impugned notifications, and therefore their fate is to swim or sink with them.

16. Last but not the least, we may observe that the impugned notifications, based as they are on the Sindh Cabinet's decision, from a bare reading do not seem to be a result of any apparent legal authority or a law in the field, *pari materia,* etc. promulgated by the province of Sindh on the subject, post 18 amendment, empowering the Sindh Cabinet to make the impugned decision to even bear scrutiny of applicability of doctrine of occupied field in this case. We therefore, quash all four impugned notifications dated 07.12.2021 and 31.12.2021 and declare them to

be void *ab initio* having been issued without a lawful authority and of no legal effect.

These are the reasons for our short order dated 18.3.2022 whereby we allowed the petition and disposed of all pending applications in the terms as above.

24-3-2022

I have had the benefit of reading the detailed reasons authored by my learned brother Muhammad Iqbal Kalhoro, J, and whilst agreeing with the same I will write an additional note.