

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No. 569/2017;
Date of Institution. 31.03.2017;
Date of Decision. 08.07.2017.

Prof. Dr. Adnan Mehraj, Head of Surgery Azad Jammu & Kashmir Medical College Muzaffarabad and Head of Department of Surgery Sheikh Khalifa Bin Zaid Al-Nehan (SKBZ) Hospital/ CMH Muzaffarabad.

..... Petitioner

Versus

1. Azad Government of the State of Jammu & Kashmir through Chief Secretary, New Civil Secretariat Muzaffarabad,
2. Secretary Health Azad Government of the State of Jammu & Kashmir, New Civil Secretariat Muzaffarabad,
3. Executive Committee for Medical Colleges of Muzaffarabad and Mirpur through its Chairman/ Chief Secretary, New Civil Secretariat Muzaffarabad,
4. Azad Jammu & Kashmir Medical College, Muzaffarabad through its Administrative Officer Muzaffarabad,
5. Prof. Dr. Jamshed Ali, Principal Azad Jammu & Kashmir Medical College Muzaffarabad.

.....Real Non-Petitioners

6. Pakistan Medical and Dental Council through its Registrar Islamabad.

.....Pro-forma Non-Petitioner

WRIT PETITION

Before: Justice Azhar Saleem Babar, J.

PRESENT:

Raja Muhammad Hanif Khan, Advocate for the petitioner.
Sardar M.R Khan, Advocate for non-petitioners.

ORDER:

The above titled writ petition has been filed under section 44 of the Azad Jammu & Kashmir Interim Constitution

Act, 1974 to challenge the validity of notification of appointment of private non-petitioner dated 17.01.2017 as Principal Azad Jammu & Kashmir Medical College, Muzaffarabad.

2. Arguments heard. Health Department of Azad Jammu & Kashmir invited applications for recruitment of Principal Azad Jammu & Kashmir Medical College, Muzaffarabad through advertisement in the daily "The News" dated 20 August 2016. The petitioner as well as non-petitioner No.5 applied for the job as a result whereof Prof. Dr. Jamshad Ali was appointed as Principal Azad Jammu & Kashmir Medical College, Muzaffarabad, vide notification dated 17.01.2017 issued by Services and General Administration Department Azad Govt. of the State of Jammu & Kashmir. The petitioner has challenged the appointment of private non-petitioner through the instant writ petition on the grounds that Executive Committee for recruitment of Principal was not competent to recommend the private non-petitioner. It has been explained that Executive Committee consisted of 8 members including the following:-

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|---|------------------|
| i. Chief Secretary | Chairman |
| ii. Secretary Finance | Member |
| iii. Secretary S&GAD | Member |
| iv. Secretary Health | Member |
| v. Secretary PP&H | Member |
| vi. Secretary P&DD | Member |
| vii. Principal Medical College Muzaffarabad | Member/Secretary |
| viii. Principal Medical College Mirpur, | Member/Secretary |

It has been contended that only 4 out of 8 members participated in the process of interview, so, the committee being incomplete was not authorized to recommend for appointment of Principal Azad Jammu & Kashmir Medical College, Muzaffarabad. It has been contended in the memorandum of appeal that constitution of Executive Committee, vide notification dated 19.10.2011 is without lawful authority. It has also been contended that contents of advertisement inviting applications for the post of Principal are beyond the scope of Pakistan Medical and Dental Council (PM&DC) criteria. In this regard it has been stated that PM&DC has already laid down the qualification for appointment of faculty/ professorial staff/ examiners/ principals/ deans/ administrative staff/ in medical and dental institutions through regulations of the year 2011. The petitioner has contended that majority of the members of Executive Committee were not present on the date of interview, so, recommendations made by Executive Committee are illegal. It has also been stated that in view of regulation of the year 2011, the private non-petitioner was not eligible for the post of Principal Medical College and the petitioner ought to have been given preference being State Subject. It has been explained that PM&DC criteria laid down in regulation of appointment requires that a high power Selection Committee comprising professionals, has to evaluate the candidates for the post of Principal. It is the

contention of the petitioner that such committee is supposed to include a Principal from professorial staff and a nominee of PM&DC. It has been prayed that notification of appointment of non-petitioner No.5 be declared as illegal and the non-petitioners may be directed to constitute a Selection Committee consisting of a member of professorial staff along-with a nominee of PM&DC for recruitment of Principal Medical College Muzaffarabad.

3. The non-petitioners have filed written statement and have contended that Azad Jammu & Kashmir Medical College Muzaffarabad is a project and is not a normal budget establishment. It has been explained that Pakistan Medical and Dental Council (PM&DC) has framed regulation for appointments of faculty members in Medical Institutions. The advertisement was, therefore, published in accordance with the regulation of PM&DC. It has been contended that eligibility criteria has been mentioned in the impugned advertisement and eligibility for the post of Principal was required as 15 years teaching experience out of which 5 years should be as professor. It has also been stated that non State Subjects were also given an opportunity to participate in the process of selection, if a suitable candidate was not available from the State Subjects. It has been explained that as many as 4 candidates from Azad Jammu & Kashmir appeared for interview but none of them was considered suitable for the job of Principal. It has been objected that the

petitioner is not an aggrieved person in the eye of law and has no locus standi to challenge the appointment of private non-petitioner. The non-petitioners have contended that after participating in the process of selection, the petitioner had acquiesced to the authority of the Selection Committee and he is estopped by conduct to challenge the process of selection after failing to achieve desired result. It has been explained that quorum of Selection Committee was complete, so, objection to that extent is weightless. The non-petitioners have further contended that the petitioner has an experience of less than 1 year as Professor, whereas the requirement was 5 years teaching experience as Senior Professor. Dr. Jamshad Ali has an experience of more than 18 years in teaching out of which 8 ½ years is as Professor in Medical College. It has been claimed that the private non-petitioner having Ph.D qualification and having more than 9 years administrative experience in Khyber Medical College, KPK, was found suitable by the Selection Committee for appointment as Principal. The non-petitioners have referred to couple of judgments of Peshawar High Court and Supreme Court of Pakistan in support of their version.

4. Moot points for resolution by this court in the instant case are that whether the impugned notification of appointment has been issued in accordance with law and that whether the petitioner has a locus standi to file the instant writ petition?

5. Medical and Dental institutions in Pakistan are regulated by Pakistan Medical and Dental Council (PM&DC). PM&DC has been established in Pakistan through Ordinance of the year 1962 and this law has been adapted in Azad Jammu & Kashmir in the year 2011. PM&DC had framed regulations for appointment of faculty/ professorial staff/ examiner/ Principal/ dean/ administrative staff in any Graduate and Post Graduate Medical and Dental institution of Pakistan in the year 2011. Rule 31 of the aforementioned regulation lays down the criteria for appointment of Principal of a Medical Institution. For convenience, Rule 31 is reproduced as under:-

“31. A senior Professor possessing all requisite qualifications and experience of a professor as laid down in these regulations can be appointed as a Principal by the institution or by the Government according to their rules and he may be the chief executive and over-all in charge of the college and attached teaching hospital. He should have an administrative experience and qualification as well.”

Qualification of a Professor has also been laid down in the regulations which mentions the eligibility as under:-

“MBBS or equivalent medical qualifications recognized/ registered by PM&DC and PM&DC level III qualification in

*respective subjects like F.C.P.S/
M.S/M.D*

OR

*Other equivalent level III
qualifications in the specialty
approved by SRC and recognized/
registered by the PM&DC.”*

This qualification has been laid down for clinical subjects like Medicine, Surgery, Obstetrics & Gynaecology, Paediatrics, ENT, Eye. In the same manner, qualification of Professor in basic Medical Sciences subjects of Anatomy, Physiology, Biochemistry, Pharmacology, Pathology has been laid down as under:-

“MBBS or equivalent medical qualifications fully recognized/registered by the PM&DC and PM&DC recognized level II b and level III qualifications in respective basic subjects OR equivalent PM&DC level II b and level III qualifications in the respective specialty approved for teaching by SRC and recognized/ registered by PM&DC.”

Level II-a requires a teaching experience of one year after level-I which is 5-6 years. In the same way level II-b requires an experience of two years after level I (5-6) years, whereas level-III requires teaching experience of 4 years after level-I. It practically means that teaching experience of 9-10 years is required for level-III qualification. It is worth mentioning that for level-III, a qualification of MD/ MS/ MDS/ FCPS and qualifications with

other nomenclatures are required for clinical, medical/ dental qualification, whereas FCPS/ Ph.D and qualifications with other nomenclatures are required for basic sciences. It may be stated here that the petitioner is a Surgeon and Professor in Azad Jammu & Kashmir Medical College, Muzaffarabad and relates to the category of clinical medical qualification, whereas, the private non-petitioner is a Ph.D in Pharmacology related to basic sciences. The non-petitioners have attached a comparative proforma of eligibility criteria of the petitioner and the private non-petitioner which states that Prof. Dr. Jamshad Ali has a teaching experience of 18 years 9 months and 4 days, out of which he has teaching experience as Prof. as 8 years 6 months and 21 days. It is worth mentioning that comparison of eligibility criteria of the contesting candidates is not required for disposal of the instant writ petition, however, it has to be ascertained that whether the private non-petitioner is qualified for the job or not? It has been stated earlier that under Rule 44 of regulation of PM&DC of the year 2011, a senior Professor in Medical Sciences can be appointed as Principal/ Dean of a Medical College. Qualification of a Professor has also been mentioned in the afore discussed paragraph. The private non-petitioner claims to have a degree of Ph.D in Pharmacology (attached) and claims experience of 9 years 11 months and 11 days in teaching profession. He has five research publications in PM&DC

approved journals with full credits. A certificate issued by PM&DC dated 26th March 2009 substantiates the afore reproduced contention. It may be stated here that the non-petitioner worked as Chief Provost, Head of Department and Vice Principal Admin in Kyber Medical College, Peshawar w.e.f. 07.05.2010 to 11.04.2016, so he has an administrative experience as well. Prof. Dr. Jamshad Ali, the private non-petitioner, therefore, fulfills the eligibility for the post of Principal Medical College, according to regulation of PM&DC of the year 2011. It has been argued on behalf of the petitioner that FRCS degree held by the petitioner is recognized by PM&DC, whereas Ph.D degree in possession of the private non-petitioner has not been recognized by PM&DC, however, a verification by PM&DC in this regard is not available on record, so, it cannot be concluded that Ph.D degree in possession of the private non-petitioner has not been recognized by PM&DC.

6. Notification of appointment of private non-petitioner dated 17.01.2017 has been issued on recommendations of Executive Committee constituted vide notification dated 19.10.2011. Notification dated 19.10.2011 has been attached with the memorandum of writ petition as annexure "PF" which states that Executive Committee consists of 8 members including Chief Secretary as Chairman. Learned counsel for the petitioner has objected to the constitution of Executive Committee on the

ground that Government of Azad Jammu & Kashmir is not vested with the powers to constitute an Executive Committee. It has further been objected that only four out of eight members assembled at the time of interview for the post of Principal, so, the recommendations of Executive Committee cannot be held as valid. It is worth mentioning that post of Principal Medical College, Muzaffarabad was lying vacant, so, Principal (Member) was not available. It has been admitted that four out of remaining seven members attended the meeting of Executive Committee, so, recommendations of the Executive Committee cannot be held as invalid for non-participation of all members. It would suffice to say that more than half of the members of Executive Committee participated in the process of selection of Principal Medical College, so, the recommendations by Executive Committee cannot be held illegal for deficient quorum.

7. It is not understandable that under what authority of law did the Government of Azad Jammu & Kashmir constitute Executive Committee, vide notification dated 19.10.2011. It has been mentioned in Rule 31 of regulation of PM&DC of the year 2011 that a senior Professor can be appointed as Principal by the institution or by the Government according to their Rules but the non-petitioner has neither been appointed by the institution and nor the rules have been framed for appointment of Principal Medical College, Muzaffarabad. The Government has not

delegated its powers to Executive Committee. Notification of appointment of private non-petitioner has been issued on recommendations of the Executive Committee, which had lost its sanctity as per Azad Jammu & Kashmir Medical Colleges (Governing Body) Act, 2014. According to aforementioned Act, governing body of the Medical College has an authority to constitute "Executive Committee" on advice of the concerned Principal but the Executive Committee has not been assigned with the powers of recruitment of Principal of Medical College. Terms of reference of the Executive Committee have been mentioned in notification dated 19.10.2011 in the following mode:-

"It shall have the following TORs.

- 1. The Committee shall exercise powers on behalf of the Government in respect of establishment of Medical Colleges and other related matters to meet stipulated deadlines.*
- 2. The Committee shall closely monitor/ supervise the activities and shall pass directions accordingly."*

It is evident that notification dated 19.10.2011 does not authorize the Executive Committee to recruit Principal of a Medical College. If for the sake of argument, constitution of Executive Committee through Government notification dated 19.10.2011 is admitted as valid, even then the Executive

Committee had lost all its powers after promulgation of the Azad Jammu & Kashmir Medical Colleges (Governing Body) Act, 2014. According to Section 7 (5) of the aforementioned Act, existing Executive Committee had ceased to function. For convenience, relevant sub-section is reproduced as under:-

“7(5) On issuance of this Act, existing Executive Committee shall cease to function and concerned Principal shall cause Executive Committee to be constituted under sub-section (1).”

Under sub-section (1) *ibid*, Governing Body on advice of concerned Principal shall constitute;

- (a) Executive Committee;
- (b) The Finance and Grants Committee; and
- (c) The Establishment Committee.

8. After coming into force of the Azad Jammu & Kashmir Medical Colleges (Governing Body) Act, 2014 the Executive Committee had ceased to exist, so, the Executive Committee was not authorized by law to appoint non-petitioner (or any other person) as Principal Medical College, Muzaffarabad. Appointment of private non-petitioner as Principal Medical College Muzaffarabad is, therefore, without lawful authority.

9. It has emphatically been argued on behalf of the non-petitioner that the petitioner participated in the process of selection of Principal Medical College and was not considered

suitable for the job. Learned counsel for non-petitioners is of the view that the petitioner was bound by law of estoppel to file the instant writ petition. He has referred to 2016 SCR 15 and 2013 SCR 134 in this regard. Learned counsel has attached couple of judgments of Peshawar High Court and Supreme Court of Pakistan in support of his version as well. This could have been a valid ground, had the appointment of private non-petitioner been issued lawfully. It is worth mentioning that the petitioner has not prayed for appointment in place of the private non-petitioner in his writ petition, rather has challenged the appointment of private non-petitioner on different legal grounds. Supreme Court of Azad Jammu & Kashmir in bunch of judgments has held that a person cannot be allowed to challenge the process of selection if he participated in the process and could not achieve desired result. 2016 SCR 15 and 2013 SCR 134 substantiate this proposition. However, when appointment of a person is held without lawful authority, this proposition does not apply, particularly in a writ of quo warranto. Argument advanced on behalf of non-petitioner in this regard is, therefore, not tenable.

In the light of what has been discussed above, it is concluded that Executive Committee constituted vide notification dated 19.10.2011 had ceased to function in view of Azad Jammu & Kashmir Medical Colleges (Governing Body) Act, 2014. Appointment of Prof. Dr. Jamshad Ali as Principal Medical

College Muzaffarabad on recommendations of such Executive Committee is without lawful authority. Notification of appointment of the private non-petitioner dated 17.01.2017 is, therefore, set aside and the non-petitioners are directed to complete the process of selection of Principal Medical College, Muzaffarabad in accordance with law, preferably within couple of months.

Muzaffarabad,
08.07.2017 (M)

JUDGE