

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE MIAN SAQIB NISAR, HCJ.
MR. JUSTICE UMAR ATA BANDIAL.
MR. JUSTICE MAQBOOL BAQAR.
MR. JUSTICE FAISAL ARAB.
MR. JUSTICE IJAZ UL AHSAN.**

**CIVIL APPEALS NO.125-K TO 131-K AND 2306 TO 2309
OF 2016 AND CIVIL MISC. APPLICATIONS NO.1254-K
AND 8973 OF 2018 AND CIVIL PETITION 2312-L OF 2018**

C.A.125-K/2016:	Government of Sindh through Secretary Health Department Vs. Dr. Nadeem Rizvi etc.
C.A.126-K/2016:	Province of Sindh through Secretary, Sindh and another Vs. Altaf Shakoor etc.
C.A.127-K/2016:	Province of Sindh through Chief Secretary, Sindh and another Vs. Dr. A.R. Jamali etc.
C.A.128-K/2016:	Province of Sindh through Chief Secretary, Sindh and another Vs. Tahir Amin Chaudhry etc.
C.A.129-K/2016:	Province of Sindh through Chief Secretary, Sindh and another Vs. Seemin Jamali etc.
C.A.130-K/2016:	Province of Sindh through Chief Secretary, Sindh and another Vs. Rohail Ali Jamali etc.
C.A.131-K/2016:	Province of Sindh through Chief Secretary, Sindh and another Vs. Dr. Sikandar Hayat etc.
C.A.2306/2016:	Jinnah Sindh Medical University, Karachi Vs. Dr.Seemi Jamali etc.
C.A.2307/2016:	National Institute of Cardiovascular Diseases, Karachi Vs. Dr.Nadeem Rizvi etc.
C.A.2308/2016:	Muhammad Anwar etc. Vs. Federation of Pakistan etc.
C.A.2309/2016:	Ms. Tahmina Fatima etc. Vs. Federation of Pakistan etc.
C.M.A.1254-K/2018:	Application for seeking permission that Mrs.Umama Anwar Khan, ASC High Court to proceed the subject appeal filed by Mr.K.A. Wahab, AOR for Respd. Nos.38,89 & 90
C.M.A.8973/2018:	Government of Sindh through Secretary Health Department Vs. Dr. Nadeem Rizvi etc.
C.P.2312-L/2016:	All Pakistan Paramedical Staff Federation Unit, Lahore Vs. Federation of Pakistan through Secretary Cabinet, Islamabad etc.

For the Appellant(s): Mr. Salman Talib-ud-Din, A. G. Sindh.
Mr. Farooq H. Naek, Sr. ASC.
Raja Abdul Ghafoor, AOR.
(in CAs.125-K to 131-K/2016)

Mr. Salah-ud-Din Ahmed, ASC.
Prof. S.M. Tariq, V.C. JSMU, Karachi.
(in CA.2306/2016)

Mr. Raza Rabbani, ASC.
Mr. Salim Saleem Ansari, ASC.
(for NICV in CA.2307/2016)

Mr. Haider Waheed, ASC.
(in CAs.2308 and 2309/2016)

Mr. Zafar Iqbal Chaudhry, ASC.
(in CP.2312-L/2018).

For the Respondent(s): Barrister Umaima Anwar, Advocate.
(with permission of the Court)
(in CAs.125-K and 129-K/2016)

Mr. Salim Saleem Ansari, ASC.
(for NICV in CAs.2306 and 2309/2016)

Mr. M. Iqbal Chaudhry, AOR.
(in CA. 127-L/2016)

Mr. Abdul Rauf Rohaila, ASC.
(in CA.2306/2016).

Mr. Sajid Ilyas Bhatti, Addl. A.G.P.
Mr. Khurram Saeed, Addl. A.G.P.

Capt. (Retd) Zahid Saeed, Secy. M/o NHR&C.
Mr. Asif Sohail, Dir. Litigation M/p NHR&C.

Raja Abdul Ghafoor, AOR for HEC.
(in CA.2306/2016)

Mr. Hamid Khan, Sr. ASC.
Mr. Ahmed Awais, A. G. Punjab.
Mr. Qasim Ali Chohan, Addl. A. G. Punjab.
(In C.P.2312-L/2018)

Dr. Seemi Jamali, Executive Director, JPMC.
Prof. A.R. Jamali, JPMC
Prof. Dr. Kausar Amir, JPMC
Dr. Riaz Gill, JPMC
Dr. M. Attique

Dates of Hearing: 03, 04 and 07.01.2019.
(Judgment Reserved).

SHORT ORDER

IJAZ UL AHSAN, J-. For detailed reasons to be recorded later, by a majority of four against one (Maqbool Baqar, J *dissenting*) these appeals are dismissed.

2. The case of Sheikh Zayed Medical Complex, Lahore ("**SZMC**"), is relatively simple and straightforward. Our attention has been drawn to its constitutive instruments including the trust deed through which it was established. It clearly and unambiguously provides that the main purpose for setting up SZMC was for research and professional and technical training of doctors and related medical staff. That being the case, we are in no manner of doubt that the case of the SZMC is clearly covered under Entry No.16 of the Federal Legislative List. Further, the SZMC has been transferred by the Federal Government without due application of mind, examining the constitutional position and without following the necessary legal procedures.

3. The case of Jinnah Postgraduate Medical Center, Karachi ("**JPMC**"); National Institute of Cardiovascular Diseases, Karachi ("**NICVD**"); National Institute of Child Health, Karachi ("**NICH**"), and National Museum of Pakistan, Karachi ("**NMP**") also shows complete lack and absence of application of mind on the part of the Federal Government. The requisite legal procedures were not followed. The real intent, import and impact of the Eighteenth Constitutional Amendment was ignored and misinterpreted.

4. We are conscious of the fact that there is a balance of powers between the Federation and the Provinces as spelt by the Constitution of the Islamic Republic of Pakistan, 1973 which grants provincial autonomy in specified areas. The provincial autonomy granted by the Constitution deserves the highest respect and is sacrosanct. However, at the same time, a declaration to the

effect that the aforementioned Institutions have been transferred by the Federal Government to the Provinces without following due process of law, application of mind and in a mechanical manner does not by any stretch of the imagination impinge upon or encroaches the provincial autonomy granted by the Constitution.

5. In the above context, the contents of Entry No.37 of the Federal Legislative List are also significant. These permit the Federal Government to undertake projects in any of the Federating Units for its purposes. However, in such circumstances, the Provinces have full authority to perform the executive and regulatory function. They can enact and enforce legislation involving such projects and implement and enforce the same within its territorial limits. This judgment, however, does not in any manner obstruct, deny or curtail the power of the Federal Government to transfer any project, works, lands or buildings owned and controlled by it to any of the Provinces. However, such transfer must be undertaken in accordance with law, through a legal instrument specifying the terms and conditions on the basis of which such transfer is to take place and the nature and duration of such transfer.

6. We find that the power of the Federation to set up, run and operate projects including hospitals and related research facilities where enforcement of fundamental rights is involved is an obligation of the Federal Government under the Constitution. In the instant case, enforcement of right to life is involved which is one of the most fundamental of the fundamental rights. To curtail or circumscribe the power of the Federal Government to enforce Fundamental Rights guaranteed by the Constitution would be anathema for the concept of Federalism. The performance of its positive obligations under the fundamental rights, for example right

to life, prevention of slavery, forced labour, human trafficking, etc constitute a “purpose” of the Federation for which it can carry out projects throughout Pakistan. For performance of the said purpose, it is not necessary to look into the legislative list when the main body of the Constitution provides the requisite powers. Refer to Province of Sindh v. MQM (PLD 2014 SC 531). We however reiterate that in doing so in the territorial jurisdiction of a Province, the projects and institutions of the Federal Government shall be subject to the Provincial Laws and regulatory control. Consequently, neither the legislative nor executive authority of the Provinces in relation to the subject of hospitals is encroached upon.

7. While upholding and reiterating the declarations and orders passed in the impugned judgment, we declare as follows:-

- i. Transfer/devolution of SZMC, JPMC, NICVD, NICH, and NMP is declared to be unconstitutional, without lawful authority and of no legal effect;*
- ii. All acts done or orders, directions, notifications and directives issued or made pursuant to the purported transfer / devolution or to give effect to the same in any manner whatsoever, which are inconsistent with or in derogation of the tenor of this order to the extent of inconsistency are declared to be without lawful authority and of no legal effect;*
- iii. Within 90 days of this judgment, the Federal and Provincial Governments and all related Departments shall take all necessary steps relating to return of the aforenoted Institutions from the Provinces to the Federation. The position of these Institutions shall as far as possible be restored to the position as on the date when they were transferred to the Provinces. It is, however, clarified that the restoration and return as aforesaid shall include resumption of the employees by the Federation in relation to the Institutions and all serving or retired officers, employees or servants thereof. In case, the aforesaid*

exercise cannot be completed within the aforementioned period of 90 days and an extension is required, any of the Governments can move appropriate application before this Court seeking extension for reasons spelt out in the application;

- iv. Till such time as the aforesaid exercise is completed, all matters relating to the Institutions shall continue on the same basis as on the date of this judgment including but not limited to financial and budgetary matters, disbursement, outlays and expenditures including disbursement relating to payment of salaries, pensions and related matters;*
- v. All ongoing projects/contracts in which partial payments have been made shall be taken over by the Federation and balance payments shall be made by it. However, all contracts completed within the past one year and equipment supplied in the same period which had actually arrived at the Institutions or in the process of being supplied or has already been installed shall be paid for/reimbursed to the Provinces by the Federation;*
- vi. In case, the Federation and any of the Provinces are unable to resolve any matter, with regard to compensation or payments to be made, the same shall be deemed to be a dispute between the Provinces and the Federation. In that case, the aggrieved party shall be entitled to seek its remedy in accordance with the Constitution and the law;*
- vii. All statutory instruments including Acts and Ordinances passed or issued in relation to the aforementioned Institutions shall stand suspended. Nothing in the Provincial Laws shall in any manner hinder, restrict or impede or otherwise affect the return of any of the aforementioned Institutions to the Federation;*
- viii. A committee shall immediately be constituted for working out the modalities for smooth, trouble free and seamless transition and transfer of the aforementioned Institutions from the Provinces to the Federation and to deal with and make recommendations regarding all aspects of such transfer including terms and conditions of employment, seniority, assimilation, etc in the*

service of the Federation and all other matters directly, indirectly or incidentally relating to the same. In case, a need arises, the Federal Government shall initiate such legislation as may be necessary for the effective completion and operation of the aforementioned Institutions; and

- ix. The Federal Government shall also allocate and disburse such funds as may be necessary to maintain the level of services being provided in the aforementioned Institutions presently and to progressively improve the environment and running of all Institutions in a more efficient, effective and patient friendly manner.*

Chief Justice

Judge

Judge

Judge

Judge

**ANNOUNCED IN OPEN COURT
AT ISLAMABAD ON 17.01.2019**

Judge

Maqbool Baqar, J.- I have had the privilege of going through the short order authored by my brother IjazulAhsan, J., but have not been able to persuade myself to concur with the same, however because of extreme paucity of time I am unable to write a note containing my reasons for disagreement, and for now would only state that Pakistan is a Federal Republic. Our constitution has conferred certain enumerated powers on the federal government and the residuary powers on the provinces. The very spirit and essence of a Federal Constitution is the distribution of legislative powers between the federation and the provinces. The subject of public health and public hospitals has throughout our legislative history remained exclusively with the provinces. Sometime by enumeration in the provincial legislative list, and at times by way of residuary powers, and have never been with the federation. Under the 1973 Constitution also, which now, as a consequence of the 18th Constitutional Amendment, contains only one legislative list, being federal legislative list, also confers such powers and authority on the provinces, as the same again do not find place in the federal list, and therefore the subjects of public health and public hospitals fall within the legislative competence and executive authority of the provinces only. The federal legislature undoubtedly lacks legislative competence and executive authority in relation to the said subjects. Article 142(c) clearly prohibits the parliament from legislating on the subjects not mentioned in the Federal legislative list.

Indeed the Federal Legislative List through entry No.37 mentions "works, lands and buildings", vested in, or in possession of federal government for the "purposes" of Federation as federal subjects, however, such property and assets, as is obvious from the language of the said entry itself, should be catering for federal purposes and not for those of the provinces, and as noted

earlier, public health and public hospital exclusively being provincial subjects, any of their facility/asset cannot be deemed as for federal "purposes" and can by no stretch of imagination be treated as federal subjects. The relevance and significance of the "purpose" attributed to any property and/or asset is evident from the provisions of Article 274 of the present constitution which provides that all properties and assets, which on the commencement of the constitution, vested in the federal government, shall, in case they, on the commencing day, were to be used for the "purposes" of a provincial government, shall become properties of the said provincial government.

From the reading of entry 37, and Article 274, it becomes abundantly clear that for vesting, even of properties and assets, the "purpose" catered for by such properties and assets is crucially relevant. It may be significant to note here that articles similar to Article 274 of the Constitution of 1973, are available in all of our earlier constitutions.

Our constitution prescribes well laid down role and limits of every organ of the State. Whereas Article 142(c) expressly curtails the limits of the Federal Legislature/Government, which needs to be respected. In order to maintain and preserve the federal nature of our constitution, our effort should be to interpret the constitutional provisions so as to preserve the provincial autonomy rather than to dilute the same.

(Justice Maqbool Baqar)