

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.121 of 2016
Dr. Khayal-ur-Rehman
Vs.

Federation of Pakistan through Secretary, M/o National Health Services, Regulations
& Coordination, Islamabad & two others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	15.1.2016	Mr. Muhammad Ali Bhatti, Advocate for petitioner, Malik Zahoor Awan, learned Standing Counsel, Mr. Attaullah Hakim Kundi, Advocate for respondent No. 2, Mr. Mohd. Azam Ghakar, Section Officer, Ministry of NHSR&C

J U D G M E N T

MIANGUL HASSAN AURANGZEB, J:-

Through this constitutional petition, the petitioner, Dr. Khayal-ur-Rehman, has impugned the notification dated 28.12.2015, issued by respondent No.2/the Ministry of National Health Services, Regulations & Coordination, Government of Pakistan, in exercise of the powers conferred by Section 3(1) of the Pakistan Medical & Dental Council Ordinance, 1962 (“the PM&DC Ordinance, 1962”), whereby the Federal Government notified the names of the 15 members of the Pakistan Medical & Dental Council (“PM&DC”), who were elected for a term of four years or until their successors were duly elected, which ever is earlier.

2. Vide Ordinance No.XI of 2015 called “the Pakistan Medical & Dental Council (Amendment) Ordinance, 2015”, various provisions of the PM&DC Ordinance, 1962, were amended. The amended Section 3(1) of the PM&DC Ordinance, 1962, reads as follows:-

“3. Constitution and composition o the Council. --- (1) The Federal Governed shall, by notification in the official Gazette, constitute a Council consisting of the following members, namely:-

(a) One member each from the Senate and the National Assembly to be nominated by the Chairman or, as the case may be, the Speaker from amongst the members of the respective House;

- (b) Secretary, Health Department of each Province shall be ex-officio member or the respective Health Departments may nominate the next senior officer of the Health Department of each Province, to represent it;
- (c) Director – General Health of the controlling Ministry as ex-officio member;
- (d) Surgeon General of the Armed Forces Medical Services as ex-officio member;
- (e) four members to be nominated by the Federal Government;
- (f) one member, belonging to the legal profession, to be nominated by the Chief Justice of Pakistan;
- (g) two members from the field of social service and philanthropy, with particular reference to patient welfare, to be nominated by the Federal Government having international standing and good repute with experience of at least fifteen years in the field;
- (h) one member each from every Province to be elected from amongst themselves by the faculties of all public sector Pakistan Universities including their constituent and affiliated colleges;
- (i) one member each from every province to be elected from amongst themselves by the faculties of all private sector Pakistan Universities including their constituent and affiliated colleges;
- (j) one member from each Province, Federally Administered Tribal Areas (FATA) and Islamabad Capital Territory, to be elected amongst themselves by the registered medical practitioners; and
- (k) one member from each Province, Federally Administered Tribal Areas (FATA) and Islamabad Capital Territory, to be elected amongst themselves by the registered dental practitioners.”(emphasis added)

3. The elections to the PM&DC were, according to the learned counsel for the petitioner, held on 05.12.2015. The petitioner participated in these elections against the single seat from the Federally Administered Tribal Areas (“FATA”) provided for in Section 3(1) (j) of the PM&DC Ordinance, 1962, (as amended). The elections were held under the overall control of the Election Committee in accordance with the Election Rules, 2015, which were framed under the provisions of the PM&DC Ordinance, 1962 (as amended). As per the public notice published in “the

Daily Jang” of 22.12.2015 by PM&DC, the Election Committee declared the names of the successful candidates. In the said public notice, the name of the petitioner finds mention under the heading of “Clause (j)”, at Serial No.6. However, in the notification issued by respondent No.2 on 28.12.2015 in exercise of the powers conferred by Section 3(1) of the PM&DC Ordinance, 1962 (as amended), the name of the petitioner was omitted from the list of the duly elected members of PM&DC. On 30.12.2015, the petitioner made a representation to respondent No.1, voicing his grievances against the non-inclusion of his name in the notification of the successful candidates. Respondent No.2 did not bother to give reply to the petitioner. This silence on the part of the respondent No.2 caused the petitioner to knock the door of this Court.

4. The learned counsel for the petitioner submitted that even though the petitioner was duly elected and his name was also mentioned in the list of duly elected candidates by PM&DC, the Federal Government in the notification dated 28.12.2015 issued under Section 3(1) *ibid* unlawfully omitted to mention the petitioner’s name in the list of the duly elected members of PM&DC. He further contends that the first meeting of the Members of PM&DC is scheduled to be held on 16.01.2016 for the purpose of electing the Executive Committee, President & Vice President of PM&DC. The petitioner is desirous of being elected to the Executive Committee of PM&DC. He further submits that in the event, he is not permitted to participate in the said elections, even though he has been duly elected as a member of PM&DC, he shall suffer irretrievably.

5. This petition was taken-up for hearing on 14.01.2015. Mr. Attaullah Hakim Kundi, learned Advocate was on watching brief and tendered appearance by accepting notice on behalf of respondent No.2/PM&DC. He submitted that he was well conversant with the election process of PM&DC

and confirmed that the petitioner was duly elected to the PM&DC as a member from FATA under Clause (j) of Section 3(1) of the PM&DC Ordinance, 1962 (as amended). According to the learned counsel for respondent No.2, the PM&DC forwarded the names of all the successful candidates, including that of the petitioner, to respondent No.1 for notification in the official gazette in terms of Section 3(1) of the PM&DC Ordinance, 1962 (as amended). The learned counsel for PM&DC submitted that even though, the petitioner was duly elected in the elections to PM&DC held on 05.12.2015 and his name was forwarded to respondent No.1 for notification under Section 3(1) *ibid*, however, he was at a loss as to why the petitioner's name was dropped by respondent No.2 and not included in the said notification dated 28.12.2015.

6. Khawaja Muhammad Imtiaz, learned Standing Counsel on court's call entered appearance by accepting notice on behalf of respondent No.1. He submitted that he shall convey to respondent No.1 to depute an officer well conversant with the subject matter of the petition to apprise the court as to why the petitioner's name was first published in the public notice as a duly elected member of PM&DC from FATA, and then subsequently dropped.

7. As the first meeting of the PM&DC and the election of the Executive Committee, President & Vice President was scheduled to be held on Saturday, 16.01.2016, the proceedings were adjourned to 15.01.2016, whereon a Report was submitted on behalf of respondent No.1. In this Report, the position taken by the Federal Government was that the names of the successful candidates including the two candidates from FATA, were forwarded by PM&DC vide letter dated 21.12.2015 for their notification as members of PM&DC. The reason advanced in said Report for the omission of the names of the two successful candidates from FATA was that the Law & Justice Division (Government of Pakistan) had

pointed out that as the operation of the PM&DC Ordinance, 1962, had not been extended to FATA in terms of Article 247 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the 1973 Constitution,"), therefore, the operations carried out by PM&DC including the recognition of institutions, registration of medical & dental practitioners and election in FATA under the PM&DC Ordinance, 2015, requires legal cover under Article 247(3) of the 1973 Constitution. It is further pleaded that the Ministry of States & Frontier Regions has been requested by the respondent No.1 to move a summary to the President of the Islamic Republic of Pakistan ("President of Pakistan") to extend the operation of the PM&DC Ordinance, 1962, with all its amendments to FATA, and that until the operation of the said laws are not so extended, the notification of the two candidates from FATA cannot be issued.

8. Mr. Muhammad Azam Ghakhar, Section Officer, Ministry of National Health Services, Regulations & Coordination, Government of Pakistan, attended the court and made submissions in reiteration of the contents of the said Report.

9. The learned counsel for the petitioner, respondent No.2/PM&DC and the representatives of the respondent No.1 are in unison on the fact that the medical qualifications of the petitioner are duly registered with the PM&DC, and that he was qualified to contest the elections to the post of member PM&DC; that the petitioner was permitted to contest the election and was declared by PM&DC to have been successfully elected as a member of PM&DC under Clause (j) of Section 3(1) of the PM&DC Ordinance (as amended); that the petitioner hails from and holds a domicile from the Khyber Agency, which is located in FATA; that the petitioner's name was forwarded by PM&DC to the Federal Government for notification in the official gazette under Section 3(1) of the PM&DC Ordinance, as a duly elected member of the PM&DC; that the petitioner's name

was not mentioned in the notification issued by the Federal Government under Section 3(1) of the PM&DC Ordinance for the reasons set out in the Report submitted by respondent No.1.

10. The parties do not dispute that the petitioner obtained his MBBS degree in 1996 from the Sindh Medical College at Karachi, which is recognized degree awarding institution with PM&DC; that he did his Masters in Public Health in 2010 from the Khyber Medical University at Peshawar; that he was employed at the Ayub Teaching Hospital, Abbotabad, in 1999 through the Provincial Public Service Commission against the quota reserved for doctors with the requisite qualifications from FATA; that the petitioner is still gainfully employed at the said hospital in Abbotabad; that there is no degree awarding medical institution in FATA; and that the PM&DC does not carry out its operations and functions in FATA because the operation of the PM&DC Ordinance, 1962, has not been extended to FATA in terms of Article 247(3) of the 1973 Constitution. In view of the above, this case proceeds virtually on admitted facts.

11. The vital question that needs to be determined is whether respondent No.1 could withhold the notification of the petitioner as a duly elected member of PM&DC from FATA on account of the fact that the operation of the PM&DC Ordinance, 1962, and its subsequent amendments, have not been extended to FATA in terms of Article 247 (3) of the 1973 Constitution.

12. Article 247(1) of the 1973 Constitution, mandates that the executive authority of the Federation extends to FATA. Article 246(c) of the 1973 Constitution, lists 10 areas which fall in FATA. Khyber Agency, from where the petitioner hails, is one such area. No law made by the federal legislature can have application in FATA unless the President of the Islamic Republic of Pakistan so directs. In this

regard, Article 247(3) of the 1973 Constitution, is reproduced herein below:-

“247 Administration of Tribal Areas.

1. _____
 2. _____
 - (3) ***No Act of Majlis-i-Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of Majlis-i-Shoora (Parliament) or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.***
 - (4) _____
 - (5) _____
 - (6) _____
 - (7) _____”
- (emphasis added)

13. Even though, by operation of Article 247(1) of the 1973 Constitution, the executive authority of the Federation is extended to FATA, yet no law made by the Majlis-i-Shoora (Parliament) can be applied in FATA unless the President of Pakistan issues a specific direction to that effect. While giving such a direction the President of Pakistan is empowered to modify the relevant law.

14. The special status of the tribal area in the 1973 Constitution, is not unique or without parentage. The earlier Constitutions in Pakistan contained similar provisions as regards the requirement of extension of statutes to the tribal areas. Without going into the deep historical background, it may be mentioned that under the Constitution of the Islamic Republic of Pakistan, 1956 (“the 1956 Constitution”), the areas, which under the 1973 Constitution are known as

FATA, were given the status of “Special Areas”. Article 104 (1) of the 1956 Constitution *inter alia* provided that *“no Act of Parliament or of the Provincial Legislature shall apply to a Special Area or to any part thereof unless the Governor, with the previous approval of the President, so directs, and in giving such a direction with respect to any Act the Governor may direct that the Act shall, in its application to a Special Area, or to any specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction”*.

15. Similarly, under the Constitution of the Islamic Republic Pakistan, 1962 (“the 1962 Constitution”) the areas, which under the 1973 Constitution are known as FATA, were renamed and given the status of “Tribal Areas”. The definition of “Tribal Areas” in Article 242 of the 1962 Constitution was exactly the same as that of “Special Areas” under the 1956 Constitution. Article 223 (1) of the 1962 Constitution provided that *“no Central Law shall apply to a Tribal Area or to any part of a Tribal Area unless the President so directs, and no Provincial Law shall apply to a Tribal Area or to any part of a Tribal Area unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs, and in giving such a direction with respect to any law, the President or the Governor, as the case may be, may direct that the law shall, in its application to a Tribal Area or to a specified part of a Tribal Area, have effect subject to such exceptions and modifications as may be specified in the direction.”*

16. In Article 261 of the Interim Constitution of the Islamic Republic of Pakistan, 1972, the procedure required to be adopted for the extension of the laws made and acts passed by the central and provincial legislatures to FATA were set out.

17. Therefore, since decades, no law made or Act passed by the federal and provincial legislatures can apply to FATA, unless extended under the special and

specific procedure set out in Article 247 (3) of the 1973 Constitution.

18. At this stage, reference to a few decided cases would be apposite.

- (a) In the case of GhilafGul Vs. Commissioner of Income Tax reported as 1997 PTD 849, it was held by the Division Bench of the Hon'ble Peshawar High Court that as the Income Tax Ordinance, 1979, had not been extended to the tribal areas as required by Article 247 of the 1973 Constitution, deduction of withholding tax by branches of Banks in the tribal area, was against the Constitution, and thus without lawful authority. The Hon'ble High Court directed the banks to reverse the entries of deduction of withholding tax and the amount deducted be credited to the accounts of the customers.
- (b) In the case of Muhamad Ihsan Vs. Government of Pakistan, reported as 1999 MLD 1154, it was held by the Division Bench of the Hon'ble Peshawar High Court that as the Federal Investigation Agency Act, 1975, had not been extended to the Provincially Administered Tribal Areas in terms of Article 247(3) of the 1973 Constitution. The FIA had no jurisdiction to operate in such areas.
- (c) In the case of Hazrat Muhammad Vs. The State reported as PLD 1988 (Peshawar) 11, it was held by the Division Bench of the Hon'ble Peshawar High Court that since the Code of Criminal Procedure (Second Amendment Ordinance, LXXI of 1979) had not been extended to the Provincially Administered Tribal Areas in terms of Article 247 of the Constitution, the amendment in Section 497 (1) of

Cr.P.C. shall not apply in the Provincially Administered Tribal Areas.

- (d) In the case of Abdul Baqui Vs. Mitha Khan reported as 1990 MLD 1960, the Hon'ble Balochistan High Court held that since the operation of Ordinance X of 1980, whereby Section 12 (2) was inserted in the Code of Civil Procedure, 1908, had not been extended to the Provincially Administered Tribal Areas in terms of Article 247(3) of the Constitution, applications under Section 12(2) filed before courts in the Provincially Administered Tribal Areas were held to be not maintainable.
- (e) In the case of Gul Zamin Vs. Sarfraz Khan reported as 1984 SCMR 374, the Hon'ble Supreme Court of Pakistan held that as the Land Reforms (Amendment) Act, 1976, had not been shown to have been extended and applied to the Provincially Administered Tribal Areas in a manner as required under Article 247(3) of the Constitution, the same would have no application in the said areas.
- (f) In the case of Najibullah Khan Vs. Federation of Pakistan reported as 2003 PTD 2083, the Division Bench of the Hon'ble Peshawar High Court held that as the Income Tax Ordinance, 1979, had not been extended to the Provincially Administered Tribal Areas in accordance with the Article 247(3) of the Constitution, the deduction of income tax/withholding tax from the income of the depositors could not be lawfully made by the National Savings Centers located in such tribal areas.
- (e) In the case of Commissioner of Income Tax Vs. Gul Cooking Oil & Vegetable Ghee

(Pvt.) Ltd reported as 2008 PTD 169, the Hon'ble Full Bench of Supreme Court of Pakistan held in paragraph 16 of the said judgment as follows:-

“16. There is no cavil to the legal position that exemption under the law from payment of Income tax is available to a person or company carrying its business in tribal areas and income tax cannot be collected from such person or company by the tax collecting authorities of the Government unless the law relating to the collection of Income Tax is extended to the tribal areas by virtue of Article 247 of the Constitution”.....

19. In view of the above, it is well settled that a legislation, whether federal or provincial, will have no application in FATA or the Provincially Administered Tribal Areas, unless and until the operation of such legislation is extended in accordance with the Article 247(3) of the 1973 Constitution, to such areas.

20. The Report submitted by the respondent No.1 confirms that the operation of PM&DC Ordinance, 1962, has not been extended to FATA in terms of Article 247(3) of the Constitution. This fact is being put-up as the reason for not notifying the petitioner as a duly elected member of PM&DC from FATA. Now as the operation of the PM&DC Ordinance has not been extended to FATA, the PM&DC or any of its elected members, cannot carry-out any functions under the PM&DC Ordinance, 1962, in FATA as per the law laid down by the Superior Courts. In order to enable the PM&DC to establish its offices in FATA or for its members to perform their official obligations/duties in FATA, the extension of the PM&DC Ordinance, 1962, would be necessary. However, the case at hand is not where the PM&DC or any of its members are required to perform any of their functions under the PM&DC Ordinance in FATA. Even the member of PM&DC from FATA is not required to carry out his duties in FATA. This is a case where a candidate who hails and is domiciled in FATA; and has obtained his medical qualifications from institutions which are not located in

FATA; and works as a medical practitioner for a gain in an area which is not located in FATA; and has participated in elections, which were not held in FATA; and now that he has been duly elected, he is not supposed to perform his duties in FATA. FATA is not the petitioner's constituency where he is supposed to perform his duties. Regardless of all this, the petitioner is not being notified as an elected member for PM&DC from FATA under pretext that the operation of the PM&DC Ordinance, 1962, has not been extended to FATA.

21. At this stage, it is pertinent to reproduce herein below the dicta of the Hon'ble Supreme Court of Pakistan in a case where a particular statute had not been extended to the tribal area yet its provisions were held applicable to a person/entity from the tribal area with respect to functions and activities being carried out by such a person/entity beyond the territorial limits of the tribal area. In the case of Commissioner of Income Tax Vs. Gul Cooking Oil & Vegetable Ghee (Pvt.) Ltd (supra), the Hon'ble Full Bench of Supreme Court of Pakistan held as follows:-

“16..... However, the question whether a company or a person derives income from business being carried out in taxable or non-taxable area is a pure question of fact which cannot be decided without holding proper inquiry for determination of controversial facts regarding the tax liability. The business of a person or Company may or may not be confined to a particular place or areas rather it may be expended beyond the local limits of the area in which Income Tax Ordinance is not applicable and thus if the income tax is derived from the sale of products which are manufactured in the factory situated in non taxable area both from taxable and non taxable area, the question relating to the tax liability of such a business concern cannot be determined only on the basis of location of factory or its registered office rather the requirement of law in such case is to hold a proper inquiry and ascertain the correct factual position for determination of tax liability. The exemption from payment of tax is certainly available on the business being carried in tribal area in which income tax law is not applicable, but the real question for determination in the present case would be that a company

with its manufacturing unit and registered office in non-taxable area, if is also carrying business in taxable area is exempted from payment of income tax on its income as a whole or only or only on the income being derived from non-taxable area.”

22. Even though, the Income Tax Ordinance, 2001, had not been extended to the tribal areas in terms of Article 247(3) of the 1973 Constitution, in the case of Commissioner of Income Tax Vs. Gul Cooking Oil &Vegetable Ghee (Pvt) Ltd (supra), the Hon'ble Full Bench of Supreme Court of Pakistan has held that the provisions of the Income Tax Ordinance, 2001, would be applicable to a company which has its registered office and manufacturing unit in the tribal area, but carries out activities in a taxable area. It was further held that it is only the activities of such a company carried out in non-taxable area, which would be immune from taxation under the Income Tax Ordinance, 2001, and not the taxable activities being carried out beyond the territorial limits of non-taxable area / tribal area.

23. By analogy therefore the non-extension of the PM&DC Ordinance, 1962, to FATA in terms of Article 247(3) of the 1973 Constitution does not pose any legal hindrance or obstacle for respondent No.1 to notify the petitioner and a similarly placed person as a duly elected member of PM&DC in terms of Section 31 of the PM&DC Ordinance (as amended). The PM&DC Ordinance or any of its amendments do not require a member of PM&DC from FATA to perform his duties in FATA. As all members of the PM&DC are required to perform their duties in the entire country other than FATA. Therefore, the respondent No.1 is not correct in its contention that for the petitioner to be notified as a member of PM&DC from FATA, the extension of the PM&DC Ordinance, 1962, is necessary.

24. As regards the medical qualifications of the petitioner, the same have been gained from institutions not located in FATA. These medical qualifications have admittedly been recognized by PM&DC. The recognition of these qualifications cannot be diluted simply on account the fact that the holder of these qualifications hails from or is

domiciled in FATA. It is no body's case that the institutions from which the petitioner gained his medical qualifications are not recognized by PM&DC.

25. For the reasons given above, this constitutional petition must, in my opinion, succeed. The petition is accordingly allowed and respondent No.2 is directed to include the name of the petitioner in the notification issued under Section 3(1) of the 1962 Ordinance (as amended) as a duly elected member of PM&DC from FATA. It is furthermore directed that the petitioner be permitted, if he so desires, to contest for the elections of the executive committee of the PM&DC.

26. In view of the fact that pure questions of law were involved in this case, I make no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Qamar Khan*

APPROVED FOR REPORTING

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