

Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

J U D G M E N T

Writ Petition No.1068-P/2015
Date of hearing.....14.03.2017

Dr.Akbar Shah
Vs
Government of Khyber Pakhtunkhwa & others.

Petitioner(s) by Mian Muhibullah Kaka Khel, Advocate

Respondent(s) by Mr. Zartaj Anwar, Advocate, Mr.
 Rabnawaz Khan, AAF for State.

MUHAMMAD YOUNIS THAHEEM, J:-

Through this single judgment, we propose to decide instant petition alongwith **W.P No.252-P/2017** titled **Dr. Shazia Hussain Vs Government of Khyber Pakhtunkhwa & others**, **W.P No.292-P/2017** titled **Dr. Akbar Shah Vs Medical Director, MTI, KTH, Peshawar & others** and **W.P No.731-P-2017** titled **Dr. Shoaib Jan Vs Government of Khyber Pakhtunkhwa & others**, as common question of law and facts are involved therein. Moreover, in all

these petitions the question for determination is one and the same.

2. Petitions wise brief facts are as below:-

i) **W.P No.1068 of 2015:-** Petitioner is performing his duty as an institutional employee as Director (BPS-19) at Khyber Teaching Hospital (KTH), Peshawar as Trauma consultant in A&E Department. During his service he was transferred as MS to Mian Rasheed Hussain Hospital, Pabbi, District Nowshera, vide transfer order dated 16.03.2015 (impugned herein). Who challenged the same order through instant petition and the operation of impugned transfer notification dated 16.03.2015 was suspended vide order of this Court dated 14.04.2015 which remain intact till date.

ii) **W.P No.252-P/2017:-** Petitioner Dr. Shazia Hussain was working as Woman Medical Officer, Khyber Teaching Hospital(KTH), Peshawar. She given option to join the institution u/s 16 of the Medical

teaching Institutions Reforms Act 2015, but despite that her services she was directed to report Health Department of the Province on the ground that she has not opted for institutional absorption. The same impugned order dated 31.12.2016 was challenged, so this petition and the operation of the same impugned order has been suspended vide interim order of this Court dated 26.1.2017.

iii) **W.P No.292-P/2017:-** Petitioner Dr. Akbar Shah through this petition had also challenged the order dated 20.01.2017 vide which the petitioner services were repatriated to Health Department and was relieved from the institution. The operation of the same impugned order was suspended vide order of this Court dated 26.01.2017.

iv) **W.P No.731-P-2017:-** Petitioner Dr. Shoaib Jan working as Medical Officer (BPS-17) in Khyber Teaching Hospital, Peshawar and under new medical services system u/s 16 of MTI Act 2015, he exercised his option to continue his services as

institutional employee in the K.T.H, Peshawar but vide impugned notification dated 07.02.2017, he was directed to report back to Health Department of the Province with immediate effect.

3. As common question of law and facts are involved and all the petitioners were institutional employees and had opted u/s 16 of MTI Act to remain employee of K.T.H and to be dealt with u/s MTI Act and whether the respondents have authority under the MTI Act to pass any order for transfer of the institutional employees to report to Health Department were questions which needed explanation from the respondents, so the respondents were called to submit their comments, who submitted the same and prayed to consider sufficient in all petitions.

4. Learned counsel for petitioners argued that after promulgation of MTI Act 2015, the petitioners were given right to exercise option to remain institutional

employees in view of section 16 of MTI Act 2015, so they filled option proformas well within prescribe time u/s 16(3) of Khyber Pakhtunkhwa Medical Teaching Institutional Reforms Act 2015 within 90 days from the date of commencement of the Act. Similarly counsel for petitioner Mian Mohibullah Kaka Khel argued that the transfer order of the petitioner dated 20.01.2016 has been challenged in the instant writ petition is against law, without lawful authority as being institutional employee, the respondents has no authority to transfer an institutional employee to direct him to report in the Health Department. Similar are the arguments in other connected writ petitions. The learned counsel for petitioners argued that they have exercised the option u/s 16 of the MTI Reform Act, so are institutional employees could not be sent to surplus pool or transfer from the Medical Institutional Hospital to report at Health Department. Learned counsel for petitioners placed

reliance on the judgment of this Court in **W.P No.2980-P/2014** titled **Dr. Muhammad Ali Johan Vs Government of Khyber Pakhtunkhwa & others** dated 02.01.2014 and judgment of Hon'ble Supreme Court in **C.P No.157 of 2017** in case titled as **Dr. Muhammad Inam Vs Dr. Waseem Anwar & others** dated 27.02.2014.

5. Conversely, learned counsel for respondents vehemently opposed the contentions raised by the learned counsel for petitioners that the petitioners have no locus standi and argued that petitioners are civil servants and the Director General Health is competent to pass transfer order anywhere in the Province and the petitioners are bound under the law to act upon the orders of the competent authority. He argued that the petitioners are not aggrieved in view of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, as the matter relates to transfer and services, so this Court lack jurisdiction. He lastly argued that

petitioners have not opted to be institutional employees within prescribe time of 90 days according to the Provision contained in the MTI Act, so petitioners were either transferred to the other Hospitals in the Province or were directed to report the Health Department.

6. Arguments heard and record perused.

7. From the submissions made by the learned counsel for the parties, examining of MTI Act, 2015 and perusal of record, it is an admitted fact that the petitioners prior to promulgation of Khyber Pakhtunkhwa Medical Teaching Institutional Reforms Act, 2015 were serving in Khyber Teaching Hospital on their respective posts and according to Section 16 of the same act were obliged to fill proformas to exercise option as to whether they want to continue to serve the institution or not. For comprehension the relevant provision of

Section 16 of the MTI Act is reproduced below:-

“3) On the commencement of this Act, all the civil servants serving in an existing Medical teaching Institution shall be given an option either to continue to serve the Medical Teaching Institution as civil servant or may opt for the employment of the Medical Teaching Institution. The option shall be exercised within a period of ninety days after commencement of this Act. Those employees, who don't opt for their absorption in the Medical Teaching Institution so notify, shall serve the Medical Teaching Institution concerned on their existing terms and conditions.

4) After the commencement of this Act, if the provisions of this Act are applied to any Medicinal Teaching Institution within the meaning of Section-3 of this Act, all civil servants serving in Medical Teaching Insituti8on, shall be given an option either to continue to serve the Institution as civil servant, or may opt for the employment of the Institution. The option shall be exercised within a period of ninety days after the notification of a Medical Teaching Institution under-3 of the Act. Those employees, who don't opt for their absorption in the Medical Teaching Institution so notify, shall serve the Medical

Teaching Institution concerned on their existing terms and conditions.

5) The option under sub-section (4) once exercised shall be final. A civil servant, who opt to serve the Medical Teaching Institution, shall cease to be civil servant from the date of his absorption in the service of the Medical Teaching Institution concerned and their seniority, pension and other matters vis-à-vis with the employees of the Medical Teaching Institution, shall be determined in the manner, as may be prescribed by rules.

6) If at any time, a Medical Teaching Institution reverts to Government for running under its own administration and management for any reason, the employees appointed under sub-section (1) shall continue to serve the Medical Teaching Institution, on the same terms and conditions as applicable to them immediately before such reversion."

8. According to the above Provision the employees of the KTH were directed to exercise their option and in this respect the petitioners exercised their choice to opt to serve the institution. The record reveals that petitioner Akbar Shah after promulgation of the said Act was transferred from KTH to

Health Department to serve as MS Buner but that transfer order was suspended by this Court vide interim order dated 14.04.2015 and thereafter petitioner Dr. Akbar Shah submitted his option to join the institution in view of above referred Section 16 of MTI Act 2015. With regard to transfer of Dr. Akbar Shah it is held that the MD has no authority to transfer the same petitioner as firstly after promulgation he became institutional employee by operation of law. Secondly, petitioner was transferred without lawful authority and illegally transferred from Medical Teaching Institution to Provincial Government Department and thirdly the operation of same transfer order was suspended by this Court vide order dated 14.04.2015, so petitioner remained an institutional employee who exercised his option to continue institutional employee of MTI of Khyber Teaching Hospital within prescribed period of 90 days. In this respect wisdom is derived from the judgment of

Hon'ble Supreme Court in **C.P No.157 of 2017** in case titled as **Dr. Muhammad Inam Vs Dr. Waseem Anwar & others** dated 27.02.2014.

9. In the instant petition and all connected petitions the option proformas was perused vide which the petitioners had opted to join and remain the Medical Teaching Institution, so the arguments of the learned counsel for respondents that petitioners have not opted in view of Section 16 of MTI Act 2015 is not supported with any contrary record and in this respect have not annexed any document.

10. Moreover in the said MTI Act the MD has not been authorized to set aside the option exercised by the institutional employee to set aside the said option. So transferring any employee after promulgation of MTS Act without first making offer to exercise option is without lawful authority. Furthermore the arguments of learned counsel for respondents that some 150

Doctors being institutional employees have exercised their option to continue as institutional employee, out of which the option exercised by 100 employees was accepted by the MD and of rest was not accepted is not supported by the MTI Act, so same argument is not valid as the Act do not authorized the MD or other respondents to revoke the option exercised by the institutional employees.

11. Thus, in view of the above discussions, we are of the view that the petitioners have locus standi and cause of action being institutional employees who had exercised their option within prescribed of 90 days. Therefore, all the petitions are allowed and consequently impugned orders are set aside and petitioners are declared as employees of MTI Khyber Teaching Hospital.

Announced.
14.03.2017.

J U D G E

JUDGE