

IN THE HIGH COURT OF SINDH, KARACHI

Plaintiffs : **Suit No. 584 of 2021**
Deepak Kumar and 10 others.

Plaintiffs : **Suit No. 585 of 2021**
Fatima Jinnah Dental College and 6 others.

Plaintiff : **Suit No. 586 of 2021**
Social Responsibility Organization.

Plaintiff : **Suit No. 730 of 2021**
Isra University.

Plaintiffs : **Suit No. 731 of 2021**
Ali Naveed Shaikh and 25 others.

Plaintiff : **Suit No. 881 of 2021**
Hamdard College of Medicine (Dental
Section) Hamdard University.

Versus

Defendant No. 1 : Federation of Pakistan, through Secretary
Ministry of National Health Services
Regulations and Coordination, Islamabad.

Defendant No. 2 : Pakistan Medical Commission,
through its Secretary.

Defendant No. 3 : Pakistan Dental Association,
through its President.

M/s. Haider Waheed and Faiz Khalil,
Advocates for plaintiffs in Suits No. 584, 585,
586, 730 and 731 of 2021.

Mr. Kashif Hanif, Advocate for plaintiff in Suit
No. 881 of 2021.

Mr. Ghulam Mohiuddin, Assistant Attorney
General on behalf of defendant No. 1 in all
suits.

M/s. Zeeshan Abdullah and Adnan Abdullah,
Advocates for defendant No.2 in all suits.

Dates of hearing : 08.04.2021, 14.04.2021, 06.05.2021 &
17.05.2021

Date of order : 02.07.2021

ORDER

ZAFAR AHMED RAJPUT, J:- By this common order, I intend to dispose of C.M.As. No. 4741, 4743, 4745, 4849, 4850, 4851, 5743, 5745 and 6959 of 2021, filed on behalf of the plaintiffs, under Order XXXIX, rule 1 & 2 read with section 151 of C.P.C. Through C.M.As. No. 4741, 4743, 4745, 5743, 5745 and 6959 of 2021, the plaintiffs seek suspension of the Public Notice dated 15th March, 2021, issued by the defendant No.2 (*Pakistan Medical Commission "PMC"*) directing private medical colleges to submit their final certified list of admitted students, and restraining PMC from leaving any sanctioned seat vacant by relying on the PMC Admission Regulations 2020-2021 (*"impugned Regulations 2020-2021"*), while through C.M.As. No. 4849, 4850 and 4851 of 2021 the plaintiffs seek suspension of the test results for the framing of the pass marks for the Medical and Dental Colleges Admissions Test (*"MDCAT"*).

2. Briefly stated facts are that the Suits No. 584 and 731 of 2021 have been filed by the candidates/students aspiring for admission in BDS in the academic year 2020-21, while Suits No. 585, 730 and 881 of 2021 have been filed by the dental colleges, whereas Suit No. 586 of 2021 has been filed by an N.G.O. for declaration, permanent and mandatory injunctions, alleging therein that the Bachelor of Dental Surgery (*"BDS"*) and the Bachelor of Medicine, Bachelor of Surgery (*"MBBS"*) degrees are fundamentally different insofar as course structure and cognitive ability requirement and, therefore, PMC being a statutory authority vested with regulatory responsibilities *inter alia* over the medical education in Pakistan, proposes 6000 hours study for the MBBS in five years and 4800 hours study for the BDS in four years, and there is a clear difference between the skills, aptitude and cognitive abilities required for the BDS vis-à-vis the MBBS; hence, the requirements for admission in the BDS should also reflect such differences; that the BDS is treated as a fall back option insofar as the MBBS is the first choice

for the students who apply for admission into medical and dental colleges; hence, it has been a recurring practice every year that the allocated seats for the MBBS are occupied first while the BDS seats are filled later; that for all previous years the process of admissions into the BDS program would continue on a rolling basis till the last available seat was filled with the highest scoring candidate left until that point; that the purpose of holding MDCAT for the students aspiring to the BDS degree is to filter out the candidates on the basis of merit by imposing a cut-off score on the intermediate exams and then to place them according to merit as per their score in MDCAT against vacant seats, which practice was carried out under the auspices of the PMDC, the predecessor of the PMC, by using its powers under Section 33 (2) of the repealed Pakistan Medical and Dental Council Ordinance, 1962; that for the previous 2019–2020 intake into the MBBS and BDS programs, the erstwhile PMDC earlier issued the MBBS and BDS (Admissions, House job and Internship) Regulations, 2018 (*repealed by the impugned Regulations 2020-2021*), the Regulation 9 (8) whereof envisaged that no candidate would be considered eligible for admission in MBBS and BDS on merit unless he scored at least 60% in the MDCAT and in case the seats were left vacant with no eligible candidates achieving said threshold, the Regulation 9 (19) (*ibid*) envisaged that such seats would be offered to candidates next in line on the “waiting list”, thus for the 2019-20 intake the last student who had secured 26.5% was admitted against a vacant seat, but upon the promulgation of the Pakistan Medical Commission Act, 2020 (*the “Act”*) such scheme for admissions has been modified by the Council of the PMC by setting passing marks for the MDCAT at 60%, through impugned Regulations 2020-2021, by exercising its power provided under section 18, read with Section 8(2)(f) of the Act, which is not only in violation of statutory scheme but also detrimental to the rights of the students and the dental colleges guaranteed to them under the Constitution of Islamic Republic of Pakistan, 1973 (*the “Constitution”*); hence these suits, with the following prayers:

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I. *DECLARE that the Council of the Defendant No. 2 has, without lawful authority, set the pass mark for the MDCAT at 60% in the Admissions Regulations, 2020 - 2021;*

II. *DECLARE that the Admissions Regulations 2020 – 2021, in particular Regulations 2 and 22, have been promulgated without jurisdiction and are ultra vires of the Pakistan Medical Commission Act, 2020;*

III. *DECLARE that the BDS and MBBS programs are conceptually different and as such warrant different treatment by the Defendant No. 2, inter alia in admissions process;*

IV. *DIRECT the Defendant No. 2 to consider and explain, for every academic year's intake, as well as for the current year of 2020-2021, the rationale for setting a particular pass mark for the BDS and MBBS programs;*

V. *DECLARE that the seats available at private dental colleges being authorized / sanctioned by the Defendant No. 2 need to be filled for each academic year's intake;*

VI. *DIRECT the Defendant No. 2 to revert to the previously followed practice wherein aspiring students would be placed / matched against available seats by virtue of their score on the MDCAT;*

VII. *PERMANENTLY RESTRAIN the Defendant No. 2 from finalizing admissions for the 2020-2021 intake on the basis of the pass mark for the same having been set without jurisdiction and in a manner that leaves sanctioned seats vacant;*

VIII. *DECLARE that the impugned statutory provisions are illegal, unjust, ultra vires the Constitution of the Islamic Republic of Pakistan, 1973 and as such are liable to be struck down;*

IX. *DECLARE that the impugned regulations (wherein the pass mark for both MBBS and BDS admissions has arbitrarily been set at 60%) are arbitrary, illegal and are liable to be set aside;*

3. Mr. Haider Waheed, learned counsel for the plaintiffs in Suits No. 584, 585, 586, 730 and 731 of 2021, while reiterating the facts of memo of complaints has contended that the statutory scheme set out in the Act has been violated insofar as the Council of the PMC, constituted under section 4 of the Act (*the "Council"*), took it upon itself as early as 03.10.2020 to announce 60% pass marks for the MDCAT in ignorance of the fact that it was the responsibility of the National Medical & Dental Academic Board of the PMC, constituted under section 10 of the Act (*the "Board"*), to do so. He has added that the Council lacked the mandate to notify the pass marks under impugned Regulations 2020-2021, as bare reading

of Section 8 (2) (f) of the Act suggests that the Council only has the power to make regulations as to the conduct of the examinations, whereas its role is limited to “approve” the standards of the MDCAT, as “proposed” by the Board, duly authorized under the Act to “formulate” and “propose” the standards of the MDCAT for the “approval” of the Council, which authority of the Board has been violated on two counts i.e. (i) the Council lacks the mandate to promulgate as regulations the pass marks for the MDCAT; hence, the impugned Regulations 2020-2021 are in excess of the powers conferred upon the Council under section 8 (2)(f) of the Act and (ii) the Council approved the Board’s decision dated 21.11.2020 of setting the pass marks at 60% on 19.02.2021, whereas the MDCAT was conducted on 29.11.2020 when there was no such approval in field. He has further added that the purported approval of the Council was made on the same day when the Board decided to formulate pass marks of 60%; hence mandatory fourteen days’ notice period for Council’s meeting as per section 7(1) of the Act has not been satisfied, which is essential so as to Council’s members to have all relevant material before them for judicious exercise of their discretion; hence the issuance of impugned Regulations 2020-2021 by the Council is in violation of aforesaid mandatory provisions of law.

4. Mr. Haider Waheed has further contended that the Council in an unreasonable, arbitrary and illegal exercise of discretion has issued the impugned Regulations 2020-2021, which have been enacted by the PMC by exercising unreasonably its discretion wherein the pass marks for the BDS and MBBS programs has been set at the same percentage. He has added that there exists no rationale for treating at par the MBBS and BDS admissions; therefore, PMC ought to act in a reasonable manner; however, by equating irrationally the BDS and MBBS pass marks for MDCAT at same percentage, PMC is discriminating against the students for there are enough vacant seats to accommodate them and it is

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inexplicable as to why this year PMC reached a conclusion that only such students would be eligible to get admission in BDS who score at least 60% in the MDCAT, whereas till last year it allowed students who scored as low as 26.5%.

5. Mr. Haider Waheed has further contended that the impugned Regulations 2020-2021 by setting pass marks at 60% for the MDCAT for the academic year 2020-2021 has abolished the concept of having a "waiting list" of candidates to be matched against the seats going vacant, which is in departure to the practice followed for all previous years where the admissions would continue on a rolling basis until the last vacant seat was filled; hence, the plaintiffs/students and dental colleges are particularly aggrieved by the removal of the "waiting list".

6. Mr. Haider Waheed has further contended that upon being accredited by the PMC, each dental college is approved to offer certain number of seats and pursuant to such accreditation, each college has made huge investments in ensuring the provision of physical infrastructure and quality faculty to cater to such sanctioned number of seats; as such, the setting of the pass marks at 60% shows that this year 492 BDS seats are left vacant in private dental colleges of the Sindh Province against 690 total sanctioned seats; hence, the cumulative effect of setting threshold of 60% is that a large proportion of the seats offered by private dental colleges are going unfilled in a sheer waste of the resources allocated by them with further result that a large number of aspiring students shall not be able to get admissions this year in BDS despite availability of several hundred seats. He has added that the exercise of discretion in enacting the impugned Regulations 2020-2021 by the PMC is ultra vires the Constitution and the rights of the dental colleges guaranteed to them thereunder, particularly their right to practice their business of providing quality dental education and right of the students to practice their chosen profession without undue hindrance. He has added that by departing from set practice of ensuring no seat goes vacant, PMC has practically pushed the

private dental colleges *mala fide*ly out of business, curtailing their constitutionally protected right to do business. He has further added that the private dental colleges are being discriminated against for they have invested considerable time and resources in ensuring the availability of seats which shall be left unused and their right to practice their business of providing quality dental education is being unduly fettered.

7. Mr. Haider Waheed has emphasized that the plaintiffs have made out prima facie arguable case for the grant of injunctive relief as prayed for; the balance of convenience lies in their favour and it is the plaintiffs who shall suffer irreparable loss if injunctive relief sought by them is not granted. In support of his contentions, the learned counsel has relied upon the following case-law:

(i) M. Shahid Saigol and 16 others v. M/s. Kohinoor Mills Ltd. and 7 others (PLD 1995 Lahore 264). It has been held by the learned Single Judge of the Lahore High Court in a petition filed under Companies Ordinance, 1984 that where the Statute provided as a mandatory requirement for issuance of a notice as prescribed under the law, implied notice or information received aliunde would not be sufficient to absolve the person from its legal obligation from issuing express notice in writing.

(ii) Sher Asfandyar Khan and others v. Neelofar Shah and others (2020 CLD 1260). It has been held by the Hon'able Division Bench of this Court that the meeting which was not held as per the provisions of section 160 of the Companies Ordinance, 1984, cannot be considered to be validly constituted and the courts are empowered to declare these types of meetings to be invalid, in case these are found to be carom non-judice.

(iii) Ahmad Nadeem v. Chairman, Arbitration Council and others (1991 MLD 1198). In this matter, the petitioner called in question an order whereby the Arbitration Council held the *Talaq* pronounced by the petitioner to be ineffective. Learned Single Judge of the Lahore High Court has deliberated on the meaning, scope and import of term "notice" as "notice means information, an advice or a written warning in more or less formal shape, intended to apprise a person of some proceedings in which his interests are involved or informing him of some fact which it is his right to know and duty of the notifying party to communicate.



(iv) Dr. Fatima Arshad v. Government of the Punjab and others (2020 PLC (C.S.) 688). The petitioner, an ad hoc appointee, being aggrieved of verbal termination from service maintained Constitutional Petition wherein learned Single Judge of the Lahore High Court has observed that “it goes without saying that after insertion of Article 10A and 19A in the Constitution of Islamic Republic of Pakistan, 1973, due process and disclosure of necessary information in a notice or a show-cause notice is fundamental right of the recipient of any notice. Any action taken, on a notice or a show-cause notice, lacking due process or necessary information, shall be susceptible to judicial review in constitutional jurisdiction and liable to be set aside for not adhering to the guaranteed fundamental rights.”

8. Mr. Kashif Hanif, learned counsel appearing for the plaintiff in Suit No. 881 of 2021, has adopted the arguments advanced by Mr. Haider Waheed.

9. Conversely, Mr. Zeeshan Abdullah, learned counsel appearing for defendant No. 2/PMC, while raising legal objections has maintained that these applications for grant of interim injunction by suspending Public Notices, dated 15.03.2021, cannot be granted, as the plaintiffs neither have impugned the alleged Public Notice in the instant suits by seeking any declaration in respect thereof nor they have sought any permanent injunction regarding the same, and it is well-settled law that an interim injunction cannot be granted where no perpetual injunction is claimed in suit

10. Mr. Zeeshan Abdullah has further maintained that earlier there was no Board and Medical Authority as required under the Act; hence, in compliance of the order, dated 11.11.2020, passed by the Division Bench of this Court in C.P. No. D-4953 of 2020, the Board and the Medical Authority were constituted by including the best Academia of Pakistan in the Board, which reviewed the formulation of the examination structure and standards and set 60% pass marks for the MDCAT in its meeting held on 21.11.2020, which review of the Board was approved by the Council through Notification, dated 21.11.2020, issued by the Secretary, PMC in exercise of powers conferred under section 14(3) of the Act. He

has added that the spirit and rationale of the said provision appears to be that the members of the Council are not technical experts or educationists; however, the Board is consisted upon top educationists, who are subject experts; therefore, the wisdom of legislature seems to be that the structure and standards of MDCAT are to be formulated by the Board and the Council is only required to approve it formally; hence, no justification is available to the plaintiffs to challenge the functions of the Council and the Board as well as standards of MDCAT. He has also added that challenging to set 60% pass marks through instant suits is also hit by law of estoppel by conduct because the plaintiffs/students were already having knowledge of setting 60% passing marks and they sat in the MDCAT but when failed to qualify, they have challenged it. He has also added that the provision of section 7 (1) of the Act providing fourteen days' notice to members prior to holding of meeting of the Council is directory in nature; hence, even in non-compliance thereof, on such technical ground, the meeting and the approval of the Council should not be vitiated.

11. Mr. Zeeshan Abdullah has further maintained that the cognitive and affective domains required for dental and medical graduates remain the same as both, MBBS and BDS, graduates are required to interpret data, make diagnoses, develop and execute a treatment plan and perform suitable patient follow-up and deal with common complications; hence, the BDS program, though shorter in duration, is not of less intense and concentration than an MBBS program. He has added that the field related training may be different but the dexterity and aptitude required for an entrant are the same nationally and globally; therefore, lowering the pass percentage for BDS entrants would jeopardize the profession of dentistry. He has further maintained that the plaintiffs have lowered the status of the profession of dental surgery by pleading that it is fundamentally different from that of MBBS, which in fact acquires a high acumen equal to that of MBBS;

therefore, there should not be any difference in the MDCAT minimum scores of these two health care and medical education programs.

12. Mr. Zeeshan Abdullah has also maintained that this year total 8287 students passed the MDCAT from Sindh Province and there are 5490 seats for both MBBS and BDS for the Sindh Province; as such, seats are less and students who passed MDCAT are more; hence, the seats are not going vacant due to the reason that MDCAT passed students are less in number, but the reason is that the fee of private colleges are too much high, therefore, many MDCAT passed students are not able to afford it; however, if they decrease their fees then the MDCAT passed students may get admissions. He has added that there is no justification to give admissions to failed students on rolling basis by maintaining "waiting list" when passed students are still available. He has also maintained that the dental colleges instead of decreasing their fees are demanding that the merit should be compromised to fulfill vacant seats, while the paramount consideration of the regulator/PMC is to improve the standards rather than to safeguard the commercial interest of private dental colleges.

13. Mr. Zeeshan Abdullah has prominently maintained that no prima facie case has been made out by the plaintiffs for the grant of interim injunction in their favour and the balance of convenience also does not lie in favour of the plaintiffs but in favour of defendant No.2 and it is the PMC who is likely to suffer irreparable loss if interim injunction is granted. In support of his contentions, learned counsel has relied upon following case-law:

- (i) Marghub Siddiqi v. Hamid Ahmed Khan and 2 others (1974 SCMR 519). It has been held by the Apex Court that in a suit where no perpetual injunction is claimed, no question of granting ad-interim injunction can possibly arise.
- (ii) Ghulam Hassan v. Jamshaid Ali and others (2001 SCMR 1001). It has been observed by the Apex Court that it is an established principle of law that where the legislature has provided a

penalty/ consequences for the non-compliance, the said provision would be mandatory in nature and where such consequences are not provided it would be termed as directory.

- (iii) Niaz Muhammad Khan v. Mian Fazal Raqib (1974 PLD Supreme Court 134). It has been held by the Apex Court that as a general rule a Statute is understood to be directory when it contains matter merely of direction, but not when those directions are followed up by an express provision that, in default of following them, the fact shall be null and void. To put it differently, if the act is directory, its disobedience does not entail any invalidity; if the act is mandatory, disobedience entails serious legal consequences amounting to the invalidity of the act done in disobedience to the provision.
- (iv) Kamil Nook Khan v. Controlling Authority, Union Committee No.60, Karachi and 3 others (PLD 1970 Karachi 730). In this matter, the seven clear days' notice as provided under rule 3(2) of the Basic Democracy (Vote of No-Confidence against Chairman) Rules, 1963 was not given for the meeting; however, the meeting was attended by all the members. A Division Bench of this Court has held that it was a merely irregularity and did not affect the result or prejudice the petitioner.
- (v) Ch. Abdul Ghani v. Deputy Commissioner and others (1987 CLC 2401). In this matter, the petitioner, who was Chairman of the Town Committee Shorkot, maintained the Writ Petition impugning the notice for special meeting of the Town Committee to consider a motion of No-Confidence against him on the ground *inter alia* that the notice fell short of requisite period of seven days provided under rules 3(2) of the Punjab Local Councils (Vote of No-Confidence against Chairman or Vice Chairman) Rules, 1980. A Division Bench of the Lahore High Court observed that it was only an irregularity which did not vitiate the proceedings and that rule 3(2) which provides seven days' notice for the meeting convened for consideration of the motion of no-confidence is directory in nature and its non-compliance does not result in the annulment of the proceedings unless prejudice is shown to have been caused to the party affected.
- (vi) Ghulam Moeenuddin v. Controlling Authority, Bahawalnagar and others (PLD 1967 Lahore 1040). It has been held by a Division Bench of the Lahore High Court that a failure to serve the notice on the member on three days' clear notice cannot invalidate the election unless it is shown in terms of rule 7 of the West Pakistan Election of Chairman Rules, 1960 that it has materially affected the result of the election.

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(vii) Anam Jabbar and 6 others v. Azad Government of the State of Jammu and Kashmir through Chief Secretary, Muzaffarabad, A.K. and 12 others (2013 YLR 169). In this matter, the appellants at one side participated in the entry test conducted by NTS for admission in the medical college and when they could not achieve the desired result and admissions were granted to private respondents, they turned round and challenged the same on the ground that the entry test conducted by NTS cannot be considered for determining the merit. A Full Bench of Hon'able Supreme Court (AJ&K) has held that it is now a celebrated principle that one cannot blow hot and cold in one breath. The doctrine of estoppel by conduct is fully applicable in the case of appellants. After participating NTS they cannot challenge the admission granted to private respondents on the basis of NTS entry test.

(viii) Muhammad Zubair and 5 others v. Government of Pakistan through Secretary Health, Islamabad and 22 others (2012 CLC 1071). In this matter, the petitioners through various writ petitions challenged the weightage criteria set by Pakistan Medical and Dental Council for entry test for admission in MBBS / Medical Colleges. Division Bench of the Lahore High Court dismissed the petitions observing *inter alia* that the petitioners appeared in Entry Test in terms of the merit/weightage criteria publicized by the competent authority without challenging it and when they could not perform well in the entry test they filed instant writ petitions, therefore, they are estopped by their own conduct to challenge the vires of the weightage criteria or merit on the settled principle of estoppel and waiver.

14. Mr. Ghulam Mohiuddin, learned Assistant Attorney General appearing on behalf of defendant No. 1, has adopted the arguments advanced by learned counsel for the defendant No. 2 in all suits.

15. I have heard learned counsel for the parties and perused the material available on record with their assistance.

16. In order to appreciate the contentions of learned counsel for the parties, I deem it appropriate to reproduce relevant provisions of sections 2 (I), (ii) & (vi), 7(1), 8 (2) (f), 13(c) and 18(1) & (2) of the Act, as under:

2. **Definitions.-** (1) *In this Act, unless there is anything repugnant in the subject or context,-*

- (i) "Authority" means the National Medical Authority established under this Act.
- (ii) "Board" means the National Medical and Dental Academic Board constituted under this Act;
- (iii)
- (iv)
- (v)
- (vi) "Council" means the Medical and Dental Council constituted under this Act;

7. **Meeting of the Council.**- (1) The Council shall meet at least once in three months at such time and place as may be decided by the President. A notice of the meeting shall be issued at least fourteen days prior to the meeting with the exception of an emergency meeting which may be called by a unanimous decision of the President and Vice-President of the Council for reasons to be recorded in writing on a minimum three days prior notice.

8. **Powers and functions of the Council.**- (1) The Council shall have the functions and powers of general supervision over the working of the Commission and shall hold the President and Vice-President of the Council, National Medical and Dental Academic Board, the National Medical Authority, committees and other authorities accountable for all its functions. The Council shall have all powers not expressly vested in any other authority or officer by any other law where such powers not expressly mentioned in this Act are necessary for the performance of its functions.

(2) Without prejudice to the generality of the foregoing powers and notwithstanding anything contained in any other law for the time being in force, the Council shall have the following functions and powers, namely:-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) to frame regulations for conduct of admissions in medical and dental colleges and examinations to be conducted by the Commission and approve the examination structure and standards of the medical and dental colleges admissions test, national licensing examination and the national equivalence board examinations as proposed by the national medical and dental academic board including the standards of revalidation of licences to practice medicine or dentistry in Pakistan;

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13. Powers and functions of the Board.- (1) *The Board shall have the following functions and powers, namely:-*

- (a)
- (b)
- (c) *to formulate the examination structure and standards for the MDCAT for approval of the Council;*

18. Medical and dental colleges admissions tests (MDCAT).-
 (1) *The Authority shall conduct annually on a date approved by the Council and as per standards approved by the Board a single admissions test which shall be a mandatory requirement for all students seeking admission to medical or dental under-graduate programs anywhere in Pakistan.*

(2) *No student shall be awarded a medical or dental degree in Pakistan who has not passed the MDCAT prior to obtaining admission in a medical or dental college in Pakistan:*

Provided that such requirement shall be mandatory for all students who have been enrolled in medical or dental under-graduate programs in the year 2021 and thereafter.

17. It reflects from the perusal of above-mentioned provisions that section 8(2)(f) of the Act provides the powers and functions of the Council to frame regulations for conduct of admissions in medical and dental colleges and examinations to be conducted by the PMC and approve the examination structure and standards of the MDCAT, national licensing examination and the national equivalence board examinations as proposed by the Board including the standards of revalidation of licences to practice medicine or dentistry in Pakistan. Section 13 (c) of the Act provides powers and functions of the Board to formulate the examination structure and standards for the MDCAT for approval of the Council; hence, framing the examination structure and standards including pass marks for the MDCAT is the responsibility of the Board, whereas the Council's role is limited to approve the standards proposed by the Board. Section 18(1) of the Act provides that the Authority shall conduct annually on a date approved by the Council and as per standards approved by the Board a single admissions test which shall be a mandatory requirement for all students seeking admission to medical or dental institution under graduate programs anywhere in Pakistan, while

as per section 18(2) of the Act, no student shall be awarded a medical or dental degree in Pakistan who has not passed the MDCAT prior to obtaining admission in a medical or dental college in Pakistan, provided that such requirement shall be mandatory for all students who have been enrolled in medical or dental undergraduate programs in the year 2021 and thereafter. Hence, section 18 of the Act envisages MDCAT to be conducted by the Authority, which also clearly sets out that the standards for the MDCAT shall be set by the Board, which is one of the constituent bodies of the PMC.

18. It may be observed that in compliance of the order, dated 14.04.2020, passed by the Honorable Supreme Court of Pakistan in Criminal Misc. Application No. 495 of 2020, an Ad-hoc Council was constituted for managing the affairs of the erstwhile PMDC which, on 02.09.2020, issued the MBBS and BDS (Admissions, Examinations, House job or Internship) Regulations, 2020 (*the "repealed Regulations, 2020"*) in exercise of power conferred under sub-section (2) of Section 33 of the repealed Ordinance, 1962, providing almost same previous method for the MDCAT for MBBS and BDS courses in the provinces by notifying an Admitting University for conducting MDCAT. Pursuant to the said Regulations, on 12.08.2020, Peoples University of Medical and Health Sciences for Women, Nawab Shah was notified as the Admitting University for conducting MDCAT for academic year 2020-2021 in the Province of Sindh, which published an advertisement in daily newspapers on 18.09.2020 for inviting applications with cut-off date i.e. 05.10.2020 for the MDCAT fixed on 18.10.2020. Subsequently, the *Majlis-e-Shoora* (Parliament) enacted the Act by repealing Ordinance, 1962; whereafter, in the month of October 2020, PMC promulgated impugned Regulations 2020-2021, whereby MDCAT pass marks were set at 60%; however, despite the aforesaid enactment, the Admitting University continued to receive applications for admission from the students under the repealed Ordinance, 1962

and repealed Regulations, 2020 and also announced that its scheduled MDCAT shall be held according to program without any change. Besides, Admitting University with other public sector universities of Sindh filed C.P. No. D-No. 4953 of 2020 before this Court, challenging vires of section 18 of the Act, wherein a Division Bench of this Court, vide order dated 16-10-2020, restrained the Admitting University from taking MDCAT; however, during the pendency of said petition, PMC through newspapers announced the date of 15.11.2020 for holding MDCAT by inviting applications from the prospective medical students. Subsequently, said petition was disposed of by the Division Bench of this Court, vide short order dated 11-11-2020, whereby PMC was restrained to hold MDCAT on 15-11-2020 with directions that the competent authority under sections 10 and 15 of the Act shall within a period of 15 days appoint National Medical & Dental Academic Board and the National Medical Authority in line with the said provisions, thereafter, within 10 days, the said Board shall review the formulation of examination structure and standards of MDCAT and announce common syllabus and, thereafter, MDCAT shall be conducted on a date to be fixed afresh at the earliest. Pursuant to the said order, the Medical Authority and the Academic Board were constituted. The Board in its meeting, held on 21-11-2020, reviewed, *inter alia*, pass marks for qualifying the MDCAT and agreed on 60% as set by the Council in the impugned Regulations, 2020-2021 with further observation that in future this level should be increased to ensure that the best students are selected for medical and dental education. The Council approved standards and structure for the MDCAT, vide its Notification dated 21-11-2020. Thereafter, on 25-11-2020, the defendant No.2 announced holding of MDCAT on 29-11-2020; however, for those students who were tested positive by COVID-19, the MDCAT was arranged on 13-12-2020 after their quarantine period is over; whereafter, the MDCAT was held on the above dates. Later PMC issued Public Notice, dated 15th March, 2021, directing private medical colleges to submit their final certified list

of admitted students; suspension thereof has been sought *inter alia* by the plaintiffs through listed applications.

19. Reverting to the case of the plaintiffs, it may be observed that the statutory scheme for holding of the MDCAT is that the Board must, as per section 13 (c) of the Act, formulate the standards of the MDCAT *inter alia* including the pass marks, which must then be communicated to the Council for its approval under section 8(2) (f) of the Act. It appears that on 17.11.2020, impugned Regulations 2020–2021 were promulgated by the Council as per its mandate under Section 8 (2) (f) of the Act whereby, under Regulation No. 2, it set the pass mark at 60%, while the Board under section 13(c) of the Act formulated the examination structure and standards for the MDCAT for the approval of the Council; hence, the impugned Regulations 2020-2021 *prima facie* do not appear in excess of the powers conferred upon the Council under section 8 (2)(f) of the Act.

20. So far the argument of learned counsel for the plaintiffs with regard to Council's approval of the Board's decision dated 21.11.2020 of setting the pass marks at 60% on 19.02.2021 after conducting MDCAT on 29.11.2020, is concerned, it may be seen that the Board was constituted under section 10(1) of the Act by the Notification dated 12.11.2020, pursuant to Court's order as discussed above, and in its meeting held on 21-11-2020, the Board deliberated on the pass marks for qualifying the MDCAT and agreed on 60% as minimum pass marks as set by the Council in the impugned Regulations, 2020-2021. (*Minutes of the meeting of the Board available as Annexure E/2 at page No. 311 of the memo of plaintiff may be referred to*). Thereafter, the Council approved standards and structure for the MDCAT, vide its Notification dated 21.11.2020 (*Annexure D-2/6-g of the Written Statement of defendant No.2*). Subsequently, on 19.02.2021, the Council held its fifth ordinary meeting wherein it approved the minutes of Board, dated 21.11.2020, under the scheme of law at Item No. 17. Hence, the requisite approval

by the Council of Board's decision, dated 21.11.2020, was already in field on 25.11.2020, when PMC announced holding of MDCAT on 29-11-2020.

21. I am not impressed by the argument of learned counsel for the plaintiffs that since mandatory fourteen days' notice period for Council's meeting has not been satisfied, the issuance of impugned Regulations 2020-2021 by the Council is in violation of section 7(1) of the Act, which is a mandatory provision of law. It may be observed that section 7 (1) of the Act contemplates issuance of at least fourteen days' notice to members for holding ordinary meeting of the Council; however, with the exception of an emergency meeting which may be called by a unanimous decision of the President and Vice-President of the Council on a minimum three days prior notice. It appears that in this matter, an urgent meeting of the Council was called through notice and e-mails, dated 18.11.2020, and the approval from the members of the Council was obtained through resolution by circulation which e-mails are available on record (*Annexure D-2/6-d to D-2/6-f of the Written Statement of defendant No.2*). Such approval by circulation was formally approved subsequently by the Council in its meeting held on 19.02.2021. The resolution by circulation was approved unanimously by all the members of the Council through emails including President and Vice President. It may be observed that the provision of section 7(1) of the Act is directory in nature inasmuch as no penal consequences are provided under the Act for its non-compliance. The case-law cited by the learned counsel for the defendant No.2 on this point may be referred to in this regard. Therefore, on such technical ground the meeting and the approval of the Council cannot be vitiated. Even otherwise, the plaintiffs being non-members and strangers cannot take any exception to the decisions of the Council on such ground.

22. As regard the contention of learned counsel for the plaintiffs that there exists no rationale for treating at par the MBBS and BDS admissions, it may be

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observed that according to Bloom's Taxonomy, there are three domains of skills: (i) Cognitive, (ii) Psychomotor and (iii) Affective. Cognitive domain deals with skills in which purely mental work is required e.g. making diagnoses, interpreting patient data, development of treatment plans etc. Psychomotor domain deals with skills that an expert performs with his/her hands e.g. giving injections, performing a surgical procedure, extracting teeth etc. Affective domain deals with professional behaviors that any expert is expected to display e.g. showing care, asking questions politely, taking care of safety for patient and self, truth telling etc. The cognitive and affective domains required for dental and medical graduates remain the same, as both graduates (MBBS and BDS) are required to interpret data, make diagnoses, develop and execute a treatment plan and perform suitable patient follow-up and deal with common complications. There may be subject specific differences in the psychomotor domain, as the skills that are required by a dental surgeon are different from those required by a medical graduate and in this domain too, there are commonalities i.e. both should be capable of giving the right injections in the prescribed way, both can give incisions etc.; hence, the BDS program, though shorter in duration, is not of less intense and deliberation than an MBBS program. The field related training may be different but the dexterity and aptitude required to students of both these medical education are the same; therefore, lowering the pass percentage for BDS entrants may jeopardize the profession of dentistry. The prime and paramount consideration for the law-makers in this regard may be to produce best health care doctors and dentists in the country and when merit is improved, the students, who desire to get admissions in dentistry, will certainly improve their capacity and the ultimate result would be in the best interest of the country which should not be compromised to achieve commercial interest of the private dental colleges.

23. I am in agreement with the learned counsel for the defendant No. 2 that as the plaintiffs/students having known the passing criteria at 60% appeared in

MDCAT without challenging it; however, when they could not perform well, they filed the instant civil suits, while the plaintiffs/dental colleges were already having knowledge of such decisions of the Council and the Board; hence, as observed in the cases of *Anam Jabbar* and *Muhammad Zubair (supra)* they are estopped by their own conduct to challenge the vires of passing criteria on the settled principle of estoppel by conduct and waiver. I am also in agreement with learned counsel for the defendant No. 2 that in a suit where no perpetual injunction is claimed, no question of granting ad-interim injunction can possibly arise. In the present cases, the applications under reference should be failed on this ground alone.

24. As a result, I have no hesitation to hold that the plaintiffs have failed to make out prima facie arguable case for the grant of interim injunctive relief as prayed for. Neither balance of convenience lie in their favour nor they shall suffer any irreparable loss and injury in case of refusal of injunction. However, in case interim injunction is granted, it is the defendant No.2 who shall be facing more inconvenience inasmuch as that the students who failed in the MDCAT would have got admissions and they would have been enrolled with PMC, while private dental colleges would have collected fees from the plaintiffs/students, and if at the said stage, suits would have been dismissed, the net result would be a complete chaos for the PMC relating to enrollment and registration of plaintiffs/ students. The case-law relied upon by the learned counsel for the plaintiffs being on distinguishable facts hardly advance the case of the plaintiffs.

25. For the foregoing facts and discussion, I find no merit in these applications, which are accordingly dismissed, with no order as to costs. Office is directed to place copy of this order in Suits No. 585, 586, 730, 731 and 881 of 2021.

Athar Zai

~~Announced by me.~~

02/07/2021
Judge

21.
Kausar Sultain Hussaini J.