

**JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

W.P.No. 5206-P/2019

Iftikhar & another

Vs

**Government of Khyber Pakhtunkhwa through Chief
Secretary, Civil Secretariat, Peshawar & others**

Date of hearing 21.10.2021

Petitioners (by) Mr. Naveed Akhtar, Advocate

Respondents (by) Sardar Ali Raza, AAG

JUDGMENT

MUSARRAT HILALI, J.- This common judgment shall decide the instant as well as connected WP No.1958-P/2019, WP No.4954-P/2019 & 5491-P/2019 having similar question of law and facts involved therein, being filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, wherein the petitioners seek issuance of writ of mandamus for striking down, the amendment made in Section 2 sub-clause (iv) & (v) of the Khyber Pakhtunkhwa Provincial Buildings (Management, Control and Allotment) Act, 2018, as according to him, the same is illegal, unconstitutional,

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discriminatory in nature and having no retrospective effect upon the petitioners.

2. Brief facts of the case are that petitioners are serving in the Khyber Pakhtunkhwa Public Service Commission since long and were allotted residential accommodation under the relevant rules. It is averred that the Provincial Assembly of Khyber Pakhtunkhwa passed Act No. II of 2018 called as the Khyber Pakhtunkhwa Provincial Buildings (Management, Control and Allotment) Act 2018. In Section 2 (a) of the Act *ibid*, the allottee was defined as, "A Government Department Office or Public Office holder, as the case may be possessing invalid allotment order, issued under this Act and the Rules"; that the said Act 2018 was amended in 2019 by the KP Provincial Assembly, according to which the employees of MTI were also held entitled for the residential accommodations in Khyber Pakhtunkhwa. It is also averred that the Khyber Pakhtunkhwa Provincial Assembly amended the said Act 2018 in 2019 and after sub clause (iv) sub clause (v) was added as "Employees

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defined in clause (g-i) of Section 2 of Khyber Pakhtunkhwa Medical Teaching Institutions Reforms Act 2015 (Khyber Pakhtunkhwa Act No. IV of 2015)". After the said amendment the employees of MTI were also made entitled for residential accommodations in Khyber Pakhtunkhwa. Likewise the Khyber Pakhtunkhwa Residential Accommodation at Peshawar (Procedure for Allotment) Rules, 2018, were also framed and notified. Thus, in view of the definition of Public Servants entitled to residential accommodation the petitioners being serving in the KP Public Service Commission were ousted by employing gross indiscriminate. The petitioners thus were issued cancellation orders of their accommodation. The petitioners now crave for indulgence of this Hon'ble Court to look into the vires of different provisions of the Act of 2018 on the touchstone of the fundamental rights as envisaged in the Constitution and the judgments of the superior judiciary. Since the vires of the Act were challenged, therefore, the worthy Advocate General, Khyber Pakhtunkhwa was put on notice under Section 27-A CPC.

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Arguments heard.

4. The question that primarily falls for consideration pertains to the amendment in Section 2 sub-clause (iv) & (v) of the Khyber Pakhtunkhwa Provincial Buildings (Management, Control and Allotment) Act, 2018. According to the petitioners discrimination has been meted out against them, therefore, the same needs to be struck down.

5. In essence, the case of the petitioners is that through the said amendment, the employees of the Provincial Assembly and the employees defined in clause (g-i) of Section 2 of Khyber Pakhtunkhwa Medical Teaching Institutions Reforms Act, 2015 (*hereinafter referred to as "MTI"*) have been declared eligible for residential accommodations while the petitioners have been ousted. Learned counsel for petitioners in his arguments heavily came down on the eligibility of the MTI employees in the Act *ibid*, as according to the learned counsel, the MTI is an autonomous body, therefore, the amendment made in favour of the MTI

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employees and exclusion of the Commission employees is based on discrimination and against the fundamental rights of the petitioners, hence the same be struck down by this Court for its being *ultra vires* of the Constitution.

6. The term *ultra vires* simply means “beyond powers”. The basic criteria for declaring a law *ultra vires* is that if the same is found repugnant to or is inconsistent with any provision of the Constitution and is beyond the mandate of the legislature then such law is *ultra vires* to the Constitution and can be struck by High Court.

7. Admittedly, employees of the Provincial Assembly are civil servants and per the terms and conditions of their service, they are entitled to the official accommodation. The MTIs are autonomous administratively and financially. Section 2 (g-i) of MTI Act, 2015 provides four categories of employees which are:-

- i. ***An employee of a Medical Teaching Institution appointed under this Act and Regulations made under this Act;***
- ii. ***An existing employee of the Medical Teaching Institution, appointed by the Management Council, under the Khyber Pakhtunkhwa***

Medical and Health Institution and Regulation of Health Care Services Ordinance, 2002, prior to promulgation of the Khyber Pakhtunkhwa Medical Teaching Institutions Reforms (Amendment) Act, 2018;

- iii. A civil servant, who has opted to become an employee of Medical Teaching Institution under Section 16 of this Act;***
- iv. A civil servant, who is on deputation to Medical Teaching Institution.***

8. In the instant case, the petitioners who are serving in Khyber Pakhtunkhwa Public Service Commission were allotted residential accommodation under the relevant Rules. In 2018, an Act called Khyber Pakhtunkhwa Provincial Buildings (Management, Control and Allotment) Act, 2018 was passed. The Khyber Pakhtunkhwa Provincial Assembly in 2019 brought amendment in Section 2 sub-clause (iv) & (v) and added employees of the Provincial Assembly as well as the employees of the MTI. According to the petitioners, the said amendment is arbitrary, discriminatory, illegal and against the fundamental rights of the petitioners and suffers from incurable legal infirmities.

9. Under Section 16 of the *ibid* Act, all the civil servants serving in an existing Medical Teaching Institutions, who opted for employment of Medical Teaching Institutes shall be subject to terms and conditions of employment as prescribed by the Regulation including but not limited to their service structure, promotion and disciplinary matters. Such opting employees have been held entitled to post recruitment benefits and emoluments as per existing law and rules, and thus as per the terms and conditions of their service, they were held entitled to official accommodation. The said amendments have been made under the requirement that certain medical staff needs to be on call and requires to be available for emergency. The inclusion of the MTI employees thus appears to be a formula based on intelligible differentia. Besides the principle of *latin* maxim "*Salus Populi Suprema Lex esto*" which means that the welfare of people is the supreme law, thus the amendment made in the *ibid* Act is based on intelligible differentia which distinguishes the

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role of civil servants mentioned in Section 16 of the MTI Act from others and thus same has reasonable nexus with the object sought to be achieved.

10. Even otherwise, the power to legislate is a plenary power vested in the legislature and unless those who challenge the legislation are required to show that their fundamental rights under the Constitution are affected or that the legislature lacked the legislative competence, in which the petitioners have not succeeded.

The august Supreme Court in case titled "*Executive District Officer (Revenue) District Khushab at Jauharabad and others .Vs. Ijaz Hussain and another*" reported in 2011 SCMR 1864 has held that:-

"15. The framing of the recruitment policy and the rules thereunder, admittedly, fall in the executive domain. The Constitution of Islamic Republic of Pakistan is based on the well known principle of trichotomy of powers where legislature is vested with the function of law making, the executive with its enforcement and judiciary of interpreting the law. The Court can neither assume the role of a policy maker or that of a law maker".

Reference can also be made to case titled "*Riaz*

Hanif Rahi .Vs. Federation of Pakistan through

Ministry of Law and Justice, Islamabad and 09 others

reported in ***PLD 2015 Islamabad 07***.

11. In view of the above, this writ petition is
dismissed.

Announced
21.10.2021


JUDGE


JUDGE

(DB) Hon'ble Mr. Justice Lal Jan Khattak
Hon'ble Justice Musarrat Hilali

Noor Shah