

Judgment Sheet

IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

I.C.A. No.327 /2013

In

W.P. No.9566 /2013

JUDGMENT

Dr. Naik Parveen and another

Vs.

District Co-ordination Officer, Multan and 4 others

Date of Decision: 03.05.2017

Appellants by: Syed Muzammil Hasan Bukhari, Advocate.

Respondents by: Mr. M. A. Hayat Hiraj & Malik Ali
Muhammad Dhol, Advocates.

Rana Muhammad Hussain, Assistant Advocate-
General.

Dr. Kazi Abdullah, DHO (HRM), Allah Ditta,
DLO O/C CEO, Health Multan.

JAWAD HASSAN, J:- Through this Intra Court Appeal, filed under Section 3 of the Law Reforms Ordinance, 1972 (the “**Ordinance**”), the Appellants have called in question the legality of impugned directions/wordings/findings passed vide judgment dated 22.10.2013 by the learned Single Judge in W.P. No.9566/2013 (the “**Impugned Judgment**”) whereby the learned Single Judge has directed the Healthcare Commission, Punjab, Lahore, to conduct an inquiry regarding the allegations pertaining to the Appellants’ negligence in matter strictly on merits and in accordance with law.

2. Necessary facts revealing from the instant appeal, as also narrated by the learned Single Judge, are that Appellant No. 1 is qualified doctor and is registered as Gynecologist by Pakistan Medical and Dental Council and is performing duties as

Gynecologist in the Gyne Department at Ameer Maternity Hospital, Multan for the last 27 years. The Appellant No. 2 is Lady Health Visitor and is registered from Pakistan Nursing Council Institute Islamabad. It is alleged that on 22.03.2013, Respondent No.5 brought his pregnant wife to the Hospital in precarious condition and during the course of necessary treatment by Appellant/Petitioner No.2, inevitable abortion took place unfortunately. Therefore, on 03.04.2013, the Respondent No.5 submitted an application/complaint before Respondent No. 1, contending therein that the Appellants/Petitioners with an ulterior motives have done miscarriage of his wife and hence, the Respondent No. 5 requested to initiate proceedings against the Appellants/Petitioners. The Respondent No.1 appointed the District Officer (Health-I), Multan as Inquiry Officer, who issued Enquiry Report dated 04.06.2013 opining that it was case of medical negligence and it comes within the purview of Healthcare Commission or Consumer Court. Further, the Respondent No. 5 filed petition under Section 22-A Cr.P.C. before the learned Justice of Peace/Addl. Sessions Judge, Multan, for registration of criminal case against the Appellants/Petitioners, who vide order dated 04.06.2013, directed the complainant/Respondent No.5 to appear before the S.H.O. concerned whereas S.H.O was directed to record his statement and proceed further in accordance with law. Hence, on 05.06.2013, the Respondent No. 5 got registered FIR No. 330/2013 against the Appellants/Petitioners for the offence under Section 338 of Pakistan Penal Code, 1860 (**PPC**) at Police Station Mumtazabad, Multan.

3. Accordingly, the Appellants/Petitioners filed Writ Petition No. 9566/2013 titled *Dr. Naik Parveen and another vs. D.C.O. and others* (the “**Writ Petition**”), challenging the validity of Enquiry Report dated 04.06.2013 prepared by the District Officer (Health-I), Multan and proceedings taken pursuant thereto. The learned Single Judge disposed of the Writ Petition with the direction to the Health Care Commission Punjab, Lahore (Respondent No. 4)

“to conduct an inquiry regarding the allegations pertaining to the petitioners’ negligence in the matter strictly on merits and in accordance with law.” Hence, this Appeal.

4. Learned counsel for the Appellants submitted that the impugned direction/finding of the learned Single Judge is contrary to the law and facts; that the learned Single Judge has not taken into consideration the fact that the Application of the Respondent No.5 was dismissed by the Respondent No.4 being time barred; that after availing the remedy of complaint, no such impugned findings could be passed by the learned Single Judge at his own; that sending the matter to the Respondent No.4 through the Impugned Judgment would tantamount to condone the delay as the earlier complaint of the Respondent No.5 has already been dismissed being time barred.

5. On the contrary, learned counsel for the Respondent No.5 vehemently opposed the appeal and prayed for its dismissal on the ground that the learned Single Judge has rightly sent the matter to the Respondent No.4, as the Respondent No.5 has submitted his first complaint/application on 03.04.2013 before the DCO, Multan, which though was not competent authority but the complaint/application was within time.

6. We have heard the arguments of the learned counsel for the parties and examined the available record.

7. After hearing the parties at length, the only moot point arising out of instant Intra Court Appeal and requiring determination of this Court is that whether this Court has powers to direct the Healthcare Commission, Punjab, Lahore to conduct an inquiry regarding the negligence of a doctor and Lady Health Visitor?

8. It may be noted that the Punjab Healthcare Commission Act, 2010 (the “**Act**”) was enacted to provide for establishment of the Punjab Healthcare Commission, to make provisions for the improvement of quality of healthcare services, to ban quackery in all its forms and manifestations and to provide for ancillary matters. Section 3 of the Act established the Punjab Healthcare Commission

(the “**Commission**”) and Section 4 of the Act provides the functions and powers of the Commission.

9. It has already been reported in the case of *Punjab Healthcare Commission v. Mushtaq Ahmed Ch. and others* (PLD 2016 Lahore 237) that the Commission is established under the Act and is a body corporate with all its allied attributes. The functions and powers of the Commission under section 4 of the Act are focused towards improving the quality of healthcare services, clinical governance and to ban quackery. The Clinical governance, under the Act, is a systematic approach to maintaining and improving quality of patient care. The functions and powers of the Commission, *inter alia*, include the power to: impose and collect penalties on violations, breach or non-compliance of the provisions of the Rules, Regulations, Standing Orders and instructions issued under this Act or issue Regulations, Guidelines, Instructions and Directives to persons involved in the provision of Healthcare Services and to take necessary steps to ban quackery. The Commission is to take into consideration the policy advice of the Technical Advisory Committee and also coordinate with the Government. The Commission may undertake investigation into allegations of maladministration, malpractice, or failure on the part of healthcare service provider or any employee of the healthcare service provider on a complaint of an aggrieved party or an aggrieved healthcare service provider or on a reference by the Government or the Provincial Assembly of Punjab or on the motion of the Supreme Court of Pakistan or the Lahore High Court, made during the course of any proceedings before it. The Commission for the purposes of investigation enjoys the powers vested in a civil court under the Code of Civil Procedure, 1908 (CPC) in respect of summoning and enforcing the attendance of any person and examining him on oath, compelling the production of documents, receiving evidence on affidavits and issuing Commission for the examination of witnesses. The procedure of investigation is provided under section 23 of the Act. The general superintendence, direction

and management of the affairs of the Commission and overall policy making in respect of its operation shall vest in the Board which may exercise all such powers and do all such acts deeds and things that may be exercised or done by the Commission under the Act. Further, architecture of the Act reveals that the stewardship of the Commission is in the hands of the Board as it exercises all the functions and powers of the Commission. Commission is, therefore, the legal entity which is run and managed by the Board. The Act only provides for penalties in the shape of monetary fine and there is no provision for sealing or passing an order for closing down a healthcare establishment under the Act. There are no Rules and Regulations in the field as yet, hence the current legislative landscape is bereft of any such power. As the nub of the matter in this Appeal is the interpretation of Section 4(7)(d) of the Act and in order to understand Section 4(7)(d), it is pertinent to explain the entire Section 4 of the Act.

10. Section 4(1) of the Act clearly states that “*the Commission shall perform such functions and exercise such powers as may be required to improve the quality of healthcare services and clinical governance and to ban quackery.*” Section 4(7) of the Act is reproduced hereunder:

“(7) Notwithstanding anything contained in any other law, the Commission may—

(a) on a complaint by any aggrieved person; or

(b) on a complaint by any aggrieved healthcare service provider;

and shall—

(c) on a reference by the Government or the Provincial Assembly of the Punjab; or

(d) on a motion of the Supreme Court of Pakistan or the Lahore High Court made during the course of any proceedings before it,

undertake investigation into allegations of maladministration, malpractice or failures on the part of a healthcare service provider, or any employee of the healthcare service provider.”

11. Careful review of Section 4(7) of the Act reveals the distinction in use of word ‘may’ and ‘shall’ in the said section. It transpires from Section 4(7) of the Act that the Commission may on a complaint by any aggrieved person or healthcare service provider undertake investigation into allegations of maladministration, malpractice or failures on the part of a healthcare service provider, or any of its employee. It seems that the Commission has discretion to undertake investigation on complaint of any aggrieved person or healthcare service provider. However, it is obligatory on the Commission to undertake investigation into such events on reference by the Government or the Provincial Assembly of the Punjab or on motion of the Hon’ble Supreme Court of Pakistan or the Lahore High Court made during the course of any proceedings before it. Therefore, the Commission has no choice under the Act but to undertake investigation on motion of the Lahore High Court made during any proceedings.

12. Section 2(xii) of the Act defines “medical negligence” as “*a case where a patient sustains injury or dies as a result of improper treatment in a healthcare establishment and, in case of death, determined on the basis of medical autopsy report”.* Similarly, Section 19 of the Act defines medical negligence and read as follows:

“19. Medical negligence.— (1) Subject to sub-section (2), a healthcare service provider may be held guilty of medical negligent on one of the following two findings:-

(a) the healthcare establishment does not have the requisite human resource and

equipments which it professes to have possessed; or

(b) he or any of his employee did not, in the given case, exercise with reasonable competence the skill which he or his employee did possess.

(2) The recognized and known complications of a medical or surgical treatment are not considered as medical negligence.”

13. It has been reported at para 9 in the case of **Muhammad Aslam v. Dr. Imtiaz Ali Mughal and 4 others** (PLD 2010 Karachi 134), citing para 49 of the case titled **Jacob Matthew v. State of Punjab and another** (AIR 2005 SC 3180), which reads as follows:

"The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution."

14. Similarly, in the case titled **Montgomery v. Lanarkshire Health Board** (2015 SCMR 663), the Hon'ble Supreme Court of UK has noted at para 82 as under:

"82. In the law of negligence, this approach entails a duty on the part of doctors to take reasonable care to ensure that a patient is aware of material risks of injury that are inherent in treatment. This can be understood, within the traditional

framework of negligence, as a duty of care to avoid exposing a person to a risk of injury which she would otherwise have avoided, but it is also the counterpart of the patient's entitlement to decide whether or not to incur that risk. The existence of that entitlement, and the fact that its exercise does not depend exclusively on medical considerations, are important. They point to a fundamental distinction between, on the one hand, the doctor's role when considering possible investigatory or treatment options and, on the other, her role in discussing with the patient any recommended treatment and possible alternatives, and the risks of injury which may be involved."

It has also been noted at para 41 and 71 as follows:

"41. In Sidaway's case this question was approached by the members of the House in different ways, but with a measure of overlap. At one end of the spectrum was Lord Diplock, who considered that any alleged breach of a doctor's duty of care towards his patient, whether it related to diagnosis, treatment or advice, should be determined by applying the Bolam test:

"The merit of the Bolam test is that the criterion of the duty of care owed by a doctor to his patient is whether he has acted in accordance with a practice accepted as proper by a body of responsible and skilled medical opinion To decide what risks the existence of which a patient should be voluntarily warned and the terms in which such warning, if any, should be given, having regard to the effect that the warning may have, is as much an exercise of professional skill and judgment as any other part of the

doctor's comprehensive duty of care to the individual patient, and expert medical evidence on this matter should be treated in just the same way. The Bolam test should be applied." (pp 893, 895)

.....

71. *The judgment of Mason CJ, Brennan, Dawson, Toohey and McHugh JJ in Rogers v Whitaker identifies the basic flaw involved in approaching all aspects of a doctor's duty of care in the same way:*

"Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices. Except in those cases where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient, no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment." (pp 489-490: original emphasis)"

15. Further, Section 23 of the Act states procedure for investigation by the Commission and Section 23(2) of the Act states that *"an aggrieved person may, within sixty days from the date of knowledge of the cause of action, file a complaint against a healthcare service provider or healthcare establishment by submitting*

an application in writing supported by an affidavit of the aggrieved person.”

16. From the perusal of the impugned judgment, it transpires that the learned Single Judge has directed the Commission to conduct an inquiry, regarding the allegations pertaining to the Appellants/Petitioners’ negligence in the matter strictly on merits and in accordance with law, and the Appellants/Petitioners have challenged the direction of the learned Single Judge to the Commission in the instant appeal.

17. We have gone through the Impugned Judgment of learned Single Judge and have noticed that learned Single Judge has rightly directed the Commission to conduct inquiry into the negligence of the Appellants/Petitioners. In order to further elucidate the matter, it may be noted that according to Section 23(2) of the Act, the aggrieved person has statutory right to submit application before the Commission which is the only forum to determine the doctor’s negligence, if any, after enactment of the Act. It is essential to add here that the Act was legislated for the improvement of quality of healthcare services, and Section 4(1) of the Act also emphasize that the Commission shall perform such functions and exercise such powers as may be required to improve the quality of healthcare services and clinical governance and to ban quackery. Importantly, Section 4(1) of the Act empowers the Commission for three following things viz: (i) to improve quality of healthcare services, (ii) clinical governance, and (iii) ban quackery. Therefore, the intention of the legislature for improvement of quality of healthcare services and clinical governance cannot be undermined or ignored under any circumstances. The intentions of the legislature for enactment of the Act are very clear, i.e. to improve the quality of healthcare service in Punjab and clinical governance, and have to be kept in mind while interpreting the Act. Furthermore, the above-mentioned sections of the Act are to be read in totality, rather than isolation.

18. Even otherwise, the Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “**Constitution**”) states that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, in particular, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law and no person shall be prevented from or be hindered in doing that which is not prohibited by the law. Similarly, Article 10-A of the Constitution grants every citizen the right to due process.

19. The wording used in Section 4(7)(d) is that Commission shall on motion of the Lahore High Court made during the course of any proceeding before it, undertake investigation into allegation of malpractice or failures on the part of a healthcare service provider, or any of its employee. No doubt, that learned Single Judge in the concluding paragraph directed the Commission to inquire into the matter, which the learned Single Judge was empowered under Section 4(7)(d) of the Act. This power has been given to the Honorable Lahore High Court in addition to the power of the Commission that the Commission can undertake inquiries either through complaint of the aggrieved, reference by the Government or the Hon’ble Supreme Court of Pakistan. The preamble of the Act emphasizes on improving quality of healthcare, clinical governance and ban quackery, which applies to all public and private hospitals. Therefore, the direction by the learned Single Judge was rightly issued in terms of Section 4(7)(d) of the Act. It is also essential to highlight that such medical matters require check on the doctors, who may mishandle any person during treatment, as allegedly in the instant case the complainant and his wife is aggrieved by abortion. Any negligence or omission on the part of doctors must be discouraged, which is the clear intention of the legislature.

20. In view of the above laws, arguments and case laws, this Court suffice it to hold that the learned Single Judge has exercised his jurisdiction vested in him in view of Section 4(7)(d) of the Act and the

Commission is obliged to conduct such inquiry as directed in the Impugned Judgment. Hence, the Impugned Judgment is upheld and the instant appeal is hereby dismissed, being bereft of any force.

(ABID AZIZ SHEIKH)
JUDGE

(JAWAD HASSAN)
JUDGE

Approved for reporting

JUDGE

JUDGE

M.NAVEED