Form No:HCJD/C-121

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

W.P.No. 49447 of 2021

Zulqernain Khurram and another

Versus

Punjab Healthcare Commission and 4 Others.

JUDGMENT

Date of hearing:	***31.08.2021***
Petitioner by:	***Muhammad Azhar Kashif, Advocate***
Respondents by:	***Asif Mehmood Cheema, Addl. Advocate General with Imran Rasheed, Deputy Director (Legal) on behalf of Respondents No.1,2 and 3.***

Sultan Tanvir Ahmad, J:– Through present petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 judgment dated 31.07.2021 passed by learned District & Sessions Judge, Tobatek Singh, in Healthcare Appeal No. PB-T.T.S-Civil.A.286-2021/22-13 of 2021 under Section 31 of the Punjab Healthcare Commission Act, 2010 (the **"Act of 2010"**) of 2021 has been challenged.

2. The facts, necessary for the disposal of the present writ petition, are that Muhammad Arshad Latif, Assistant Director (Enforcement), Punjab Healthcare Commission, Lahore visited the Healthcare Establishment on 09.04.2021 on the complaint that a surgical operation of a patient namely Mst. Aqsa Bibi is being conducted by some unauthorized persons and the said officer visited the establishment and found Muhammad Amir Waseem and Zulqernain Khurram

(Petitioner No.1) were rendering healthcare services. Allegedly, both of the said service providers were providing medical services without basic medical education or license to practice and registration from Pakistan Medical and Dental Council/Pakistan Medical Council (PMC), in contravention of various provisions of the Punjab Healthcare Commission Act, 2010 (PHCA, 2010) and the Punjab Healthcare Commission Regulations for banning quackery in all its forms and manifestations (**Anti-Quackery Regulations 2016**). The aforesaid officer reported that 6 to 7 patients were present at the time of his visit. Blood of one child was being transfused. Allegedly, a patient of C-Section was also admitted for which no record was available in hospital. It was also found that LHV was available in the dispensary which was open at the material time. It was reported that unqualified persons were practicing allopathic for which evidence was collected and placed on record. Resultantly, the operation theater (OP) was sealed. On 30.04.2021, the authorized officer again visited the healthcare establishment and found the same functional despite the fact that it was sealed on 09.04.2021, in violation of the law. Allegedly, it was found that Muhammad Amir Waseem resumed his allopathic practice at the same premises, who failed to give any explanation regarding the aforesaid position. The team of the Commission also found that certain patients were admitted in healthcare establishment, leaving no option but to again seal the operation theater and patients were shifted.

3. The proceedings were conducted by the Punjab Healthcare Commission (the Hearing Committee)

which reached to the conclusion that the healthcare establishment is responsible for illegal and unauthorized practice of allopathy system of medicine as well as quackery in terms of Section 2 (XXIX) of the Punjab Healthcare Commission Act, 2010 and Regulation 2(g) of Anti-Quackery Regulator's 2016; Fine of a Rs.5,00,000/- (Rupees five hundred thousand only) was imposed upon Muhammad Amir Waseem, Abdullah and Petitioner No.1, collectively. Hearing Committee also decided to de-seal the premises subject to the following conditions:-

> "*24. The Hearing Committee has further decided to* ***De-Seal*** the premises **subject to**:-
>
> *(i). Payment of aforementioned amount of fine;*
>
> *(ii). Submission of affidavit of Respondents to the effect that they shall not indulge in quackery or illegal activities again.*
>
> *(iii). Undertaking that no healthcare services will be provided without registration from Punjab Healthcare Commission.*

4. Besides the above, undertaking was obtained from the owner of the premises /incharge of healthcare establishment as well as warning was issued.

5. The aforesaid order was challenged by way of Healthcare Appeal No. PB-T.T.S-Civil.A.286-2021/22-13 of 2021 dated 12.07.2021 before the District and Sessions Judge, Tob Tek Singh. This appeal was also dismissed on 31.07.2021.

6. Mr. Muhammad Azhar Kashif, Advocate for the Petitioners has submitted that the allegations against the Petitioners are false and the healthcare establishment was conducting its operation through qualified persons who are registered with Pakistan Medical Council; that Petitioner No.2 (Dr. Muhammad Maqsood) is qualified doctor and there is no embargo on his practice or services

of healthcare commission establishment; that Petitioner No.1 is a dispenser; that application for registration of healthcare establishment was filed with Pakistan Medical Council and the same is already pending with the said department; that the delay in registration by Pakistan Medical Council as well as proceeding are based on *mala fide;* that learned Appellate Authority has failed to give well-reasoned findings on issues raised by the Petitioners.

7. Conversely, Mr. Asif Mehmood Cheema, Additional Advocate General and Mr. Imran Rasheed, Deputy Director Legal (on behalf of Respondents No. 1 to 3) have opposed the petition and supported the impugned judgment.

8. I have heard arguments of learned counsel for the parties and with their able assistance perused the record.

9. Record reflects that statements of five persons namely, Muhammad Amir Waseem, Muhammad Zulqernain Khurram, Abdullah, Dr. Muhammad Maqsood/Petitioner No. 2 and Dr. Muhammad Suleman Ali were recorded by the Hearing Committee. The witnesses have not denied the visits of the authorized officer on 09.04.2021 and 30.04.2021 as well as the presence of the patients, as detailed above.

10. Muhammad Zulqernain Khurram, Abdullah, Naeem and Muhammad Amir Waseem do not possess the requisite qualification and they are not authorized to practice allopathy system of medicines, independently as the certificates/diplomas issued by The Punjab Medical Faculty itself exclude the Petitioners from independently practicing. The certificate attached with this petition and

relied upon by the learned counsel, itself clearly indicates as under:-

> "*This certificate does not authorize the holder to practice independently or to open a private clinic"*

11. During the aforesaid visit by the authorized officer of the Commission, doctor allowed to practice the allopathy system was not found present. No proof of their presence is attached with this petition or provided to the Commission or the Appellate Court to their satisfaction. It is admitted by the parties that the healthcare establishment is not registered with the Punjab Healthcare Commission till to-date. Learned counsel for the Petitioners has relied upon letters dated 30.12.2020 and 30.04.2021, requiring information and documents from the Petitioners/service providers. Some of the required information is yet to be provided to Punjab Healthcare Commission.

12. As far as the contention of the learned counsel for the Petitioners regarding not providing the proper opportunity for cross-examination is concerned, the same appears to be afterthought as none of these contention is recorded in the judgment dated 31.07.2021 passed by the learned first Appellate Court. Perusal of the Healthcare Appeal No. PB-T.T.S-Civil.A.286-2021/22-13 of 2021 dated 12.07.2021 also reflects that this contention was never raised in the appeal. When a particular plea or objection is not raised before the learned *fora* below, it is not open for the party to raise the controversy at this stage. This plea was always available to the Petitioners, which is neither a part of the impugned judgment nor is given in the appeal, which shows that Petitioners were satisfied with adopted

procedure. Now, the same cannot be allowed to be raised in the Constitutional jurisdiction of this Court. There are number of judgments of this Court which have already settled this law point including cases titled "*Muslim Commercial Bank Ltd. Versus The Punjab Labour Appellate Tribunal, Lahore and Others"*(**1989 PLC 209**) "*Daulat Bibi versus Galeen Khan and another"*(**1991 MLD 2335**) "*Mst. Shaheen Bibi (Nusrat Shaheen) versus Zulfiqar Ali Shah Kazmi and 2 Others"*(**1995 CLC 306**).

13. Relevant para of case titled "*Daulat Bibi versus Galeen Khan and Another"*(**1991 MLD 2335**) is as under:-

> *"**There is nothing in the judgment of the Additional District Judge to show that the findings on these issues were challenged before him during the course of arguments. In these circumstances, it is not open to respondent No.1 to raise these points now**. It has been held by this Court in Mumtaz Begum v. Sh. Inayat Ullah PLD 1969 Lah. 16 and Saleh Muhammad v. Abdul Manan and another (1984 C L C 3321) that **if an argument has not been noticed in the impugned judgment,** the **presumption is that point was never raised before that Court**. It is also to be seen that no affidavit either of the counsel or the respondent specifically to the effect that these points were raised before the Additional District Judge, has been filed in this Court".*
>
> (Emphasis supplied)

14. Even otherwise, Mr. Imran Rasheed, Advocate for the Respondents No. 1 to 3 has placed on record the documents showing written questions and answers put to the persons who appeared and gave affidavits. Therefore, this contention of the learned counsel is rejected being not tenable in law.

15. It has been observed that Petitioner No. 2 has not filed appeal against order of the Punjab Healthcare Commission before learned District Judge.

The remedy of appeal is provided in the statute i.e. Section 31 of the Punjab Healthcare Commission Act, 2010 and grievances relating to refusal of the Commission to issue or renew a license or decision to suspend or revoke a license or order of the Commission to improve or closing the healthcare establishment as well as relating to imposition of fine by the Commission can be assailed by way of the appeal within thirty days from the communication of the said orders of the Commission.

16. I also agree with the contention of Mr. Asif Mehmood Cheema, Additional Advocate General that Petitioner No.2 has opted to file this constitution petition without availing remedy provided under the Statute and after expiry of the period of limitation for filing the appeal, therefore, Petitioners cannot invoke the constitutional jurisdiction of this Court as an alternate. Grant of such concession, in the circumstances of the case, would amount to frustrate the law. When a person fails to avail the remedy of review, revision or appeal if provided by Statute, the constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can only be invoked in the limited and exceptional circumstances. In this regard, the Honourable Supreme Court of Pakistan in case titled "*Farzand Raza Naqvi and 5 Others versus Muhammad Din through Legal Heirs and Others"*(**2004 SCMR 400**) has observed as follows:-

> *"4. There is no cavil to the proposition that* ***if the remedy of appeal is available to a party under the statute, without availing such statutory remedy, the Constitutional jurisdiction of the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 cannot be invoked*** *and the*

> *remedy of writ petition cannot be allowed to be availed as substitution of appeal. Following the above rule, the High Court undoubtedly in the normal circumstances, should not entertain the Constitution petition if an alternate remedy under the relevant statute is available to a party but this rule does not create bar of jurisdiction rather it regulates the Constitutional jurisdiction, of High Court and thus in* ***exceptional circumstances, the High Court may exercise its Constitutional jurisdiction in a matter in which the statutory remedy of appeal or revision as the case may be, was available but could not be availed. The order impugned in the writ petition if is a void order or it was passed without jurisdiction, the non-availing of alternate remedy of appeal, review or revision against such an order would not debar the High Court to proceed in Constitutional jurisdiction*** *and declare such an order as without lawful authority. The rule that High Court should not entertain the Constitution petitions and adjudicate the matter in its Constitutional jurisdiction, in which remedy of appeal, review or revision is available under the statute, is not an absolute rule and to exceptional cases the strict observance of the rule that extraordinary remedy of writ petition cannot be availed in a matter in which the relief being sought under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 could be granted by way of appeal, review or revision, may cause injustice in substance, therefore, the application of this rule would depend on the facts and circumstances of each case".*
>
> *(Emphasis supplied)*

17. These exceptional circumstances, which include an order passed without jurisdiction or a void orders are not available in present case. Even if there was some infirmity (to the extent of Petitioner No.2) in the order passed by the Hearing Committee, the same could have been assailed before the learned District Judge / Appellate Authority. There is nothing on record reflecting that the Petitioner was restricted from

approaching the Appellate Authority, which was adequate and expeditious remedy.

18. Mr. Muhammad Azhar Kashif, Advocate has zealously argued as to the *mala fide* on the part of Commission and the Authorities. *Mala fide* is pleaded for both (i) impugned proceeding as well as order passed by the Committee on 15-06-2021 and (ii) failure to provide registration in terms of section 13(1) of the Act of 2010, which provides that a healthcare services provider shall not supply healthcare services without being registered under this Section, though filing of application is provisional registration in terms of section 13(4) of the Act. However, it is observed that learned counsel for the petitioner could not spell out or give details of this allegation of *mala fide*. No reason could be explained as to why the health commission or its authorities have acted with *mala fide*.

19. Raising allegations of *mala fide*, without substantiating the same or reasonable and plausible explanation for the allegation, has become a practice without realizing such allegations may blemish the character of other person(s) or departmental credibility. This allegation of bad-faith, keeping in view the definition of ‘faith’ for the present scenario, essentially means that one is challenging loyalty of the official to his duty or allegiance to his department as well as to the society. Undeniably, some of these allegations are result of inaccuracy of Government controlled sectors, institutions or bodies to gain absolute public trust and curb the components of the departments/bodies who causes ignominy to given department or results into this embracement but at same time this certainly does not

mean to assume *mala fide*s behind every official act or action of aforesaid entitites. Nevertheless, if the baseless and unfounded allegations of bad-faith behind every act are not discouraged, then those who are faithfully serving the Country will be disheartened causing further damage to the society. Not every lacuna or judgmental error or minor mistake can be taken as an indication or supposition of *mala fide* / bad-faith. Both parts have rights to be watched and guarded, one who can be victim of bad-faith and/or neglect of duty by official(s) and on the other hand officials as well as their respective departments/entities, who are also to be equally protected from wrong allegations / accusations as to their faith, in sense of loyalty, resulting into humiliation.

20. The way to examine is to initially presume the given act of department or its official as untainted. This presumption, however, is rebuttable presumption that arises in favour of the official act and until this presumption is rebutted, action cannot be challenged by simply raising allegation of bad-faith. Article 129 of Qanun-e-Shahadat Order, 1984 and the illustration (g) of the said Article in its true spirit has the same rational and wisdom which requires to presume that official acts have been regularly performed.

21. The one, who raises this allegation must bring something rational on record showing deviation from due process of law or clearly visible from circumstances, as initial burden to construct a cause to further proceed. Then for the final success, on the plea of *mala fide*, the party alleging has heavy burden to be discharged. Obviously, this burden is not that is required in the criminal cases or ‘beyond reasonable doubt’ but

certainly evidence in this regard should be at least 'clear and convincing'.

22. In this regard further guidance can be taken from the observations of the Honourable Supreme Court of Pakistan in cases titled *"Dr. Akhtar Hassan Khan and Others versus Federation of Pakistan and Others"* (**2012 SCMR 455**) *"Khushal Khan Khattak University through Vice-Chancellor and others versus Jabran Ali Khan and others"* (**2021 SCMR 977**), *"Government of Khyber Pakhtunkhwa through Chief Secretary and others versus Muhammad Khurshid"* (**2021 SCMR 369**) and "*State Bank of Pakistan versus Franklin Credit and Investment Company Ltd, through Attorney"* (**2009 CLD 1542 SC**), which are highly important in the present case.

23. The relevant part of *"Khushal Khan Khattak University"* (Supra) is as follows:-

> *"17.* ***The learned counsel for the Respondents has alleged mala fides on part of the Appellants in not appointing the Respondents. We note that other than a mere allegation of mala fides no material of any nature has been placed on record to substantiate the allegation. It needs no repetition that mala fides where alleged must be proved.*** *We also note that the P&SC comprised of five independent members of good credentials and standing and nothing has been shown or even alleged indicating mala fide or bias against the Appellants. Notwithstanding the above, we note that even otherwise, the Vice Chancellor only has the power to fill temporary posts for a limited duration and is neither competent nor has the power to make permanent appointments as provided in section11(5)(d) of the University of KP (Amendment) Act 2016 which provides as under:-*
>
> *"(5) The Vice-Chancellor shall also have the powers to (d) create and fill temporary posts for a period not exceeding one year after which the posts shall stands abolished;"*

COULD THE HIGH COURT GO INTO FACTUAL CONROVERSIES INVOVLED IN THE CASE WHILE EXERCISING JURISDICTION UNDER ARTICLE 199 OF THE CONSTITUTION?

18. The learned counsel for the Respondents has alleged that the P&SC and the Syndicate disenfranchised the Respondents and this act was mala fide and discriminatory. Further, the learned High Court has made the following observations in the impugned judgment:-

"The finding of the Promotion and Selection Committee is based on mala fide and to justify the non-appointment of petitioners declared them failed in the so-called interview. As the petitioners were not treated in accordance with the law, and Constitution of 1973 and as they were meted out with discrimination and were ousted and deprived of their legal, constitutional and vested right to be appointed on the posts, for which they had successfully, went through all the codal formalities and had passed not only the test conducted through ETEA but also the skill test."

The above findings of the High Court are neither supported by the record nor by the law on the subject. Further, these findings are in contradiction to the order dated 12.11.2018 passed by the High Court for the reason that the High Court had itself directed the Syndicate to undertake an inquiry into the matter. ***Once having reposed confidence in the Syndicate, it could not have substituted the findings of the Syndicate without proof of mala fides, bias, illegality or lack of transparency which was non-existent in the instant case.*** *Further, all the findings recorded by the learned High Court in the impugned judgment relate to questions of fact which could not have been gone into in exercise of constitutional jurisdiction specially so since these required recording of evidence which exercise could not have been and was not undertaken by the High Court."*

(Emphasis Supplied)

24. It will also be advantageous to reproduce paragraphs 20 of case titled "*State Bank of Pakistan*

versus Franklin Credit and Investment Company Ltd, through Attorney" (**Supra**):-

> "*20.* ***It is also well settled that the acts performed by public authorities deserve due regard by the Courts and every possible explanation for their validity should be explored and*** *the whole gamut of powers in pursuance to which they act or perform their functions and discharge their duties should be examined.* ***A presumption of regularity is attached to the official acts****. Reference may usefully be made to the cases of Saghir Ahmed (supra), Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs and others v. Aftab Ahmed Khan Sherpao and others PLD 1992 SC 723, Government of Sindh through Chief Secretary and others v. Khalil Ahmed and others 1994 SCMR 782, Syed Muhammad Khurshid Abbas Gardezi and others v. Multan Development Authority and others PLD 1983 SC 151, Lahore Improvement Trust v. Custodian, Evacuee Property PLD 1971 SC 811, Chairman Pakistan Railway Board, Chittagong and others v. Abdul Majid Sardar PLD 1966 SC. 725 and Federation of Pakistan and others v. Ch., Muhammad Aslam and others 1986 SCMR 916".*
>
> (Emphasis Supplied)

25. The learned counsel for the petitioner has not shown any elements of arbitrariness, favoritism and material disregard of mandate of law, discrimination or visible animosity of the authorized official, Hearing Committee or Commission against the petitioners, therefore, the contentions as to *mala fide*, cannot be accepted.

26. Punjab Healthcare Commission Act, 2010 and the Regulations have provided a mechanism whereby the commission has been equipped with the specialists of the particular field relating to the healthcare establishment assisted by technical advisory committee consisting of experts from the concerned. Besides other

objectives the Commission has to fix the standard of healthcare services and maintain the same under the mandate of Chapter-14 of the Punjab Healthcare Commission Act, 2010. The Commission and its Hearing Committee are best suited to determine as to whether any of the healthcare establishment or service providers are maintaining the required or settled standard. Therefore, the questions raised by learned counsel for the Petitioners regarding the standards of this particular healthcare establishment are suitably answered by the appropriate forum, which in this case is the Committee constituted by the Healthcare Commission. Committee has already given findings of facts against the Petitioners. These findings have been maintained by the learned Appellate Court.

27. The learned Appellate Court through a detailed judgment and after considering all the facts has concurred the findings of the Committee, which are cogent and consistent with the available record. The same cannot be interfered only because any different conclusion can be possible by appraisal of facts. The Honourable Supreme Court of Pakistan in case titled "*Mst. Mobin Fatima versus Muhammad Yamin and 2 others*" **(PLD 2006 Supreme Court 214)** has already observed that High Court should not interfere in findings of the Appellate Court merely because a different conclusion is possible from the reappraisal of the facts. The Constitutional Jurisdiction should only be exercised when the findings of learned Appellate Court are shown to be devoid of merits or contrary to the record. Paragraph No.8 of the said judgment is as under:-

> *"8. The High Court, no doubt, in the exercise of its constitutional jurisdiction*

> *under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can interfere if any wrong or illegal conclusions are drawn by the Courts below which are not based on facts found because such an act would amount to an error of law which can always be corrected by the High Court.* ***However, in the present case, the interference was made by the High Court merely because a different conclusion was possible from the facts found****. This is our view would not amount to an error of law. The appellate Court had discussed the entire evidence. Its judgment did not suffer from any misreading or non-reading of evidence.* ***The findings of the appellate Court were cogent and consistent with the evidence available on the record. Its conclusions were in accordance with the facts found. The finality was attached to its findings which could not be interfered with merely because a different conclusion was also possible****.* ***The High Court, in the present case, in our view, exceeded its jurisdiction and acted as a Court of appeal which is not permissible under the law****. Therefore, the High Court ought not to have undertaken the exercise of the reappraisal of the evidence."*
>
> *(Emphasis supplied)*

28. Learned counsel of the petitioners has failed to show any jurisdictional defect, illegality or gross misreading or non-reading of evidence requiring any interference through this Constitutional Petition. The petition is, therefore, ***dismissed***, with no order as to costs.

(SULTAN TANVIR AHMAD)
JUDGE

APPROVED FOR REPORTING

JUDGE

Jamshaid Ali Hashmi