

IN THE COURT OF SOHAIL NASIR DISTRICT AND SESSIONS
JUDGE/JUDGE CONSUMER COURT,
RAWALPINDI

1. Muhammad Rashid Iqbal vs. Dr. Masood Iqbal
2. Mrs. Rashida Bashir vs. Brig. Dr. Muhammad Amer Yaqoob

Present: Malik Muhammad Humayun advocate for Mrs. Rashida Bashir (claimant)
Mr. Mati-ur-Rehman advocate for Brig. Dr. Muhammad Amer Yaqoob (defendant)
Hafiz Malik Mazhar Javed, Mr. Muhammad Irfan-ul-Haq and Mr. Mumtaz Ali Khan advocates for Muhammad Rashid Iqbal (claimant)
Mr. Abdul Malik Sherpao advocate for Dr. Masood Iqbal (defendant)
Date of hearing of arguments 29.01.2013 & 01.02.2013.

ORDER

1. For the purpose of this order the Medical and Dental Council, Ordinance, (XXXII of 1962), Pakistan Registration of Medical and Dental Practitioners Regulations, 2008, Punjab Health Care Commission Act, 2010 and the Punjab Consumer Protection, Act 2005 shall be called hereinafter as Ordinance, Regulations, Act and Consumer Act respectively.

2. By way of this single order common question of law in both claims about jurisdiction of this Court is being decided.

3. There is no need to give detail facts of both claims. In brief in claim filed by Mrs. Rashida Bashir her case was that she had hired medical services of Brig. Dr. Muhammad Amer Yaqoob for her left eye treatment and due to negligence and defective services her vision deteriorated and she could hardly see anyone. Defendant did not file written statement however, submitted an application for return of claim by maintaining that remedy is available to claimant under the Ordinance, and Regulations.

4. In second claim instituted by Mr. Muhammad Rashid Iqbal his case is that he had obtained medical services of Dr. Masood Iqbal for treatment of Piles disease, which were defective. Written statement was submitted by defendant where he had also taken objection about jurisdiction of this Court to hear the claim.

5. Mr. Mati-ur-Rehman and Mr. Abdul Malik Sherpao both learned advocates had contended that in view of provisions of Ordinance and Regulations there is a remedy to an aggrieved person in case a complaint is made to Disciplinary Committee who has an authority to remove the name of medical practitioner from roll for a specific period; the Act which is

a special legislation also gives an immunity under section 29 to a doctor for prosecution or other legal proceedings; an aggrieved person can too approach said Commission constituted under the Act, who has the jurisdiction to impose fine on a doctor which may extent to Rs. Five hundred thousand; under section 30 of the Act, there is bar of jurisdiction and only a District & Sessions Judge can examine the question of validity of any action taken or intended to be taken etc; when there are two special laws on same subject, then under the settled principles of law a statue later in field shall prevail; there is a judgment of predecessor of this Court where on same question of jurisdiction claim against a doctor was returned. Both learned counsels have made reliance on Shifa International Hospital Ltd. through Chairman & C.E.O vs. Pakistan Medical Dental Council (PMDC) & 3 others, & Muhammad Saleem vs. the State & another 2002 PCr.LJ-216

6. On the other hand, Malik Muhammad Humayun, Hafiz Malik Mazhar Javed and Mr. Mumtaz Ali learned advocates for claimants had maintained that section 29 of the Act, shall not oust the jurisdiction of this Court because the Consumer Act also covers the interest of a consumer whereas the Act does not give any right of compensation or damages to him except to move an application before Commission on the allegations of violation of any provisions of the Act; if Consumer Act, had to be in same parameter and with same object as the Act was then section 29 of the Act, has to be an absolute barrier ousting jurisdiction of this Court; Consumer Act also provides a shelter to services provider which is a beneficial legislation; relationship of 'Consumer and Services Provider' in both claims are established because both claimants had engaged the doctors for their treatment by paying considerations.

7. First of all, I will like to resolve the issue that if judgment of my learned predecessor is binding on me? My answer is in negative. Under the concept of independence of judiciary and sitting in parallel jurisdiction I am not bound to follow what my learned predecessor had held because in that case (Dr. Tehmeena Ashfaq Vs. Dr. Faiz Rasool) neither these arguments were raised as made before me nor my learned predecessor had examined the case in view of all relevant provisions of different statues on the subject. Therefore, with all respect to my learned predecessor I have disagreement with the views that he had taken and forgoing reasons shall support this declaration.

8. Before, I enter into the question of jurisdiction, I will like to settle that whether relations between parties is of 'Consumers and Services

Provider'? This proposition has been resolved by the honourable Lahore High Court in **Dr. Shamshad Akhtar vs. District Consumer Court Lahore PLD-2010-Lahore-214**. Relevant paragraph is as under: -

It is, therefore, clear that respondent No. 2 is a consumer and the petitioner rendered services to the said respondent. The internal arrangement between the petitioner and the GCC states does not in any way affect the jurisdiction of the Consumer Court. The respondent No. 2 has availed medical services after paying consideration and is, therefore, a Consumer under the Act and the Consumer Court has the jurisdiction to try the complaint of respondent No.2.

9. I am also able to find out through internet (<http://indiankanoon.org/docfragment/723973/?formInput=medical%20negligence>) an unreported judgment from Indian jurisdiction (Supreme Court) titled 'Indian Medical Association vs. V. P. Shantha & Others' (decided on 13.11.1995). Sole question raised there was that in law there is a distinction between a profession and an occupation and that while a person engaged in an occupation renders service which falls within the ambit of Section 2 (1) (o) of the Consumer Protection Act, 1986 the service rendered by a person belonging to a profession does not fall within the ambit of the said provision and, therefore, medical practitioners who belong to the medical profession are not covered by the provisions of the Act and that medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under Section 3 of the Indian Medical Council Act, 1956 which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or State Medical Councils against a person for professional misconduct. Their lordships were pleased to hold as under: -

1. Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2 (1) (o) of the Act.
2. The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

3. A 'contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is service rendered under a contract for personal services and is not covered by exclusionary clause of the definition of 'service' contained in Section 2 (1) (o) of the Act.
4. The expression 'contract of personal service' in Section 2 (1) (o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in Section 2 (1) (o) of the Act.
5. Service rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/Nursing home where such services are rendered free of charge to everybody, would not be "service" as defined in Section 2 (1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.
6. Service rendered at a non-Government hospital/Nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service is outside the purview of the expression 'service' as defined in Section 2 (1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/Nursing home would not alter the position.
7. Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service' as defined in Section 2 (1) (o) of the Act.
8. Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2 (1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be "service" and the recipient a "consumer" under the Act.
9. Service rendered at a Government hospital/health centre/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service is outside the purview of the expression 'service' as defined in Section 2 (1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.
10. Service rendered at a Government hospital/health centre/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services would fall within the ambit of the expression 'service' as defined in Section 2 (1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be "service" and the recipient a "consumer" under the Act.

- 11.** *Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2 (1) (o) of the Act.*
- 12.** *Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under Section 2 (1) (o) of the Act.*

10. *Coming to the question of jurisdiction in view of Regulations, Act and Consumer Act it is found that the Consumer Act was promulgated on 25.01.2005 with following preamble: -*

“Whereas, it is expedient to provide for protection and promotion of the rights and interests of the consumers, speedy redress of consumer complaints and for matters connected therewith”

11. *Section 3 of the Consumer Act specifically provides that it is in addition and not in derogation of the provisions of any other law for the time being in force. Under section 13 a provider of services shall be liable to a consumer for damages proximately caused by the provision of services that have caused damage, whereas section 31 provides various kinds of reliefs which a Consumer Court can grant and those are: -*

- a)** *to remove defect from the products in question;*
- b)** *to replace the products with new products of similar description which shall be free from any defect;*
- c)** *to return to the claimant the price or, as the case may be, the charges paid by the claimant;*
- d)** *to do such other things as may be necessary for adequate and proper compliance with the requirements of this Act;*
- e)** *to pay reasonable compensation to the consumer for any loss suffered by him due to the negligence of the defendant;*
- f)** *to award damages where appropriate;*
- g)** *to award actual costs including lawyers' fees incurred on the legal proceedings;*
- h)** *to recall the product from trade or commerce;*
- i)** *to confiscate or destroy the defective product;*
- j)** *to remedy the defect in such period as may be deemed fit; or*
- k)** *to cease to provide the defective or faulty service until it achieves the required standard.*

12. *Section 35 of the Consumer Act also empowers the Court to dismiss a claim and impose fine on claimant not exceeding Rs.10000/- for*

filing a false claim besides appropriate compensation to defendant from amount of fine so realized.

13. *Above relevant features I have deliberately referred on the reason that unless a comparison of the Act and Consumer Act is made, it will be difficult to resolve the issue rose.*

14. *The Act was promulgated on 02.08.2010 by the Provincial Assembly Punjab with following preamble: -*

“Whereas it is expedient 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”

15. *Under section 1 (4) the Act shall apply to all healthcare establishments, public or private hospitals, non-profit organizations, charitable hospitals, trust hospitals, semi-government and autonomous healthcare organizations. Section 2 provides definition of various words and expression including ‘Health Care Establishment, Health Care Service Provider and Medical negligence’. By virtue of section 3 the Provincial Government has to establish a Commission to be called Punjab Health Care Commission. Section 4 describes functions and powers of Commission in which sub-section (e) is important and reproduced as under: -*

“To enquire and investigate into maladministration, malpractice and failures in the provision of healthcare services and issue consequential advice and orders”

16. *Section 4 (7) gives right to an aggrieved person to move an application against Health Service Provider as well as to Commission to investigate the allegations. Under section 19 on the allegations of medial negligence a Health Care Service Provider can be held guilty of medical negligence 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 employees did not, in the given case, exercise with reasonable competence the skill which he or his employee did possess.

17. *Section 23 describes the procedure for investigation and section 28 is about jurisdiction of Commission for adjudication of fine which says that: -*

(1) Notwithstanding anything contained in any other law, the Commission may, for contravention of a provision of this Act, rules or regulations, impose fine which may extend to five hundred thousand rupees in accordance with the provisions of this Act, keeping in view the gravity of offence.

(2) The Commission shall afford adequate opportunity of hearing to a person before imposing fine on the person under this Act.

(3) If the complaint, submitted either by an aggrieved person or a healthcare service provider, is proved false, the Commission may impose fine which may extend to two hundred thousand rupees upon the complainant.

18. Finally come sections 29 and 30 which are about immunity and bar of jurisdiction and those are as under: -

29. Immunity. No suit, prosecution or other legal proceedings related to provision of healthcare services shall lie against a healthcare service provider except under this Act.

30. Bar of jurisdiction. Save as provided in this Act, no court other than the Court of the District and Sessions Judge shall have jurisdiction—

(a) to question the validity of any action taken, or intended to be taken, or order made, or anything done or purporting to have been taken, made or done under this Act; or

(b) to grant an injunction or stay or to make any interim order in relation to any proceeding before, or anything done or intended to be done or purporting to have been done by, or under the orders or at the instance of the Commission.

19. What are the principles for interpretation of statutes? Those are quite important to be referred before I come to conclusive discussion. Some of those are that: -

- in construing the provisions of a welfare legislation, Courts should adopt beneficial rule of construction i.e. if two constructions are reasonably possible then the construction which furthers the policy and the object of the Act and is more beneficial, is to be preferred to achieve the legislative purpose provided.
- Beneficial or remedial legislation conceived as a means of ameliorating the law of working class and as such it would be in keeping with the accepted principles of interpretation that it should be so construed as to advance the remedy and suppress, the mischief, or else it would frustrate the legislative intent.
- Court cannot construe even a beneficial statute in such a way that it may violate its provisions nor the Court can place a beneficial interpretation on a provision contrary to its language merely on the ground that its literal construction will cause hardship or would not be beneficial to the class for whose benefit the statute in question was enacted.

- *Court, while construing a beneficial enactment, can take into consideration the object for which it was enacted and the mischief which it intended to suppress.*
- *Court should adopt an interpretation, which may give meanings to each word of an enactment taking into consideration the spirit of such legislation. An interpretation, whereby any portion of an enactment is rendered ineffective is not to be adopted when clear meanings can be given to various provisions of an enactment in a harmonious manner.*

20. *Comparison of schemes of both laws shows that Consumer Act is comprehensive than the Act. The main differences are as under: -*

- i.** *The Act does not give a right to an aggrieved person for asking compensation or damages whereas Consumer Act, provides so.*
- ii.** *The Act, does not give any power to Commission to compensate in terms of money or otherwise to an aggrieved person from the amount of fine so realized whereas under Consumer Act, jurisdiction is there for Court to award compensation, damages, exemplary damages and even to give relief which is appropriate keeping in view facts and circumstances of the case.*
- iii.** *The Consumer Act also gives protection to manufacture and services provider because in case of any false claim Consume Court can impose fine on claimant and out of that fine compensation can be awarded to a defendant.*
- iv.** *The Act does not authorize a Commission to impose expenses of litigation on any of the parties whereas under section 29 of the Consumer Act, the actual cost of litigation including lawyers' fee by deciding the case finally can be ordered.*
- v.** *Under the Act, initial remedy is before an administrative Authority, whereas under Consume Act, adjudication has to be made by a Court of Law.*

21. *It is now quite clear that under the Act, Consumer has no authority to ask for any compensation or damages which remedy is available to him under the Consumer Act. It means that Consumer Act, is a beneficial legislation and by way of the Act, statutory right available to a consumer has been withdrawn. The question arises that if a consumer asks for some damages on account of medical negligence by a doctor, which forum he shall adopt? Whether Consumer Court or Commission? Of course, if he knocks the door of Commission, he cannot be awarded what he demands if he succeeds in his allegations. On the other hand, if he*

approaches a Consumer Court, in case of success he can get what he has desired. This is also not understandable that before Commission if he succeeds, he gets nothing and if he loses the case an amount of Rs, two hundred thousand can be imposed on him as fine. If it is held that only Commission in every eventuality has the jurisdiction, what will it mean that an innocent aggrieved person first shall go to commission, fight for his rights for a long period and if he is succeeded there than he shall come to Consumer Court, for damages and till that another obstruction shall be in his way that is of limitation for filling a claim, which is thirty days after accruing cause of action.

22. I cannot disagree with the proposition that if there are two special laws on same subject later shall prevail. But both laws must be on same subject and covering all possible remedies for both sides. Therefore, what I find is that the Consumer Act, as a whole is not on the same subject for which Act is made. Hence immunity shall be available to a doctor only if any other law is there within the same scheme and legislative intention.

23. Both statues are laws of land and hold the field with all force. Therefore safe interpretation, so as to keep alive their provisions, will be that if an aggrieved person simply levels allegations of medical negligence against a doctor without asking any compensation or damages, he has to approach the Commission under the Act, and in that eventuality there will be a bar of jurisdiction. On the other hand if an aggrieved person as a 'Consumer' calls for action for defective services against a doctor and demands compensation etc. then section 29 of the Act shall not be a barrier for Consumer Court to assume the jurisdiction.

24. Even the referred Regulations on examination shows that a Disciplinary Committee can only remove the name of doctor from roll of medical practitioners for a certain period. This Committee too has no authority to award any compensation or damages to a patient if he is affected because of medical negligence of a doctor.

*25. I have gone through case laws relied by learned counsels for defendants. In **Shifa International** case (supra) there was an FIR registered against doctor. It was quashed by the Honourable Islamabad High Court on the ground that under the Regulations no prosecution can be initiated against a medical practitioner except action by Disciplinary Committee. By no stretch of imaginations question of jurisdiction of a Consumer Court to deal the cases between consumer and services provider was there. On the*

other hand, judgment of Honourable Lahore High Court in **Dr. Shamsad Hussain's** case is directly on the proposition of jurisdiction of Consumer Court in a case where patient knocks the door of Consumer Court for an action against a doctor, therefore, with all humbleness I am bound to follow the view taken by Honourable Lahore High Court.

26. In Muhammad Saleem's case it was held that if there are two special laws although inconsistent the law later in field shall prevail. The question in that case was that an offence under Section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance 1979 had to be tried by Special Court constituted under the Suppression of Terrorist Activities Act, 1975 (since repealed) or by a Court of Sessions? No proposition as in the case in hand was there. Of course if there are two special laws on one and the same subject the later shall prevail, but in the case in hand I have already come to a view that both laws are not on the same subject but with different scheme and legislative intent, therefore Muhammad Saleem's case is of no help for defendants.

27. Whatever, has been discussed above in the light of that it is held that this Court has jurisdiction to hear both claims because of dispute between 'Consumer and Services Provider' and section 29 of the Act is not barrier for assuming the jurisdiction. The objection raised by Dr. Masood Iqbal in his written statement is overruled whereas application for return of claim by Brig. Dr. Muhammad Amer Yaqoob is hereby dismissed. Copy of this order shall also be placed on connected file.

Announced:
01.02.2013

(Sohail Nasir)
District & Sessions Judge/
Judge Consumer Court
Rawalpindi

Certified that this order consist on ten pages. All pages have been dictated, read, corrected and signed by me.

(Judge Consumer Court)
Rawalpindi