

IN THE HIGH COURT OF SINDH KARACHI

**Present:**

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry.

C.P. No. D-858 of 2016	Irshad Ali and 42 others versus Province of Sindh and another.
C.P. No. D-3475 of 2016	Sawan Kalmati Baloch and 21 others versus Province of Sindh and others.
C.P. No. D-6810 of 2016	Muhammad Shahid and 80 others versus Province of Sindh and another.
C.P. No. D-654 of 2017	Ghulam Mustafa Jatoi and 08 others versus Province of Sindh and another.
C.P. No. D-1631 of 2017	Mohan Lal Aadwani and 25 others versus Province of Sindh and another.
C.P. No. D-1402 of 2017	Muhammad Younis Baloch and 11 others versus Province of Sindh and another.
C.P. No. D-339 of 2017	Asadullah and 23 others versus Province of Sindh and another.
C.P. No. D-191 of 2017	Khan Muhammad and 23 others versus Province of Sindh and another.
C.P. No. D-6718 of 2017	Hameed Ali and 03 others versus Province of Sindh and another.
C.P. No. D-161 of 2017	Prem Das and 49 others versus Province of Sindh and another.
For the Petitioners	M/s. Faizan H. Memon and Khurram Memon, Advocates, in C.P. No. D-858 of 2016.
	Mr. Khalid Ahmed Khan, Advocate in C.P. No. D-3475 of 2016.
	Mr. Mukesh Kumar Khatri, Advocate in C.P. Nos. D-6810 of 2016, 654,

1631, 1402, 339, 191, 6718, 161 of 2017.

For the Respondents

Mr. Ghulam Shabbir Shah, Additional Advocate General Sindh alongwith Mr. Jamaluddin, Additional Secretary, Health, Government of Sindh.

Assisted by:

Mr. Rafique Ahmed Bhanbhro, Advocate.

Mr. Mehmood Farooq Channa, Advocate.

Ms. Sabeen Ansari, Advocate.

Ms. Nadia Afzal, Advocate.

Mr. Aamir Bukhari, Advocate.

Mr. Owais Mustafa, Advocate.

Dates of hearing

10-08-2018, 29-08-2018, 05-09-2018 and 11-09-2018.

## JUDGMENT

**Adnan Iqbal Chaudhry J.** – All these petitions have been brought to challenge acts taken by health officials to stop the medical/health practice/business being carried on by the Petitioners. Since these petitions are for a similar cause and raise common questions of law, these are decided by us by a common judgment.

C.P. No. D-858/2016, Irshad Ali & others v. Province of Sindh & others

1. These are 42 Petitioners who hail from Sukkur, Shikarpur, Kashmor, Dadu, Khairpur, Ghotki and Umerkot respectively, where they claim to be providing services as Health Technicians by way of private practice. Per the Petitioners they have *“set-up centers within the locality of their residence to provide first-aid and treatment for common conditions as well as to earn livelihood for themselves and their dependents”*. Per the Petitioners, they are competent to engage in such practice, and in support of that, most of the Petitioners rely on a Health Technician Certificate issued to them by the Sindh Medical Faculty, which appears to be an examining body under the Health Department of the Government of Sindh. The Health Technician

Certificate states that the holder thereof has completed the Medical Technician Course from a certain training school and passed the Health Technicians' Examination, and that he/she is a fit person to be entrusted with the duties of a Health Technician.

The primary grievance of the Petitioners (Health Technicians) is that health officials are harassing them by conducting raids on their 'health centers' on the allegation that the Petitioners are quacks practicing medicine.

2. Mr. Faizan Memon, learned counsel for the Petitioners (Health Technicians) submitted that the Petitioners do not hold themselves out as doctors, however as certified Health Technicians they are competent to practice "*first-aid*", "*the treatment of common conditions*", and to provide "*basic health facilities*" to the general public by way of private practice. To demonstrate such competency, Mr. Faizan Memon Advocate relied firstly on Clause 1.7 of the Health Technicians Training Guide, published in 1990 by the National Basic Health Services Cell, Health Division, Government of Pakistan, which describes the functions of a Health Technician. Secondly, he submitted that at Basic Health Units and Rural Health Centers in villages where a Medical Officer is not available, a Health Technician is ordinarily authorized by the Government to undertake duties of an 'incharge'. Thirdly, he relied on the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968 [framed under the Allopathic System (Prevention of Misuse) Ordinance, 1962], where under qualified Health Technicians and Dispensers with a certain experience were eligible to apply for permits to prescribe antibiotics and dangerous drugs. Though it is not the case of the Petitioners that they were ever issued permits under the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968, Mr. Faizan Memon submitted that the aforesaid is to show that the independent practice by Health Technicians of providing first-aid and treatment of common conditions, especially in rural areas, through independently set-up '*health centers*', is envisaged under the

law, and therefore the stopping of such practice/business by health officials violates the Petitioners' Fundamental Rights enshrined under Articles 8, 18 and 25 of the Constitution of Pakistan.

Learned counsel for the Petitioners (Health Technicians) further submitted that pursuant to the Eighteenth Amendment to the Constitution of Pakistan, the Allopathic System (Prevention of Misuse) Ordinance, 1962 was replaced in Sindh by a more or less identical law called the Sindh Allopathic System (Prevention of Unauthorized Use) Act, 2014; but since the Government of Sindh has failed to frame Rules thereunder similar to the Allopathic System (Prevention of Misuse) Rules, 1968, the Petitioners are denied the opportunity to apply for permits to prescribe antibiotics and dangerous drugs.

Based on the aforesaid submissions, the Petitioners pray for writs to restrain the official Respondents from stopping the private practice/business of the Petitioners as Health Technicians; and for a direction to the Government of Sindh to frame Rules under the Sindh Allopathic System (Prevention of Unauthorized Use) Act, 2014 to enable the said Petitioners to obtain permits for prescribing antibiotics and dangerous drugs.

C.P. No.D-3475/2016, Sawan Kalmati Baloch & others v. Province of Sindh & others

3. The Petitioners 1 to 18 reside at Thatta where they claim to be 'practicing' as Dispensers. Per the said Petitioners, they are qualified Dispensers, and in support of that, most of them rely on a Dispensers' Certificate issued to them by the Sindh Medical Faculty, which certificate states that the holder thereof has passed the Dispenser's Examination, and that he/she is fit to be entrusted with the duties of a Dispenser & Compounder.

The Petitioners 19 to 22 also reside at Thatta where they claim to be practicing respectively as Midwives, Nurses and Health Visitors. Per these Petitioners, they are competent to provide such services, and in support of that, they rely on diplomas issued to

them by the Sindh Nurses Examination Board, which is an examining Board under Section 11 of the Pakistan Nursing Council Act, 1973.

4. It is the case of these Petitioners (Dispensers, Nurses, Midwives and Health Visitors) that they *“provide basic health facilities to the general masses in particular to the rural and far flung areas where the general population is deprived of primary health care facilities.....”*; and that they have *“setup their places within the locality”*. Therefore, like the petitioners of C.P. No.D-858/2016, the Petitioners of this C.P. No.D-3475/2016 are also engaged in private practice at independently-run health centers/clinics. Their grievance is that the District Health Officer Thatta has vide notice dated 09-03-2016 required the said Petitioners to close down their *“illegal allopathic practice”* on the ground that the same is in violation of the Allopathic System (Prevention of Misuse) Ordinance, 1962 and the Pakistan Medical & Dental Council Ordinance, 1962.

5. Mr. Khalid Ahmed Khan, learned counsel for the Petitioners adopted the submissions of Mr. Faizan Memon Advocate made in C.P. No.D-858/2016. He further submitted that the aforesaid private practice by the Petitioners is lawful because as duly certified Dispensers/Compounders, Midwives, Nurses and Health Visitors, they are competent to engage in such practice; that the Allopathic System (Prevention of Misuse) Ordinance, 1962 does not prohibit such practice by the Petitioners, but only regulates it; that the Petitioners’ right to carry on such practice/business is also protected by Article 18 of the Constitution of Pakistan; and therefore these Petitioners pray for writs to restrain the official Respondents from stopping their practice/business and from taking coercive measures against them in that regard.

C.P. No.D-6810/2016, Muhammad Shahid & 80 others v. Province of Sindh & others;

C.P. No.D-191/2016, Khan Muhammad & 23 others v. Province of Sindh & another;

C.P. No.D-161/2017, Prem Das & 49 others v. Province of Sindh & another;

C.P. No.D-339/2017, Asadullah & 23 others v. Province of Sindh & another;

C.P. No.D-654/2017, Ghulam Mustafa Jatoi & 8 others v. Province of Sindh & another;

C.P. No.D-1402/2017, Muhammad Younis Baloch & 11 others v. Province of Sindh & others;

C.P. No.D-1631/2017, Mohan Lal Aadwani & 25 others v. Province of Sindh & another;

C.P. No.D-6718/2017, Hameed Ali & 3 others v. Province of Sindh & another.

6. The Petitioners of these petitions claim to be engaged in private practice as Dispensers and Health Technicians respectively at Shaheed Benazirabad, Tando Alahyar, Sanghar, Noushero Feroz, Ghotki, Matyari, Khairpur, Mirpurkhas, Dadu, Larkana, Jamshoro, Umerkot and Hyderabad. In support of such practice, most of them rely on Dispensers' Certificates and Health Technician Certificates issued to them by the Sindh Medical Faculty, which certificate states that the holder thereof has passed the requisite examination and that he/she is fit to be entrusted with the duties of Dispenser, Compounder and Health Technician respectively. Others have filed certificates issued to them by various private training institutes.

7. Mr. Mukesh Kumar Khatri, learned counsel for the Petitioners submitted that the Petitioners operate private dispensaries where they only provide first-aid to walk-in patients before referring them to trauma centers and/or a registered medical practitioner. He submitted that pursuant to orders passed by this Court at Hyderabad Circuit in C.P. No.D-919/2014, the local administration and health officials were directed to take action against quacks operating illegal dispensaries/clinics in various localities; that though such order did not apply to the Petitioners who were duly certified Dispensers and Health Technicians, still the local administration and health officials are raiding and shutting-down the dispensaries of the Petitioners; therefore, these Petitioners pray

for writs to restrain the official Respondents from stopping the lawful practice/business of the Petitioners and for directions to de-seal their dispensaries. In support of their petition, the Petitioners rely on an order dated 18-10-2000 passed by a Division Bench this Court at Hyderabad Circuit in C.P. No.D-329/2000 whereby a similar petition was disposed off by prohibiting Dispensers from prescribing antibiotics and dangerous drugs, but by permitting them to practice first-aid.

8. While opposing all of the subject petitions, Mr. Ghulam Shabbir Shah, learned AAG Sindh, accompanied by the Additional Secretary Health, Government of Sindh, submitted that the practice of the Petitioners manifests that they hold-out to the public that they are qualified medical practitioners which makes them 'quacks' within the meaning of the Sindh Healthcare Commission Act, 2013, and therefore action was taken against them pursuant to the order dated 20-10-2016 passed by a Division Bench of this Court at Hyderabad Circuit in C.P. No.D-919/2014. He submitted that while Dispensers, Health Technicians, Midwives, Nurses and Health Visitors perform an invaluable and salutary function/service, their purpose and function is essentially to act in aid of registered medical practitioners, whereas the fact that the Petitioners are operating independent clinics, dispensaries and health centers and selling thereat medicines to the general public, manifests that they are in fact practicing medicine without the prescribed qualification, which acts, not only do they put the public health at risk, but are also prohibited by the Pakistan Medical and Dental Council Ordinance, 1962 and the Drugs Act, 1976. He pointed out that the certification relied upon by most of the Petitioners, issued to them by the Sindh Medical Faculty, categorically states that *"This certificate does not authorize the holder to practice Western Medicine."*

9. We heard the learned counsel for the parties, the Additional Secretary Health, and also some of the Petitioners who wanted to explain the nature of the practice they were engaged in.

The Petitioners do not claim to be medical practitioners within the meaning of the Pakistan Medical and Dental Council Ordinance, 1962, but they claim that as certified Health Technicians, Dispensers, Nurses, Midwives and Health Visitors respectively, they too are qualified and permitted to engage in the private practice of providing certain medical/health services to the public directly and independently. Such private practice is carried on by the Petitioners at premises they manage themselves, which some Petitioners call 'health centers' and some 'dispensaries', and it is to safeguard such private practice that they are before this Court.

10. It is the case of the Petitioners that the private practice they are engaged in is the providing of "first-aid" and/or "the treatment of common conditions" and that their respective certification is sufficient qualification to permit them to engage in such practice. But ironically, as regards the certificates issued by the Sindh Medical Faculty to Health Technicians and Dispensers, those certificates categorically state that "*This certificate does not authorize the holder to practice Western Medicine*". As regards the Petitioners who are Nurses, Midwives and Health Visitors, while they claim to hold diplomas issued by the Sindh Nurses Examination Board, none of them produced any document to show that they were registered with the Pakistan Nursing Council under Section 20 of the Pakistan Nursing Council Act, 1973.

While none of the Petitioners have filed any certificate to show that they have received training in 'first-aid', the meaning of 'treatment of common conditions' was elaborated by the Petitioners themselves on queries put by us during the hearing, to state that it meant the treatment of common ailments such as cough, sore throat, cold, fever, stomach aches etc., by way of prescribing and selling medicines. Mr. Faizan Memon Advocate did not dispute that such



practice was, for all intents and purposes, the practice of allopathy<sup>1</sup>, however in support of such practice (to the extent of Health Technicians) he relied on Clause 1.7 of the Health Technicians Training Guide published in 1990 by the National Basic Health Services Cell, Health Division, Government of Pakistan, to argue that a Health Technician is competent to engage in the private practice of allopathy. On the other hand, the learned AAG and the Additional Secretary Health had submitted that the reliance placed by the Petitioners on the said Training Guide to practice medicine was misleading, as such Training Guide was not a document prescribed by law, but was published for a specific health project being undertaken by the Government at the time. Though the said Training Guide was not produced before us in its entirety to enable us to gauge its scope, nonetheless, Clause 1.7 thereof which is filed with the petition as an extract, reads as follows:

*“1.7 JOB DESCRIPTION OF HEALTH TECHNICIANS (MALE AND FEMALE)*

*Statement of Work. As members of the health team of the RHC where the team leader is the Medical Officer, the Health Technicians, both male and female, provide mainly health promotive, illness preventive services and some curative services. Health Technicians are to provide the following services at the BHU or RHC, and through outreach activities in their assigned areas:*

*Family health services.*

*Maternal health services.*

*Control of communicable diseases.*

*Health education.*

*Community participation and coordination.*

*Referral.*

*First-aid and treatment of common conditions.*

*Record keeping.*

*Training.”*

The above Clause 1.7 shows that the functions listed therein are envisaged by Health Technicians “As members of the health team” of the BHU or RHC run by the Government “where the team leader is

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<sup>1</sup> The Chambers dictionary defines ‘allopathy’ as the orthodox medical practice, treatment of diseases by drugs, etc, whose effect on the body is the opposite of that of the disease, distinguished from homoeopathy.

*the Medical Officer.....*". In other words, it does not envisage that Health Technicians could engage in an independent private practice of allopathy. Therefore, the reliance placed on the aforesaid Clause 1.7 is misplaced.

11. We now turn to discuss the primary submission made on behalf of the Petitioners viz, that the Allopathic System (Prevention of Misuse) Ordinance, 1962 and the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968 envisage the practice of allopathy by other persons as well who may not be registered as medical practitioners with the Pakistan Medical and Dental Council. On the other hand, the learned AAG had cited the case of *Iftikhar Hussain Butt v. Government of Punjab* (2016 CLC 95) to submit that after the Sindh Healthcare Commission Act, 2013, the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968 do not hold the field. In *Ifitkar Hussain's* case (2016 CLC 95), as in this case, the submission of the petitioners before the Lahore High Court was that though they were not registered medical practitioners under the Pakistan Medical and Dental Ordinance, 1962, nevertheless the Allopathic System (Prevention of Misuse) Ordinance, 1962 and the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968 envisaged that they could undertake the practice of allopathy. Their grievance was that their applications for the grant of permits to prescribe antibiotics and dangerous drugs under the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968 had been rejected by the Government of Punjab. One of the grounds cited by the learned Single Judge for dismissing the said petition was that subsequent to the Punjab Healthcare Commission Act, 2010, the Government of Punjab had issued a notification dated 08-03-2012 to repeal the Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968. But, and as highlighted *infra*, the said Rules of 1968 were Provincial Rules, and in the petitions before us it is not the case of the learned AAG Sindh that the Province of Sindh too has expressly repealed the said Rules. Therefore, a decision on

the submissions recorded in this para necessitates a discussion on the law that has progressed in the Province of Sindh to regulate medical/health service providers, and as we discuss the relevant statutes (*infra*), we have simultaneously opined on how each statute affected the practice of allopathy by persons such as the Petitioners who were not registered medical practitioners under the Pakistan Medical and Dental Council Ordinance, 1962.

12. **The Medical and Dental Council Ordinance, 1962**<sup>2</sup> [hereinafter '**the PMDC Ordinance, 1962**'] came into effect on 05-06-1962 and extended to the whole of Pakistan. It was promulgated primarily to regulate basic and higher qualifications in medicine and dentistry, and consequently to regulate the practice of such medical practitioners as follows:

“29. - (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no one other than a registered medical practitioner or a registered dentist shall be competent to hold any medical or dental appointment in a medical or dental college or its attached hospitals or as a Commissioned Medical or Dental Officer in any branch of the Armed Forces or as a Medical or Dental Officer in any hospital, asylum, infirmary, dispensary, or lying-in hospital, maintained or aided by any Government, Railway or local authority.

(2) Notwithstanding anything to the contrary contained in any other law for the time being in force, no certificate required by any such law to be obtained from a medical or dental practitioner shall be valid unless it is signed by a registered medical practitioner or a registered dentist, as the case may be.

(3) No person shall be entitled to recover any charge in any court of law for any medical dental or surgical advice or attendance, or for the performance of any operation, or for any medicine prescribed or supplied unless he shall prove upon the trial that he is a duly registered medical practitioner or a registered dentist.

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<sup>2</sup> The Allopathic System (Prevention of Misuse) Ordinance, 1962 was promulgated under the Presidential Proclamation of Martial Law dated 07-10-1958. Though Article 225 of the Constitution of 1962 had repealed the said Presidential Proclamation, it had saved the laws made thereunder.

It appears that at the time it was promulgated, the PMDC Ordinance, 1962 did not expressly bar the practice of allopathy by persons not registered as medical practitioners under the Ordinance.

13. **The Allopathic System (Prevention of Misuse) Ordinance, 1962<sup>3</sup>** [hereinafter '**the ASPMO 1962**'] came into effect on 07-06-1962. It extended to the whole of Pakistan and it was promulgated "to prevent the misuse of the allopathic system of medicine and to provide for matters connected therewith."

Section 3 of the ASPMO 1962 confined the use of the word "doctor" and its variations to a "registered medical practitioner" i.e., a person registered under the PMDC Ordinance, 1962 (not applicable to a person on whom a Doctor's degree other than a medical degree has been conferred by any university in or outside Pakistan). Section 4 restricted the use of a medical degree or a medical diploma for any purpose connected with medical practice, unless such degree or diploma was recognized under the PMDC Ordinance, 1962.

Section 6 of the ASPMO 1962, which is of most significance to the discussion that follows, stated that "No person other than a registered medical practitioner or a person authorized in this behalf by the Provincial Government shall prescribe any antibiotic or dangerous drug specified in the rules made under this Ordinance."

Per Section 8 of the APSMO 1962, "The Provincial Government may make rules for carrying out the purpose of this Ordinance." Section 9 provided for punishment for contravention of Sections 3 to 7.

14. The Rules under Section 8 of the ASPMO 1962 were framed by the Provincial Government of the erstwhile West Pakistan which were titled the **Allopathic System (Prevention of Mis-use) (West Pakistan) Rules, 1968** [hereinafter '**the ASPM Rules, 1968**'].

Rule 3 of the ASPM Rules, 1968 provided:

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<sup>3</sup> Ibid

“(1) Any person, other than a medical practitioner, desirous of prescribing any antibiotic or dangerous drug shall make an application in Form I to Government through the District Health Officer, Civil Surgeon or Agency Surgeon as the case may be, for the area where the applicant ordinarily resides, for the grant of a permit.”

(2) If the application is in proper form and the applicant appears to be a person eligible for the grant of a permit to prescribe antibiotic or dangerous drugs, the officer receiving the application shall forward the same to the appropriate Regional Screening Board constituted under rule 5.”

The Regional Screening Board, after scrutinizing the applications and interviewing the applicants was required to submit a report to the Provincial Screening Board (see Rule 6), and the latter Board was then required to consider the applications and reports and to advise the Government as to which of the applicants fulfils the conditions for a grant of a permit (see Rule 7).

Rule 4 of the ASPM Rules, 1968 listed those ‘other persons’ who were not registered medical practitioners but were nevertheless eligible for the grant of a permit under Rule 3, and such persons included a Health Assistant and a Dispenser in the following terms:

“4. Eligibility.- No person shall be eligible for the grant of a permit unless -

- (b) he has studied for a period of not less than one and a half years, a course of medical education in any institution which, in the opinion of the Provincial Screening Board had, at the time when the applicant studied therein, the facilities laid down in Schedule “A” and has been declared successful in the final examination conducted by that institution and has not less than five years of practice in Allopathic System of medicine; or
- (d) he is a Health Assistant duly registered with the West Pakistan State Medical Faculty and has not less than five years of practice in Allopathic System of medicine; or
- (e) he is a dispenser duly registered with the West Pakistan Medical Faculty and has not less than seven years of practice in Allopathic System of medicine”.

Rule 9 of the ASPM Rules, 1968 provided:

“(1) A person, who is authorized to prescribe antibiotics and dangerous drugs shall be granted a permit in Form 2 bearing the signature of an officer authorized by Government in this behalf.

(2) A person to whom a permit has been granted under this rule shall be entitled to prescribe any antibiotic or dangerous drug specified in Schedule “B”.

Rule 13 of the ASPM Rules, 1968 required :

“13. Mode of keeping the permit. - (1) The permit shall be displayed in the premises where normally the person holding the permit is engaged in practice and photostat copy of duplicate permit shall be carried by him while going out to visit patients at their residences.”

15. A perusal of the ASPMO 1962 and ASPM Rules, 1968 shows that those did envisage the practice of allopathy by a person other than a medical practitioner registered under the PMDC Ordinance, 1962; however such practice was regulated by mandating that the prescribing of antibiotics and dangerous drugs would be subject to a permit granted by the Provincial Government. A Health Assistant and a Dispenser with the requisite registration and experience were amongst persons eligible to apply for the said permit. Furthermore, sub-section (1) of Section 31 of the **Pharmacy Act, 1967** that prohibited a person to practice as a pharmacist unless he was a registered pharmacist, did not, per sub-section (4) of Section 31 of the said Act, apply to a person authorized to prescribe antibiotic and dangerous drugs under the ASPMO 1962 “*who dispenses medicine to his own patients or serves his own prescriptions.....*”. However, it is to be kept in mind that none of the Petitioners before us claim to have ever been granted permits under the ASPM Rules, 1968.

16. **The Pakistan Nursing Council Act, 1973 [the PNC Act]** was enacted “to amend and consolidate the laws relating to registration and training of nurses, midwives and health visitors and to provide for matters ancillary thereto”.

Section 3 of the PNC Act provided for the establishment of the Pakistan Nursing Council (PNC). Section 11 of the PNC Act

provided for Provincial Nursing Examination Boards pursuant to which the Sindh Nurses Examination Board conducts examinations and awards diplomas to nurses, midwives and health visitors. Under Sections 15 and 20 of the PNC Act, a person possessing a qualification recognized by the PNC is entitled to be registered with the PNC, and in the absence of such registration, Section 23 prohibits a nurse, midwife and health visitor from being employed as follows:

“23. Prohibition of Employment of Unregistered Nurses, etc.:

(1) No hospital, asylum, infirmary, dispensary or lying in hospital maintained or aided by the Federal Government or a Provincial Government or a local authority shall employ therein any person as nurse, midwife, health visitor or nursing auxiliary unless such person-

- a) is registered in the register; or
- b) is a trainee at an institution recognized for the purpose by the Council and is certified by the head of that Institution to have already received sufficient training to be able to perform his duties safely and satisfactorily.”

Section 24(c) of the PNC Act provides for punishment if a person “practices as a nurse, midwife, health visitor or nursing auxiliary in contravention of any Regulations made under Section 26.” The latter Section empowers the PNC, with the previous sanction of the Federal Government, to make Regulations inter alia for “(j) regulating the practice of nurses, midwives, health visitors and nursing auxiliaries and for prohibiting persons not registered in the register from so practicing.”

From Section 23 of the PNC Act it appears that the prohibition therein was on the employment of nurses, midwives and health visitors in an establishment maintained or aided by the Government or local authority unless they (nurses, midwives and health visitors) were registered with the PNC. Though the PNC Act by itself did not prohibit freelance or private practice by nurses, midwives and health visitors (in that capacity) if they are not registered with the PNC, the Act bestowed that power on the PNC to exercise by way of Regulations in that, Section 24 of the PNC Act provides for punishment only if a person practices as a nurse, midwife or health

visitor in contravention of Regulations made under Section 26; and Section 26 empowers the PNC, with the previous sanction of the Federal Government, to make Regulations for “regulating the practice of nurses, midwives, health visitors and nursing auxiliaries and for prohibiting persons not registered in the register from so practicing.” However, we are not informed whether any Regulations have been framed under Section 26 of the PNC Act to regulate private practice by nurses, midwives and health visitors.

17. **The Medical and Dental Degrees Ordinance, 1982** was promulgated to further regulate the grant of medical qualifications as follows:

“3. Right to confer degrees, etc. – The right of conferring, granting or issuing in Pakistan degrees, diplomas, licenses, certificates, or other documents stating or implying that the holder, grantee or recipient thereof is qualified to practice scientific Medical and Dental System shall be exercisable only by the authorities specified in the Schedule and by such other authority as the Federal Government or a Provincial Government may, by notification in the official Gazette, and subject to such conditions as it thinks fit to impose, authorize in this behalf.”

Under Section 2 of the said Ordinance, “scientific Medical and Dental System” included the scientific methods of Allopathic Medicine. The Schedule referred to in Section 3 recognized only the following authorities to grant medical qualifications:

- I. Every University in Pakistan established by an Act of the Federal or Provincial Legislature.
- II. College of Physicians and Surgeons of Pakistan.”

While the certificates on which the Petitioners rely to practice allopathy, do not appear to have been issued by an authority recognized under the Medical and Degrees Ordinance, 1982, in any case the said certificates do not state nor imply that the holder is qualified to practice scientific Medical and Dental System. While the diploma issued to nurses, midwives and health visitors by the Sindh Nurses Examination Board is a valid certification of their qualification, it is not of itself a permit to practice scientific Medical



and Dental System. As regards the certificate issued by the Sindh Medical Faculty to Health Technicians and Dispensers, that certificate categorically states that the holder is not authorized to practice Western Medicine.

18. The PMDC Ordinance, 1962 was substantially amended by the **Medical and Dental Council (Amendment) Act, 2012** *inter alia* to add and substitute respectively the following provisions:

“28A. Penalty of practicing without registration. - (1) No person, other than a registered medical or dental practitioner, shall practice medicine or dentistry.

(2) Any person who acts in contravention of the provisions of subsection (1) shall be punishable with imprisonment for a term which may extend to two years but shall not be less than six months or with fine which may extend to two hundred thousand rupees but shall not be less than one hundred thousand rupees or with both.

29. Privileges of registered medical or dental practitioners. - (1) A registered medical practitioner and dentist shall have the following privileges, namely:--

(a) valid registration shall be considered as a license to practice medicine and dentistry in Pakistan and of a level mentioned the Council in the registration certificate;

(b) a registered medical practitioner or a registered dentist having valid full registration shall be competent to practice medicine or dentistry and prescribe allopathic medicine and perform any surgical or interventional procedure on any patient;

(c) .....

(d) to hold any medical or dental or relevant administrative appointment in any medical or dental institution or setup or hospitals or clinic or related health institution;

(e) to hold a commission as a medical or dental officer in the Armed Forces; and

(f) .....

(2) Notwithstanding anything to the contrary contained in any other law for the time being in force, no medical certificate or prescription or advice shall be considered valid unless obtained from a medical or dental practitioner having valid registration.

(3) No person shall be entitled to recover any charge in any court of law for any medical or surgical advice or attendance or for the performance of any operation or intervention or for any medicine

prescribed or supplied unless he can prove upon the trial that he is a registered medical or dental practitioner having valid registration.”

36A. Over-riding provision.—The provisions of this Ordinance shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.....”

19. The change brought about by the Medical and Dental Council (Amendment) Act, 2012 to the PMDC Ordinance, 1962 was that no person, other than a medical or dental practitioner registered under the PMDC Ordinance, 1962, was permitted to practice medicine or dentistry, and the contravention of such provision was made an offence (Section 28A); a medical practitioner with a valid registration was licensed to practice medicine in Pakistan and to prescribe allopathic medicine; and a prescription or medical advice obtained from a person other than a registered medical practitioner was declared invalid (Section 29). Therefore, the provisions of the ASPMO 1962 and the ASPM Rules, 1968, to the extent those envisaged the practice of allopathy (subject to permits) by persons other than registered medical practitioners, became inconsistent with Sections 28A and 29 of the PMDC Ordinance, 1962 as amended. In these circumstances, since the provisions of Sections 28A and 29 of the PMDC Ordinance, 1962 (as amended) had an overriding effect ‘notwithstanding anything to the contrary contained in any other law for the time being in force’<sup>4</sup> (see Sections 29(2) and Section 36A), these came to prevail over and override the earlier provisions of the ASPMO 1962 and the ASPM Rules, 1968 to the extent those earlier provisions envisaged the practice of allopathy by persons other than registered medical practitioners.

20. The Pakistan Medical and Dental Council Ordinance, 2019 [the PMDC Ordinance, 2019] came into effect on 08-01-2019. By Section 49 of the PMDC Ordinance, 2019 the previous PMDC

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<sup>4</sup> A non-obstante clause, which indicates the legislative intent to avoid the operation of conflicting provisions. See *Syed Mushahid Shah v. Federal Investigation Agency* (2017 SCMR 1218).

Ordinance, 1962 has been repealed. We have not so far come across a resolution passed under Article 89 of the Constitution of Pakistan disapproving the PMDC Ordinance, 2019, and since the said Ordinance of 2019 has not expired, it still holds the field. The provisions of the said Ordinance relevant to this discussion are as follows:

“28. Privileges of registered medical or dental practitioners. – (1) A registered medical practitioner and dentist shall have the following privileges, namely:--

- (a) valid registration shall be considered as a license to practice medicine and dentistry in Pakistan and of a level mentioned by the Council in the registration certificate;
- (b) competent to practice medicine or dentistry and prescribe allopathic medicine and perform any surgical or interventional procedure on any patient, commensurating with their training and experience;
- (c) to hold any medical or dental or relevant administrative appointment in any medical or dental institution or setup or hospitals or clinic or related health institution; and
- (d) to hold a commission as a medical or dental officer in the Armed Forces; and

(2) Notwithstanding anything to the contrary contained in any other law for the time being in force, no medical certificate or prescription or medical or dental advice shall be considered valid unless obtained from a medical or dental practitioner having valid registration.

(3) No person shall be entitled to recover any charge in any court of law for any medical dental or surgical advice or attendance or for the performance of any operation or intervention or for any medicine prescribed or supplied unless he is a registered medical or dental practitioner having valid registration with the Council.

48. Over-riding provision. – The provisions of this Ordinance shall have affect notwithstanding anything to the contrary contained in any other law for the time being in force.....”

21. The PMDC Ordinance, 2019 does not appear to contain a provision like Section 28A of the repealed PMDC Ordinance, 1962 which had expressly restricted the practice of medicine to a registered medical practitioner. However, like Section 29 of the repealed PMDC Ordinance, 1962, Section 28 of the PMDC Ordinance, 2019 still declares invalid a prescription or medical

advice unless obtained from a registered medical practitioner, thereby being inconsistent, in the very least, with the scheme of granting permits to persons other than a registered medical practitioner to prescribe antibiotics and dangerous drugs under Section 6 of the ASPMO 1962 and the ASPM Rules, 1968. In such circumstances, Section 29 of the PMDC Ordinance, 2019, which has an overriding effect 'notwithstanding anything to the contrary contained in any other law for the time being in force' (Section 48), still prevails over and overrides Section 6 of the ASPMO 1962 and the ASPM Rules, 1968 to the extent those earlier provisions envisage the grant of permits to persons other than a registered medical practitioner to prescribe antibiotics and dangerous drugs.

22. The upshot of the above discussion is that the ASPMO 1962 and the ASPM Rules, 1968 no longer provide any of the Petitioners the legal basis for continuing the practice of allopathy. Rather, the Petitioners are presently confronted by the Sindh Healthcare Commission Act, 2013.

23. **The Sindh Healthcare Commission Act, 2013** [the SHCC Act], which came into effect on 20-03-2014, was enacted "to make provision for the improvement, access, equity, and quality of healthcare service, to ban quackery in all its forms and manifestations and to provide for ancillary matters." Section 3 of the SHCC Act provided for the establishment of the Sindh Healthcare Commission [SHCC]. Vide notification published in the Sindh Gazette on 09-11-2017, the Commission framed '**The Commission Regulations, 2017 of the Sindh Healthcare Commission**' [SHCC Regulations].

24. The following provisions of the SHCC Act and SHCC Regulations highlight the purpose and functions of the SHCC.

“4.(1) 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.

(2) Without prejudice to the generality of the provisions of subsection (1), the Commission shall –

- (a) maintain register of all healthcare service providers;
- (b) grant, revoke and renew licenses to persons involved in the provision of the healthcare services and to vary terms and conditions and purposes of the licenses;
- (e) enquire and investigate into maladministration, malpractice and failures in the provision of healthcare services and issue consequential advice and orders;
- (o) issue regulations, guidelines, instructions and directives to persons involved in the provision of healthcare services;
- (q) take necessary steps to put ban on quackery;

(5) The Commission shall conduct third party evaluation through independent performance/ clinical audit of healthcare establishments in the private sector.

(8) The Commission shall take measures and devise a strategy to counter sale of drugs without prescription.”

Under Section 2 of the SHCC Act:

“(xv) “healthcare establishment” means a hospital, diagnostic centre, medical clinics, nursing home, maternity home, dental clinic, homeopathic clinic, Tibb clinic, acupuncture, physiotherapy clinic, pharmacy or any system of the treatment

- (a) wholly or partly used for providing healthcare services; and
- (b) declared by Government, by order published in the official Gazette, as a healthcare establishment;

(xvi) “healthcare services” means services provided for diagnosis, treatment or care of persons suffering from any physical or mental disease, injury or disability including procedures that are similar to forms of medical, dental or surgical care but are not provided in connection with a medical condition and includes any other service notified by Government;

(xvii) “healthcare service provider” means an owner, manager or incharge of a healthcare establishment and includes a person registered by the Pakistan Medical Dental Council, National Council for Tibb and Homeopathy or Nursing Council, pharmacy service provider;

(xxix) “quack” means a pretender providing health services without having registration of Pakistan Medical Dental Council, Council for Tibb and Homeopathy and Nursing Council;”

The SHCC Act also introduced a registration and licensing regime as follows and to the following effect:

“13.(1) A healthcare service provider shall not provide healthcare services without being registered under this Act.

(2) An existing healthcare service provider shall, within a period of ninety days of the coming into force of this Act, apply for registration in accordance with this Act.

(3) A person seeking to be registered as a healthcare service provider shall make an application to the Commission in the prescribed form and accompanied by such particulars, documents as the Commission may prescribe.

(4) If a person fulfills the requirements of this section, the Commission shall issue a certificate of registration to the person within thirty days otherwise the applicant shall be considered as having provisionally registered for ninety days.

(5) The Commission may impose a fine which may extend to five hundred thousand rupees upon a healthcare service provider or any other person who practices without registration.

14. (1) A healthcare establishment shall not be used except in accordance with the terms and conditions of a license issued under this Act.

(2) If a healthcare establishment is not licensed under this Act or is used otherwise, the Commission may impose a fine, which may extend to five hundred thousand rupees upon the healthcare service provider.

15. (1) Within thirty days of the issuance of the certificate of registration, or such other time as may be fixed by Government, the healthcare service provider shall make an application for a license to the Commission in the prescribed form which shall be accompanied by such particulars, documents and fees as the Commission shall prescribe schedule.

17. (1) Every license of a healthcare establishment shall specify the kind of healthcare establishment for which it is issued and the purposes thereof.

(2) A licensed healthcare establishment shall not be used for any purpose other than the purpose in respect of which the license is issued and purposes incidental thereto.

(3) The Commission shall maintain a register of all licensed healthcare establishments and may enter in the register any

necessary details or other particulars of the healthcare establishment.”

Sections 20 and 21 of the SHCC Act provide for the development and implementation of standards for healthcare services, and Section 22 provides for and regulates inspections under the Act.

“35. All executive authorities and law enforcement agencies of Government shall act in aid of the Commission.

#### Regulation 13. Unregistered Healthcare Service Provider

(1) The Commission shall issue a notice to the unregistered Healthcare Service Provider directing him to get himself registered within thirty days, failing which coercive measures including imposition of fine and closing down/sealing the Healthcare establishment shall be taken.

(2) In case of no response within 30 days of the communication, the Commission may impose a fine which may extend to five hundred thousand rupees upon a healthcare service provider or any other person who practices without registration U/S 13(5) and the Commission may close down/seal the healthcare establishment till the defaulter fulfils all the requirements for registration and may refer the case to the competent forum for further proceedings.

#### Regulation 35. Determination of “Quack”

In pursuance to Section 2 (xxix) of Sindh Health Care Commission Act 2013, a Healthcare Service Provider shall be deemed as “quack” if he/she is;

- (i) Duly qualified but not validly registered with Pakistan Medical & Dental Council, Council for Tibb and Homeopathy and Nursing Council;
- (ii) Neither qualified nor registered with the relevant council
- (iii) Duly qualified and validly registered but providing services beyond the provisions of his registration.
- (iv) Neither duly qualified nor validly registered but practicing under the name of a qualified and validly registered medical practitioner

#### Regulation 36. Anti-Quackery Directorate

The Commission shall establish Anti-Quackery Directorate which shall be responsible to perform all such functions and take such necessary steps as are required to put ban on quackery in the Province of Sindh in all its forms and manifestations.”

Regulation 39 provides for the powers / functions of Anti-Quackery team, which includes the power to inspect any healthcare establishment and to make seizures and to seal/close down the premises where Quackery is being practiced in any form, and to

initiate legal action including lodgment of case against the defaulters.

The SHCC Act also provides remedies to persons aggrieved by acts taken under the SHCC Act as follows:

“30. 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.

31. (1) A person who is aggrieved by the –

- (a) refusal of the Commission to issue or renew a license;
- (c) order of closing down of a healthcare establishment or making improvements in the healthcare establishment;
- (e) imposition of fine by the Commission,  
may, within thirty days from the date of communication of the order of the Commission, prefer an appeal in writing to the District and Sessions Judge.

Regulation 40 provides a healthcare service provider a remedy against any action of the Anti-Quackery team by way of a representation to the Chairperson Board of Commissioners SHCC who will refer the same to the Complaint Management Committee of the Board under Section 9 (n) of the Act.

25. As distinguished from the PMDC Ordinance, the pith and substance of which is the regulation of basic and higher qualifications in medicine and dentistry, the pith and substance of the SHCC Act is the regulation of healthcare establishments with the aim of improving healthcare services to the public and eliminating the threat to public health posed by quackery.

26. After the SHCC Act, the practice of allopathy and the practice of first-aid by the Petitioners (Health Technicians, Dispensers, Nurses, Midwives and Health Visitors) squarely falls within the meaning of “healthcare services” and “healthcare service provider” defined in Section 2(xvi) and (xvii) of the SHCC Act. Health centers,



dispensaries, clinics or any like premises where the Petitioners claim to be providing services to the general public, would also fall within the meaning of a “healthcare establishment” defined in Section 2(xv) of the SHCC Act. In other words, before the Petitioners can claim any right to the private practice of allopathy or first-aid in Sindh, or to operate a healthcare establishment, they have to demonstrate that notwithstanding their qualification under any other law, they are also in compliance of the SHCC Act. Section 13(1) of the SHCC Act prohibits a healthcare service provider from providing any healthcare service without being registered under the Act; and Section 14(1) prohibits the use of a healthcare establishment except in accordance with a license granted under the SHCC Act after an inspection. The contravention of the said provisions entails both penal and coercive consequences, including the closing down/sealing of the healthcare establishment (Regulation 13 of the SHCC Regulations).

27. Section 13 of the SHCC Act further requires that a person seeking to be registered as a healthcare service provider shall make an application to the SHCC and if such person fulfills the requirements of the SHCC Act, the SHCC shall issue a certificate of registration, and thereafter the healthcare service provider can make an application under Section 14 of the SHCC Act for a license to use a healthcare establishment. A remedy of an appeal is then provided under Section 31 of the SHCC Act against certain orders passed by the SHCC. However, none of the Petitioners have so far even applied to the SHCC for the requisite registration. Per the learned AAG that is so because the Petitioners are ‘quacks’ within the meaning of the SHCC Act. But we are not inclined to make any such observation in these proceedings inasmuch as, in our view, that is a determination which in the first instance has to be made by the SHCC as nothing stops the Petitioners from making an application to the SHCC under Section 13 of the SHCC Act.

28. The effect of the SHCC Act is that even if the Petitioners are assumed to qualified (as distinct from being authorized) to practice allopathy and/or first-aid, they cannot continue to do so until their healthcare establishments are licensed under Section 14 of the SHCC Act, and consequently no writ can issue to enable the Petitioners to carry on such practice.

29. This brings us to the last leg of the submission of the Petitioners of C.P. No.D-858/2016 which raises the question of the effect of the Sindh Allopathic System (Prevention of Unauthorized Use) Act, 2014 [Sindh Act No.XVIII of 2015]. The said Act came into effect on 10-04-2015 “to prevent unauthorized use of Allopathic System of Medicine and to provide for matters connected therewith”. The provisions of the Sindh Act No.XVIII of 2015 are more or less identical to the provisions of the ASPMO 1962, and like the ASPMO 1962, Section 6 of the Sindh Act No.XVIII of 2015 also provides as follows:

“6. No person other than a registered medical practitioner or a person authorized in this behalf by the Government shall prescribe any antibiotic or dangerous drug specified in the rules made under this Act.”

30. Per Mr. Faizan Memon Advocate, so also the learned AAG, the aforesaid Sindh Act No. XVIII of 2015 was enacted in furtherance of the devolution of the subject matter to the Province under the Eighteenth Amendment to the Constitution. However, we find that the matter of the Sindh Act No. XVIII of 2015 is not as simply put by the learned counsel. Prior to the Eighteenth Amendment to the Constitution of Pakistan, the subject of “legal, medical and other professions” (Entry No.43) was in the Concurrent Legislative List. But, while abolishing the Concurrent Legislative List, the Eighteenth Amendment brought the subject of “legal, medical and other professions” within the exclusive legislative domain of the Parliament by inserting Entry No.11 in Part II of the Federal Legislative List. Therefore, the questions that arise are whether the

Sindh Allopathic System (Prevention of Unauthorized Use) Act, 2014 is legislation in the field of “medical profession” ? and if so, whether it is competent legislation by the Province when that field is within the exclusive legislative domain of the Parliament ? This point was not raised and hence not addressed by learned counsel during the hearing, therefore we do not embark upon an examination of the said questions especially when the Petitioners at present are not even licensed under the SHCC Act to avail any benefit that may or may not accrue to them under the Sindh Allopathic System (Prevention of Unauthorized Use) Act, 2014.

31. Having concluded that no writ can presently issue to enable the Petitioners to carry on the practice of allopathy and/or first-aid, and that the prayer of the Petitioners for a direction to frame Rules under the Sindh Allopathic System (Prevention of Unauthorized Use) Act, 2014 is entirely premature, these petitions are dismissed along with pending applications.

**JUDGE**

**JUDGE**

Karachi

Dated: \_\_\_\_-02-2019