IN THE HIGH COURT OF SINDH, AT KARACHI

C. P. No. D-2753 of 2021

Present:
Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Petitioner	:	Dr. Muhammad Asif Osawala through Kashif Hanif, Advocate.
Respondent No.1	:	Mst. Qamar-un-Nisa Hakro, through Rajesh Kumar Khagaija, Advocate.
Respondent No.2	:	The State through Abdul Jaleel Zubedi, Assistant Advocate General, Sindh.
Date of hearing	:	27.09.2021.

ORDER

YOUSUF ALI SAYEED, J. - The captioned Petition emanates from a complaint under the Sindh Consumer Protection Act, 2014 (the "**SCPA**"), pending before the Court of the Civil Judge & Judicial Magistrate, Karachi, South, notified as the Consumer Court in that district (the "**Consumer Court**"). It is unnecessary to burden this judgment with the details of the underlying claim; suffice it to say that the matter entailed an allegation of medical negligence advanced by the Respondent No.1 against the Petitioner and the matter at hand arises from the dismissal of certain Applications[1] filed before the lower forum seeking rejection/dismissal of the Complaint on grounds of limitation and a lack of jurisdiction.

[1] The Applications of the Petitioner under S. 36 read with S 29 (4) of the SCPA 2014 and Order VII Rule 11 CPC, as well as under S. 29 of the SHCA 2013 were dismissed by the Consumer Court vide an Order dated 11.03.2021.

2. At the outset, the Petition was met with an objection as to its maintainability in view of Section 34 of the SCPA, reflecting a legislative intent to streamline proceedings under that statute by providing an appeal against only a final order of the Consumer Court, as follows:

> "34. Any person aggrieved by any final order of the Consumer Court may file an appeal in the Sindh High Court within 30 days of such order."

3. Addressing the objection, learned counsel for the Petitioner elected to confine the scope of the Petition to eliciting a determination as to the jurisdiction of the Consumer Court, and contended that a writ could be issued for correcting an error made in that respect notwithstanding Section 34 of the SCPA. The point advanced was that a claim founded on an allegation of medical negligence could not be determined in terms of the SCPA, as per learned counsel, the subject of medical malpractice and/or negligence was to be addressed solely in terms of the Sindh Healthcare Commission Act, 2013 (the "**SHCA**"), which was a special law that would command primacy. Hence, any claim sought to be agitated on that score would have to be initiated before the Sindh Healthcare Commission (the "**Commission**") in its capacity as the Provincial regulatory authority in terms of that statute, for an enquiry and authoritative finding in that regard. It was contended that the Consumer Court had failed to appreciate that its jurisdiction was thus circumscribed and had erred in proceeding with the Complaint. Alternatively, it was argued even if a claim founded on medical malpractice could be agitated under the SCPA, it had to be preceded by a decision to that effect rendered by the Commission following an enquiry/investigation in terms of the SHCA.

4. Conversely, learned counsel for the Respondent No.1 (i.e. the Complainant) strongly refuted the contention that the Consumer Court lacked jurisdiction to entertain the Complaint, and argued that the forum was fully competent in that respect.

5. In support of their contentions for and against the conflicting propositions, learned counsel invited attention to certain substantive provisions of the SCHA and SCPA read in light of the relevant clauses of the definition sections of the respective enactments, being as follows:-

The SHCA - S.2 (xvi) & (xvii), S. 4(1), (2) & (6), and S. 29

2. In this Act, unless there is anything repugnant in the subject or context-

(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**;

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 sub-section (1), the Commission shall-
....
....

(c) monitor and regulate the quality and standards of the healthcare services developed by Government;

....

(d) enquire and investigate into maladministration, malpractice and failures in the provision of healthcare services and issue consequential advice and orders;

(6) Notwithstanding anything contained in any other law, the Commission may –

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

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

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

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

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

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

The SCPA – S. 2(e) & (q), S. 13 and S.14

2. In this Act, unless there is anything repugnant in the subject or context-

(e) "**Consumer**" means a person or entity who-

(i) buys or obtain on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or

(ii) hires any service for a consideration and includes any beneficiary of such services,

Explanation: For the purpose of sub-clause (i) "Commercial purpose" does not include use by a consumer of products bought and used by him only for the purpose of his livelihood as a self employed person.

(q) "**Services**" includes the provision of any kind of facilities which includes all services such as communication etc. or advice or assistance such as provision of medical, legal or engineering services but does not include-

(i) the rendering of any service under a contract service;

(ii) a service, the essence of which is to deliver judgment by a Court of law or Arbitrator;

3. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

13. A provider of services shall be liable to a consumer for damages proximately caused by the provision of service that have caused damage.

14. (1) Where the standard of provision of a service is regulated by a special law, provincial or federal standard of services shall be deemed to be the standard laid down by such special law.

(2) Where the standard of a service has not been provided in law or by, the professional or trade body concerned, the standard shall be that which at the time of the provision of the service, a consumer could reasonably expect to obtain at that time in Pakistan.

6. Learned counsel for the Petitioner placed particular emphasis on Section 29 of the SHCA and argued that the same served to oust the jurisdiction of the Consumer Court. Furthermore, in support of the alternative plea advanced, it was contended that in the matter of tortious liability, professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control.

7. It was submitted that in devising a rational approach to professional liability, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. Attention was drawn to Section 14 of the SCPA and it was contended that the Commission was the competent forum for determining the applicable standard in medical matters as well as any shortfall that may have arisen in the rendition of the relevant service in a particular case. Reliance was placed on the judgment of a Divisional Bench of the Lahore High Court in the case reported as *Dr. Riaz Qadeer Khan vs. Presiding Officer PLD 2019 Lahore 429*, where it was held that the Consumer Court constituted under the Punjab Consumer Protection Act, 2005, was not the proper forum for adjudicating matters relating to medical maladministration/malpractice falling within the competence of the Punjab Healthcare Commission under the Punjab Healthcare Commission Act, 2010. It was thus contended that the Consumer Court lacked jurisdiction to adjudicate upon a claim of medical malpractice, or at least could not proceed until its jurisdiction was triggered through a finding of the Commission.

8. Contrarily, it was argued on behalf of the Respondent that the definition of the term 'services' for purpose of the SCPA explicitly included the provision of medical services and the object of Section 3 thereof was to provide a forum for redressal of the grievance of a consumer in a manner that was not contemplated in terms of the SHCA in as much as the power and jurisdiction of the Commission constituted thereunder did not extend to the grant of compensation/damages. As such, the question of the Consumer Court's jurisdiction being ousted did not arise.

9. A perusal of the preambles of the respective enactments reflects that they stand on different planes, to cover different subjects, in as much as the SHCA was apparently promulgated "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", whereas the raison d'être of the SCPA is "to provide for protection and promotion of the rights and interests of the consumers, speedy redress of consumer complaints and for matters connected therewith".

10. The definition of 'service' as per Section 2(q) of the SCPA can be split into different parts. The first and inclusionary part defines a service to generally include the provision of any kind of facilities, then specifically envisaging the provision of advice or assistance, such as the provision of medical, legal or engineering services, whereas the exclusionary part omits the rendering of any service under a contract service or a service, the essence of which is to deliver judgment by a Court of law or Arbitrator. While it is not disputed that the Petitioner is a healthcare service provider and provided healthcare services to the Respondent No.1 as per Sections 2 (xvi) and (xvii) of the SHCA, at the same time it is manifest from a plain reading of Sections 2(c) and (q) of the SCPA that such healthcare services also clearly fall within the broader genus of 'services' and were apparently availed by the Respondent No.1 in the capacity of a 'consumer' as per the case of the Respondent No.1 before the Consumer Court.

11. What thus falls to be determined from the rival contentions advanced at the bar is whether the SHCA nonetheless overrides the SCPA so as to divest the Consumer Court of jurisdiction to redress the grievance of a consumer who complains of a 'deficiency in service' provided by a medical practitioner, or alternatively, whether such proceedings before the Consumer Court necessarily have to be preceded by a finding of the Commission against the concerned practitioner, and, if so does a writ lies to prevent that forum from adjudicating upon a matter in either case.

12. It is well settled that exclusion of jurisdiction of a Court or a Tribunal cannot be readily inferred. Exclusion of jurisdiction should be explicit. However, in a given case, jurisdiction may be excluded by necessary implication if there are clear unambiguous indicia or determining parameters in the statute governing the establishment, duties, functions and powers of the Court or Tribunal. As such, a writ of prohibition cannot be granted except in a clear case of want of jurisdiction in the Court whose action is sought to be prohibited and to warrant issue of Writ of Prohibition a petitioner must clearly show that an inferior Court is set to proceed in a matter over which it has no jurisdiction.

13. As per Section 3 of the SCPA (reproduced above), the provisions of that statute are in addition to and not in derogation to any other provisions of any other law for the time being in force. Having due regard to the scheme of the SCPA and purpose sought to be achieved to protect the interest of consumers, the provisions thereof are to be interpreted broadly, positively and purposefully in that context so as to give meaning and effect to the

jurisdiction, particularly when Section 3 thereof seeks to provide a remedy in addition to other remedies provided under other statutes, unless there is a clear bar.

14. Looking to the contentions advanced on behalf of the Petitioner, while it may appear at first blush that a complaint against a medical practitioner before a Consumer Court ought to be stayed in view of Section 29 of the SHCA for the words "not in derogation of the provisions of any other law for the time being in force", in Section 3 of the SCPA, to be given proper meaning and effect, on proper introspection it transpires that such a contention is not well founded.

15. It merits consideration in that respect that the SHCA and SCPA are both products of the same legislature, with the former having been promulgated prior in time. As such, the Provincial Assembly is to be regarded as having been cognizant of the provisions of the SHCA at the time of enacting the later statute and defining the term 'services' so as to specifically bring the provision of medical services within its fold so as to thereby provide an additional remedy.

16. Furthermore, it falls to be considered that as per Section 4 of the SHCA, the powers of the Commission do not extend to awarding compensation or damages and at best extends to the imposition of a fine, that too subject to the limits prescribed through Section 28 thereof. Such an assessment is fortified by the wording of Section 31(1) of the SHCA, which sets out the scope for an appeal against an order/decision of the Commission, as follows:

> "31. (1) A person who is aggrieved by the –
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> (a) refusal of the Commission to issue or renew a license;
>
> (b) decision of the Commission to suspend or revoke a license;
>
> (c) order of closing down of a healthcare establishment or making improvements in the healthcare establishment;
>
> (d) order relating to equipments, apparatus, appliances, or other things at a healthcare establishment; or
>
> (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."
>
> [Emphasis supplied]

17. In our view, an ouster of jurisdiction in terms of such a provision in a special law can at best operate to the extent of a subject co-extensive to the powers of the forum under that enactment, and the scope of Section 29 of the SHCA has to be construed accordingly with reference to the powers of the Commission.

18. As for the Petitioner's reliance on the judgment in *Dr. Riaz's case* (Supra), suffice it to say that the same is not binding on us and we are constrained to say with utmost respect that in view of the foregoing discussion we find ourselves unable to concur with the assessment in that matter. Even otherwise, the sequence of the parallel legislation enacted in the Punjab is the mirror image of that in this Province, with the consumer protection law having preceded that constituting the healthcare commission.

19. Turning to the aspect of whether the Consumer Court is the appropriate forum to determine whether medical malpractice or negligence has occurred, it is well accepted that for a claim for medical/clinical negligence to be established, a medical practitioner has to be found to have breached a duty of care to a patient, who in turn suffers injury as a result of that breach. Demonstrating that a doctor has breached the duty of care is the first major hurdle in any negligence case but this is not always clear cut. There is certainly scope for genuine differences of opinion when it comes to diagnosis and treatment. The Petitioner's contention is that the Consumer Court lacks the necessary expertise and it is the Commission that is to make an assessment in that regard in view of the standards envisaged under the SHCA, hence the for the jurisdiction of the Consumer Court to be triggered/attracted there has to be a prior determination of culpability on the part of the practitioner by that quarter. Section 14 of the SCPA was cited to support the point. Needless to say, liability claims for defective services, as envisaged under Section 13 of the SCPA, would similarly entail a breach of a duty to be determined with reference to the parameters laid down in Section 14, where the quantum of damages, if any, would be circumscribed by the restriction imposed in terms of Section 15 thereof. However, that is not to say that Section 14 requires that a prior determination to that effect be made by the Commission for the Consumer Court to be able to proceed on a medical negligence claim. Indeed, Section 14 merely restates a well enshrined common law principle laid down in *Bolam v Friern Hospital Management Company [1957] 2 All ER 118*, where in his advice to the jury Mr. Justice McNair stated:

> "Where some special skill is exercised, the test for negligence is not the test of the man on the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising or professing to have that special skill."

20. The *Bolam test* as it came to be called has over the years been modified by a number of legal cases – perhaps most notably by that of *Bolitho v City and Hackney Health Authority* (1997), where the House of Lords decision made an important clarification when faced with two conflicting expert views, and found both the expert evidence presented by the claimant and defendant to be reasonable, but the Defendant's evidence to be preferred. An important element of the Judgment is Lord Browne-Wilkinson's comments on expert evidence that can no longer be supported or which, although supported, is not logical.

> "In cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence… In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion… But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."

21. The unfortunate case of *Bolitho (Supra)* involved a two-year old child who was admitted to hospital with croup. On the ward the child had two episodes in which he went pale and had trouble breathing. A senior registrar was notified on both occasions but did not attend. Shortly after the second episode the boy stopped breathing and suffered cardiac arrest leading to severe brain damage and later death. His mother later sued the health

authority for clinical negligence claiming that had her son been intubated after the second episode he would have survived. The health authority admitted breach of duty in the Registrar's failure to attend the child, but it disputed the claim that this breach led to Patrick's death as the Registrar would not have intubated the boy. It was claimed that this decision would have been consistent with a respectable body of medical opinion and thus supported by the *Bolam test*. In the case, five medical experts stated that any competent doctor would have intubated and three held the opposite view but the judge was most impressed by the view of one of the dissenting experts who suggested there was only a small risk of total respiratory failure and this did not justify the invasive procedure of intubation. In the end the House of Lords ruled that:

> "The court should not accept a defence argument as being 'reasonable', 'respectable' or 'responsible' without first assessing whether such opinion is susceptible to logical analysis."

As such, merely being a minority view of accepted medical practice does not necessarily mean an opinion is "illogical" or "irrational" and the final judgement as to whether there has been professional negligence must lie with the court and not the medical profession.

22. In view of the foregoing, the Petition is found to be devoid of merit and stands dismissed accordingly.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: