

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD**

C.P No. D-3022 of 2022

**BEFORE**

*Mr. Justice Muhammad Junaid Ghaffar*

*Mr. Justice Adnan-ul-Karim Memon*

Petitioners : Eric Ghori & others through Abdul Aziz,  
Advocate

Respondent No.1 : Learned Consumer Court & others  
through Rafique Ahmed Dahri, Asst. A.G Sindh.

Respondent No.2 : None present.

Respondent No.3 : Mst. Mehnaz through Manzoor Hussain  
Subhopoto, Advocate

Date of hearing : 16.05.2023  
Date of Order: : 16.05.2023

**ORDER**

**Muhammad Junaid Ghaffar, J:-** Through this petition, the petitioners have impugned order dated 06.08.2022, whereby the application filed by both the petitioners under Order 7 Rule 11 CPC has been dismissed in Consumer Complaint No.09 of 2021 by Consumer Protection Court at Hyderabad. It has been jointly contended by the petitioners' counsel as well as counsel for respondent No.3 that the Consumer Court lacks jurisdiction in the matter, inasmuch as the issue of alleged medical negligence, if any, falls under The Sindh Healthcare Commission Act, 2013 ("**Commission Act**"); hence, respondent No.2 could not have approached the Consumer Court under the Consumer Protection Act, 2014 ("**Consumer Protection Act**"). Reliance has also been placed on a Divisional Bench Judgment of the learned Lahore High Court reported as *Dr. Riaz Qadeer Khan v. Presiding Officer, District Consumer Court, Sargodha & others (PLD 2019 Lahore 429)*.

Inssofar as the respondent No.2 is concerned despite being served nobody has turned up. We have heard the petitioners' counsel and respondent No.3 as well as learned A.A.G and perused the record.

It appears that in similar, rather identical facts, a doctor had approached a Division Bench of this Court by way of a Constitutional

Petition being aggrieved by a similar order of the Consumer Court; whereby his application under Order 7 Rule 11 CPC as well as under Section 29 of the Commission Act and Section 36 read with Section 29(vi) of the Consumer Protection Act, was dismissed. The case of the said doctor was on identical footing and it was contended that the negligence, if any, does not fall within the jurisdiction of Consumer Court under the Consumer Protection Act, but is to be governed under the Commission Act. The learned Division Bench was pleased to distinguish the case of *Dr. Riaz Qadeer Khan supra* and was pleased to dismiss the petition in the case of *Dr. Muhammad Asif Osawala v. Mrs. Qamar-un-Nisa Hakro through attorney & another (PLD 2022 Sindh 430)*. Para Nos.12 and 19 of the said judgment are relevant which reads as under:-

“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.

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 state”

Moreover, on our own perusal it further appears that insofar as the Commission Act is concerned in terms of Section 1(4) *ibid*, it only applies to healthcare establishments, public or private hospitals, non-profit organizations, charitable hospitals, trust hospitals, semi government and autonomous healthcare organizations but does not apply to a health care service provider; though such service provider is defined in section 2(xvii)<sup>1</sup>. In that case the argument of the Petitioners Counsel does not find support from the law relied upon itself.

In view of the above, by following the dicta laid down in the case of *Dr. Muhammad Asif Osawala (Supra)* we do not see any reason to interfere with the impugned order passed by the learned Consumer Court as the matter has already been decided and held otherwise; hence, the petition is misconceived and is hereby dismissed.

**JUDGE**

**JUDGE**

***\*Hafiz Fahad\****

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<sup>1</sup> (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;