

JUDGMENT SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.51 of 2021

Present

Mr. Justice Muhammad Jaffer Raza

Muhammad Faraz Kasbati and 4 others.....Plaintiff

Versus

M/s. South City Hospital (Pvt) Ltd. and others.....Defendants

Mr. Basim Raza, Advocate for the plaintiff a/w
Mr. Ehsan Malik Advocate.

Mr. Sameer Tayebaly, Advocate for defendants 1 and 3.

Mr. Tahmasp Rasheed Rizvi, Advocate for defendant No.2 along with
Barrister Umaima Mansoor Khan.

Dates of hearing : 13.02.2025 & 18.02.2025

Date of announcement of order : 24.02.2025

JUDGMENT

MUHAMMAD JAFFER RAZA, J; - The instant suit has been filed under the Fatal Accidents Act, 1855, for compensation and recovery of Rs.37,660,000/-. Without delineating deeply into the factual aspects of the case, it is sufficient to mention that the plaintiff being legal heirs of the deceased/patient have filed the instant suit against the "Healthcare Establishment" i.e. the Hospital and the Medical Practitioners. The order sheet of this Court reveals that on 01.10.2024 the following order was passed: -

"01.10.2024

Mr. Sanaullah Khan, Advocate for the plaintiff.
Mr. Asim Mansoor Khan, Advocate for Defendant No.1.

Mr. Tahmasp Rasheed Rizvi, Advocate for defendant No.2.

Counsels are in agreement that first issue to be decided which is under the law is whether the suit maintainable in the eyes of law being barred by Section 29 of the Sindh Health Commissioner Act, 2013 and Sindh Healthcare Commission Regulations, 2017.

Re-list after 3 weeks.”

2. In this respect learned counsel for the defendants have collectively argued that the instant suit is not maintainable and the plaint is liable to be rejected under Order 7 Rule 11 CPC as the same is not maintainable under the Sindh Healthcare Commission Act, 2013, (**“Act”**) and Sindh Health Care Commission Regulations 2017 (**“Regulations”**). It is specified at this stage that the defendants for the present purposes have not filed any application under Order 7 Rule 11 and neither is it necessary for them to do so under the dicta laid down in ***M/s. ARY Communications Limited versus Abdul Qadir Shaikh, Commissioner (Audit) Inland Revenue-III, CTO, Karachi***¹.

3. Both the learned counsels for the Defendants have collectively argued the matter, hence their arguments are noted communally. The learned counsel for the defendants have relied upon Section 29 of the Act and the same is reproduced as under: -

“Section 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.”

4. Learned counsels have further submitted that a civil suit under Section 9 CPC is barred by law in light of Section 29 of the Act above as the said Act is special law. It is further argued that the only remedy available to the plaintiff

¹ High Court Appeal No. 324 of 2024

under the Act is filing of a complaint under Regulation 44. Relevant part of the said regulation is reproduced below: -

“44. Who can lodge the complaint?

The complaint can be lodged:

(1) by any aggrieved person or in case of his/her death, by the legal representatives U/S 4(6)(a) & 23(2);”

5. It has further been argued by the learned counsel appearing on behalf of the defendants that the scope of complaint is mentioned in Regulation 42 and it was argued most vehemently that the finding of medical negligence can only be made by the Healthcare Commission. Relevant portions of the said regulation are reproduced below: -

“42. The Commission may accept a complaint regarding allegations of:

(a) maladministration, malpractice or failure in the provision of healthcare services, on the part of a healthcare service provider, or any employee of the healthcare service provider U/S 4(6).

(c) medical negligence U/S 2 (xxii) & 19.”

6. It has further been argued that suit as framed is not competent without referring to the provisions of Regulation 45 and in this respect a complaint under the Regulation is, to put it simply, a prerequisite for a civil suit under Section 9 CPC. Learned counsels have argued that a Civil Court is not competent to give finding on medical negligence as it does not have the expertise and the knowledge to make the said deliberation. The same it has been argued is the exclusive domain of the Commission under the Act and the Regulations. Learned counsel have relied upon the following judgements: -

1) *Dr. Riaz Qadeer Khan vs. Presiding Officer, District Consumer Court, Sargodha and others*².

² PLD 2019 Lahore 429

- 2) ***Riaz Ahmed vs. Additional Sessions Judge/Ex-Officio Justice of Peace Rojhan District Rajanpur***³.
- 3) ***Shifa International Hospitals Ltd. through Chairman and C.E.O vs. Pakistan Medical and Dental Council (PMDC) and 3 others***⁴.
- 4) ***Dr. Muhammad Asif Osawala versus Mrs. Qamar-un-Nisa Hakro and another***⁵.
- 5) ***Dr. Sheeraz-ur-Rehman and others versus Province of Sindh through secretary and others***⁶.
- 6) ***Anees versus Province of Sindh through Secretary Home***⁷.

7. In reply learned counsel appearing on behalf of the plaintiffs has argued that no exclusive jurisdiction vests in the Commission and the suit as framed is competent. Leaned counsel in this regard has invited my attention to Regulation 49(d)(iv), which is reproduced hereunder: -

“49. Disposal of complaint

(d) If the complaint is proved to be true,

(iv) If circumstances of a case warrant action under any other law, the Chief Executive Officer may upon the recommendation by the Director Complaints, refer the case to the competent forum U/S 4(7) or the concerned government authorities or law enforcement agencies for appropriate action under the relevant laws U/S 26(2).

Provided that adequate opportunity of hearing shall be afforded to a person before imposing any penalty and provided further that the maximum limit of fine shall be fifty thousand rupees if the complaint has been lodged U/A 22(5) or 25.”

8. In this regard learned counsel has stated that the above-mentioned Regulation refers to Section 4 (7) and Section 26 (2) of the Act. At this stage it is important to reproduce Regulation 4 (7) which reads as follows: -

“4 (7) The Commission shall take cognizance of any case of harassment of healthcare service provider or damage to healthcare establishment property and may refer such a case to the competent forum.”

³ 2022 P.Cr.LJ 1067

⁴ 2011 CLC 463

⁵ PLD 2022 Sindh 430

⁶ 2020 CLC 2037

⁷ PLD 2022 Sindh 151

9. It has been argued by the learned counsel for the plaintiffs, more specifically in reference to Section 26 (2) that the said section itself breaks the myth of exclusivity and itself creates a provision, whereby, a case may be referred to the concerned government authority or law enforcement agency for appropriate action under the relevant laws. Section 26(2) reads as follows: -

“26 (2) Where it appears to the Commission that the circumstances of a case warrant action under any other law, the Commission may refer such case to the concerned governmental authorities, or law enforcement agencies for appropriate action under relevant laws.”

10. Learned counsel for the plaintiffs has thereafter invited my attention to Regulation 45(8), which clearly require an affidavit to be furnished with the complaint that no suit or appeal or any other proceeding is pending before any Court of “competent jurisdiction” regarding the same complaint. Furthermore, learned counsel has invited my attention to Regulation 45(9)(d) and (3) and 49(b)(2), which are reproduced below: -

*“45(9)
The Commission shall not entertain the complaint if
(a).....
(b).....
(c).....
(d) The subject matter is subjudice before a Court of competent jurisdiction on the date of receipt of the complaint.”*

11. Learned counsel has argued that in light of the above provisions, which clearly refer to other proceedings, the jurisdiction of this Court cannot be ousted under Section 9 CPC.

12. I have heard all the learned counsel for the parties and have specifically inquired from the learned counsel for the defendants whether the Healthcare Commission under the Act and the Regulations is empowered to grant damages to a party, who is aggrieved or is seeking compensation for medical negligence.

Further a question was posed to the learned counsel for the defendants regarding the jurisdiction of a criminal Court under Pakistan Penal Code as to whether a criminal Court can charge and convict a medical practitioner i.e. Doctor for medical negligence under various provision of the PPC (which need not be discussed here) without a finding of medical negligence from the Commission. In reply, learned counsel for the defendants have reiterated their stance and have most vehemently argued that Civil Court is not competent given the technical nature of the subject to pass any judgment or to adjudicate medical negligence. It was also argued that medical jargon is alien to a Civil Court and therefore, a complaint before the Commission is essentially a pre-requisite to a civil suit under Section 9 or criminal proceedings under the penal code.

13. The arguments advanced by the defendants are ingenious to say the least, but do not find favour with me. It is unfathomable and inexplicable that hurdles are created in the way of a litigant, who wishes to seek remedy under Section 9 of the CPC. The restriction in this case will be for an already aggrieved person, who is presumably bereaved, to first approach the Commission and thereafter based on a finding (to his liking) approach the Civil Court for redressal of his grievances. In this respect it is held that there is no “prerequisite” for a litigant to approach a Civil Court for redressal of his grievance in similar circumstances.

14. Moreover, the jurisdiction of the Commission is restricted in many respects and for the present purposes, suffice it to say that the said Commission does not have the power to grant damages to an aggrieved person. The purpose of the Commission is primarily (amongst other things) to regulate the working of the Healthcare establishment and therefore, in this regard no exclusivity is vested in it to give a finding of medical negligence.

Having stated the above, this Court recognizes its constraints and limitations in giving a definitive finding regarding medical negligence as the same may be tainted with medical jargon, which is incomprehensible for this Court. However, under Article 59 of the Qanoon-e-Shahadat Order 1984, this Court has ample power to appoint an expert and seek his/her opinion on the subject in cases where the Court is incapable or unable to form its opinion. The said article is reproduced below: -

“59. Opinions of experts: When the Court has to form an opinion upon a point of foreign law, or of science/or art, or as to identity Of hand-writing or finger impressions; the opinions upon that point of persons specially skilled in such foreign law science or art, or in questions as to identity of hand-writing or finger impressions-are relevant facts. Such persons are called experts.”

15. In that respect the Court can adjudicate a case of medical negligence having regard to the opinion furnished by the medical expert. To advance the said proposition I have also stumbled upon the English case of ***Bolitho v City and Hackney Health Authority (1997)***, in which, the House of Lords opined as follows:-

“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.”

16. It is also well established that if a forum (in this case the Commission) cannot grant relief (damages in this case) which a Court otherwise could, then there is no bar to the jurisdiction of a Civil Court. It is also a settled principle of law that where a law creates a right in favour of the litigant, it also provides a remedy, therefore, the scope of Section 9 CPC cannot be restricted by the provisions of the said Act and/or Regulation. The Honourable Supreme Court in

the case of **Messrs Sui Northern Gas Pipelines Limited (SNGPL) versus Messrs Noor CNG filling Station**⁸ in paragraph number 10 held as under: -

“Under section 9 of C.P.C., the Civil Courts have the jurisdiction to try all suits of a civil nature except in suits of which their cognizance is either expressly or impliedly barred. The ouster of civil court jurisdiction cannot be straightaway inferred or congregated in a routine, save as the conditions laid down are fulfilled. The presumption of lack of jurisdiction may not be gathered until the specific law enacted by the legislation debars Court from exercising its jurisdiction with specific remedy within the hierarchy which may attain the finality of order or controversy involved.”

17. It is also settled law based on the maxim recognised on our jurisprudence *ubi jus ibi remedium* meaning where there is a right, there is a remedy. This was expounded by the Honourable Supreme Court in the case of **Pakistan Television Corporation versus Noor Sanat Shah**⁹. In paragraph number 8 the court held as follows: -

“It is settled law, based on a latin maxim recognised by our jurisprudence, that ubi jus ibi remedium (where there is a right, there is a remedy). It 'postulates that where law has established a right, there should be a corresponding remedy for its breach. The right to a remedy is one such fundamental right that has historically been recognised by our legal system. However, the recovery of the said resources (in this case, monetary expenses) is not covered or regulated by any law in Pakistan for the time-being other than awarding costs. Since the said suit is not regulated by any specific law for the time being in Pakistan, section 9 of the Civil Procedure Code, 1908 (the "C.P.C.") would operate and vest jurisdiction in the Civil Court to adjudicate the suits for recovery of damages of the nature filed by the Respondent. For ease of reference, section 9 of the C.P.C. is reproduced below:-

In the absence of any law which expressly excludes the jurisdiction of the Civil Court to adjudicate matters

⁸ 2022 SCMR 1501

⁹ 2023 SCMR 616

pertaining to suits for damages, the suit of the Respondent, insofar as jurisdiction is concerned, was filed before the competent forum and the Trial Court did not lack jurisdiction when it passed its judgment dated 23.06.2015.

9. The nature of the damages claimed by the Respondent on account of the Appellant's conduct fall within the ambit of a civil tort. A basic definition of tort is an act or omission that gives rise to an injury either to person or property. Without putting too fine a point on it, a tortious breach is where one party (the tort-feasor) breaches legally protected rights of another party (the claimant)."

18. Remarkably the Supreme Court of India echoed a similar view in the case of ***Dhulabhai and Ors. Versus The State of Madhya Pradesh and Ors.***¹⁰ In paragraph number the Court summarised the propositions advanced and held as under: -

"54 . The result of this inquiry into the diverse views expressed in this Court may be stated as follows: -

*(1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded **if there is adequate remedy to do what the Civil Courts would normally do in a suit.** Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.*

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3)

(4)

(5)

¹⁰ Civil Appeals Nos. 260 to 263 of 1967 MANU/SC/0157/1968

(6)

(7) *An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.*” (Emphasis added).

19. In the context of the present case it is also pertinent to mention that the plaintiffs in the said case are not seeking a declaration for medical negligence and only seeking compensation for what they classify as a “fatal accident”. The prayer clause of the suit is reproduced below: -

“15. It is therefore prayed that this Honourable Court may be pleased to pass a judgment and decree in favour of the Plaintiffs against the Defendants jointly and severally for:

a) A sum of Rs. 37,660,000 (Rupees thirty seven million, six hundred and sixty thousand only) together with mark-up at the bank rate from the date of Suit until realisation;

b) For costs of the suit;

(c) For such other relief as the Court deems just and appropriate.”

20. It would at this stage, be imprudent to deliberate on the merits and/or demerits of the case but what is clear is that irrespective of the same the plaint is not liable to be rejected. The learned counsels for the defendants have attempted to argue that damages cannot be granted without a declaration of medical negligence. Even if the said argument holds weight the same does not warrant rejection of the plaint at this stage.

21. In the case of ***Federation of Pakistan and others v. Messrs Saman Diplomatic Bonded Warehouse***¹¹, a Divisional Bench of this Court at page 1207 of the judgment summarized the principles concerning the jurisdiction of Civil Court under Section 9 CPC as follows: -

“The following ratio are deducible from the cases cited at the bar:

(i) The Civil Courts under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature

¹¹ 2004 PTD 1189

except those of which their jurisdiction is barred either expressly or by necessary implication.

(ii) The provisions contained in a statute ousting the jurisdiction of Court of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to.

(iii) The bar of jurisdiction could never be sustained if it could be shown that the impugned order / action was passed / taken not in bona fide exercise of powers conferred by the Act or the Rule.

(iv) A mala fide order or one without jurisdiction is a fraud on the law and can never be assumed to have been passed under a particular statute.

(v) Where the jurisdiction of Civil Court is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown that the Authority or the Tribunal was validly constituted under the Act and; that the order passed or the action taken by the authority or Tribunal was not mala fide; and that the passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or Tribunal; and that in passing the order of taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the Tribunal would not be immune from being challenged before a Civil Court.

(vi) Where the Authority or Tribunal acts in violation of provisions of statute which conferred the jurisdiction on it or the order is exercised in lack of jurisdiction or mala fide or passed in violation of principles of natural justice, such order could be challenged before the Civil Court in spite of provisions of statute, barring the jurisdiction of Civil Court.”

(Emphasis added).

22. The subject issue deliberating on the jurisdiction of the Civil Court under Section 9 has come up for extensive deliberation over the years and the most comprehensive dictum in this regard has been laid down in a recent judgment passed in the case of ***Federation of Pakistan and others vs. Mehran***

Associates¹², the issue of Section 9 was deliberated upon by the Divisional Bench of this Court. In paragraph number 8 it was held as under: -

“Overall, the principle is that jurisdiction ouster must be clearly and strictly within the statutory framework, and any deviation from this would invalidate the ouster claim (such as where the authority has not acted in conformity with the statute's mandate). Accordingly, the exclusion of civil court's jurisdiction ought not be lightly assumed or readily inferred but should be jealously safeguarded.”

23. I have also had the benefit of perusing a judgement authored in the case of **Samma TV**¹³. In paragraph No.30 and 34 Mohammad Abdur Rahman, J. held as under: -

“30. Prior to the promulgation of the Defamation Ordinance, 2002, as there was no statute that regulated the law, defamation was absorbed into this Courts jurisprudence from the English Common law of Tort. 54 I would have thought that after the promulgation of the Defamation Ordinance, 2002 as a statute had occupied the area of law, the resort to the common law under the principles of “justice, equity and good conscience” would no longer be justiciable under Section 9 of the Code of Civil Procedure, 1908. Such an interpretation would derive force from the interpretation given by the superior courts that where the power of a judge to adjudicate on the basis of the principles of “justice, equity and good conscience” is exercised it can be done so as per the decision of the Lahore High Court Lahore in Haji Nizam Khan vs. Additional District Judge, Lyallpur as a “residuary” power and as per the decision of the Supreme Court of Pakistan in reported as A.M Qureshi v Union of Soviet Socialist Republics to be applicable where a “vaccum exists in [the] statutory field”.

34 (ii) if the lis has been instituted under the common law of tort under Section 9 of the Code of Civil Procedure, 1908, then to institute the suit before the Civil Court having original civil jurisdiction.”

24. In light of the above pronouncement, it is evident that even in cases under the Defamation Ordinance 2002 (special law) the jurisdiction of the Civil Court

¹² HCA No.163 of 2018

¹³ M.A No 07 of 2022

under Section 9 CPC cannot be ousted. It is clear that if a suit has been preferred under common law of tort, then the same can be instituted before the Civil Court.

25. Now turning to the case laws cited by the defendants, the same are not applicable for the following reasons: -

26. A similar case came before the Divisional Bench of this Court in the case of **Dr. Muhammad Asif Osawala** (supra) in which a complaint was filed under the Sindh Consumer Protection Act, 2014 (before the Consumer Court) advancing the cause of medical negligence. Whilst the facts in the present suit are distinguishable on that score it was held in para-16 of the said judgment that the powers of the Commission do not extend to awarding compensation or damages and that best extent to the imposition of a fine and that too within limited of Section 28 of the Act. Further it was held in para-17 as under: -

“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.”

27. Interestingly, the learned divisional bench in the case of **Dr. Muhammad Asif Osawala** (supra) was found itself unable to concur with the dicta laid down in the case of **Dr. Riaz Qadeer Khan** (supra) which has been relied upon by the learned counsels for the defendants. In the latter case a complaint was filed before the Consumer Court for claiming damages for alleged medical negligence and rejection of the complaint was sought on the ground that after the promulgation of Punjab Healthcare Commission, 2010, the consumer Court did not have jurisdiction to entertain the matter. Even in the said case the Hon'ble Lahore High Court did not adjudicate in reference to Section 9 CPC and

the only case before the Hon'ble Court was that of the complaint pending before the consumer Court.

28. In the case of **Riaz Ahmed** (supra), the learned Single Judge of the Lahore High Court, Multan Bench, adjudicated the matter pertaining to Section 22(a) and (b) of the Cr.P.C., which is distinguishable from the present case. Even otherwise, with respect, I do not find myself in agreement with the dicta laid down in the above case and the same is not binding upon this Court.

29. In the case of **Shifa International Hospitals Ltd.** (supra), the complainant submitted the complaint to the Chief Commissioner, Islamabad Capital Territory alleging medical negligence and a petition was filed before the Hon'ble Islamabad High Court impugning the lodging of the report by the relevant police station, pursuant to the said complaint.

30. In the case of **Anees** (supra) a Divisional Bench of this Court was seized with a Constitutional Petition in which the petitioner was seeking constitution of an inquiry committee to inquire into the said subject matter in the case and also direction was sought to constitute Special Medical Board for inquiry into the said allegation. The petition was dismissed as the learned Divisional Bench held in paragraph number 4 that the said controversy cannot be resolved under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. It was further held that the remedy of the petitioner before the Divisional Bench was with the Sindh Healthcare Commission, however, interestingly the Divisional Bench did not delineate regarding the jurisdiction of the Civil Court. The judgment in paragraph No.6 reflects the pendency of a civil suit without giving a finding thereon.

31. In the case of **Dr. Sheeraz-ur-Rehman** (supra) a divisional bench of this court was seized with constitutional petitions filed by doctors who in essence prayed for quashing of FIRs lodged against them. Even otherwise, the learned

divisional bench did not hold that a finding of the Commission was a prerequisite for lodging of an FIR. To the contrary the learned divisional bench directed the Investigation Officer to refer the matter for enquiry to the Commission after lodging of the FIR.

32. It is therefore, held that the question framed on 01.10.2024 is answered in affirmative and the suit is hereafter held to be maintainable. Needless to mention that any observation in the present order shall not prejudice the case of either party on merits.

Judge

Nadeem