

JUDGMENT SHEET

**PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)**

**FAO No. 208-P/2021 with CM No.
693-P/2021**

JUDGMENT

Date of hearing: **01.04.2024**

**Appellant: (Professor Dr. Niamat Ullah) by
Mr. Muhammad Tariq Afridi, Advocate.**

**Respondent: (Izaz Khan) by Mr. Akhtar Ilyas,
Advocate.**

MOHAMMAD IBRAHIM KHAN, CJ.-

Through this appeal, the appellant/ respondent has called in question the order of the learned Judge Consumer Protection Court, Peshawar dated 22.11.2021 whereby, while dismissing the objection petition of the appellant /respondent, the complaint of the respondent No.1/complainant has been termed maintainable.

2. Facts of the case are that the respondent No.1/complainant filed a complaint under section 13 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997 with the allegations that his mother was infected with

corona virus (Covid-19), which resulted into adverse impact on her nose and cheek hence, respondent No. 1/ complainant approached the appellant for medical treatment of his mother where she was examined and referred for undergoing CT scan. Thereafter, the patient was advised surgery to be conducted in LRH, Peshawar on 28.06.2021 however, when the respondent No.1 took his mother to the LRH, the appellant refused to undergo surgery there and directed him to approach his clinic. When the respondent No. 1 attended the clinic of appellant, he was directed to deposit Rs. 3,00,000/- (rupees three lacs) for surgery despite the fact that LRH is an international standard hospital having all operation facilities, as a result of which the respondent No. 1 not only suffered physical hardships but mental torture due to the unethical and unprofessional attitude of the appellant/respondent. Having no other option, the respondent No.1/ complainant approached Saidu Sharif Medical Complex for medical treatment of her mother hence, the present complaint.

1/19

3. The appellant / respondent appeared before the court and hotly contested the complaint of the complainant by filing reply wherein, legal and factual objections have been raised. He also filed an application for dismissal of complaint, which was replied by the respondent No.1/complainant. The learned Consumer Protection Court, Peshawar after hearing arguments on the application for dismissal of complainant, dismissed the same through an order dated 22.11.2021 hence, this appeal.

4. Arguments of learned counsel for the parties heard in detail and record with their valuable assistance gone through.

5. Learned counsel for appellant placed reliance on the judgment cited as **PLD 2019 Lahore 429** *Dr. Riaz Qadeer Khan vs Presiding Officer, District Consumer Court, Sargodha and others* and prayed for acceptance of this appeal. Inversely, learned counsel for respondent NO. 1 placed reliance on **PLD 2013 Peshawar 9** *Neelab CNG Filling Station through Managing Director vs Managing*

Director, SUI Northern Gas Pipeline Ltd & 4 others and prayed for dismissal of this appeal.

6. Perusal of record transpires that the mother of the respondent No.1/complainant at first instance was admitted in DHQ Hospital Dager, Buner and she, being the patient of Corona virus, was referred to Lady Reading Hospital, Peshawar on 26.05.2021 and on the same date, she was admitted in Covid ward LRH, Peshawar. Thereafter, due to positive Covid, there was adverse impact on nose and chick of mother of the respondent No.1/complainant hence, the ENT doctors were consulted who conducted CT scan and the mother of the respondent No.1/complainant was advised for undergoing surgery for debridement and biopsy however, on 16.06.2021, the respondent No.1/complainant left the hospital at their own. It is also on record that on 25.06.2021, the respondent No.1/ complainant visited alongwith his mother to private clinic of the appellant however, she being the patient of positive Covid, was again referred to LRH for proper treatment. The whole record is silent

that the appellant has examined or conducted any surgery of the mother of the respondent No.1/complainant except the medical prescription dated 25.06.2021 whereby, the appellant has examined the mother of the respondent No. 1/complainant. The whole record transpires that the mother of the respondent No. 1/complainant has throughout been examined at Lady Reading Hospital, Peshawar.

7. Turning to another aspect of the case whether the Consumer Protection 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

120

treatment. The complainant's contention is that the Consumer Protection Court lacks the jurisdiction and it is the Commission that is to make an assessment in that regard in view of the standards envisaged under section 13 of the Khyber Pakhtunkhwa Health Care Commission Act, 2015. Needless to say, liability claims for defective services, as envisaged under Section 13 of the Act *ibid*, would similarly entail a breach of a duty to be determined by the commission under section 13, it reads:

"13 Complaints---(1) *An aggrieved person may, within sixty days from the date of knowledge of the cause of action, file a complaint against a healthcare service provider or healthcare establishment by submitting an application in writing supported by an affidavit national identity card number and address of the aggrieved person.*

Reliance in this respect is placed on **PLD 2019**

Lahore 429 *Dr. Riaz Qadeer Khan vs*

Presiding Officer, District Consumer Court,

Sargodha and others, the relevant is:

***"For what has been discussed above,
we are persuaded to hold that***

Healthcare Commission is the only competent forum to investigate into the allegations of maladministration or malpractice by a health service provided and the consumer court has no jurisdiction to adjudicate upon such matters. Resultantly, all these writ petitions are allowed and the complaints pending before the learned consumer court are directed to be returned for its presentation before the appropriate forum.

8. In view of the above provision of law, the respondent No.1/complainant has not filed any complaint rather approached the Consumer Protection Court, which has no jurisdiction to try such like complaints. Apart from above, Section 19 of the Khyber Pakhtunkhwa Health Care Commission Act, 2015 has given immunity to the private health care establishment, it reads:

"19 Immunity--- No suit, prosecution or other legal proceedings related to provision of private health care services shall lie against a health care establishment except under this act."

Even otherwise, in view of the observations penned in the order of the learned Consumer Protection Court dated 22.11.2021 whereby, this complaint before the said court was maintained it is found that the respondent No.1/complainant has not been deprived of any exorbitant fee and even no surgery has been performed by the appellant and at all no offence or wrong has been committed by the appellant hence, in these circumstances, the order of the learned Judge, Consumer Protection Court is not maintainable.

9. In view of the above observations, this appeal is allowed whereby, the complaint filed by the respondent No. 1/complainant before the learned Consumer Protection Court stands dismissed.

Announced.
Dt: 01.04.2024


Chief Justice