JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No.3431-2023

Dr. Farhat Ullah Bakhsh

Versus

Ex-Officio Justice of Peace/ASJ-III (East), Islamabad and others.

Petitioner by:	Ch. Qaiser Nazir Sipra, Advocate.
Respondents No. 3 & 4 by:	Sardar Salman Ejaz, State Counsel. Syed Mohammad Ali Shah, S.I.
Date of Hearing:	05.06.2024.

.....

MOHSIN AKHTAR KAYANI, J. Through the instant writ petition, the petitioner has assailed the order dated 23.10.2023, passed by learned ASJ-VI/Ex-Officio Justice of Peace (East), Islamabad, whereby application filed by respondent No.2 for registration of criminal case was allowed and the S.H.O was directed to lodge a criminal case against the proposed accused.

2. Brief facts referred in the instant writ petition are that respondent No.2/Syed Ihsan Hussain Shah filed a complaint for registration of FIR on 04.07.2023 against the petitioner and other proposed accused, paramedical staff working in Shafi Hospital, whereby allegations have been leveled that his daughter was kept in nursery by the Doctors after delivery, her legs were found burnt due to negligence of Nursing Staff and Doctors, thereafter he moved an application before S.H.O, P.S Shahzad Town for registration of criminal case against the Nursing Staff and Doctors and finally learned Ex-Officio Justice of Peace/ASJ-VI has passed the impugned order with direction to the SHO to register an FIR.

3. Learned counsel for the petitioner contends that after enactment of Islamabad Healthcare Regulation Act, 2018, no

criminal case can be registered directly unless a complaint has been adjudicated by the authority declaring the misconduct and negligence of the accused/healthcare provider. He further contends that Sections 32 and 33 of Islamabad Healthcare Regulation Act, 2018 deals with the powers to exercise the jurisdiction unless a complaint in writing is filed before the Authority; that learned Ex-Officio Justice of Peace has no jurisdiction to pass any such direction; that a complaint has separately been filed before the Healthcare Authority by respondent No.2, which was allowed and fine of Rs.250,000/- was imposed upon the Institution instead of doctors or Paramedical Staff, therefore, no offence is made out from any angle.

4. Learned State Counsel alongwith I.O have opposed the instant writ petition on the ground that the offences have been explained by learned Ex-Officio Justice of Peace in the impugned order, relates to the hurt, which was caused to endanger the life of a human being, therefore, instant writ petition be dismissed.

5. Arguments heard and record perused.

6. Perusal of record reveals that incident was reported on 02.07.2023 when a new born baby got serious burn injuries while admitted in nursery of Shakeela Hospital Lehtrar Road, Islamabad due to negligence of Nursery Staff and Doctors. The father of the minor Syed Ahsan Hussain Shah filed a complaint to the SHO P.S Shahzad Town, Islamabad for registration of FIR, which was not entertained and finally application under Section 22-A & B Cr.P.C. was filed before learned Ex-Officio Justice of Peace, whereby impugned order dated 23.10.2023 was passed.

7. In order to deal with this proposition, I have gone through the relevant law of Islamabad Healthcare Regulation Act, 2018, which provides a regulatory framework to ensure provision of

quality health care services, by implementing quality standards by the healthcare sector, to the residents of Islamabad Capital Territory. The primary function highlighted in this Act, is to deal with the healthcare facilities through regulatory framework. Section 2(xxiv) is as under:-

> *(xxiv) "medical negligence" means any negligence by an act or omission of a healthcare professional in performing his duty. In medical negligence cases it has to be established that:-*
>
> *(a) There was a duty which the healthcare professional owed to the patient;*
>
> *(b) There was a breach of duty;*
>
> *(c) The breach resulted in injury to the patient; and*
>
> *(d) The injury resulted in causing damage or death;*

8. The Section 4 of the Act deals with the powers and functions of the Authority, in which Authority has to enforce minimum standards of safety for patient, healthcare professional and other staff in a healthcare establishment; inquire and investigate into violation of any of the provisions of this Act, by any healthcare establishment; ensure compliance and implementation of provisions of this Act, rules and regulations made thereunder. The Healthcare Regulatory Authority performs its duties through Board for General superintendence, direction and management of affairs of the Authority and overall policy making in respect of its operations. The Board is to be notified by the Authority, which shall be consisting of 09 members. The Act also provides penalty and offences against healthcare professional as well as establishment, who operate without the registration and license or obstructs an inspection in the exercise of any power conferred upon him by or under this Act or disobeys the lawful authority and

imposed a quackery, where fine has been provided alongwith imprisonment, but the penalty under Section 29 is only meant for penalty in terms of money.

9. On the other hand, PMDC Act, 2022 is also in field, which deals with the registration of medical practitioners and dentists and to establish a uniform minimum standard of basic and higher qualifications in medicine and dentistry. The entire law revolves around constitution and composition of the medical council, selection of members in terms of office meeting and functions of the Council. There is no denial that PMDC has been regulated through a Council and the law also provides constitution of different powers.

10. Now question arises as to whether any case of medical negligence could be decided by the Islamabad Healthcare Regulatory Authority. In order to answer the proposition, when there is overlapping jurisdiction on certain special law, then both the special laws have to be seen with reference to their overriding clauses like Section 50 of PMDC Act, 2022 has been given an overriding effect. On the other hand, similar effect has been provided in terms of Section 51 of the Islamabad Healthcare Regulation Act, 2018. In such scenario, if there was a conflict between two special laws containing overriding clauses, then generally the statute later in time would prevail over the statute prior in time as held in ***2017 SCMR 1218 (Syed Mushahid Shah Vs. Federal Investment Agency)***.

11. No doubt there are so many facts to be considered including, but not limited to the object, purpose and policy of both statutes and the legislature's intention, as expressed by the language employed therein, needed to be considered in order to determine which of the two special laws was to prevail. Similarly, two special

laws of different nature, which do not exclude each other and are not in conflict with each other, rather supplementing every aspect of objectives as held in ***2019 CLC 347 [Islamabad] (Federal Employees Cooperative Housing Society Vs. Director General, Federal Investigation Agency, Islamabad)***. When two special laws deal with a similar situation, then question of jurisdiction is to be seen in the light of its nature, object, scope and remedial portion provided therein in ordinary meaning to understand its true legislative intent as held in ***PLD 2018 [Islamabad] 51 (Sui Northern Gas Pipeline Limited, (SNGPL) Vs. Director (Legal), President Secretariat (Public), Aiwan-e-Sadar Islamabad)***.

12. This Court is mindful of the fact that when two or more enactments in the same field each containing non-obstante clause, stating that provisions would have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Conflict in such cases had to be resolved on consideration of purpose and policy of the Act as held in ***2006 PCr.LJ 921 (References by Judge Special Court-II (C.N.S.): In the matter of Criminal Transfer References)***, therefore, in the present scenario, both the laws deal with the health and medical practitioners and healthcare establishments. The PMDC Act deals with the registration, accreditation, recognition of medical and dental practitioners through licensing regime, examination system including but not limited to the curriculum and recognition of the educational institution and the recognition of the degree awarding institution. The PMDC is also equipped with the powers to cancel the license of healthcare profession in a proper manner and even PMDC is equipped with the powers in terms of Section 9(2)(k) to hear and decide the complaints against licenses of professional negligence and misconduct in accordance with regulations

prescribed by the Council and similarly in terms of Section 9(2)(s), the PMDC has to determine, in addition to penalties already provided under this Act, the quantum of penalties in respect of any violation or offence pursuant to this Act or as may be prescribed in accordance with regulations by the Council subject to the quantum being a fair compensation for the wrong caused and a deterrent to future violations of similar nature by any person. Though PMDC in terms of Section 41 cannot take cognizance of any offence, which exclusively falls within the domain of Medical Tribunal Act, 2020, except on the complaint in writing made by the Authorized Officer.

13. On the other hand, medical negligence has exclusively been explained in Islamabad Healthcare Regulation Act, 2018, which covers the negligence in performance of duty by the healthcare professional, owed to the patient and the injury causing damage or death, such aspect establishes the jurisdiction of Islamabad Healthcare Regulatory Authority under the law.

14. Now question arises as to whether any complaint could be entertained by the local police for any offences, in which healthcare professional has committed any medical negligence or caused injury to any patient by mistake or otherwise due to their negligence, which is the case in hand. I have attended the proposition from the order passed by learned Ex-Officio Justice of Peace, who had explained the proposed offences in terms of Sections 337-H and 337-L PPC, which deals with the hurt by rash and negligent act or other hurt not mentioned in the provisions of Chapter XIV of Pakistan Penal Code, which endangers life or which causes the sufferer to remain in severe bodily pain for twenty days or more or renders him unable to follow his ordinary pursuits for twenty days or more, shall be liable to daman and also be

punished with imprisonment of either description for a term which may extend to seven years.

15. In both these eventualities, overriding effect is available in Islamabad Healthcare Regulation Act, 2018, though the offences which were provided in that special law, are entirely different and for that matter Pakistan Penal Code is a general law with bodily injuries or hurt, therefore, while interpreting these two situations, in which special law versus general law is to be considered in juxtaposition, it appears that Pakistan Penal Code does not exclusively cater for the medical negligence, rather covers. In generalized hurt caused by negligence without referring to any medical concept or with reference to any patient, however, *actus reus* or *mensrea* are the key factors in the PPC, especially the entire criminal law, but in order to determine the offence, in this scenario, it requires the evidence and report of the expert, especially when proposed accused are professional doctors or Healthcare providers or incident took place in the Healthcare Institution. Unlike, Punjab Healthcare Commission Act, 2010, there is no explicit immunity clause provided in Islamabad Healthcare Regulation Act, 2018 that no suit, prosecution or other legal proceedings related to healthcare services shall lie against a healthcare service provider, except under PHCA, 2010. Since, IHRA Act has overriding effect thus before lodging an FIR and to determine offence, the concerned Police Station shall write a letter of request to IHRA for their expert report/opinion as laid down in Regulation No.54 in the Islamabad Healthcare Regulation, 2023 and submit the final/signed report to Police Station, whereafter the concerned S.H.O shall act accordingly. Additionally, by virtue of section 44 of PMDC Act, the police shall also send a copy of letter

of request to PMDC as well but only when the matter is related to medical negligence of a healthcare professional.

16. There is very thin line to adjudicate these aspects, however, if a criminal case has already been registered then it is mandatory to have a report from Healthcare Authority at the first instance to establish the negligence, if any. In such eventuality, police shall submit report before the concerned Court alongwith final report under Section 173 Cr.P.C. However, in case when FIR has not been lodged, in such situation, the complaint should be filed before the Islamabad Healthcare Regulatory Authority at the first instance if the Authority comes to conclusion that it is a case of medical negligence and the Authority pinpoints the role and conduct of any of healthcare provider including Doctors or any Paramedical Staff of the medical institution then FIR in terms of offences referred in the Chapter XIV PPC should be registered, but in all other cases, FIR should not be registered.

17. Now adverting towards the present case, the complainant has separately filed a complaint before Islamabad Healthcare Regulatory Authority qua the incident reported in this case, whereby Healthcare Regulatory Authority vide its order dated 02.01.2024 extended complete right of hearing to all the concerned after having inspection of Shafi Hospital, probed in the matter and suspended the services of operation theater and concluded multiple lapses in the documentation and protocol of the said hospital and imposed a penalty of Rs.250,000/- for their maladministration and malpractices, but role of doctors and paramedical staff has not been defined as guilty of medical negligence neither any observation has been recorded against the individual, which could fall within the purview of Sections 337-H and 337-L PPC, though the impugned order refers these two

offences, but ignored the basic theme of expert view i.e. investigate the Healthcare Regulatory Authority decision, which was not available to the learned Ex-Officio Justice of Peace at the time of passing of the impugned order.

18. The offences provided in Section 30 of IHR Act, 2018, provides exclusive jurisdiction to the Court of Sessions for their cognizance under this Act, but such complaint shall only be filed by the authority and not by the aggrieved. In terms of Section 33 of the Act, the Authority shall investigate the complaints relating to healthcare establishment, healthcare professional healthcare services and medical negligence filed by any individual directly to the authority and shall investigate the matter in terms of Section 30 of the Act, as prescribed by the authority itself. The offences provided in Section 30 did not cater the requirements envisaged in Pakistan Penal Code, hence, in case of any complaint it requires to be adjudicated in only one eventuality i.e. subject to conclusive report by IHRA or PM&DC qua issuance of the medical negligence.

19. While comparing both laws (IHRA Act & PMDC Act) this court has drawn following guidelines to deal with the issue of medical negligence, whenever an aggrieved person instead of filing complaint in IHRA goes to police station or files private compliant u/s 200 Cr.PC. or 22-A & 22-B Cr.P.C. application for lodging of FIR against healthcare service establishment, professional or administration with the allegation of medical negligence;

i. *To criminally prosecute only a healthcare professional for medical negligence under criminal law it must be shown that the accused did something wrong or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. And for that a technical report of subject experts is necessary by IHRA or PMDC.*

ii. *When an aggrieved person informs police regarding matters of medical negligence against a healthcare/medical professional, no FIR shall be lodged and SHO is bound to keep the record in daily diary and shall prepare official letters requesting an expert inquiry/investigation report and address them to both IHRA and PMDC. Upon receiving a negative report form IHRA or PMDC or both then FIR will be lodged otherwise no FIR will be lodged.*

iii. *The SHO is bound to cite the name of the expert as a witness and make the report of IHRA or PMDC as part of challan.*

iv. *Similarly, the case of private complaint under section 200 Cr.PC. may be entertained subject to all legal exceptions, however, the complaint shall not be proceeded further unless the expert report from IHRA or PMDC with its conclusive findings is not obtained.*

v. *Ex-officio Justice of Peace when receives an application u/s 22-A & 22-B CrPC, instead of issuing order for lodging FIR, he/she would direct the concerned SHO to prepare official letters requesting an expert inquiry/investigation report and place it before the IHRA or PMDC. After receiving the report, based on the findings of the report, Justice of Peace will pass an order of lodging the FIR (or as the case may be).*

vi. *IHRA and PMDC have mutually exclusive jurisdiction to deal with the matter of medical negligence in case of a medical professional under section 33 and 44 of their respective laws. And the findings of one have persuasive value for other.*

vii. *Both the authority and council are bound to complete their investigation and submit the report to the PS within a period of ninety days.*

viii. *The standard minimum requirement to initiate criminal proceedings against a medical professional is to receive a technical expert report from IHRA or PMDC whereby it is suggested or held that the accused has been medically negligent. One negative report from any one of the above departments is sufficient to proceed criminally against the accused.*

ix. *PMDC is the regulatory body which deals with the licensing and registration of medical and dental practitioners in Pakistan, and it hears the matters pertaining to cancelation/suspension of license to practice. IHRA after completion of its inquiry forwards the matter to PMDC for cancelation/suspension of license of medical or dental practitioner. However, the findings of IHRA are not binding on PMDC and vice versa.*

x. *On the contrary, if a person is aggrieved from the negligent behavior of a healthcare establishment or healthcare service, only IHRA has the exclusive jurisdiction to entertain the matters against them.*

Under such circumstances the concerned Police Station will request to IHRA for expert report. And IHRA shall submit the report within 90 days.

xi. *Consumer courts have no jurisdiction to exercise in the matter of medical/professional negligence by any healthcare professional or establishment. Because consumer protection law is general in nature and only the healthcare Commissions and Authorities (as the case may be) are solely responsible to investigate and adjudicate on complaints against healthcare service providers, professionals and establishments. As held by a division bench of Lahore High Court in* ***PLD 2019 Lahore 429 (Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha and others)*** *and further in* ***PLD 2022 Lahore 18 (Lady Dr. Nafeesa Saleem vs justice of peace/ASJ Multan and 2 others.***

xii. *If a complaint qua medical negligence is filed in IHRA, and the authority comes to conclusion that there is medical negligence and mensrea of doctor or paramedical staff is reflected, the authority may refer the case to the concerned Police Station for criminal prosecution against the delinquent irrespective of the fact that complaint in terms of Section 30 of IHRA (which deals with only three specialized offences i.e. quackery, obstruction of inspection and running an Establishment without license) has been referred to Sessions Judge or otherwise.*

20. For what has been discussed above, instant writ petition is **ALLOWED** and the impugned order dated 23.10.2023 is hereby ***SET-ASIDE***.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE

Approved for reporting

RAMZAN