

PESHAWAR HIGH COURT, MINGORA BENCH
(DAR-UL-QAZA), SWAT

FORM OF ORDER SHEET

Court of

Case No..... of.....

Serial No. of order or proceeding 1	Date of Order or Proceedings 2	Order or other Proceedings with Signature of Judge and that of parties or counsel where necessary. 3
	15.12.2017	<p><u>Criminal Appeal No. 241-M/2017</u></p> <p>Present: Mr. Shah Nawaz Khan, Advocate for the Appellant.</p> <p>Muhammad Rahim Shah, Assistant A.G for the State.</p> <p>Mr. Usman Ali, Advocate for the Appellant in connected Cr.A 9-M/2013.</p> <p>Mr. Ahmad Hussain, Advocate for the Appellant in Cr.A 190-M/2017.</p> <p>Mr. Abdul Ghaffar Khan, Advocate for the Respondent No.2 in Cr.A 190-M/2017.</p> <p>Mr. Usman Ali, Advocate for the Appellants and Mr. Iftikhar Ahmad Nasir, Advocate for the Respondents in Cr.A 3-M/2017.</p> <p>Respondent No.3 in person in Cr.A 244-M/2016.</p> <p>Mr. Aurangzeb and Ms. Humaira Shaukat, Advocates as Amicus Curiae.</p> <p style="text-align: center;">***</p> <p><u>ISHTIAQ IBRAHIM, J.</u> This single order shall resolve the issue relating to the maintainability of the present Criminal Appeal as well as the connected Criminal Appeal No.9-M/2013 titled '<u>General Manager SNGPL etc Vs. Farooq Shah</u>', Criminal Appeal No. 190-M/2017 titled '<u>Fazal Rabi</u></p>

Vs. Gohar Ali etc’, **Criminal Appeal No. 244-M/2016** titled ‘*Chairman, Central Board of Revenue Islamabad & 1 other Vs. General Manager, SNGPL & others*’ and **Criminal Appeal No. 03-M/2017** titled ‘*SNGPL through Incharge SNGPL Aqba Road & 1 other Vs. Muhammad Saleem*’ as in all these five appeals, emanating from separate orders of the learned Consumer Courts, common questions of law and facts are involved.

2. Brief but essential facts for the purpose of resolving the controversy to the extent of maintainability of these appeals are as under.

Criminal Appeal No. 241-M/2017

Respondent No.1 filed a Complaint before the learned Consumer Court, Swat/Camp Court, Shangla, against the present appellant i.e. *All Swat Papar Chips and Pops Owner Association*, complaining therein that the appellant company is selling such foods items on a wide scale in District Shangla, which create certain diseases like hepatitis, throat and chest infections and stomach disease, therefore, legal action may be taken against the said company by imposing ban on sale of such unhygienic and unwholesome items, which was accepted vide order dated 28.8.2017.

Criminal Appeal No. 9-M/2013

Respondent Farooq Shah, being a consumer of SNGPL, filed a complaint before the learned Consumer Court, Malakand at Batkhela with the averment that once the appellants i.e. officials of the SNGPL took his meter for checking and after being found to be correct reinstalled the same, but thereafter again the respondents disconnected the supply of gas to his premises without any legal justification by stating that his meter will be converted from domestic to commercial because he is using this connection for his Plastic Pipe Small Factory rather such Plastic Pipe Factory has nothing to do with his domestic gas connection. He approached office of the respondents with a request to reinstall his meter but in vain. Respondent, thereafter, filed a complaint before the learned Consumer Court which after report of Bailiff that the respondent/complainant is neither using the gas under this connection for his factory nor there is any amount outstanding against him, directed the appellants/SNGPL to reinstall gas meter to the complainant/respondent vide order dated 22.12.2012.

Criminal Appeal No. 190-M/2017

Respondent No.1 in this appeal submitted a complaint in the learned Consumer Court, Swat against the appellant/Principal Swat Children Academy School and College seeking legal remedy that his two children are studying in the School of the appellant and now their fees have been increased; that his children are also charged for Rs.3000/- annually on account of admission, which is an extra burden on parents of the students and due to limited income, he cannot afford to pay the same; that as per information he received, third child studying in the same school will not be charged for any fee but the School authorities do not agree on this issue. The present appellant submitted an application for dismissal of the complaint of the Respondent No.1 by advancing the ground that the respondent No.1/complainant, without firstly approaching the concerned quarter i.e. Complaints Regulatory Authority, has directly approached the Consumer Court by filing a complaint, which after the reply and arguments was dismissed by the learned Consumer Court with the directions to the appellant to file written reply to the complaint, vide

order dated 18.7.2017.

Criminal Appeal No. 244-M/2016

The respondents No.2 & 3 in this appeal filed a complaint before the learned Consumer Court, Swat to the effect that the appellants are illegally imposing general sale tax (GST) in their monthly sui gas bills, which is against the fact that in Malakand division consumers are exempted from paying such taxes. After reply of the appellants, the said complaint was accepted by holding that the complainant/respondents are exempted from general sale taxes vide order dated 17.7.2012 rendered by the learned Consumer Court, Swat, where-against the present appellants filed an appeal before this Court, which was also dismissed. Thereafter, respondents/complainants again approached the learned Consumer Court for implementation of the order dated 17.7.2012 through an application, which alongwith connected applications was allowed vide order dated 21.9.2016 of the learned Consumer Court and the present appellants were directed to refund the GST and surcharge, if any, received from the domestic consumers of this area since 17.7.2012 till date with further directions to the SNGPL to

approach the CBR who shall refund it to the SNGPL to adjust it in the future monthly bills of the domestic consumers, hence, this appeal.

Criminal Appeal No. 3-M/2017

The respondent in present case filed a complaint before the learned Consumer Court, Swat against the appellants to the effect that he is sui gas consumer under meter No.GN-25322774, Reference No.38942820000 which was replaced by the appellants with new meter No.MR-04913655, Reference No.3894383000 in his absence without any prior notice and thereafter, sent him a bill of Rs.87250/- for the month of October, which is illegal and against facts as his old meter was replaced by the appellants without his knowledge and notice and that no fault or reason for changing his old meter was communicated to him as he has neither consumed the disputed units nor tampered with the meter. This complaint, after the reply of the present appellants, was allowed with the directions to remove the deficiency for illegally charging the respondent/complainant for an amount of Rs.86277/- in the bill of October, 2015 by issuing a revised bill for the consumed units of gas, with

		<p>further directions to issue correct bill for the actual reading for each and every month in future to the consumer/complainant vide order dated 24.11.2016, hence, this appeal.</p> <p><u>3.</u> Feeling aggrieved by the above orders of the learned Consumer Courts, appellants have moved these Criminal Appeals.</p> <p><u>4.</u> Admittedly, all these criminal appeals have been preferred by the appellants under section 17 of the Khyber Pakhtunkhwa, Consumer Protection Act, 1997. All the impugned orders have been rendered by the learned Consumer Courts under section 15 of the Khyber Pakhtunkhwa Consumer Protection Act as the same do not speak of any conviction or acquittal of the accused/respondents as provided u/s 16 of the <i>ibid</i> Act, however, the same are regarding ban on the sale of goods/commodities, connection of gas, dismissal of application for rejection of the main complaint, issuance of directions not to impose GST on the consumers of Malakand Division and correction of sui gas bills etc. In view of section 17 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997 which provides forum for filing of an appeal against the order of the Consumer Court under the Code of Criminal Procedure, however, no detail of powers</p>
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of the appellate Court has been given under this section, therefore, in such situation, the first and foremost issue for debate cropped up before this Court is regarding the maintainability of these appeals as to whether this Court under the Code of Criminal Procedure can entertain such like appeals where the question is not relating to the conviction or acquittal of the respondents/accused or otherwise. In this respect, this Court directed learned counsel for the parties as well as the learned Assistant Advocate General to assist this Court. In addition to that Mr. Aurganzeb and Ms. Humaira Shaukat , Advocates were appointed as *amicus curiae* to assist the Court on competency or otherwise of these criminal appeals.

5. Section 14 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997, provides the mechanism for receiving and dealing with a complaint of the Consumer, whereas in case a complaint succeeds, under section 15 of the *ibid* Act, the respondent/accused has to be directed to remove defect from the goods in question or replace the goods with new ones, return the price to the complainant or to make compliance of sections 4,5 or 6 of the Act or to pay compensation to the consumer for any loss or negligence. For the sake of convenience, section 15 of the Khyber Pakhtunkhwa Consumers Protection Act, 1997 is reproduced

as under:

“Findings of the Court.---(1) If after the proceedings conducted under section 14, the Court is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any or all of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to take one or more of the following actions, namely-

(a) to remove defect from the goods in question;

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price or, as the case may be, the charges paid by the complainant;

(d) to do such other things as may be directed for adequate and proper compliance with the requirements of section 4, section 5 or section 6;

(e) to pay such amount as may be awarded by it as compensation to the consumer for any loss or negligence of the opposite party.

(2) Every order made by the Court under sub-section (1) shall be signed. ”

Whereas, section 16 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997, provides penal consequences including substantive punishment i.e. imprisonment and fine, which is reproduced herein below for ready reference.

“16. Penalties.--- (1) Where any right of consumer required to be protected under this Act, is in any way infringed, or is likely to be infringed, the person

responsible for such infringement shall be punished with rigorous imprisonment which shall not be less than seven days or with fine which shall be extended to fifty hundred thousand rupees but not less than ten thousand rupees or with both and shall also be liable to provide such compensation or relief to the consumer as may be determined by the Court.

(2) Whoever makes advertisement through print or electronic or social media or by wall chalking or in any other manner in contravention of the provisions of this Act, the person responsible shall be punished with rigorous imprisonment which shall not be less than seven days or with fine which shall extend to twenty hundred thousand rupees but not less than ten thousand rupees or with both.]

(3) The Court may, where it is deemed appropriate, order for payment of compensation to the consumer to the extent the consumer has suffered any damage or loss through any unfair trade practice.

(4) The Court may, where it is deemed necessary for protection of the rights of other consumers, order for confiscation of any goods or material or direct for their destruction.

(5) The Court may, where it is deemed appropriate, order for removal of the defect (s) of the product involved or replacement thereof.”

In the present cases, anxieties of the appellants are with regard to the findings of the learned Consumer Courts rendered in the impugned orders are totally under section 15 of the Act as the same do not impose any type of penalty as provided in section 16 of the Act and ironically the appellate

forum provided by this Act is to function only under section 17, which reads as follows.

“17.Appeal.--- (1) Any person aggrieved from the order passed by the Director, under sub-section (1) of section 11-A of this Act, may file an appeal in the Court within a period of thirty days of such order by depositing full amount of the fine so imposed, which shall be reimbursed in case, the Court set-aside the decision of the Director.

(2) Any person aggrieved by an order made by the Court may prefer an appeal against such order to the High Court within period of thirty days from the date of the order, and the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), in respect of appeal to the High Court shall, *mutatis mutandis*, apply.”

The above words ‘**mutatis mutandis**’ is a Latin Phrase, which has been defined in the **Black's law Dictionary** (Revised 7th Edition 1999 at P. 1039) as follows.

“‘mutatis mutandis’ as ‘with the necessary changes in points of detail, meaning that matters or things are generally the same, but to alter when necessary, as to names, offices, and the like, Houseman v. Waterhouse.’”

The apex Court, in a case reported as **P L D 1999 SC 1063**, has also used the phrase ‘mutatis mutandis’. The relevant portion of the said judgment is reproduced as under for the sake of convenience.

“It is also to be borne in mind that the provisions of sub-Article (1) of Article 27 of the Prohibition Order which provides

that the provisions of the Code of Criminal Procedure, 1898 shall apply mutatis mutandis, poses no difficulty in preferring the fore-noted interpretation. As per dictionary meaning contained in Chamber's 20th Century Dictionary "mutatis mutandis" means "with necessary changes" Black's Law Dictionary defines the expression 'mutatis mutandis' as under:-

"With necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like."

The legal term "mutatis mutandis" connotes, as per Venkataramaiy's Law Lexicon as follows:-

"When a law directs that a provision made for a certain type of case shall apply mutatis,mutandis in another, type of case, it means that it shall apply with such changes as may be necessary, but not that even if no change be necessary, some change shall nevertheless be made.

This expression mutatis mutandis is an adverbial phrase qualifying the verb 'shall apply' and meaning "those changes being made which must be made".

Hence, in light of the above meaning of the phrase 'mutatis mutandis' by the Black's Law Dictionary and used the same by the apex Court in the above referred sense, this phrase would play no role in the maintainability or otherwise of the present criminal appeals due to the reason that section 17 of the Act by itself does not laid down any sort of mechanism for adjudging an appeal under this

Act. So, in my view the word *mutatis mutandis* is of no significance keeping in view the language of this section.

6. Notwithstanding, the insertion of the first part of the above section in section 17 of the Khyber Pakhtunkhwa Consumers Protection Act, 1997 by virtue of the Khyber Pakhtunkhwa Act No. XVII of 2015, scope of exercising the powers by the appellate Court while seized of a criminal appeal and exercising appellate powers under section 423 Cr.P.C challenging the validity of an order other than the substantive sentence passed by a Consumer Court has not been made clear. In other words, no provision is there in the Consumer Protection Act to specify the powers of the appellate Court. Even this new amendment made in the Act would not provide adequate remedy to the subject matters of these criminal appeals. Moreso, in case of comparison of section 17 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997 with that of the other Provinces and Capital Territory Islamabad, it appears that order of the Consumer Court is appealable in Punjab u/s 33 of the Punjab Consumer Protection Act, 2005 while it is appealable in Balochistan u/s 18 of the Balochistan Consumers Protection Act, 2003, though it is appealable in Sindh u/s 24 of the Sindh Consumers Protection Ordinance, 2007, however, it is appealable in the Capital Territory u/s

10 of the Islamabad Consumers Protection Act, 1995. Furthermore, provisions under which appeal is to be filed under the Khyber Pakhtunkhwa, Balochistan and Capital Territory, Islamabad Consumer Protection Acts are almost *pari-materia* with each other.

7. Chapter XXXI of the Code of Criminal Procedure provides mechanism and powers of the appellate Court adjudicating criminal appeals arising out from the judgment and order of a criminal Court. Section 404 of the *ibid* chapter of the Cr.P.C reads as under.

“404. Unless otherwise provided, no appeal to lie.—No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.”

As is clear from the impugned orders that the learned Consumer Courts while rendering the orders under section 15 of the Khyber Pakhtunkhwa Consumer Protection Act have not acted as Criminal Court, so, this Court, while exercising jurisdiction under Chapter XXXI of the Cr.P.C with particular reference to section 404 *ibid*, is unable to pass any order because the learned Consumer Courts have not dealt with the questions involved in the present appeals as Criminal Courts. Thus conferring power of the appellate criminal Court (i:e section 423 of the Code) under the afore

section clearly demonstrates that the appeal would be competent only when the order impugned is passed under section 16 of the Act *ibid.* Moreso, powers of this Court as provided under section 423 of the Cr.P.C are only with regard to the conviction or acquittal or other matters provided under sections 405, 406 & 406-A Cr.P.C etc. In this regard, I deem it proper to refer section 423 Cr.P.C herein below for the sake of convenience.

“423. Powers of Appellate Court in disposing of appeal. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A, subsection (2) or section 417, the accused, if he appears, the Court may if it considers that there is no sufficient ground for interfering, dismiss the appeal or may:

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retired or [sent for trial to the Court of Session or the High Court], as the case may be or find him guilty and pass sentence on him according to law;
- (b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retired by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or (2), alter the finding, maintaining the sentence, or, with or without altering the finding reduce the sentence or, (3) with or without such reduction and with or without altering the finding, alter the

		<p>nature of the sentence but, subject to the provisions of the section 106, sub-section (3) not so as to enhance the same;</p> <p>(c) in an appeal from any other order, alter or reverse such order.</p> <p>(d) make any amendment or any consequential or incidental order that may be just or proper.”</p> <p>Bare reading of the above referred provision of the Criminal Procedure Code would clearly manifest that the same is dealing only with matters relating either to the conviction or acquittal as provided under sub-section ‘a’ & ‘b’ while the powers under sub-section ‘c’ are meant to deal with appeals as provided under sections 405, 406 & 406-A Cr.P.C while sub-section ‘d’ only empowers the appellate Court to pass any consequential or incidental order. In my view, this section nowhere would empower this Court to deal with such matters like involving the issues of imposing ban on sale of certain commodities, School fees or to issue an order regarding the supplying or disconnection of the natural gas or electricity. Moreover, issuance of the orders under section 15 of the Consumer Protection Act nowhere indicates conviction or acquittal and that’s too by a criminal Court, therefore, in such circumstances, how the High Court would determine the matters before it other than acquittal or conviction or as provided by Chapter XXXI of the Cr.P.C and when there is no order of conviction or acquittal as</p>
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provided by section 16 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997 though the orders challenged through these appeals are other than those of a criminal Court as provided by 404 Cr.P.C. Therefore, this Court cannot extend the meaning and scope of a criminal appeal beyond the clear-cut provisions of the Cr.P.C as provided by Chapter XXXI of the Cr.P.C. It is well settled that if remedy by way of appeal is not available then the only remedy available to the aggrieved party is to file a writ petition. In this regard, reliance is placed on a judgment of this Court rendered by the Larger Bench in case of *Mian Sharif Shah Vs. Nawab Khan and 05 others* reported as **PLD 2011 Peshawar 86**, wherein the following view has been made.

“19. The Courts, under general principle, are not entitled to widen the scope of the plain and express meaning of the statute through process of undue straining nor legal fiction therein shall be made ground for giving it extended meaning on the basis of obscure analogy, defeating the clear intent of the law makers. The right of appeal is a substantive right which is expressly conferred by the express language of a Statute and, under no circumstances; it can be assumed to have been conferred upon an individual. It is also cardinal principle of the construction of Statute that such right cannot be imported to a Special Statute from general law on the ground of convenience unless it is clearly spelt out therefrom. ‘Transposition of Statutes would amount to legislation which is not the domain of Judges but that of the Legislatures alone.’”

In the above referred judgment, after exhaustive discussion on similar matter, the Hon'ble Larger Bench finally arrived at the following conclusion.

“Keeping in view the above dangerous consequences, which in all probabilities may ensue in due course of time and because of the centuries old practice of legislation on criminal law, that at least one right of appeal is invariably provided against the judgment of the trial Court, we feel constrained to advise the Federal Government to make immediate necessary arrangements for suitably amending The Illegal Dispossession Act, 2005 (XI of 2005) through the Parliament by providing one right of appeal to the aggrieved person against the final judgment of the trial Court, of course with a narrow/restricted period of limitation, and also to fix a time limit for the disposal of such appeal by the High Court. As numerous cases are decided on day to day basis and the aggrieved persons are deprived to seek justice in a fair and effective manner by way of filing appeal, therefore, an early action in the matter if taken would be in the interest of justice. This last conclusion of the Bench would adequately meet the third law point.

It is further held, that till the time of law is amended, the aggrieved persons may avail the remedy by way of filing and maintaining constitutional petition against the final judgment of the trial Court.”

8. In light of the above discussion, scope of section 17 of the Khyber Pakhtunkhwa Consumer Protection Act, 1997, cannot be widened for the purpose of resolving the controversies involved in these criminal appeals.

9. In the peculiar circumstances of these cases, this Court would not like to straightway dismiss these appeals in an oblivious manner on the technical ground of being not maintainable but to avoid inconvenience to the parties and its far-reaching effects, this Court deems it appropriate to remove such a pivotal deficiency by adopting a proper way as it is the duty of the Court to make such a construction of the statute which leads to the remedial part of that statute and suppress the mischief therein. In case of any ambiguity, a suitable construction may be formed for the purpose to avoid unsuitable one and what is good and just should be given effect particularly keeping in view the administration of justice and equity. Reliance in this regard is placed on a judgment reported in **PLD 1958 (W.P) Karachi 35**, wherein it has been stated that:

“it is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it.”

In another judgment reported as **PLJ 2011 Lahore 433 (DB)**, the following view has been adopted.

“Interpretation of Statutes--- It is settled principle of interpretation of statutes “Interpretatio talis in ambiguis simpliciter frienda est ut evitetur inconvenience et absurdum” that in case of ambiguity, a

construction should always be found such that what is unsuitable and absurd may be avoided and law is the science of what is good and just, the words have to be taken so as to effect and in all affairs indeed especially in those that concern the administration of justice, equity should be regarded.”

10. For what has been discussed above and keeping in view the arguments advanced at the bar by learned counsel for the parties as well as the learned *amicus curiae*, it is held that that appeal can only be filed under section 17 of the Khyber Pakhtunkhwa Consumer Protection Act if the order of the learned Consumer Court relates to section 16 of the Act, whereby Court can impose sentence while the adequate remedy available to challenge order made u/s 15 and other non-penal provisions of the Act by a Consumer Court unless the law is properly amended, would be writ petition, as such, appeal under section 17 of the Act would not cater for such a situation, therefore, all these five criminal appeals are not competent. However, while considering these appeals as not maintainable, I will not dismiss them but would convert the same into writ petitions in view of the dictum laid down by the apex Court in the recent judgments rendered in the cases of “**Muhammad Akram Vs. DCO, Rahim Yar Khan and others**” reported as **2017 SCMR 56** and “**Mian Asghar Ali vs. Government of Punjab and Others**” reported as **2017 SCMR 118**. In the

former judgment, the apex Court had held that:-

“....Arts. 184(3) & 199---Constitutional jurisdiction of the Supreme Court/High Court to convert one type of proceedings into another—Scope---No fetters or bar could be placed on the High Court or the Supreme Court to convert and treat one type of proceedings into another and proceed to decide the matter either itself, provided it had jurisdiction over the lis before it in exercise of another jurisdiction vested in the very court, or it may remit the lis to the competent authority/forum or court for decision on merits---Courts to follow the practice of treating and or converting appeal into revisions and vice versa and constitutional petition into appeal or revision vice versa.”

11. Thus, in light of the above referred judgment of the apex Court, all these five criminal appeals are converted into Writ Petitions. Office is directed to make necessary entries in the relevant record accordingly and thereafter place the petitions before the Bench in accordance with the High Court Rules and Orders. Learned counsels for the petitioners are directed to furnish additional copies of the record within a fortnight, if needed.

Order accordingly.

JUDGE