

**JUDGMENT SHEET.**

**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT.**

**Criminal/Consumer Appeal No.166/2019.**

**Hajira Bibi** Vs. **Shifa International Hospital Ltd.**  
**etc.**

Appellant by: Ch. Abdur Rehman Nasir,  
Advocate.

Respondents by: **Mr. Zaheer Bashir Ansari,**  
**Advocate.**

**Date of Hearing:** 03.03.2020.

**MOHSIN AKHTAR KAYANI, J:-** Through this criminal appeal, the appellant has assailed the judgment dated 07.05.2019, passed by learned Additional Sessions Judge-West, Islamabad, whereby complaint filed by the appellant U/S 8, 8-A & 9 of Islamabad Consumers Protection Act, 1995 was dismissed.

2. Brief facts referred in the instant appeal are that the appellant sought medical services for her treatment from Shifa International Hospitals Limited/respondent No.1 by engaging specialist doctors/respondents No.2 to 5 in November, 2012 till May, 2015 against MR#72-01-6C, however, due to non-improvement in her medical condition, she has gone through numerous tests like CT Scan and X-rays on the advice of the doctors but real disease could not be diagnosed due to ill advice of the doctors/respondents No.2 to 5 as such the advices given by the doctors were not based upon the expertise expressed by them and it has been diagnosed that the appellant has been suffering from Leprosy "Jazam" and finally she has been treated from Leprosy Hospital, Rawalpindi and she got better, where-after conduct of the respondents has been assailed through consumer complaint. The respondents submitted their reply, where-after Trial Court recorded evidence of Yar Muhammad as P.W.1 and Nasir Ali as P.W.2, in the meanwhile an application has been filed by the respondents for appropriate orders U/S 151 CPC, which was accepted and complaint of the appellant was dismissed through impugned order dated 07.05.2019 mainly on the ground that the complaint is not maintainable in the light of section 35(4) & (5) of The Pakistan Medical & Dental

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Council Ordinance, 2019, which provides exclusive jurisdiction to Medical Tribunal for adjudication of such claims.

3. Learned counsel for the appellant contends that learned Trial Court has not considered effect of PM & DC Ordinance, 2019 as the same has already been settled by the Apex Court in case reported as 2018 SCMR 1956 (PMDC vs. Muhammad Fahad Malik); that recent Ordinance of Pakistan Medical Commission 2019 has also been declared void ab initio by this Court vide reported judgment dated 11.02.2020 in case W.P No.3800/2019 titled *Saira Rubab Nasir etc. vs. President of Pakistan etc.*, which has not been yet published, therefore, impugned order passed by Trial Court is not justified.

4. Conversely, learned counsel for the respondents contends that effect of repealed Ordinance has rightly been considered by Trial Court and orders made and action taken during the period, when the Ordinance was enforced would remain intact being saved by Article 264 of the Constitution. In support of his contention, learned counsel has relied upon *PLD 2000 [Lahore] 181 (Zamir Ahmad Sheikh, Ex-Deputy Chief Controller of Purchase/C.F. Pakistan Railways, Lahore vs. Pakistan Railways through Central Manager, Pakistan Railways, Lahore and 2 others)*; that proceedings initiated by the appellant stands abated and relied upon *2003 SCMR 1471 (Zafar Iqbal Khan vs. Pakistan Agricultural Research Council, Islamabad and others)*.

5. I have heard arguments of learned counsel for the parties and gone through the record.

6. Perusal of the record reveals that the appellant filed consumer complaint U/S 8-A & 9 of Islamabad Consumer Protection Act, 1995 against the respondents for wrong medical treatment, however, the said complaint was contested by the respondents and evidence of some of the witnesses was recorded, when the respondents filed application U/S 151 CPC for appropriate orders on the following grounds:-

*“3. That under section 39 of the latest Ordinance all suits and proceedings including appeals and applications pending immediately before the commencement of the ordinance have abated.*

*4. That reason for the abatement is that under section 34 of the new Ordinance medical tribunal has been established which had been given power to try offences or matters or claims. The medical tribunal for the purposes of criminal jurisdiction had been given the same powers as are vested in the court of session under the Code of Criminal Procedure, 1898 and in exercise of civil jurisdiction medical tribunal had been given the same powers and shall follow the same procedures as civil court under the Code of Civil Procedure, 1908 under section 37 of the new Ordinance appeals from the order of medical tribunal shall lay to August Supreme Court.*

*5. That as by virtue of PM&DC Ordinance, 2019 which is special law and having an overriding effect, the present complaint before this learned court has abated, hence, the dismissal as such."*

7. The above referred application has been contested by the appellant, however, learned Trial Court passed the impugned order, operative part of which is reproduced as under:-

*"12. Section 39 of the Pakistan Medical & Dental Council Ordinance, 2019 provides that all suits, appeals or applications regarding any matter within the jurisdiction of a Medical Tribunal pending in any court immediately before the commencement of this Ordinance shall abate forthwith.*

*13. It is pertinent to mention here that as per subsection 4 of Section 30 of the Pakistan Medical & Dental Council Ordinance, 2019 the claim of professional negligence shall initially be established before the disciplinary committee of the Council before any other proceedings.*

*14. Although Islamabad Consumers Protection Act, 1995 is a special law yet the Pakistan Medical & Dental Council Ordinance, 2019 is also a special law. If there are two special laws on same subject latter shall prevail. The Pakistan Medical & Dental Council Ordinance, 2019 is covering both civil claims as well as criminal proceedings before a Medical Tribunal. Hence, proceedings before this Court have been abated on the promulgation of the Pakistan Medical & Dental Council Ordinance, 2019.*

*15. It is also pertinent to mention here that overriding provisions have been incorporated in section 48 of The Pakistan Medical & Dental Council Ordinance, 2019 which provides that the provisions of this Ordinance shall have affect notwithstanding anything to the contrary contained in any other law for time being in force.*

*16. For what has been discussed above the application of the respondents is accepted and the instant complaint is hereby dismissed. File be consigned to the record room after its completion and compilation."*

8. Before discussing other issues, it is necessary to settle the status of PM & DC Ordinance, 2019, which has not been taken into account by learned Trial Court as the Pakistan Medical Tribunal in terms of Section 39 of the PMDC Ordinance 2019 was not constituted despite the mandate of law and not a single case has been

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referred to the said Tribunal, which renders it clearly that the Tribunal had not performed any duties, nor it was convened in any building or office, although the mandate of law provided in Section 39 of the PM&DC Ordinance, 2019 has correctly been appreciated by the learned Trial Court but without taking into the account the factual aspect. Even otherwise, the applicability of PM & DC Ordinance, 2019 has to be seen in the light of recent pronouncement of this Court passed in case titled as Saira Rubab Nasir, etc. vs. President of Pakistan, etc. (W.P. No.3800/2019), wherein it has been held that:-

*“12. On 08.01.2019, a new Ordinance known as PMDC Ordinance, 2019 was promulgated to provide for the regulation and control of the medical profession and to establish a uniform minimum standard of basic medical education and training and recognition of qualification in medicine and dentistry with detailed concepts extending the powers to the Council, its composition, election, restriction, terms of office, committees of the Council, recognition of the institutions and education, withdrawal of recognition, medical practitioners, removal, penalties, offences as well as further provided the concept of medical tribunals with its jurisdiction, appeals, and rule making authority along with the commission of inquiry as well as the terms and conditions of officials working in the PMDC, **however the said PMDC Ordinance, 2019 was disapproved by the Senate on 28.09.2019 after due deliberation**, which resulted into promulgation of a new Ordinance on 20.10.2019 i.e. the Pakistan Medical Commission Ordinance, 2019 with the purpose to provide for the regulation and control of the medical profession and to establish a uniform minimum standard of basic and higher medical education and training and recognition of qualifications in medicine and dentistry. However, since the petitioners have assailed the said PMC Ordinance, 2019 in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, therefore, I have to go through the history of the Ordinances of PMDC as well as the 89 of the Constitution providing the concept of promulgation of an ordinance by the President”*

9. Besides the above referred legal question, the proposition in hand has to be seen in the light of event, which was reported by the appellant to the Consumer Court, therefore, the question has to be attended to in the light of factual aspect referred in Para-1 of the complaint, in which the appellant has categorically stated that she remained under treatment of respondents from November, 2012 till May, 2015 when PM & DC Ordinance, 1962 was in field through certain amendments, however, PM & DC Ordinance, 2019 was promulgated in January, 2019, but the

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same has not taken effect as the Senate has not approved the same and it has been removed from the statue book and after pronouncement of *Fahad Malik case* by the apex Court, the Federal Government has promulgated the Pakistan Medical Commission Ordinance in October, 2019, which was taken into account by this Court in case titled as *Saira Rubab Nasir vs. President of Pakistan, etc.*, whereby the said Ordinance has been declared *void ab initio*, therefore, its effect cannot be considered in between the said period.

10. There is no cavil to the proposition that orders made and actions taken during the period when the Ordinance was enforced would remain intact under Article 264 of the Constitution, but in this case the respondents have heavily relied upon PM & DC Ordinance, 2019 being special law having overriding effect, but it has not been considered by learned Trial Court that PM & DC Ordinance, 2019 has died its natural death when Senate of Pakistan has not extended its Constitutional authority for its approval. Thereafter PM & DC Ordinance, 2019 was not applicable during the said period, especially when the tribunal was not functional and even the law stands abated by the order of Senate.

11. Besides the above referred background, effect of section 39 of PM & DC Ordinance, 2019 has to be seen in the light of recent development, whereby if at all the provisions of the said Ordinance be applied to the case of the appellant, the consumer complaint ought to be referred to Medical Tribunal, however, when the Ordinance was not approved and the tribunal became non-functional, although the tribunal has not entertained single complaint and as such, effect of repeal and abatement of previous law would revive the previous PM & DC Ordinance, 1962 as held in *Fahad Malik case supra* in the following manner:-

“24. For the foregoing reasons, it is held as under:-

- (h) *Any amendment/insertion/introduction made by an Ordinance would not survive after its lapse/repeal. If, notwithstanding the fact that an Ordinance promulgated under Article 89 of the Constitution expires through efflux of time, the amendments made by it to a permanent statute, i.e. an Act of Parliament, are allowed to possess a permanent character, then this will virtually amount to giving plenary power of making permanent legislation to the Executive; it would be tantamount to providing the Executive a machinery to bypass the constitutional*

*mandate of the Legislature and this we cannot permit, being absolutely against the spirit of the Constitution which embodies the important principles of democracy and trichotomy of powers;*

- (i) *The Ordinance making power under Article 89 (or Article 128) of the Constitution does not constitute the President (or the Governor) into a parallel source of law making or an independent legislative authority. The power to promulgate Ordinances is subject to legislative control. The failure to comply with the requirement of laying an Ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process. Re-promulgation of Ordinances, especially when the earlier ones were either not approved or disapproved by Parliament, is a fraud on the Constitution and a subversion of democratic legislative processes;*
- (j) *Therefore, any amendment/insertion/substitution made by the Amendment Ordinances in the Ordinance of 1962 did not survive after the former lapsed/were repealed, and the latter stood revived;*
- (k) *The judgments of this Court, unless declared otherwise, operate prospectively, as such, the Amendment Ordinances are not hit by Mustafa Impex's case (supra);*
- (m) *As a necessary corollary, the Regulations of 2016 framed under Section 33 of the Ordinance of 1962 by the Council constituted under Section 3 thereof, both of which were substituted by the Ordinance of 2015, also ceased to exist having been illegally and invalidly framed."*
- (n) *However, in the facts and circumstances, the various actions/activities/orders/decisions etc. taken in the ordinary day-to-day business of the earlier Council, are protected under the de facto doctrine, until reviewed, revised, amended or modified by the new Council to be constituted after fresh elections are conducted;*
- (o) *The Council created under the short order of even date (ad hoc Council) shall remain functional and intact from the date of such order, i.e. 12.01.2018, after which fresh elections shall be conducted in accordance with law, and in the meantime, the present Registrar of PMDC shall continue to work till an appropriate order is passed in this behalf by the President of PMDC;*
- (p) *The ad hoc Council may re-visit the relevant law/policies/rules/regulations etc., and any actions/activities/orders/decisions etc. taken by such Council till its termination/dissolution shall be legal and valid for all intents and purposes; however, in case any issue arises in this regard, for resolution thereof, an appropriate application may be filed before this Court;*

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12. In view of above position, the learned Trial Court has not attended to the legal position highlighted in the recent judgment of Superior Court, therefore, instant appeal is **ALLOWED**, impugned order dated 07.05.2019 is **SET ASIDE** and the matter is **REMANDED** to the learned Trial Court to decide the same in accordance with law within the period of 03 months from the date of receipt of copy of this judgment, under intimation to this Court.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

**Announced in open Court on 17.03.2020.**

**JUDGE**

R.Anjam