JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. no. 66 of 2013
Circlenet Communication Pakistan (Private) Limited
versus
Pakistan Telecommunication Company Limited

R.F.A. no. 55 of 2015
Circlenet Communication Pakistan (Private) Limited
versus
Pakistan Telecommunication Company Limited

R.F.A. no. 56 of 2015
Circlenet Communication Pakistan (Private) Limited
versus
Pakistan Telecommunication Company Limited

Appellant by:	Malik Qamar Afzal, Advocate
Respondent by:	Mr. Tariq Aziz, Advocate
Date of Hearing:	**24.10.2023**

Sardar Ejaz Ishaq Khan, J:- By this common judgment we proceed to decide these three regular first appeals that were heard together due to commonality of the parties and the underlying civil suits. A brief resume of each appeal follows.

RFA 66 of 2013

2 Circlenet Communication Pakistan (Private) Limited (**Circlenet**) appeals from the impugned judgment and decree dated 14.03.2013 passed in civil suit no.40 of 2009, decreeing that Pakistan Telecommunication Company Limited (**PTCL**) qua plaintiff was entitled to recover Rs.356,890,357/- from Circlenet qua defendant, along with profit at the prevailing bank rate from the date of institution of the suit till realization.

3 Both PTCL and Circlenet are telecom operators. They entered into an Interconnect Agreement (**IA**) on 24.08.2004 for the interconnection of their respective telecommunication systems to exchange long distance and international (LDI) telecommunication traffic that could be terminated (or originated) for the fixed line customers of PTCL. By the very nature of the IA,

the payments were to be made by Circlenet to PTCL for the traffic delivered to or received from PTCL's network. The IA enabled PTCL to suspend the interconnection services, *inter alia*, on payment default by Circlenet. It is an admitted position that Circlenet fell into arrears under the IA, leading to the signing of the *1st Settlement Agreement* dated 24.04.2007, whereby the defaulted payments were restructured and PTCL resumed the interconnection service for Circlenet's network.

4 Circlenet defaulted again under the 1st Settlement Agreement, and on suspension of its interconnection services again by PTCL, entered into a *2nd Settlement Agreement* on 23.11.2007. The 2nd Settlement Agreement stipulated certain upfront payments and 5 post-dated cheques of Rs.2 million each. It also stipulated that, once the 5 post-dated cheques given on signing of the 2nd Settlement Agreement had been utilized, Circlenet would give the next 5 post-dated cheques, and this process was to repeat until the full payment of defaulted amount was cleared by January 2010.

5 Circlenet defaulted again under the 2nd Settlement Agreement, and its services were suspended yet again in January 2008. PTCL got registered FIRs in respect of the defaulted cheques. PTCL also filed a civil suit no.40 of 2009 for recovery of Rs.491,890,537/-.

6 While the suit was pending, a *3rd Settlement Agreement* was signed on 29.04.2010[1]. It stipulated payment of Rs.15 million upfront, and '*the remaining agreed amount of Rs.120 million*' was expressed as payable in 12 equal monthly instalments of Rs.10 million through post-dated cheques. The payments henceforth were changed from post-paid to pre-paid and no credit was to be extended by PTCL. The clause on which Circlenet's case rests in this and connected appeals is clause 3 of the 3rd Settlement Agreement, which reads as follows:

> PTCL shall not withdraw its pending claims and legal proceedings against CNCL or any of its officials or directors. PTCL will withdraw its cases when it will earn the remaining outstanding amounts of money from the mutual business.

7 It is Circlenet's case that the 3rd Settlement Agreement novated the earlier Settlement Agreements, and under section 62 of the Contract Act, 1872, the 1st and 2nd Settlement Agreements were no longer required to be performed,

[1] Produced as Mark B in the trial.

and that only the 3rd Settlement Agreement remained to be performed. Circlenet goes on to say that the tenor and substance of the 3rd Settlement Agreement was that only Rs.135 million was agreed to be payable to PTCL, given the use of the words 'the remaining amount of Rs.120 million' in the preamble of the 3rd Settlement Agreement. Circlenet argues that the substantive effect of those words is that the differential between Rs.491 million claimed by PTCL in its suit and Rs.135 million as the remaining outstanding amount per the 3rd Settlement Agreement was therefore to be regarded as written-off by PTCL.

8 However, learned counsel for PTCL controverted this submission on several grounds, including clause 3 of the 3rd Settlement Agreement reproduced above, whereby PTCL despite entering into 3rd Settlement Agreement declined to withdraw the pending cases, being the instant civil suit no.40 of 2013 and the two other civil suits filed under Order 37 CPC for recovery under the cheques issued under the 2nd Settlement Agreement (of which more will be said later in this judgment).

9 The judgment under appeal deals with the evidence and we need not go into that in any detail because the submissions made in appeal at the bar centred around clause 3 of the 3rd Settlement Agreement on the point of law of novation.

10 About just over 3 months after the 3rd Settlement Agreement was signed, on 06.08.2010, PTCL and Circlenet entered into an *International Incoming Traffic Transit and Termination Agreement* (ITTA), whereby the international incoming traffic brought in by Circlenet was to be exchanged with PTCL's network through a VOIP[2] interconnection and not through the conventional analogue or digital connection. The ITTA was stipulated to remain in force for one year and, under its clause titled 'Duration and Termination', it was terminable by either party by 30 days' notice. The services under the ITTA continued for about 5 months. PTCL terminated the ITTA on 23.12.2010 without assigning any reason.

11 It is Circlenet's case that the sudden termination of the ITTA when Circlenet was duly paying under the 3rd Settlement Agreement disabled Circlenet from continuing to provide the services and generating business for

[2] Voice over internet protocol

PTCL to *earn the remaining outstanding amounts of money from the mutual business* per clause 3 of the 3rd Settlement Agreement. We would revert to this point which is the pivot of Circlenet's case in these appeals.

RFA no.55

12 This regular first appeal was filed by Circlenet against the impugned judgment and decree dated 20.02.2015 whereby the trial Court decreed PTCL's civil suit no.44 of 2012 filed under Order 37 CPC for recovery under 2 cheques dated 23.03.2008 and 23.04.2008 for Rs.20 million each, representing 2 out of 5 post-dated balance instalments cheques given by Circlenet to PTCL on signing of the 2nd Settlement Agreement. Circlenet's case in appeal is the same as in RFA 66 of 2013, namely, that the cheques were no longer encashable nor any liability remained thereunder once the 3rd Settlement Agreement dated 29.04.2010 was signed. Relying on the settled principle that developments occurring during the pendency of any suit are relevant considerations that in appropriate cases are to be taken into account by the Court, learned counsel cited *Mst. Akhtar Sultana vs Major Retd. Muzaffar Khan Malik through his legal heirs and others*[3] and *Muhammad Farooq and others versus Javed Khan and others*[4] for the submission that the relief can be moulded to take into account facts and circumstances occurring during the pendency of the suit between the parties.

RFA 56

13 This regular first appeal is against the impugned judgment and decree dated 20.02.2015 decreeing PTCL's civil suit no.45 of 2012 filed on dishonour of Circlenet's cheque dated 23.01.2008 in the sum of Rs.20 million that was one of the 5 post-dated cheques issued by Circlenet under the 2nd Settlement Agreement. The reasoning in the impugned judgment and the grounds of appeal by Circlenet are the same as for RFA 55 noted above.

ANALYSIS

Implied terms

14 In substance, Circlenet's case rests on the doctrine of implied terms, namely, that a term was to be implied in the ITTA that it would not be

[3] PLD 2021 SC 715
[4] PLD 2022 SC 73

terminated by PTCL until such time that the remaining outstanding amount per the 3rd Settlement Agreement was recovered by PTCL through mutual business. There are several obstacles in the way of accepting this argument for such a term to be implied. If such a term cannot be implied, then there was no clog on PTCL from terminating the ITTA under its 'Duration and Termination' clause whereby either party could terminate that contract on 30 days' notice. It is to be noted that the termination clause is not fault-based, in that it does not say that the agreement would be terminated only upon a default by either party. The termination clause is neutral, giving either party a unilateral right to walk away from the ITTA by giving a 30 days' notice. This is what PTCL did, and this is what Circlenet is aggrieved of, saying that PTCL could not do so, for it precluded the performance of the ITTA rendering Circlenet in default once again under the 3rd Settlement Agreement.

15 The ITTA was signed on 06.08.2010, about 3 months after the 3rd Settlement Agreement was signed. Neither of these two agreements cross refers to the other. The 3rd Settlement Agreement obviously could not, for it was signed before the ITTA was signed[5]. But when the ITTA was signed, the 3rd Settlement Agreement existed and, if Circlenet's arguments were to be accepted, it would be only natural to expect to see a cross-reference in the ITTA to the existent 3rd Settlement Agreement, acknowledging that the ITTA was made in contemplation of the 'mutual business' in furtherance of clause 3 of the 3rd Settlement Agreement. However, the ITTA is silent on this score. On the contrary, it has the 'Entire Agreement' clause 4.5, which reads as follows:

> This Agreement represents the entire understanding between the parties in relation to the subject matter hereof and supersedes all other agreements and representations made by either party, whether oral or written.

16 If one were to look for a succinct distillation of the legal principles on implied terms, one can perhaps not do better than to cite the following passage by Lord Simon speaking for the majority in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[6]:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the

[5] except through an addendum which was never signed.
[6] (1977) 16 ALR 363 at 376.

> contract is effective without it[7]; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

These principles rest on ancient authority, with several citations feeding them, and many of those citations and principles find an emphatic approval by the Supreme Court of Pakistan in *West Pakistan Industrial Development Corporation, Karachi vs Aziz Qureshi*[8] and *House Building Finance Corporation vs Shahinshah Humayun Cooperative House Building Society*[9]. Further, the courts are also reluctant to imply a term where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them. The implication of terms is therefore the exception, rather than the rule. The reason for this was explained by Sir Thomas Bingham MR in *Philips Electronique v British Sky Broadcasting*[10]:

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.

17 Out of the 5 principles reiterated in *BP Refinery*, Circlenet's case fails tests of '*business efficacy*' and '*no contradiction with any express term'*. It is not demonstrated how the ITTA was not capable of performance in accordance with its terms without implying the term that it was not to be terminated until the balance outstanding under the 3rd Settlement Agreement was paid. Such implied restriction would also contradict ITTA's 'Duration and Termination' clause, by which ITTA was terminable at any time upon 30 days' notice, and would also contradict the 'Entire Agreement' clause, whereby the ITTA was '*the entire understanding between the parties*' and '*superseded all other agreements'*.

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[7] This footnote is not in the original passage. The leading authority for the 'business efficacy' test is *The Moorcock* (1889) 14 PD 64, where Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have".

[8] PLD 1973 Supreme Court 222

[9] 1992 SCMR 19

[10] [1995] EMLR 472 at 482

18 We therefore remain unconvinced that a case for implying a term in the ITTA is demonstrated so as to preclude its termination at any time before the balance outstanding under the 3rd Settlement Agreement was fully paid off.

Novation

19 Circlenet argued that the 3rd Settlement Agreement resulted in a novation of the 1st and 2nd Settlement Agreements, and therefore they need not be performed and, by extension, all accrued obligations under those two prior agreements also stood wiped out. We need not go into any detail with this argument, nor need to discuss the case law on novation cited by the counsels, because we fail to see how a novation *excusing performance* of accrued obligations under the previous contracts can co-exist with express preservation of such accrued obligations, because clause 3 of the 3rd Settlement Agreement expressly stated that PTCL will not withdraw its pending claims and legal proceedings, it being remembered that the pending claims and litigations arose out of or in connection with those previous settlement agreements. Section 62 of the Contract Act deals with novation and reads as follows:

> 62. **Effect of novation, rescission and alteration of contract**. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

20 It goes without saying that section 62 speaks of discharge of the original contract *only to the extent* it is novated, rescinded or altered. It obviously does not override the intention of the parties to novate the original contract only partially, and the original contract to the extent it is not novated or altered remains binding and operative.

21 For novation excusing performance of the previous agreements, it first needs to be established that the parties agreed to substitute a new contract *wholly* for the earlier one, but it cannot be so if the accrued obligations under the previous contract are kept alive in express terms under, and despite, the new contract; all the more so where the new contract was occasioned due to the breach of the first contract and the injured party included a term in the new contract that its claims under the old contract would remain alive. If Circlenet's argument were to be accepted, it would mean that the substantive effect of clause 3 was that the differential between Rs.491 million claimed by PTCL in its suit and Rs.135 million as the remaining outstanding amount per the

preamble of the 3rd Settlement Agreement was effectively written-off by PTCL while signing the 3rd Settlement Agreement, which would contradict outright PTCL's express reservation of its entitlement to that differential sum in clause 3 itself.

22 A case in point is *Karachi Municipal Corporation vs Nawabuddin*[11]. The Municipal Corporation breached the original contract of allotment, the parties then entered into a new contract of allotment, which was again breached by the Corporation. The Corporation sought to argue that the original contract need not be performed because it stood novated by a new contract. The Court found that, though there was a novation, but on account of the breach of the novated contract, the parties stood relegated to the original contract, and the reliance by the Corporation on section 62 was invalid since it was founded on its own breach.

23 For the foregoing reasons, the argument premised on novation excusing performance of the accrued obligations under the previous settlement agreements also fails.

24 Resultantly, the appeals fail and are **dismissed**.

(Mohsin Akhtar Kayani)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on _____.

Judge **Judge**

Imran

Approved for reporting.

[11] PLD 1961 (W.P.) Karachi, 599