FORM NO.HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

F.A.O. No. 25 of 2012

Pakistan Telecommunication Company Ltd.

Versus

Pakistan Telecommunication Authority.

Date of Hearing: 13-04-2015.

Appellant by: ***Mr Azid Nafees, advocate. Ms Saniya Cheema, for PTCL.***

Respondent by:- ***Barrister Mian Sami ud Din.***

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Athar Minallah, J: This appeal under Section 7 (1) of the Pakistan Telecommunication Authority (Re-organization) Act 1996, (hereinafter referred to as the "Act"), is directed towards the enforcement order dated 03-05-2012, passed under Section 23 of the Act, read with Rule 9 (4) of the Pakistan Telecommunication Rules 2000 (hereinafter referred to as the "Rules").

2. The facts, in brief, are that a show cause notice dated 09-08-2011 was issued, wherein an amount of Rs.46 million was alleged to have been outstanding against the appellant company on account of non-payment of annual charges of numbers allocated in the year 2010/2011. The appellant was also asked to explain as to why a penalty under Section 23 of the Act may not be imposed for the alleged violation. The appellant

filed a written reply and after affording an opportunity of hearing, the impugned order was passed.

3. The learned counsel for the appellant has contended that; the impugned order is illegal, arbitrary, without lawful authority and jurisdiction; Clause 6.4 of the license does not impose any liability on the appellant for delay in payment of outstanding annual charges of numbers allocated in the year 2010/2011; the purported penalty prescribed in Regulations 18(2) of the Number Allocation and Administration Regulations 2005 (hereinafter referred to as the "Regulations of 2005") is ultra vires the Act; no power under Section 5(1) (o) of the Act is vested in the Authority to impose any liability or penalty by way of issuing Regulations; the scope of the power of making Regulations is limited; Section 23 of the Act does not provide for violation of a Regulation; the Regulation cannot be applied retrospectively, and admittedly the alleged liability was related to the numbers allocated prior to the promulgation of the Regulations of 2011; there is no condition stipulated in the license which has been violated; the alleged charges / penalty are otherwise invalid.

4. On the other hand, the learned counsel for the respondent / Authority contended that; the appellant had violated Clause 6.4 of the license, which binds the licensee to pay such charges as may be imposed under the Regulations; Regulation 18 (2) is ultra vires the Act; Section 21 of the Act exclusively vests the power in the Authority, and Clause 6.4 of the license imposes a condition and a binding obligation on the appellant to pay the charges as imposed under the Regulations. Reliance has been placed on *"AIR 1986 S.C. 1323"*, particularly Para 32 thereof; Section 5 (1) is general in nature and vests the Authority with the power, so as to

enable it to effectively perform its functions specified under Section 4; under Section 21(4), the Authority has the jurisdiction to impose the penalty; Regulations 18(2), 19(1) and 19(4) of the Regulations of 2011, are binding on the appellant; retrospective effect has not been given, rather at the time of promulgation of the Regulations of 2011, the appellant was liable to a penalty under Regulation 18(1).

5. The learned counsels for the parties have been heard and the record perused with their able assistance.

6. The Pakistan Telecommunication Authority (hereinafter referred to as the "Authority") has been established under Section 3 of the Act. The functions of the Authority are provided under Section 4, while its powers have been enumerated under Section 5. Section 5 (1) empowers the Authority to exercise all the powers as shall enable it to effectively performs its functions specified in Section 4. The power to issue Regulations is provided under Section 5 (2) (o) of the Act, and the same is to the extent of issuing Regulations for exercising powers and performance of its functions, while Section 57 of the Act vests the powers in the Authority to make Rules. Pursuant to the powers vested under Section 57, the Authority has made the Pakistan Telecommunication Authority Rules 2000 (hereinafter referred to as the "Rules"). Likewise, the Number Allocation and Administration Regulations 2011 (hereinafter referred to as the "Regulations of 2011") have been issued by the Authority in exercise of its power conferred under Clause (o) of Sub-section (2) of Section 5 of the Act The Regulations of 2011 had repealed the Number Allocation and Administration Regulations 2005 (hereinafter referred to as the "Regulations of 2005"). Regulation 18(2) of the Regulations of 2005 provides as follows:

"(2) The licensee shall be liable to pay a penalty at the rate of 10% on the amount outstanding, if the dues are not paid by 31st July, each year".

7. It is also pertinent to mention that pursuant to the powers vested under Section 21 of the Act, the Authority granted a license in favour of the appellant to establish, maintain and operate a Telecommunication System, and to provide Telecommunication Services in Pakistan. The license was notified on 13-06-2005. The Clauses relevant for the purposes of the instant appeal are 6.4 and 6.5 of the license, which are reproduced as follows:-

6.4 "The Licensee shall, following the Modification Date, pay the amount for all the number(s) allocated to it, in accordance with Numbering Plan Regulations issued by the Authority from time to time".

6.5 "The Licensee shall pay all annual fees to the Authority and make contributions referred to in Paragraphs 6, 12 and 13 within 120 days of the end of Financial Year to which the such fees or contributions relate".

8. The perusal of the impugned order reveals that the Authority has raised the liability on account of the outstanding dues and number allocation charges, in accordance with the license conditions and the Regulations of 2005, particularly Regulation 18 (1) thereof. The question which needs to be answered is whether the liability could be imposed pursuant to Regulation 18(1) of the Regulations of 2005. More precisely,

the question to be answered essentially relates to the vires of the imposition of penalty through the Regulations. Imposition of penalty is obviously creating a charge on the outstanding amount and, therefore, it has to be examined whether such a power is vested in the Authority?

9. Regulations or Rules fall in the category known as delegated or subordinate legislation. It is settled law that the authority empowered to make rules or regulations cannot go beyond the scope of the statute. No rule or regulation can be made inconsistent with the parent statute, and any such delegated legislation is void and inoperative to the extent of the inconsistency. The Supreme Court has elucidated these principles consistently, and reference in this regard may be made to PLD 2014 SC 389 (Suo Motu Case No.11 of 2011), PLD 2011 SC 619 (Suo Motu Case No.13 of 2009), 2013 SCMR 642 (ZTBL Versus Said Rehman), 1985 SCMR 365 (Ziauddin Versus Punjab Local Government), PLD 1995 SC 423 (Multiline Associates Versus Ardeshire Cowasjee), 2005 SCMR 186 (Khawaja Ahmad Hassan Versus Government of Punjab). Likewise, it is also trite law that 'A thing required to be done in a certain manner must be done in the same manner as prescribed by law or not at all'. Reliance in this regard is placed on 2010 SCMR 1437 (Tehsil Nazim TMA Okara Versus Abbas Ali), 2007 SCMR 307 (Raja Hamayun Sarfraz Khan Versus Noor Muhammad), 2001 SCMR 838 (Assistant Collector Customs Versus Khyber Electric Lamps) and PLD 2005 SC 842 (Khyber Tractors Pvt. Ltd. Versus Pakistan through M/O Finance, Revenue and Economic Affairs, Islamabad)

10. It would, therefore, be relevant to examine the scheme of the statute i.e. the Act, to ascertain the legislative intent and the extent or

scope of powers vested in the Authority to make Rules or Regulations for the purposes of creating a charge e.g. by way of imposing a penalty. The functions of the Authority are provided under Section 4 and enumerated in clauses (a) to (k) of Sub-section (1) thereof. None of the clauses envisages any function whereby the Authority may be empowered to impose, prescribe or create a liability or charge, inter alia, in the nature of a penalty. Similarly, the scope of issuing Regulations under section 5 (2) (o) is only to the extent of the powers and performance of functions of the Authority. In the present context the most relevant provision of the Act is section 5(2)(p) which provides for the levy and imposition of fee and other charges subject to such limits as may be specified by a Committee of the Cabinet. Sub-section (1) of Section 5, strenuously argued by the learned counsel for the Authority, provides that the Authority shall exercise all powers as shall enable it to effectively perform its functions specified under Section 4. There is no force in the arguments advanced by the learned counsel for the respondent / Authority that the latter can impose any liability or charge under its general powers vested under Section 5(1) of the Act.

11. It is a settled principle of interpretation that in order to discover the intention of the legislature the statute has to be read as a whole. The combined reading of Sections 4 & 5 of the Act makes it obvious that the power to levy a fee or impose other charges is provided under Section 5(2) (p), and the said provision prescribes the manner in which this power is to be exercised. Section 5 (1) (o) provides for a restricted and narrow power of the Authority to issue Regulations, and the scope is restricted to exercising its power and the performance of its functions. Clause (o) and (p) of Sub-section (2) of Section 5, when read

together, unambiguously reveals the legislative intent. Clause (p), specifically empowers the levy of fee or any other charge and further provides for the manner in which this power could be exercised. If the argument of the learned counsel for the Authority is accepted that the latter can impose a liability under its general power vested under section 5(1) then the legislature would not have included clause (p) of section 5(2). In other words clause (p) would become redundant, irrelevant or meaningless. Similarly, Sub-section (1) of Section 5 relied upon by the learned counsel for the Authority by no stretch of the imagination provides the power to levy a charge. Furthermore, it is settled law that while interpreting a statute redundancy is to be avoided, and an effort has to be made to read the provisions harmoniously. Clause (o) and (p) of Sub-section (2) of Section 5 of the Act, when read together, can only have one interpretation i.e. if it is intended to prescribe or impose a charge through a Rule or Regulation then the same shall be subject to Clause (p). As a first step, the Authority will have to resort to its powers under Clause (p), otherwise any imposition of the charge by way of issuing Regulations shall be inconsistent with and thus ultra vires the Act. The learned counsel for the Authority has not been able to satisfy this Court that before incorporating Regulation 18(2), the mandatory procedure or the power conferred under Clause (p) had been complied with.

12. The judgment of the Supreme Court of India, relied on by the learned Counsel, is also of no help to the Authority as the same is distinguishable in the context of the Act. It may also be noted that 'penalty' is a punitive action in nature and, therefore, its imposition would require an express authority under the statute. No provision has been pointed out by the learned Counsel for the Authority to show that the

legislature has explicitly vested a power in the latter to prescribe punitive action by exercising its powers of making rules or regulations. It could also have been argued that a penalty or any other penal action is distinct from the expression "charges" as used in Section 5(2)(p) and, therefore, out of its ambit. Thus as a corollary, it may be interpreted that a penalty cannot be imposed even if there is compliance with clause (p) of sub-section (2) of Section 5 of the Act. As this question is not relevant in the present case, therefore, this Court does not consider necessary to advert to this question at this stage. In the instant case it is an admitted position that the mandatory requirements of Section 5(2)(p) have not been complied with.

13. The Act has, however, vested power in the Authority to, inter alia, levy fines under section 23 (3) (c) (i) of the Act if the licensee has contravened any term or condition of the License. This punitive power has been explicitly provided by the legislature. It was alleged in the show cause notice that the appellant had delayed the payment pursuant to its obligations under the relevant clause of the License and, therefore, it may have considered the above provisions of section 23 of the Act.

14. Based on the above discussion, the incorporation of the penalty clause under Regulation 18(2) is inoperative, void and ultra vires of the Act.

15. In the light of the above, this Court holds that as Regulation 18 (2) of the Act is ultra vires, therefore, the imposition of the penalty through the impugned order has no leg to stand on. The purported liability imposed on the appellant is, therefore, illegal, without lawful

authority and jurisdiction. The appeal is, therefore, ***allowed*** and the impugned order is consequently ***set aside***. However, the show cause notice dated 09-08-2011 shall be deemed to be pending before the Authority. The Authority is expected to proceed in accordance with law by decided the matter afresh, after affording an opportunity of hearing to the appellant.

(Athar Minallah)
Judge

Announced in the open Court on _____.

Judge.

Approved for reporting.

Asad K/*

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