

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.231/21.
Date of institution 22.12.2021.
Date of decision 16.06.2023.

M/s Telenor Pakistan (Pvt.) Limited through Mr. Syed Yasir Ali Rizvi, Manager Legal Affairs, Plot No.55 River View Avenue, Block B, Gulberg Greens, Islamabad.

....Appellant

VERSUS

Pakistan Telecommunication Authority through its Chairman, Sector F-5/1, Islamabad having its Regional Office at Upper Chatter Housing Scheme, Muzaffarabad, Azad Kashmir.

....Respondent

CIVIL APPEAL

*Before:- Justice Sadaqat Hussain Raja, CJ.
Justice Syed Shahid Bahar, J.*

PRESENT:

Barrister Humayun Nawaz Khan, Advocate for the appellant.
Raja Gull Majeed Khan, Advocate for respondent.

Judgment:

(Justice Syed Shahid Bahar) The captioned appeal has been filed by the appellant under Section 7 of Pakistan Telecommunication (Re-Organization) Act, 1996 as adapted in Azad Jammu and Kashmir through Act I of 2005, against the order dated 06.12.2021.

Saga of Telecommunication

2. We are living in the era of Information Technology (IT) where everything is digitalized. We are moving forward in

this field faster than a wink of any eye. Digital movement by fingers is like a magician who can put the entire Globe at your table. Birds eye view of chequered history of telecommunication reveals that Alexander Graham Bell was pioneer in the field of Communication. It was in the year 1876 when he was able to invent his electrical speech machine which is now known as **telephone**.

3. It was 10th March 1876 in Boston, Massachusetts United States of America when Alexander Graham Bell had invented the telephone, his fellow Thomas Watson fashioned the device as a crude thing made of wooden stand a funnel ‘ a cup of acid’ and some chopper wire. It was the happiest moment in the life of Alexander Graham Bell when he first called his friend Thomas Watson at a distance of few yards “Mr. Watson, Come here, I want you.” It was the moment when the first ever telephone link was established between two persons at some distance and opened the vistas of further research to improve this device for commercial purpose.

4. The word ‘tele’ is Greek word means ‘far off’ or at or to a distance according to the concise Oxford dictionary, similarly, telecommunications has been defined a communication of information in verbal, written, coded or pictorial form by telephone, telegraph, cable, radio, television whereas the telecommunications is the science of technology of such communication.

5. In logical parlance, history of telephone is the history of human beings and well end with the end of humanity from this earth. From the very first day of his speaking, the man was communicating aloud to send his voice at a long distance to communicate something to his fellow-being.

Factual Matrix

6. Summarized facts necessary for disposal of the titled appeal are that the appellant is a company incorporated under the Laws of Pakistan and is engaged in providing telecommunication services in Azad Jammu & Kashmir under Mobile Cellular License dated 26.06.2006 issued by Pakistan Telecommunication Authority. The appellant averred that Commissioner Inland Revenue of AJ&K raised some illegal tax demands from appellant and as a pressurizing tactics started to stop the operations of the appellant through various attachment/seizer orders/notices which were never received by the appellant, whereupon the appellant filed writ petitions No.1949/2020, 1950/2020 & 1951/2020 before this Court and this Court immediately suspended all notices and attachment orders of Commissioner Inland Revenue vide order dated 15.01.2021. It has been alleged by the appellant that he has immediately informed Zonal Director Muzaffarabad through telephone regarding aforesaid illegal disruption of service by Commissioner and also wrote to the respondent on 31.12.2020 and subsequently on 05.01.2021 and 07.01.2021, however, the

respondent issued show cause notice dated 19.03.2021 to the appellant which was replied by the appellant through its reply dated 16.04.2021. The official Press Release by the appellant dated 01.01.2021 and the statement published on 30.12.2020 are attached as (Annexure H) and in addition to this the Appellant also filed an application before the respondent for placing additional documents on record which have been made part of this Appeal for reliance/and record attached as (Annex. I). It has been contended by the appellant that respondent issued order dated 06.12.2021, which is impugned herein, under section 23 of Azad Jammu and Kashmir Council Adaptation of Pakistan Telecommunication (Re-Organization) Act, 2005 whereby a fine to the tune of Rs. 50, 000, 000/- (Rupees Fifty Million) has been imposed upon appellant along with other directions by totally ignoring the contents of appellant's reply to SCN, facts, record and orders of High Court of AJ&K.

Narrative of Appellant

7. Barrister Humayun Nawaz Khan, the erudite counsel for the appellant reiterated the facts of the case and contended that the impugned order is patently illegal, against the facts and record and passed in total violation of AJ&K Interim Constitution as well as other applicable laws, hence, not sustainable. He staunchly contended that the respondent has totally failed to consider the contents of appellant's reply to

SCN which proved each and every allegations of SCN as incorrect. The learned counsel vehemently contended that the respondent despite the knowledge of CIR's actions and orders of AJ&K High Court failed to consider the same and in order to execute his predetermined mindset, passed the impugned order which is not sustainable under law. He forcefully contended that the appellant submitted the chain of events through its reply dated 16.04.2021, but the same has not been taken into consideration. The learned counsel vigorously contended that not a single violation or negligence was committed by the appellant and instead it was an illegal action of Commissioner Inland Revenue which caused disruption of appellant's telecommunication service which were duly recognized by this Court, therefore, imposing fine upon appellant by respondent is not only illegal and unconstitutional but also is a gross miscarriage of justice. He maintained that the appellant always provided uninterrupted services as per License Clause 1.1.2 and never denied or refused to provide telecommunication services to its consumers, however, the interruption in the provision of service was a result of the unwarranted act on the part of the CIR which was beyond the appellant's reasonable control. The learned counsel argued that the service breakdown was due to the involvement of CIR, under purported discharge of his official duties and not as a result of the Appellant's forecasted shutdown, therefore, as per

the requisite Section 7.2.1(iv) of the License, any refunds or rebates to the consumers are not applicable under the given circumstances, rather is entitled to be compensated by Commissioner Inland Revenue/ CIR. He submitted that the CIR failed to take the respondent or the appellant into confidence prior to forcefully shutting down the network, and illegally proceeded to take the action of interfering with telecommunication equipment at the cost of consumers and the appellant. The learned counsel forcefully contended that the appellant diligently discharged its duty to provide the information of incident within 14 days as envisaged under Clause 12.4 of the License, as the said incident was beyond the appellant's control and could not be termed as breakdown by any stretch of imagination. He vehemently contended that as per the force majeure clause of the License reproduced above, appellant's obligations under legal provisions as declared in impugned order could not be imposed under Section 23 of the Act and the chain of events leading up to the forceful shutdown and the actions taken by the appellant, subsequent to the Force Majeure, to inform respondent had been detailed in reply to SCN which were totally ignored by the respondent in impugned order, hence, same is not sustainable.

Contra Version

8. While on the other hand, Raja Gull Majeed Khan, learned Advocate appearing on behalf of the respondents

Pakistan Telecommunication Authority by controverting the arguments advanced by the counsel for the appellant conversely contended that all the proceedings taken by the authorities as well as impugned decision are completely in accordance with scheme and spirit of law. He staunchly contended alleged that the appellant has failed to substantiate his stance in reply of the show cause notice given to him on 19.03.2023 under Section 23 of AJ&K Council and Adaption of Pakistan Telecommunication (Re-Organization) Act, 2005, the appellant/licensee has failed to fulfill his obligations and comply with the condition No.3.1 of the license pertaining to observe the provisions of the Act, rules, regulations, orders, determinations, directions and decision of the authority. He further stated that the above law governing the matter provides to safeguards and protect the rights of the petitioner. He forcefully argued that appellant/licensee has failed to provide licensed service to the consumers, as the appellant has miserably failed to justify its act/negligence as well as violated the law and conditions imposed in the license, thus, the impugned decision herein rightly been taken by the competent authority and no illegality has been committed in this regard, therefore, the appeal has no substance and merits dismissal.

9. Pro and contra arguments have been heard. Record perused.

Determination

10. The claim of the appellant is that the impugned order dated 06.12.2021 may be set-aside by declaring the same as illegal, void ab-initio and having no legal effect upon rights of the appellant. It has been prayed that a direction be issued to respondent to initiate appropriate action against persons involved in network shutdown. The respondent-Pakistan Telecommunication Authority issued the impugned order dated 06.12.2021 against the appellant in the following manner:-

“5.1 In light of foregoing discussion and findings, it is an admitted position that the licensee is at fault due to non-adherence of applicable regulatory framework, therefore, the Authority directs the licensee as under:-

- (a) The licensee shall tender an apology to all its affected consumers in the print and electronic media in an unambiguous and legible format.
- (b) The Authority imposes a fine to the tune of Rs.50,000,000/- (Rupees Fifty Million Only) out of which:
 - (i) An unconditional refund of Rs.18,000,000/- (Rupees Eighteen Million Only) shall be made to the 60% affected subscribers forthwith, along with compliance report, containing details of consumers affected, within 15 days from the receipt of the order;
 - (ii) The remaining amount of Rs.32,000,000/- (Rupees Thirty two million only) to be deposited in the Authority's designated account within 15 days from the receipt of this order, and
 - (iii) A certificate from external auditor to confirm that refund has been made to all affected subscribers in the required manner within 60 days from the receipt of this order.

5.2 In case of non-compliance of the afore-referred direction, further legal action will be initiated without any notice.”

11. The file shows that the licensee/ appellant vide letter dated 05.01.2021 intimated PTA about the incident/ breakdown occurred on 29th, 31st December 2020 and 1st January, 2021, which affected 43,500 subscribers and resulted in loss of 10% customers as per licensee’s response. A show cause notice was issued to licensee on 19.03.2021, resultant of which a reply to show cause notice was submitted vide letter dated 16th April 2021 on behalf of licensee, wherein it has been averred that the Licensee under the License is providing Telecommunication Services in Azad Jammu and Kashmir and Northern Areas which is being regulated by the Authority under the Act. According to Licensee the Commissioner Inland Revenue, AJK raised illegal tax demands against the Licensee as a pressurizing tactic and attached the Licensee’s BTS towers and further illegally proceeded to switch off the BTS towers in the territory. It may be mentioned here that under Section 138 of Income Tax Ordinance, 2001, the Commissioner’s action for the recovery of tax is only limited to the attachment for sale of assets (other than telecommunication equipment) which do not include switching off public switch network deployed by the Licensee, thus, the Commissioner has clearly acted beyond his jurisdiction and has exceeded his statutory rights by forcefully

shutting down the Telecommunication Network which was not warranted under the law.

12. The record further shows that the service break down was due to the involvement of AJK Government through Commissioner, under purported discharge of his official duties and not a result of the Licensee's forecasted shutdown, thus, as per the requisite Section 7.2.1 (iv) of the License, any refunds or rebates to the consumers are not applicable under the given circumstances, rather is entitled to be compensated by Government of AJK and or the Commissioner. In the case, the Commissioner failed to take the Authority or the Licensee into confidence prior to forcefully shutting down the network, and illegally proceeded to take the action of interfering with telecommunication equipment at the cost of consumers and the Licensee. The authority being the regulator should have intervened in this matter and provided its due support in countering the unwarranted act by the Commissioner and strived towards an amicable resolution to the same, thus, the allegations in show cause notice in this regard seems to be against the facts and liable to be set at naught.

13. The incident itself by all means was an event of Force Majeure as defined in the clause 12.4 of the License of Licensee. It is useful to reproduce the same as under:-

12.4 Force Majeure

12.4.1 Notwithstanding anything to the contrary contained in this License, if the

Licensee shall be rendered unable to carry out the whole or any part of its obligations under this License for any reasons beyond the control of the Licensee, including but not limited, to acts of God, strikes, war, riots etc, then the performance of the obligations of the Licensee as it is affected by such cause shall be excused during the continuance of any inability so caused, provided that the Licensee has taken all appropriate precautions and reasonable measures to fulfill its obligation and that it shall within 14 days of its first occurrence notify to the Authority the same and cause of such inability and its efforts to remove such cause and remedy its consequences.”

14. It is useful to through light on the term Force Majeure, term has been defined in the Black Law dictionary 11th edition as infra:-

Force Majeure

Law Frech, a superior force (1883) An even or effect that can be neither anticipated nor controlled especially an unexpected even that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both act of nature (e.g floods and hurricanes) and act of people (e.g riots, strikes, and wars) also termed Force Majeure vis major; superior force.

15. It transpires from record that Force Majeure clause has not been adhered to, thus, impugned decision is not sustainable.

16. The record postulates that the appellant immediately informed Zonal Director Muzaffarabad through

telephone regarding aforesaid illegal disruption of service by CIR and also wrote to the respondent on 31.12.2020 and subsequently on 05.01.2021 and 07.01.2021, proof of which is a letter and other documents which has been annexed with the appeal as *Annexure "E" and "H"*.

17. It is also worth mentioning here that Section 4(1)(m), 21 (4) (1) and 6(f) of the Act, Regulation 5(1), 5 (2) and 7(2) of the Telecom Consumer Protection Regulation 2009 relate to the protection of the interests of the consumers by the Authority. Clause 6.2.1 of the License pertains to the provision of a 90 days' written notice to the consumers and prior approval of the Authority for discontinuation of services. The licensee has and will ensure compliance with the said provisions in circumstances in which such events may arise and has provided the due notice in lieu thereof to its consumers in the past. 90 days prior notice in the current state of affairs could not be provided to the consumers or to the Authority as the forceful shutdown of the network was not due to any planned or forecasted technical interruption/fault of the Licensee and was a direct consequence of the illegal act undertaken by the Commissioner, hence, allegations in SCN in this regard are false, not sustainable or maintainable and are liable to be withdrawn and set aside.

18. Thus, in view of the stated circumstances of the case, it can safely be said that issuance of show cause notice

was not justified in its true essence as the Licensee was victimized by the illegal and unwarranted actions of the Commissioner which led to the forceful shutdown of the network resulting in immense loss of revenue in millions rupees, alongwith users of the company in thousands or above from thousands. Being victim of the alleged actions, the Licensee invested all its efforts and prioritized its network restoration by approaching the Court of Law to ensure continued services to its customers and in this respect, the Licensee had expectation from the Authority to intervene in this major and forceful network shutdown or take any action against the Commissioner over the illegal act. It is a settled principle of law that no one can be penalized for inaction or for that matter fault of the functionaries.

19. By placing abreast pro and contra version, it transpires from record the appellant has already challenged the tax assessment/ demand leveled by the Commissioner Income Tax before the Appellate fora which is pending adjudication, Commission Inland Revenue AJ&K in furtherance of the tax demands attached the Licensees BTs Towers and Switched off the BTs towers in the territory.

20. As per stance of the appellant even otherwise service of the demand notice was defective and improper.

21. Be that as it may nothing adverse pertaining to the previous track record of the appellant is on record which can

be established that appellant deliberately has failed to provide communication services to the consumers.

22. Abrupt breakdown was outcome of attachment of BTs Towers and switching off on account of relevant quarters, thus, it can safely be held that appellant cannot be blamed for that, particularly prior to adjudications of his claim form appellate forum. Even by this angle impugned proceedings are premature.

23. Order of the Commission qua switching off public switch network deployed by the licensee is harsh and not warranted by law as consequent of same the Consumers suffered a lot for no fault at their end.

24. The provisions of tele consumer Protection regularization i.e. 5 (2) and 7 (2) read with Section 4 (1) (m) & 21 (4) (1) of the parent Act are not attracted pertaining to the present controversy. The Authority has misconstrued the aforesaid law.

25. Circumstances pertaining to break down were beyond control of the appellant, thus, clause 6.2.1 of the Licensee qua notice to the Consumers was also not attracted.

Squeezed Analysis

26. It is an admitted fact oozing from record that service break down was not on part of the appellant but obviously beyond the control of Licensee/appellant.

27. It is trite that where evasion of duty is not willful and deliberate then imposition of penalty is illegal.¹ Where the appellant/appellant did not act with mala-fide with the intention to evade the tax the imposition of penalty of additional tax and surcharge was not justified.²

28. Each and every order is required to be commanded with rational and reasoning as envisaged in Section 24-A of the General Clauses Act, particularly where it carries pend consequences then such like order must have adonize itself with fairness and solid grounds, in order to qualify the test of fairness embedded in the fundamental guaranteed rights i.e. right to fair trial, irrespective of factum of tax liabilities of the appellant and regardless of the consequences a breakdown, it is a stark fact oozing from record that appellant could not be blamed for the break down.

29. In view of the Section 24-A of the General Clauses Act read with Fundamental Right No.19 qua fair trial. It was incumbent upon the authority to adjudicate the matter fairly and in judicious manner. Our this view receives support from 2003 YLR 2736, 2004 YLR 1689 and 2008 MLD 1377.

30. Findings of the authority are findings of fact which is not based on material available on record, thus findings are perverse, even every quasi-judicial or akin to quasi-judicial

¹ PLD 1991 SC 963.

² PTCL 1995 CL 415.

findings be based on reasons which contained the justification for the findings in order itself.³

31. No penalty can be imposed caused due to Force Majeure, reference in this regard is placed on 2012 CLC 1145.

32. Adamant of the fact that tax evasion should not be left unattended and tax evader should be dealt with in accordance with law, by adopting due course of law. Be that as it may now controversy pertaining to the tax assessment is pending adjudication before the relevant fora, thus let the matter be decided by the competent fora in this regard.

33. Sensus verborum ex causa delcendi accipiendus est, et sermons semper accipiendi sunt secundum subjectam materiam.

The above Axiom of law denotes that sense of words is to be taken from the occasion of speaking them, and discourses are always to be interpreted according to the subject matter.

In interpretations the context must always be looked to.

34. The authority has miserably failed to attend the very spirit and plain language of the law governing the matter, particularly the Rule 19 of the Telecom consumers protection regulations 2009 framed under Section 4 of the Pakistan telecommunication (Re-organization) Act, 1996. Non observance of Force Majeure clause is suffice to annul the impugned decision besides other multiple reasons.

³ . PLD 1970 SC 158-173, 1984 SCMR 1014 and PLD 1995 SC 272.

35. Gist of the above is that the instant appeal is accepted and impugned order dated 06.12.2021 is hereby set-aside.

Muzaffarabad,
16.06.2023.

CHIEF JUSTICE

JUDGE