

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.
Mr. Justice Mohammed Karim Khan Agha, J.

Const. Petition No.2487 of 2012

Telecard Limited through its Representative
Mr. Waseem Ahmed son of Tanjeed Ahmed (Petitioner)

Vs.

Federation of Pakistan and others (Respondents)

Counsel for the Petitioner.

Mr. Arshad Tayebaly, Advocate
Mr. Aimal Kanshi Khan, Advocate

Counsel for the Respondents.

Mr. Mohammed Altaf, Special Prosecutor, NAB.
Mr. Badar Alam, Advocate for Respondent No.2
Mr. Saeed A. Memon DAG for Respondent No.1

Date of Hearing: 06.02.2018, 23.03.2018, 23.04.2018

Date of Order: 21-05-2018

ORDER

Mohammed Karim Khan Agha, J. Through the above mentioned petition the petitioner (Telecard Limited) has prayed for the following relief(s):-

- i) Allow the instant petition;
- ii) Declare that impugned notice dated 29.05.2012 issued by the Respondent No.2 is illegal, violative of the law, void ab initio and of no legal effect;
- iii) Permanently restrain the Respondents from taking any action including taking any coercive action against the petitioner under the NAB Ordinance or pursuant to the impugned notice dated 29.05.2012;
- iv) Permanently restrain the Respondents from taking any action including taking any coercive action against the petitioner, its sponsors, chairman, chief executive, managing directors, elected directors, Guarantors or any one exercising direction or control of the affairs of the petitioner under the NAB Ordinance;
- v) Restrain the Respondent No.2 from taking any action as threatened to be taken by it through the impugned notice dated 29.05.2012;
- vi) Grant any further relief to which the Petitioner is found entitled to in the circumstances, in the interest of justice, equity and fairness.

2. The Brief facts of the case are that the petitioner was granted a Wireless Local Loop License (WLL License) by the Respondent No.2 (Pakistan Telecommunication Authority (PTA)) to provide WLL services utilizing the 450 MHz and 1900 MHz frequency spectrum in different regions within Pakistan. The WLL License of the petitioner was issued in 2004 for a duration of 20 years and the petitioner obtained the frequency spectrum through an auction in 2004 which was in turn assigned to its WLL License.

3. The said spectrum was granted to the petitioner for a 20 years period against the payment of an initial spectrum fee (ISF) in the amount of Rs.3,171,000,000 where 50% of such ISF amounting to Rs.1,585,500,000 was to be paid at the time of the grant of the Spectrum and the balance 50% of such ISF was to be paid by the petitioner at the time of grant of the Spectrum. Thus, petitioner has already paid the ISF for a 10 years period which ended on 2014 (over 4 years ago) That, the petitioner fell into financial difficulties and was unable to make the balance payment of 50% of the amount within the due date and wanted to pay this amount through installments. The Respondent No.2 however, demanded payment of the entire amount which the petitioner did not pay. Respondent No.2 in order to recover the outstanding dues served a show cause notice dated 02.06.2010 on the petitioner under S.23 of the Pakistan Telecommunication (Reorganization) Act 1996. After hearing both parties by a final enforcement order dated 03.06.2011 the Authority found that the amount due by the petitioner to the respondent No.2 was RS2,053,751,000 inclusive of late payment additional fee at 2% per month which which late payment additional fee would continue to apply until the petitioner paid the entire amount due to the respondent No.2. This order was impugned by the petitioner vide FAO No.37 of 2011 before the Islamabad High (IHC) however, the aforesaid order was upheld by the IHC vide its order dated 22.05.2012. This order was challenged before the Hon'ble Supreme Court of Pakistan which vide order dated 10.08.2012 held as under at Para's 4 and 5;

"4. Where a directive has been issued by the Ministry and as per contention of the learned counsel for the petitioners, the Regulatory Authority is bound thereby, let the Ministry which is at the peak of the hierarchy, enforce it. Let it also resolve the controversy whether it does or does not concern the petitioners.

5. In this view of the matter, the learned counsel for the petitioners does not press these petitions and thus wants to approach the concerned Ministry for the redressal of the grievance."

4. According to the petitioners pursuant to the aforesaid order of the Hon'ble Supreme Court on 03.09.2012 they wrote to the Federal Secretary IT & Telecom, Ministry of Information Technology, Government of Pakistan, seeking the Ministry to intervene in this matter mainly to ensure that the Respondent No.2

allegedly agreed by the ECC (Economic Co-ordination Committee) until the balance of the 50% due to respondent No.2 was paid off. According to the petitioners, it received no response to its aforesaid letter.

5. That on 29.05.2012 Respondent No.2 issued the petitioner with a notice under Section 5(r) of the National Accountability Ordinance, 1999 (NAO) whereby the Respondent No.2 has alleged willful default by the petitioner and has demanded that the petitioner pay the entire outstanding balance payment of Rs.2,435,328,000/- to Respondent No.2 within 30 days of the date of the notice. (the impugned notice).

6. Learned counsel for the petitioner has submitted that this was not a case of willful default as envisaged under Section 5(r) NAO and that in any event Respondent No.2 had no authority to issue the impugned notice under Section 5(r) NAO. That, the amount which the petitioner actually owes Respondent No.2 has not been ascertained and is disputed and as such the alleged amount mentioned in the impugned notice cannot be considered as an amount which the petitioner has willfully defaulted on and as such the impugned notice was without lawful authority and was of no legal effect. Learned counsel for the petitioner placed reliance on **Sajid Dadbhoy V NAB** (2015 P.Cr.LJ 729), **Asim Textile Mills V NAB** (PLD 2004 Kar 638) and **Mian Munir Ahmed V State** (2004 P.Cr.LJ 2012)

7. Learned counsel for the Respondent No.2 contended that the alleged letter which the petitioner had purportedly sent to the Federal Secretary on 03-09-2012 had never actually been sent. That since 2012 the petitioner was attempting to avoid its liability to pay the balance 50% which is lawfully owed by the petitioner to Respondent No.2 and was attempting to use all available fora to mislead and confuse the issue; that this court did not have territorial jurisdiction to hear this matter as the Respondent No.2 was based in Islamabad; that the impugned notice was entirely lawful as the petitioner was a willful defaulter and was simply attempting to avoid its liability. Learned counsel placed reliance on **Danish Kaneria V Pakistan and others** (2012 CLC 389), **Mir Nabi Bakhsh Khan Khoso V Branch Manager NBP Jhatpat** (2000 SCMR 1017), **Commissioner of Income Tax Peshawar V Messrs Siemens A.G** (PLD 1991 SC 368), **Messrs Dancom Pakistan (Pvt) Ltd V Pakistan Telecommunication Authority** (2012 CLD 394) **Deonath Singh V Debendranath Rai** (AIR 1930 Patna 78)

8. Learned counsel for the NAB submitted that so far it had not received any complaint from the Respondent No.2 and was not seized of the matter. Learned DAG on behalf of Respondent No.1 (Federation of Pakistan through Secretary Ministry of Information and Technology Government of Pakistan) supported the contentions of Respondent No.2

9. We have considered the arguments of learned counsel for the parties, perused the record and considered the various case laws upon which they have relied.

10. At the outset we are of the view that this Court does have territorial jurisdiction to entertain this petition since a zonal office of the Respondent No.2 is based in Karachi although other High Courts in Pakistan may also have concurrent jurisdiction. Reference in this respect is made to the case of **Federal Government V Ms Ayan Ali** (2017 SCMR 1179)

11. We have noted from the record that a plethora of litigation has been going on between the parties in different High Courts of Pakistan (Lahore High Court Rawalpindi Bench, Islamabad High Court and this Court in another separate Constitutional Petition moved by the petitioner which shall be referred to below) since around 2010 in respect of the petitioner's various grievances such as the alleged balance payment payable by the petitioner to respondent No.2 and the cancellation of its license by respondent No.2. It even procured an ex parte stay order from this Court on 06.07.2012 against the operation of the impugned notice in this petition which has been continuing for one reason or the other for over 5 years.

12. In our view, prima facie, it appears from the record that the petitioner has been engaged in forum shopping by jumping between different High Courts of Pakistan on different or similar issues in order to obtain continuous relief in avoiding paying its outstanding dues. When the petitioner is unable to obtain favourable orders from one High Court then it switches to another High Court with similar or the same contentions about the so called agreed installment plan. A good example of this being order of this Court dated 04.02.2015 in C.P. No.D-2043 of 2014 **Telecard Limited Vs. Federation of Pakistan and others** (unreported) whereby it appears that the petitioner had challenged a notice to avoid payment of the balance 50% that the Islamabad High Court had already held was due (as will be referred to later in this order) whereby dismissing the above petition this court at paragraphs 22, 23 and 24 held as under:-

"22 From the perusal of order and judgments passed by the Lahore High Court, Islamabad High Court and the August Supreme Court, demonstrate that the petitioner has already agitated almost identical grounds and claims before the superior Courts and failed to get any advantageous verdict in its favour. Thereafter the petitioner by the concealment of certain relevant facts preferred the instant petition for the similar nature relief which have been already declined by the superior Courts. Even the petitioner has failed to produce any cogent material before this Court as well as the Lahore High Court regarding the petitioner being allowed to pay 50% of the balance of ISF in 10 equal installments. Consequently, we have no hesitation to observe that no fresh ground or convincing material have been placed by the petitioner for consideration in support of its

23. It is well settled that when an alternate and efficacious remedy is already provided to the petitioner in relevant laws pertaining to the subject controversy and **instead of availing such appropriate remedy, the petitioner invokes the Constitutional jurisdiction of the High Court with sole motive to defeat and delay the rights of the respondent, then such petition should not be considered compassionately, as per the maxim of the equity that he who claims equity must come with clean hands**".

24. It is significant to mention that the contention raised by the counsel for the petitioner that cancellation and termination of WLL License will deprive thousands of its users, prima facie, reflects that the petitioner has been carrying its business since the year 2004. **Admittedly, WLL Licence was granted by the respondent No.2 and the petitioner by committing default in payment of 50% of the balance of ISF, being public money as such has in fact caused huge losses to public exchequer. It is duty of the Court to make sure that such an action should neither be tolerated nor allowed to be continued.**" (bold and italics added)

13. In our view pursuant to the above discussion the petitioner has not approached this Court with clean hands. It is noteworthy that the petitioner had filed the above referred to petition which was reproduced in part above before this court as in the case in hand and it seems that he has in effect made similar submissions in both cases concentrating on the payment of installment issue (barring the issue of willful default) in this case which is to be highly deprecated as this issue has already reached finality as will be discussed later in this order and seems to be both a conscious and deliberate design/tactic by the petitioner to delay paying its dues to respondent No.2. As such in our view this Court may dismiss this petition in its constitutional discretionary jurisdiction on this ground alone since the sole motive of the petitioner in approaching this Court appears to be to avoid paying the balance amount which it lawfully owes to Respondent No.2.

14. We consider the contention of the petitioner that the final amount owed by the petitioner to Respondent No.2 is undecided as being without merit. This is because it is an admitted position by the petitioner that it owes the 50% balance amount to Respondent No.2. The amount was **finally determined** by the PTA's authority whilst giving a full opportunity of hearing to the petitioner through its aforementioned final enforcement order dated 03-06-2011 which was upheld, when challenged by the petitioner before the IHC, by the aforesaid order of the IHC dated 22-05-2012 **which has obtained finality.**

15. It appears that the only outstanding issue which in reality the petitioner has is the method and manner of its balance payment which it owes to respondent No.2 i.e. whether it is paid by one lump sum or by installments which it cannot dictate to the respondent No.2 as the final amount as mentioned above **has been finally judicially determined** (admitted outstanding balance amount plus late

payment fee) by the IHC which determination has reached finality and as such is **not** an issue for us to decide as it has already been decided by the IHC which determination was **not** interfered with by the Hon'ble Supreme Court on appeal when the petitioner withdrew his appeal with a view to approaching the concerned Ministry which it appears it failed to do as discussed in the next paragraph of this order. As such the authorities cited by the petitioner are of no assistance to him

16. With regard to an alleged letter sent on behalf of the petitioner to the Federal Secretary IT and Telecom dated 03-09-2012 pursuant to the Hon'ble Supreme Court's order dated 10-08-2012 it has been belatedly produced by the petitioner in his statement placed before this court on 23-04-2018 being the last date of hearing despite his much earlier requests for time (orders dated 10-05-2015, 13-05-2016 and 07-11-2017) to place the same on the record of this court and has **not** even been specifically mentioned in the petitioners pleadings. Furthermore despite the letter being dated 03-09-2012 there is no material on record that it was ever sent, received or even followed up which in our view creates doubt about its authenticity and the genuine desire of the petitioner to settle this matter pursuant to the above mentioned Supreme Court order as opposed to continually delaying paying its lawfully outstanding dues to respondent No.2 as finally determined by the aforesaid order of the IHC. In this respect reliance is placed on **Deonath Singh's case** (Supra). **Furthermore, despite being directed by this court the petitioner has not been able to place a single document on record to show that the installment repayment plan was approved by the ECC** as opposed to only a 4 year moratorium (which has now passed) on repayment as alleged by the petitioner.

17. Notwithstanding our above misgivings however, we are not entirely convinced that Respondent No.2 has the lawful authority to issue the impugned notice under Section 5 (r) NAO. However keeping in view the conduct of the petitioner by approaching the various courts of this country with the sole objective to avoid payment of his outstanding dues we are left with no option except to dismiss the instant petition with costs of RS50,000 (fifty thousand) to be deposited by the petitioner in the account of the High Court clinic within 7 days of the date of this order a compliance report of which shall be put up by MIT II within two weeks of the date of this order. We also **direct** the petitioner to deposit the amount as finally judicially determined by the final enforcement order dated 03-06-2011 referred to earlier in this order with the Respondent No.2 (PTA) within 30 days of the date of this order failing which Respondent No. 2 will be at liberty to initiate proceedings against the petitioner in order to recover the same in accordance with law which, if so advised, may include forwarding the case by way of complaint to the NAB.

18. The above petition along with listed applications stands dismissed in the above terms.