

IN THE HIGH COURT OF SINDH, KARACHI

M.A No.22 of 2014

Date of hearing : 01st October, 2018
Date of judgment : 30th October, 2018
For Appellant : Mr. Arshad Tayyabali, Advocate.
For Respondent : Mr. Muhammad Saad Siddiqui, Advocate.

J U D G M E N T

Kausar Sultana Hussain, J. Through instant appeal under Section 7 of the Pakistan Telecommunication (Re-organization) Act, 1996, the appellant Telecard Limited have called in question the order dated 15.09.2014, whereby the respondent has found the appellant liable to pay late payment additional fee on account of Annual Radio Spectrum fee paid after due date for the year ended 30.06.2012 and 30.06.2013.

2. Encapsulating the relevant facts forming background of this appeal are that appellant is a telecommunication service provider duly licensed by the Ministry of Information and Technology, Government of Pakistan under Section 21 of the Pakistan Telecommunication (Re-organization) Act, 1996, whereas, the respondent is a statutory body created under Section 3 of the Act for functions given in Section 4 of the Act (supra), which inter alia includes regulating the establishment, operation and maintenance of the telecommunication system. The appellant had been granted license by the respondent non-exclusive license NO.LL-23-2004 dated 04.08.2004. It is stated that respondent issued a show cause

notice dated 06.02.2014 to the appellant calling upon to show cause against non-payment of Annual Radio Spectrum Fees for the year ended 30.06.2012 and 30.06.2013, in response thereto, the later replied the show cause notice vide letters dated 03.03.2014, 20.03.2014 and 30.04.2014 and also paid Annual Radio Spectrum Fees for the said years through cheques in the sum of Rs.22,335,966/-, Rs.22,335,966/- and Rs.870,000/- dated 04.03.2014, 04.03.2014 and 28.04.2014, respectively. Thereafter, the respondent held a hearing of the show cause notice on 16.07.2014 attended and heard by Director General (Finance), Director General (Laws & Regulations) and Director (Wireless & Licensing) and passed impugned order dated 15.09.2014 against the appellant which is unjust, illegal and arbitrary. Being aggrieved, the appellant has preferred instant appeal.

3. The learned counsel for the appellant has submitted that the impugned order is bad in law, based on erroneous consideration and mis-appreciation of facts and law. He has emphasized on the point that the imposition of late payment additional fees of Rs.23,987,876/- @ 2% under Clause 4.2.3 of the appellant's license is patently illegal and unlawful. He has referred the case of Pakistan Broadcast Association through Executive Director and 7 others Vs Pakistan Electronic Media Regulatory Authority through Chairman and another (2014 CLC 197) and case of Province of Sindh through Secretary, Ministry of Excise and Taxation and others Vs M/s Azad Wine Shop and others (PLD 2006 Supreme Court 528) and submitted that in the said cases levy of surcharge not supported by any provision of law held without lawful authority. He went on to state further that there is no provision in the PTA Act or the rules and regulations framed there under which

allows or permits the respondent to impose additional fee on late payment of Annual Radio Spectrum Fee, as such, the impugned order is the one contrary to law, liable to be set aside.

4. Learned counsel for the PTA inter alia submitted that Pakistan Telecommunication (Re-organization) Act, 1996 empowers the respondent Authority to levy fee and other charges; that the late payment Additional Fee was part of the license agreement all along and the appellant knew all terms of the same including the instant Clause i.e. Clause 4.2. It was further contended that after acceptance of the terms of license, the appellant now convert retract from the same in light of the case law reported as ***Pak Com Limited and others Vs Federation of Pakistan and others (PLD 2011 SC 44)***. He has further submitted that the Regulation 23 (7) of PTA (FNP) Regulation, 2006 where framed under Pakistan Telecommunication (Re-organization) Act, 1996 and are in consonance with the terms of license. Learned counsel further contended that the appellant is bound to pay late payment Additional Fee as part of its contractual obligation. He has further argued that in presence of agreed terms regarding late fee charges in case of non-payment of Annual Radio Spectrum Fee in time, no legal footing available to the appellant to challenge the impugned order, who having failed to pay such annual fee in time, hence instant petition is mis-conceived, liable to be dismissed.

5. I have considered the submissions advanced by the learned counsel for the parties and perused the record. The sole issue before this Court, in the instant appeal, is concerning the demand of late payment Additional Fee by respondent Authority from the appellant primarily with respect to initial Spectrum Fee vide the impugned order on the ground that Fee was not paid in time as

required under the license agreement. It is noted that the appellant was granted license bearing No.LL-23-2004 dated 04.08.2004 by the respondent Authority on the terms and conditions set forth and contained thereto. In order to adjudge the controversy involved, the relevant Article 4 of the License is reproduced for ready reference:-

ARTICLE 4-FEES AND OTHER CHARGES

4.1 PAYMENT OF FEES

- 4.1.1. The Licensee shall pay the following initial fees to the Authority prior to the Effective Date:
- a) Initial license fees, US \$ 10,000/- or Pakistan Rupees 580,000/- (five hundred and eighty thousand) for each Licensed Region identified in Appendix 1 hereto, and
 - b) Initial spectrum fees, the amount specified in Appendix 2 annexed hereto.
- 4.1.2. The Licensee shall pay the following annual regulatory fees to the Authority:
- a) Calculated on the basis of 0.5% (or such lesser amount as the Authority may, by Regulations, determine) of the Licensee's annual gross revenue from Licensed Services for the most recently completed Financial Year of the Licensee minus inter-operator payments and related PTA/FAB mandated payments. However initial license fee and initial spectrum fee shall not be deducted from the gross revenue.
 - b) The amount of the annual fees referred to in Appendix 2 annexed thereto, and
 - c) For each number allocated to the Licensee at end of the Licensee's Financial Year, the Licensee shall pay the following amount or the amount determined by the Authority through Regulation from time to time.

Number Category	Annual Fee
Seven (or higher) digit number (including Freephone Service and Premium Rate Service numbers)	Rs.0.50
Six digit number	Rs.5.00
Five digit number	Rs.50.00
Four digit number	Rs.500.00
Three digit number and short codes	Rs.5,000.00

4.1.3 In addition to the fees payable hereunder, the Licensee shall pay to the Authority all fees required to be paid under the Act, Rules and Regulations.

4.2 GENERAL CONDITIONS CONCERNING FEES

4.2.1 The Licensee shall pay all annual fees to the Authority and make contributions referred to in section 3.3.1 and 3.4.1 within 120 days of the end of the Financial Year to which such fees relate.

4.2.2 The Licensee shall make all contributions referred to in section 3.3.1 and 3.4.1 within 120 days of the end of the Financial Year to which such contributions relate.

4.2.3 In addition to any other remedies available to the Authority, late payment of fees shall incur an additional fee calculated at the rate of 2% per month on the outstanding amount, for each month or part thereof from the due date until paid.

4.2.4 The Licensee shall annually submit to the Authority audited financial statement in support of its calculations of annual fees and contributions payable pursuant to this Article 4. The Authority shall have the right to audit such statements at any time.

6. A glance at the aforesaid Article, it appears that the Licensee i.e. appellant is required to pay along with initial License Fee and the regulatory fee, initial Spectrum Fee; the appellant is also required to pay all fees as provided under the Act, Rules and Regulations. Under Clause 4.2.3, the Licensee is also required to

pay additional fee calculated @ 2% per month on the outstanding amount for each month on part thereof from the due date until paid. Admittedly, in response to show cause notice, the appellant vide its letter dated 03.03.2014 and 20.03.2014 submitted cheques (1) payment of Rs.22,335,966/- for the year ended 30.06.2012; (ii) payment of Rs.22,335,966/- for the year ended 30.06.2013; and (iii) payment of Rs.2,851,400/- deducted as 6% withholding tax for the payment of ARFSF for the years ended 2012 and 2013, however failed to pay late payment additional fee of Rs.23,987,876/-. It is settled law that liabilities under an instrument, being in the nature of a contract, cannot be avoided when it has been entered into voluntarily and out of the free will of the parties thereto. In the instant case, Clause 4.2.3 of the License as reproduced above, clearly provides that the late payment of fee shall incur additional fee calculated @ 2% per month on the outstanding part thereof. This being part of the consensual instrument i.e. the license, is binding on the appellant. While saying so, I have derived the strength from the verdict of the Hon'ble Supreme Court of Pakistan in case of ***Pak Com Limited Vs. Federation of Pakistan (PLD 2011 SC 44)***, wherein the Hon'ble apex Court has held that the Licensee is bound by the terms of the License and no exception can be taken thereto, subsequently. It was further observed in the referred judgment that where all the terms and conditions of the contract have been accepted by the parties with free consent without coercion or undue influence, fraud or mis-representation the liability under the same cannot be avoided on the ground of mistake of facts or law. It may be observed that Clause 4.2.3 was all along in the knowledge of the appellant since 04.08.2004, when the License

was granted and after about a decade and at this stage no exception thereto can be taken on the premises with the terms of late payment Additional Fee (LPAF) is in the form of a penalty. The appellant being bound by obligations accepted pursuant to Clause 4.2.3 of the License, cannot turn around and disown the unequivocal commitment to pay the late payment additional fee @ 2% per month on the outstanding amount for each month thereof.

7. The only plea raised by the learned counsel for the appellant challenging the validity of additional late fee is that the imposition of late payment additional fees of Rs.23,987,876/- @ 2% under Clause 4.2.3 of appellant's License is patently illegal and unlawful as there is no provision in the PTA Act or the rules and regulations framed there under which permit the respondent Authority to impose additional fee on late payment of Annual Radio Spectrum Fee. This point was sufficiently and in detailed discussed in case of ***DV Com Data Vs Pakistan Telecommunication Authority through Chairman and another (PLD 2017 Islamabad 177)*** wherein, it has been held as follows:-

(a) Pakistan Telecommunication (Re-organization Act (XVII of 1996)-

----Ss. 21, 5(2), 23 & 7---Pakistan Telecommunication Authority (Functions and Powers) Regulations 2006, Reglns. 23(7) & 6 --- Exclusive power of the Pakistan Telecommunication Authority ("PTA") to grant licenses --- Issuance of license, cancellation of license, levy of fee and late payment of additional fee for license by the PTA--- General conditions concerning fee(s)---Nature of Late Payment Additional Fee---Scope---Appellant impugned order of the PTA where it was held to be liable to pay additional fee for late payment of the Initial Spectrum Fee under the license agreement---

Question before the High Court was whether the demand by the PTA on the appellant to pay additional fee for late payment of the Initial Spectrum Fee was justified---Validity---License agreement and Regln. 23(7) of the Pakistan Telecommunication Authority (Functions and Powers Regulations 2006, envisaged a levy of 2 percent late payment additional fee per month and in addition to the said fee, a licensee had to pay all fees required under the Pakistan Telecommunication (Re-organization) Act, 1996 and the Rules and Regulations framed under the same--- Contention of the appellant that the default on payment of the Initial Spectrum Fee was not willful, therefore the penalty of the late payment fee could not be imposed on it, was not tenable as the late payment additional fee was not a penalty but additional fee by way of compensation and Regln. 23(7) of the Pakistan Telecommunication Authority (Functions and Powers) Regulations 2006 did not provide that levy of late payment fee shall only be in the case of willful default---License agreement between the parties revealed that PTA did not have any discretion not to impose or waive the said late payment fee---High Court observed that the Late Payment Additional Fee was part of the agreement between the parties and admittedly the appellant did not make the payment of the Initial Spectrum Fee as required, and hence it was liable to pay the same---No illegality therefore existed in the impugned order---Appeal was dismissed in circumstances.

Besides, the learned counsel for the respondent has also placed copy of judgment dated 29.05.2015 in F.O.A No.51 of 2012 (Re; Telecard Limited Vs Pakistan Telecommunication Authority) and judgment dated 21.09.2015 in F.O.A No.17 of 2015 (Re; Pakistan Telecommunication company Ltd Vs Pakistan

Telecommunication Authority), passed by the Islamabad High Court, wherein same point so involved in this petition was raised and concurrent observation was made as to validity of additional late payment fee so also so empowerment of the Pakistan Telecommunication Authority concerning imposition of such additional fee found within line to the Act.

8. It may be mentioned that in the aforesaid case law not only the nature of late payment additional fee was discussed but also discussed the power of the respondent Authority in connection to imposition of such charges on account of non-payment of Annual Radio Spectrum Fee and it was found that the same is under the power bestowed with respondent Authority. The learned counsel for the appellant has not been able to point out any specific provision of law under which such imposition of late payment Additional Fee is not in consonance with law rather it is abundantly clear on record such term duly incorporated in the License awarded to the appellant. As regards, the case of Pakistan Broadcasters Association through Executive Director and 7 others Vs Pakistan Electronic Media Regulatory Authority through Chairman and another (2014 CLC 197 Sindh), same is distinguishable from the case in hand, as in the said case question of imposition of surcharge in relation to PEMRA Ordinance, 2002 was taken into consideration, rather in the same case, it was held that PEMRA vide its regulations could impose a surge on account of late payment of License fee on its Licensee. Likewise, the other case law relied by the learned counsel for the appellant reported in PLD 2006 Supreme Court 528 (Re; Province of Sindh through Secretary, Ministry of Excise and Taxation and others Vs M/s Azad Wine Shop and others), the question and validity relating to levy

and recovery of vend fee, assessment fee and surcharge on assessment fee was challenged, and in my firm view said case law has no nexus with the case in hand, wherein point of charging late payment fee on account of non-payment of Annual Radio Spectrum Fee is in dispute and no question of additional taxing is involved.

9. In view of above, since the late payment Additional Fee is a part of License agreement executed by the appellant and admittedly, the appellant did not make payment of initial Spectrum Fee as required under the referred License, hence Clause 4.2.3 as well as Clause 4.1.3 of the License agreement is attracted requiring the payment of late payment Additional Fee @ 2% per month. This being the position, there is no factual or legal infirmity in the impugned order.

10. For the reasons, recorded above, the instant appeal merits no consideration, stands dismissed accordingly.

JUDGE

M. Khan