

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Miscellaneous Appeal No.01 of 2017

Show Time Cable & Datacom (Pvt.) Ltd.

Versus

Pakistan Electronic Media Regulatory Authority & another

Date of Hearing: 30.03.2021 & 07.04.2021

Appellant: Through Ms. Sana Akram Minhas Advocate.

Respondents: Through Mr. Kashif Hanif and Mr. Sarmad Ali
Advocates

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This Miscellaneous Appeal under section 30-A of Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (hereinafter referred as "PEMRA Ordinance 2002) was filed by the appellant who were/are engaged in the business of cable television operation since last two decades.

2. The appellant being aggrieved of impugned order dated 02.01.2017 whereby extension and/or revalidation of its licence, was made conditional subject to a financial claim made in the impugned order, which claim is seriously denied and/or challenged by the appellant on two counts, has preferred this appeal. Two propositions/ counts are as under:

- (i) That for the impugned decision an opinion was sought from the Regional Council of Complaints which had no jurisdiction under the ibid Ordinance to comment and/ or recommend any opinion, as far as dispute is concerned;
- (ii) That even if such recommendations are ignored to have been forwarded by the Council of Complaints and the

impugned order be seen as an independent decision of PEMRA then again, the details of the outstanding dues does not seem to generate from PEMRA Ordinance 2002, Regulations 2011-12 and PEMRA Rules 2009, and hence are/were illegal and unlawful, and could be struck down by this Court on merit.

3. At the very outset learned counsel for appellant was inquired that if the council of complaints had no jurisdiction, will the appellant be satisfied in case the matter is remanded to the authority for a decision by itself independently? Counsel submitted that since this is second round of litigation and rules and regulations, as framed under the *ibid* Ordinance, are clear, therefore, this Court may decide the matter on merit to the effect as to whether such claim of the respondents is a lawful claim arising out of PEMRA Ordinance and the rules and regulations framed thereunder and terms of agreement forming a contract. Hence I opted to hear this appeal on both the counts, at the request of appellant's counsel.

4. Respondent No.1 is an authority created under PEMRA Ordinance 2002 for the development and improvement of the electronic media in Pakistan, the respondent No.2 is the regional office of respondent No.1 i.e. Pakistan Electronic Media Regulatory Authority Sindh region which is under control of respondent No.1.

5. The initial licence was issued to the appellant on 01.07.2000 for the operation of cable TV for a period of five years which was renewable and extendable by Pakistan Telecommunication Authority i.e. to establish, maintain and operate cable television in Pakistan (Annexure A/1). A few years later to the issuance of this licence, PEMRA Ordinance 2002 was introduced and the respondent No.1 was created as an authority thereunder to regulate the operation of broadcasting and cable

television operation/distribution. The aforesaid licence was then required to be renewed under the ibid Ordinance of 2002.

6. The first renewal (Annexure A/5) of licence of the appellant was issued as category B-3 having a capacity upto 5000 subscribers which was issued on 15.04.2006 having effective date as 01.07.2005, as stated therein. The said first renewal in category of B-3 expired on 30.06.2010 and prior to its expiry the appellant's licence category was upgraded to B-5 having a maximum cap of 10,000 subscribers. It was upgraded on 10.10.2008.

7. The facts disclosed that the appellant was compelled to file a Suit No.07 of 2008 against the authorities for an action against the operation of three in-house channels and for declaration that the acts of the respondents including the categorization to B-6 of the licence were unlawful.

8. While the parties remained under serious dispute in respect of allegations raised in show-cause notice dated 18.09.2009, respondent No.2 raided the premises of the appellant and attempted to serve an order dated 30.09.2010 upon the appellant whereby respondent No.2 declined to renew and revalidate appellant's licence. The said decision of 30.09.2010 was challenged in M.A. No.50 of 2010 which was disposed of on 05.05.2016 after setting aside of the aforesaid decision with directions to decide the application afresh in accordance with relevant rules and law.

9. In response to such disposal of aforesaid Misc. Appeal, a decision in pursuance of 39th meeting of Council of Complaints PEMRA Sindh held on 02.06.2016 was taken and the authority on recommendations of Council of Complaints, offered to renew the licence with terms as incorporated therein including payment of outstanding dues/amount. Important part in the impugned decision is/was that renewal of licence

of appellant was stated to have been forwarded to Regional Council of complaint in accordance with the decision of this Court in the aforesaid M.A. 50/2010. Some of the charges therein were claimed to be unlawful, as stated in paragraph 10 of the appeal. Finally after correspondence exchanged between them, the authority was pleased to pass an order on 02.01.2017 (impugned order) reiterating the claim which is highlighted in the decision as outstanding dues.

10. With these set of facts, learned counsel for the appellant submitted that the respondent sought an opinion in this regard from the Council of Complaints which advised the authority for passing such decision, which they did in terms of impugned decision. It is submitted that formation of the Council of Complaints under the ibid Ordinance originates from Section 26 and so far as the dispute, as disclosed in the decision is concerned, per learned counsel, it is beyond the domain, mandate and sphere of the Council of Complaints for which it was formed under Ordinance. Without prejudice to such recommendation, it is submitted by the learned counsel that the authority had not applied its mind independently which has rendered the decision as illegal and unlawful as the authority has simply approved the recommendation of Council of Complaints. Learned counsel for the appellant in this regard has relied upon Section 19 read with Section 24 of the ibid Ordinance and submitted that it does not provide any room for the subject dispute to be forwarded to the Council of Complaints for opinion.

11. Learned counsel for appellant further submitted that the rules and regulations framed under the Ordinance so far they are not in consonance with the parent statute, do not call for its application in resolution of dispute. It is submitted that neither fee nor tax could be levied through subordinate legislation such as the rules framed and hence even if this decision is considered to be a decision of the

authority, it is beyond their mandate to claim such amount as outstanding, such as renewal fee, subscriber fee, surcharge, in-house and 5% Gross Annual Advertisement Revenue (GAAR). Learned counsel thus argued the case for its disposal on merit as well.

12. On the other hand, learned counsel appearing for respondent/ PEMRA submitted that the appeal is not maintainable as appellant has approached the Court with unclean hands. It is urged that the licence was issued at the relevant time to Show Time Cable Network/appellant and by virtue of change in its shareholding or directorship they have lost the integrity as the permission from PEMRA for such change was not obtained. It is claimed that the licence is liable to be cancelled on this count alone under section 30(d) of PEMRA Ordinance 2002.

13. It is further urged that they (appellants) are habitual defaulter and numerous complaints/show-cause notices have been issued on various counts such as copyrights, broadcasting anti-religious scholars, anti-Islamic and pirated contents etc. and prompt actions by issuing notices were taken. It is however conceded by the learned counsel that initial licence was issued as Category B-3 for only one town i.e. Jamshed Town which was later upgraded to category of B-5 covering the operation in Gulshan Town, Saddar Town, Gulberg Town, Liaquatabad Town, Jamshed Town. Learned counsel submitted that the claim as raised in the impugned order is a legitimate one and is covered under the rules and regulations, contract terms and the PEMRA is authorized under the law to levy and recover such amount as disclosed and incorporated therein.

14. It is further submitted that the Council of Complaints was competent to look into the matter and rightly advised PEMRA, which recommendations were considered and the impugned decision was taken by PEMRA. Learned counsel further submitted that it is immaterial for

them (appellant) to object that an opinion is sought from the Council of Complaints as this claim is otherwise covered under Ordinance 2002 and rules and regulations framed thereunder and none of the claims is beyond the frame of such law.

15. I have heard learned counsel for parties and perused material available on record.

16. At the outset I may say that the statement in the impugned decision that this Court in Misc. Appeal No.50 of 2010 forwarded it to Council of Complaints is incorrect and contumacious. No such order, forwarding the case of renewal of licence, was passed by this Court to Regional Council of Complaints and I issue notice of this contemptuous statement to Chairman PEMRA to respond. Office to act accordingly. Similarly there was no recommendation either by Council of Complaints or PEMRA that since there were changes in the directorship or shareholding of the appellant, therefore, licence may be cancelled or if the appellant was put on notice by PEMRA. The impugned decision is silent in this regard, therefore, the objection of the respondent to this extent that there was change in the directorship or shareholding is discarded as it is not subject matter of the present lis. The case in hand is beyond such sphere as it is the renewal of licence of the appellant on the matter of outstanding dues alone.

17. The primary objection of the appellant was of the Council of Complaints insofar as present controversy between the parties is concerned that an opinion was unnecessarily sought from it. Section 26 of the Ordinance 2002 is the one whereby the federal government was obligated to issue a notification in the official gazette to establish Council of Complaints at Islamabad, the provincial capitals and also at such other places as the federal government may determine. In terms of subsection (2) of Section 26 the Councils were obliged to receive and

review complaints made by persons or organizations from general public against any aspects of the programmes broadcast or distributed by a station established through a licence issued by the authority and render opinions on such complaints. Thus, in terms of subsection (2) of Section 26, the role of Council is restricted to the contents of programmes broadcasted and distributed and a complaint in this regard alone may be lodged with PEMRA which may be marked to Council of Complaints for an opinion and recommendation.

18. The reliance of learned counsel for respondents on subsection 3A of section 26 that the council shall have power to summon a licensee is also misconceived as it pertains to an issue where a complaint was lodged regarding any matter relating to its operation. Since the domain and sphere of the Council of Complaints is adjudged in subsection (2) of section 26, subsection (3A) cannot prevail beyond sphere of subsection (2). Even the rules of Council of Complaints framed, would cover the scope as highlighted in subsection (2) of section 26 and nothing beyond, even if they are so framed.

19. Rule 8 of PEMRA (Councils of Complaints) Rules 2010 provides room for grievance of complainant to the extent of aspect of a program or advertisement. Only on this count summon may be issued and not otherwise. Similarly in terms of Sub-Rule 4 of ibid Rules even Chairman of PEMRA cannot seek an opinion “under the Ordinance” and regulation/rules for a matter beyond the work assigned by Section 26(2) of Ordinance 2002. Rule 8(5) is also limited to the imposition of fine, censure and/or action up to a limit prescribed in Section 29 of Ordinance 2002, provided it is within campus of their assigned work in terms of 26(2) of Ordinance 2002.

20. Subsection (5) of Section 26 also provides that Council may recommend the authority appropriate action of censure, fine against a

broadcast or CTV station or licensee for violation of the codes of program content and advertisement as approved by the authority as may be prescribed, which is not the case here as it primarily revolves around outstanding dues.

21. Similarly Section 13 of PEMRA Ordinance, which deals with the delegation of powers in essence provides that the authority may, by general or special order, delegate to the Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee of the Authority any of its powers, responsibilities or functions under this Ordinance subject to conditions as it may by rules prescribe. This is not the case that PEMRA as an authority defined under 2(b) has by general or special order delegated such power to Council of Complaints. Besides, this delegation of powers under section 13 is also subject to the scope and sphere of working of all components within PEMRA. If any such authority is delegated, which is otherwise not permitted, and/or restricted by PEMRA Ordinance, would render 26(2) of Ordinance 2002 as redundant or any other provision defining scope of work, as unneeded. Provisions providing a definite role will be diluted in case such interpretation is allowed. Council of Complaint's role is the subject of contents of the programme and advertisement such as subsection 2 of Section 26 which provides a contour line of the job description. It therefore cannot be done at least "under the Ordinance 2002". Authority has its role under PEMRA Ordinance 2002 and it only seeks opinion from any component of PEMRA, provided component's role is defined under the Ordinance for the subject. As in this case the role of Council of Complaints is defined and Chairman/Authority cannot ask more than what legislature has entrusted.

22. Hence, so far as the first question as raised by the appellant is concerned, is answered in affirmative that the Council of Complaints had

no jurisdiction for rendering opinion/recommendation to PEMRA “under the Ordinance” and its role in this regard and the advice sought is of no avail and merits no consideration; it should have been an independent order of PEMRA in view of provisions of PEMRA Ordinance.

23. Now, since the appellant’s counsel has requested that the appeal may also be heard and decided on merit since long standing dues are being claimed beyond rules and regulations, I would therefore, deal with the merits of the case as under:

24. The details of pending outstanding dues are incorporated in the decision, which for the sake of convenience are reproduced as under: -

S N	Head of account	2006-07	2007-08	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	Total
1	Renewal fee	-	-	-	175,000 (submitted)	87,500 (submitted)	87,500 submitted	87,500 submitted	87,500 submitted	180,000 submitted	87,500 submitted	0
2	Subscriber fee	107,500	15,000	61,800 submitted 36,800	0	60,000 (Submitted)	120,000 submitted	120,000 submitted	120,000 submitted	-	120,000 submitted	147,500
3	Surcharge	12,500	12,500	-	0	87,500	26,250	26,250	26,250	-	17,500	208,750
4	In-house	-	-	-	660,000	660,000	660,000	660,000	660,000	660,000	660,000	4,620,000
5	5% GAAR	-	-	-	-	As per audited accounts	As per audited accounts	As per audited accounts	As per audited accounts	As per audited accounts	As per audited accounts	As per audited accounts
	Total	120,000	27,500	25,000	660,000	747,500	686,250	686,250	686,250	660,000	677,500	4,976,250

25. The first claim is of renewal of the fee which perhaps has already been paid as it reflects NIL in the last vertical column hereinabove. The renewal of licence and its fee is dealt with in terms of Regulation 9 of Pakistan Electronic Media Regulatory Authority (Distribution Service Operations) Regulations, 2011 and regulation 8 of PEMRA (Television Broadcast Station Operation) Regulations 2012. These regulations also deals with fees and security deposits. Not much emphasis was made on this count and therefore reference of these regulations are enough to identify the origin of such claim. In terms of Regulation 7 of both the regulations, the licence and annual fees payable shall be as determined by the authority from time to time. These Regulations provides a way out of a surcharge at the specified rate per month upto a maximum of 15% to 30% late payment of annual fee or licence renewal fee, as the case may be. Proviso to it enabled the authority to revoke a licence if

licensee fails to pay dues and surcharge after expiry of three months with further power to seize the equipment.

26. Regulation 9 of Pakistan Electronic Media Regulatory Authority (Television Broadcast Station Operations) Regulations, 2012 also covers renewal of licence fee which shall be at the prevalent applicable licence rate of the respective area and category of licence plus rate of inflation calculated as prescribed by the State Bank of Pakistan.

27. Table VI of Rules 2009 framed under Section 39 of Ibid Ordinance 2002 prescribes the licence fee and renewal fee with addition of subscriber's fee at Rs.24/- per subscriber. The claim of licence fee, renewal fee and subscriber fee and surcharge are legitimate in this regard.

28. In addition to distribution licence, appellants were also found relaying (6) six in-house channels during inspection on 30.07.2016 and channels brand names are Mango HD, Orange HD, Apple Box Office, Tune M and ABC HD, which report was signed by the representatives. These in-house channels are in addition to those channels for which subject licence was issued and thus the appellants were generating additional revenue through advertisements by interrupting/breaking the recorded programmes through in-house channels. Since it is private arrangement of appellants to generate revenue, Gross Annual Advertisement Revenue (GAAR) is being charged in terms of audited accounts. Like other satellite e-channels who are being charged in terms of Table 1, attached to Schedule 'B' of Rules 2009 which includes licence fee, renewal fee and 5% annual gross advertisement revenue, the appellants are also being charged Gross Annual Advertisement Revenue (GAAR) for their in-house channels only. In case of in-house channel relay, not only the licence fee and renewal fee is payable but the advertisement revenue is also collected, like it is being collected from other satellite TV channels in

terms of Table 1 of Rules 1009. It is a universal yardstick applied in case of all distributors who are relaying in-house channels and generating advertisement revenue otherwise the permission for such relay/in-house channels could be withdrawn in terms of independent agreement.

29. Regulation No. 12 of PEMRA Regulations 2011 provides conditions in respect of in-house channel permission. It enables the distribution service licensee having in-house channel permission to abide by the terms and conditions of such permission. It also provides that during a regular program a continuous break for advertisement shall not exceed three minutes and duration between two successive breaks shall not be less than fifteen minutes, provided that during transmission of any given one hour, the total duration of advertisement shall not exceed a maximum of twelve minutes.

30. Pakistan Electronic Media Regulatory Authority Rules, 2009 provides guidelines and conditions. Rule 5 of *ibid* Rules set out terms for duration of licence, payment of fee, as mentioned in Schedule 'B' of *ibid* Rules 2009. Sub-rule 2 of Rule 5 provides that it shall be valid for the term for which it was granted subject to the payment of annual fee or other charges as set out in the Schedule-B. Charging of fee from the subscriber is also provided in Rule 10 of the *ibid* Rules 2009 and schedule 'B' disclosed the amount. Rule 12 provides renewal of licence on expiry of licence term which should have been applied six months prior to the expiry of licence, which renewal is based on satisfactory past performance, opinion of the concerned Council if the authority so requires, payment of prescribed fee prevalent at the time of renewal and payment of outstanding dues, if any, fulfillment of any other terms and conditions, as prescribed or varied in the public interest.

31. Schedule-B attached to these rules enables PEMRA to recover in-house channel fee for cable TV. Table VI provides licence fee of

Rs.175,000/- upto 10,000 subscribers as B-5 category which category appellant is enjoying followed by annual renewal of Rs.87,500/-. This amount is being paid by the appellant in terms of said rules as reflected in the outstanding dues chart hereinabove. It also enable the licensor PEMRA to recover Rs.24/- per subscriber per year which is a subscriber fee (Table VI), disclosed in horizontal column 2 in the subject chart incorporated in the impugned order. Table IX deals with in-house channel licence fee and is chargeable to all categories from B-1 to B-10.

32. Thus, in view of aforesaid rules and regulations, the claim is legitimate and I do not see any transgression of the PEMRA authority in claiming the amount mentioned in the impugned decision.

33. It is pertinent to point out that rationale and vires of such levy and charge were argued by appellant's counsel as the fee and other claims are claimed to be disproportionate. Perhaps these arguments could have served better had it been a case of challenging the vires of regulations and rules.

34. In view of above:

i) Notice in terms of Para 16 above be issued.

ii) The appeal merits no consideration, which is accordingly dismissed along with listed application. Thus, if any of the dues are still outstanding, it may be paid in 15 days' time from date of this judgment.

Dated: 28.04.2021

Judge