

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No. D – 6552 of 2016
Constitution Petition No. D – 6553 of 2016
Constitution Petition No. D – 6554 of 2016

Date	Order with signature of Judge
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Constitution Petition No. D – 6552 of 2016

1. For hearing of Misc. No.31489/2016
2. For hearing of main case.

Constitution Petition No. D – 6553 of 2016

1. For hearing of Misc. No.31492/2016
2. For hearing of main case.

Constitution Petition No. D – 6554 of 2016

1. For hearing of Misc. No.31495/2016
2. For hearing of main case.

19.09.2024

Mr. Ayan Mustafa Memon, advocate for the Petitioners in all petitions along with Mr. Muhammad Nawaz Khan and Ms. Yumna Waris, advocates.

Mr. Kashif Hanif advocate for the Respondent / PEMRA.

Mr. Furqan Ali advocate for the Respondent / PEMRA.

COMMON ORDER

JAWAD AKBAR SARWANA J.: By this common order, we intend to dispose of three (3) constitution petitions, namely, CP No. D-6552/2016, CP No. D-6553/2016 and CP No. D-6554/2016. The three petitions involve similar facts and issues arising from the actions of the same Respondent/Pakistan Electronic Media Regulatory Authority (“PEMRA”). Hence, the common order.

2. The Appellants, ARY Communication Limited and Haji Muhammad Iqbal s/o Haji Muhammad Yaqub (hereinafter collectively referred to as “ARY”) have filed these three constitution petitions against PEMRA impugning three notices/letters issued by PEMRA to ARY concerning outstanding dues of up-linking from Pakistan only, of (i) “The HBO” movie channel vide notice/letter

dated 10.11.2016;¹ (ii) the children's channel "The Nickelodeon" vide notice/letter dated 01.11.2016;² and, (iii) "The Musik" music channel vide notice/letter dated 18.11.2016.³

3. The learned Counsel for petitioner/ARY claimed that ARY is aggrieved that PEMRA has decided/determined the outstanding dues towards up-linking charges for up-linking these three satellite TV channels, i.e. HBO, Nickelodeon, and The Musik, from Pakistan only for the period commencing from the date of expiry of ARY's Landing Right Permission ("LRP") of the concerned satellite TV channel up to the date mentioned in the notice/letter issued by PEMRA. Counsel argued that (i) the impugned notices/letters were issued by an unauthorised officer lacking competency to issue such notices/letters, (ii) the said officer did not have lawful authority to decide/determine the dispute, (iii) the dispute was decided unilaterally by PEMRA; (iv) no show-cause notice was issued to ARY before PEMRA's alleged determination, (v) no opportunity of hearing was extended to ARY, (vi) the impugned notices/letters amounted to imposing penalty sans following the principles of natural justice notwithstanding the officer concerned was also not authorised to impose such penalty; and, (vi) ARY has already paid to PEMRA the Revalidation Fee, Annual Renewal Fee towards LRP, Application Process Fee for the years 2010 to 2019,⁴ without receiving any objections from PEMRA⁵ and therefore the latter was estopped from claiming any outstanding dues concerning up-linking of the said Satellite TV channels from Pakistan only for the period for which the payment was unconditionally settled with PEMRA.

¹ Available on pages 29-31 of CP No.D-6552/2016.

² Available on pages 29-31 of CP No.D-6553/2016.

³ Available on pages 29-31 of CP No.D-6554/2016.

⁴ Available on pages 129 to 137 of CP No.D-6552/2016; on pages 129-141 of CP No.D-6553/2016; and pages 129 to 143 of CP No.D-6554/2016.

⁵ Acknowledgement available on page 141 of CP No.D-6552/2016.

4. Counsel for PEMRA argued that the petitioner/ARY had a license for LRP, but apart from distribution/broadcast, it had carried out up-linking of satellite TV channels of HBO, Nickelodeon and The Music for which the applicable fee is/was US\$500 per day, but ARY did not make any payment towards such up-linking during the period specified in the notices/letters, hence PEMRA issued the said impugned notices/letters. He contended that there was no determination/decision by the officer issuing the impugned notice/letters, and that the amount required to be deposited was tentative. No proceedings occurred after November 2016 with regard to the determination of the provisional outstanding dues with regard to up-linking from Pakistan of the three satellite TV channels, as this Court suspended the impugned notice/letters in the same month (November 2016) in all three petitions. With the notices/letters suspended from November 2016 till the present (2024), neither the tentative outstanding dues were re-examined, nor PEMRA has reached any final determination, notwithstanding that ARY has also filed Suit Nos.1126//2014, and 1127/2014,⁶ against PEMRA which are still pending against some other 2014 show-cause notices issued by PEMRA regarding, inter alia, illegal operation without renewal of LRP, illegal up-linking of satellite TV channels, non-payment of due/annual fees/default in payment of the surcharge, etc.⁷ During the pendency of these two suits (after their filing and post-2014), ARY made certain payments towards the Revalidation Fee, Annual Renewal Fee of LRP, Application Process Fee of HBO, Nickelodeon and The Music for the period 2010 to 2019. PEMRA's Counsel argued that in the three petitions before us, ARY had challenged PEMRA's tentative claim for outstanding dues concerning up-linking from Pakistan of the three satellite TV channels, which was provisional, and there is no dispute regarding the annual renewal fee of the LRP licenses with ARY, having been paid and settled by ARY in 2016. Counsel further argued that in the

⁶ Available on pages 65-95 of CP No.D-6552/2016.

⁷ Available on pages 49-63 of CP No.D-6552/2016.

circumstances, ARY could have approached the Authority in 2016 challenging the outstanding dues of up-linking from Pakistan only at the time when PEMRA issued the impugned notices/letters, but it did not do so and instead filed these three petitions. Hence the three petitions are pre-mature as the outstanding dues of up-linking from Pakistan only for the satellite TV channels is yet to be commenced/finalized.

5. We have heard Counsel and perused the record in the three petitions. From a perusal of the impugned notices/letters, it appears that PEMRA had yet to decide ARY's final liability under Section 31 of the PEMRA Ordinance, 2002, in relation to up-linking of the three satellite TV channels from Pakistan, namely HBO, Nickelodeon and The Musik. The impugned notices/letters mentioned that the up-linking of a satellite TV channel falls within category "C" of the guidelines for temporary up-linking permission, for which the applicable fee is/was US\$500/day. The Guidelines for the Temporary Up-linking Permission and Revision of the Tariff for Temporary Up-linking Permission were notified vide Notification No.PEMRA.1(9)/Secy/Gazette/2012 dated 16.03.2012 and were published in the Gazette of Pakistan, Islamabad on 17.04.2012.⁸ ARY has neither challenged the vires of this said Notification nor any illegality, arbitrariness, malafide or lack of jurisdiction concerning PEMRA issuing the said Notification. ARY has also not argued that the quantum of outstanding dues of up-linking from Pakistan only, allegedly temporarily determined by PEMRA, is beyond the scope of either Section 31 of the PEMRA Ordinance, 2002, or the Guidelines on the subject of up-linking framed under the PEMRA Ordinance, 2002. ARY has claimed (and PEMRA does not deny this) that ARY has already paid the Revalidation Fee, the Annual Renewal Fee of LRP, and the Application Processing Fee of the three satellite channels, i.e., HBO, Nickelodeon and The Music up to the date of issuance of the impugned notices/letters, i.e. November 2016. Yet, at the same time, we note that ARY has not claimed in the three

⁸ Available in Part-II of CP No.D-6552/2016

petitions that it did not carry out up-linking from a ground transmission facility, within or outside Pakistan, to a satellite for distribution/transmission of the three satellite channels in Pakistan or beyond and as such no outstanding up-linking dues could arise. Instead, ARY has raised a challenge in writ jurisdiction against the tentative determination of the outstanding dues for Pakistan only; its quantum and the mode of demand raised by PEMRA is/was illegal, arbitrary, malafide, without jurisdiction and contrary to ARY's legal and vested rights.

6. Section 31 of PEMRA Ordinance, 2002, read with PEMRA Rules 2009 and the PEMRA Guidelines on up-linking of satellite TV channels, clearly identifies the item of the up-linking fee of satellite TV channels. It is separate from the revalidation fee, the annual renewal fee of LRP, the application processing fee, etc. Each item is distinguishable as described in the statute and its rules, regulations, and guidelines framed thereunder. The details of the two suits filed by ARY against PEMRA and others are not available before us; however, based on the documents placed in the three petitions, it appears that ARY filed the two suits challenging a show-cause notice dated 03.07.2014, which consolidated various show-cause notices issued by PEMRA to ARY from 18.06.2009 to 02.05.2014, principally for the non-renewal-of LRP and continuing relay of transmission despite lapse of validity of the license. The 2014 show-cause notice impugned in the two Suits filed by ARY quantified the outstanding annual renewal fee, surcharges, etc., related to LRP but did not mention any quantification of any outstanding dues of up-linking from Pakistan only of satellite TV channels by ARY. This item, i.e. the quantification of the outstanding dues of up-linking from Pakistan only, is the subject matter of the three petitions which impugn the notices/letters wherein a demand for the outstanding dues of up-linking from Pakistan only of these satellite TV channels by ARY is raised for the first time by PEMRA. ARY has raised a distinct challenge against the three impugned notices/letters in the form of these three petitions objecting to the

outstanding dues of up-linking from Pakistan only to the satellite TV channels in writ proceedings. This is separate from the two civil suits still pending on the trial side. According to the documents available in the petitions, ARY, has neither preferred any contempt proceedings against PEMRA in its two civil suits nor filed a fresh civil suit against PEMRA for issuing the three impugned notices/letters. ARY has elected to treat these impugned notices/letters as a fresh cause and challenged them in writ jurisdiction only. If ARY intended to rely on the 2014 ad-interim Order passed in the two civil suits as a defence against the 2016 impugned notices/letters, it did not need to file these three petitions. But in fact, ARY has opted to file constitutional petitions against PEMRA's 2016 notices/letters. ARY's grievance in these three petitions is to be now examined within the contours of the restricted jurisdiction of this Court, exercising jurisdiction under Article 199 of the Constitution of Pakistan alone. This Court's hands are tied to making any factual inquiry while exercising writ jurisdiction under Article 199 of the Constitution of Pakistan. In such circumstances, we cannot examine any aspect of the dispute between the parties beyond the four corners of Article 199.

7. The upshot of the above discussion is that prima facie, the impugned notices/letters appear to be a snap-shot/series in the process of PEMRA ultimately determining the final outstanding dues towards the up-linking from Pakistan only of the three satellite TV channels by ARY. ARY was always at liberty to engage the machinery available under the PEMRA Ordinance to challenge the notices/letters, but it did not do so. While we note that the amount mentioned in the three notices/letters is tentative, yet there were no details provided of such quantification and no background of how and when the dues relating to up-linking from Pakistan only were detected by PEMRA and accrued therefrom. This information is/was missing from the impugned notices/letters. Accordingly, to bring closure to the dispute, which has been pending for the last eight (8) years, we direct PEMRA to issue to ARY through the duly authorized

officer, fresh show-cause notices for outstanding dues with regard to up-linking from Pakistan only, of the three satellite TV channels by ARY (the subject matter of these petitions), setting out therein in writing the missing information identified in this Order detailing the basis, calculation and break-up of PEMRA's demand, including, inter alia, but not limited, to any other material information relevant for proper adjudication of the dispute between ARY and PEMRA concerning outstanding dues of up-linking from Pakistan only of the three satellite TV channels. PEMRA will provide an opportunity of hearing to ARY, including the right to file/raise objections in writing to such fresh demand raised by PEMRA. It is clarified that ARY is at liberty to raise any, all and further grounds before PEMRA. PEMRA shall pass a speaking order on the matter with the entire exercise to be concluded by the parties within four (4) months time.

8. It is clarified that the observations made herein are confined to providing a background for deciding this petition on principally the sole subject of outstanding dues of up-linking from Pakistan only, if any. The observations are without prejudice to parties' claims and defences and Counsel submissions as recorded herein. These should not influence the adjudication officer/Tribunal/Authority deciding the dispute. Finally, the action or inaction by the parties arising out of or in relation to or in connection with any of the observations/directions/orders passed in these petitions will not be construed as contemptuous in the presence of any ad-interim Order⁹ of the trial court in the two civil suits, which ad-interim Order, the trial court will decide finally on its own merits and in its own wisdom.

9. The three (3) petitions stand disposed of in the above terms along with pending applications.

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⁹ Available on pages 99 to 103 of CP No.D-6552/2016