

IN THE HIGH COURT OF SINDH AT KARACHI

**Present:
Mr. Justice Muhammad Shafi Siddiqui CJ
Mr. Justice Jawad Akbar Sarwana**

C.P. No. D-2119 of 2024

DVCom Data (Pvt.) Limited
Versus

Pakistan Telecommunication Authority & another

Date of Hearing: 18.09.2024 and 25.09.2024

Petitioner: Through Mr. Ayan Mustafa Memon along with Mr. Ali Zuberi Advocates.

Respondent No.1: Through Mr. Salahuddin Chandio Advocate along with Mr. Ali Akbar Sahito, Deputy Director (Law) PTA.

Respondent No.2: Through Mr. Khaleeq Ahmed, Deputy Attorney General.

J U D G M E N T

Muhammad Shafi Siddiqui, CJ.- In line with the Scheme envisaged in the Pakistan Telecommunication (Re-organization) Act, 1996, Pakistan Telecommunication Rules, 2000 and De-Regulation Policy for the Telecommunication Sector 2003, petitioner obtained nine Regional Wireless Local Loop Licenses described in paragraph 6 of the petition and for convenience the same are identified hereunder:-

Sr. No.	Region	Annual Fee payable.
1.	CTR	USD 25,000 or PKR Rs.1,450,000/-
2.	NTR-1	USD 25,000 or PKR Rs.1,450,000/-
3.	NTR-II	USD 25,000 or PKR Rs.1,450,000/-
4.	WTR	USD 25,000 or PKR Rs.1,450,000/-
5.	HTR	USD 25,000 or PKR Rs.1,450,000/-
6.	RTR	USD 25,000 or PKR Rs.1,450,000/-
7.	ITR	USD 75,000 or PKR Rs.4,350,000/-
8.	KTR	USD 75,000 or PKR Rs.4,350,000/-
9.	LTR (N/S)	USD 75,000 or PKR Rs.4,350,000/-

2. The cause for filing this petition triggered when the petitioner received demand note dated 02.04.2024 followed by letter dated 20.04.2024. Earlier, in Suit No.986 of 2023 similar notice dated 20.04.2023 followed by letter of 18.05.2023 were challenged (claimed to have different cause for different period). In terms of the impugned demand notice the Annual Radio Frequency Spectrum Fees for the year ending 31.12.2023, cumulatively amounting to US Dollars 375,000 or its equivalent in Pak Rupee in terms of prevailing exchange rate was claimed. Petitioner being aggrieved of such claim of US Dollar's equivalent in Pak Rupee, **as the prevailing exchange rates were/are significantly different than they were when license was granted**, was challenged and filed instant petition on several counts described below as bullet points:

- It is claimed that these Radio Frequency Spectrum fee was being claimed since 2004 and is being paid in Pak Rupee as disclosed and identified in nine separate license agreements for nine Regions cumulatively amounting to US Dollar 375,000 or "identified" Pak Rupees, in the license agreements;
- It is claimed that for the last 18 years or so, up until April 2023 Pak Rupee amounts as license towards regional agreements were accepted without any objection whereas for the last two years i.e. the year ending on 31.12.2022 and 31.12.2023 the respondents demanded US Dollars 375,000 (cumulative amount of nine regional agreements) or its prevailing equivalent Pak Rupee amount.
- It is claimed to be an attempt to revise the terms of the petitioner's licenses, which cannot be done unilaterally;

- It is claimed that neither Clause 4.1.2 of petitioner's licenses nor Appendix-2 of the same could compel the petitioner to pay prevailing Pak Rupee equivalent to US Dollars 375,000;
- It is claimed that this unilateral modification encompassing the claim of equivalent Pak Rupee of US Dollars 375,000 is contrary to Section 22 of Pakistan Telecommunication (Re-Organization) Act, 1996;
- It is claimed that it could only be modified with the consent of the parties and not otherwise;
- It is claimed to have been done on the basis of inquiry conducted by CF&AO, Cabinet Division wherein it was allegedly decided that annual fee payable by the licensee would be in US Dollars or equivalent in Pak Rupee, however, neither any decision of the cabinet was placed nor such inquiry, if any, conducted was placed.

3. Without prejudice to the above it is claimed that such inquiry upon which purported decision of the cabinet was made could not override the contractual terms, unless otherwise consented. It is further argued that Section 8 of Pakistan Telecommunication (Re-Organization) Act, 1996 empowers the federation to issue policy directives concerning inter alia the terms of the license to be granted hence it (the federal government) cannot amend an existing license.

4. It is thus summarized by Mr. Ayan Memon learned counsel, that the subject claim is not only without jurisdiction but contrary to Section 8 and 22 of the Pakistan Telecommunication (Re-Organization) Act, 1996 read with Clause 4.1.2 read with Appendix-2 of the subject licenses. It is argued that on account of consistent acceptance of the fee in Pak Rupee, identified in the agreements, licensor, by way of promissory estoppel/waiver restrained to take another view, and is expressly/

impliedly estopped, in view of consistent inaction during the last 18 years.

5. Learned Deputy Attorney General did not file comments on behalf of the federation though on 18.09.2024 he undertook to file the Minutes of the Cabinet meeting in respect of equivalent amount now being claimed through demand notices. He however failed and expressed his inability to file such Minutes of Meeting without expressing any reason. He also showed his inability if he could file the same if further time is granted.

6. We then heard Mr. Salahuddin Chandio, learned counsel appearing for respondent No.1 PTA. He initially raised a preliminary question regarding maintainability of the petition on the count that previously some suits have also been filed raising similar grievances and while those suits were pending adjudication, the jurisdiction of this Court is invoked by filing instant petition.

7. Learned counsel for respondent No.1 further relied upon Section 5 of Pakistan Telecommunication (Re-organization) Act, 1996 specially Section 5(2)(p) that includes the powers of the Authority to levy fee and other charges at such rates in respect of such services, as may be fixed by it from time to time, not exceeding the limits as specified by a Committee of the Cabinet. He further relied upon Section 8 of the ibid Act which discusses the powers of the Federal Government to issue policy directives.

8. We have heard Mr. Ayan Mustafa Memon, learned counsel appearing for the petitioner, learned Deputy Attorney General appearing for Federation of Pakistan and Mr. Salahuddin Chandio, appearing for respondent No.1 PTA.

9. The preliminary question of maintainability is the one that stretches upon Section 10 CPC. Since there are more than one

agreements, for the sake of brevity, we would refer only one agreement as all are more or less same except for different regions and quantum of fee. We have noticed that a copy of Suit bearing No.986 of 2023 is attached with the memo of petition wherein the demand notice and letter dated 20.04.2023 available at page 39 of the file and letter dated 18.05.2023 available at page 41 were impugned. For the purposes of present petition the cause triggered when the demand note of 02.04.2024 followed by demand note dated 29.04.2024 were issued. The demand notices, as identified in the prayer clause of the suit, apparently were different and were also responded by petitioner, whereupon fresh demand notices, impugned in this petition, were issued which were thus made subject matter of this petition by way of an impugned demand.

10. Section 10 otherwise calls for stay of the trial and it does not oppose filing of the present lis. As dissected above, the two causes disclosed are different and distinct hence it is neither an issue, which is directly or substantially an issue in a previously instituted suit, nor the jurisdiction of this Court is barred and/or ousted in view of separate causes triggered on different dates. The two claims are thus different and distinct.

11. Referring to the merits of the demand notices we have noticed that there were nine Regional agreements in all, as disclosed above. The cumulative amount in terms of US Dollars for Annual Radio Frequency Spectrum Fee was 375,000 US Dollars whereas each agreement discloses a separate amount for the individual license. This amount is yearly fee which is other than the initial amount paid before or at the time of bidding/grant of licenses. The nine individual licenses are available as Annexure P/12 to P/12H. These licenses are Wireless Local Loop Licenses issued under Pakistan Telecommunication (Re-organization) Act, 1996.

The De-Regulation Policy for the Pakistan Telecommunication sector July 2003, which is pressed for the claim of current equivalent of disclosed dollar value to Pak Rupee, reveal that in terms of its clause 4 sub-clause 2 the Entry to Local Loop Market would be unrestricted, open and for consideration of such request for a license, the one who otherwise meet the criteria and requirement will be eligible to get a license on payment of the prescribed fee which will be set at Pak Rupee equivalent of US Dollar 10,000 for Local Loop License. The word “which will be set at Pak Rupees” expresses the “intention”. So the license set two fees i.e. initial payment and yearly payment. Initial payment also includes bidding fee payable then and there in Pak Rupees. However, Mr. Ayan stated that initial payment, which is also disclosed to be payable in Pak equivalent, cannot be stretched upon the claim of Annual Radio Frequency Spectrum Fee, which is required to be paid annually for the renewal of a yearly license and be seen independently. The above referred fee of US Dollar 10,000 or its equivalent in Pak Rupee is only entry fee and policy is silent as far as annual frequency spectrum fee is concerned, per Mr. Ayan.

12. While the policy referred above may be silent about Annual Spectrum Fee in terms of equivalent of US Dollar in Pak Rupee but the silence could be voiced by understanding the “intention of parties”. “Intention of parties” is the precise and core point which could conveniently resolve the issue in hand. Agreement clause 1.3.2 disclose Radio Frequency Spectrum fee as under:

US Dollar 25000/- OR

Pak Rs.1,450,000/-

Controversy thus is narrowed down to two points:

- (a) Whether reading of the document/license i.e. policy and license agreement clearly provides an independent and clear mind of executors to pay Pak Rupee only or the intention at

the relevant time was to pay either of the two, having “equal value” in terms of money, “at the given point”?

- (b) Whether waiver and/or promissory estoppel would come in the way if the reading of documents suggest that the intention of executant is to pay amount either in US Dollar or its equivalent in Pak Rupee as prevailing at the time of payment?

13. In 2003 when this policy was framed the executants were cognizant of the phenomena that the amount could either be in US Dollar or its equivalent to Pak Rupee per clause 4(2) typed page-6 of policy, and the agreements were executed in the year 2004. Article 4.1 of the agreement/license disclose the mechanics of the fee and in terms of Article 4.1.1 the licensee is obliged to pay the initial fee to the authority prior to the effective date i.e.

- (a) license fee of US Dollar 10,000 or Pakistan Rupees 580,000/- for the regions identified in Appendix 1; whereas
 (b) for the initial spectrum fees the amount is identified in Appendix 2. (Demonstrated in above Para).

14. In the agreement Article 4 provides two kinds of fee; (a) initial fee to authority region-wise per Appendix - (1) and (b) initial spectrum fee to authority - Appendix (2). Initial fee in the agreement is also not shown to have any equivalence in Pak Rupee whereas appendix - 2's 1.3.1 only gives the additional fee one-time as successful bidder and 1.3.2 as spectrum fee; this fee has its value under clause (a) in Pak Rupees as Rs.1,450,000 at the then prevailing rate of 58/- per dollar.

15. To proceed further from here to discover the intention, the case of House Building Finance Corporation¹ as relied upon by both the parties, can be considered. The case of House Building Finance Corporation is the one which provides for reading of a document to

¹ 1992 SCMR 19 (House Building Finance Corporation v. Shahinshah Humayun Cooperative House Building Society)

ascertain intention. "Contract" has to be construed strictly without deviating or implying anything which is not supported by the intention of the parties and the language of the document. Indeed nothing can be implied in a contract which is found inconsistent with its expressed terms. For the purposes of understanding the construction of the document and the terms used therein one has to construe the intention which has persuaded the parties to enter into such agreement and the policy framed has to be kept in mind as nothing could have deviated therefrom. So in case of a dispute as to understanding of the terms used in the contract/agreement the Court, in order to read the reasonableness of the agreement would adopt a reasoned construction by which intention of the parties can be spelt out.

16. Considering the above proposition of law, as laid down by the Supreme Court, the argument of Mr. Ayan does not provide a balanced approach insofar as the "payment in Pak Rupee only as identified" in the contract is concerned. The Policy, for the initial fee of US Dollar 10,000, for participation, "only" talks about equivalent amount in Pak Rupee. The other "initial payment" as being successful was shown in Pak Rupee in Appendix - 2 as was payable then and there, however the spectrum fee payable yearly is shown in the agreement with US Dollar. Question is, why is that? The amount for initial payment is payable then and there, be it entry fee or bidding amount; whereas yearly payment is payable periodically at the time of renewal, hence cannot be read in similar fashion. The initial spectrum fee, which is a dispute in this petition, is specified in Appendix 2 attached to the agreement. For initial payment of 10,000 US Dollar, its Pak Rupee value of the relevant time is shown whereas for spectrum fee 4.1.1 (b) takes us to Appendix - 2 which also shows Pak Rupee Value of the relevant time.

17. 1.3.2 (a) of Appendix - 2 to the Agreement poses a question whether the Annual Spectrum Fee should either be paid as US Dollar 25,000 or Pak Rupee 1,450,000/- or equivalent of US Dollar when it is paid. The agreement was for 20 years and the fee is payable annually. Now if at all the fee is payable in Pak Rupee why was an amount of US Dollar 25,000 disclosed in Appendix 2 of the agreement. The intention of writing US Dollar 25,000 is obvious that (at the time of payment) this has to be at par with the local currency as only then it could make sense. The value of the two currencies, in the country where the agreement is executed has to be the same as “consideration” cannot vary for different currencies, as for what petitioner is getting in bargain via license is same. In an agreement where a licensee is required to perform, there cannot be two different currencies that could fetch two different values.

18. In any country transactions in local currency is always convenient unless otherwise specifically agreed. However, the incorporation of the two currencies in the subject agreements reflects the intention of the parties that it could either be in foreign currency or the local currency, however, the value of money, in terms of whatever currency the consideration is paid, has to be at par with each other; otherwise if the value of money is not same it does not make sense that for a consideration of license, a lesser and higher value could be the option. The agreement of the parties in incorporating the two currencies only signifies that the two then values identified were at par and ought to be when it is being paid, otherwise the agreement could have been “whichever is less”, which is not expressed by Mr. Ayan. Thus, the intention of the parties is that it could either be in US Dollars or its equivalent in terms of local currency i.e. Pak Rupee payable at the prevailing rate/value.

19. The next argument is the question of acquiescence and waiver as argued by Mr. Ayan that for the last almost 18 years the difference in value of Pak Rupee and US Dollar was not claimed and that has estopped the respondents/licensor to claim the equivalent amount of US Dollars shown in the agreement. On this point as well we are not in agreement with Mr. Ayan Memon. In order to apply the principle of waiver and acquiescence we must first understand what the waiver and estoppel is.

20. The waiver is an intention of relinquishment of a known right and it must be shown that the party, despite knowledge of facts and the rights, deliberately gave up that right. Mere omission to assert the right does not necessarily constitute waiver². An implied waiver is also not demonstrated in its true sense as implied waiver ought to indicate the abandonment of right in clear terms as mere silence do not constitute waiver. Even delay in asserting a right does not by itself result in waiver as it ought to indicate the abandonment of right in clear terms. Thus, there must be a clear and decisive convey of such abandonment of right which could clearly indicate waiver of their rights³. Indeed estoppel can form a foundation of waiver to assert a right but does not automatically lead to waiver as it requires initial relinquishment while estoppel is a right of evidence that prevents a party from acting inconsistently with previous conduct.

21. Without prejudice to the above understanding since the spectrum fee is being claimed on yearly basis, it could at the most be counted as periodical waiver running from year to year as the spectrum fee is payable on annual basis. So without prejudice to the above it cannot be construed that what was ignored for a year could also be deemed to be ignored for the subsequent years as those subsequent claims are of

² 1992 SCMR 78 (Jam Pari v. Muhammad Abdullah)

³ (2013 YLR 1103 & 2013 CLC 1727) Hilal Trading Company v. Swami Narain Temple Estate

independent nature for the yearly license to be regulated on payment of spectrum fee.

22. In view of above, impugned demand notes/notice dated 02.04.2024 followed by letter dated 20.04.2024, requires no interference and hence petition is dismissed along with pending application.

Dated:

Chief Justice

Judge