

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

**MR. JUSTICE GULZAR AHMED
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL**

CIVIL PETITIONS NO. 3186 AND 3187 OF 2017

(Against the judgment dated 25.05.2017 of the Islamabad High Court, Islamabad passed in F.A.O No. 95/09 and W.P. No. 2686/09)

Space Telecom (Private) Limited, Lahore. *(in both cases)*
... **Petitioner**

VERSUS

*The Pakistan Telecommunication Authority,
Islamabad through its Chairman.* *(in both cases)*
... **Respondent**

For the Petitioner : Syed Ali Zafar, ASC
(In both cases) Mr. Khurram Raza, ASC
Mr. Tariq Aziz, AOR (absent)

For the Respondent : Not represented

Date of Hearing : 16th October, 2018

J U D G M E N T

QAZI FAEZ ISA, J. The Government of Pakistan had decided to open up the telecommunication sector and to increase investment and competition therein. Pursuant to this objective the Pakistan Telecommunication Authority ("**PTA**"), constituted under section 3 of the Pakistan Telecommunication (Re-Organization) Act, 1996 (the "**PTA Act**"), proceeded to invite bids for the "*award [of] two technology neutral National Mobile Cellular Licenses through a bidding/auction process*" as mentioned in the "Information Memorandum Mobile Cellular License" dated February 09, 2004 ("**IM**" or "**the Memorandum**"). Part III of the Memorandum set out the terms and conditions of the "Bidding Procedure And Auction Process".

2. Three companies, comprising of Space Telecom (Pvt.) Ltd. ("the petitioner") and two foreign companies (Drex Technologies SA and SiloServ Offshore SA) formed a consortium ("the Consortium"). The Consortium submitted their bid on 14th April, 2004 for the award of a license (lot "A" of the stipulated "Spectrum Bandwidth" and "Uplink-Downlink"). The Consortium's bid of two hundred and ninety one million United States dollars (US \$ 291,000,000) ("the bid") was accepted by PTA (the respondent) which by letter dated 15th April, 2004 informed the Consortium of the same. PTA's letter dated 15th April, 2004 is reproduced hereunder:

"No. 12.5.27/2003(CMT)/RBS/Vol.III April 15 2004
Subject: Cellular Mobile License to Space Telecom

Pakistan Telecommunication Authority is hereby pleased to confirm the winning of auction for Cellular Mobile License by M/s Space Telecom (Consortium consists of M/s Space Telecom (Pvt) Ltd, M/s Drex Technologies SA, M/s Siloserv Off Shore, SAL) in the open bidding held on 14th April 2004 at Islamabad for the auction price of US\$ 291 million (Two hundred and ninety one US Dollars).

2. As per lot "A" you will be assigned following frequencies on grant of license:-

	<u>Spectrum Bandwidth</u>	<u>Uplink-Downlink</u>
a.	4.80 MHz (24 carriers)	890-894.8 MHz 935-939.8 Mhz
b.	8.8. Mhz (44 carriers)	1710-1718.8 MHz 1805-1813.8 MHz

3. The mode of payment for license is as follows:
a. Payment of the initial 25% of US\$ 291 million (Two hundred and ninety one US Dollars only) within ten working days commencing from 14th April 2004 (A sum of US \$ 10 million, already deposited with PTA as earnest money will form part of this amount).

- b. Payment of the remaining 25% of US\$ 291 million (Two hundred and ninety one US Dollars only) within 40 working days commencing from 14th April 2004.
- c. Payment of the remaining 50% of US\$ 291 million (Two hundred and ninety one US Dollars only) within in equal annual installments within ten (10) years of effective date as mentioned in the license.

4. The license will be granted on payment of 50% of the auction winning price, US \$ 291 million (Two hundred and ninety one US Dollars only).

Director General (Licensing)"

3. The Consortium was required to pay 25% (twenty five per cent) of the bid price, less the earnest money of US \$ 10,000,000 (ten million United States dollars) ("**the earnest money**"), already deposited with PTA, which came to US \$ 62,750,000 (sixty two million, seven hundred and fifty thousand United States dollars). This amount was required to be paid within ten days of the acceptance of the bid, that is, by 26th April, 2004. The Consortium however did not make payment, therefore, PTA on 27th April, 2004 wrote to the Consortium informing it that PTA had forfeited the earnest money. PTA's letter dated 27th April, 2004 is reproduced hereunder:

"No.12.5.27/2003(CMT)RBS/Vol.III

27th April 2004

SUBJECT: GRANT OF CELLULAR MOBILE TELEPHONY
LICENSE TO M/S SPACE TELECOM CONSORTIUM

This is with reference to PTA letter even number dated April 15, 2004.

2. Consequent upon the highest bid offered on 14th April 2004 of US\$ 291 Million (Two Hundred and Ninety One million US Dollars only), M/s Space Telecom Consortium were required to remit payment of initial 25% of US\$ 291 Million (Two Hundred and Ninety One million US Dollars only) within ten working days commencing from 14th April 2004 (A sum of US \$ 10 Million,

already deposited as earnest money with PTA to form part of this amount) under clause 9(k) of the IM.

3. M/s Space Telecom Consortium have failed to remit the said amount in PTA designated account by due date, i.e, 26th April, 2004 (Copy of certificate of NBP, Marriott Hotel Branch, Islamabad is attached).

4. Therefore, as per recommendations of the Bidding Committee under the IM clause 10(a) and 9(n) M/s Space Telecom Consortium stands disqualified and the earnest money of US\$ 10 Million (Ten Million US Dollars only) is hereby forfeited by the PTA.

For and on behalf of the Authority
Director General (Licensing)"

4. Sub-clauses (k) and (n) of clause 9 and sub-clause (a) of clause 10 of the Memorandum, which were referred to by PTA in its letter of 27th April, 2004, are reproduced hereunder:

Clause 9:

"k. Each one of the winning Bidders shall deposit in PTA designated bank account, 25% of the Auction Winning Price (License fee) after adjustment of the Bid Earnest money within ten (1) working days. Each winning bidder shall deposit remaining 25% of the Auction Winning Price within forty (40) working days from the Bidding Date."

Clause 9:

"n. The Authority shall forfeit the Bid earnest money and all other amounts received from the defaulting bidder(s)."

Clause 10:

"a. If a successful Bidder abandons the bid or fails to pay 25% of the license fee within ten (10) working days or remaining 25% within forty (40) working days from the Bidding Date."

5. The learned counsel representing the petitioner (Space Telecom (Pvt) Ltd.) states that the petitioner had every intention to comply with the terms of PTA's letter of 15th April, 2004 and to pay US \$ 62,750,000 ("**the said amount**") but was prevented from

doing so by an order of a court. In this regard he has referred to the suit filed in Islamabad before a Civil Court by Drex Technologies SA, SiloServ Offshore SA and the Pakistan Oil Fields Limited ("**the plaintiffs**") against the petitioner and PTA, who were respectively arrayed therein as defendant Nos. 1 and 2. Along with the plaint, an application under Order XXXIX rules 1 and 2 of the Code of Civil Procedure, 1908 ("**the application**") was also filed, whereupon an *ex parte* ad-interim order was passed on 23rd April, 2004, which concluded as under:

"In such circumstances, in the interest of justice, it is deemed appropriate that the remaining members of consortium excluding defendant No. 1 be provisionally allowed to deposit the amount of first installment with the PTA subject to further orders of the Court after hearing the parties to the suit and determination of the rights of the parties to the consortium inter se and with PTA so that the complications ensuing from default on part of the entire consortium may be avoided. Hence, the remaining members of the consortium which declared successful bidder in the open bid are provisionally allowed to open a escrow account and to deposit the amount of the first installment with PTA, subject to further orders of the Court after hearing the parties to the suit."

If the petitioner had deposited the said amount with PTA, according to the learned counsel, it would have committed contempt of court. The learned counsel further states, that the plaintiffs neither paid the said amount to PTA nor opened the referred to escrow account. The following day, that is on 24th April, 2004, another order was passed by the learned Civil Judge which restrained PTA from canceling the license awarded to the plaintiffs, however, the learned counsel states, that no license had been issued by PTA therefore the question of its cancellation did not arise.

6. On 26th April, 2004 the petitioner wrote to PTA, enclosed therein a copy of the order of the learned Civil Judge, and requested PTA to extend the time for making payment of the said amount. However, as stated above, PTA did not extend time and instead forfeited the earnest money. PTA then awarded the license to another party at the same price as was mentioned in the bid submitted by the Consortium, that is US \$ 291,000,000, therefore, the learned counsel submits, PTA did not suffer any loss. Under such circumstances, the learned counsel states, PTA should have refunded to the petitioner its contribution of the earnest money which was deposited with PTA, and failure to refund violated the principle enunciated in the cases of Province of West Pakistan v Mistri Patel & Co. (PLD 1969 Supreme Court 80) and Khanzada Muhammad Abdul Haq Khan Khattak & Co. v WAPDA (1991 SCMR 1436) and the provisions of section 74 of the Contract Act, 1872 ("**the Contract Act**"). Referring to section 56 of the Contract Act the learned counsel further contends that if the said amount was paid by the petitioner it would have constituted contempt of court, therefore, it was tantamount to an impossible or unlawful act. The learned counsel also referred to the order of the High Court dated 4th May, 2009 passed in FAO No. 41/2006, which directed PTA to determine the questions and matters mentioned therein, but which, according to the learned counsel, PTA did not do and in this regard reliance has been placed upon the case of Jameel Ahmed v Saifuddin (PLD 1994 Supreme Court 501).

7. We have heard the learned counsel for the petitioner and with his assistance examined the documents on record. PTA

invited bids and the Consortium, of which the petitioner was a member, submitted its bid which was accepted by PTA; the contract between PTA and the Consortium thus stood concluded. It is not the case of the petitioner that PTA violated any term of the contract / the Memorandum. Sub-clauses (k) and (n) of clause 9 and sub-clause (a) of clause 10 of the Memorandum clearly stipulate that the earnest money will be forfeited if the requisite payments are not made. The petitioner does not state that the referred to clauses were not attracted or that they had been misconstrued by PTA.

8. The petitioner maintains that it could not pay the said amount because the learned Civil Judge had restrained the petitioner from making payment, which was the kind of situation envisaged by section 56 of the Contract Act. PTA was unnecessarily embroiled in the dispute between the plaintiffs and the petitioner. A dispute regarding which the petitioner has been reticent. The petitioner has not attached copies of its written statement, reply and/or counter affidavit, to the plaint and the application respectively, to enable us to ascertain whether the petitioner had contested the suit and what, if any, was its defence. The petitioner has also not disclosed the agreement or arrangement with the plaintiffs and the other two members of the Consortium. The learned Civil Judge in his order dated 25th May, 2004 (paragraph 2) had observed, that:

"... the learned counsel for the defendant No. 1 [*petitioner herein*] states that at this stage, the plaintiffs have sought temporary injunction against PTA and no relief has been sought against the defendant No. 1, therefore, it is the PTA who has to oppose or otherwise the application for grant of temporary injunction."

The aforesaid submission of the petitioner before the learned Civil Judge contradicts the petitioner's contention and undermines its claim to the earnest money. It appears that the petitioner did not oppose the plaintiffs' application. The petitioner also did not state that it was ready, able and willing to pay the said amount to PTA. Therefore, the contention that on account of the said *ex-parte* ad-interim order of the learned Civil Judge the said amount could not be paid to PTA does not convince us. There is also nothing on the record to show that the petitioner made any attempt to have the order of the learned Civil Judge set aside, or varied, to enable the petitioner to pay the said amount. The petitioner also did not demonstrate that it had the said amount in its account/s to pay PTA, and which it would have paid, but for the said order of the learned Civil Judge. Moreover, the contracting parties were PTA and the Consortium, of which the petitioner was one of three members. However, the petitioner did not array the other two members of the Consortium as parties to the cases filed by it, even though it had sought recovery of half of the earnest money deposited by the Consortium. In the facts and circumstances of the case the other members of the Consortium were necessary parties. It is also not disclosed whether the petitioner preferred any claim against the other two members of the Consortium.

9. The petitioner had filed a suit in a Civil Court at Islamabad but withdrew it on 19th June, 2004 without filing another to recover the earnest money. Therefore, there has been no judicial determination, that is, after evidence was lead and considered, as to whether the petitioner was entitled to a judgment and decree in

its favour on the principle of restitution (section 39 of the Contract Act) or on the ground that the contract was impossible to perform (section 56 of the Contract Act) or that the contract had become void (section 65 of the Contract Act) or that the forfeited amount did not constitute "reasonable compensation" (section 74 of the Contract Act) or on the ground that PTA had repudiated the contract entitling the petitioner to damages.

10. The petitioner, after withdrawing its suit (mentioned above), wrote to PTA letter dated 23rd August, 2004, titled "Request for Return of Earnest Money of US \$ 5 Million Deposited with Pakistan Telecommunication Authority deposited for Cellular Mobile License", and called upon PTA to refund to it five million United States dollars which purportedly it had paid towards the earnest money. By letter dated 7th September, 2004 PTA declined the petitioner's request. The petitioner did not assail PTA's letter dated 7th September, 2004 but continued corresponding with PTA. PTA reiterated its rejection of the petitioner's request by letter dated 19th January, 2005, which letter the petitioner then challenged by filing writ petition No. 1143/2005 before the Rawalpindi Bench of the Lahore High Court. This writ petition was disposed of by order dated 17th June, 2005, whereby PTA was directed, *"to decide the claim of refund of the earnest money of the petitioner through a speaking order after giving an adequate opportunity of being heard to the petitioner"*. Pursuant to the said order of the High Court PTA heard the petitioner. However, vide its determination dated 23rd February, 2006 PTA again declined the request of the petitioner and maintained that the petitioner had, *"failed to perform its obligation hence cannot be entitled to the earnest money forfeited"*.

11. Thereafter, the petitioner filed a first appeal against order ("FAO"), FAO No. 41/2006, purportedly under section 7 of the Pakistan Telecommunication (Re-organization) Act, 1996 ("the PTA Act"). It would be useful to reproduce section 7 of the Act of 1996:

"Appeal and revision. (1) A person aggrieved by any decision or order of the Authority on the ground that it is contrary to the provisions of this Act, may, within thirty days of the receipt of such decision or order, appeal to the High Court or to any other Tribunal established by the Federal Government for the purpose, in the manner prescribed by the High Court for filing the first appeal before that Court or the Tribunal and the Court or the Tribunal shall decide such appeal within ninety days.

(2) A person aggrieved by any decision or order of any officer of the Authority acting under the delegated powers of the Authority may, within thirty days of the receipt of the decision or order, appeal to the Authority in prescribed manner and the Authority shall decide such appeal within thirty days."

Admittedly, no license was executed by PTA in favour of the Consortium and/or the petitioner. Therefore, the learned Single Judge treated FAO No. 41/2006 as a writ petition. By judgment dated 4th May, 2009 PTA was directed to decide the matter afresh, *"after hearing the petitioner in the light of section 74 of the Contract Act... ."* On 19th August, 2009 PTA decided that the petitioner was not entitled to the refund of the forfeited earnest money and that its forfeiture was in accordance with the terms of the Memorandum and the provisions of section 74 of the Contract Act. PTA also referred to the cases of Karachi Port Trustees v Ghulamali Habib (PLD 1961 (W.P.) Karachi 623) Mistri Patel (above) and Stockloser v Johnson ((1954) 1 AER 630), which was referred to in the Mistri Patel case. PTA determined that the

forfeited earnest money accounted for less than four per cent of the total bid amount and as such it could not be categorized as a penalty and the Consortium, which included the petitioner, had accepted the terms of the Memorandum and had submitted their bid pursuant thereto. PTA observed that to hold otherwise would mean that there would be no adverse consequence for a successful bidder if it did not fulfill its obligations which would undermine the credibility of the entire bidding and auction process. PTA's order dated 19th August, 2009 was assailed by the petitioner by simultaneously filing FAO No. 95/2009 and W. P. No. 2686/2009. Both these cases were heard together and decided through a consolidated judgment dated 25th May, 2017, which upheld PTA's impugned order dated 19th August, 2009. The consolidated judgment of the learned single Judge of the Islamabad High Court has been impugned before us in these two petitions.

12. The Consortium accepting the stipulated terms and conditions, including the condition that, if its bid was accepted it would pay the said amount failing which its earnest money would be forfeited, and on this condition had participated in the bidding process. The petitioner doesn't allege that PTA did not act in accordance with the Memorandum, let alone having contravened any term thereof or that PTA acted contrary to any provision of the PTA Act. Upon acceptance of the bid the said amount, which was the first tranche of the bid, was required to be paid to PTA, failing which PTA could forfeit the earnest money. The Consortium, which included the petitioner, having failed to fulfill their contractual obligations entitled PTA to forfeit the earnest amount. The only question which needs consideration is whether the earnest money

could be forfeited if PTA had not suffered any loss. In this regard the petitioner relies upon the provisions of section 74 of the Contract Act. Section 74 of the Contract Act (excluding its explanations and exception, which are not relevant) is reproduced hereunder:

"74. Compensation for breach of contract where penalty stipulated for. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

13. Section 74 of the Contract Act stipulates that a party is *"entitled, whether or not actual damages or loss is proved..., to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named"*. After considering section 74 of the Contract Act and the judgment in the Mistri Patel case PTA rejected the petitioner's claim for refund of the earnest money. The learned Judge of the High Court, also considered section 74 of the Contract Act, and upheld PTA's decision. The learned counsel relies on the judgments in the case of Mistri Patel, which is a judgment by five distinguished judges of this Court, and the subsequent judgment in the case of Khanzada Muhammad Abdul Haq Khan Khattak & Co. v WAPDA (above). In the case of Mistri Patel the firm of Mistri & Patel Co. had agreed to purchase from the provincial government 4,000 tons of rice at a rate of about thirty three rupees for each two and half *maund* bag. The firm's offer was accepted on certain terms, including the provision of a bank guarantee for the amount of the earnest

money. The firm however purchased only 1,550 tons out of the agreed quantity of 4,000 tons because the Government of Pakistan did not allow it to sell the rice in Pakistan and as the Government of India had prohibited its import. The Province therefore sold the rice to a third party at a much higher price, and by that transaction instead of suffering a loss the Province made a profit of ten thousand and five hundred rupees. Nonetheless the Province of West Pakistan filed a suit seeking recovery of about seventy thousand rupees from the said firm because it had breached the contract. In considering section 74 of the Contract Act this Court held (page 89D) that, it is not necessary for a party to suffer a loss to claim or retain the earnest money:

"The award of compensation by the Court under section 74 of the Contract Act will depend upon its finding as to what in the facts and circumstances of the case is reasonable compensation subject to the limit of the amount mentioned in the contract. It is true that the aggrieved party is entitled to recover compensation from the party who is guilty of breach of the contract whether or not actual damage or loss is proved to have been caused thereby."

And after laying down the general principle (above) the claim of the plaintiff-Province was considered by this Court (page 89F), as under:

"In the present case we have already seen that the plaintiff instead of suffering any loss for the failure of the firm made a profit of Rs.10,500. The question that arises, therefore, is whether in spite of the above fact the claim of the plaintiff in whole or in part can be justified. We are of the view that the plaintiff is not entitled to any part of its claim whether the term of the contract regarding forfeiture comes within the purview of section 74 of the Contract Act or not. We have, therefore, found no reason to interfere with the decisions of the Courts below."

In the other cited case, Khanzada Muhammad Abdul Haq Khan Khattak & Co. v WAPDA, it was held (page 1439C), that:

"Liquidated damages is not a punishment. The parties may by an agreement fix a specified amount as liquidated damages to avoid the difficulty that may be found in setting the actual damages that may accrue against the defaulting party on the breach of contract. The manifest intention is to get rid of future calculation and disputes. Where an amount is mentioned in the contract as penalty payable on breach of contract, the parties are entitled to recover actual damages not exceeding the amount mentioned in the contract but in case of liquidated damages, a party is entitled to recover the same from the opposite party in case of breach of contract. However, where the Court considers that the amount mentioned in the contract as liquidated damages is oppressive, or highly penal in nature the Court may refrain to grant such amount and itself determine the amount which is reasonable in the circumstances of a particular case."

14. In the present case the amount of the earnest money paid by the Consortium was US \$ 10,000,000, which constituted less than 3.5% (three and a half per cent) of the bid amount of US \$ 291,000,000. According to the petitioner it had contributed US \$ 5,000,000, towards the earnest money, which constituted less than 1.8% (one point eighth per cent) of the total bid amount. The petitioner alone claimed refund of its contribution to the earnest money. PTA determined that the earnest money which had been forfeited was reasonable. The High Court agreed. 1.8%, or for that matter even 3.5%, is not a high percentile of the total bid, and, therefore, its forfeiture can not be termed to be "oppressive" or "highly penal in nature" or not "reasonable". As regards the case of Jameel Ahmed (above), referred to support the argument that PTA did not abide by the direction of the High Court, we have read the determination of PTA and the contention of the learned counsel is factually not correct. We therefore find no reason to interfere with the decision of the High Court and decline leave to appeal.

15. These petitions were dismissed through our short order on 16th October, 2018 and these are the reasons for doing so.

JUDGE

JUDGE

JUDGE

Bench-III
ISLAMABAD
22nd October, 2018
(Farrukh)

Approved for Reporting