IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Mian Saqib Nisar
Mr. Justice Sh. Azmat Saeed
Mr. Justice Maqbool Baqar

CIVIL PETITION NO.2093 OF 2015
(On appeal from judgment dated 5.5.2015, passed by the Islamabad High Court, Islamabad, in FAO No.25/2012)

Pakistan Telecommunication Authority (PTA), Islamabad through its Chairman. ... Petitioner

Versus

Pakistan Telecommunication Company Limited, Headquarters, G-8 Markaz, Islamabad. ... Respondent

For the Petitioner : Mr. Afnan Karim Kundi, ASC a/w Syed Rifaqat Hussain Shah, AOR
Mr. M. Khurram Siddiqui, Director (Law), PTA and
Mr. Gul Hassan, Assistant Director (Law), PTA

For the Respondent : Mr. Azid Nafees, ASC

Date of Hearing : 26.10.2015

JUDGMENT

SH. AZMAT SAEED, J.- This Civil Petition for Leave to Appeal is directed against the judgment dated 13.04.2015 (announced on 05.05.2015) whereby an Appeal under Section 7(1) of the Pakistan Telecommunication (Re-organization) Act, 1996,

hereinafter called to as “Act of 1996”, filed by the Respondent Pakistan Telecommunication Company Limited (Company) was allowed and the Order dated 03.05.2012 impugned therein was set aside. Furthermore, Regulation 18(2) of the Number Allocation & Administration Regulations, 2005 hereinafter referred to as “Regulations of 2005” was held to be void and *ultra vires* the Act of 1996.

2. The brief facts necessary for adjudication of the *lis* at hand are that the Petitioner is an Authority established under Section 3 of the Act of 1996 authorized to carry out, *inter alia*, the functions of regulating the establishment, operation and the maintenance of the Telecommunication System and for the provision of Telecommunication Services in Pakistan. The Respondent is a Company, which is a Licensee in terms of the Act of 1996 vide License dated 15.04.1997, subsequently, modified on 13.06.2005. Purportedly in pursuance of the Act of 1996, Regulations of 2005 were issued (since substituted by the Number Allocation & Administration Regulations, 2011). In terms of Regulation 18(1) of the Regulations of 2005, a Licensee is required to pay an annual charge specified therein in respect of number(s)

allocated to such Licensee. Such charges as specified in the Regulations of 2005 are payable by 31st July, each year. It appears that the Respondent Company did not pay such charges, as claimed by the Petitioner Authority for the years 2005 to 2011 in terms of Regulation 18(1) of the Regulations of 2005, despite repeated demands. Eventually, the annual charges as claimed by the Petitioner Authority were deposited by the Respondent Company in the year 2011. However, the Petitioner Authority on account of late payment of the aforesaid charges had also raised a claim of 10% penalty in terms of Regulation 18(2) of the Regulations of 2005. Such amount was not paid or deposited by the Respondent Company.

3. In the above backdrop, the Petitioner Authority issued a Show Cause Notice dated 09.08.2011 to the Respondent Company under Section 23(3)(c)(i) of the Act of 1996, claiming a balance amount of more than Rs.46 million in terms of Regulation 18(2) of the Regulations of 2005. The Respondent Company disputed the said liability. However, vide Order dated 03.05.2012, the Respondent Company was held liable to pay the said amount of penalty and stood exposed to further

proceedings in terms of the Act of 1996 and the Rules and Regulations framed there-under.

4. Aggrieved, the Respondent Company filed an Appeal i.e. FAO No.25 of 2012 under Section 7(1) of the Act of 1996 against the Order dated 03.05.2012 before the learned Islamabad High Court. After hearing the parties, the learned Single Judge of the Islamabad High Court vide judgment dated 13.04.2015 (announced on 05.05.2015), allowed the Appeal and also held Regulation 18(2) of the Regulations of 2005 void being *ultra vires* the Act of 1996. However, it was held that the Petitioner Authority was vested with the power to proceed under Section 23(3)(c)(i) of the Act of 1996 and levy a fine in terms thereof. The aforesaid judgment dated 13.04.2015 (announced on 05.05.2015) was challenged by the Petitioner Authority through the instant Civil Petition for Leave to Appeal. Pursuant to a detailed Order dated 05.10.2015 of this Court, notices were issued to the Respondent Company, who had entered appearance.

5. The learned counsels for the parties have been heard and the available record perused.

6. It is contended by the learned counsel for the Petitioner Authority that the learned High Court by way

of the impugned judgment has misapplied and misinterpreted the provisions of the Act of 1996 as well as the Regulations of 2005. It is added that the said Regulations had been validly issued in exercise of the powers conferred by the Act of 1996 and are not in conflict with the parent statute and Regulation 18(2) of the Regulations of 2005 are not *ultra vires* the Act of 1996. The learned counsel further contended that the Respondent Company deliberately delayed the payment of annual charges for the years 2005 to 2011 without any legal or factual justification and such delay in payment squarely falls within the purview of Regulation 18(2) of the Regulations of 2005, which perceives of a penalty @ 10% on the amount due, which had been imposed upon the Respondent Company after due process of a service of Show Cause Notice, as envisaged in Section 23 of the Act of 1996 and affording a right of hearing. Hence, the impugned judgment is not sustainable in law and is liable to be set aside.

7. The learned counsel for the Respondent Company controverted the contentions raised on behalf of the Petitioner Authority by contending that the Regulation 18(2) of the Regulations of 2005 is *ultra vires*

the Act of 1996, as has been correctly held by the learned High Court, inasmuch as, it perceived for the imposition of penalty for late payment, which is not provided for in the Act of 1996. In fact, it is contended, that the Petitioner Authority is not entitled under the Act of 1996 to impose or collect any penalty for late payment. In the alternative, it is contended that the amount claimed by the Petitioner Authority as the annual charges for the Numbers Allocation was not lawfully due under the law and has been deposited under protest, therefore, the question of imposition of penalty under the Regulation 18(2) of the Regulations of 2005 did not arise. The learned counsel further contended that in terms of the License issued by the Petitioner Authority to the Respondent Company, the former was only entitled to impose and collect such charge/fine @ 2% and not @ 10%, as has been imposed vide Order dated 03.05.2012, which has been rightly set aside by way of the impugned judgment.

8. The Petitioner is a Regulatory Authority, established under Section 3 of the Act of 1996. Its functions are enumerated in Section 4, while its powers

are set forth in Section 5 of the Act of 1996, the relevant portions thereof are reproduced hereunder:

> "5. **Powers of the Authority.—**(1) The Authority shall exercise all powers as shall enable it to effectively perform its functions specified in section 4.
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> (2) In particular, and without prejudice to the generality of the foregoing power, the Authority shall-
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> (a) .....
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> (b) monitor and enforce Licenses;
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> (c) .....
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> (d) .....
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> (e) .....
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> (m) .....
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> (n) .....
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> (o) <u>issue regulations</u> for exercising its powers and performance of its functions.
>
> (p) levy fee and other charges at such rates and 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.

(q) .....

(r) .....".

(emphasis supplied)

9. In exercise of the powers conferred under Section 5(2)(o) of the Act of 1996, reproduced hereinabove, the Regulations of 2005 were issued.

10. Section 20 of the Act of 1996, subject to the proviso thereof, enjoins that no person shall establish, maintain or operate any Telecommunication System or provide any Telecommunication Service unless he has obtained a License from the Authority. It is not the case of the Respondent Company that it was exempted from obtaining such License. In fact, the Respondent Company has obtained a License in terms of Sections 20 and 21 of the Act of 1996 and the License includes Clause 1.3 thereof, which is reproduced hereunder:

"1.3. This License is subject to the Conditions included in Schedules 2, 3, 4, 5, and 6 to this License, and any further Conditions duly added to this License pursuant to its terms and is subject to the Rules or Regulations issued from time to time by the Federal Government or the Authority."

(emphasis supplied)

With regard to Numbers Allocation Charges, reference may be made to Clause 6.4 of the License, which reads as follows:-

> "6.4 The Licensee shall, following the Modification Date, pay the amount for all the number(s) allocated to it, in accordance with Numbering Plan Regulations issued by the Authority form time to time."

11. Thus, by virtue of the License and its terms and conditions, more particularly, Clauses 1.3 and 6.4 thereof reproduced hereinabove, the Respondent Company is bound to comply with the provisions of the Regulations of 2005. Such Regulations were in force during the period in question.

12. Regulation 18 of the Regulations of 2005, which is in issue, for ease of reference, is reproduced herein below:

> "18. **Number allocation fee.—**(1) For each number(s) allocated to the applicant, the annual charges payable by 31st July each year shall be as follows:

S.No.	Number Category	Annual Fee (Rs.)
1.	Six (or higher) digit number for PSTN/WLL & Mobile Phone Numbers	0.50
2.	Short Codes, Carrier Pre-selection Codes, NSPC, ISPC, SID, Toll Free Numbers, UAN, UIN, Premium Rate Service	5000.00

	numbers and other special numbers etc.	

Explanation:

(a) The annual standard rate of charge for most seven digit numbers including mobile numbers (excluding NDC) shall be as Rs.0.50/-;

(b) The maximum amount of charge that shall be imposed on any individual number is Rs.5,000. This maximum rate of charge shall be imposed on short codes as well; and

(c) Payment of Annual Numbering Fee for number allocation shall be made in advance at the time of application;

Provided that the Annual Numbering Fee shall not be charged for the numbers allocated for less than six (6) months. Provided further that annual charges shall be required for the subsequent years.

(2) The Licensee shall be liable to pay a penalty @10% on the amounts outstanding if the dues are not paid by 31st July each year.

(3) The Licensee may apply for refund of charges paid for allocation of numbers within 90 days from the date of allocation of the Number(s) subject to the condition that Licensee could not start its services under the circumstances beyond its control.

Provided that the Authority may consider the matter and decide on merit which shall be final and binding on the Licensee."

(emphasis supplied)

13. In the above circumstances, as per the terms and conditions of the License, the Respondent Company was required to make payment for the Numbers

Allocation at the rate specified in Regulation 18(1) of the Regulations of 2005 by or before the 31st July of each year. It is the case of the Petitioner Authority that in spite of various demands, in this behalf, the Respondent Company failed to deposit the amount in time for the period in question i.e. 2005 to 2011 and such payment was, in fact, belatedly made in the year 2011.

14. Thus, *prima facie*, the Respondent Company had failed to comply with the terms of its License. Such a situation is dealt with by Section 23 of the Act of 1996, which for ease of reference, is reproduced herein below:

> "23. **Issue of enforcement orders and penalties.—**(1) Where a Licensee contravenes any provision of this Act or the rules made thereunder or any term or condition of the licence, the Authority [or any of its officers not below the rank of director] may by a written notice require the Licensee to show cause within thirty days as to why an enforcement order may not be issued.
>
> (2) The notice referred to in sub-section (1) shall specify the nature of the contravention and the steps to be taken by the Licensee to remedy the contravention.
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> (3) Where a Licensee fails to—
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> (a) respond to the notice referred to in sub-section (1); or
>
> (b) satisfy the Authority about the alleged contravention; or

(c) remedy the contravention within the time allowed by the Authority, may, by an order in writing and giving reasons—

(i) levy fine which may extend to three hundred and fifty million rupees; or

(ii) suspend or terminate the License, impose additional conditions or appoint an Administrator to manage the affairs of the Licensee, but only if the contravention is grave or persistent.

(4) Without prejudice to the provisions of sub-section (1) and sub-section (3), the Authority [or any of its officers not below the rank of director] may, by an order in writing, suspend or terminate a licence or appoint an Administrator, if the Licensee—

(a) becomes insolvent or a receiver is appointed in respect of a substantial part of the assets;

(b) being an individual, become insane or dies.

Explanation.—For the purpose of this section, the Administrator shall be appointed from amongst the persons having professional knowledge and experience of telecommunication."

(emphasis supplied)

15. A perusal of the aforesaid provisions reveals that where a Licensee contravenes any of the provision of the Act of 1996, the Rules framed there-under or any term or condition of its License, such Licensee may be proceeded against under Section 23 of the Act of 1996.

Section 23(3)(c)(i), reproduced hereinabove authorizes the Authority to levy fine to a maximum limit of Rs.350 million. Thus, the Petitioner Authority has been clothed with the jurisdiction, *inter alia*, to levy a fine in case of failure to comply with any term and condition mentioned in the License. The aforesaid Section is further supplemented by Rule 9 of the Pakistan Telecommunication Rules, 2000, hereinafter referred to as "Rules of 2000", which is reproduced herein below for ease of reference:

> **"9. Monitoring of compliance, enforcement and early termination**.- (1) The Authority may monitor compliance by Licensees with their Licenses in accordance with the terms of their Licenses and the Act.
>
> (2) If the Authority considers, whether or not as a result of any complaint or made by another person as a result of monitoring by the Authority, that the Licensee has contravened any condition of the License, the Authority may serve a written notice requiring the Licensee to show cause, within thirty days after the date of the notice, as to why an enforcement order should not be issued.
>
> (3) If the Licensee appears before the Authority to give an explanation, or submits a written explanation to the Authority, within the period specified in sub-rule (2), to the satisfaction of the Authority, the enforcement order shall not be issued.

(4) If the Licensee fails to respond to the notice referred to in sub-rule (2) or satisfy the Authority in respect of the alleged contravention in accordance with sub-rule (3), the Authority may issue an enforcement order requiring the Licensee to remedy the contravention within such period, which shall be less than thirty days from the date of service of the enforcement order, as the Authority may reasonably consider appropriate.

(5) If the Licensee fails to comply with the enforcement order served under sub-rule (4), the Authority may, by further enforcement order in writing hereinafter referred to as "final order":-

(a) levy a fine which may extend to three hundred and fifty million rupees; or

(b) in the case of a grave or persistent contravention of its License, require the Licensee to cease that contravention within such further period of time, not being less than thirty days from the date of service of the final order, as the Authority may reasonably consider appropriate, failing which the Authority may take action under sub-rule (6) in respect of such contravention.

(6) Subject to sections 23 and 24 of the Act, the Authority may terminate the License on service of not less than thirty days a notice in writing to the Licensee if the Licensee:-

(a) commits a grave, or persistent, contravention of its License and fails to comply with a final order which order has not been set aside by, or is not the subject of any appeal or other proceedings before any court, the Authority or the Federal Government as referred to in section 7 of the

> Act, served in respect of that contravention within the period specified in that order, or any longer period allowed to the Licensee by the Authority;
>
> (b) fails to pay any overdue fee under the License, which fee is not the subject of any dispute in good faith between the Licensee and the Authority and in respect of which any appeal or proceedings have been initiated by the Licensee, within sixty days following service on the Licensee of written notice requiring payment together with a written warning that action will be taken under this sub-rule if the contravention is not remedied within the period specified in the notice; or
>
> (c) becomes insolvent or if a receiver is appointed in respect of a substantial part of the assets used by the Licensee for undertaking activities under the License."
>
> (emphasis supplied)

16. In the above circumstances, it is clear and obvious that the Petitioner Authority could impose a fine in case of failure to make payments on the due dates in terms of Regulation 18(1) of the Regulations of 2005 due compliance whereof is a condition of the License (Clauses 1.3 and 6.4). This aspect of the matter has been acknowledged and accepted in the impugned judgment itself, more particularly, in para 13 thereof, which is reproduced hereunder:

> "13. The Act has, however, vested power in the Authority to, inter alia, levy fines under section 23(3)(c)(i) of the Act if the Licensee has contravened any term or condition of the License. This punitive power has been explicitly provided by the legislature. It was alleged in the show cause notice that the appellant had delayed the payment pursuant to its obligations under the relevant Clause of the License and, therefore, it may have considered the above provisions of section 23 of the Act."

17. In pith and substance, it appears to be the case of the Respondent Company, which has found favour with the learned High Court by way of the impugned judgment that in terms of Regulation 18(2) of the Regulations of 2005, a penalty has been imposed, which is not envisaged in the Act of 1996, except under Section 31 thereof pertaining to the offences and penalties, which is not attracted to the facts and circumstances of the instant case. In short, it is contended that a fine could be imposed as envisaged by Section 23 of the Act of 1996 but not a penalty, as provided in Regulation 18(2) of the Regulations of 2005. The entire argument, in this behalf, is based upon assumption that the penalty and the fine are two mutually exclusive concepts.

18. In order to resolve the aforesaid controversy, it appears to be imperative that the true meaning and scope of the terms "penalty" and "fine" be explored. In

Wharton's Law Lexicon, Fourteenth Edition by A.S. OPPE, "Penalty" is defined as follows:-

> "Penalty:
>
> 1. A sum agreed to be paid on non-performance of the condition of a bond. See Bond
>
> 2. A sum agreed to be paid on breach of an agreement or any stipulation of it. See LIQUIDATED DAMAGES, and NOMINE POENE. The fact that the parties state expressly in their contract that the sum named is 'liquidated damages' will not prevent the Court from deciding that it is a penalty. 'The cases upon the subject of penalty or liquidated damages are very numerous. The result of them seems to be this, that what the Courts look at is the real intention of the parties as it is to be gathered from the language they have used' (*Lea* v. *Whitaker*, (1872) L. R. 8 C. P. p. 73, per Keating, J.). The words are not conclusive ; the essence of penalty is a payment stipulated as *in terrorem* of the offending party : the essence of liquidated damages is a genuine covenanted pre-estimate of loss, *Dunlop Co.* v. *New Garage Co.*, 1915, A. C. 79, approved in *Widnes Foundry* (1925) *Ltd.* V. *Cellulose Acetate Co. Ltd.*, 1931, 2 K. B. 393, and 1933, A. C. 20.
>
> 3. A sum recoverable by action from a person infringing a statute. See PANAL STATUTES.
>
> 4. A sum, also called a fine, recoverable in a Court of Summary Jurisdiction from a person infringing a statute."

In Stroud's Judicial Dictionary Of Words And Phrases, Fifth Edition Volume 4 By Johns S. James, the meaning of "Penalty" and "Fine" describes as under:

"Penalty.

(1) "'Penalty' is an ambiguous word. A penalty may be the subject-matter of an information, or of a complaint" (*per* Wright J., *R.* v. *Lewis* [1896] 1 Q.B. 665). See *Chisholm* v. *Mackenzie*, 30 S.L.R. 604, cited PAIN.

(2) Where an Act imposes a penalty for anything done (*Crepps* v. *Durden*, 2 Cowp. 640, cited NECESSITY) or omitted to be done (*Llewellyn* v. *Glamorgan Vale Railway* [1898] 1 Q.B. 473, cited OWNER) on a day, that generally means only one penalty for the entire day; e.g. a man may "exercise his ordinary calling on a Sunday" on any number of times on a particular Sunday but will only be liable to one penalty therefore under Sunday Observance Act 1677 (c. 7) (*Crepps* v. *Durden*). So, only one penalty could be recovered for each day that a railway company offended against Railway Clauses Consolidation Act 1845 (c. 20), s.54, by not making a substituted road for an existing road which the company had interrupted (*Llewellyn* v. *Glamorgan Vale Railway*)."

3) "The civil liability arising from a breach of a statutory duty is of a wholly different nature from a penalty for such a breach. The former gives no cause of action unless damage to a third party follows from it, and then, in general, gives ground for an action for the amount of such damage at the suit of such third parties. But penalties for breaches of statutory duties apply whether damage has been caused or not" (p*er* Fletcher Moulton L.J. In *David Britannia Merthyer Coal Co*. [1909] 2 K.B. 149 (*Sub Nom. Britannic Merthyr Coal Co.* v. *David* [1910] A. C. 74), Cited Mine See DUTY. See also *Simmons v. Newport, etc* [1921] 1KB 616; *Couch v. Steel*, 23 L.J., QB 125).

> Fine:
>
> (1) ”Fine, finis. here (litt. s.194 signifieth a pecuniarie punishment for an offence, or a contempt committed against the King, and regularly to it imprisonment appretaineth. And it is called *finis,* because it is an end for that offence. And in this case a man is said *facere finem de transgressione, etc.., cm rege*, to make an end or fine with the King for such a transgression. It is also taken for a sum given by the tenant to the lord for concord and an end to be made. It is also taken for the highest and best assurance of lands, etc.” (Co. lit 126 b). See further Termes de la ley; cowel; jacob; 5 encyc. 341-343; for form of fine of lands. See 2 b1. Com App. XIV. CP. REDEMPTION.”

In the Oxford Companion to Law by David M. Walker, the term of “Penalty” and “Fine” is stated as under:

> “Penalty.
>
> A sum of money payable as compensation or as punishment. Many statutes impose penalties for non-implement of a public duty. Penalties may be agreed upon by the parties, as in a bond subject to a condition, where a party binds himself to pay a sum, frequently double the amount secured, if the condition is not complied with. Parties to a contract may agree that, in the event of a beach, the one in breach will pay to the other an agreed sum; if this sum cannot be regarded as a genuine pre-estimate of the damage likely to be sustained by a breach of contract, but is rather a sum stipulated in *terrorem* of the party in breach, it is deemed to penalty and is irrecoverable so far as in excess of the damage actually sustained.

> Fine:
>
> (I) In criminal law, a sum of money, ordered to be paid to the Crown by an offender by way of punishment. At common law a fine was one of the penalties for a misdemeanour. In 1861 statute permitted a fine for certain felonies but only in 1948 were courts empowered generally, to fine persons convicted of felonies Magistrates' courts have limits set on the amount of fine imposed for various kinds of offences and statutory offences normally provide for fines within stated limits as the, or a, penalty. Payment of a fine may be enforced by the Crown suing the offender in the civil courts, or, after judicial inquiry into his means, by imprisoning for default in payment."
>
> (emphasis supplied)

In the Black's Law Dictionary, Tenth Edition by Bryan A. Garner, the meaning of "Penalty" and "Fine" is stated as follows:

> "Penalty:
>
> (15c) I. Punishment imposed on a wrongdoer, usu. In the form of imprisonment or fine, esp, a sum of money exacted as punishments for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss). Though usu. for crimes penalties are also sometimes imposed for civil wrongs.
>
> Civil penalty (17c) A fine assessed for a violation of a statute or regulation.

Fine:

5. A pecuniary criminal punishment or civil penalty payable to the public treasury. Fine, vb

> "this word is ambiguously taken in our law, for sometimes it is taken for a sum of money or mulct imposed or laid upon an offender for some offence done, and then it is also called a ransom. And sometimes it is taken for an income, or a sum of money paid at the entrance of a tenant into his land: [sometimes as a sum paid for the renewal of a lease, and sometimes as a sum paid for the renewal of a lease, and denominated a fine for renewal:] and sometimes it is taken for a final agreement or conveyance upon record, for setting and securing of lands and tenements." 1 Edward Hilliard *Sheppard's Touchstone of Common Assurance* 2B (Richard Preston ed., 7th ed. 1820) (brackets in original)"

(emphasis supplied)

In the Law Dictionary with Pronunciations by James A. Ballentine 1948 Edition, the meaning of "penalty" is described as under:

> "Penalty:
>
> A word which when used in a contract is sometimes construed as meaning liquidated damages, as where the sum named is reasonable, and the actual damages are uncertain in amount and difficult of proof. If, however, it is called

> a penalty in the contract, it will be held to be a penalty if there is nothing in the nature of the contract to show a **contrary** intent. **See 15 Am Jur 679; 19 Am Jur 100**
>
> An exaction in the nature of punishment for nonperformance of an act, or for the performance of an unlawful act, and involving the idea of punishment, whether enforced by a civil or criminal action or proceeding. See Hall v Norfolk & Western Railroad Co., 44 W. Va 36, 41 L.R.A. 669, 67 A.m. St. Rep 757, 28, S. E. Rep 669."
>
> (emphasis supplied)

The question as to the meaning, the word "penalty" came up for interpretation before the Indian Supreme Court in the judgment, reported as N.K. Jain and others v. C.K. Shah and others (AIR 1991 SC 1289), wherein it was observed as under:-

> "10. In the common parlance the word 'penalty' is understood to mean a legal or official punishment such as a term of imprisonment. In some contexts it is also understood to mean some other form of punishment such as fine or forfeiture for not fulfilling a contract. But in gathering the meaning of this word, the context in which this is used is significant. In the Act, as already noted, Section 14 deals with penalties and enumerates various contraventions or non-compliances which are punishable with imprisonment. Every contravention mentioned in each of the sub-sections is punishable with imprisonment and for offences covered by Sections 14(1A), 14(1B) and 14(2A) minimum imprisonment is also made compulsory. The imposition of fine also

is prescribed. The penalties mentioned in this connection would indicate that the Legislature envisaged that a penalty should necessarily mean imprisonment or at least imposition of fine.
.....
.....
However, we shall proceed to consider some of the submissions made on this aspect. The learned counsel referred to certain standard books on words and phrases. In Butterworths' Words and Phrases, legally defined Third Edition page 343 the meaning of the word 'Penalty' is given as that the word ‘penalty’ is large enough to mean, is intended to mean, and does mean, any punishment whether by imprisonment or otherwise. Blackburn, J. in R. v. Smith, [1862] Le Ca 131 at 138, observed as under:

"I consider that the word "penalty" falls to be read in a wide popular sense, ... and I select two definitions adequately conveying that sense. The late Mr. Roberton Christie The Encyclopedia, Vol. I 1, p 204) said: “Penalty in the broad sense may be defined as any suffering in person or property by way of forfeiture, deprivation or disability, imposed as a punishment by law or judicial authority in respect of ... an act prohibited by statute.” The Oxford Dictionary echoes the same wide conception by referring to "a loss, disability or disadvantage of some kind ... fixed by law for some offence.

The meaning of the word 'penalty' as given in the Collins English Dictionary, is as under:

"Penalty: 1. a legal or official punishment, such as a term of imprisonment. 2. some other form of punishment, such as a fine or forfeit for not fulfilling a contract. 3. loss, suffering, or other unfortunate result of

one's own action, error, etc. 4. Sport, games etc. a handicap awarded against a player or team for illegal play, such as a free shot at goal by the opposing team, loss of points, etc. "

In addition, the learned counsel also relied on some decisions of foreign courts where the meaning of the word 'penalty' was considered. In People ex rel Risso v. Randall, 58 N.Y. 2d 265, 268 Misc.1057, it was held that:

"A "penalty" may refer to both criminal and civil liability, being denied as penal retribution, punishment for crime of offense, the suffering in person, rights or property which is annexed by law or judicial decision to commission of a crime or public offense."

In City of Fort Wayne v. Bishop, 92 N.E. 2d 544, 547, 228 Ind. 304, it was observed as under:

"The term "penalty" embraces all consequences visited by law on heads of those who violate police regulations and extends to all penalties whether exigible by state in interest of community or by private persons in their own interest, even when statute is remedial as well as penal."

In City of Cincinnativ. Wright, 67N.E.2d 358, 361, 77 Ohio App.261, it was noted that:

"The word "penalty" is not confined to punishment or crime; it has a broader meaning in law of contracts; it is used as contradistinguished from liquidated damages. It is also used to indicate the sum to be forfeited on breach of a bond. And in common parlance it expresses any disadvantage resulting from an act."

(emphasis supplied)

This Court in the case, reported as Abdul Hameed Talib v. Addl. District Judge (PLD 2013 SC 775), interpreted the meaning of "fine" as follows:

> "The definition **(of fine)** whereof is *"a sum of money as a penalty by a Court of law"* **OR** "a punishment to pay a sum of money for the breach of the law". As it is a penalty and a punishment which has been imposed by the law itself, thus the Tribunal is left with no discretion to waive it off, exonerate or absolve a party coming before it, from such a fine."

At this juncture, it may be appropriate to refer the judgment, reported as R.S. Joshi etc. v. Taluka Sahakari etc. (AIR 1977 SC 2279), wherein the Supreme Court of India had borrowed the meaning of "penalty" and "fine" from the American Jurisdiction in a case, reported as Gosselink v. Campbell, 4 Iowa, 300, wherein it was observed as under:

> "The terms 'fine', 'forfeiture' and 'penalty' are often used loosely, and even confusedly; but when a discrimination is made, the word 'penalty' is found to be generic in its character, including both fine and forfeiture. A 'fine' is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in some form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property."
>
> (emphasis supplied)

19. An over view of the aforesaid reveals that the penalty implies a loss, disability or disadvantage of some

kind visiting a person or his property on account of his own actions or omissions. It has both criminal and civil dimensions. In the former, it denotes a punishment imposed on a wrongdoer in the form of term of imprisonment or a sum of money exacted from him for violation of the law. While in Civil Law, it may arise from a breach of statutory duty or a contractual obligation with its inherent limitations and peculiar remedies, the details whereof are not necessary for the adjudication of the *lis* at hand. It is a word of great amplitude.

The “fine” on the other hand is a form of “penalty” which implies the payment of money by way of punishment usually imposed for breach of law. It also appears that it is difficult to define “fine” without referring to the concept of “penalty”, thus, it can safely be said that “fine” is a form of “penalty”. All fines are penalties but all penalties are not necessarily fines. In short, a fine is a pecuniary penalty. It is also apparent that both the terms “penalty” and “fine” in a statutory construction may sometime be used loosely but a true import of the term would obviously depend upon the subject matter and the object of the Statutory Instrument

wherein such term has been employed that too with reference to the context in which it is used.

20. In the instant case, in terms of Regulation 18(2) of the Regulations of 2005, a Licensee, who fails to make payment of the dues under Regulation 18(1) of the Regulations of 2005 is liable to suffer a penalty equivalent to 10% of the amount due, i.e. a peculiarity disadvantage resulting from a violation of the Regulations of 2005, which a Licensee is required to comply with in view of Clauses 1.3 and 6.4 of his License Agreement but also constitutes a breach of Section 23 of the Act of 1996. Thus, when examined with reference to the subject and object of the Act of 1996 and the Rules of 2000 and the Regulations of 2005 framed there-under and in the context in which the term “penalty” has been used, there is no manner of doubt that for all intents and purposes, it is a fine. It is a common ground between the parties and as is also obvious from the provisions of the Act of 1996 that the said Statute provides specifically for imposition of a fine in terms of Section 23 of the Act of 1996.

21. The reference to Section 5 sub-section 2(p) made in the impugned judgment (apparently at the

behest of the learned counsel for the Respondent Authority) appears to be of limited relevance. The said provision of law pertains generally to levy of fee and other charges. The payment in terms of Regulation 18(1) of the Regulations of 2005 is described as a fee/charge therein and the power to impose a fine is specifically mentioned in Section 23 of the Act of 1996, which perhaps is the appropriate provision of law for determining the *vires* and Regulation 18(2) of the Regulations of 2005.

22. Perhaps the Regulation 18(2) of the Regulations of 2005 may not be happily worded and could have been constructed with a greater care and accuracy. It is an ancient and consistently applied principle of Interpretation of Statutes that where "object and intention of statute is clear it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance" (The Interpretation of Statutes 7th Edition by Sir Peter Mexwer).

23. Even otherwise, it is a settled law that the Courts should always lean in favour of validity of a Statutory Instrument and should be slow to strike it down and an interpretation, which saves the law, should be adopted rather than holding a law to be invalid,

unconstitutional or *ultra vires*. Reference, in this behalf, may be made to the judgments reported as (1) Mehreen Zaibun Nisa and others v. Land Commissioner, Multan and others (PLD 1975 SC 397), (2) Multiline Associates v. Ardeshir Cowasjee and 2 others (PLD 1995 SC 423), (3) Messrs Elahi Cotton Mills Ltd and others v. Federation of Pakistan through Secretary, M/o Finance, Islamabad and 6 others (PLD 1997 SC 582), (4) Federation of Pakistan through Secretary, Ministry of Finance and others V. Haji Muhammad Sadiq and others (PLD 2007 SC 133), (5) Syed Aizad Hussain and others v. Motor Registration Authority and others (PLD 2010 SC 983), and (6) Dr. Tariq Nawaz and another v. Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan, Islamabad and another (2000 SCMR 1956).

24. A perusal of Section 23 of the Act of 1996 reveals that it deals with contravention of any provision of the Act of 1996 or the Rules framed there-under for any term or condition of a License and in terms of Section 23(3)(c)(i) of the Act of 1996, a fine may be imposed in this behalf to a maximum of Rs.350 million. Regulation 18(2) of the Regulations of 2005 deals only with one of such contravention i.e. Regulation 18(1) of

the Regulations of 2005 for which a penalty/fine @ 10% per annum is provided. Obviously, the quantum of fine, if imposed, would be subject to a maximum limit mentioned in Section 23 of the Act of 1996. In the instant case, the fine sought to be imposed is less than the amount mentioned in Section 23(3)(c)(i) of the Act of 1996. In view of the above, it is difficult to hold that Regulation 18(2) of Regulations 2005 is *ultra vires* the parent statute i.e. the Act of 1996 and the findings to the contrary by way of the impugned judgment are not sustainable.

25. A feeble attempt was made by the learned counsel for the Respondent Company to canvass that no amount was due under Regulation 18(1) of the Regulations of 2005, therefore, proceedings under Section 23 of the Act of 1996 to impose penalty/fine in terms of Regulation 18(2) of the Regulations of 2005 could not be initiated. Suffice it to say, that the payment due under Regulation 18(1) of the Regulations of 2005 has admittedly been made by the Respondent Company. The Show Cause Notice in terms of Section 23 of the Act of 1996 was issued by the Petitioner Authority only with reference to the imposition of the penalty/fine in terms of

the Regulation 18(2) of the Regulations of 2005 and the Order dated 03.5.2012 in this behalf was passed by the Petitioner Authority, which was challenged by way of an Appeal filed under Section 7(1) of the Act of 1996 by the Respondent Company. It has not been held in the impugned judgment that the Respondent Company is not liable for the amount due in terms of Regulation 18(1) of the Regulations of 2005. The Respondent Company has not challenged the said judgment before this Court. The liability of the Respondent Company in terms of Regulation 18(1) of the Regulations of 2005, since paid, is not the subject matter of the instant *lis.*

26. The learned counsel for the Respondent Company, while relying upon Clause 6.6 of the License Agreement has attempted to argue that the amount of penalty under Regulation 18(2) of the Regulations of 2005 should be calculated *@ 2%* and not @ 10%. The Clause in question is of general import and perhaps relates to all fee payable by a Licensee, while Regulation 18.2 of Regulations of 2005 is specific in nature and applies to amounts due only under Regulation 18.1 of the Regulations of 2005, therefore, must prevail. Secondly, if the argument of the learned counsel for the Respondent

Company is accepted, the liability, in fact, would increase, manifold as Clause 6.6 of the License Agreement pertains to the additional payment unpaid fee @ 2% per month, while, in the instant case, the amount under the Regulation 18(2) of the Regulations of 2005 is calculated @ 10% per every year. In the above circumstances, we find ourselves unable to agree with the learned counsel for the Respondent Company or sustain the impugned judgment.

27. Consequently, this Civil Petition is converted into appeal and the same is allowed. The impugned judgment dated 05.5.2015 of the learned Islamabad High Court, Islamabad is hereby set aside.

Judge

Judge

Judge

Islamabad, the
26th October, 2015
'Not Approved For Reporting'
Safdar/*