

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE EJAZ AFZAL KHAN.

MR. JUSTICE QAZI FAEZ ISA.

CIVIL APPEALS NOS. 139 to 144 of 2013 AND
CIVIL PETITION NO. 1384 of 2011.

(On appeal against the judgment dated 21.01.2009 of the Islamabad High Court, Islamabad passed in FAO Nos. 7, 11 & 13 of 2008 and WP Nos.705,706,741,763 and 1526 of 2008)

World Call Telecom Ltd thr. its Chief Executive Officer.
(in CAs. 139-140/13).

Wi-Tribe Ltd. Pakistan Ltd. thr. its Director.
(in CA. 141/13)

Telecard Ltd. World Trade Center thr. its Director.
(in CA.142/13)

DV com Limited.
(in CA.143/13)

Telecard Limited.
(in CA.144/13)

M/s Dancom Pakistan (Pvt) Limited.
(in CP.1384/11)

...Appellants/Petitioner.

Versus

Pakistan Telecommunication Authority (PTA) thr. its Chairman.
(in CAs. 139, 140, 143 and 144/13)

Federation of Pakistan thr. Secy. Information Technology, etc.
(in CAs. 141-142/13 and CP. 1384/11)

...Respondents

For the appellants/petitioners: Mr. Khalid Anwar, Sr. ASC.

Mr. M. Ali Raza, ASC.

Mr. Shahzad Shoukat, ASC
 Kh. Ahmed Tariq Rahim, ASC
 Mr. Afnan Karim Kundi, ASC
 Raja Abdul Ghafoor, AOR.
 Mr. Tariq Aziz, AOR.
 Syed Safdar Hussain AOR.

For the respondents:

Ch. Aamir Rehman, Addl. A. G.
 Mr. Waseem Sajjad, Sr. ASC.
 Mr. M. Ikram Ch., Sr. ASC.
 Mr. Azid Nafees, ASC. (For PTCL)
 Mr. Asim Hafeez, ASC
 Sardar M. Aslam, ASC.
 Mr. Shamshadullah Cheema, ASC (For FAB)
 Mr. M. S. Khattak AOR.
 Mr. Waseem Anwar, A. D. Law (PTA)
 Mr. M. Khurram Siddiqui, Dir. Law. (PTA)
 Mr. Bilal Afzal Khokhar, Consultant, PTA.
 Syed Sibte-e-Hassan Gardezi, AGM (Law), USF.
 Mr. Nasir Ayyaz, Director, Legal, M/o IT.
 Mr. Arif Sargana, Director (C.A.) Law, M/o IT
 Ms. Ameena Sohail, Member (Legal), M/o IT

Dates of hearing:

16.4.2013, 17.04.2013, 06.05.2013,
 23.05.2013, 18.9.2013, 23.9.2015,
 12.10.2015, 13.10.2015, 15.10.2015,
 26.10.2015, 04.11.2015 and 05.11.2015.
 (Judgment Reserved).

J U D G M E N T

EJAZ AFZAL KHAN, J.- Vires of Access Promotion Rules, 2004 was challenged on the grounds that they are outside the orbit of Section 57 of the Pakistan Telecommunication (Re-Organization) Act, 1996; that Access Promotion Contribution being insertion of Pakistan Telecommunication (Re-Organization) (Amendment) Act, 2006 (Act II of 2006) could not precede the amendment especially

when the provision regulating it was also inserted in Section 4(k) through the above mentioned Amendment Act in 2006; that though the term Access Promotion Contribution was also defined by the Access Promotion Rules, 2004 but in the absence of any clear provision in the Act, it could not be exacted from the licencees; that Rules under Section 57 of the Act could be made for carrying out the purposes of the Act provided therein as the words "and where provided for herein before" clearly exclude what has not been provided by the Act; and that as the rules requiring payment of APC are ultra vires, no action could be taken against the appellants under Section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 on account of their failure to pay APC. Even establishment of the USF, according to Mr. Ali Raza, ASC for appellants in Appeal No. 141 of 2013 which is required to be made by a notification in the Official Gazette under Section 33A of the Pakistan Telecommunication (Re-Organization) Act, 1996, cannot precede the insertion of the provision providing therefor, therefore, the USF exacted under the rules 2004 is also ultra vires. Functions and powers of the Authority have been listed in Section 4 and 5 of the Act respectively, therefore, performance of any other function or exercise of any other power according to the learned ASC shall be outside the scope of this Act.

2. Mr. Khalid Anwar, learned Sr. ASC appearing on behalf of the appellants in Appeals Nos. 139 to 140 of 2013 contended that the Authority did not have any power to levy fee, other charges and fix rates in respect of the services, before the passing of Pakistan Telecommunication (Re-organization) (Amendment Act), 2006, therefore, no amount in any form could be exacted from the

appellants. Licence, the learned Sr. ASC contended, is subject to the terms and conditions of the Act, rules and regulations and that in the event of any conflict or inconsistency between the provisions of the licence and provisions of the Act, rules or regulations, the latter shall prevail; that revenue could be shared from international calls, from LDI and LL licences according to the formulas specified by the Authority from time to time but it cannot remain static when the rates vary from time to time. The amount exacted in the form of APC for the USF cannot be spent anywhere but to promote the availability of a wide-range of high quality, efficient, cost-effective and competitive telecommunication services throughout Pakistan. The Federal Government, the learned Sr. ASC went on to argue is not always supposed to be on the receiving end as it is also required to credit sums mentioned in sub-Section 4 of Section 33A of the Act. The mainstay of the learned Sr. ASC was that Access Promotion Contribution could not be exacted just for the heck of it; that if it is a tax, it cannot be imposed without express provision of the statute and that in case it is a fee, some service should have been provided in lieu thereof; and that where it lacks the essential attributes of tax as well as fee it has no statutory foundation. The APC, the learned Sr. ASC maintained, could have been treated as a fee, had it been spent on the development of the infrastructure or on the welfare of the Contributors, but where it is not known where does it go and who spends it, not only proceedings against the petitioner under Section 23 of the Act be dropped but the amount received so far be restored to coffers it has come from. Another strange anomaly, the learned Sr. ASC argued, is that the Access Promotion Contribution has been made part of Federal consolidated fund vide notification

dated 29.06.2013 which is not justified under any canons of law and the Constitution. Arguing further, the learned Sr. ASC contended that if the amount exacted from the appellants is shown to have been spent on the purpose it is exacted for a greater part of his grievance shall stand redressed but where it has neither been audited nor accounted for in accordance with the relevant provisions of the Act and the rules, its retention by the Federation would be absolutely unjustified. He next contended that even Approved Account Rates which are the main sources of APC for the USF are also prescribed without considering the grave ground realities with the result that the licensees instead of gaining anything out of the business are losing even what they have invested. The learned Sr. ASC further argued that the learned Single Judge erred by construing the word "and" as disjunctive without considering the justification therefor; that such conversion is justified only when it leads to absurdity or gives rise to a conflict. The learned Sr. ASC to support his contentions placed reliance on the cases of **C. E. Gibbon, Deputy Speaker, National Assembly. Vs. Pakistan (through the Secretary Ministry of Law, etc (PLD 1957 (W.P.) Karachi 956),** **Imtiaz Ahmed Lali. Vs. Ghulam Muhammad Lali (PLD 2007 S.C. 369)** and **Salehon and others. Vs. The State (PLD 1969 SC 267)**. He lastly argued that notification enforcing the USF issued under the Pakistan Telecommunication (Re-Organization) Amendment Ordinance, 2005 would die with the death of the Ordinance and cannot continue unless another notification in terms of Section 33A of the Act is issued by the Federal Government soon after the commencement of the Pakistan Telecommunication (Re-Organization) Amendment Act, 2006, notwithstanding the provisions contained in Article 264(b) of the

Constitution. The learned ASC to support his contention placed reliance on the case of **Government of Punjab through Secretary, Home Department. Vs. Zia Ullah Khan and 2 others (1992 SCMR 602)**.

3. The learned Sr. ASC appearing on behalf of the USF contended that licensee cannot provide any telecommunication service or system, establish, maintain or operate in telecommunication system unless authorized by the Authority; that grant of licence is subject to fulfillment of terms and conditions stipulated in the licence and that no person has any locus standi to enter the realm of telecommunication without a license. The learned Sr. ASC next contended, that the appellants whose existence in the field of telecommunication is on account of the licence would stand nowhere if the licence which has its origin in the draft Rules of 2004 is withdrawn. Though the Rules, the learned Sr. ASC maintained, were given legal attire in 2004 nevertheless they being in draft form were accepted as such at the time of grant of licence. The learned Sr. ASC next contended that though the definition of Access Promotion Contribution was inserted in the Act through the Amendment Act, 2006, but it was all along present in the rules framed under Section 57 of the Act. The learned Sr. ASC went on to argue that Access Promotion Rules, 2004 are fully covered by Section 57 of the Act, even if the word "and" used therein is read conjunctively. The learned Sr. ASC, however, conceded that APC for the USF exacted from the contributors cannot be made part of consolidated fund nor can it be used for a purpose not mentioned in the statute. The learned Sr. ASC next contended that appellants cannot approbate the terms and conditions of licence as well as the rules where they benefit them and reprobate the same where they bring them under

some obligation. The learned Sr. ASC contended that Section 33A of the Act provides for issuance of a notification after the commencement of the amendment Act, 2006 but it does not mean that the notification issued under the provision of the Ordinance which is in para materia with the above mentioned provision would cease to have effect. Such notification, the learned Sr. ASC added, would continue under Article 264(b) of the Constitution. The learned Sr. ASC by concluding his argument contended that the efficacy or legitimacy of the terms and conditions of the licence or even the rules cannot be challenged at such a belated stage when the very establishment of the appellants in the field owes its origin and whole existence to the said terms and conditions as well as rules.

4. The learned Addl. A. G. appearing on behalf of the Federation contended that a great deal of the amount exacted through APC for the USF has been spent on the increase of teledensity, development of infrastructure and betterment of contributors, therefore, its restoration to the coffers it has come from is unthinkable. He, however, conceded that the amount exacted through APC for the USF could not be made a part of the Federal Consolidated Fund. He next contended that the appellants cannot take a U-turn to deny the whole dispensation when their presence in the field of telecommunication originated therefrom and one of them availed subsidies from the USF to the tune of 1.12 billion for different projects.

5. We have gone through the entire record carefully and considered the submissions of the learned Sr. ASCs and ASCs for the parties as well as learned Addl. A. G. for the Federation.

6. The first and foremost question arising for consideration is as to what is the true meaning of the word "and" used in sub-Section (1) of Section 57 of the Act and whether Access Promotion Rules of 2004 can be held to have been enacted in accordance with the said Section of the Act. Before we deal with the arguments addressed at the Bar it is worthwhile to refer to Section 57 as it stood before amendment. It thus reads as under:

"57. Power to make rules._ (1) *For carrying out the purposes of this Act ["and where provided for hereinbefore"], the Federal Government may, from time to time, by notification in the official Gazette, make rules not inconsistent with this Act.*

(2) *Without prejudice to the foregoing powers, the Federal Government may make rules_*

a) *extending the categories of telecommunication systems or telecommunication services or which a licence is not required under Section 20;*

b) *regulating the use of encryption apparatus or software by requiring use of approved apparatus or software or such appropriate apparatus or software be lodged with the Authority free of cost; and*

c) *restricting or prohibiting the use of any public switched network for signaling purposes in circumstances in which charges otherwise payable may be avoided or reduced, or the advertising of means or services for such use."*

7. The above quoted provision in clear and unambiguous terms provides for rules making power of the Authority. The purpose behind making these rules is to carry out the purposes of this Act and "where provided for hereinbefore". The word "and" as contended by the learned Sr. ASC for the appellants is conjunctive and has to be read as such. We agree that it is conjunctive and has to be read as such but still it does not support the deduction that the rules of

2004 have been framed outside the scope of Section 57. The legislature by using the word “and” intended to include and encompass the rules framed for carrying out the purposes of the Act and the rules envisaged by Section 29(4) thereof. Given that the expression APC has been defined as the payment made by LDI licencees to LL Licencees or to the USF pursuant to the rules made under this Act, by 2(a) of the Act of 1996 which was inserted by the Amendment Act, 2006, but as is evident by the definition itself, it was already in existence and in force ever since 2004. It was in this context that the learned Sr. ASC for the appellant went to the extent of calling it inconsistent with the Act of 1996, but they cannot be held to be inconsistent on any account. It would have been inconsistent with the Act, had its levy been prohibited by the Act express and unequivocal terms. But when there is nothing in the Act prohibiting its levy, we don’t agree with the learned Sr. ASC for the appellants that the APC or the rules providing therefor are either ultra vires the Act or inconsistent therewith. The judgments rendered in the cases of C. E. Gibbon, Deputy Speaker, National Assembly. Vs. Pakistan (through the Secretary Ministry of Law, etc, Imtiaz Ahmed Lali. Vs. Ghulam Muhammad Lali and Salehon and others. Vs. The State (supra) are not relevant to the case in hand when by reading the word “and” as conjunctive the status of the rules remains much the same. Even if we assume for a while that rules were not in force at the time of grant of licence, it would not have much effect when even instructions contained in memoranda issued by the Government could be regarded as statutory in nature where they are expressed with precision and have been acted upon. Reference can well be made

to the case of **Faiz Ullah Khan. Vs. Government of Pakistan** (PLD 1974 SC 291).

8. The argument that APC for the USF cannot be imposed even as a fee when no service is provided in lieu thereof, is absolutely devoid of force when a great deal of money so exacted is spent on the development of infrastructure, increase of teledensity and betterment of contributors which widen the gamut of their business and in turn bring them more and more profits. The argument that the Approved Account Rates which are the main sources of APC for the USF are not prescribed after taking stock of the dynamics in the international market of telecommunication is mere conjectural than real as nothing has been brought on the record to substantiate this argument. The argument that the fund exacted through APC for the USF has neither been audited nor accounted for in accordance with the relevant provisions of the Act and the rules has a lot of force in it but the instant litigation has not been initiated for the audit the amount so exacted. The argument that when it is not known as to where does the fund exacted through APC for the USF goes, proceedings against the appellants under Section 23 of the Act be dropped is also nothing but a subterfuge to cover up their failure to do what they are required to do under the terms and conditions of the licence, the rules and the Act. The argument that where establishment of the USF is required to be made by notification in the official gazette under Section 33-A of the Act, it cannot precede the insertion of the provision is also devoid of force when it was already established by a notification in the official gazette under Section 33-A of the Pakistan Telecommunication (Re-organization)

(Amendment) Ordinance which continues as is clearly provided by Article 264(b) of the Constitution which reads as under:-

"264. Effect of repeal of laws.—Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the Constitution,--

- a)
- b) affect the previous operation of the law or anything duly done or suffered under the law;
- c)
- d)
- e)

....., as if the law had not been repealed."

The judgment rendered in the case of **Government of Punjab through Secretary Home Department. Vs. Zia Ullah Khan and two others** when read carefully does not support the contention of the learned Sr. ASC for the appellants. The argument that licence is subject to the terms and conditions of the Act, rules and regulations and that in the event of any conflict or inconsistency between the provisions of the licence and the provisions of the Act, rules and regulations, the latter shall prevail is, no doubt correct but we don't think there is any conflict or inconsistency between the terms and conditions of the licence and the provisions of the Act or the rules and regulations made threreunder. The argument that functions and powers of the Authority have been listed in Sections 4 and 5 of the Act, therefore, performance of any other function or exercise of any other power shall be outside the scope of the Act is also devoid of force, when acts done, orders passed, rights acquired or liabilities incurred pursuant to the rules framed under Section 57 of the Act cannot be held to be outside the scope of the Act. The more so when we have

observed above, that rules of 2004 are by no stretch of imagination inconsistent with the provisions of the Act.

9. We, however, don't understand why do the appellants question the terms and conditions of the licences which emanate from the rules and why do they question the rules when they emanate from the provisions contained in Sections 20, 21, 23 and 24 of the Act. No person, in view of the provision contained in Section 20 of the Act, can establish, maintain or operate any telecommunication system or provide any telecommunication service unless he has obtained a licence under this Act. All the licences are granted by the Authority as it alone has the exclusive power to grant them under Section 21 of the Act on the terms and conditions enumerated therein. It is the Authority which, in view of the provision contained in Section 22 of the Act, has the power to modify a licence or its conditions with the consent of the licensee. Orders and penalties are also enforced by the Authority in view of the provision contained in Section 23 of the Act and again it is the Authority which wields the powers of Administrator under Section 24 of the Act. We don't understand why do the appellants approbate the rules when they benefit them and reprobate them when they bring them under obligation. The appellants don't understand that by questioning vires of the rules they not only embark on a self defeating exercise but hack the branch they are resting on when they minus the rules are just non-entity. Leaving apart the question of acquiescence or estoppel where one of the appellants availed subsidies from the USF to the tune of rupees 1.2 billion for different projects, it does not behove it to bite the hand that feeds it.

10. The argument that the amount exacted from the APC cannot be made part of the Federal Consolidated Fund has not been disputed by the learned Sr. ASC for the USF and the learned Additional Attorney General and rightly so because neither the parameters prescribed by Articles 78 and 79 of the Constitution for the fund, nor the purpose of APC for the USF prescribed by the Act can be enlarged or extended without amendment in the Constitution and the Act. Even the Secretary, Ministry of Finance, Govt. of Pakistan has assured the Court through a statement duly signed by him that the USF shall be used for the purposes it has been exacted for and that the USF amount transferred earlier to the Federal Consolidated Fund is also available for transfer to the USF as per the current mechanism in place. We would, however, observe that it be transferred to the USF as early as possible.

11. Having thus considered, we don't feel inclined to interfere with the impugned judgment, notwithstanding the reasons recorded in support of the conclusions are different.

12. For the reasons discussed above, these appeals as well as petition being without merits are dismissed.

Judge

Judge

Announced in open Court at Islamabad on 22.12.2015.

Judge

'Not Approved For Reporting'

M. Azhar Malik