

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Mushir Alam
Mr. Justice Qazi Faez Isa

CIVIL PETITION NO. 1247 OF 2016

(Against the judgment dated 19.02.2016 of the Islamabad High Court, Islamabad passed in FAO No. 34/2012)

***Pakistan Telecommunication Authority,
PTA Headquarters, Islamabad.***

... Petitioner

Versus

Pakistan Mobile Communication Limited.

... Respondent

For the Petitioner: Mian Shafaqat Jan, ASC.
Syed Rifaqat Hussain Shah, AOR.
Khurram Siddiqui, Director Law, PTA.

For the Respondent: Mr. Azid Nafees, ASC.

Date of Hearing: 02.04.2019.

ORDER

Qazi Faez Isa, J. This petition was converted into an appeal and allowed on 2nd April, 2019 through a short order and the following are the reasons for allowing the same.

2. The Pakistan Telecommunication Authority ("**PTA**"), established under section 3 of the Pakistan Telecommunication (Re-organization) Act, 1996 ("**the Act**"), in exercise of its powers directed that a Quality of Service ("**QoS**") survey be conducted to determine whether the respondent, a holder of license issued by PTA under section 21 of the Act to provide cellular mobile services throughout Pakistan, is providing services that conform with the Cellular Mobile Quality of Service Regulations, 2011 ("**the Regulations**"). QoS survey was conducted which showed that the respondent's services were, "*below the required standard*". Copy of the inspection report of the survey was provided to the respondent by PTA under cover of its letter dated

25th August, 2011 and the respondent was called upon to, *"take all remedial measures to remove the shortfall identified in the inspection report and submit report within 30 days"*.

3. The respondent responded to PTA's aforesaid letter by its letter dated 30th August, 2011 and sought the, *"log file of the survey"*. PTA provided the, *"CD drive test log files quality of service survey"* under the cover of letter dated 9th September, 2011. The respondent vide letter dated 27th September, 2011 then requested to meet with the technical staff of PTA, *"for further analysis of the result so that remedial measures should be expedited"*. There was further correspondence between the parties.

4. PTA issued a show cause notice dated 11th November, 2011 under section 23 of the Act which called upon the respondent to remedy the stipulated shortcoming in the services being provided by the respondent and to bring its services in conformity with clause 1.3 of the Appendix-A(3) of the license and the Regulations within 25 days and to explain in writing within 30 days as to why adverse action may not be taken against the respondent in terms of section 23 of the Act. Another show cause notice dated 12th December, 2011 was issued by PTA under section 23(1) of the Act requiring the respondent to provide, *"Quality of Service measurement tools"* within 25 days and to explain within 30 days why adverse action should not be taken pursuant to section 23 of the Act. Instead of replying to these show cause notices the respondent filed an appeal before PTA under section 7(2) of the Act against the, *"decision of the Director General (Enforcement) to conduct QoS survey"* as the QoS survey was stated to be without jurisdiction and so too were the show cause notices issued subsequent to the survey.

5. The Chairman and Member (Technical) of PTA on 4th June, 2012 decided the appeal. They held that the Act and Regulations mandated the monitoring of services provided by licensees and specifically provided for conducting surveys and that the survey was conducted pursuant to the direction of PTA therefore it was not a decision or order of an officer of PTA and as such could not be

challenged under section 7(2) of the Act. However, since the respondent had not submitted replies to the show cause notices, PTA permitted the respondent to do so within 7 days, failing which the matter would be heard and decided, "*as per available record*".

6. The respondent assailed the abovementioned decision of PTA by filing an appeal under section 7(1) of the Act before the Islamabad High Court, Islamabad. The learned Judge of the High Court allowed the appeal vide judgment dated 19th February, 2016 in the following terms:

"For what has been discussed above, I am of the view, the impugned order dated 04.06.2012 is illegal as appellant was knocked out on technical grounds, whereas, if the Authority holds that the Appeal U/S 7(2) of the Act as not maintainable, the same shall be returned, to be filed before competent forum which has not been done; and on merit the inspection procedure adopted by the Inspecting Officer and subsequent actions are declared illegal. **The appeal is allowed,** Authority is directed to conduct new survey after observing all legal formalities and appellant must be associated with the inspection during survey and notify all contravention, remedial measures to remove the shortfalls (if any) in accordance with the law.

7. The learned counsel for the petitioner-PTA stated that the decision of PTA was in conformity with the Act and Regulations. An appeal under section 7(2) of the Act can only be preferred against a decision or order of an officer of PTA and has to be filed within 30 days, whereas, as per the learned counsel, the decision to conduct the survey was taken by PTA itself and no challenge to conducting the survey was made within 30 days, nor within 30 days of receiving the survey report. It was next argued that the show cause notices were issued to the respondent and sufficient time was granted to reply thereto however without responding to these show cause notices appeal was filed, first before PTA and then before the High Court, which was not maintainable as no "*decision or order*" in terms of section 7(1) of the Act had been passed against the respondent. The learned counsel has also relied upon the case of *Pakcom Limited v Federation of Pakistan* (PLD 2011 Supreme Court 44, 105U) to contend that when the legislature entrusts an authority with the power to decide something the authority should be permitted to do so and its decision can only be interfered with if it commits a mistake of fact or law.

8. The learned counsel for the respondent on the other hand supported the impugned judgment of the High Court and stated that PTA had exceeded its authority by ordering a survey and that a survey can only be conducted by first informing the respondent and associating it with such survey. In support of his contention the learned counsel referred to regulation 10 of the Regulation. He concluded by stating that the directions issued to improve services in the show cause notices could not be implemented as PTA had not mentioned the particular remedial measures to be taken by the respondent to resolve the same.

9. We have heard the learned counsel for the parties and with their assistance examined the documents on record and the provisions of the Act and Regulations. It would not be appropriate to discuss the merits of the matter as the respondent never submitted its response to the show cause notices and no decision was taken or order passed.

10. In its decision PTA had referred to the record and held that it was PTA itself, and not any of its officers, who had decided to conduct the survey therefore the appeal could not be preferred before PTA under section 7(2) of the Act. Section 7 of the Act is reproduced hereunder:

"7. 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."

The decision of PTA was in accordance with section 7(2) of the Act. The appeal preferred before the High Court was also incompetent as there was no *decision or order* of PTA. There was also no decision on the show cause notices. The High Court could not suspend or strike down the said show cause notices in exercise of its appellate jurisdiction under section 7(1) of the Act. The High Court's appellate jurisdiction under the Act commences once there was a *decision or order*, however, there wasn't any in the present case. The learned counsel for the respondent's contention that PTA did not have the power to order a survey to be conducted overlooks Regulation 10(1) of the Regulations which provides that:

"10. Inspections and performance audit for quality of service.

(1) The Authority shall conduct inspections surveys, tests or make surprise checks through its designated officers or conduct performance audit of quality of service of the licensee from time to time to ensure that users of telecommunication services get such quality of service as laid down in the license, Regulations, and/or KPIs."

11. The matter of the show cause notices was still pending and no adverse action was taken or ordered against the respondent to enable it to invoke the appellate power of PTA or the High Court, respectively under section 7(2) or 7(1) of the Act. At this juncture it would however not be appropriate to dilate upon any of the issues involved as it may affect the rights of either party. We note that PTA had graciously extended the period for filing of replies to the show cause notices by 7 days (in paragraph 14 of its decision), however, the period has expired and the opportunity provided was not availed of by the respondent. We, therefore, have no hesitation in setting aside the impugned judgment of the learned Judge of the High Court since it has been passed by disregarding section 7(1) of the Act. We can however not be unmindful of the fact that the show cause notices were issued a few years back and it is not known whether action pursuant thereto is still contemplated. In case the officers of PTA want to proceed with the matter of the said show cause notices they would grant at least seven days to the respondent to submit its reply thereto. If the reply submitted by the respondent is not found to be

satisfactory or none is submitted the respondent will be granted a hearing whereafter the matter shall be decided. It is clarified that no challenge can be made or entertained till *a decision or order*.

Judge

Judge

Bench-IV
Islamabad:
02.04.2019

Approved for Reporting
(M. Tauseef)