

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A. No.186 of 2018
Interworld Communication (Private) Limited
Versus
Pakistan Telecommunication Authority, etc.

Appellant by: Mr. Muhammad Shahzad Shaukat, Advocate
Respondent No.1 by: Barrister Munawar Iqbal Duggal, Advocate
Date of Decision: **05.04.2022**

Sardar Ejaz Ishaq Khan, J: This intra court appeal is from the judgment dated 22.03.2018 in writ petition 3508 of 2017 on the ground that the judgment bypassed the core question, namely, whether respondent no.1 Pakistan Telecommunication Authority (PTA) could withhold issue of service commencement certificates to the petitioner for the Telecom Regions (TRs) of Muzaffarabad and Northern Areas pending the adjudication of disputed dues for Access Promotion Contribution (APC) for Universal Service Fund (USF).

2 The writ petition raised several other questions of law on the jurisdiction of PTA to act for AJK & Northern Areas, but these were no longer contested and the core question mentioned above was the only one argued in appeal. That is to say, both the appellant and the PTA, for the purposes of this appeal, are no longer at issue on the question of PTA's jurisdiction raised in the writ petition and in the memo of this appeal.

3 The writ petition was filed against PTA's impugned letter dated 07.06.2017, titled "Issuance of Commencement Certificate for LDI Services to be offered in AJK & GB TR-II and TR-III to Interworld Communication (Pvt.) Ltd." The impugned letter conditioned the issue of service commencement certificates to the petitioner for the two TRs with the payment of APC for USF dues claimed by PTA and disputed by the petitioner, for which both the counsels agreed that the adjudication

proceedings remain pending for the determination of the question of liability of the petitioner for the said dues.

4 The Court asked PTA's counsel to identify any legal provision enabling PTA to withhold issue of commencement certificate pending adjudication of disputed APC for USF dues. No such legal provision was identified in response.

5 By issuing the impugned letter, PTA is saying that, regardless of the merits of the petitioner's defence to the demand for payment of APC for USF, which is yet to be adjudicated, PTA will not issue the commencement certificate, and in doing so, it will not let the customers of AJK and Northern Areas (and of Pakistan if the traffic is to be terminated in or originated from Pakistan also) benefit from the services of additional operators. This, we say with no little trepidation, is an egregious excess beyond the statutory mandate of PTA which, *inter alia*, obligates PTA to "...promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services..." under section 4(1)(d) of the *Pakistan Telecommunication (Re-organisation) Act, 1996*. To let an infrastructure regulator thwart the operations of one of its licensees pending payment of its claimed but disputed dues is a coercive action, bordering on extortion, which may behove a taxation authority but not a services regulator which issues licenses for fees. PTA has extensive statutory powers to take recovery and enforcement actions once disputed dues are adjudicated and found due, but there is no mandate with the PTA to stop commencement of services in the meantime and render nugatory the substantial investments made by its licensees in the network and other facilities. It has now been more than 5 years that the petitioner has not been able to commence services in the aforesaid two telecom regions due to PTA withholding the commencement certificates pending payment of its claimed dues.

6 In *Arshad Mehmood and others versus Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and Others* (PLD 2005 Supreme Court 193), a seven member Full Bench of the Hon'ble Supreme Court held that:

It is well settled that the right of trade, business or profession under Article 18 of the Constitution is not an absolute right but so long as a trade or business is lawful a citizen who is eligible to conduct the same cannot be deprived from undertaking the same, subject to law which regulates it accordingly.

7 We find no provision in the 1996 Act enabling the PTA to restrict commencement of services pending payment of disputed dues by its licensees and we add on the authority of the Arshad Mehmood case (*supra*) that any exercise of authority including by way of delegated legislation by PTA to that end would be open to challenge for being *ultra vires*. We repeat that default in payment of properly adjudicated dues follows a different path for enforcement under the 1996 Act, which in the instant case is not only pending but is yet to reach the stage of a formal determination. The following passage in the Arshad Mehmood case says it all:

[t]here cannot be denial of the Government's authority to regulate a lawful business or trade, but question would arise whether under the garb of such authority, the Government can prohibit or prevent running of such a business or trade. To find out the answer to this question, reference may be made to the case of Municipal Corporation of the City of Toronto v. Virgo (1896 AC 88, 93), where Lord Davey while discussing a statutory power conferred on a Municipal Council to make bye-laws for regulating and governing a trade made the following observation:

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on this exercise where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think that *there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.*" (Emphasis supplied)

8 Resultantly, we allow this appeal, set aside the impugned judgment, and direct PTA to issue the service commencement certificates to the petitioner forthwith for the remaining TRs if the requisite rollout is in place, noting that PTA has not denied in its reply to the writ petition that the requisite infrastructure and the interconnect arrangements are in fact in

place, including the National Signalling Point Codes (NSPCs) and the International Signalling Point Codes (ISPCs) already allocated to the petitioner since 24.11.2016 (paras 13 and 15 of PTA's reply). The adjudication of the APC for USF dues can continue in parallel.

(Aamer Farooq)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Imran

Approved for reporting.