

ISLAMABAD HIGH COURT, ISLAMABAD

NO. _____ IHC/Jude. Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. W.P. 2451-2015

Titled Linkdotnet Telecoms F o P etc.

- (a) Judgment approved for reporting ☒ Yes / No
- (b) Judgment any comment upon the Conduct of the Judicial Officer for Quality of the impugned judgment is Desired to be made. Yes / No

(In case the answer is the affirmative Separate confidential note may be Sent to the Registrar drawing his Attention to the particular aspect).

Initial of the Judge.

NOTE

1. If the slip is used, the Reader must attach on top of first page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for Reporting of any comment is to be made about the Judicial Officer/ quality of judgment.
3. This slip is only to be used when some action is to be taken.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No.2451/2015

Linkdotnet Telecom Vs F.O.P, etc

Petitioner by:	Sardar Ejaz Ishaq Khan, Advocate.
Respondents:	Barrister Munawar Iqbal Duggal. Syed Hasnain Ibrahim Kazmi, D.A.G.
Date of hearing:	21.4.2016.

AAMER FAROOQ, J.- Through the instant petition, the petitioner has assailed clarifications dated 15.6.2015 and 22.6.2015 and demand notices issued by respondent No.2 on the basis of the referred clarifications. The petitioner has also sought direction to respondent No.2 to implement the rates made applicable vide notification letter dated 1.7.2014 w.e.f. 1.8.2014.

2. The facts, in brief, are that LDI operators were licensed to convey long distance and international voice and data traffic from and to mobile operators and local loop operators in order to expand the availability of telecommunication services under the Deregulation policy of respondent No.1. The LDI operators were required to pay a charge, named as "Access Promotion Contribution" (APC) out of their revenues from international incoming traffic. Under the law respondent No.2 is empowered to regulate Access Promotion Contribution. Vide its policy Directive dated 13.8.2012, the Federal Government established the International clearing house to manage and determine the

Access Promotion Contribution. In this behalf through Directive it fixed the rate which can be termed as ICH-APC Rate. The respondents caused all the LDI Operator to enter into ICH agreement dated 30.8.2012 whereby all the contracting parties agreed to route all international traffic through the gateway exchange established therein and became subject to the rates stipulated in 2010 Directive. The ICH arrangement attracted litigation and in view of the same when the ostensible objectives of 2012 Directive were not realized, respondent No.2 vide letter dated 16.6.2014 recommended abolition of ICH arrangement. The Federal Government vide review policy Directive on 17.6.2014 withdrew 2012 Directive. On 1.7.2014 through a Directive respondent No.2, under section 4-K of Pakistan Telecommunication Reorganization Act, 1996, vide notification letter dated 1.7.2014 issued rates whereby it notified that APC contribution to be zero percent w.e.f. 1.8.2014. However, the implementation of 2014 policy directive was stayed by the Honourable Sindh High Court in Suit No.1060/2014 vide order dated 2.7.2014. On 4.12.2014 the Honourable Lahore High Court in W.P.No.32142/2014 also passed a stay order to the same effect. The matter eventually came up before Honourable Supreme Court of Pakistan in C.P.No.146 and 147 of 2015 wherein vide order dated 24.2.2015 the august Apex Court set aside the orders passed by the respective High Courts. Respondent No.2 raised demand of ICH APC Rate after the issuance of stay order by Honourable Sindh High Court but the same was resisted by the LDI operators. The

petitioner made an exit from the ICH arrangement on 1.8.2014 and same was informed by respondent No.2 vide email dated 26.9.2014. After the exit the petitioner claimed that ICH APC Rate was not applicable to it and it re-negotiated its international rates. Despite the exit of the petitioner the respondent No.2 made a demand for payment of charges as provided in the ICH agreement prior to the exit of the Petitioner. In this behalf respondent No.2 also sought opinions from its legal department as well as respondent No.1 and both the departments rendered opinion to the effect that the petitioner is liable to pay the charges till 24.2.2015 inasmuch as though the respondent on 1.7.2014 withdrew the Directive of 2012, however, the same was stayed and the referred stay order remained in the field till 24.2.2015 when the issue was finally decided by the Honourable Supreme Court of Pakistan.

3. At the outset, learned counsel for respondent No.2 as well as the learned D.A.G objected the maintainability of the petition in light of the fact that an alternate remedy is available to the petitioner under Pakistan Telecommunication (Re-organization) Act, 1996.

4. In response to the objection raised by the respondents learned counsel for the petitioner, inter alia, submitted that alternate remedy per se is not a bar for exercising jurisdiction under Article 199 of the Constitution. In this behalf reliance was placed on case titled Government of Punjab Vs M/s Crescent Textile Mills Limited (PLD 2004 SC 108), Collector of Customs etc Vs Karachi Bulk Storage and

Terminal Ltd (2007 SCMR 1357), Collector of Customs, Customs House Lahore Vs M/s S.M.Ahmed & Company Pvt.Ltd (1999 SCMR 138), Nizamuddin etc Vs Civil Aviation Authority etc (1999 SCMR 467) and Rana Aftab Ahmed Khan Vs Muhammad Ajmal etc (PLD 2010 SC 1066). Learned counsel for the petitioner also submitted that petitioner has no alternate remedy against the clarifications issued by the respondents. It was further contended that in light of the clarifications / opinions given by respondents the Statutory remedy as provided under the Act of 1996 is illusory. On merits the learned counsel contended that petitioner had made an exit from the ICH agreement in 2014 and respondent No.2 was duly informed of the same vide E-mail dated 26.9.2014, therefore, the demand of the rates as per ICH agreement on behalf of respondent No.2 is not tenable. It was also contended that without prejudice to the above argument the ICH arrangement was duly withdrawn by the respondents w.e.f 1.7.2014, however, the implementation of 2014 policy Directive was initially stayed by Honourable Sindh High Court vide order dated 2.7.2014 and subsequently by the Honourable Lahore High Court. The referred order remained in field till 24.2.2015. Subsequently, the august Supreme Court of Pakistan on 24.2.2015 set aside the stay orders meaning thereby that the Directive of 2014 which came in field on 1.7.2014 was restored; that since 2014 Directive policy which abolished 2012 Directive policy was reinstated in field, therefore, the charges are to be levied in accordance with 2014 policy meaning thereby that there is no

obligation to pay on part of the petitioner as zero rating stood restored w.e.f its original date. Learned counsel also contended that it is an established law that the act of the court shall not prejudice any one. In support of his contentions learned counsel placed reliance on case titled M/s Shree Chamundi Mopeds Ltd Vs Church of S.I.T.Association (AIR 1992 SC 1439), Kanoria Chemicals and Industries Ltd Vs U.P.State Electricity Board etc {(1997) 5 Supreme Court Cases 772} and M/s B.P.L. Ltd Vs R.Sudhakar (AIR 2004 SC 3606). Learned counsel also contended that since the 2015 policy Directive was issued by the respondents, therefore, at this stage they are estopped from demanding the charges under the ICH agreement, 2012. It was also contended that it is the legitimate expectation of the petitioner it shall be treated in accordance with law. In support of his contentions learned counsel placed reliance on case titled Nadia Nazir etc Vs Chairman, Board of Intermediate and Secondary Education Lahore etc (PLD 1999 Lahore 187), Mst.Attiyya Bibi Khan etc Vs F.O.P, etc (2001 SCMR 1161), Muhammad Nawaz Malik etc Vs Government of the Punjab etc (PLD 2011 Lahore 160), Pak Shaheen Containers Services Pvt.Ltd Vs Trustees of Port of Karachi etc (PLD 2001 Karachi 30).

5. Learned counsel for respondent No.2, interalia, submitted that since there is an alternate remedy available to the petitioner under Pakistan Telecommunication Re-organization Act, 1996, therefore, instant petition is not maintainable. It was further contended that since the policy Directive of 2014 was stayed by the Honourable Sindh High

Court as well as Lahore High Court, therefore, respondents are well within their rights to demand the charges under the policy directive 2012. It was further contended that petitioner can make all submissions on facts and law before the Pakistan Telecommunication Authority (Respondent No.2) under the forum provided under the Act of 1996.

6. Learned D.A.G adopted the arguments of learned counsel for respondent No.2.

7. Petitioner in the instant petition has challenged the clarifications issued by the respondents as well as demand for payment of APC charges and sought direction to respondent No.2 to implement notification dated 1.7.2014. It is appropriate first to take the objection of the respondents vis-à-vis the maintainability of the instant petition. The basic contention of the learned counsel for the respondents is that since Statutory remedy is provided under section 7 of Pakistan Telecommunication (Re-organization) Act, 1996, therefore, the writ petition is not maintainable. **In this behalf for the sake of brevity it is appropriate that relevant provision of law be re-produced which is as follows:-**

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 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 bare reading of above provision shows that any order passed by respondent No.2 i.e Pakistan Telecommunication Authority can be assailed before it and subsequently to this court under the Act. The authority i.e respondent No.2 has already rendered clarifications/opinions to the effect that it can charge and demand APC charges as the effective date of termination of ICH is 24.2.2015. Similar clarification was issued by respondent No.1. The clarifications issued by respondents cannot be deemed to be an order of the Authority, therefore, petitioner has no alternate remedy vis-à-vis the clarifications issued by the respondents. In presence of the clarifications the availing of statutory remedy is illusory, inasmuch as it is unlikely that respondent No.2 shall decide the issue contrary to the referred clarifications. **In this behalf reliance is placed on case titled Farzand Raza Naqvi etc Vs Muhammad Din (2004 SCMR 400) in which the august Supreme Court observed as follows:-**

Rule that High Court should not entertain Constitutional petitions and adjudicate the matter in it Constitutional jurisdiction in which remedy of appeal, review or revision is available under the statute, is not an absolute rule and in exceptional

cases the strict observance of the rule that extraordinary remedy of Constitutional petition cannot be availed in a matter in which relief being sought under Article 199 of the Constitution could be granted by way of appeal, review or revision may cause injustice in substance, therefore, application of such rule would depend on the facts and circumstances of each case.

Similarly, in case titled Government of Punjab Vs M/s Crescent Textile Mills Limited (PLD 2004 SC 108), the august Apex Court observed as follows:-

Availability of such remedy would not have adverse effect on jurisdiction of High Court to entertain Constitutional petition under Article 199 of the Constitution, whereunder only point for determination is whether discretion vested in Court should or should not, in a particular case, in attending circumstances be exercised.

Similar view was taken in Collector of Customs etc Vs Karachi Bulk Storage and Terminal Ltd (2007 SCMR 1357) and it was observed that where impugned order is found to be illegal, contrary to law or void ab initio non availing of remedies under departmental hierarchy would be inconsequential and in such a case aggrieved party would be entitled to invoke constitutional jurisdiction of High Court. The same was also held in case titled Collector of Customs, Customs House Lahore Vs M/s S.M.Ahmed & Company Pvt.Ltd (1999 SCMR 138), Nizamuddin etc Vs Civil Aviation Authority etc (1999 SCMR 467) and Rana Aftab Ahmed Khan Vs Muhammad Ajmal etc (PLD 2010 SC 1066).

8. In view of above case law and the legal position the demand of APC charges by respondent No.2 is based on ICH agreement and respondent No.2 has already by way of clarifications prejudged the issue, therefore, the availability of departmental remedy is inconsequential. Undoubtedly against the demand petitioner has remedy under the Act of 1996, however, in light of clarifications, the remedy is not efficacious. On 17.6.2014 respondent No.1 abolished the ICH policy and set APC at Zero. The revised policy Directive was challenged and in this behalf injunctive orders were passed by Honourable Sindh High Court and Lahore High Court and the matter was finally decided by Honourable Supreme Court of Pakistan on 24.2.2015. **The Honourable Supreme Court of Pakistan in Civil Petition No.146 and 147 of 2015 vide order dated 24.2.2015 observed as follows:-**

In the circumstances, it does appear prima-facie that the insistence of LDI licences on retaining the benefits/advantages of the policy of 2012 is for the purpose of advancing their interests contrary to the policy directive issued by the Government and also contrary to the interests of the consumers of telecom services and the security interests of the country which are envisaged under the policy of 2014. In view of the above circumstances, the impugned orders dated 17.1.2015 of the appeal Bench of the Sindh High Court and dated 4.12.2014 of the learned Single Bench of the Lahore High Court shall remain suspended. The High Courts of Sindh and Lahore may also consider the serious implications noted in the order dated 3.12.2014 passed by the learned Single Bench of the High Court and proceed to decide these cases expeditiously.

9. The clarifications issued by the respondents are to the effect that termination of ICH became effective from 24.2.2015 when the order of Honourable Supreme Court was passed. The referred stance in the clarifications and the demand notices are challenged by the petitioner but defended by the respondents. The position where an order or notification is stayed by any court comes up for consideration before the Indian Supreme Court in case titled M/s B.P.L. Ltd Vs R.Sudhakar (AIR 2004 SC 3606) and it was observed that if in pending proceedings operation of order is stayed pending disposal of the main matter such as an appeal or revision, obviously the impugned order does not get quashed or wiped out. **The Supreme Court of India further observed as follows:-**

This court held that the said stay order could not have the effect of reviving the proceedings, which had been disposed of by the appellate authority by its order dated 7.1.1991 observing that "While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in restoration of the position as it stood on the date of passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the appellate authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the

appellate authority would be restored and it case be said to be pending before the appellate authority after the quashing of the order of the appellate authority. The same cannot be said with regard to an order staying the operation of the order of the appellate authority because in spite of the said order, the order of the appellate authority continues to exist in law and so long as it exists it cannot be said that the appeal, which has been disposed of by the said order has not been disposed of and is still pending.”

Similar view was taken by Indian Supreme Court in case titled titled M/s Shree Chamundi Mopeds Ltd Vs Church of S.I.T.Associatin (AIR 1992 SC 1439) and it was held that stay order of the High Court cannot have the effect of reviving procedure which had been disposed of by the appellate authority. The court further observed as follows:-

While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does

not mean that the said order has been wiped out from existence.

Similarly in case titled Union of India etc Vs Delhi Cloth and General Mills Co.Ltd etc [(1997) 5 Supreme Court Cases 772] and it was held that:-

Stay of operation of order or notification only means the orders or notification which has been stayed would not be operative from the date of passing of the stay order and it does not mean that the order or notification has been wiped out from existence. An order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court.

10. In the instant case the Honourable Sindh High Court in Suit No.1060/2014 vide order dated 2.7.2014 restrained respondents from taking any coercive measures under Directive dated 17.6.2014. The Honourable High Court in W.P.No.32142/2014 vide order dated 4.12.2014 suspended the Directive in question.

11. In view of the above case law it is clear that the effect of stay order passed by any court is that the order/notification is suspended for the time being and when the stay is vacated it is revived, therefore, in the instant case 2014 Directive was stayed by the Honourable Sindh High Court and Lahore High Court, however, the referred stay orders came to end on 24.2.2015 and the result of the same was that the 2014 policy Directive was revived and became operative from its original date. In view of the legal position

the clarifications issued by the respondents are not sustainable, hence the demand based on the clarifications issued by respondent No.2 are also not tenable. Since the respondents issued the notification dated 1.7.2014 which is in field and was suspended only for some period, therefore, the respondent are estopped from demanding the charges on the basis of 2012 policy Directive.

12. For the foregoing reasons the instant writ petition is allowed and the impugned clarifications dated 15.6.2015 and 22.6.2015 as well as the demand notices based thereon are set-aside. Respondent No.2 is required to implement notification letter dated 1.7.2014 from its date of issuance.

(AAMER FAROOQ)
JUDGE

Announced in open court this 18th day of July, 2016.

JUDGE

M.S.ZAKI.

Approved For Reporting