

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

F.A.O. No.33/2012

Great Bear International Services (Pvt) Ltd

VERSUS

Pakistan Telecommunication Authority

Petitioner by : **Mr. Ali Raza, ASC and Mr. Aimal Khattak Advocate.**
Respondents by : **Barrister Munawar Iqbal Duggal Advocate**
Date of Hearing : **06-02-2015**

ATHAR MINALLAH, J.- The instant appeal is directed against the enforcement order dated 04-06-2012. The appellant has been granted a licence under the Pakistan Telecommunication (Re-organization) Act, 1996 (*hereinafter referred to as the 'Act of 1996'*). The license is for rendering services to its customers in the 14 regions across Pakistan. The licence issued on 28-09-2007 provides for the payment of various fees and charges as enumerated under Article 4 thereof. The respondent issued a show cause notice dated 25-01-2012 pursuant to powers vested under Section 23 of the Act of 1996. The appellant was required to remedy the contravention, as specified in the show cause notice, by submitting the annual audited accounts along with payment of annual regulatory dues for the year ending on 30-06-2011 and annual Radio Frequency Spectrum Fee (*hereinafter referred to as the 'spectrum fee'*) amounting to Rs.15,079,995/- for the year ending on 30-06-2011, along with late payment additional fee calculated @ 2% per month. The

respondent Authority, after affording an opportunity of hearing to the appellant, passed the impugned enforcement order dated 04-06-2012.

2. Mr. Ali Raza, ASC, learned counsel for the appellant, has argued that the appellant along with other similarly placed companies were faced with severe economic hardships and, therefore, requested the respondent Authority to relax the conditions for payment of various dues; reference has been made to letters dated 23-3-2009, 01-10-2010 and 14-12-2009; the appellant submitted its annual audited accounts, which reflected a loss of Rs.74.8 million; the spectrum fee was not due as the assigned spectrum was not 'used' by the appellant during the financial year ending on 30-6-2011; under clause 4.1.2 of the licence, obligation of the appellant is only to the extent of the annual fee referred to in Appendix 2 annexed to the licence; the licence terms specify a fixed amount due as the annual fee, and the spectrum fee is to be paid only if it is used; reference has been made to the amended Pakistan Telecommunication Authority (Functions & Powers) Regulations 2006 (hereinafter referred to as the '*Regulations of 2006*'), particularly Regulation 23(1) thereof, in support of the contention that the spectrum fee is required to be paid in case of 'use' of Radio Frequency Spectrum including annual spectrum charges; the spectrum fee can only be charged where the assigned spectrum has been 'used' in the relevant year; it is evident from the appellant's annual audited account for the relevant year that the said spectrum was not used; there is lack of *quid pro quo* and no services were rendered by the respondent which would justify the imposition of the spectrum fee; reliance has been placed on the cases of

'Mian Ejaz Shafi and others v. Federation of Pakistan and others' [PLD 1997 Karachi 604], *'Rahimullah Khan and 65 others v. Government of N.-W.F.P. through Secretary Agricultural Forest and Cooperation Department Peshawar and 5 others'* [1990 CLC 550] in support of the contention that the fee is exacted for a specific purpose and for rendering of services; the amount demanded by the respondent Authority is arbitrary and without basis; the extract of the Board Resolution, dated 28-05-2011, has inadvertently been annexed with the appeal, whereas the actual Resolution, dated 05-06-2012, is annexed with the application for additional documents filed by the appellant on 06-02-2015. It is, therefore, urged that the appeal be accepted.

3. Mr. Munawar Iqbal Duggal, learned counsel for the respondent Authority, has argued that; the instant appeal is not competent, as the Board Resolution appended with the Memo of Appeal at page-117 is defective, and the grounds in support thereto were elaborated; it is settled law that in case of a juridical person, the */is* cannot be initiated without a Board Resolution passed by the Board of Directors in a meeting convened for the said purpose; reliance has been placed on the cases of *'Telecard Limited through authorized representative v. Pakistan Telecommunication Authority through Chairman'* [2014 CLD 415]; *'Messrs Razo (Pvt.) Limited versus Director, Karachi City Region Employees Old Age Benefit Institution'* [2005 CLD 1208], *'Qarman Construction (Pvt.) Ltd. v. Saleemullah and 2 others'* [2008 CLD 239], *'American Life Insurance Company (Pakistan) Ltd. v. Commissioner, Sindh Employees Social Security Institution and others'* [2009 CLD 1329], *'WAPDA and another v.*

Messers Ghulam Rasool & Co. (Pvt) Ltd.’ [2005 MLD 1165], *‘Sirajuddin Paracha and 12 others v. Mehboob Ellahi and 3 others’* [PLD 1997 SC 276], *‘Khan Iftikhar Hussain Khan of Mamdot (represented by 6 heirs)’ v. Messers Ghulam Nabi Corporation Ltd, Lahore’* [PLD 1971 SC 550]; the licence issued to the appellant is a contractual instrument granted under the Act of 1996; despite having knowledge the appellant did not file any reply to the show cause notice; Clause/Article 4 of the licence, particularly Clause 4.2.1 thereof, clearly provides that all fees have to be paid within 120 days of the end of the financial year; the spectrum fee has to be paid regardless of its use, or the licensee having not earned any revenue; spectrum is a scarce resource of the State, as mentioned in Section 2(qc) of the Act of 1996; if spectrum is not used, then in that case it is to be surrendered/returned to the Authority for allotment to someone else; the spectrum fee is to be paid for the allocation of a share of the scarce resource, and it is irrelevant whether it has been used or not; Clause 4.1.2(b) provides that the licensee shall pay the fee; in addition to the fee payable under clause 4.1.3, the licensee is under obligation to pay to the Authority all fees required to be paid under the Act, Rules and Regulations made thereunder. The appellant has not pointed out any error or discrepancy in the calculation of the spectrum fee; a late payment additional fee is provided under clause 4.2.3 of the licence, which provides that it is to be calculated @ 2% per month on the outstanding amount for each month or part thereof; the appellant accepted all the terms and conditions at the time of granting of the licence; the licence is contractual in nature and, therefore, the terms and conditions are binding on the appellant; reliance has been placed on the case of *‘Pakcom Limited and*

others v. Federation of Pakistan and others' [PLD 2011 SC 44]; Regulation 23(7) of the Pakistan Telecommunication Authority (Functions & Powers) Regulations 2006 provides that late payment fee shall be paid; the said Regulation is in addition to the express clause of the licence; the appellant had not raised any objection regarding the late payment fee at the time of hearing before the Authority.

4. The learned counsels have been heard and the record perused with their able assistance.

5. The issuance of the licence to the appellant and its terms and conditions are not in dispute. The allocation of 'spectrum' to the appellant is also admitted. Clause 4.2.3 of the licence is also admitted, and the same is reproduced as follows.-

"In addition to any other remedies available to the Authority, late payment of fee shall incur an additional fee calculated at the rate of 2% per month on the outstanding amount, for each month or part thereof from the due date until paid"

6. Three questions have emerged from the arguments for consideration by this Court. Firstly, whether the spectrum fee is to be charged or paid only on its 'use'; secondly, whether late payment fee pursuant to Clause 4.2.3 of the licence is independent or subject to Regulation 23(7) of the Regulations of 2006 and lastly, whether the

appeal is competent, as admittedly, at the time of its institution, a valid Board Resolution was not appended with the Memo of Appeal.

7. Section 2 (qc) of the Act of 1996 defines 'scarce resource' as meaning radio frequency spectrum, right of way and numbering. Chapter IV of the Act of 1996 provides for establishing a Frequency Allocation Board. Section 43 confers the exclusive power and authority on the Board to allocate and assign portions of the radio frequency spectrum to the Government, providers of telecommunication services and telecommunication systems, radio and television broadcasting operations, public and private wireless operators and others. Sub-section (5) and sub-section (6) of Section 43 provide for the manner in which applications for allocation and assignment of Radio Frequency Spectrum are to be processed. Regulation 23 of the Regulations of 2006 provides for the power of the Authority to charge and levy various fees for the granting and renewal of licences, as enumerated there under. Clause 'c' relates to spectrum fee, for the 'allocation and use' of Radio Frequency Spectrum, auctioned through a transparent, non-discriminatory and open competitive process. A combined reading of the provisions clearly shows that the allocation and assignment of spectrum, as a scarce resource, is to be undertaken through a transparent process and by means of auction. As it is a scarce resource, therefore, regardless of its use, its allocation or assignment attracts the levy and charge of the spectrum fee. A licensee to whom such a scarce resource has been allocated is liable to pay the fee regardless of its use. The august Supreme Court in the case of '*Pakcom Limited and others v. Federation of Pakistan and others*' [PLD 2011 SC 44]

elaborated the nature of Radio Frequency Spectrum, and the fee pursuant to the allocation thereof. It was held that such fee is paid as the Radio Frequency Spectrum is owned by the State and is one of its precious scarce resources. It was held that the spectrum fee can neither be treated as confiscatory, nor in any manner violate the fundamental rights guaranteed under the Constitution. Likewise, the august Supreme Court in the case of '*Pak Telecom Limited v. Pakistan Telecommunication Authority, Islamabad*' [PLD 2014 SC 478], while considering the annual spectrum administrative fee, held that the same was not for the 'use' of the spectrum, but was for the reasonable operational cost of 'managing licensing and policing'. The Radio Frequency Spectrum is, therefore, a precious scarce resource owned by the State, and its allocation attracts the fee notwithstanding its use. There is no force in the argument of the learned counsel for the appellant that the spectrum fee shall be charged, levied or paid only if it is used. His emphasis on the expression 'use' in vacuum is misconceived. While reliance has been placed on Regulation 23(1) in support of the contention that only the use of Radio Frequency Spectrum shall attract the charge and payment of fee, the expression 'allocation' has altogether been ignored. The spectrum fee has been explicitly connected to allocation and use. As long as the Radio Frequency Spectrum, being a scarce resource, remains allocated to a licensee, the spectrum fee shall be attracted and, therefore, charged, levied and paid.

8. The respondent Authority is vested with exclusive powers to grant a licence under Section 21 of the Act of 1996. Sub-section 4 thereof provides that '*Every licence granted under this Act may, inter alia,*

contain” and thereafter clauses (a) to (n) have been enumerated. By using the expression *‘inter alia’* the legislature has made it obvious that the list enumerated in sub-section 4 is not exhaustive. It is also pertinent to point out that clause (b) of sub-section 4 of Section 21 specifically provides that the licence may contain conditions requiring the licensee to pay a fee for the granting or renewal of the licence. It is not disputed that the licence is consensual in nature, giving rise to a contractual relationship between the respondent Authority and the licensee. The terms and conditions of the licence form part of the consensual and thus contractual arrangement. When the licence is granted and accepted by the licensee, the latter renders itself bound by the terms and conditions thereof. In accepting the licence, the licensee obviously gives full and free consent to concur with the terms and conditions thereof.

9. It is settled law that liabilities under an instrument, being in the nature of a contract, cannot be avoided when it has been entered into voluntarily, and out of the free will of the parties thereto. In the instant case, Clause 4.2.3 of the licence as reproduced above, clearly provides that the late payment of fee shall incur additional fee calculation @ 2 % per month on the outstanding part thereof. This being part of the consensual instrument i.e. the licence, is binding on the appellant. The argument advanced by the learned counsel for the appellant relating to Regulation 23(3) of the Regulations of 2006 is not relevant in the instant case. The appellant, being bound by obligations accepted pursuant to clause 4.2.3 of the licence, cannot turn around and disown the unequivocal commitment to pay the late payment additional fee @ 2 %

per month on the outstanding amount for each month thereof. The payment of the late additional fee is, therefore, not pursuant to Regulation 27(3) of Regulations 2006 but clause 4.2.3 of the license, and consequently the Regulations are not relevant in the instant case. The late payment fee is, therefore, liable to be paid by the appellant.

10. Lastly is the question of maintainability on the ground that at the time of institution of the appeal, a valid Board resolution had not been appended with the Memo of Appeal. Admittedly, in order to fulfil the mandatory requirement, an extract of the Board Resolution dated 15-06-2012 was submitted, after an objection in this regard was raised by the learned counsel for the respondent Authority. This extract has been appended with an application dated 06-02-2015 while the appeal was filed on 20-06-2012.

11. Order XXIX of the Civil Procedure Code 1908 relates to suits by or against corporations, and rule 1 thereof prescribes the manner for the pleadings to be verified and signed. It does not authorize the institution of the litigation, but enables pleadings to be signed and verified in a validly instituted suit. As far as the valid institution of a suit on behalf of an incorporated company is concerned, the law is well settled. In the judgment titled '*Khan Iftikhar Hussain Khan Mamdot versus Ghulam Nabi Corporation Ltd*' [PLD 1971 SC 550] the august Supreme Court cited with approval '*H.M Ebrahim Sait versus South India Industries Ltd*' [AIR 1938 Mad 962] and held that for a suit to be validly instituted, it must have been so instituted by a person authorized in this behalf, through a resolution passed in a meeting of the Board of Directors, convened after

due notice has been given to all the Directors. Following the law laid down by the Supreme Court, a Division Bench of the Lahore High Court in the case of *Government of Pakistan versus Premier Sugar Mills and others* [PLD 1991 Lahore 381] has held as follows.-

"It is well settled that when a company institutes a suit, it has to establish that the suit has been competently and authorizedly instituted on its behalf. The rigor of this principle is to the extent that even a person incharge of the affairs of the company unless specifically authorized in this behalf is not considered competent to initiate proceedings on behalf of the corporate entity"

12. The above law has been consistently followed, and reference in this regard may be made to the case of '*Dr. S.M. Rab versus National Refinery Ltd*' [PLD 2005 Karachi 478]. It is also pertinent to discuss whether the defect in a suit which has been incompetently instituted is curable? The Sind High Court in two cases i.e. '*Abdul Rahim versus United Bank Ltd of Pakistan*' [PLD 1997 Karachi 62] and '*Qamar Construction (Pvt) Ltd Versus Saleemullah and others*' [2008 CLD 239] has held that the defect remains incurable, even by a subsequent ratification.

13. As a corollary to the above discussed law, a suit or legal proceedings invalidly or incompetently instituted in the name of an incorporated company, a juridical person, cannot be treated as legal proceedings by that company. It may be added that since these are not valid legal proceedings instituted by the company, therefore, even a subsequent ratification would not cure the defect by making the

proceedings valid and competent. The wisdom behind the principle that the defect is incurable seems to be the intention to protect the juridical person on the one hand, and on the other, to safeguard any attempt to circumvent the period of limitation. It may be possible that the defect is pointed out before the expiry of the period of limitation, thus enabling the juridical person to cure the defect by withdrawing the suit and filing it afresh, or filing it after the dismissal on the ground of it being invalid or incompetent. This course can obviously not be resorted to after the limitation period has lapsed. However, if no limitation is prescribed, then the company will be entitled to institute legal proceedings, even if the earlier suit or application has been dismissed on the sole ground that its institution was not valid or competent. Furthermore, producing an extract of a Board Resolution after the expiry of the limitation period for filing an appeal would, in my humble opinion, not cure the institution of the appeal on the analogy that such a defect cannot be cured even if subsequently ratified. If this is accepted in routine then it will be open to juridical persons to circumvent the period of limitation prescribed by the legislature. The extract of the Board Resolution filed on 06-02-2015 was neither appended with the appeal at the time of institution, nor placed on record before the lapse of the limitation period provided under section 7 of the Act of 1996. The appeal cannot be treated as one validly instituted by the appellant company, unless the appellant establishes that the extract of the Board Resolution meets the essentials as highlighted by the august Supreme Court in Khan Iftikhar Hussain Mamdot case supra, and to further account for each days delay in filing the said extract. It is, therefore, concluded that if a valid Board Resolution and authorisation is

not appended with the appeal, nor submitted within the limitation period provided by the statute, then an appeal cannot be treated as having been instituted by the juridical person within the period of limitation. It would also be pertinent to reproduce the relevant paragraph from the recent judgment in the case of '*Telecard Limited v. Pakistan Telecommunication Authority*' [2014 CLD 415] as follows.-

"The appeal filed by the appellant under the provisions of the Pakistan Telecommunication (Re-Organization) Act, 1996 has been dismissed by the learned High Court on the ground that the same has not been filed by an authorized person; admittedly the appellant is a limited company and the appeal has not been filed by someone having due authority under the articles of association of the company authorization by the board resolution. It is a settled law that a lis cannot be initiated on behalf of the company which is a juristic person, without having due authority either in terms of the articles of association or by the board resolution. This is conspicuously missing in the present case. The appellant has not even appended herewith any document to establish that the CEO of the company, who allegedly signed the memo of appeal, had the authority."

14. For the reasons discussed above, the instant appeal is without merit and accordingly dismissed.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on _____.

JUDGE

Approved for reporting.

*Luqman Khan/