ISLAMABAD HIGH COURT, ISLAMABD

NO._____ IHC/Jude. Deptt.

(REVISED FORM OF BLUE SLIP

Case No. WP. 1152— 2012

Titled Warid Telecom Vs Pakistan Telecom Authority (Pvt) Limited Islamabad

(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 t 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.

FORM NO.HCJD/C

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Sr.No.	Writ Petition / FAO No.	Title
1.	W.P. No.1152/2012	Warid Telecom Pvt. Ltd. Vs. Pakistan Telecommunication Authority, Islamabad
2.	FAO No.16/2012	M/s Pakistan Telecom Mobile Limited Vs. Pakistan Telecommunication Authority, Islamabad
3.	FAO No.17/2012	M/s Telenor Pakistan Pvt. Limited Vs. Pakistan Telecommunication Authority, Islamabad
4.	FAO No.18/2012	M/s Pakistan Mobile Communication Limited Vs. Pakistan Telecommunication Authority, Islamabad
5.	FAO No.19-2012	M/s CMPak Limited Vs. Pakistan Telecommunication Authority, Islamabad

Dates of hearing : **04.03.2013 & 08.03.2013**

Petitioner / Appellants by : **Mr. Ali Raza, Advocate**
Mr. Ali Sibtain Fazli, Advocate &
Malik Sardar Khan, Advocate.

Respondent by : **Mr. Afnan Karim Kundi & Misbah-ul-Mustafa, Advocates**

NOOR-UL-HAQ N. QURESHI J.- As the above titled writ petition and FAOs involve common question of law and facts, therefore, the same are being disposed of through this single order.

2. In all these cases, the petitioner as well as appellants seek setting aside of the impugned directive dated 09.04.2012 issued by the respondent being illegal, void, without due authority and violative of constitutional rights.

3. Brief facts as narrated in all these cases are that petitioner in W.P. No.1152-2012 is a public limited company whereas in FAO Nos.16 to 19-2012, the appellants are private/limited companies engaged in the business of providing cellular telecom services to millions of customers in Pakistan. All the above titled companies launched different prize schemes for their customers for the purpose of marketing and providing incentives to their customers. On 06.07.2010, the respondent issued a directive requiring all cellular mobile operators to stop all

prize schemes on the ground that respondent had received complaints about these schemes which were being used by unscrupulous elements for committing fraud with the customers. After a hearing held on 23.07.2010, the respondent withdrew its suspension directive dated 06.07.2010 vide letter dated 02.08.2010 permitting such marketing schemes to continue with certain directions. Later on, the respondent vide its directive dated 09.04.2012 directed that all prize schemes being offered by all cellular mobile operators be suspended immediately on the ground that such schemes were prima facie contrary to law, PTA's direction and in violation of Regulation 8(4) & 8(5)(i) of Telecom Consumer Protection Regulation, 2009.

4. Learned counsel for the petitioner in W.P. No.1152-2012 argued that the impugned directive is in violation of the settled principle of audi altrem partem. The impugned directive has been issued without hearing the petitioner or issuance of notice, the same has been issued without conducting any inquiry or hearing therefore is patently illegal, void, ab-initio and merits to be set aside. The respondent should have issued a show cause notice u/s 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 in the event, a licensee has contravened any provision of the license, Act, Rules or Regulations. The impugned directive has been issued to five cellular mobile licensees, whereas similar schemes are being offered and operated by various wireless local loop operators, hence the same is discriminatory in nature. The respondent had no authority to interfere with lawful marketing of products of these cellular companies. He has further argued that impugned directive is contrary to the terms of petitioner's license and the mandatory requirement u/s 4(f) of the said Act should have been fulfilled by the respondent in case of any complaint. He has argued that impugned directive is in violation of respondent's earlier directive dated 02.08.2010, in which, such schemes were held to be permissible with certain conditions. He further argued that respondent has directed to stop "all types of prize schemes including genuine schemes with immediate effect", which itself is an admission that there are genuine schemes also. Lastly, he has prayed that impugned directive dated 09.04.2012 may be set aside and respondent may be directed to carry out a hearing under the provisions of the Pakistan Telecommunication (Re-

Organization) Act, 1996. In support of his contentions, he has relied upon the following case law:-

i) PLD 1989 FSC 60
ii) 2001 CLC 385
iii) PLD 2010 SC 61
iv) PLD 1992 SC 153
v) 2004 YLR 1161
vi) 2006 CLC 342
vii) 1998 SCMR 1863
viii) 2007 SCMR 289
ix) 2007 SCMR 410
x) 2011 YLR 2705

5. Learned counsel for the appellants in FAO Nos.16 to 19-2012 has almost adopted the same arguments as advanced by learned counsel for the petitioner. He has argued that the respondent has acted in violation of law and the Constitution to stop all prize schemes whether genuine or not. In term of Article 4 of the Constitution, a person cannot be prevented in doing anything which is not prohibited by law. The respondent itself admitted that there are genuine schemes, which cannot be stopped. Under Regulations 8(4) & 8(5)(i) of the Pakistan Telecommunication Protection Regulation, 2009, only those prize schemes are prohibited which are fraudulent or misleading in material content, whereas the appellants have given prizes to eligible winners, hence these schemes cannot be called fraudulent. Moreover, the impugned directive has been issued without hearing the appellants, which is against the natural justice as well as Section 24-A of General Clauses Act, 1897. In the end, he has requested for setting aside of the impugned directive.

6. At the very outset, learned counsel appearing for the respondent has agitated the maintainability of the writ petition on the ground that enforcement of some rights guaranteed under Article 4, 18 & 25 of the Constitution of Islamic Republic of Pakistan has been sought, which gives protection to the 'citizens' of Pakistan, whereas the petitioner as well as appellants are private/public limited companies. Furthermore, he has argued that FAOs are also not maintainable because remedy of filing an appeal is provided against any decision or order of the respondent under section 7(1) of the Pakistan Telecommunication (Re-Organization) Act, 1996. Moreover, the issues involved require probe into the facts of the matter, which could only be possible after adducing of evidence.

Under clause 3.1.3 of the license, a licensee is bound to cooperative with the respondent and to comply with all orders, determinations, directives and decisions of the Authority, hence challenging of the directive is not tenable in the eye of law.

7. On merits, he has argued that under section 6(f) of the said Act, the respondent is bound to ensure the interests of users of telecommunication services, which should be safeguarded and protected. On this point, the respondent has to submit yearly reports to the Federal Government. Moreover, he has argued that respondent was compelled to issue this directive, as unscrupulous elements of the society used to exploit these prize/Inami schemes for their fraudulent activities. Those unscrupulous elements were deceiving the consumers through calls/SMS whereby they were falsely offered and fleeced through attractive cash prizes/Inami schemes including balance increase, transfer of credit facility etc. Regarding the opportunity of hearing which according to the petitioner/appellant, was not provided, learned counsel for the respondent contended that in response to the aforesaid directive, all CMTOs approached the respondent. Keeping in view the concerns raised by the CMTOs including the petitioner/appellants, some precautionary measures were required to be taken to safeguard the interest of telecommunication consumers. Moreover, the letter dated 09.04.2012 is a directive which requires no prior issuance of show cause notice or hearing, hence the said directive is perfectly legal and is binding. The respondent being a statutory body has a legal mandate to monitor and enforce the licenses granted by it vis-à-vis their provision of telecommunication services. The petitioner as well as appellants has gone beyond their real business by luring the customers through launching different prize/Inami schemes. Moreover, the Hon'ble Supreme Court of Pakistan also took notice of such activities of the CMTOs and directed the Chairman, PTA to monitor the commercial activities of all the service providers/operators by adopting a self-executory mechanism and take action, if law, rules and regulations controlling their commercial activities are being violated. In support of his contentions, he has relied upon case law reported in PLD 2010 Supreme Court 676. He has requested for dismissal of instant Writ Petition as well as FAOs.

8. Arguments heard. Record perused as well as the relevant provisions of law and the case law presented by both the sides.

9. The petitioner and the appellants in their respective matters have mainly agitated the legal ground based upon the principle of *audi alteram partem* that they have been condemned unheard.

10. The case law relied upon by the learned counsel for the appellants reported in PLD 1989 SC 61, PLD 1965 SC 90 enunciates the principle that requirement of such principle of natural justice must depend upon circumstances of each and every case. The duty costs upon the court to affect any statute or legal document.

Another case law in support of such contentions reported as 2008 CLC 694 also discusses the scope of *audi alteram partem* in view of conflict between the basic natural right borne out of natural justice and provisions of law either general or special. The court gave verdict that the natural right should prevail.

The case law reported in 2003 CLC 331 also enunciates such principle of natural justice in the perspective, when the order on representation passed without hearing the petition was not sustainable, as the same was passed in violation of principles of natural justice.

11. As against their viewpoint, learned counsel for the respondent has drawn my attention towards the dictum laid down in PLD 2010 SC 676, wherein the Hon'ble Supreme Court of Pakistan has clarified the clouds by an elaborate discussion. The relevant paragraph No.23 discussing the issue is reproduced here-under: -

> *"23. Learned counsel appearing on behalf of the respondent-employees contended that before passing any adverse order, the respondent-employees were entitled for opportunity of hearing, as it has been held in Anisa Rehman V. PIAC (1994 SCMR 2232). In this behalf, it may be noted that in the said case the question for consideration was with regard to demotion of the petitioner (therein) and in that context it was observed that right of hearing should have been made available to her. In addition to it, recently, this Court in Justice Khurshid Anwar Bhinder V. Federation of Pakitan (CMA No.2475 of 2009, etc.) while dealing with the right of hearing has observed that "the principle of audi alteram partem, at the same time, could not be treated to be of universal nature because before invoking / applying the said principle one had to specify that the person*

against whom action was contemplated to be take prima facie had a vested right to defend the action and in those cases where the claimant had no basis or entitlement in his favour he would not be entitled to protection of the principles of natural justice".

Another case law, which has been relied upon in this regard reported in PLD 2010 SC 483 in the case of Justice Khurshid Anwar Bhindar Vs. Federation of Pakistan, wherein the Hon'ble Supreme Court by a detailed discussion has formed an opinion, which too, is reproduced herein below:-

"No stricture was passed qua their eligibility, integrity, entitlement, qualifications and besides that their removal from the office of Judges does not amount to be a stigma and therefore, the doctrine of 'audi alteram partem' argued with vehemence cannot be pressed into service which otherwise is not universally recognized due to certain limitations. Let us examine the doctrine itself which was referred to time and again by the learned Advocate Supreme Court on behalf of petitioners. "In Seneca's Medea, it is said: "a judge is unjust who hears but one side of a case, even through he decides it justly". Based on this, has been developed "Audi alteram partem" as facet of natural justice". (Seneca Medea 4 BC-AD 65) "Audi alteram partem' means hear the other side; hear both sides. Under the rule, a person who is to decide must give the parties an opportunity of being heard before him and fair opportunity to those who are parties in the controversy for contradicting or correcting anything prejudicial to their view" (emphasis provided). (Union of India V. Tulsiram Patel AIR 1985 SC 1416 at p.1460). The petitioners were admittedly not a party in the main controversy. "Since the audi alteram partem rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation. 'Audi alteram partem' rule as such is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications". (Emphasis provided). (Maneka Gandhi V. Union of India AIR 1978 SC 597). It may not be out of place to mention here that by now it is well established that "where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. Thus, the rule may be discarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests" (Swadeshi Cotton Mills Vs. Union of India AIR 1981 SC 818, (1981) 51 Comp Cas 210 SC, (1981) 2 SCR 533. Note: Decisions in Maneka Gandhi V. Union of India AIR 1978 SC 597 (1978) 1 SCC 248, Mohinder Singh Gill V. The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405, Union of India v. Tulsiram Patel AIR 1985 SC 1416, (1985) 3 SCC 398. The 'audi alteram partem' rule would be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands.(Pearlberg v Varty (Inspector of Taxes), [1971] 1 WLR 728 (CA), [1971 2 All ER 552 (CA). A prima facie right to opportunity to be heard may be excluded by implication in the following cases: -

i) ***When an authority is vested with wide discretion***

(H.W.R. Wade & C.F. Foryth: Administrative Law, 7th Ed. at p.391 H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed. at p.392)

ii) ***When the maxim 'expression unius est exclusion alterious' is involved***

(Colquhoun v Brooks 21 QBD 52 at p.62 Humphrey's Executor v. United States (1935) 295 US 602)

iii) ***Where absence of expectation of hearing exists***

Y.G. Shivakumar v. B.M. Vijaya Shankar (1992) 2 SCC 207, AIR 1992 SC 951

iv) ***When compulsive necessity so demands***

(Union of India v. W.N. Chdha (supra)

v) ***When nothing unfair can be inferred***

(Union of India v. W.N. Chdha (supra)

vi) ***When advantage by protracting a proceedings is tried to be reaped.***

Ram Krishna Verma v State of U.P. (1992) 2 SCC 620, AIR 1992 SC 1888)

vii) ***When an order does not deprive a person of his right or liberty***

(Indian Explosive Ltd. (Fertilizer Division), Panki, Kanpur v. State of Uttar Pradesh (1981) 2 Lab LJ 159)

viii) ***In case of arrest, search and seizure in criminal case***

(Union of India v. W.N. Chdha 1993 Cr. LJ 859, 1993 Supp (4) SCC 260, AIR 1993 1082)

ix) ***In case of maintaining academic discipline***

(1992) 2 SCC 207)

x) ***In case of provisional selection to an academic course***

(S.R. Bhupeshkar v. Secretary, Selection Committee, Sarbarmath Hostel, Kilpauk, Medical College Hostel Campus, Madras AIR 1995 1995 Mad 383 (FB)

xi) ***In case of enormous malpractices in section process***

(Biswa Ranjan Sahoo v Sushanta Kumar Dinda (1996) 5 SCC 365, AIR 1996 SC 2552)".

12. After going through the above principle enunciated by the Hon'ble Supreme Court, it becomes explicitly clear that such right borne from the Roman Maxim is to be exercised under the circumstances of each case and in some particular requirements, when a natural right is going to be infringed.

13. The case in hand, from its contents, is very much clear after going through its general complexion. The petitioner/appellants themselves have pleaded that

prize schemes were launched for the purpose of marketing and proving incentives to their customers, but same do not affect their original business as such no right is abridged, hence the petitioner/appellants cannot agitate the same to be their natural right.

14. It can be evaluated from another prospective that a right is guaranteed with acceptance of responsibility. From perusal of record it reveals that petitioner/appellants earlier responded the similar type of proceedings initiated in the month of July, 2010, when they approached the authorities and finally on resolving, decisions were initiated by their meetings of minds.

15. From the whole pleadings, the petitioner/appellants have never claimed that any of directive or such decisions have been complied with in its letter and spirit and nothing on their part is available, thereupon liability was to be shifted to respondents.

16. On a query raised by the Court, as to whether they are capable to stop such mal-practices, mischievousness and cheating with the general public by using their efforts, to which, the petitioner/appellants bluntly refused that it is beyond their capabilities, meaning thereby that they are ably ready to enjoy the fruits of those schemes launched beyond to their actual business, but not ready to take responsibilities. Therefore, in my opinion, if anybody escapes from his responsibilities, he cannot claim the rights on the same footings.

17. Learned counsel for the respondent during course of arguments has also drawn my attention towards section 8(4) & 8(5)(i) of the Pakistan Telecommunication Protection Regulation, 2009 by which, the petitioner/appellants were enjoying by launching their respective schemes. He by producing a Notification dated 25.04.2012 disclosed that such provision of law has been omitted therefore now the petitioner/appellants cannot continue such their activities, which highly affected the rights of citizens, who are millions in number. Moreover, he has argued that respondent was compelled to issue this directive, as unscrupulous elements of the society used to exploit these prize/Inami schemes for their fraudulent activities. Those unscrupulous elements were deceiving the consumers through calls/SMS whereby they were falsely offered and fleeced

through attractive cash prizes/Inami schemes including balance increase, transfer of credit facility etc.

18. The petitioner/appellants ultimately when are not able to deter those mischievousness elements through their own system thereby deceitfully cheating the general public, they cannot claim any relief. Admittedly those elements by misusing the system of petitioner/appellant through modern devices creating troubles for innocent consumers. But they are not able to stop such their evil activities.

19. The impugned directive issued by the Director Consumers Protection is not deemed to be a 'decision' by authority in view of Sections 3 & 7 of the Pakistan Telecommunication Re-Organization Act, 1996 therefore preferring FAOs are not in accordance with law.

20. The rights as guaranteed under Article 18 of the Constitution of Islamic Republic of Pakistan, as contended, are attached with certain conditions envisaged and not entirely unfettered. Therefore, in my view, no right of the petitioner/appellants has been infringed.

21. Moreover, multiple issues raised by either side call for factual controversy, as such, same cannot be redressed by exercising writ jurisdiction. View in this regard is supported by ***"2009 MLD 367, 2007 YLR 399, 2008 YLR 2381, PLD 1983 SC 280*** and ***2004 CLC 324"***.

22. Moreover, throughout the provisions of Pakistan Telecommunication Re-Organization Act, 1996, it appears that consumer's interest is protected, which is undisputed legal right. In this regard, Section 4(1)(m) of the said Act is reproduced herein below: -

> ***"4(1)(m) regulate competition in the telecommunication sector and protect consumer rights".***

23. Moreover, section 6(f) also provides such protection as under: -

> ***"6(f) the interests of users of telecommunication services are duly safeguarded and protected".***

24. The Regulatory Authority is bound under the law to inform the Government through their yearly reports under section 18 (1) of the said Act regarding protection of consumers' interest, which is reproduced hereunder:-

> ***"18. Submission of yearly report, returns, etc.: (1)*** *As soon as possible after the end of every financial year but before the last day of September next following, the Authority shall submit a report to the Federal Government on the conduct of its affairs, including action taken for protection of consumers interest, for that year".*

25. From the general complexion, an opinion can conveniently be formed that paramount consideration has been paid to consumers' interest for which the petitioner/appellants have no remedial way. If the petitioner/appellants are seeking relief in their favour on the general principle of natural justice, how they can get rid of their responsibilities when general public is highly affected through such schemes launched. The consumers cannot be left upon the mercy of the companies, who have launched these schemes without any accountability. They are the direct affectees and are facing tortures and mental agonies on daily basis and the Court cannot remain oblivious. It inheres duty to Court to help them for relieving their miseries before they completely became languish mentally financially as well as morally. Throughout the dispute, general public has not been paid any attention despite a decision arrived at between the companies and PTA authorities produced at page-66 of the petition dated 02.08.2010.

26. Under these circumstances, no way remains except to dismiss the petition as well as FAOs as the relief claimed is against the rights of general public.

27. The above are the reasons of shot order announced on 08.03.2013.

(NOOR-UL-HAQ N. QURESHI)
JUDGE

Zawar

Approved for Reporting

Blue slip added

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