

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.315/2019

Trans World Associates (Pvt.) Ltd.
Versus
Pakistan Telecommunication Authority & others

Dates of Hearings:	29.03.2019, 19.04.2019, 03.05.2019, 10.05.2019 and 12.06.2020.
Petitioner by:	M/s Munawar-us-Salam and Waleed Khalid, Advocates,
Respondents by:	M/s Rashid Hanif, Sardar Ejaz Ishaq Khan, and MNA Rehan, Advocates. Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General.

MIANGUL HASSAN AURANGZEB, J:-Through this judgment I propose to decide writ petition No.315/2019 and 317/2019 since they entail common questions of law and fact.

2. Through writ petition No.315/2019, the petitioner, Trans World Associates (Pvt.) Ltd., impugns letter dated 19.09.2018, whereby respondent No.2 (Pakistan Telecommunication Authority) informed the petitioner that it had been decided during the hearing held on 27.07.2018 to initiate a “*consultation process*” over the issue raised by respondent No.6 (Nayatel (Pvt.) Ltd.) in its complaint under Sections 4(1)(I) and 5(1) of the Pakistan Telecommunication (Re-organization) Act, 1996 (“the 1996 Act”) read with Regulation No.6 of the P.T.A. (Functions and Powers) Regulations, 2006 (“the 2006 Regulations”). Furthermore, the petitioner impugns the *vires* of Regulation No.6 of the 2006 Regulations made by respondent No.2 in exercise of the powers conferred by Section 5(2)(o) of the 1996 Act.

3. Through writ petition No.317/2019, the petitioner, Pakistan Telecommunication Company Ltd. (“P.T.C.L.”), impugns (i) notice dated 02.01.2019 issued by respondent No.1 (Pakistan Telecommunication Authority) seeking the petitioner’s comments/views/feedback on the issues highlighted in the consultation paper on “*charging of wholesale IP bandwidth in US Dollars*” and (ii) notice dated 17.01.2019 issued by respondent No.1

reminding the petitioner to submit information specified in paragraph 10 of the consultation paper.

4. In this judgment, the petitioner, Trans World Associates (Pvt.) Ltd. shall be referred to as “Trans World”; respondent No.2, Pakistan Telecommunication Authority shall be referred to as “P.T.A.”; and respondent No.6, Nayatel (Pvt.) Ltd. shall be referred to as “Nayatel”.

5. The facts essential for the disposal of these petitions are that on 23.04.2014, a *“lease agreement for IP transit services”* was executed between Trans World and Nayatel. This agreement was valid for a period of 12 months. Clause 2(i) of the said agreement provided that Trans World shall charge Nayatel at the rate of US Dollars 15/Mbps/month for bandwidth capacity of 5xSTM4 (3,110 Mbps). The total price for 5xSTM4 was agreed to be US Dollars 46,650/- per month. Clause 2(ii) of the said agreement provided that Trans World will invoice Nayatel on a monthly basis in advance in US Dollars. Payment was agreed to be made by Nayatel in Pak Rupees, within one calendar month of the issuing date of invoice using the inter-bank US Dollars – Pak Rupees conversion rate on the day of the payment.

6. Clause 4 of the said agreement dated 23.04.2014 provided *inter-alia* that the disputes between the parties to the said agreement would be resolved through amicable negotiations failing which the disputes would be settled through arbitration in accordance with the provisions of the Arbitration Act, 1940. It is not disputed that the said agreement, after its expiry, has been renewed yearly. The last renewal was on 12.01.2018 for a period of one year. The terms and conditions of the renewal explicitly provided that the relationship between the parties was to be governed by the terms of the said agreement dated 23.04.2014.

7. Nayatel provides broadband internet services in Islamabad, Rawalpindi and Faisalabad. Nayatel purchases internet bandwidth from P.T.C.L. and Trans World in wholesale and sells the same in retail to home and corporate customers. The cost of internet bandwidth is one of Nayatel’s major expenses in its total operating

costs. P.T.C.L. and Trans World charge internet bandwidth in US Dollars.

8. Vide letter dated 16.01.2018, Nayatel requested the Chairman, P.T.A. that P.T.A. may pass orders to P.T.C.L. and Trans World to fix and charge the wholesale IP bandwidth rates in Pak Rupees only. This, according to Nayatel, would remove a major disadvantage factor for the broadband service providers engaged in retail of IP bandwidth. In essence, Nayatel's complaint was that since under the agreements executed by P.T.C.L. and Trans World with their wholesale customers the charge for internet bandwidth is in US Dollars payable in Pak Rupees at the exchange rate on the date of payment, whenever the Pak Rupee depreciates, Nayatel's costs for bandwidth automatically increases. This results in an increase in Nayatel's operating costs. The position taken by Nayatel was that although P.T.C.L. and Trans World pay the cost of IP ports to the international operators in US Dollars but this payment is less than 20% of the total cost that is paid to P.T.C.L. and Trans World by Nayatel and other similar providers of broadband internet services. Nayatel also complained that P.T.C.L. and Trans World were providing retail services and competing with other broadband operators in the retail market through subsidiary companies and retail dedicated divisions, and that P.T.C.L. and Trans World do not bill their own subsidiary companies and divisions for such services in US Dollars and consequently the broadband internet service provider like Nayatel are discriminated against.

9. The said letter dated 16.01.2018 was issued by Nayatel just four days after renewing its agreement dated 23.04.2014 with Trans World. Nayatel's said letter prompted P.T.A. to call upon P.T.C.L. and Trans World to provide their comments on the subject matter. The position taken by P.T.C.L. and Trans World in their response was that all their major input costs for the wholesale IP bandwidth delivery, including the interlinking charges and IP port charges were in US Dollars. Furthermore, Trans World took the position that it charged the cost of international IP to its subsidiary in US Dollars.

10. Vide letter dated 21.02.2018, P.T.A. requested Nayatel to submit its views on P.T.C.L.'s and Trans World's responses and

provide additional cost breakup/evidence of the claims made in its letter dated 16.01.2018. There is nothing on the record to show that P.T.A.'s said letter was responded to.

11. Subsequently, Nayatel submitted a complaint before P.T.A. under Sections 4(1)(l) and 5(1) of the 1996 Act read with Regulation No.6 of the 2006 Regulations against P.T.C.L. and Trans World for charging wholesale internet bandwidth in US Dollars. In the said complaint, the *“summary of dispute”* is in the following terms:-

“2. SUMMARY OF DISPUTE

This Complaint is against TWA and PTCL for charging wholesale internet bandwidth in USD and getting payments from Nayatel in Pakistani Rupees (PKR) equivalent on the date of payment, all to the unfair benefit of Respondents and prejudice of Complainant, despite the fact that the costs incurred by TWA and PTCL on submarine cable system are not confined exclusively to the wholesale IP bandwidth as they also carry traffic of other services like voice, point to point data, MPLS, IPLC, CDN peering and on that account the payments made by TWA and PTCL to international operators in USD are just a fraction (less than 20%) of the total cost that Nayatel pays to them”.

12. On 24.07.2018, a detailed reply to the said complaint was submitted on behalf of Trans World, which had sought the dismissal of the complaint as not maintainable. Trans World had raised several objections to P.T.A.'s jurisdiction to initiate proceedings on Nayatel's complaint.

13. P.T.A., vide letter dated 19.09.2018 informed Nayatel as well as P.T.C.L and Trans World that it had been decided to initiate a consultation process over the issues raised in Nayatel's complaint, and directed the concerned parties to provide all the requisite information so as to enable P.T.A. to make a decision after the consultation process. P.T.A. *“disposed of”* Nayatel's complaint in the said terms.

14. Trans World did not agree with the initiation of the consultative process and vide letter dated 06.10.2018, informed P.T.A. that the contents of its letter dated 19.09.2018, including the directions contained therein, were prejudicial to Trans World's rights, interests and privileges. Furthermore, it was asserted that it was beyond P.T.A.'s jurisdiction to proceed further in the matter.

15. Nayatel, through its legal counsel's letter dated 19.11.2018, *inter-alia* requested P.T.A. to *“sever the link with the complaint”* and

to proceed with the consultation process. It was also asserted that it was only after consent to the consultation process given by P.T.C.L. and Trans World that Nayatel had withdrawn its complaint. Nayatel also provided a draft of the background and the issues and required the same to be circulated to the consultees consistent with P.T.A.'s practice. Vide letter dated 12.12.2018, P.T.A. informed Nayatel that it was in the process of finalizing the consultation paper which should be shared with the industry in due course of time.

16. Trans World, through its legal counsel's letter dated 13.12.2018 *inter-alia* informed P.T.A. that it had not given its consent to the initiation of the consultation process. Furthermore, it was asserted that Trans World neither accepts nor submits to the jurisdiction or authority of P.T.A. to proceed with the matter.

17. Vide letter dated 02.01.2019, P.T.A. informed the heads of Local Loop Operators, Long Distance International Operators, Common Mode Operators, Class Value Added Services (Data) Operators as well as P.T.C.L., Trans World and Nayatel that the consultation paper on "*charging of wholesale IP bandwidth in US Dollars*" had been placed on P.T.A.'s website, and sought comments/views/feedback on the issues highlighted in the said paper. There were striking similarities between the said consultation paper prepared by P.T.A. and the draft provided to P.T.A. by Nayatel's legal counsel through letter dated 19.11.2018. Vide letter dated 17.01.2019, P.T.A. once again requested Trans World to provide information so as to enable P.T.A. to make a decision after the consultative process. As mentioned above, P.T.A.'s letters regarding the initiation of a consultative process has been impugned by Trans World in the instant writ petition. Trans World has also thrown a challenge to the *vires* of Regulation No.6 of the 2006 Regulations.

18. Learned counsel for the petitioner after narrating the facts leading to the filing of the instant petition submitted that Nayatel had filed its complaint before P.T.A. under Sections 4(1)(I) and 5(1) of the 1996 Act and Regulation No.6 of the 2006 Regulations; that in Nayatel's complaint, there is no allegation against P.T.C.L. or Trans World as to the violation of any provision of the 1996 Act; that

P.T.A.'s letter dated 19.09.2018 shows that a hearing was conducted by only one Member of P.T.A.; that in fact the hearings on 28.06.2018, 17.07.2018 and 27.07.2018 were conducted by a Single Member of P.T.A.; that Section 3(2) of the 1996 Act provides *inter-alia* that P.T.A. shall consist of three Members, whereas Section 3(9) of the said Act provides that the decision of P.T.A. shall be with the concurrence of the majority of its Members; that Regulation No.44-A of the 2006 Regulations provides that the presence of majority of Members of P.T.A. shall constitute quorum for the purposes of hearing; that the statutory mandate is that the decision by P.T.A. has to be taken by three of its Members; that since a decision was made by a Single Member to conduct a non-adversarial consultation process, the same was without lawful authority for want of the required quorum; that hearings had been conducted to adjudicate upon a dispute between Trans World and Nayatel; that since under Regulation No.6 of the 2006 Regulations, the determination made by P.T.A. after a consultative process is to be treated as an order of P.T.A., the proceedings before P.T.A. are *quasi judicial* in nature; and that the *quasi judicial* powers of P.T.A. cannot be delegated to a Single Member of P.T.A. In making these submissions, learned counsel for the petitioner placed reliance on the judgment in the case of National Silk and Rayon Mills Vs. Federation of Pakistan (2015 MLD 995) and the unreported judgment dated 10.03.2017 passed by this Court in F.A.O.No.37/2012.

19. Furthermore, it was submitted that the 2006 Regulations were made in exercise of the powers conferred by Section 5(2)(o) of the 1996 Act; that Section 5(2)(o) of the 1996 Act empowers P.T.A. to "*issue regulations for exercising its powers and performance of its functions*"; that the functions that P.T.A. can perform, and the powers that it can exercise are specified in Sections 4 and 5 of the 1996 Act, respectively; that Sections 4 and 5 of the 1996 Act do not empower P.T.A. to initiate any consultation process; that Section 22(2) of the 1996 Act is the only provision which envisages consultation between a licensee and P.T.A.; that such consultation can take place only when the licensee and P.T.A. cannot agree to the modifications of a license or its conditions proposed by P.T.A.;

that none of clauses (a), (c), (d), (e), (i), (j), (k), (l) and (m) of Section 4 of the 1996 Act empower the P.T.A. to initiate any consultation process; and that since the functions that P.T.A. can perform and the powers that it can exercise do not include the initiation of the consultation process, Regulation No.6 of the 2006 Regulations empowering P.T.A. to initiate a consultation process, is beyond the scope and *ultra vires* to the provisions of the 1996 Act. In making these submissions, learned counsel for Trans World placed reliance on the judgment in the case of Sunbiz Private Limited Vs. Federation of Pakistan (2018 YLR 1785).

20. Learned counsel further submitted that Nayatel wants P.T.A. to interfere in a concluded contract between Nayatel and Trans World by rewriting its commercial terms and conditions; that Nayatel is seeking P.T.A. to protect it from the adverse effects of devaluation of the Pak Rupee; that Nayatel lodged a complaint before P.T.A. on 16.01.2018 soon after renewing the agreement with the Trans World; that in the presence of an arbitration clause in the agreement between Nayatel and Trans World, the former could not have filed a complaint before P.T.A.; that the terms of reference for the consultative process proposed by P.T.A. in its letter dated 02.01.2019 are identical to the ones proposed in the draft provided by Nayatel's legal counsel's letter dated 19.11.2018; and that the adoption by P.T.A. of the terms of reference proposed by Nayatel shows the absence of an independent application of mind by P.T.A. and is indicative of regulatory capture.

21. Furthermore, it was submitted that P.T.A. does not have the power to regulate tariff without framing regulations; that Section 4(1)(d) of the 1996 Act provides that P.T.A. shall promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan whereas Section 5(2)(e) of the said Act provides that P.T.A. shall establish or modify accounting procedure for licenses and regulate tariffs for telecommunication services in accordance with Sections 25 and 26 of the said Act; that Section 26(d) of the said Act provides that the level of tariffs for telecommunication services including basic telephone service shall be regulated by P.T.A. in accordance

with the regulations and the following general principles which ensure that tariffs are at a level which provide a reasonable rate of return on investments taking into consideration the cost of operation; that P.T.A. certainly has the power to regulate tariffs but if it wants to regulate tariffs it has to make regulations; that in the absence of regulations to regulate tariffs, P.T.A. does not have the unbridled and unfettered power to regulate tariffs; and that P.T.A. is proceeding with the consultative process without deciding the objections to its jurisdiction taken by P.T.C.L. and Trans World. Learned counsel for Trans World prayed for the writ petition to be allowed in terms of the relief sought therein.

22. Other than the challenge to vires of Regulation 6 of the 2006 Regulations the arguments of learned counsel for P.T.C.L. were substantially the same as those advanced by learned counsel for Trans World. Additionally, learned counsel for P.T.C.L. submitted that the disclosure of cost components, invoices and accounting details of P.T.C.L.'s private commercial dealings with its retail customers during consultation process would breach P.T.C.L.'s internal confidentiality as the said information is also going to be shared with Nayatel.

23. On the other hand, learned counsel for Nayatel submitted that in essence Nayatel, through its complaint against Trans World, sought the Regulator/P.T.A. to investigate and hold that the charge for IP internet bandwidth in US Dollars by Trans World was unwarranted for the reason that it distorted fair competition; that sales by Trans World to its wholly owned subsidiary competing with Nayatel at the retail level were not in the same terms as the terms agreed between Trans World and Nayatel; that under Section 6(e) of the 1996 Act, P.T.A. is required to ensure that fair competition in the telecommunication sector exists and is maintained; that the service provided by Trans World to Nayatel under the terms of the agreement dated 23.04.2014 comes within the meaning of "*telecommunication service*" as defined in Section 2(v) of the 1996 Act; that under Section 4(m) of the 1996 Act, P.T.A. has been empowered to regulate competition in the telecommunication sector and to protect consumer rights; that during the hearings regarding

Nayatel's complaint, P.T.C.L. had suggested that a consultation ought to take place over the matter; that Trans World had not objected to the said suggestion; that Nayatel had withdrawn its complaint on the understanding that a consultation would take place; that Trans World has not provided the required information to P.T.A. for there to be a purposeful consultation; that the instant writ petition is pre-mature and has been filed as a pre-empted measure to avoid the provision of the information sought by P.T.A.; that under Section 5(2)(l) of the 1996 Act, P.T.A. has been empowered to collect information with respect to telecommunications within and outside Pakistan and review the impact thereof; that Clause 4(d) of Trans World's license obligates Trans World to furnish detailed information regarding service description, tariffs, operating statistics, financial accounts, annual reports or any other information as may be required by P.T.A. in connection with the monitoring and regulation of service; that Trans World's tariffs are also subject to regulation inasmuch as Clause 8(1) of its license provides that the licensee shall ensure that the service tariffs are reasonable and costs based; that in order to ensure that Trans World's tariffs are reasonable and costs based, P.T.A. can require Trans World to furnish information.

24. Furthermore, it was submitted that since a remedy of an appeal lies under Section 7 of the 1996 Act against the decision of P.T.A., the instant petition against the issuance of the consultation paper which does not determine the legal rights and obligations of the parties, is not maintainable; that the impugned consultation paper only sets out the issue to be probed into and does not impose any legal consequences on any party; that the instant petition has been filed with the motive to obstruct P.T.A. from performing of its functions to investigate under Section 4(1)(f) of the 1996 Act; that under Section 4(1)(f) of the 1996 Act, P.T.A. can investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contraventions of the provisions of the 1996 Act, the rules made and the licenses issued thereunder and can take action accordingly; and that since no enforcement has been issued

by P.T.A. as yet, the instant petition is liable to be dismissed as premature.

25. Learned counsel further submitted that Section 20(1) of the 1996 Act provides that no person shall establish, maintain or operate any telecommunication system or provide any telecommunication service unless he has obtained a license under the said Act, whereas Section 20(2) of the 1996 Act provides that no licensee shall establish, maintain or operate any telecommunication system or provide any telecommunication service which is not authorized under the license; that through the lease agreements, Trans World provides a licensed service under clause 3(5) and 3(6) of its license; that but for Trans World's license, it could not have been able to sell the service to Nayatel; that Section 25(3) of the 1996 Act provides that no licensee shall enter into any agreement or arrangements which is inconsistent with any obligation of the licensee under the said Act, the rules or any condition attaching to its license, and any such agreement or arrangement shall to such extent be void; that the said prohibition in Section 25(3) of the 1996 Act has also been incorporated in Clause 3(23) of Trans World's license; that the said Clause 3(23) of Trans World's license further provides that the licensee shall not enter into any agreement or arrangements which shall in anyway prevent or restrict competition in relation to the operation of any telecommunication service licensed by P.T.A; and that the service provided by Trans World to Nayatel under the agreement is not beyond the purview of regulation by P.T.A.

26. Furthermore, it was submitted that Nayatel's complaint had two limbs viz (i) whether it was fair for Trans World to charge Nayatel in US Dollars for the domestic component of the service, and (ii) whether Trans World's subsidiaries were being charged at the same rate as Nayatel for there to be a level playing field; that it is within the realm of possibilities that P.T.A. could return a finding against Nayatel; and that for the enforcement of P.T.A.'s findings, a show cause notice is required to be issued under Section 23 of the 1996 Act.

27. It was further submitted that the arbitration clause contained in the agreement dated 23.04.2014 is unlawful inasmuch as Section 4(1)(l) of the 1996 Act provides that P.T.A. shall settle disputes between licensees, and Clause 3(27) of the Trans World's license provides that in case of any dispute between the licensee, the licensed operators or company including the payment of dues shall be referred to P.T.A. whose decision thereon shall be final and binding; that the dispute between Trans World and Nayatel as to the invoices under the said agreement had been raised in US Dollars can only be settled by P.T.A.; that the consultation process initiated by P.T.A. is aimed to settle the said dispute between Trans World and Nayatel; that the terms of the said agreement cannot oust the jurisdiction of P.T.A. to ensure fair competition; that despite a lapse of 42 days no response to Nayatel's proposed terms of reference was given by petitioners hence the Authority issued the same as terms of reference for the consultation paper; that when the consultation paper was issued, the Authority was complete; and that Clause 8(1) of the Trans World's license provides that the licensee shall ensure that the service tariffs are reasonable and cost-based. Learned counsel prayed for the petition to be dismissed.

28. Learned counsel for the petitioner in rebuttal submitted that since no order has been passed by P.T.A., the question of filing an appeal under Section 7 of the 1996 Act does not arise; that P.T.C.L. had not given its consent to the initiation of a consultative process but only a suggestion had been given to that effect; that the petitioner has no intention of stopping P.T.A. from investigating or collecting information; that till date, no provision of the 1996 Act or any rule or regulation or provision of a license has been pointed out which obligates the petitioner to bill Nayatel in the currency other than in which the petitioner's costs are incurred; that the dispute raised by Nayatel before P.T.A. is a contractual one; and that there is no harm if a process for consultation with all the stakeholders after the framing of regulations in the future is to take place.

29. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance. The facts leading to the filing of these petitions have

been set out in sufficient detail in paragraphs 5 to 17 above and need not to be recapitulated.

30. In essence, the petitioners have raised objections to the jurisdiction of P.T.A. to initiate a consultation process aimed to review the US Dollars denominated wholesale of IP bandwidth by Trans World and P.T.C.L. although the invoices so generated are payable in Pak Rupees at the exchange rate prevailing on the date of payment. These objections were raised on behalf of Trans World vide letter dated 24.07.2018 and by P.T.C.L. vide letter dated 15.07.2018. These objections were taken before the issuance of P.T.A.'s impugned letter dated 19.09.2018. Although, on behalf of Trans World, objections to P.T.A.'s jurisdiction were again raised vide letters dated 06.10.2018 and 13.12.2018, there is nothing on the record to show that after 19.09.2018, P.T.C.L. had raised any objection. This is perhaps due to the fact that P.T.C.L. had suggested the initiation of a consultative process by P.T.A. If P.T.C.L. was of the view that P.T.A. did not have the jurisdiction to initiate a consultative process, it should have raised an objection to the jurisdiction of P.T.A. in its response to P.T.A.'s letter dated 19.09.2018.

31. Be that as it may, since Trans World had raised such an objection, it was incumbent on P.T.A. to decide whether it had the jurisdiction to initiate a consultative process. It is well settled that where an objection to the jurisdiction of a Court or a Tribunal is raised, it is necessary for such an objection to be decided first before a decision on the merits of the case. Reference in this regard may be made to the following case law:-

- (i) In the case of Zahid Zaman Khan Vs. Khan Afsar (PLD 2016 SC 409), it has been held that *"law enjoins a duty upon the Court to settle questions about its jurisdiction, because subject to certain exceptions, any decision rendered by the Court having no jurisdiction stands vitiated on that account alone"*.
- (ii) In the case of Izhar Alam Farooqi Vs. Abdul Satta rLasi (2008 SCMR 240), it has been held as follows:-

"This is an established law that jurisdiction cannot be assumed with the consent of the parties and notwithstanding the raising of such an objection by the

parties, the forum taking cognizance of the matter must at the first instance decide the question of its jurisdiction. There can be no exception to the principle that an order passed or an act done by a Court or a tribunal not competent to entertain the proceedings is without jurisdiction and that it is mandatory for the Court or tribunal as the case may be to attend the question of jurisdiction at the commencement of the proceedings because the jurisdictional defect is not removed by mere conclusion of trial or inquiry and objection to the jurisdiction can be raised at any subsequent stage.”

- (iii) In the case of Muhammad Siddique Anwar Vs. Faisalabad Development Authority (2007 SCMR 1126), it has been held *inter alia* that a question of jurisdiction is to be considered to be of a fundamental nature in judicial proceedings, and the Court seized with the matter should preferably decide such a question on priority basis instead of considering the merits of the case, and that if it is possible to decide the question of jurisdiction without recording evidence, it should decide the same expeditiously and as early as possible with the view to save its own time as well as that of the public litigants.
- (iv) In the case of Mansab Ali Vs. Amir (PLD 1971 SC 124), it has been held as follows:-

“It is an elementary principle that if a mandatory condition for the exercise of jurisdiction by a Court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in continuation of these proceedings in appeal or revision equally suffer from illegality and are without jurisdiction.”

- (v) In the cases of Dr.Asadullah Khan Tareen Vs. Government of Balochistan, Health Department (2016 PLC (C.S) 195) and Registrar, High Court of Balochistan, Quetta Vs. Mazar Khan (2014 PLC (C.S) 1275), it was held that it was mandatory for the Court to decide, at the first instance, the question of its jurisdiction and without deciding the question of jurisdiction, the proceedings on merits may ultimately prove to be a futile exercise. Law to this effect has also been laid down in the case of Ishrat Malik Vs. Jameel Ahmad Manj (2017 YLR 1788).

32. It is also well settled that where a petitioner is of the view that

a forum before which a matter is pending does not have the jurisdiction to entertain the matter it is always open to him to appear before the forum in response to a notice and make a preliminary objection regarding jurisdiction.

33. P.T.A. is a creation of the 1996 Act and can exercise powers only within the scope and ambit laid down by the express provisions of the said statute. Mere issuance of a notice informing the petitioners regarding the initiation of consultation process cannot be taken to be an act without jurisdiction, as alleged by the petitioners, as no hearing or adjudication has taken place. There is no averment in the petition to the effect that the petitioners had appeared before P.T.A. pursuant to the said notice. P.T.A. had not even been made aware by P.T.C.L. of the objection regarding P.T.A.'s jurisdiction to entertain the matter. Till date P.T.A. has had no opportunity to apply its mind to the question of jurisdiction. Issuance of a notice and that too without a hearing, cannot be equated with passing of an order after hearing the parties. In this view of the matter, like Trans World, P.T.C.L. ought to have raised the objection regarding jurisdiction before P.T.A. at the first instance. P.T.C.L. has not chosen to take recourse to this avenue open to it but has, instead, directly approached this Court. Be that as it may, the objections to the jurisdiction taken by P.T.C.L. before this Court are almost the same as the ones taken by Trans World before P.T.A., in its letters dated 06.10.2018 and 13.12.2018. Since Trans Word has raised objections to the jurisdiction of the P.T.A. to proceed with the consultation process, the latter is under an obligation to hear and decide the same before proceeding with the matter on merits, if at all.

34. I am of the view that while considering the prayer for certiorari, the High Court is not entirely powerless to look into the question as to whether the concerned authority at all had jurisdiction to entertain the matter and to decide the question relating to initial lack of jurisdiction. Though this Court undoubtedly has power to exercise jurisdiction under Article 199 of the Constitution, I am not inclined to do so, for the reason that, on the facts and in the circumstances of the case, only notices for a

consultative process had been issued to the petitioners. No effective hearing had taken place before P.T.A. No occasion had arisen for P.T.A. to have proceeded further, as the petitioners have rushed to this Court and obtained interim relief against the continuation of proceedings before P.T.A. Had P.T.A. had the occasion to hear the petitioners on their objections to P.T.A.'s jurisdiction, it could be possible that P.T.A. would have accepted the same. If objection regarding jurisdiction is accepted by P.T.A., the matter may end there. Only if P.T.A. finds that it does have the jurisdiction to proceed with the matter can it proceed further with the consultation process.

35. In other words, P.T.A. has not yet had the opportunity to effectively exercise the jurisdiction vested in it, for a decision on its own jurisdiction. In this view of the matter and for the reasons stated hereinabove, this Court does not consider it appropriate to entertain the petitions at this premature stage, leaving it open to the petitioner to approach P.T.A. and take objections regarding jurisdiction. In the event that the petitioners approach P.T.A. and take such objections, P.T.A. shall consider and decide the same as a preliminary issue, in accordance with law, before proceeding with the matter on merits of the case. Subject to the above directions, the petition filed by P.T.C.L. and the petition filed by Trans World (save to the extent of the challenge to the *vires* of Regulation No.6 of the 2006 Regulations) are disposed of.

36. Trans World has also challenged *vires* of Regulation No.6 of the 2006 Regulations on the ground that Sections 4 and 5 of the 1996 Act do not empower P.T.A. to initiate consultation process; and that the 1996 Act provides for the consultation only under Section 22 (2) in the event that P.T.A. and a licensee cannot agree to the terms and conditions of the license. It is to be seen as to whether in exercise of power to make regulations under Section 5 (2) (o) of the 1996 Act, P.T.A. could have provided a mechanism for dispute resolution between the licensees under Regulation 6 of the 2006 Regulations which was not otherwise provided in Section 4 (1) (I) of the 1996 Act. Since the Attorney General for Pakistan was not heard on this question, Trans World's petition only to the extent of the

challenge to the *vires* of Regulation No.6 of the 2006 Regulations, shall remain pending. The pendency of Trans World's petition to the said extent cannot be a valid ground for the continuation of interim relief.

37. As regards the ground of lack of jurisdiction, this Court would refrain from expressing any opinion on this issue, as it would be appropriate if such objection is decided by the P.T.A. first. It is clarified that no observation made by this Court be construed as having touched the merits of the case.

38. The petitions stand disposed of in the above terms. However, Trans World's petition, only to the extent of challenge to the *vires* of Regulation No.6 shall remain pending. There shall be no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON 25th day of /2020

(JUDGE)

*M.A.Baig**