

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

CASE NO. : FAO NO.22-2015

DV Com Data

Vs.

**Pakistan Telecommunication Authority through its Chairman &  
Another**

**Appellant by : M/s Muhammad Shahzad Shoukat & Mr. Asim Hafeez, Advocates**

**Respondents by : Barrister Munawwar Iqbal Duggal for PTA with  
Mr. Muhammad Khurram Siddiqui, Director  
(Law), PTA  
Mr. Nasir Ayyaz, Advocate for MoIT.  
Ch. Abdul Khaliq Thind, Standing Counsel.**

**Date of hearing : 09.01.2017**

**AAMER FAROOQ J.** This appeal is directed against order dated 20.03.2015 passed by respondent No.1 i.e. Pakistan Telecommunication Authority.

2. Facts, in brief, are that on 04.11.2004, a Wireless Local Loop License bearing No.WLL-06-2004 was issued by PTA to DV Com Limited, to provide services to different regions in Pakistan. On 06.06.2007, the appellant Company, the majority shareholder of DV Com Limited, applied for splitting the license into three on the allocated Frequency Spectrum. The request was approved on 28.10.2007. Accordingly, the license was split into three different licenses on allocated Frequency Spectrum. The appellant was awarded a non-exclusive license bearing No.WLL-18-2004 dated 28.09.2007 for providing licensed services in Nine Licensed Regions. Under the terms of the license (Clause 3.2.1), the licensee i.e. appellant was required to

Roll Out at least one 'Network Connection Point' in each Licensed Region within the stipulated time i.e. 18-months from the effective date. The referred target could not be achieved as stipulated in the license in two Telecom Regions i.e. NTR & NTR-02. PTA issued a show-cause notice dated 11.08.2008 due to failure on behalf of appellant to accomplish its Roll Out obligations. In this behalf, the determination was announced by PTA on 04.11.2008, whereby license of the appellant was cancelled. The appellant assailed the referred order before this Court by way of petition under Article 199 of the Constitution (W.P. No.633-2009). This said petition was allowed by this Court on 18.05.2009 and the impugned order dated 04.11.2008 was set aside, however it was observed that the appellant should Roll Out by 18.09.2009. The appellant assailed the order in the said writ petition by way of Review Petition (RA No.9-2009) to the extent of said Roll Out date. In the Review Petition, initially the judgment to the extent of Roll Out date was suspended, however it was dismissed for non-prosecution on 23.11.2010. PTA, on 28.02.2011, again cancelled the license of the appellant. Feeling aggrieved, the appellant filed a petition under Article 199 of the Constitution (W.P. No.807-2011), which was dismissed vide judgment dated 15.06.2011. The appellant assailed said judgment before August Apex Court by way of Civil Petition for Leave to Appeal (CPLA No.1432-2011), which is pending adjudication. The above mentioned Review Petition was restored to its original number and came up for hearing before learned Division Bench of this Court on 23.02.2015 and was allowed with consent of the

parties. In terms of the consent order, the case was remanded to PTA to decide the matter afresh after giving an opportunity of hearing to the appellant. Meanwhile, the appellant installed towers across the country and provided other facilities as well. The appellant, in addition to sum of Rs. 1.3 billion, also paid Rs.20 million for the year 2009-10 and hence paid not only 'Initial Spectrum Fee (ISF)', but also Annual Spectrum & License Fee. Since the license fee was paid after its due date therefore PTA levied penalty in the sum of Rs.2.4 million. In March, 2010, PTA served notices on all the WLL Operators including the appellant to make payment of the remaining license fee in the sum of Rs.1.3 billion. The entire Telecom Sector protested to this and made representation to Economic Coordination Committee of the Cabinet (ECC). In response to said representation, Economic Coordination Committee of the Cabinet declared a Moratorium on payment of Balance Spectrum License Fee for a period of four years. The appellant and other LDI companies also made repeated requests to Federal Government and PTA for payment of balance 50% 'ISF' in installments, but PTA issued notices for payment of 50% balance 'ISF' by 17.03.2010, which was also followed by a show cause notice dated 02.06.2010, in which, an order was passed on 03.06.2011, whereby the appellant was ordered to pay remaining Spectrum Fee and also late payment additional fee @ 2% per month. The said decision was challenged by way of appeal (FAO No.40-2011), which was dismissed by this Court vide judgment dated 22.05.2012. The appellant filed a petition for Leave to Appeal (C.P. No.1260-2012) before Hon'ble Supreme Court of

Pakistan, which was decided on 10.08.2012. As mentioned above, the Review Petition was allowed and the matter was remanded to PTA for decision afresh, which was decided vide the impugned order dated 20.03.2015 and the appellant has been ordered to pay balance Spectrum Fee as well as Late Payment Additional Fee. The balance Spectrum Fee has been paid and the controversy in the present appeal is with respect to Late Payment Additional Fee.

3. Learned counsel for the appellant, at the outset, submitted that balance Spectrum Fee has been paid and now the controversy remains only to the extent of Late Payment Additional Fee; that PTA is neither authorized nor entitled to impose penalty designated as 'Late Payment Additional Fee' in respect of Additional Spectrum Fee, as same is not envisaged in Pakistan Telecommunication (Re-Organization) Act, 1996 (the Act) or terms of license; that Late Payment Additional Fee is illegal inasmuch as there was no evasion or willful default with respect to the payment of Spectrum Fee; that it is settled law that in case of penalty, the Court/Authority has to examine, whether the same was willful or reasons beyond the control of defaulter. It was further contended that the impugned decision is in absolute disregard and gross violation of the provisions of clause 6 of Pakistan Telecommunication Authority (Powers and Functions) Regulations, 2006; that PTA regards the penalty as Additional Fee, which is not tenable inasmuch as there is no element of *quid pro quo*, as no additional services have been rendered by PTA; that Federal Government has already allowed the payment of Spectrum Fee in

installments and in this behalf, this Court in W.P. No.1696-2012, vide order dated 27.11.2013, disposed of the petition by directing the appellant to make payments in accordance with the policy directives of PTA and the Federal Government. It was further contended that PTA has failed to take into consideration the entire history of the litigation in imposing the penalty. In support of his contentions, learned counsel for the appellant has placed reliance on cases reported as ‘M/s D.S. Textile Mills Limited Vs. Federation of Pakistan and others’ (PLD 2016 Lahore 355), (2015 SCC Bombay 336), (2016 SCMR 626) ‘Assistant Collector, Customs & Central Excise, Division-III, Sukkhar Vs. M/s Mari Gas Company Limited’ (2003 PTD 818), ‘Mahmood Rafique Vs. Muhammad Ismail & 03-Others’ (PLD 2008 Kar. 260), ‘State Life Insurance Corporation of Pakistan through Chairman & Others VS. Mst. Begum Rashida Jamil’ (2014 CLD 1216), ‘Rehmat Ullah Khan & Others Vs. GOP through Secretary, Petroleum & Natural Resources Division, Islamabad & Others (2003 SCMR 50) & ‘M/s Lahore Textile and General Mills Limited, Lahore’ (1986 CLC 2728). Learned counsel further contended that Late Payment Additional Fee is an essence of penalty, which is not permissible in light of Section 74 of Contract Act. In this behalf, reliance has been placed on cases reported as ‘Industrial Development Bank of Pakistan Vs. M/s Han Dossa Limited & 06- Others (PLD 1985 Kar. 71), ‘M/s Aslam Saeed & Company Vs. M/s Trading Corporation of Pakistan’ (PLD 1985 SC 69) & (2016 SCMR 16).

4. Learned counsel for the PTA *inter alia* submitted that Section 5 (2) (p) of 1996 Act empowers the PTA to levy fee and other charges;

that the Late Payment Additional Fee was part of the license agreement all along and the appellant knew all terms of the same including the instant clause i.e. clause 4.2. It was further contended that after acceptance of the terms of license, the appellant now cannot retract from the same in light of the case law reported as 'PakCom Limited & Others Vs. Federation of Pakistan & Others' (PLD 2011 SC 44); that the issue of Late Payment Additional Fee has been examined by this Court in case titled 'Great Bear International Services Pvt. Ltd. Vs. Pakistan Telecommunication Authority' (FAO No.33-2012) & 'Telecard Limited Vs. Pakistan Telecommunication Authority' (FAO No.32-2012) & (FAO No.51-2012), wherein it has been held that Late Payment is a part of terms of license; that Regulation 23 (7) of PTA (FNP) Regulations, 2006 were framed under section 5(2)(O) of the 1996 Act and are in consonance with the terms of license. It was further contended that the decision of this Court in FAO No.25-2012 is not applicable in the instant case, as in the said case, charges were under Regulation 18(2) of Numbering Allocation and Administration Regulations, 2005. Learned counsel further contended that under the license agreement, the appellant is required to pay different charges and fees and the Late Payment Additional Fee has been charged with respect to the same. The bulk of Late Payment Additional Fee is Rs.1,626,673,667/- out of total Rs.1,697,081,803/- and is in respect of Initial Spectrum Fee. It was further contended that Moratorium was granted by ECC and it expired in March, 2010. Under the terms of the license, the appellant was required to pay the remaining 50% Spectrum

Fee as per clause 4.1.1. of the license and there was no justification or basis for not making payment therefore default was willful; that the impugned order was passed after taking into account all the facts and circumstances. The letter dated 30.08.2011 issued by the Ministry of Information Technology is not a policy directive and is an internal communication between the Ministry and PTA and neither the appellant nor any other Telecom Company were recipient of the same; the appellant is hiding behind the said letter to justify its default. It was further contended that Late Payment Additional Fee is calculated @ 2% per month which is mandatory in nature and leaves no discretion with the Authority in this regard; reliance was placed on a case reported as 'Assistant Collector, Customs and Central Excise, Division-III, Sukkur Vs. M/s Mari Gas Company Limited' (2003 PTD 818). Learned counsel further contended that Late Payment Additional Fee is not a penalty and is a fee in the strict legal sense. Reference was placed on a case reported as 'The Adoni Ginning Factory and Others V. The Secretary, Andhra Pradesh Electricity Board, Hyderabad & Others' & 'Bajrang Jute Mills Ltd. Vs. State Electricity Board Andhra Pradesh and Others (AIR 1979 Supreme Court 1511). Learned counsel also placed reliance on case reported as 'M/s D.S. Textile Mills Limited Vs. Federation of Pakistan and Others' (PLD 2016 Lahore 355) to substantiate that License Fee stands on different footings from general concept of fee. It was further contended that clause 4.2.3 of the license provides for payment of Late Payment Additional Fee and the doctrine of *ejusdem generis* i.e. general words followed by specific phrase is not

applicable *stricto sensu*, as the words in the agreement are to be given their plain meaning. It was further contended that spectrum is a scarce resource of the state and since its allocation, the same stands blocked therefore the license fee is charged with respect to the same and despite the fact that license is cancelled, the appellant is entitled to charge the same. Learned counsel further contended that the appellant is bound to pay Late Payment Additional Fee as part of its contractual obligation and the same is not hit by Section 74 of the Contract Act. It was further contended that under section 8 of Act, the Government can issue a policy directive on the issues enumerated in the section however no directive can be issued directing change in the already signed contract i.e. license. In this behalf, reliance has been placed on a case reported as 'Pakistan Telecom Mobile Limited Vs. Pakistan Telecommunication Authority, Islamabad' (PLD 2014 Supreme Court 478). It was also contended that the judgment rendered by this Court dated 27.11.2013 in W.P. No.1585-2012 is not binding under the principle of *per incuriam* and *sub silentio*. In this behalf, reliance was placed on cases reported as Abdul Razzak Vs. The Collector of Customs and another (1995 CLC 1453), 'Member, Board of Revenue/Chief Settlement Commissioner, Punjab Lahore Vs. Abdul Majeed and another (PLD 2015 Supreme Court 166) & 'Sindh High Court Bar Association through its Secretary and another Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others' (PLD 2009 Supreme Court 879).



5. The arguments on behalf of learned counsels for the parties have been heard and the documents on record perused with their able assistance.

6. The parties have been involved in litigation over the question of issuance of license, its cancellation, levy of fee and now payment of Late Payment Additional Fee. In this behalf, the appellant was granted Wireless Local Loop License bearing No.18-2004 on 28.09.2007 for providing license services in nine Regions enumerated in the contract/license agreement. Under the terms of the license, the appellant was required to fulfill Roll Out obligations within 18-months from the effective date and since this could not be done therefore a show cause notice dated 11.08.2008 was issued by PTA. The determination in respect of said show cause notice was announced on 04.11.2008, whereby license of the appellant was cancelled. A petition under Article 199 of the Constitution (W.P. No.633-2009) was filed by the appellant, which was allowed vide judgment dated 08.05.2009 and impugned order dated 04.11.2008 was set aside. However, the appellant was directed to accomplish Roll Out obligation by or before a certain date. The appellant filed a Review Petition in which the impugned order was suspended however subsequently the matter was remanded back to PTA for decision afresh vide order dated 23.02.2015. Meanwhile, litigation between the parties on other issues including payment of Initial Spectrum Fee and other charges ensued. In this behalf, the Federal Government announced Moratorium for four years with respect to payment of the balance 50% of the Initial Spectrum

Fee, the said four years expired in 2011, but the payment was not made by the appellant. The appellant, as a justification, relied upon on letter dated 30.08.2011 for making payment in installments with respect to remaining Spectrum Fee dues.

7. The sole question before this Court, in the instant appeal, is regarding the demand of Late Payment Additional Fee by PTA from the appellant primarily with respect to Initial Spectrum Fee vide the impugned order on the ground that Fee was not paid in time as required under the license agreement. Under Section 21 of the Act, PTA has exclusive power to grant license. In this behalf, under section 21(2)(b), every license *inter alia* is to contain conditions requiring licensee to pay the fee for grant or renewal of license. Under Section 5(2)(o) & (p) of the Act, the Authority has the power to issue regulations for exercising its powers and performance of its functions and levy fee and other charges at such rates and in respect of such services, as may be fixed by it from time to time not exceeding the limits as specified by the Committee of the Cabinet. Section 8 of the Act empowers the Federal Government to issue policy directive to PTA relating to Telecom Policy referred to in subsection (2) and PTA is required to apply and follow directives so issued. The issues, on which policy directive can be issued, are provided in subsection (2) and (2A) of Section 8 *ibid*. Section 23 of the Act provides for issuance of enforcement orders and penalties in case of contravention with respect to any provision of the Act or rules made there-under or any terms and conditions of license. In pursuance of section 5(2) of the Act, Pakistan

Telecommunication Authority made Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 and under Regulation 23 (7), the licensee is bound to pay such fee as stipulated in the license within due date and in addition to any other remedy available to the authority, late payment of fees shall be incurred on the licensee @ 2% per month on the outstanding amount.

8. The relevant term of the license for the purposes of present controversy is Article 4 of the same. For sake of brevity, Article 4 is reproduced below: -

#### **ARTICLE 4 – FEES AND OTHER CHARGES**

##### **4.1 PAYMENT OF FEES**

*4.1.1 The Licensee shall pay the following initial fees to the Authority prior to the Effective Date:*

- (a) Initial license fees, US \$ 10,000/- or Pakistan Rupees 580,000/- (five hundred and eighty thousand) for each Licensed Region identified in Appendix 1 hereto, and*
- (b) Initial spectrum fees, the amount specified in Appendix 2 annexed hereto.*

*4.1.2. The Licensee shall pay the following annual regulatory fees to the Authority:*

- (a) Calculated on the basis of 0.5% (or such lesser amount as the Authority may, by Regulations, determine) of the Licensee's annual gross revenue from Licensed Services for the most recently completed Financial Year of the Licensee minus inter-operator payments and related PTA/FAB mandated payments. However, initial license fee and initial spectrum fee shall not be deducted from the gross revenue.*
- (b) The amount of the annual fees referred to in Appendix 2 annexed hereto, and*
- (c) For each number allocated to the Licensee at end of the Licensee's Financial Year, the Licensee shall pay the following amount or the amount determined by the Authority through Regulation from time to time.*

<b><u>Number Category</u></b>	<b><u>Annual Fee</u></b>
<i>Seven (or higher) digit number (including Freephone Service and Premium Rate Service numbers)</i>	<i>Rs. 0.50</i>
<i>Six digit number</i>	<i>Rs. 5.00</i>
<i>Five digit number</i>	<i>Rs. 50.00</i>
<i>Four digit number</i>	<i>Rs. 500.00</i>
<i>Three digit number</i>	<i>Rs. 5,000.00</i>

4.1.3 *In addition to the fees payable hereunder, the Licensee shall pay to the Authority all fees required to be paid under the Act, Rules and Regulations.*

#### **4.2 GENERAL CONDITIONS CONCERNING FEES**

4.2.1 *The Licensee shall pay all annual fees to the Authority and make contributions referred to in section 3.3.1 and 3.4.1 within 120 days of the end of the Financial Year to which such fees relate.*

4.2.2 *The Licensee shall make all contributions referred to in sections 3.3.1 and 3.4.1 within 120 days of the end of the Financial Year to which such contributions relate.*

4.2.3. *In addition to any other remedies available to the Authority, late payment of fees 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.*

4.2.4. *The Licensee shall annually submit to the Authority audited financial statements in support of its calculations of annual fees and contributions payable pursuant to this Article 4. The Authority shall have the right to audit such statements at any time.”*

The examination of the above Article shows that the licensee i.e. appellant is required to pay along with initial license fee and the regulatory fee, Initial Spectrum Fee; the appellant is also required to pay all fees as provided under the Act, Rules & Regulations. Under Clause 4.2.3, the licensee is also required to pay additional fee calculated @ 2% per month on the outstanding amount for each month on part thereof from the due date until paid. The nature of the license fee was lucidly discussed by the Hon’ble Lahore High Court, Lahore in case reported as ‘M/s D.S. Textile Mills Limited Vs.

Federation of Pakistan and others' (PLD 2016 Lahore 355) and it was held that license fee is architecturally different, as it is a fee charged to permit or allow a person to operate within regulatory scheme designed to protect and improve public welfare; while 'fee' had a micro objective of extending services to an identified person; license fee had a more micro object and was charged to meet the administrative costs of maintaining a regulatory scheme. It was further observed that such distinction was constitutionally recognized under Article 73(3)(a) of the Constitution and 'fee' and 'license fee' were held to be two distinct sub-species of charges having their own peculiar characteristics. The Hon'ble Court repelled the argument that in the absence of service in return, license fee amounted to a tax and observed that license fee, in essence, was a regulatory fee and not a user fee and did not require a service rendered in return. In view of the judgment of the Hon'ble Lahore High Court, there is no requirement of quid pro quo for levy of license fee.

9. Clause 4.2.3 of the license agreement and Regulation 23 (7) of Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 envisage levy of 2% Late Payment Additional Fee per month. Under clause 4.1.3, in addition to fee, licensee has to pay all fees required to be paid under the Act, Rules and Regulations.

10. Learned counsel for the appellant has vehemently argued that following the principle of *ejusdem generis*, the levy of payment of additional fee is confined to annual fee and other controversies referred to in 3.3.1 & 3.4.1 inasmuch as clause 4.2 provides general

conditions concerning fee and 4.2.1. provides payment of annual fee and other contributions however, does not mention Spectrum Fee. The doctrine of *ejusdem generis* was revisited and propounded by the Hon'ble Supreme Court of Pakistan in case reported as 'Mercantile Traders Pvt. Ltd. and another Vs. State Bank of Pakistan (2002 SCMR 250) in the following terms: -

*“Doctrine of ejusdem generis would apply when the following conditions exist:-*

- (1) The statute contains an enumeration by specific words;*
- (2) The members of the enumeration constitute a class;*
- (3) The class is not exhausted by the enumeration;*
- (4) A general term follows the enumeration; and*
- (5) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.*

*Doctrine of ejusdem generis is only a rule of construction and not of substantive law. It provides a mode of interpretation, which is always subject to the intention of the Act. It does not apply if the intention of the Act suggests to the contrary”*

Firstly, the doctrine of *ejusdem generis* is a rule of construction and not substantive law secondly; it is confined to the statute and not a contractual document thirdly; bare perusal of clause 4.2.3 shows that reference to late payment of fee is not confined only to fee and other charges, but all kinds of fees provided in Article 4 of the license agreement. Moreover, as mentioned above, Regulation 23(7) of Regulations, 2006 also provide for payment of Late Payment Additional Fee @ 2% per month and the licensee is required to pay all kinds of fees as provided in the Act, Rules and Regulations.

11. Learned counsels for the appellant have also argued that levy of Late Payment Additional Fee, as provided in the license agreement and

Regulations of 2006, is a penalty hence not sustainable in light of Section 74 of Contract Act. The nature of Late Payment Additional Fee has been explained in case reported as 'The Adoni Ginning Factory and Others V. The Secretary, Andhra Pradesh Electricity Board, Hyderabad & Others' & 'Bajrang Jute Mills Ltd. Vs. State Electricity Board Andhra Pradesh and Others (AIR 1979 Supreme Court 1511) in the following terms: -

*“4. The very rate of levy of surcharge stipulated in the agreement, namely, one percent per mensem i.e. twelve percent per annum, is a clear indication that the levy is not meant to be a penalty but is a provision for interest by way of compensation for delayed payment. There is, therefore, no question of relieving the appellants against any penalty”*

12. It was also argued that since default on part of appellant in payment of the Initial Spectrum Fee was not willful therefore the appellant is not required to pay Late Payment Additional Fee. In this behalf, it has been observed above that Late Payment Additional Fee is not a penalty, but additional fee by way of compensation. Secondly, license agreement as well as Regulation 23(7) of Regulations, 2006, does not provide that levy of Late Payment Additional Fee shall only be in case of willful default rather requires the payment of same, where there is late payment of fee. In this behalf, in a case reported as 'Assistant Collector, Customs & Central Excise, Division-III, Sukkhar Vs. M/s Mari Gas Company Limited' (2003 PTD 818), the Division Bench of Hon'ble Karachi High Court observed that there is a distinction between the phrase 'shall pay' and 'shall be liable to pay', the former makes it mandatory on the person to pay the amount while

the use of the words 'he shall be liable to pay' gives a discretion to the concerned functionary of the Department to impose additional tax or waive the same totally. In the instant case, the words used in the license agreement are 'late payment of fee shall incur an additional fee ....'. The term of the license agreement is mandatory and does not leave any discretion to PTA not to impose additional fee in case of Late Payment of Additional Fee. Similarly, Regulation 23(7) of Regulations, 2006 provides that late payment of fee shall incur additional fee calculated @ 2% per month on the outstanding amount.

13. Learned counsel for the appellant has also argued that in light of letter dated 30.08.2011 issued by Ministry of Information Technology, the appellant could make payment in installments and this letter has been acknowledged before Hon'ble Supreme Court of Pakistan as well as this Court. In one of the cases before the August Apex Court (CP No.1258-2012) & (CP No.1260-2012), the August Supreme Court, vide order dated 10.08.2012, disposed of the petitions filed by the appellant with the observations that where a directive has been issued by the Ministry and as per contentions of the learned counsel for the appellant, Regulatory Authority is bound thereof let the Ministry, which is at the peak of the hierarchy and enforce it. Let it also resolve controversy whether it does or does not concern the petitioner. The said petition was disposed of, as the petitioners (including the appellant) did not press the same in order to approach Ministry for redressal of the grievance.



14. Admittedly, the appellant never approached the Ministry, however relied upon above mentioned letter of the Ministry. Moreover, a petition filed before this Court under Article 199 of the Constitution (W.P. No.1585-2012), was disposed of with the direction to the petitioners to make payments in accordance with policy directive to respondent No.2 within a period of 30-days. There is no policy directive requiring the appellant to pay the balance spectrum fee in installments. Learned counsel for the Ministry of Information Technology specifically submitted that no such policy directive was issued. Even-otherwise, the letter in question is addressed to PTA and requires it to formulate an installment plan which was never done therefore Spectrum Fee was to be paid in accordance with terms of license agreement. In case reported as 'Pak Telecom Mobile Limited Vs. PTA (PLD 2014 SC 478), the Hon'ble Supreme Court held that policy directives issued by Federal Government under section 8 of the Act did not have a binding effect to compel PTA to modify the terms of existing license.

15. It was also argued by the appellant that since the Late Payment Additional Fee is in the nature of penalty therefore under section 23 of the Act, only the levy of Rs.350 million can be made by way of penalty. As observed above, the Late Payment Additional Fee is not a penalty but rather additional fee by way of compensation therefore section 23 *ibid* is not attracted.

16. In so far as the nature of obligation viz-a-viz the payment of Late Payment Additional Fee is concerned, the same was held to be payable

since part of contract between the parties by this Court in case ‘Great Bear International Services Pvt. Ltd. Vs. Pakistan Telecommunication Authority’ (FAO No.33-2012) vide judgment dated 29.05.2015 in the following terms;-

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 licence, and consequently the Regulations are not relevant in the instant case. The late payment fee is, therefore, liable to be paid by the appellant”*

17. Similar view was taken by this Court in case titled ‘Telecard Limited Vs. Pakistan Telecommunication Authority’ (FAO No.32-2012) & (FAO No.51-2012) vide judgment dated 24.05.2015 in the following terms: -

“8. *The question before this Court is regarding the legality of imposing upon the appellant “Late Payment Additional Fee” at the rate of 2% per month of outstanding dues. Liability to pay “Annual Radio Frequency Spectrum Fee” and “Annual Regulatory Dues” is admitted and the learned counsel at the very outset has stated that the said fees have already been paid. The question is, therefore, essentially restricted to the late payment fee. The Act of 1996 has established the respondent authority. Chapter-II relates to licence; Section 21 provides that the issuance of licence under the Act of 1996 shall exclusively vest in the respondent authority. Sub-section (4) of Section 21 specifies as to what terms and conditions may be included in the licence. Sub-section (a) & (b) of Section 21(4) are reproduced as follows.-*

**“21. Exclusive power of the Authority to grant licenses.-**

(4) Every licence granted under this Act may, inter alia, contain-

- (a) conditions requiring the licensee to adhere to the provisions of this Act and the rules and regulations made thereunder;
- (b) conditions requiring the licensee to pay the fees for grant or renewal of the licence;”

9. *From the above it is obvious that the respondent authority is conferred with the power to impose conditions requiring the licensee to pay fee for grant or renewal of licence. Moreover, the respondent authority has the power to include clauses in the licence whereby terms and conditions may be imposed requiring the licensee to adhere to the provision of the Act of 1996 and the Rules made there under. The terms and conditions which may be included in the license are not restricted to the clauses which are enumerated in clause 'a' to 'n' of sub Section 4 of Section 21. The expression "inter alia" used in subsection 4 of Section 21 makes it obvious that the legislature intended to keep the realm of terms and conditions, which may be included in a license as expansive i.e. beyond the clauses enumerated in subsection 4 of Section 21. The list provided in subsection 4 of Section 21 is not exhaustive. The terms and conditions of a license are essentially of a contractual nature. At the time of issuance of the license, the appellant obviously was aware of the terms and conditions expressly mentioned therein. The acceptance of the express terms and conditions becomes binding on the parties to a license. The licensee enters into a binding contractual relationship after it accepts the license and enjoys the benefits there under. Clause 4.2.3 relating to payment of late payment additional fee in both the licenses issued to and accepted by the appellant is not in dispute. The appellant is bound by the said clause. The arguments of the learned counsel relating to Regulation 23(7) of the Pakistan Telecommunication Authority (Functions and Powers) Regulation 2006 are misconceived and irrelevant in the instant appeals. The contentions may have been relevant if the respective licenses had not included clause 4.2.3. There is also no force in the argument that the said clause is void. The "late payment additional fee", as held in the impugned orders, is liable to be paid pursuant to clause 4.2.3 of the respective licenses rather than resorting to Regulation 23(7) of the Pakistan Telecommunication Authority (Functions and Powers) Regulation 2006"*

18. In case titled as 'Pakistan Telecommunication Company Ltd. Vs. Pakistan Telecommunication Authority (FAO No.17-2015), while elucidating the concept of Late Payment Additional Fee, this Court vide judgment dated 21.09.2015 observed as follows:-

*"12. Moreover in clause 6.6 of the license, it is specifically provided that in case of default in payment of fee (included Initial Spectrum Fee) Late Payment Additional Fee (LPAF) at the rate of 2% shall be attracted. In this behalf, the Hon'ble Supreme Court of Pakistan in case titled "Pakcom Limited Versus Federation Of Pakistan" reported as (PLD 2011 SC 44) has held that the licensee is bound by the terms of the license and no exception can be taken thereto, subsequently. It was further observed in the referred judgement that where all the terms and conditions of the contract have been accepted by the parties with free consent without coercion or undue influence, fraud or misrepresentation the liability under the same cannot be avoided on the ground of mistake of fact or law. Clause 6.6 was all along in the knowledge of the appellant and at this stage no exception thereto can be taken on the premises with the term of Late Payment Additional Fee (LPAF) is in the form of a penalty. This Court in FAO 32/2012 titled Telecard Ltd. Vs Pakistan Telecommunication Authority held as follows:*

*“From the above it is obvious that the respondent authority is conferred with the power to impose conditions requiring the licensee to pay fee for grant or renewal of license. Moreover, the respondent authority has the power to include clauses in the license whereby terms and conditions may be imposed requiring the licensee to adhere to the provision of the Act of 1996 and the Rules made there under. The terms and conditions which may be included in the license are not restricted to the clauses which are enumerated in clause ‘a’ to ‘n’ of sub Section 4 of Section 21. The expression ‘inter alia’ used in subsection 4 of Section 21 makes it obvious that the legislature intended to keep the realm of terms and conditions, which may be included in a license as expansive i.e. beyond the clauses enumerated in subsection 4 of Section 21. The list provided in subsection 4 of Section 21 is not exhaustive. The terms and conditions of a license are essentially of a contractual nature. At the time of issuance of the license, the appellant obviously was aware of the terms and conditions expressly mentioned therein. The acceptance of the express terms and conditions becomes binding on the parties to a license. The licensee enters into a binding contractual relationship after it accepts the license and enjoys the benefits there under. Clause 4.2.3 relating to payment of late payment additional fee in both the licenses issued to and accepted by the appellant is not in dispute. The appellant is bound by the said clause. The arguments of the learned counsel relating to Regulation 23(7) of the Pakistan Telecommunication Authority (Functions and Powers) Regulation 2006 are misconceived and irrelevant in the instant appeals. The contentions may have been relevant if the respective licenses had not included clause 4.2.3. There is also no force in the argument that the said clause is void. The “late payment additional fee”, as held in the impugned orders, is liable to be paid pursuant to clause 4.2.3 of the respective licenses rather than resorting to Regulation 23(7) of the Pakistan Telecommunication Authority (Functions and Powers) Regulation 2006.*

13. *Since the provision of Late Payment Additional Fee (LPAF) is specifically provided in the license, therefore, the appellant is bound to pay the same. The impugned Order is not contrary to facts and law and therefore no exception to the same can be taken”*

19. In view of above, since the Late Payment Additional Fee is a part of license agreement executed by the appellant and admittedly, the appellant did not make payment of Initial Spectrum Fee as required under the referred license, hence clause 4.2.3 as well as clause 4.1.3 of the license agreement is attracted requiring the payment of Late Payment

Additional Fee @ 2% per month. This being the position, there is no factual or legal infirmity in the impugned order.

20. For the reasons set out above, the instant appeal is without merits and is accordingly dismissed.

**(AAMER FAROOQ)**  
**JUDGE**

Announced in Open Court on \_\_\_\_\_

**JUDGE**

Zawar