

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No. 1580 of 2014

Pakistan Telecommunication Company Limited

Vs

Federation of Pakistan, etc

Petitioner's by : Barrister Zainab Janjua, Advocate.
M/s Sherdil Khan and Raheel Zafa, Manager
(Legal), PTCL.

Respondent's by : Syed Hasnain Ibrahim Kazmi, Advocate.

Date of hearing : 21.08.2020.

LUBNA SALEEM PERVEZ J. Through present petition the petitioner has assailed the show cause notice dated 01.01.2014, and the order dated 28.03.2014, issued by respondent No. 3, whereby fine has been imposed on the petitioner. The petitioner challenged the show cause notice (*hereinafter referred to as SCN*) as well as order on the ground of being issued without jurisdiction and lawful authority and prayed to declare the same as void, illegal and ultra vires of law and constitution. The petitioner further challenged the vires of regulation 20 of PEMRA Regulations being ultra vires of the PEMRA Ordinance and the Constitution.

2. Brief facts of the case are that the petitioner, a company established under Pakistan Telecommunication (Re-organization Act), 1996, promulgated under Companies Ordinance, 1984, has been granted license by the respondent No. 2 (*hereinafter referred to as "Authority"*) under section 19 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002, (*hereinafter referred to as "Ordinance, 2002"*) to establish and operate Internet Protocol Television (IPTV) for channel distribution services. Respondent No.3/General Manager of the Authority issued show cause notice dated January, 1, 2014, to the petitioner for imposition of penalty u/s 30 of Ordinance, 2002, for relaying illegal/un-authorized STV channels through its IPTV network in violation of section 2(ka) read with

sections 9 and 13 of the Ordinance, 2002, as amended by PEMRA Amendment Act, 2007, with further intimation that the equipment of CTV network shall be seized u/s 29 of the Ordinance, 2002, in case of failure to comply with the directives of the Authority. The said show cause notice was duly responded by the petitioner, vide their reply dated 15.01.2014. Being not satisfied with the reply of the petitioner, Respondent No. 3 imposed penalty of Rs.100,000/- vide order No. RGM/ISB/07(26)/2009/7807, dated 28.03.2014, (incorrectly mentioned as 28.04.2014, in the memo of petition). Hence, present petition challenging the show cause notice dated 01.01.2014, and order 28.03.2014, having been issued by authority having no jurisdiction in terms of section 29 read with section 13 of the Ordinance, 2002, and under regulation 20 (2) of PEMRA Regulations, 2011 (*hereinafter referred to as "Regulations, 2011"*)

3. Learned counsel for the petitioner submitted that the petitioner has invested huge amount of money and developed infrastructure to digitalize their system as per PEMRA Policy; that Authority has targeted the petitioner despite the fact that Analogue Cable Television Providers are distributing illegal channels without any legal rights in Pakistan; that the Authority has issued warnings letters to all the licensees under Ordinance, 2002, to stop relaying unauthorized and illegal channels, however, the petitioner prior to the receipt of such warnings were operating within the legal bounds prescribed under Ordinance, Rules and Regulations introduced from time to time; that the show cause notice dated 01.01.2014, has been illegally and unlawfully issued as the petitioner was duly complying with the terms of license; that the SCN dated 01.01.2014, and order dated 28.03.2014, is illegal and without lawful jurisdiction; that Respondent No. 3 was not a legally competent authority under section 29(5) of the Ordinance, 2002, as only the Authority or the Chairman has been authorized for inspection and take action against person acting in contravention of the provision of the Ordinance and the Rules made thereunder; that the powers to cancel or revoke the license of the licensee cannot be delegated; that the petitioner has not violated or breached the provision of Rule 14 of Rules, 2009, mentioned in the SCN; that no warning notice

dated 30.08.2013, was received by the petitioner as alleged by the respondent; that section 2(ka) defines “illegal operation” whereas, section 19 empowers the Authority to issue license and section 33 provides for nature of offences and consequential penalties thereof, therefore, the question of violation of the said provisions as alleged by the respondent in the SCN does not arise; that the Respondent No.3 is not empowered to revoke or cancel the license of the petitioner as under section 30 of the Ordinance, only Authority enjoys the power of revocation or suspending the license by order in writing for the reasons mentioned therein; that ambiguous mention of section 29 in the SCN by the Respondent No.3, is not permissible as no authorization by the Authority has been communicated to the petitioner whereby, he has been empowered to authorized inspection u/s 29; that according to section 13 the Authority by order in writing can delegate its power, responsibilities, functions to the Chairman or Member or the Member of its Staff, etc but the subject to the conditions under Rules, 2009, therefore, clause 20(2) of the Regulation, 2011, is ultra vires of the Ordinance, 2002; that Regulations cannot override the provisions of statute i.e. Ordinance, 2002. The learned counsel thus prayed for acceptance of the writ and consequential relief.

4. On the other hand learned counsel for respondents vehemently controverted the arguments made on behalf of petitioner and submitted that the petition is not maintainable as the vires of SCN cannot be challenged under Article 199 of the Constitution; that section 30-A of the Ordinance, 2002, provides alternate remedy of appeal against the order of the Authority which the petitioner has by passed hence, the petition is not maintainable on this score also; that since, the statutory period of thirty days provided, under section 30-A of the Ordinance, 2002, was lapsed after passing of the order, therefore, the petitioner has filed the present petition, whereas the forum of the High Court cannot be used as an alternate remedy against appeal thus the present petition is not maintainable; on the merits of the case, he submitted that Section 4(3) of the Ordinance, 2002, grants power to the Authority to make Regulations for carrying out the purpose of the Ordinance as such the respondent No. 3 being an Authorized Officer within the meaning of

section 2(c) of the Rules, 2009, read with Regulation 2(c) of Regulations, 2011, is competent to issue SCN and passing the orders under the Ordinance, 2002; that Respondent No. 3 being an Authorized Officer in terms of regulation 2(c) of Regulations, 2011, can issue and proceed with the SCN as per law under regulation 16 (4) of Regulations, 2011, read with section 29(6) of the Ordinance, 2002; that the allegation of the petitioner that regulation 20 of Regulations, 2011, is ultra vires the Ordinance, 2002, is misconceived as the Rules and Regulations have been framed u/s 4 (3) and section 13 of the Ordinance, 2002; that powers are delegated to the Authorized Officers under the specific provision of the regulations, as such, no further instrument of the delegation is required; that the petitioner has been continuously violating the terms and conditions of the license by relaying those channels for which the petitioner has no landing rights; that despite warning, the petitioner did not stop violating the law and continued to relay the unauthorized foreign channels; that various surprise inspections have been conducted at the premises of the petitioner and he was found distributing illegal STV channels on the CTV network of the petitioner, thus indulged in illegal operation of channels as defined under section 2(ka) of the Ordinance, 2002; that due to breach of terms and conditions of license and violation of Ordinance, 2002, Rules, 2009 and Regulations, 2011, the penalty of Rs. 100,000/- was imposed through order dated 28.03.2014. Learned counsel prayed for dismissal of instant writ petition.

5. Arguments heard. Record perused.

6. The main grievance of the petitioner is that the SCN issued by the Respondent No. 3 is illegal and unlawful as he has no authority to issue the SCN under the PEMRA Ordinance/Rules/Regulations for alleged violation of the provisions mentioned therein. Perusal of the SCN dated 01.01.2014, revealed that the same has been issued to the petitioner for violation of Rule 14 of PEMRA Rules, 2009, as it has been relaying those STV channels (mentioned in the impugned notice) distributed on CTV network for which they have not obtained license from the authority. Said Rule 14 is reproduced as under:-

“14. Proscription of a foreign broadcasting service: No foreign channel shall be distributed unless landing rights permission for such channel has been obtained from the authority.

Provided that a distribution service operator shall relay only TV channels licensed by the authority.”.

7. Perusal of Regulation 20 of the Regulations, 2011, reveals that an authorized officer is empowered to physically inspect the service station of the licensee to check any violation of the term and conditions of the license and regulation 20(2) grant powers to the regional officer in-charge to impose fine not exceeding 100,000/- rupees on the licensee for violation of law and /or terms and conditions of the license. Regulation 20 is also reproduced below:-

“20. Inspection and Operation.- (1) An authorized officer or his nominee may physically inspect a distribution service station at any time and if any violation of the Ordinance, rules, regulations or license terms and conditions is found, shall direct the operator to rectify the same within such time as may be reasonable for this purpose and may also seize the equipment being used in such violation.

(2) Where a licensee has been found involved in violation of the relevant laws, the regional officer incharge may, after hearing the licensee, impose a fine not exceeding one hundred thousand rupees:

Provided that where the officer if of the view that the violation is of severe nature, he may forward the case to the council of Complaints of the Chairman through proper channel, along with appropriate recommendation.

(3) A licensee shall be served a prior show cause notice for violation before seizure of equipment and equipment so seized may be returned after deposit of such fine as may be imposed:

Provided that the equipment seized for being used for illegal operation or without having a valid license shall be confiscated.

(4) The authorized officer shall have the following powers:

- i. to exercise the powers regarding inspection, search and seizure conferred under section 29 of the Ordinance;*
- ii. to request the officer of Federal Government, Provincial Governments and Local Governments including the Capital Territory Police and the Provincial Police for their assistance in discharge of its functions under the provisions of the Ordinance and the rules and regulations made thereunder;*
- iii. to file and defend Court cases and sign complaints, replies, comments including a criminal complaint under section 34 of the Ordinance for any violation of provisions of the Ordinance; and*

- iv. *to apply for issuance of warrants under section 33B of the Ordinance.*”.

8. In this regard section 29 of the Ordinance, 2002, as amended by Act, 2007, has also been perused. According to which the Authority may authorize any of its officers or its nominee to carryout inspection of the licensee’s/broadcast media or distribution service operator’s premises and the licensee shall provide all assistance to such authorized officer during inspection. Whereas, section 29(5) of the Ordinance, 2002, provides that the Authority or the Chairman are empowered to seize broadcast or distribute service equipment or seal the premises of the licensee if found any contravention and violation of law by providing the licensee an opportunity of hearing after issuing a show cause notice of the alleged violation. Section 29 of the Ordinance, 2002, for ready reference is also reproduced below:-

“29. Power to authorize inspection (1) *The Authority may authorize any of its officers or its nominees to enter the premises of a broadcast media or distribution service operator for purposes of inspection.*

(2) *A broadcast media station or distribution service premises shall, at all reasonable times, be open to inspection by an authorized officer under sub-section (1) and the licensee shall provide such officer with every assistance and facility in performing his duties.*

(3) *The authorized officer shall, within forty-eight hours of the inspection, submit his inspection report to the Authority.*

(4) *The Authority may authorize any of its officers to undertake investigation, in the manner it may prescribe, in any matter with regard to its functions and to seek any specific information, from any person, which the Authority may deem useful in order to enable it to determine and dispose of such matter.*

(5) *The Authority or as the case may be the Chairman, after issuing show cause notice to broadcast media or distribution service may seize its broadcast or distribution service equipment, or seal the premises, which is being used in contravention of the provisions of this Ordinance or the rules made thereunder or any other law:*

Provided that the equipment shall be returned to the holder of a valid licence after imposing on him such penalty as the Authority may determine.

(6) *The Authority may, after the licensee has been, given reasonable opportunity to show cause, impose fine up to one million rupees on a licensee who contravenes any of the provisions of this Ordinance or the rules or regulations made thereunder.”.*

9. The case of the petitioner is that, in view of the provision reproduced above the respondent No. 3, unless authorized through special or general order by the Authority, cannot initiate penal proceedings under the Ordinance, rules or

regulations against the petitioner. Learned counsel relied on provisions of section 13 of the Ordinance, 2002, which provide for delegation of any of its powers, responsibilities or functions by the Authority for the purposes of carrying out the object of the Ordinance. Section 13 of the Ordinance, 2002, is also reproduced as under:-

“13. Delegation.- The Authority may, by general or special order, delegate to the Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee of the Authority any of its powers, responsibilities or functions under this Ordinance subject to such conditions as it may by rules prescribe:

Provided that the delegation of such power shall not include the power to grant, revoke or cancel a broadcast media or distribution service license except Cable TV.”.

10. The authorized officer has been defined vide rule 2(c) as well as regulation 2(c) which is reproduced as under:-

“Rule 2(c) of Rules, 2009:

2(c) "authorized officer" means the Chairman or a member, or any member of staff, expert, consultant, adviser, other officer or employee of the Authority to whom the Authority has by general or special order delegated its powers, responsibilities or functions under the Ordinance for carrying out the purposes of the Ordinance, rules or regulations made thereunder;

Regulation 2(c) of the Regulations, 2011:

2(c) "authorized officer" means the Chairman, Regional General Manager, Officer in-charge of the respective region or any other officer authorized by the Chairman or the Authority for carrying out the purpose of these regulations.”.

11. Plain reading of the definition provided under the Rules, 2009 clearly shows that any officer would become an authorized officer when he has been specifically authorized by the Authority for the purposes of carrying out the purposes of the Ordinance, rules or regulations. It has also been noted that any officer of the Authority would be the authorized officer within the meaning of regulation 2(c) of Regulations, 2011, if authorized by the Chairman or the Authority. Thus Chairman or a member, or any member of staff, expert, consultant, adviser, other officer or employee of the Authority cannot claim himself as an authorized officer unless authorized through special or general order in writing delegating powers, responsibilities and functions by the Authority under section 13 of the Ordinance,

2002. In the instant case, the SCN has been issued by the Regional Manager, however, there is no mention of the delegation of powers to him for the purposes of initiating penal proceedings against the petitioner. Nor the learned counsel for the respondent assisted by the representative of the respondent could produce before this Court any special order or general office order or memorandum issued in terms of section 13, whereby, powers, functions and responsibilities have been delegated to its officer and staff duly authorizing them to carry out the object of the Ordinance, rules and regulations made there under. Therefore, I am of the view that the Regional General Manager/Respondent No. 3, since could not show any general or special order in writing, whereby, he is authorized to proceed under Regulation 20 of the Regulations, 2011, thus, cannot assume jurisdiction to initiate penal proceedings against the petitioner through impugned Show Cause Notice or impose penalty under Regulation 20(2) of the Regulations, 2011.

12. Learned counsel for the petitioner challenged the vires of Regulation 20 of the Regulations, 2011, on the ground of being inconsistent with the provisions of Ordinance, 2002. I have carefully gone through the law as well as rules and regulations and find no conflict between them. The Ordinance, 2002, read with Amendment Act, 2007, is a special law promulgated for the purposes of regulating the electronic media in Pakistan which contains a comprehensive procedure and a mechanism for regulating the operations of broadcast and distributions, and to implement its objects and rules, vide section 39 and through section 4 *ibid* regulations have also been framed. Moreover, it has now been established principle that the rules and regulations are subservient to parent law and in case of any inconsistency, the parent statute would prevail. Reliance in this regard is placed on the judgment of Hon'ble Supreme Court re: ***M/s Mehraj Flour Mills v. Provincial Government (2001 SCMR 1806)*** wherein it has been held that:-

"12. There is no cavil with the proposition that the rule shall always be consistent with the Act and no rule shall militate or render the provisions of the Act ineffective. The test of consistency is whether the provisions of the Act and that of rules can stand together. Main object of rules is to implement the provisions of the Act and in case of conflict between them the rule must give way to the provisions of the Act. In any case, the rules shall not be repugnant to the enactment under which they are made."

13. The maintainability of the petition has been challenged by the learned counsel for the respondent by referring section 30-A of the Ordinance, 2002, which provides for forum of appeal before the High Court against the orders of the Authority. In this regard I am of the opinion that since, the SCN and the impugned order have been issued by an officer having no jurisdiction to proceed without assuming powers as an authorized officer through special or general order by the competent authority i.e. the Authority, hence the very notice is *void ab initio* and has been issued without lawful authority. The law has been settled now that the jurisdiction of the High Court under Article 199 of the Constitution can be invoked where the action is without lawful authority and jurisdiction. It has been held by the Hon'ble Supreme Court re: ***Mughal-E-Azam Banquet Complex v. Federation of Pakistan (2011 PTD 2260)*** that:-

"7. Petitioner, however, can invoke the constitutional jurisdiction of this Court, if the Show-Cause Notice is not issued by a competent authority or the liability in the Show Cause Notice is palpably unlawful and without jurisdiction. This is not so in the present case. Show-Cause Notice is admittedly issued by a competent authority and its contents do not prima facie reveal that the liability is ultra vires the law. In fact the allegations raised in the Show-Cause Notices requires factual inquiry in order to determine whether the petitioner renders services as Caterers."

14. For the foregoing discussion, instant petition is allowed by holding that the Show Cause Notice followed by impugned order is without lawful jurisdiction and *coram non judice*.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on this 14th day of September, 2020.

JUDGE

M. JUNAIDUSMAN

Approved for reporting.