

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI**

Civil Appeal No.11 of 2022

(On appeal against judgment dated 13.08.2021
passed by High Court of Sindh, Karachi in
Constitution Petition No.D-2680 of 2020.)

Pakistan Electronic Media Regulatory Authority (PEMRA), Islamabad ... **Appellant**

vs

Pakistan Broadcasters Association and another ... **Respondents**

For the Appellant : Mr. Ahmed Pervaiz, ASC
Ch. Akhtar Ali, AOR
Mr. Tahir Farooq Tarar, Head Legal,
PEMRA
Mr. Mohsin Hamid Dogar, Director
Regulation, PEMRA

For Respondent No.1 : Mr. Faisal Siddiqi, ASC

Attendance for Media Channels : Mian Aqeel Afzal, Express News
Mr. Sajjad Haider, Capital T.V.
Mr. Ibrar Istori, G.T.V.
Mr. Abid Raza, Roze T.V.
Mr. Afzal Javed, Aaj T.V.
Mr. Abid Abbasi, PNN

Date of Hearing : 10.11.2022

JUDGMENT

Munib Akhtar, J.: This appeal arises in relation to the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("Ordinance"). The purpose of the Ordinance, as per the preamble, is "to provide for the development of electronic media in order to" achieve the objectives thereafter stated, and it creates an eponymously named regulatory authority ("Authority"). The contesting respondent is the trade body of media houses and suchlike organizations regulated under the Ordinance. They are aggrieved by a decision taken by the Authority to delegate, under s. 13 of the Ordinance, its powers under s. 30 to its Chairman. The said delegation was challenged in the High Court of

Sindh, and by means of the impugned judgment a learned Division Bench disposed of the petition in the following terms:

"19. In the wake of above discussion, we declare that the powers of the Pakistan Electronic Media Regulatory Authority vested in Section 30 of the PEMRA Ordinance 2002 could not be delegated to the Chairman or any other official of PEMRA by dint of Section 13 of PEMRA Ordinance, 2002 for suspension of Broadcast Media Licenses without framing of Rules. Henceforth, the decision of Authority to this extent conveyed vide minutes of meeting dated 24th April 2020 is also declared null and void. Consequently, all actions taken by the Chairman pursuant to the delegated powers for suspension of Broadcast Media Licenses are strike down. The petition with pending application is disposed of accordingly."

2. Being aggrieved by the said judgment, the Authority petitioned this Court for leave to appeal, which was granted in the following terms:

"We have heard the learned counsel for the petitioner and gone through the impugned judgment. We are inclined to grant leave to appeal in the matter to examine, *inter alia*, the question whether the provisions of Section 30 of the PEMRA Ordinance, 2002 ("the Ordinance") and the powers available to the authorities thereunder to delegate any of their powers, responsibilities or functions are to be interpreted in isolation of the nature of the power, function or responsibility so delegated. Further whether the learned Division Bench of the Sindh High Court erred in law in interpreting the expression, "subject to such conditions as it may by rules prescribed" employed in section [13] of the Ordinance to impose a mandatory condition for the enactment of rules for the purposes of the delegation of powers under the said section...."

At the conclusion of the hearing of the appeal a short order was made dismissing the appeal, for reasons to be stated later. Those reasons are set out below.

3. It will be convenient to first set out the relevant statutory provisions. The whole controversy essentially revolves around the correct interpretation and application of s. 13 of the Ordinance. As originally promulgated, it had provided as follows (emphasis supplied):

"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, *suspend*, revoke or cancel a broadcast licence:

Provided further that the rules made under this Ordinance shall specify use of delegated powers and shall be framed and enforced after promulgation of this Ordinance and before the notification of the establishment of the Authority".

It will be seen that the first proviso disallowed the delegation of certain powers, viz., the power to grant, suspend, revoke or cancel a broadcast licence. By an amending Act of 2007 ("2007 Act"), which made fairly extensive changes in, and to, the Ordinance, both the provisos were omitted, and replaced with the following:

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

It will be noted that the newly substituted proviso did two things. Firstly, it removed the bar against delegation of powers in relation to cable TV. We are not concerned with this aspect. What is of central importance for present purposes is that the bar against the delegation of powers in relation to "a broadcast media or distribution service licence" (which can, for present purposes, be equated with the "broadcast licence" referred to in the original proviso) now did *not* include the power to suspend such a licence as had earlier been the case. In other words, the Authority's power to suspend a licence could now be delegated in terms of s. 13. That power resided in s. 30 of the Ordinance. The said section was wholly substituted by the 2007 Act, and now provided as follows (emphasis supplied):

"30. Power to vary conditions, suspend or revoke the licence.-

(1) The Authority may revoke or *suspend* the licence of a broadcast media or distribution service by an order in writing on one or more of the following grounds, namely:-

(a) the licensee has failed to pay the licence fee, annual renewal fee or any other charges including fine, if any;

(b) the licensee has contravened any provision of this Ordinance or rules or regulations made thereunder:

Provided that in the case of revocation of a licence of a broadcast media an opinion to this effect shall also be obtained from the Council of Complaints;

(c) the licensee has failed to comply with any condition of the licence; and

(d) where the licensee is a company, and its shareholders have transferred a majority of the shares in the issued or paid up capital of the company or if control of the company is otherwise transferred to persons not being the original shareholders of the company at the time of grant of licence, without written permission of the Authority.

(2) The Authority may vary any of the terms and conditions of the licence where it deems that such variation is in the public interest.

(3) Except for reason of necessity in the public interest a licence shall not be varied, suspended or revoked under sub-section (1)

or (2) unless the licensee has been given reasonable notice to show cause and a personal hearing.

4. It will be seen that s. 30 allows the Authority, subject to whatever is set out therein, to, inter alia, revoke or suspend the licence of a broadcast media or distribution service. The power to revoke could not be delegated under s. 13: that was always the position and remained so. However, the power to suspend could now be delegated, in terms of the substituted proviso inserted by the 2007 Act. The Authority purported to do just that at its 156th meeting held on 24.04.2020. That delegation, to the Chairman of the Authority, triggered the challenge, under Article 199 of the Constitution, by the contesting respondent before the learned High Court. As noted, the learned High Court gave relief in terms of para 19 of its judgment, set out above. That is the judgment appealed against to this Court by the Authority.

5. Learned counsel for the appellant-Authority submitted that the learned High Court had erred materially in its interpretation of the above noted provisions, and in particular of s. 13. It was submitted that the power of delegation was cast in broad terms, which had been faithfully complied with by the Authority in delegating the power to the Chairman as regards suspension of licence. It was submitted that the learned High Court had introduced an extraneous element into the power of delegation, i.e., the requirement that appropriate rules be framed. That however was a misreading of the section. It was prayed that the appeal be allowed. Learned counsel for the contesting respondent on the other hand strongly defended the impugned judgment. It was submitted that the correct approach had been taken by the learned High Court and the relief granted was unexceptionable. It was prayed that the appeal be dismissed.

6. We begin by considering s. 13 as it stood originally. The first proviso had expressly disallowed delegation of four kinds of powers: the grant, suspension, revocation or cancellation of a broadcast licence. The amendments of 2007 reduced the disallowed powers to three, the power of suspension being excluded. In other words, the power to suspend the licence can now be delegated. That power is contained in s. 30 which (as substituted) has also been reproduced.

7. Considered analytically, s. 13 can be regarded as having three "parts", with the proviso as an (important) tailpiece. Firstly, and most obviously, the section states that the power of delegation is discretionary. The exercise of the power can be in terms general or

special. Secondly, it identifies to whom, and of what, the delegation can be made. Here, the section has, *prima facie*, been cast in broad terms. This “part” can be regarded as having two aspects. Any power, responsibility or function of the Authority can be delegated. And such delegation can be to anyone, whether he is the “Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee”. Thirdly, the section provides that the Authority may subject any delegation to conditions, which are to be provided for in the rules. The power to make rules, “to carry out the purposes of this Ordinance”, is conferred on the Authority by s. 39. It is however subject to the approval of the Federal Government. Finally, the proviso identifies what cannot be delegated. Since the position adopted by learned counsel for the Authority was that the section was to be read literally the three “parts” were, in effect, to be applied disjunctively. This would mean, in the case of the power of suspension, that it could be delegated by general or special order; that it could be delegated to any of the persons identified in the section; and that the Authority might (or might not) subject the delegation to any conditions. It was put to learned counsel during the hearing that this would mean that potentially the power of suspension could, e.g., be delegated to the junior most officer or employee of the Authority or even to an outsider such as an expert, consultant or adviser. That would, it was queried, be a rather startling result. To this learned counsel, with respect, could not come up with a convincing reply consistently with his position that the section had to be applied and read simply as it stood. That, in our view, was not a defensible position.

8. Having considered the point, in our view, and in line with settled propositions of law, the discretion conferred on the Authority by s. 13 has to be understood and applied only in a properly structured manner. That structuring requires that the literal approach, which would regard the three “parts” of the section as essentially self-contained “units”, is to be eschewed. The section has to be read as a whole and the three “parts” can only be regarded as, and applied, as an interlocking whole. Each “part” acts on, and interacts with, the others. It is only in this way that the section can function properly and in a lawful manner. And, in carrying out this exercise in the specific context of the power of suspension, the proviso also is to be taken into account.

9. The starting point for the exercise has to be the second “part”. As noted above, it can be regarded as having two “elements”: to whom the delegation can be made and what it is that is to be delegated. It is the second “element” that must constitute the first step, i.e., the Authority

has to properly identify the power, responsibility or function that is to be delegated. Now, the powers, responsibilities and functions of the Authority are varied and manifestly of differing natures and importance. Thus, s. 4(1) casts the functions of the Authority in broad and general terms. Some of the matters which come within the scope of s. 13 may relate entirely to its internal functioning while others may involve the exercise of powers in relation to third parties, including especially the licence-holders. It is obvious that, when viewed from the perspective of possible delegation, they cannot all be lumped together and treated essentially in the same terms. Thus, the significance of what is to be done in terms of the power, responsibility or function being considered for delegation, in the context of its exercise and its impact on those affected by it are some (though by no means all) of the aspects that have to be kept in mind when deciding whether there is to be a delegation at all. This treatment leads naturally to a meaningful differentiation between not just the three categories identified in s. 13 (i.e., powers, responsibilities and functions) but also within each category itself. In our view, this differentiation is of the essence of the power of delegation. In the context of s. 13, the Authority must in a sense act as a sieve and "scale" its powers, responsibilities and functions in order of importance. The power of delegation cannot be properly exercised without such an exercise being carried out, or at the very least there being an awareness of the same when the decision is being taken whether to delegate or not. Indeed, this aspect goes to the very root of the matter, and any purported delegation absent such consideration would be unlawful. This leads naturally to the next conclusion. The more important the nature of the power, responsibility or function (i.e., the higher up it is on the "scale") the higher also in the hierarchy must be the person to whom the delegation can be made and the manner in which it is made (i.e., by general or special order).

10. That does not, however, conclude the matter. For, there is the "third" part that must also be taken into consideration. At first sight it appears to confer unfettered discretion on the Authority, which is that it may (or may not) impose conditions on the delegation, as it may will. This cannot be so. This "discretion" must also be understood contextually and applied structurally. It cannot be read literally and in the open-ended and disjunctive manner urged by learned counsel for the Authority. It is, rather, an integral adjunct to the rest of the section, i.e., the first two "parts". Identifying the power, responsibility or function to be delegated in the manner just described influences and affects both the identification of the person to whom it can be, and the

manner in which it is to be, delegated. In like manner, this identification must also influence and affect the question whether any conditions are to be imposed in terms of the third "part". In other words, the Authority cannot simply choose to apply or ignore this "part" as it wishes, i.e., as being something entirely within its "discretion". That would be to misunderstand and misapply the power conferred by s. 13 and result in an unlawful delegation. If the identification of the importance of the powers, responsibilities or functions being considered for delegation is to be regarded in terms of a "scale", then the less important matters would obviously be clustered at the bottom and the more important ones at the top. In parallel manner the question of whether conditions are to be imposed in terms of the third "part" can be understood in terms of "thresholds". The more important the power, responsibility or function being considered for delegation, the higher must be the "threshold" for the Authority in deciding *not* to impose any conditions and vice-versa. Put differently, the scope of the "discretion" conferred by the third "part" of s. 13 to not impose any conditions must narrow as one moves up the "scale" of importance of the power, responsibility or function, such that for the most important of such matters, the threshold becomes so high that the "discretion", in effect, vanishes.

11. This brings us to the power of suspension. It is clearly one of the most important powers conferred on the Authority. Its importance is highlighted by the fact already noted, that originally it was wholly beyond the power of delegation. It was only when s. 13 was amended in 2007 that it fell within its scope. That s. 30 lays out in the statute itself the procedure and scope for its exercise also attests to its importance in the scheme of things. In the "scale" of importance it is quite obviously in the very top tier. To this extent, its delegation to the Chairman (and to him alone) could be regarded as consistent with the manner in which s. 13 can be lawfully applied. However, even here there must be a proper application of mind by the Authority as to whether this power ought to be delegated at all. Simply because the power to delegate exists and the proposed delegatee is the Chairman is not enough. The impugned decision taken by the Authority at its 156th meeting of 24.04.2020 in our view fell short of the requirements of law as identified herein above. The minutes of the meeting (at agenda item No. 5) refer to earlier delegations of power to the Chairman and then proceed, rather baldly, to state that the delegation at hand "would enable the Chairman to take prompt action against the Broadcast media that violates the provisions of PEMRA Laws". This in itself will

not do. The power of suspension, especially in the context of the provision of subsection (3) of s. 30 whereby such power can be exercised without prior notice or hearing “for reason of necessity in the public interest” is simply too powerful and broad an instrument to be entrusted to anyone other than where the statute places it (i.e., in the hands of the Authority itself) on a ground so flimsy as the desire to take “prompt action”. In the context of a power to suspend a licence without prior notice or hearing, both “public interest” and “necessity” can be rather malleable terms either of which can be bent hither or thither. In *Richardson v Mellish* [1824] EngR 715, (1824) 2 Bing 229, it was famously said of “public policy” that “it is a very unruly horse, and when you get astride, you never know where it will carry you”. As with public policy, so with public interest and necessity at least in the present context. And, if the power is placed in the hands of an individual even if he is the Chairman there is a danger that, even with the best of intentions, the horse may become even more unruly. While metaphors can only go so far, the point is that every effort must be made to ensure that the “horse” with which the law is here concerned is kept firmly bridled. On first impression that can be best be achieved by leaving the power where the statute itself has placed it, i.e., with the Authority itself. However, this is not to say that the power cannot be delegated at all. The amendments of 2007 allow for this. But any delegation (and especially that aspect of the power which is contained in subsection (3)) must be for legally valid and sustainable reasons. We pause here to make one comment. The need or desire to take “prompt action”, even if legally sustainable, is not to be confused or equated with the “necessity” to take action, especially when such necessity can only exist in the context of public interest. A strong case must be made out and there must be very serious application of mind by the Authority for it to be satisfied that the power of suspension ought to be delegated. We were not satisfied that the delegation of this power to the Chairman, in terms and for the reason as stated in the meeting of 20.04.2020, was legally sustainable.

12. But that is not all. The Authority also failed, and this was in itself a fatal legal error, to take the “third” part into account. Even if the power of suspension is delegated to the Chairman for legally valid and sustainable reasons, the “threshold” for *not* exercising its “discretion” in relation to the imposition of conditions in relation to such delegation is so high that, as explained, it effectively vanishes. Conditions had to be imposed, and that had to be done by rules. However, no conditions were imposed. Indeed, there was no consideration at all of this aspect.

A blanket delegation was made, in near absolute terms. The actual decision to delegate did provide that the Chairman, "after exercising such powers", was to "bring such action into the notice of the Authority at its forthcoming meeting". However, this "condition", even if it could be so called (and in our view it cannot) was inconsistent with the proper understanding and application of the power of delegation, as set out herein above. In the legal sense therefore no condition was at all imposed. In our view this was an error that went to the very root of how s. 13 is to be understood and lawfully applied. The High Court was therefore right in requiring that the delegation could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules. The delegation being legally unsustainable was correctly quashed and set aside.

13. For the foregoing reasons, the appeal stood dismissed.

Judge

Judge

Judge

Islamabad, the
10th November, 2022
Naveed/*

Approved for reporting