

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench-V:

Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Shahid Waheed

Civil Appeal No.1518 of 2013

*(On appeal against judgment dated
16.8.2013 passed by the High Court of
Sindh, Karachi in C.P. No. D-2633 of 2010)*

Pakistan Electronic Media Regulatory Authority

.....Appellant(s)

Versus

Pakistan Broadcasters Association & others

....Respondent(s)

For the Appellant(s):

Mr. Ahmed Pervaiz, ASC.
(via video link from Lahore)
Tahir Tarar, H.L. (PEMRA)
Muhsin Dogar, Director (R)
Anas Farooq, L.O.
Barrister Ali Asghar, L.O.

For the Respondent(s):

Mr. Salahuddin Ahmed, ASC.
(via video link from Karachi)

For the Federation:

Ch. Amir Rehman, Addl. AGP.

Assisted by:

Muhammad Hassan Ali, Law Clerk.

Date of Hearing:

24.02.2023

JUDGMENT

Syed Mansoor Ali Shah, J.- Through the instant appeal, the appellant has challenged judgment dated 16.8.2013 passed by the High Court of Sindh, Karachi, whereby the constitutional petition filed by the respondents was allowed.

2. The brief facts of the case are that respondents No. 2 to 8, being private broadcasters owning and operating different television channels, were issued various show cause notices in 2010 by the appellant/PEMRA, demanding payment of surcharge on account of late payment of annual fee pertaining to the licences granted to the respondents by the appellant. The said surcharge claimed by the

appellant was under Regulation No. 9(5) of the PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 ("**2002 Regulations**"). The respondents challenged the vires of the said surcharge by filing a constitutional petition before the High Court. Through the impugned judgment dated 12.09.2013, the constitutional petition was allowed and the demand for payment of said surcharge under the 2002 Regulations was in effect declared to be ultra vires to the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("**Ordinance**"), and resultantly, the show cause notices demanding the same were set aside.

3. Leave to appeal was granted by this Court vide order dated 19.11.2013 in the following terms:-

"It is argued that the view set out by the learned High Court in the impugned judgment that the levy of surcharge vide Regulation 9(5) of the PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 is beyond the scope of the provisions of Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (the Ordinance, 2002) and thus *ultra vires* is not in consonance with the provisions of Section 24(5) of the Ordinance, 2002 read with Section 29-A of the Ordinance, 2002. Leave is granted to consider the above."

4. While arguing the matter, the learned counsel for the appellant took us through the scheme of the Ordinance, particularly referring to Sections 2(s), 4(3), 24(4), 24(5), 29-A, 30(1)(a) and 39 of the Ordinance. He also referred to the Pakistan Electronic Media Regulatory Authority (PEMRA) Rules, 2002 ("**2002 Rules**") and the Pakistan Electronic Media Regulatory Authority Rules, 2009 ("**2009 Rules**"), as well as to two sets of Regulations; the 2002 Regulations and the Pakistan Electronic Media Regulatory Authority (Television Broadcast Station Operations Regulations, 2012) ("**2012 Regulations**"). While referring to the above, the main plank of the arguments of the learned counsel for the appellant was that the surcharge provided under the 2002 Regulations was sanctioned by the Ordinance through Sections 29-A and 30(1)(a), being described as "other charges". While explaining the legality of the 2002 Regulations, he submitted that initially the 2002 Regulations were promulgated under the 2002 Rules made under the Ordinance, thereafter, an amendment was brought about in Section 4 of the Ordinance through the Pakistan Electronic Media Regulatory

Authority (Amendment) Act, 2007 ("**Amendment Act of 2007**"), authorizing PEMRA to make Regulations for carrying out the purposes of the Ordinance. Under the said provision, regulations were then issued for the first time in the year 2012 i.e. the 2012 Regulations. Therefore, he argued that the demand for surcharge was valid as the same had the sanctity of the law. Further, the learned Additional Attorney General for Pakistan submitted that the said surcharge could be treated as compensation for late payment of annual fee which could be charged by PEMRA under Section 19(4) of the Ordinance.

5. On the other hand, the learned counsel for the respondents supported the judgment of the High Court and vehemently reiterated that the 2002 Regulations did not have the sanction of the law; they could not have been issued under the 2002 Rules without any substantive sanction under the Ordinance; the Ordinance did not provide for any power to demand surcharge on late payment of annual fee, therefore, Regulation 9(5) of the 2002 Regulations, being beyond the scope of the Ordinance, was ultra vires to the Ordinance; and that even if Regulation 9(5) of the 2002 Regulations is taken on its face value, it only provides for late payment surcharge on licence fee or renewal fee and does not provide for any sanction for demanding surcharge with regards to late payment of annual fee.

6. We have heard the learned counsel for the parties and the learned Additional Attorney General for Pakistan, and have also examined the record with their able assistance. The question before us pertains to whether the demand of payment of surcharge under Regulation 9(5) of the 2002 Regulations, through the show cause notices issued to the respondents pertaining to the years 2004 to 2011, was valid under the law. In order to dilate upon the said question, it will have to be ascertained whether the 2002 Regulations were legally issued under the Ordinance and whether the Ordinance provides for any power to levy and recover surcharge on late payment of annual fee with or without the 2002 Regulations.

7. It is an admitted position that the Ordinance before it was amended through the Amendment Act of 2007 neither had any provision empowering PEMRA to issue regulations thereunder and nor any power to impose surcharge on account of late payment of annual fee was provided therein. By virtue of Section 39, the Ordinance only

empowered PEMRA to make rules with the approval of the Government and by notification in the official Gazette. The 2002 Rules were then promulgated under the said provision. Rule 30 of the 2002 Rules provided for the power to issue regulations and by exercising the same, the 2002 Regulations were issued by PEMRA, which, through Regulation 9(5), provided for the imposition of surcharge for 'late payment of the licence or renewal fee'. Subsequently, through the Amendment Act of 2007, Section 4 of the Ordinance was substituted and the new Section 4 provided that, by notification in the official Gazette, the Authority i.e. PEMRA¹ may make regulations and also issue determinations for carrying out the purposes of the Ordinance. Notably, the Amendment Act of 2007 was not given retroactive effect and no validation clause was provided in the Amendment Act of 2007 to validate or save the proceedings initiated or actions undertaken under the 2002 Regulations. Furthermore, no express provision to impose surcharge was provided in the Amendment Act of 2007 either. It, however, added a new provision i.e. Section 29-A into the Ordinance which caters to recovery of dues, including any other charges, as arrears of land revenue. It also substituted Section 30 of the Ordinance, which, through Section 30(1)(a), now provides that PEMRA may revoke and suspend any licence if the licensee fails to pay the licence fee, annual renewal fee or any other charges including fine, if any. The term "other charges", however, has not been defined therein.

8. Thereafter, the 2009 Rules were promulgated under the Ordinance, repealing the 2002 Rules. However, still no regulations were made under the Ordinance after the express power to make the same was added into the Ordinance through the Amendment Act of 2007, as noted above. The 2002 Regulations, made under the 2002 Rules, were still applied by PEMRA and the show cause notices, pertaining to the years 2004 to 2011, demanding payment of surcharge were issued to the respondents under Regulation 9(5) of the said 2002 Regulations. Thereafter, as admitted by the learned counsel for the appellant, the 2012 Regulations, as notified in the official Gazette, were issued under the Ordinance for the first time in the year 2012.

9. It is apparent from the above that the Ordinance before it was amended by the Amendment Act of 2007 did not provide for any

¹ See Section 2(b) of the Ordinance.

power to PEMRA to issue regulations. It only provided for the power to make rules under Section 39 of the Ordinance, which was exercised by making the 2002 Rules. Through the said 2002 Rules, without any such power to the said effect in the Ordinance, the power to make regulations was extended to PEMRA through Rule 30 of the 2002 Rules. The 2002 Regulations were then issued under said Rule 30 of the 2002 Rules. Thereafter, the Ordinance was amended through the Amendment Act of 2007 and the power to make regulations under the Ordinance was specifically added into the Ordinance by substituting Section 4 of the Ordinance. However, the Amendment Act of 2007 was not given retroactive effect and did not contain any provision validating the 2002 Regulations.² We have also noted that the amended Section 4 of the Ordinance authorized PEMRA to make regulations by notification in the official Gazette, however, the 2002 Regulations were not notified in the official Gazette, as admitted by the appellant in its para-wise comments filed before the High Court.³ Therefore, the Amendment Act of 2007 did not extend any legal cover to the 2002 Regulations. The 2002 Regulations, which were made under the 2002 Rules without any such power provided in the Ordinance, remained operative till 2012 i.e. when the 2012 Regulations were issued for the first time under the amended Ordinance. Therefore, the 2002 Regulations did not derive their power from the parent statute i.e. the Ordinance and, even after the Ordinance was amended, remained non est. They were made under Rule 30 of the 2002 Rules which was beyond the scope of the Ordinance. It is settled law that the rules made under a parent statute cannot go beyond the scope of the said statute and nor can they enlarge the scope of the statutory provisions therein. The power of rule-making is an incidental power that must follow and not run parallel to the parent statute. Furthermore, regulations must be made by the authority of the parent statute and regulations that do not draw their power from the parent statute are also ultra vires to the said parent statute.⁴ Therefore, Rule 30 of the 2002 Rules, going beyond the scope of the Ordinance, was ultra vires to the Ordinance and the 2002 Regulations were void ab

² See *Molasses Trading v. Federation of Pakistan*, 1993 SCMR 1905; *Star Textile v. Government of Sindh*, 2002 SCMR 356.

³ Para 24 of the para-wise comments.

⁴ See *Jurists Foundation v. Federal Government*, PLD 2020 SC 1; *Zarai Taraqiati Bank v. Said Rehman*, 2013 PLC (CS) 1223; *Suo Motu Case No. 11 of 2011*, PLD 2014 SC 389; *Suo Motu Case No. 13 of 2009*, PLD 2011 SC 619; *Farrukh Raza Sheikh v. The Appellate Tribunal Inland Revenue*, 2022 SCMR 1787.

initio, having been made without any lawful authority, and hence, of no legal effect.

10. Even otherwise, without prejudice to the above, the Ordinance as it stood before it was amended through the Amendment Act of 2007 and as it stands after it has been amended through the Amendment Act of 2007, there was and is no specific provision that empowers PEMRA to impose a surcharge on the late payment of annual fee. The Ordinance only contemplates the levy of a licence fee and annual fee but does not empower PEMRA to levy any surcharge over and above the annual fee.⁵ The contention of the learned counsel for the appellant that after the Ordinance was amended through the Amendment Act of 2007, the power to levy and recover surcharge was included in the term "other charges" as appearing in Sections 29-A and 30(1)(a), is without any force. It is trite law that fiscal statutes are to be interpreted strictly and there is no room for any intendment therein.⁶ It is underlined that despite the Ordinance being amended through the Amendment Act of 2007, the power to levy and recover surcharge was still not provided therein by the legislature. Even otherwise, Section 29-A of the Ordinance only caters to recovery of dues as arrears of land revenue and Section 30(1) provides that PEMRA may revoke or suspend a licence on one or more of the grounds mentioned therein, including, as stipulated under Section 30(1)(a), if the licensee fails to pay the licence fee, annual renewal fee or any other charges including any fine, if any. Therefore, it is apparent that there is no definition of "other charges" under the Ordinance and no specific charging provision whereby the "other charges" are levied on a licensee or any provision that empowers PEMRA to levy and recover surcharge even as "other charges".

11. Reliance on Section 19(4) of the Ordinance by the learned Additional Attorney General of Pakistan is also misplaced as the said provision only empowers PEMRA to charge fee as it may fix from time to time for the grant of a licence and for its annual renewal but does not provide for the power to levy and recover surcharge on non-payment of annual fee. Section 19(3) provides that every licence shall be subject to

⁵ See Sections 19(4) and 24(4) of the Ordinance.

⁶ *Hirjina and Co. v. Commissioner of Sales Tax*, 1971 SCMR 128; *Star Textile v. Government of Sindh*, 2002 SCMR 356; *Pearl Continental Hotel v. Government of NWFP*, PLD 2010 SC 1004; *The Commissioner Inland Revenue v. Kohinoor Sugar Mills*, 2021 SCMR 536.

such terms and conditions as may be prescribed. Section 24(4) of the Ordinance provides that a licence shall be valid for a period of five, ten or fifteen years subject to payment of the annual fee prescribed from time to time. Section 24(5) provides that the Authority may renew a licence on such terms and conditions as may be prescribed. Although, through the Amendment Act of 2007, Section 2(s) was amended and the definition of “prescribed” was expanded to include as “prescribed by the rules or regulations made by the Authority”, however, as held above, the 2002 Regulations were void ab initio and remained non est. As such, there were no valid regulations in the field for the purposes of Sections 2(s), 19(3), 24(4) or 24(5) of the Ordinance up till the 2012 Regulations were issued. Thus, the demand of surcharge under Regulation 9(5) of the 2002 Regulations was ultra vires to the Ordinance which does not confer any power on PEMRA to impose and recover such a surcharge.⁷

12. Even otherwise, we have also noted that Regulation 9(5) of the 2002 Regulations provided that the surcharge would be incurred upon the late payment of the licence or the renewal fee but did not provide that surcharge could be imposed on late payment of annual fee. Therefore, even under Regulation 9(5), the demand of surcharge on late payment of annual fee was without any lawful authority.

13. In view of what has been held above, we see no reason to interfere in the well-reasoned judgment of the High Court. The instant appeal is therefore, dismissed accordingly.

Judge

Judge

Islamabad,
24th February, 2023.
Approved for reporting
Sadaqat

Judge

⁷ Province of Sindh v. Azad Wine Shop, PLD 2006 SC 528.