

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.424 of 2023

China Mobile Pakistan Limited (Zong)
Versus
Pakistan Telecommunication Authority

High Court Appeal No.426 of 2023

M/s. Pakistan Mobile Communications Limited
Versus
Pakistan Telecommunication Authority

High Court Appeal No.430 of 2023

Telenor Pakistan (Private) Limited
Versus
Pakistan Telecommunication Authority

DATE	ORDER WITH SIGNATURE OF JUDGE(S).
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Present:
Mr. Justice Muhammad Shafi Siddiqui
Justice Ms. Sana Akram Minhas.

1. High Court Appeal No.424 of 2023

Hearing (Priority) Case

1. For hearing of main case.
2. For hearing of CMA No.5398/2023 (Stay).

2. High Court Appeal No.426 of 2023

Hearing (Priority) Case

1. For hearing of main case.
2. For hearing of CMA No.5406/2023 (Stay).

3. High Court Appeal No.430 of 2023

Hearing (Priority) Case

1. For hearing of main case.
2. For hearing of CMA No.5421/2023 (Stay).

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Dated 13.05.2024

Mr. Kashif Hanif, Advocate for Appellant in H.C.A. No.424/2023
a/w Mr. Sarmad Ali Advocate and Mr. Amir Ali Solangi, Assistant
Manager Legal Zong.

Mr. Jahanzeb Awan, Advocate for the appellant in H.C.A.
No.426/2023 a/w Mr. Rashid Mehar Advocate.

Mr. Jawwad A. Qureshi, Advocate for the appellant in H.C.A.
No.430/2023.

Mr. Faizan Hussain Memon, Advocate for PTA a/w
Mr. Muhammad Saleem Khaskheli Advocate.

Mr. Ali Akbar Sahito, Deputy Director Law PTA.

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Muhammad Shafi Siddiqui, J.- Before us three appellants
have challenged the common order separately, which order has

precisely recalled the ad-interim order only while the application and *lis* remain pending.

2. The brief facts are that these appellants being cellular/mobile phone service provider have filed suits in terms of Section 22(2) of The Pakistan Telecommunication (Re-organization) Act, 1996 (**Act 1996**), challenging the directions contained therein of Pakistan Telecommunication Authority (PTA) as delineated in the impugned show cause notice of 29.07.2022. Alongwith the main pleadings filed under Section 22(2) of The Pakistan Telecommunication (Re-organization) Act, 1996, an injunction / interim application was also filed whereupon an injunctive order was passed on 26.08.2022; thereafter the matter was taken up for hearing on 22.11.2023 and the learned single Judge was pleased to recall the ad-interim order on the following counts:

- (i) that the appellants have exhausted the remedy before the Islamabad High Court; and
- (ii) that the jurisdiction was otherwise vested before the Tribunal under Section-22(2) of Act 1996.

3. The learned single Judge concluded the aforesaid points in the following terms:

“4. Perusal of above reflects that remedy to plaintiff is only to challenge the proceeding of the defendants before Tribunal or any final order passed by the defendants, in an appeal before High Court. In present case impugned notice is not a final show cause notice but a simple show cause notice, hence powers provided to the defendants under statutory Act cannot be snatched at the outset if any party come in civil suit. Accordingly, earlier order is hereby recalled. Defendants may proceed and learned counsel for plaintiff would be competent to argue the matter on next date.”

4. We have heard the learned counsel for the parties and perused the record. Mr. Jahanzeb Awan and Mr. Kashif Hanif Advocates have taken us to the scheme of law, especially Section-22(2) which is for an independent cause/event, notwithstanding the order of such nature to be challenged under Section-7 of Act 1996. It is their case that they have attempted to exhaust the remedy in terms of Section 22(2) of the Act 1996 which has enabled them to seek indulgence of the Court when an attempt was made by PTA to intervene, modify and novate the license conditions. It is their case that notwithstanding the contours of clause 6.3.1 of license, P.T.A. has issued directions as impugned before the learned single Judge, to have a “real time live access” to the communication of their subscribers which was found beyond the frame of license especially in terms of clause 6.3.1 of the license agreement which would enable them to exhaust the jurisdiction under Section-22(2) of Act 1996 of either High Court or the Tribunal established by the Federal Government. It is their case that at the time of filing of the suit/ application under Section 22(2) of the Act 1996, there was neither a Tribunal functional nor a notification in this regard; hence the jurisdiction of this Court was invoked.

5. Learned counsels have further taken us to the rationale provided by the learned single Judge that firstly appellants have to exhaust the jurisdiction of the Tribunal and that the service provider has already exhausted remedy at Islamabad High Court.

6. None of the two grounds apparently are applicable for the determination of issue raised in the main *lis*. It is not seriously disputed by respondents that the Tribunal was not formed when the *lis* was filed and up until hearing of these appeals. All that is

required to be seen whether a cause to intervene and exhaust remedy in terms of Section 22(2) of the Act 1996 was matured for appellant or otherwise.

7. The appellants' case is that "real time live access" to the system was never a condition in terms of any clause, in particular clause 6.3.1 which was relied upon by respondent; hence if all at any modification or novation in the license agreement was required, it could only be followed via scheme, as provided under Section 22(2) of the Act 1996. It provides that if the Authority and a licensee cannot agree to modification proposed by the authority to a license condition, the Authority and the licensee shall resolve their difference or dispute through consultation and negotiation. If the licensee and the Authority fail to amicably resolve such difference or dispute, either party may make an application to the High Court or a Tribunal established by the Federal Government for the purpose and the High Court or, as the case may be, the Tribunal shall exercise exclusive jurisdiction to adjudicate thereupon. It is this event where parties are parked hence the jurisdiction was invoked.

8. It is appellants' case that this demand is in fact in excess to the requirement of the license terms which is not just a simple access to the system to monitor functioning but an access to the live streaming or a live access to the network to reach subscribers directly. Thus, the privileged communication of subscribers would then be in complete access to the authority under the PTA.

9. Without commenting as to whether such demand was lawful, in terms of the Constitution, even then prima facie it is not borne out of the terms of the license; hence in our view the jurisdiction of

the learned single Judge, in the absence of the Tribunal, as was not formed/constituted, was rightly invoked. None of the appellants have invoked the jurisdiction of Islamabad High Court and the rationale as provided in the impugned order is factually incorrect.

10. Another aspect of the matter is that when in absence of territorial jurisdiction ad-interim order is recalled, why then main *lis* was fixed for hearing or if the learned single Judge found that these appellants have already exhausted the remedy before the Islamabad High Court then instead of recalling the interim order, the entire *lis* could have been disposed of but that has not been done.

11. As far as the question of Mr. Faizan Hussain Memon Advocate that this only arises out of a show cause notice, we may conclude that heading alone of a document would not make it so unless the text of the documents also supports which in this is not; this could only be adjudicated by the learned single Judge once he finds it (novation) within the competence of the authority to novate the agreement on its own. Tentatively we are of the view that since *prima facie* it seems to be an attempt to modify the license, directly without a recourse required under Section-22(2) of Act 1996, the jurisdiction would not lie with the authority except the scheme to be followed in terms of Section 22 of the Act 1996. All legal questions which may be raised by Mr. Faizan Hussain Memon Advocate on behalf of Pakistan Telecommunication Authority may also be dealt with and decided accordingly by the learned single Judge.

12. We, therefore, deem it appropriate to set aside the impugned order, allow the appeals along with pending applications and restore ad-interim order dated 26.08.2022 and send the matter back to the learned single Judge with the observation that the main *lis* under Section 22(2) of the Act, 1996, be heard and decided. In case the matter does not require any factual analysis, then based on the question of law to be framed and after admission and denial of documents, not only the injunction application but the main *lis* may also be disposed of at the earliest preferably within four months' time.

JUDGE

JUDGE

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