

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
**Suit No.529 of 2017**

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DATE ORDER WITH SIGNATURE OF JUDGE

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**Plaintiff:** **Multinet Pakistan (Pvt.) Limited  
Through Mr. Arshad Tayebaly, Advocate**

**Defendant No.1:** **Federation of Pakistan Through  
Mr. Osman A. Hadi, Assistant Attorney  
General.**

**Defendant No.2:** **N.H.A. Through Mr. Zubair Rajput,  
Advocate alongwith Mr. Ghulam  
Hussain DDR Legal NHA.**

For hearing of CMA No. 4128/2017  
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**Date of Hearing:** **15.01.2019**

**Date of Order:** **15.01.2019**

**ORDER**

**Muhammad Junaid Ghaffar J.** This is a Suit for Accounts, Declaration, Injunction and Recovery and through listed application, the Plaintiff seeks suspension of impugned Notices dated 09.11.2016, and subsequent Letters dated 01.02.2017 and 06.02.2017, with a further prayer to restrain Defendants from withdrawing, cancelling or refusing to grant new No Objection Certificates (“NOC”) for use of Right of Way to lay Optical Fiber Cables on the National Highways. It is further prayed that they may further be restrained from removing or damaging the Optical Fiber Cables already installed on the Right of way.

2. Learned Counsel for the Plaintiff submits that Plaintiff is duly licensed as a Long Distance and International Operators by Pakistan Telecommunication Authority (“PTA”) under Section 21 of the Pakistan Telecommunication Act. He submits that the Plaintiff for establishing a Nationwide Network lays down underground cables to establish end to end connectivity and since 2005 has installed numerous underground Optical Fiber Cables across Pakistan and the network is working and covering approximately 120 cities in the country. He submits that for laying of the Optical Fiber Cables, the Defendant No.2 i.e. NHA grants

permission to use the Right of Way on the National Highways / roads and bridges and from time to time various No Objection Certificates were issued to the Plaintiff upon payment of the requisite charges. Per learned Counsel now suddenly impugned Notice dated 09.11.2016 was issued by demanding the alleged outstanding rentals in respect of Right of Way and thereafter, two Letters dated 01.02.2017 and 06.02.2017 have been issued, whereby, allegedly an amount of Rs.518.672 Million is being shown as outstanding; whereas, neither the amount claimed is supported by any calculation, nor any reasoning has been provided as to why such exorbitant amount is being demanded. He submits that firstly it is the case of the Plaintiff that in terms of National Highway Authority, Act, 1991 ("**NHA Act**"), NHA has no lawful authority to collect and demand any charges / fee for Right of Way. In support Learned Counsel has referred to Sections 10 & 21 of the NHA Act, and submits that none of these Sections provide any authority or jurisdiction to NHA to collect and demand charges for Right of Way. He submits that the Law is silent, whereas, there is no specific provision in the Act or the Rules law for collection of such charges. Secondly, per learned Counsel the Plaintiff's case is that they are covered by the Pakistan Telecommunications (Re-Organization) Act 1996 as they are Licensees of PTA; whereas, recently a Draft Right of Way Rules has been prepared by the PTA in Association with Joint Stake Holders, which provides that such charges are not to be paid regularly per annum, but only once; whereas, the rates which are being charged by NHA are much higher and exorbitant as against the one being fixed by PTA through the Draft Rules. Per learned Counsel even otherwise the entire work of laying cables, digging and other works are carried out by the Plaintiff and NHA is not providing any services; therefore, the principle of *quid pro quo* is applicable and no fee can be charged. He further submits that now internationally, the Internet usage has been accepted as a fundamental right, and therefore, NHA cannot demand such exaggerated charges without any due process of law. Learned Counsel has referred to Letter dated 25.9.2013 issued by the NHA, which states that from 2005 to 2013 all charges have been paid and they are again being demanded through impugned Letter, which is impermissible. Per learned Counsel all fresh permissions have been withheld on the basis of impugned notice and Letters, which again is without lawful authority. According to him these charges cannot be demanded on yearly basis; but only once, as after the cable has been laid, no further permission is required; whereas, the Plaintiff is an

established Company and is not running away; therefore, the intended action of NHA for dismantling the cables is not justified. In these circumstances he has prayed for grant of the application for restraining NHA from demanding any amount and at the same time directions to issue fresh NOC's. He lastly submits that since it is a matter between two Ministries, therefore, it may be referred to the Federal Government for an amiable solution.

3. On the other hand, learned Counsel for NHA submits that pursuant to Order dated 17.10.2017, a Reconciliation exercise was carried out and at the relevant time no such objections were raised; nor the said order was challenged; and therefore, the stance of the Plaintiff is not only surprising, but even beyond the scope of Order dated 17.10.2017. According to him, the Reconciliation report confirms that as of today an amount of Rs.625.934 Million is presently outstanding; whereas, the Plaintiff after attending the reconciliation meeting showed a stringent stance and its unwillingness to resolve the issue and refused to sign the minutes of the meeting / report, though it had agreed to resolve the issue of outstanding amount. He further submits that Plaintiff is continuously defaulting; whereas, earlier on several occasions, they have paid the charges as demanded, including the amount for renewal every year and now suddenly they have raised an objection regarding authority of NHA, which is not justified. He submits that at the time of applying for an NOC, a specific undertaking is given to abide by the terms and conditions as well payment of dues of NHA, which is being violated and has not even been disclosed in the pleadings, and therefore, the Plaintiff has come with unclean hands and is not entitled for any injunction. Per learned Counsel, the default has occurred and rentals are due; whereas, after certain period of time, surcharges is also leviable, and therefore, the amount has increased day by day, and at the time of issuance of impugned Letters it was Rs.518.672 Million, whereas, now it has increased to Rs.625.934 Million. He submits that on several occasions, meetings were held with Stake Holders by NHA and the rental amount of Rs.20 per meter /year was agreed to be increased to Rs.30 per meter / year w.e.f. 01.03.2017; whereas, all along it has been in the knowledge of the Plaintiff, who along with others, have been attending such meetings. According to him Plaintiff is not only a willful defaulter of NHA, but so also of PTA, and certain proceedings also pending before National Accountability Bureau. Learned Counsel has referred to Regulatory

Framework and Standard Operating Procedures for Preservation and Commercial use of Right of Way [ROW]-2002, and submits that it is within the competence and authority of NHA to levy such charges; whereas, Sections 7 & 12 of the NHA Act, also provides and confer such jurisdiction. He has also referred to The National Highways & Strategic Roads (Control) Rules. 1998 as amended in 2002, and according to him in terms of Rules 6 & 12, NHA is fully competent to levy such charges. Per learned Counsel the Plaintiffs case is lacking any of the ingredients for grant of an injunction i.e. prima facie case, balance of convenience and irreparable, and therefore, in view of the dicta laid in the case reported as **2012 MLD 371 (Tanveer Naz v. Abdul Rashid)**, the Plaintiff is not entitled for any injunctive relief; hence the listed application is liable to be dismissed.

4. Learned Assistant Attorney General submits that though no direct relief has been sought against the Federation; however, the prayer for referring the matter to the concerned Ministries for an amicable resolution is not justified after filing of this Suit and obtaining an Ad-interim orders as the Plaintiff ought to have approached the Ministry for reconciliation and for settlement prior to coming to this Court. He further submits it is a case where no permanent injunction can be granted, therefore, no case for a temporary injunction can be made out.

5. While exercising his right of Rebuttal, learned Counsel for the Plaintiff submits that no stance has been changed; whereas; the Plaintiff has challenged the very basis of authority of demanding such amount as earlier the NOCs were being issued @ Rs.5 per meter, and now suddenly they have been increased. He further submits that the Draft Rules of PTA are under consideration; therefore, the Defendant No.2 be restrained till such time the Rules are implemented. According to him any Auditor can be appointed to verify the payments made by the Plaintiffs and rates being demanded by NHA.

6. I have heard all learned Counsel as well as learned Assistant Attorney General and perused the record. Precise facts have been already stated hereinabove which reflects that for laying fiber optic cables, the plaintiff had been approaching NHA for obtaining NOC and was also making payments as demanded by NHA. The dispute now being raised is to the effect that firstly, NHA is not authorized in Law; and secondly, they

cannot charge over and above the rates already fixed and that too can only be done once, and not on yearly basis. Insofar as the legal proposition raised on behalf of the Plaintiff that in terms of the NHA Act and Rules framed thereunder, NHA is not entitled to levy or demand any such charges for Right of Way, either on the rates determined by them from time to time or on yearly basis is concerned, it would suffice to observe that for the present purposes, it is only the injunction application, which is before the Court. It is to be borne in mind that if a certain provision is introduced in the Ordinance or Law, it remains a valid part of the Statute, unless otherwise, it is clearly demonstrated that it lacks Constitutional authority. It is a settled proposition of law that until and unless a Statute or a part of it, has been held or declared to be ultra-vires, the same remains operative for all intents and purposes. The present applications are to be decided keeping in view the three main ingredients for passing an injunctive order i.e. prima-facie case, balance of convenience and irreparable loss, viz-a-viz law already in field and being acted upon by the Plaintiff for so long. If any act or Rules is challenged being ultra vires, that could only be adjudicated upon at the final stage of the proceedings and not through an injunction application. The Hon'ble Supreme Court of Pakistan in the case of ***Federation of Pakistan versus Aitzaz Ahsan & others*** reported as **PLD 1989 SC 61**, in somewhat similar situation has been pleased to observe that *it is a well settled principle of law that unless a law is finally held to be ultra-vires for any reason it should have its normal operation.*

It may further be observed that it is a matter of record that all along since 2005, the Plaintiff has been obtaining NOCs from, NHA after making payments as demanded in this regard, without raising any such objection as to the authority and even the amount being demanded. Para No.8 of the Plaint is relevant and may be referred to, which reads as under:-

“8. That the Plaintiff, in the year 2005, applied for the permission of the Defendant No.2, for grant of permission over the ROW to lay its OFC. The Defendant No.2, while granting the said permission/NOC, represented that the charges/rental for the use of ROW would be PKR 5/- per running meter, per annum. It was on this representation that the Plaintiff, after payment of the required amount, started laying/installing the OFC over the ROW along the national highways network.”

7. From perusal of the above, it reflects that Plaintiff was paying charges for obtaining NOC's. To say that such charges have now been increased belies from the fact that subsequently the Plaintiff has paid

charges @Rs.20/meter per year. In fact there is a claim of excess payment and refund; however, this contention apparently does not appear to be justified at this stage. Such charges had been paid and so also on annual basis, without raising any objection or making a claim to that effect. In fact it has been pleaded on behalf of the Plaintiff that from 2005 till 2013 their dues are clear. This resultantly means that such payments were being made without any objection. However, once the impugned notice and letters were issued regarding the outstanding amount, they have come before the Court and obtained an ad-interim order on 23.02.2017 by depositing an amount of Rs.5 Million tentatively against rentals before Nazir of this Court and upon such deposit; NHA was restrained from taking any coercive action. As to the amount, which has been claimed, the Plaintiff has not been able to assist the court as to why such huge amount is outstanding, and if so, then what payments have been made after 2013, before which date, according to them the amounts stood paid. Counsel has not been able to refer to any such payments between 2013 to 2016, or 2017 for that matter, when these impugned Letter and Notices were issued. It further appears that on 17.10.2017 at the request of the learned Counsel for the Plaintiff the following order was passed:-

“On 2.10.2017 both the learned counsel agreed that Chartered Accountant may be appointed for the calculation of dues but the term of reference was to be decided by this court on hearing. Today, both the learned counsel have agreed that before appointment of Chartered Accountant, which will incur much fee and expenses, therefore, plaintiff and defendant No.2 may be allowed one opportunity to sit together and try to resolve the issue. **They further submits that the Plaintiff may submit the entire record of payments that have been made to the NHA. The representatives of the parties will reconcile their accounts as to whether the dues have been paid from 2005 to June, 2017.** Learned counsel for the plaintiff submits that they are payment dues @ Rs.5/- per meter and in this regard they claim excess payment whereas counsel for the defendant submits that in 2006 the rate was Rs.10/- per meter and subsequently it was raised to Rs.20/- per meter in the year 2010 and now in 2017 the Executive Board, NHA has raised the rate of Rs.20/- to Rs.50/- per meter per annum. The counsel for the plaintiff seriously disputed the enhancement of rate which according to him much exorbitant as well as against the relevant rules. This aspect will be taken up in meeting and the report shall be submitted to this court on the next date. The counsel for the plaintiff and defendant both are directed to complete this exercise within 20 days. The meeting shall be convened at NHA, Headquarters at Islamabad. By consent adjourned to 10.11.2017.

Interim order passed earlier to continue till next date.”

8. The gist of the above order is that according to the Plaintiff there is a dispute regarding rate per meter per annum and Plaintiff further disputes that any amount could be charged in excess of Rs.5/- per meter. Further, even if any excess payment has been made by them, the same is to be refunded. To resolve the controversy, Plaintiff was directed to attend the reconciliation meeting at NHA, Head Quarters; however, the

report furnished thereafter, reflects that the Plaintiff backed out from such meeting and failed to satisfy as to their claim. The order of the Court, as above, was never challenged and it was incumbent upon the Plaintiff to satisfy as to its claim regarding payments and the outstanding amount.

9. On the other hand, though the Defendant NHA has also claimed a huge amount, but again the calculation are not clear, nor the Court has been able to satisfy itself as to the entire amount being claimed, and whether it is to be paid immediately by the Plaintiff without further adjudication of the same. It is of utmost importance to observe, that the dispute as presently before the Court is in respect of the amount which is being disputed on two counts by the Plaintiff. One is the authority to demand such amount, and second is, regarding charging of the same at a higher rate, and too on yearly basis. This cannot be decided at this stage without further probe and an opportunity to the parties to lead evidence in support of their respective claims. At the same time, as already noted, the Plaintiff has not shown to the Court any single document or receipt of any payments made after 2013. In these circumstances, it would not be in the interest of justice to burden the Plaintiff with directions to pay the entire amount, and at the same time, the interest of NHA has to be secured as well, at least to a certain extent. In view of such position, and on the fact, that the matter presently is at an injunctive stage, this Court is of the opinion that at least 50% amount as being claimed in the impugned Notice / letters, must be paid by the Plaintiff to NHA directly, and the remaining 50% of the said amount be secured with the Nazir of this Court through a Bank Guarantee or a surety. Therefore, on 15.01.2019 through a short order in the following terms, the listed application was disposed of / allowed by confirming the ad-interim order dated 23.02.2017 and above the reasons thereof. The short order dated 15.01.2019 is reproduced for convenience.

For reasons to be recorded later on, listed application is disposed of / allowed by confirming the ad-interim order dated 23.02.2017, whereby, NHA / Defendant No.2 was directed not to take any coercive action against the Plaintiff pursuant to notices dated 9.11.2016, followed by letters dated 1.2.2017 and 6.2.2017; however, subject to following conditions:-

“1) The Plaintiff shall pay an amount of Rs.259.336 Million directly to NHA / Defendant No.2, being 50% of the amount claimed in the impugned notice / letters.

2) For the balance 50% i.e. Rs.259.336 Million, the Plaintiff shall furnish Bank Guarantee / tangible surety to the satisfaction of the Nazir of this Court, along with an undertaking on behalf of the Company, duly executed by its authorized Director to the effect that in case the Suit is finally dismissed against the Plaintiff, the guaranteed amount as above, shall be paid without further orders.

3) This arrangement / directions will not apply to any future NOC being obtained by the Plaintiff from NHA / Defendant No.2 for laying of any optic fibre cables.

4) If any amount has already been secured by way of a Bank Guarantee or otherwise with the Nazir, pursuant to orders of this Court, such amount shall be adjusted against the amount as above in Para 2.”

Judge

Ayaz P.S.