

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar and Agha Faisal, JJ.**

CP D 6683 2018 : Pakistan Telecommunication
Company Limited vs.
Federation of Pakistan & Others

For the Petitioner : Barrister Makhdoom Ali Khan
Ms. Beenish Javed, Advocate
Mr. Fahad Khan, Advocate

For the Respondents : Mr. Kafeel Ahmed Abbasi
Deputy Attorney General
Mr. Ishrat Zahid Alvi, Advocate
Assistant Attorney General
Mr. Hussain Bohra
Assistant Attorney General

Dates of Hearing : 03.05.2019, 17.05.2019 & 16.10.2019

Date of Announcement : 09.03.2020

JUDGMENT

Agha Faisal, J. The present petition impugns an order, of the Auditor General of Pakistan (“AGP”) dated 15th August 2018 (“Impugned Order”), holding that the petitioner is liable to be audited by the AGP notwithstanding the fact that the petitioner is a listed public limited company, management and control whereof admittedly vests in the private sector. It is considered illustrative to reproduce the Impugned Order herein below:

“Reference is invited to The Honorable Supreme Court of Pakistan’s Judgment/Order passed on 7th February 2018 by deciding Constitutional Petition No.105/2012 (including Civil Miscellaneous Applications (CMA) No.4107/2013 – organizations refusing statutory audit by the Auditor-General of Pakistan), attached herewith as Exhibit-I.

2. In compliance to the last paragraph of the orders of the Honourable Court on the subject, the Auditor General of Pakistan had given a fair hearing to Mr. Danial Rits, President and Chief Executive Officer of Pakistan Telecommunication Company Limited (PTCL) and to Mr. Sikandar Naqvi, Chief Business Development Officer of PTCL, on 15th July, 2018. Points of mentioned hearing are attached herewith as Exhibit-II.

3. In the light of the above and in compliance to the referred orders of the Honourable Supreme Court of Pakistan, the undersigned in capacity of the Auditor General of Pakistan passes, the following speaking order:

Speaking Order:

4. After independent application of mind, and determining the powers vested into the Auditor General of Pakistan by the Constitution of Islamic Republic of Pakistan, the speaking orders are passed herewith that the Pakistan Telecommunication Company Limited (PTCL) is liable to be audited by the Department of The Auditor General of Pakistan.

(Underline added for emphasis.)

5. The above speaking orders may also be read in conjunction with the Orders / judgment passed by the Honorable Supreme Court of Pakistan dated 08.7.2013 in CP.No.105/12 regarding organizations refusing Audit, attached herewith as Exhibit-III with a special reference to its Paras No. 27(b) and 33 alongwith other paras of the order.”

2. Briefly stated, a petition was filed before the Supreme Court in 2012 seeking audit of the secret funds held by the Ministry of Information. In those proceedings the AGP submitted¹ a list of 19 organizations, including the petitioner. The Supreme Court held² that the AGP can access the record of accounts maintained by all federal and provincial government as well as the bodies or authorities established or controlled by the federal or the provincial government. The petitioner, and several other, filed review petitions³ before the Supreme Court and vide order dated 07.02.2018, the Supreme Court disposed of the proceedings with directions⁴ to the AGP to issue fresh notice to the applicants (including the petitioner), and after a fair hearing, with an independent application of mind, pass a speaking order to determine whether or not the applicants fell within its jurisdiction and / or within the parameters of a statutory audit to be conducted by the AGP. In furtherance thereof the AGP issued a notice of hearing to the petitioner, dated 13.04.2018, to which the petitioner submitted a detailed response, dated 23.04.2018. However, it was argued that in *prima facie* disregard of the directives of the Supreme Court, and without addressing the objections raised by the petitioner, the AGP mechanically issued the Impugned Order, hence, this petition.

3. Per petitioner’s counsel, the Impugned Order was inconsonant with the directions of the Supreme Court as the petitioner was never given a fair hearing; there was no independent application of mind and the Impugned Order was not a speaking order. It was further articulated that the petitioner is neither managed nor controlled by the Government,

¹ CMA 4107 of 2013.

² *Hamid Mir vs. Federation of Pakistan*, reported as 2013 SCMR 1880 at page 753.

³ *PTCL vs. Hamid Mir & Others (CMA 5285 of 2013)*.

⁴ *Order dated 07.02.2018*.

hence, not amenable to the jurisdiction of the AGP. Further, that the AGP had no authority to audit accounts of the petitioner *Inter alia* in view of the De-Regulation Policy for the Telecommunication Sector 2003 and Section 38(3) of the Pakistan Telecommunication (Re-organization) Act 1996 ("PTR Act") read with Article 169 of the Constitution. In conclusion it was demonstrated before the Court that the Federation, through the Ministry of Information Technology & Telecommunications, had filed a reply in the present case wherein the averments of the petitioner have been admitted and it has been pleaded that the present petition may be allowed as prayed.

4. The learned Deputy Attorney General supported the Impugned Order and relied upon the reply filed by the office of the AGP, notwithstanding the fact that a diametrically opposed position has been pleaded by the Federal Government, in the reply filed through the Ministry of Information Technology & Telecommunications. It was further argued that the Impugned Order was rendered in compliance with the directives of the Supreme Court. It was also argued that Section 38(3) of the PTR Act is *ultra vires* of the Constitution, hence, ought not to be considered.

5. We have heard the respective learned counsel and have also considered the record to which our surveillance was solicited. The primary issue before us is whether the Impugned Order has been rendered in consonance with the directives of the Supreme Court and in such regard it is considered illustrative to reproduce the observations⁵ herein below:

"12. After hearing learned counsel for the applicants and the learned Additional Attorney General for Pakistan, we dispose of this application with a direction to the Auditor General of Pakistan to issue fresh notices to the applicants and after giving them a fair hearing, pass speaking orders by independent application of mind determining whether or not they are liable to be audited and fall within the jurisdiction and parameters of the statutory audit sought to be conducted by him. In case, it is found that certain companies/entities are liable to undergo a statutory audit by the office of the Auditor General of Pakistan, such audit shall be undertaken in accordance with law. This would, however, be without any prejudice to the right of the applicants, who may if aggrieved by the order of the Auditor General of Pakistan avail such remedies as may be available to them under the law."

(Underline added for emphasis.)

⁵ Order dated 07.02.2018.

Since the aforementioned order directed the AGP to conduct determinant proceedings, therefore, we deem it prudent to proffer no observations upon the merits and confine ourselves to determine whether the Impugned Order was rendered in consonance with the directives of the Supreme Court.

6. The law⁶ requires that where an authority is making any order or issuing any direction, under the powers conferred by or under any enactment, then it shall give reasons for making the order or as the case may be for issuing the direction. These integral ingredients are included in the definition of a speaking order, being an order that speaks for itself and demonstrates that the adjudicating authority has applied its independent mind to the issues and controversy involved in the cause⁷. This requirement is not exclusive to courts but also applies to public functionaries, who are duty bound to decide cases after independent application of mind⁸ and their orders are obliged to demonstrate reasoning in the determination of the *lis* seized there before⁹.

7. The Impugned Order states that a fair hearing was provided to the petitioner on 15.07.2018. On the contrary the petitioner has pleaded¹⁰ that on the said date its chief executive and the chief development officer had made a courtesy call on the AGP at Islamabad and the said meeting was unrelated to the issue under scrutiny.

The AGP reply is also dissonant with the narrative contained in the Impugned Order as the reply pleads¹¹ that 26.04.2018 was the date of hearing at Lahore before the DG Audit PT&T Lahore. The reply admits that the AGP met the chief executive and the chief development officer of the petitioner on 15.07.2018 at Islamabad, however, submits that the said meeting constituted the *fair hearing* mandated by the Supreme Court. There is no mention of a hearing dated 26.04.2018, or any other prior date of hearing, in the Impugned Order and even

⁶ Section 24A(2) General Clauses Act 1897.

⁷ *Poly Pack Limited vs. Customs & Central Excise Appellate Tribunal & Others* reported as 2005 PTD 2566.

⁸ *United Woolen Mills Limited Workers Unions vs. United Woolen Mills Limited* reported as 2010 SCMR 1475; *Fasihudin Khan vs. Govt of Punjab* reported as 2010 SCMR 1778.

⁹ *Secretary Health vs. Dr. Rehana Hameed* reported as 2010 SCMR 511; *Airport Support Services vs. Airport Manager Karachi* reported as 1998 SCMR 2268.

¹⁰ Paragraph 29 of the memorandum of petition.

¹¹ Paragraphs 28 to 31 of the reply.

otherwise it appears absurd that the petitioner would attend a hearing, pertaining to such an integral issue, devoid of any legal representation.

8. The honorable Supreme Court has maintained¹² that the right of fair trial meant grant of a proper hearing to a person by an unbiased competent forum so that justice should not only be done but be seen to be done. This High Court has expounded¹³ that the right to a fair hearing necessitated that no one should be penalized by the decision upsetting and afflicting his right or legitimate expectations unless he was given prior notice of the case, a fair chance to answer it and a fair opportunity to explicate / present the case¹⁴.

In the present facts and circumstances we are constrained to observe that no corroboration of any adequate opportunity to be heard has been placed before us, hence, the essential requirements of natural justice and due process appear not to have been met.

9. The Impugned Order contains a sub heading titled "*Speaking Order*" and also begins the following sentence with the words "*After independent application of mind*", however, it is apparent that no independent application of mind is manifest from the three sentence paragraph that constitutes the purported speaking order.

10. The directives of the Supreme Court mandated the AGP to consider the issue of jurisdiction at the very onset. The petitioner had argued that jurisdiction was lacking *inter alia* in view of the De-Regulation Policy for the Telecommunication Sector 2003 and Section 38(3) of the PTR Act read with Article 169 of the Constitution.

The Impugned Order, under the sub heading "*Speaking Order*" contains no mention of any of the grounds relied upon by the petitioner nor does it enter into any deliberation upon the issue of jurisdiction. On the contrary the learned DAG placed reliance upon an earlier paragraph in the Impugned Order, purportedly part of the recital, referring to an

¹² Per Umar Atta Bandial J. in *Ishtiaq Ahmed vs. Honorable Competent Authority through Registrar Supreme Court of Pakistan* reported as 2016 SCMR 943.

¹³ Per Muhammad Ali Mazhar J. in *Inbox Technologies Limited vs. Federation of Pakistan & Others* reported as 2018 PTD 621.

¹⁴ Reliance was placed upon *Warid Telecom (Private) Limited vs. Federation of Pakistan & Others* reported as 2015 SCMR 338.

exhibit, which is an unsigned document (carrying no signature of the AGP or any other person whatsoever) professing itself to be minutes a meeting, in order to qualify the Impugned Order on the anvil of the law. Respectfully, we are unable to sustain the argument of the learned DAG that this unsigned extraneous document somehow qualifies as the reasoning in respect of the Impugned Order.

11. The Impugned Order merely reiterates the facts in a mechanical manner and passes an order without any patent reasoning and / or independent application of mind. Such a perfunctory approach to adjudication of a question formulated by the honorable Supreme Court is unmerited. Therefore, it is respectfully observed that the Impugned Order cannot be considered as a speaking order, hence, not sustainable in law.

12. In view of the reasoning and rationale herein contained we are constrained to observe that the Auditor General of Pakistan appears not to have complied with the directives of the honorable Supreme Court and has rendered the Impugned Order, devoid of reasoning, in a cursory manner and without any application of mind. Therefore, we do hereby allow the present petition, set aside the Impugned Order and remand the matter back to the Auditor General of Pakistan for a *de novo* determination in accordance with the law.

The petitioner shall remain at liberty to raise all the grounds raised before us with respect to the merits of its case, and in addition thereto may also place reliance upon the reply filed herein by the Federal Government through the Ministry of Information Technology & Telecommunications, and the AGP shall conduct and conclude the proceedings expeditiously, uninfluenced by any observation herein contained, preferably within three months from the date hereof.

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