

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Miscellaneous Appeal No. 7 of 2017

Southern Networks Limited

Versus

Pakistan Electronic Media Regulatory Authority & another

Date of Hearing: 13.04.2021, 26.04.2021 and 23.08.2021

Appellant: Through Mr. Salahuddin Ahmed Advocate

Respondents: Through Mr. Kashif Hanif Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Aggrieved of a decision of Pakistan Electronic Media Regulatory Authority Islamabad dated 21.02.2017, the appellant, a company incorporated under Companies Ordinance, 1984 (as it then was applicable), has filed this appeal under section 30-A of Pakistan Electronic Media Regulatory Ordinance, 2002 (hereinafter referred as “Ordinance 2002”).

2. Brief facts are that the appellant was initially incorporated as Shaheen Pay TV on 29.05.1996 whereafter the status of the appellant was changed and it was then incorporated and listed as a limited company on 21.08.2003. The appellant was granted three non-executive licences to establish and operate a TV Channel Distribution Station for Karachi, Lahore and Islamabad for a period of ten years each with effect from the date of issuance of licences i.e. 20.05.2004 having Multichannel Multipoint Distribution Service (MMDS operator).

3. Litigants above carry a history of earlier litigation when the aforesaid licences were about to expire on 20.05.2014 and renewal or revalidation of licences were asked, prior to their expiries for another period of ten years. Although the renewals were made conditionally on

payment of nine installments but later on 19.03.2014 show-cause notice was issued that the directors of the company were changed without prior permission and this act was stated to be in violation of Section 30(d) of Ordinance 2002 and Rule 16(2) of PEMRA Rules, 2009 and clause 11.2(a) of the terms and conditions of the licences. The appellant was then asked to appear before the authority. The appellant also filed the reply stating therein that the PEMRA had knowledge of change of management when the terms of the licences were extended subject to payment of the requisite fee in installments.

4. The licences however were revoked earlier on 05.05.2014 pursuant to their (PEMRA's) 94th meeting which was held on 24.04.2014. The act of claiming of fee for the extension of licences was however subsequent to the revocation of licences which beside being harsh is also a massive one. Respondent however in pursuance of their revocation returned the post-dated cheques on 05.05.2014 through a covering letter. This act of the respondent was challenged in Misc. Appeal No.15 of 2014, which apparently remanded the case to the authority for reconsidering the case of the appellant in view of facts and circumstances of the case.

5. As required in terms of order passed in the aforesaid Misc. Appeal, fresh application dated 26.02.2016 was filed by the appellant, which accompanied resignation letters of former directors, letter addressed to PEMRA intimating change in shareholding of the appellant and letter dated 30.03.2016 showing their inability to trace the former directors and inability to provide the Resolution, which could not have been passed by them as being retired directors. In consequence of such proceedings and in response to the orders of this Court in M.A.No.15 of 2014, the impugned decision dated 21.02.2017 was issued revoking the

licence of the appellant yet again and consequently this fresh Misc. Appeal was filed.

6. Learned counsel for the appellant on the above facts and circumstances submitted that the facts of the case are such which do not call for a penalty of revocation of licence. A maximum penalty in terms of the amount could have been imposed i.e. Rs.1 Million prescribed in terms of Section 29(6) of Ordinance 2002. Counsel submitted that principle of proportionality should have been applied as the only rationale, justification and/or logic for the PEMRA authority is to adjudge the incoming directors rather than outgoing directors, which exercise in respect of incoming directors could have been carried out any time. The punishment imposed by the authority, per learned counsel, is not proportionate to the default allegedly committed by the appellant. Learned counsel for appellant further submitted that instead of relying on Section 30(d), provisions of Section 29(6) of Ordinance 2002 should have been applied.

7. Learned counsel further submitted that the omission to obtain permission from PEMRA prior to the change of directors/ shareholders was only a bona fide mistake and unintentional and the record of SECP vide Form-29 etc. ought to have been taken into consideration as the insistence of the respondent to make those outgoing directors available before them was only to ascertain that they have, without any coercion and undue influence, transferred the shares. This could have been verified by the record of SECP. Learned counsel submitted that there is nothing which could demonstrate that there was any issue of security clearance or qualification and eligibility of incoming directors or that these new directors do not fulfill the requirements of the ibid Ordinance and rules framed thereunder. Learned counsel finally submitted that the approach of the respondent was mala fide as they intend to bargain

restoration of licences with the “frequency” allocated to the appellant, as evident from the correspondence.

8. On the other hand Mr. Kashif Hanif, learned counsel for respondents, submitted that this is not first occasion that the directors of the original licensee were changed. After issuance of licences, twice the directors were changed which action calls for a heavy penalty. Respondents denied to have received any application of the appellant on 23.07.2012 as no acknowledgment of PEMRA is available. Counsel further submitted that necessary show-cause notice was issued, which culminated as proceedings thereunder and by virtue of 94th meeting on 24.04.2014 for the first time licences were revoked which was challenged and matter was remanded, as stated above.

9. Learned counsel further submitted that in the second round too the outgoing directors never appeared which is the requirement of law and in defiance thereof the licences were lawfully revoked under section 30(d) of Ordinance 2002. The licence fee was never accepted by the respondents.

10. I have heard learned counsel for parties and perused material available on record.

11. The primary dispute as involved is an attempt to change the directors of the company without prior approval of the PEMRA. Learned counsel for parties have primarily relied upon the following provisions of Ordinance 2002 and the rules framed thereunder, according to their respective pleadings, which needs a discussion and the same for the sake of convenience are reproduced:-

2. Definitions.- ... or context,-

2(r) “person” includes an individual, partnership, association, company, trust or corporation;

Section 20

20. Terms and conditions of licence.- A person who is issued a licence under this Ordinance shall-

(a) ..

(i) not sell, transfer or assign any of the rights conferred by the licence without prior written permission of the Authority.

Section 29

29. Power to authorize inspection.- (1) ...

(6) The Authority may, after the licensee has been, given reasonable opportunity to show cause, impose fine up to one million rupees on a licensee who contravenes any of the provisions of this Ordinance or the rules or regulations made thereunder.

Section 30

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.

Rule 16

16. Mergers and transfers.- (1) Without prior approval of the Authority, a licensee shall not transfer, merge or

amalgamate with any other person any rights conferred under the licence.

(2) Without prior approval of the Authority, any person shall not transfer or dispose of his shares or interest which he is holding or owning in a company which is a licensee:

Provided that in the case of a listed company, the shares, representing not more than two per cent of the issued and paid up share capital, may be transferred without such approval.”

12. Definition of a ‘person’ is provided under Ordinance, 2002, which includes an individual, partnership, association, company, trust or corporation. Invariably in the show-cause/decision impugned, PEMRA presumed to have issued licenses to individual directors hence referred that licenses to them should not have been transferred by them. It is misconceived impression.

13. Section 20 with the heading of “terms and conditions of licence” provides that a person who is issued a licence under Ordinance 2002 shall ensure preservation of sovereignty, security and integrity of Islamic Republic of Pakistan and shall further ensure national, cultural, social and religious norms and the principle of public policy as enshrined in Constitution of Islamic Republic of Pakistan, 1973 and that the contents of program and advertisement shall not contain or encourage violence, terrorism etc. and it should adhere to the rules framed under Ordinance 2002. Subsection (i) of Section 20 restricts the person to sell, transfer or assign any of the rights conferred by the licence without prior written permission of the authority. Primarily it relates to all rights flowing of the licenses.

14. The issuance of licence is subject to Section 19 of Ordinance 2002. The authority enjoys exclusive right to issue licence for the establishment and operation of broadcasting media and distribution services and that these licences shall be in conformity with the principles of fairness and equity and the eligibility of such applicant to

whom the licence is likely to be granted is based on prescribed criteria notified in advance.

15. Section 19 primarily applies when fresh licences are issued, however, its spirit is not restricted to issuance of 1st licence. Indeed the prescribed criteria, either notified or to be notified, is applicable, even in case when there is a transfer of such assigned rights under the licence. Thus, the restrictions embodied therein are not absolute. Incoming directors may match the prescribed criteria to be a part of operating licences. “Prior permission” itself suggests that incoming directors are required to cross all bridges and obstacles before being adjudged as qualified and eligible, to operate/broadcast media.

16. This is not a case where rights under a licence issued to a person/appellant were/are being transferred. This is a case where the directors/individuals of a company/person to whom licences were issued have transferred their respective shares. Application of Section 20 may not be ideally suited under the facts of the case. Similarly, reliance of the appellant on subsection 6 of Section 29 for imposition of fine is also not impressive in the sense that all these fines are in relation to “inspection” likely to be carried out within the broadcasting media or distribution service premises. These fines are linked and associated with inspection related offences.

17. I shall now revert to Section 30 of Ordinance 2002. The authority enjoys the power to revoke or suspend licence of broadcasting media or distribution service by an order in writing on the considerations, which are:

The licensee has failed to pay licence fee, annual fee or any other charges including fines;

The licensee has contravened any provisions of Ordinance 2002 or rules and regulations made thereunder.

18. These two subsections of Section 30 are followed by a proviso that in case of revocation of a licence of broadcasting media an opinion to this effect shall also be obtained from the Council of Complaint. I am not convinced that in a frame where Council of Complaints operates, it is supposed to give an opinion in relation to the subject in hand i.e. transfer of shares and replacement of directors. Council of Complaints' role is defined under section 26 of Ordinance 2002, which for the sake of brevity is reproduced as under:-

“26. Council of Complaints.- (1) The Federal Government shall, by notification in the Official Gazette, establish Councils of Complaints at Islamabad, the Provincial capitals and also at such other places as the Federal Government may determine.

(2) Each Council shall receive and review complaints made by persons or organizations from the general public against any aspects of programmes broadcast or distributed by a station established through a licence issued by the Authority and render opinions on such complaints.

(3) Each Council shall consist of a Chairperson and five members being citizens of eminence from the general public at least two of whom shall be women.

(3 A) The Councils shall have the powers to summon a licensee against whom a complaint has been made and call for his explanation regarding any matter relating to its operation.

(4) The Authority shall formulate rules for the functions and operation of the Councils within two hundred days of the establishment of the Authority.

(5) The Councils may recommend to the Authority appropriate action of censure, fine against a broadcast or CTV station or licensee for violation of the codes of programme content and advertisements as approved by the Authority as may be prescribed.”

19. Thus, council can review complaints of persons, organizations from general public against any aspect of programmes broadcast or distributed/aired by a station and render its opinion. In terms of subsection 5 of Section 26 Council can only opined in matters related to programme's contents and advertisements which is not the case here. However, an opinion in pursuance of proviso to Section 30 of Ordinance 2002 was sought on account of an alleged contravention of Ordinance,

2002 and rules thereunder. PEMRA faced a tricky situation where role of council though defined under Section 26 of Ordinance, 2002, yet second limb of Section 30 urges for an opinion through a proviso thereafter.

20. The Council of Complaints however opined earlier when a fine of Rs.1 Million was imposed which was not taken into consideration and the reasons are not exposed to light. No doubt the opinion is not binding but PEMRA is expected to reveal reasons as it operates as a public authority.

21. Later provisions of Section 30 i.e. (c) and (d) were not served with this proviso. Subsection (d) provides where a licensee is a company and its shareholders have transferred majority of 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 getting permission of the authority, the licence may be “suspended or revoked”.

22. None of the counsels have placed before me the criteria prescribed for considering the eligibility of the licensee and/or directors/individuals who would carry the object of licence. The word ‘person’ used in 30(d) is for individual directors and not for a company/person to whom licence was issued as the scheme of this subsection suggest, which is an exceptional circumstance and in a statute a definition of a word carries same meaning, unless otherwise required by the scheme of statute.

23. What is material for the purpose of present dispute is that authority insisted for physical appearance of outgoing directors. Outgoing directors may not matter as much as incoming directors does. The insistence of the authority that outgoing directors should be in physical attendance does not inspire confidence. If at all the prescribed eligibility and criteria to be applied, it could be applied only to the incoming directors rather than those who have left or leaving, which it

(PEMRA) can always adjudge by calling them or referring the matter to any authority for obtaining a fair opinion about their fulfilling eligibility and prescribed criteria. It appears that they have refused to adjudge the incoming directors as far as their eligibility criteria is concerned since they insisted that outgoing directors should be in attendance. The requirement is of prior permission and not of physical attendance. Notwithstanding above, outgoing directors attended the authority in the shape of Form 29 and through their resignations and formal applications addressed to PEMRA (underlining is for emphasis). In the decision impugned, the authority feared that the outgoing directors might have been coerced or the transfer of shares may be an outcome of duress but in presence of record of SECP, this fear has no legs to stand, hence insistence of PEMRA for their physical appearance is tainted.

24. The first order dated 02.05.2014, which was impugned in M.A. No.15 of 2014 disclosed that a show-cause notice on the same cause was issued on 19.03.2014 and during hearing (before PEMRA) the representative of the company (appellant) was asked as to whether any approval of the authority was obtained for the change in management in terms of Section 20(i) of Ordinance 2002 read with Rule 16(2) of Rules 2009 and Clause 11.2.a of the terms and conditions of the licence. Although there is no rationale provided for taking a summary decision, this revocation was turned down in the earlier M.A. No.15 of 2014 as the appellant was condemned unheard before Authority. However, out of that, what is important for the purposes of the present appeal is that some directions were issued to the authority with reference to M/s Southern Networks Limited/ appellant in terms of its corporate status as it stood on 22.02.2016 when earlier appeal was disposed of. Relevant part of the order is reproduced as under:-

“Heard. The record reflect that the request of the appellants though not properly worded but was kept

pending for almost two years and in the meanwhile the request of the new management was entertained and the correspondence was also exchanged with the company payments were also accepted, therefore, in all fairness an opportunity to be dealt in accordance with law/rules, has to be provided to the appellants. Let the Authority reconsider the case of the Appellants for the change of management/shareholders/directors by assuming that the application dated 23.07.2012 seeking change of Director/ shareholder is still pending.....”

25. The authority was directed to reconsider the case of the “appellant” for the change of management/shareholders/directors by assuming that the application dated 23.07.2012 seeking change of director/shareholder is still pending. The order never said that application should be filed by outgoing directors. Thus, the appellant in terms of its corporate status, as it stood on 22.02.2016, was recognized. The “appellant” was also given opportunity to rephrase the application along with all supporting documents and the authority was required to consider the request as per law and rules, after hearing the appellant. The order never suggested that the application be filed by outgoing directors.

26. This being the situation, insistence of the authority for physical appearance of outgoing directors was misconstrued. No provision of Ordinance 2002 would require physical appearance of outgoing directors. Yes, there was an obligation of prior approval or permission from the authority before directors could be changed however, the intensity of said violation and/or inaction, required a balanced sagacity in accordance with provisions of PEMRA laws. If at all the genuineness of sale of shares of the outgoing directors is to be adjudged then the record of SECP is impressive and it could have been relied upon only for the purposes of adjudging that there was no coercion or duress insofar as sale and transfer of shares and/or resignation of the directors are concerned but that is not the case here.

27. With this understanding of law perhaps the intensity of violation and penalty imposed on appellant should be viewed in term of their proportionality. Wednesbury's principle while defining proportionality has discussed role of public officers entrusted with the discretionary powers. However, it is often seen that officers' entrusted with such powers exercising their discretion goes unattended. Discretion at times goes unmeasured. Subjective analysis of a discretion exercised by public officers is a difficult proposition but proportionality is a tool which can play its role to serve the subject. The principle requires that measures adopted by the authority should not exceed the limits of what is proper and necessary in order to attain the objectives, legitimately. It is generally expected that where there is choice between several appropriate remedies and measures, the recourse that must be the least onerous and least cumbersome be adopted.

28. Reliance is placed in the following case laws:-

- (i) **1993 SCMR 1533 (Independent Newspaper Corporation v. Chairman, Fourth Wage Board)**

"6. There is much weight in the contentions of Mr. Khalid Ishaque. The principle is well settled that when express statutory power is conferred on a public functionary, it should not be pushed too far, for, such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. In the words of Scarman L.J. "excessive use of lawful power is itself unlawful" ("The Development of Administrative Law" published in Public Law 1990, page 490 at 491). Further there is a presumption that the legislature does not transgress its jurisdiction and invade the fundamental rights given by the Constitution. This rule is to be kept in view also in construing and enforcing the law."

- (ii) **2004 PTD 2187 (Abu Bakar Siddique v. Collector of Customs)**

"...It is fundamental principle that authority enjoying the discretionary powers, exercises the same without any guideline but at the same time such authority must not exercise the discretion in an arbitrary and capricious manner. It may not be obligatory for the concerned authority to exercise D the discretion in a particular

manner but exercise of such power in an unreasonable manner is not proper and in such a case the order passed in discretionary jurisdiction is not immune from judicial review of the superior Courts. It is well-settled that word 'may' is discretionary a, an enabling word and unless the subject-matter shows that the exercise' of power given by the provision using the word 'may' was intended to be imperative for the person to whom the power is given, it might not put him under an obligation to necessarily exercise such power but if it is capable of being construed as referring to a statutory duty, it will not be entirely for such person to exercise or not to exercise the power given to him under the law..... This is an accepted principle of law that in a case in which the statute authorizes a person for exercise of discretion to advance the cause of justice, the power is not merely optional but it is the duty of such person to act in the manner it is intended. ...”

(iii) **PLD 2019 SC 189 (Sabir Iqbal v. Cantonment Board, Peshawar)**

“6. Applying the test of proportionality to the executive discretion exercised in the instant case, the order of the authorized officer, other than the legal infirmities discussed above, fails to maintain fair balance by removing a person from service because he absented himself from duty for a day. The executive discretion also fails the structured test of proportionality including the test of suitability and test of necessity requiring minimum impairment of the right of the petitioner.”

29. In paragraph 6 of the impugned decision, the authority is of the view that the appellant was required to file any fresh application within a period of seven days, however, there was no board resolution, declaration seeking approval of the authority for the change in management by the directors to whom PEMRA granted licences. This observation in paragraph 6 is inconceivable as; firstly the outgoing directors could not have passed resolution in favour of existing directors and it was never intent and spirit of the order/decision that outgoing directors were obliged to pass the resolution favouring the appellant and/or present directors in compliance of orders in earlier lis.

30. In the last line of paragraph 6 on type page 2 of the impugned decision, the authority required a declaration duly signed by the

legitimate directors of the company in accordance with law. This perhaps was catered by the appellant by providing resignation letters of the former directors including CEO, the letters addressed to PEMRA indicating change in shareholding by appellant Southern Networks Limited record of SECP and letters of the appellant that it is not possible to trace former directors for their physical appearance now.

31. In paragraph 11 of the impugned decision the authority again misconstrued that the licences were issued to the directors individually and hence they were/are afraid that in case any director of the previous management claims right in future then PEMRA will be in indefensible position. The conceived idea of PEMRA is amiss. They were of incorrect view that the previous management was granted any licence and that the individuals could claim rights arising out of the licence in future. This was only an apprehension that they (PEMRA) wanted physical presence of outgoing directors.

32. They further claim in paragraph 11 of the impugned decision that the current management is obliged to give documentary proof/ declaration showing consent of original directors for transfer of shares to existing directors and that they shall further indemnify PEMRA accordingly. This again seems to be mockery of law since entire record including but not limited to record of SECP is available. This was the only reason that they (PEMRA) have not processed the case of the appellant for security clearance.

33. Again in the concluding paragraph, the Authority required NOC from the outgoing directors for the transfer of share to new directors and on this failure the licences were revoked. As observed, there is no provision in Ordinance 2002 or Rules 2009 that require physical appearance of outgoing directors.

34. Rule 16(1) and (2) do not satisfy the insistence of the authority regarding appearance of the outgoing directors. Rule 16(1) however provides that a licensee i.e. the company itself, which is an entity under law, shall not transfer itself or merged or amalgamate with any other entity any of the rights conferred under the licence. This is not the case here. Rule 16(2) however requires prior approval of the authority before a change in the shareholding. This violation is being treated by PEMRA as the most violative contravention of Ordinance 2002 and Rules 2009 and the terms of licence.

35. As stated, the terms of licence are not available, which terms in any case could not be extraneous to main statute. There is no specific requirement of personal appearance of the outgoing directors. Proviso to Section 30(b) requires (subject to my understanding) an opinion of the Council of Complaints, which has already been rendered when a fine of Rs.1 Million was suggested. It is prima facie a violation under section 30(d) read with rule 16(2) however the proportionality of penalty does not seem to be in balance. The object of adjudging the eligibility of the incoming directors, which criteria ought to be have been prescribed in advance, could be adjudged conveniently since present directors are available and in no way the appellant or any of directors would come in that way as far as security clearance of these directors are concerned but suggested deficiency alone does not call for a maximum punishment of revocation of licence and principle of proportionality seems to have been violated.

36. Under the facts and circumstances the only goal perhaps required to be achieved is whether the incoming directors are within the frame of eligibility and criteria notified or otherwise and there is no other impediment at all. The action impugned seems to be an ambush, coercion and duress since PEMRA authority intend to bargain the claim of

spectrum frequency issued to the appellant at the time of issuing the licences. Paragraph 3 of the letter in this regard is reproduced as under:-

“3. It was also pointed out to the representatives of company during the personal hearing that the MMDS services uses spectrum in the band 2.5-2.69 GHz while managing and allocating spectrum is the domain of FAB under section 42 and 43 of Pakistan Telecommunication Re-organization Act 1996. It was elaborated that any decision with regard to the MMDS licence is subject to allocation/re-allocation of spectrum by FAB. The company was also informed that it was occupying enormous spectrum and that it was mandatory to resolve all issues pertaining to spectrum for MMDS by communicating in writing so that it may be taken up by the committee constituted by FAB comprising representatives of Ministry of Information Technology, PTA, FAB and PEMRA. Any decision with regard to change in management/MMDS licence cannot be taken alone unless the issue of spectrum is also resolved.”
(Underlining is for emphasis).

Thus, highhandedness and mala fide of the authority cannot be ruled out.

37. In view of facts and circumstances, the appeal is allowed in the following terms:-

- (a) Impugned decision dated 21.02.2017 rendered by Pakistan Electronic Media Regulatory Authority Islamabad is set aside;
- (b) Appellant’s case for change of directors be considered in terms of above analysis and outgoing directors’ physical appearance be dispensed;
- (c) The eligibility criteria of present directors be adjudged at the earliest to be followed by security clearance of directors, which is of prime consideration;
- (d) Entire process may not take more than 60 days from the date of this judgment;
- (e) Validity of licences shall be subject to outcome of clause (d) above, however till such process is completed, appellant may continue to operate;

(f) Fine for subject violation in terms of money may be considered by PEMRA.

38. Appeal stands allowed in the above terms.

Dated:

Judge