IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui, CJ
Mr. Justice Jawad Akbar Sarwana

High Court Appeal No. 519 of 2024

Frequency Allocation Board
Versus
Southern Network Limited & others

Date of Hearing:	15.01.2025 and 24.01.2025
Appellant:	Through M/s. Zahid F. Ebrahim, Furkan Ali and Ms. Shabnam Noorali Advocates.
Respondent No.1:	Through M/s. Salahuddin Ahmed and Nadeem Ahmed Advocates.
Respondent No.2:	Through Mr. Zia-ul-Haq Makhdoom, Addl. Attorney General for Pakistan, Mr. Khaleeq Ahmed and Ms. Hira Agha, Deputy Attorney General.
Respondent No.3:	Through M/s. Saad Siddiqui, Abd-e-Arhum, Raja Ali Abbas and Ali Akbar Saheto Advocates.
Respondent No.4:	Through M/s. Kashif Hanif, Zafar Iqbal Arain and Ali Hyder Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, CJ.- This appeal impugns an order dated 20.12.2024 passed by learned Single Judge on the original jurisdiction in Suit No.1392 of 2024, having been treated by the appellant as an "ad-interim mandatory injunction", whereby directions were given to the appellant that they shall not interfere in the Radio Frequency Bandwidth (allegedly) being used by the respondent No.1/plaintiff.

2. In substance M/s Zia-ul-Haq Makhdoom, Saad Siddiqui and Kashif Hanif, appearing for respondents No.1, 2 and 3 respectively have supported the arguments of Mr. Zahid Ebrahim and/or case of the appellant.

3. The appeal is objected by Mr. Salahuddin Ahmed, learned counsel appearing for respondent No.1, on two counts:

(i) that a mandatory notice under order XLIII Rule 3 CPC was not served upon respondent No.1 and

(ii) that this, being an ad-interim order, the appeal would not be maintainable, as the application is yet to be decided.

4. We have heard learned counsel appearing for the parties as well as learned Addl. Attorney General, and perused material available on record.

5. Historically, the respondent No.1 was enjoying a license for the use of a Radio Frequency Bandwidth 2556-2619 MHz for Lahore, 2668-2689 MHz for Islamabad and 2550-2690 MHz for Karachi. The license claimed to have been granted in perpetuity, however, a learned Division Bench of this Court in C.P. No.D-482 of 2007 vide its judgment dated 19.12.2023 ruled that in view of "statutory development" the licenses issued under the previous regime were made subject to further renewal and conditions under the new law. Thus, arguments of the petitioners' therein, to have a license in perpetuity was not sustained and was subjected to its renewal under the new statutory regime. Having been decided the question as to the renewal against appellant by the FAB, earlier a suit bearing No.559 of 2024 was filed by respondent No.1 on an allegation of malice against the appellant, which resulted in terms of remand since respondent No.1 i.e. Southern Network Limited (SNL) was not heard before a decision was taken by Frequency Allocation Board (FAB) on 22.03.2024.

6. Consequently, in pursuance of the above, the respondent No.1 was heard by Frequency Allocation Board which in its 52nd Meeting passed the order again which was impugned in the subsequent suit of which subject impugned order formed and agitated in this appeal. On

the first date when the suit was fixed for orders, the impugned order was passed thereby directing the appellant (in the shape of restraining orders) not to interfere with the use of Radio Frequency Bandwidth allocated to the respondent No.1/SNL. Being aggrieved of it this appeal is preferred which is objected on the aforesaid two counts.

7. We shall first deal with first issue of maintainability of this appeal as it is claimed by Mr. Salahuddin that the statutory notice was not served upon the respondents before filing instant appeal.

8. The emphasis of Mr. Salahuddin was that service of notice along with a copy of memo of appeal and grounds raised therein was inevitable. The counsel has brought to the notice of this Court the judgments which have the significance over the issue of maintainability of appeal pursuant to Order XLIII Rule 3 CPC. It requires that where an appeal against an order is preferred during the pendency of a suit, the appellant shall, before presenting the appeal, give notice of such appeal to the respondent or his advocate by delivering a copy of the memorandum and grounds of appeal along with a copy of the order appealed against, **either personally or through registered post acknowledgement due and the postal or other receipt shall be filed with the memorandum of appeal for the record of the appellate Court (emphasized applied)**. The bold portion was inserted by Act 14 of 1994. Order XLIII Rule 3(2) CPC requires that a respondent may with the permission of the Court, appear before it and contest the appeal and may be awarded cost of dismissal of the appeal in limine.

9. The consequences however of not delivering copy of Memorandum and grounds of appeal and/or giving notice of such appeal to the respondent, were not provided. The insistence of Mr. Salahuddin however is otherwise in terms of the pronouncements of this Court as well as of Supreme Court. The first case that was citied is the case of

Mrs. Dino Manekji Chinoy[1] in which the Code of Civil Procedure was held applicable as at the relevant time the Sindh High Court made no Rules governing the question and manner in which the appeals shall be heard by Bench of two or more judges from interlocutory order passed by learned Single Judge of that Court in exercise of its original jurisdiction.

10. The essentials of Order XLIII Rule 3 CPC were considered in the aforesaid cited case law and it was ruled out to be meant for the disposal of the appeal at the earliest on account of pendency of civil suit, which is yet to be concluded, and that in the absence of a notice under order XLIII Rule 3 any right that may have accrued to the respondents or the one in whose favour the order was passed, should not be taken away exparte, such as "admission of an appeal" etc. In the Dino Manekji Chinoy's case (Supra) the conclusion drawn in the later part of paragraph 19 is as under:-

> *"…Since the proper place of procedure is to help and not to thwart the obtaining of justice and procedural laws, as pointed out by Mr. Sharifuddin Pirzada, should be utilized as "stepping stones" rather than we might add, as stumbling blocks; the right of a party in this case to have his appeal heard, cannot be allowed to be defeated for failure to comply with the form where the substance has, in fact, been complied with."*

11. Reliance was placed on the cases of Imtiaz Ahmad v. Ghulam Ali and others (PLD 1963 SC 382) and Manager, J & State Property in Pakistan v. Khuda Yar (PLD 1975 SC 678).

12. Earlier the High Court in the aforesaid case reported as PLD 1983 Karachi 387 (Muhammad Matin v. Dino Manekji Chinoy) in terms of sideline "G" and "H" observed as under:-

> *"….We also, cannot overlook that Order XLIII, rule 3, C. P. C. does no provide for the consequences that will ensue in regard to an appeal on account of non-compliance of the rule. One of the important tests in the matter of a rule*

[1] Mrs. Dino Manekji Chinoy and 8 others v. Muhammad Matin (PLD 1983 SC 693)

> *being mandatory, or, directory is, whether a consequence in the nature of dismissal of an appeal, or, imposition of penalty must ensue on account of the non-compliance. The statute book contains several provisions laying down the consequences for non-compliance of a rule. But, in the instant case, the consequences are not stated, much less than the dismissal of an appeal for the mere reason of non-supply of copies. This appears to be a rule of convenience and expediency. ….”*

13. Other case cited before us was of Salahuddin[2]. In this case the matter before the apex Court triggered on account of dismissal of appeal by High Court for non-compliance of order XLIII Rule 3 CPC. The apex Court observed that the order of High Court showed that the respondents were represented by a counsel. The appeal was admitted for full hearing and hence the acceptance of the petition for leave to appeal and sending it back to High Court for decision on merit was accorded. Respondent being represented before High Court before admission of appeal, object of waiving notice by respondent under Order XLIII Rule 3 CPC was fully made and therefore “appellant” (therein) should not have been non-suited in appeal on such ground. (emphasis applied).

14. One of the paramount cases in respect of the interpretation of Order XLIII Rule 3 CPC is also of Sindh Industrial Trading Estate Ltd.[3]. This case also considered the case of Dino Manekji Chinoy (Supra) wherein it was observed as under:-

> *“…Thus, because Rule 3 of Order XLIII, C.P.C. neither employs negative language nor contemplates a consequence of invalidity upon non-compliance nor was it for the benefit of the entire populace, as distinct from the parties to a cause, the inescapable conclusion is that while the requirement of notice in Rule 3 of Order XLIII, C.P.C. may be obligatory or binding, something in the higher echelon of being directory, <u>it cannot be termed to be mandatory</u>, peremptory or absolute. The conclusion that it is so is strengthened by the fact that the positive step*

[2] Salahuddin (1997 SCMR 414)
[3] Sindh Industrial Trading Estate Ltd. v. Noorani Enterprises (1996 CLC 570)

envisioned in the rule is procedural and the place of all procedure in law is designed to secure the ends of justice and not, as pointed out by the Supreme Court, to create "stumbling blocks". Thus approached the condition seems to be enacted to ensure expeditious disposal of interlocutory appeals and to thwart the proverbial delays of law. Failure to satisfy the requirement of the prescribed notice in Rule 3 of Order XLIII, C.P.C., in appropriate cases, may be visited by dismissal of the appeal whereas in like manner where the justice of the case so requires, the party in default may be relieved of the pains of dismissal by according adequate dispensation in the way of costs or otherwise because costs, we may add, have been held to be a panacea for all civil wrongs (emphasis applied). This arises because the legislature, in its wisdom, has chosen not to spell out the consequences of default in each individual case, leaving a discretion on the Court but like all discretions, vesting in judicial and quasi judicial bodies, such has to be judiciously exercised."

15. In the case of Haji Suleman Gowawala[4] the learned Division Bench of this Court held as under:-

"The real difficulty, however arises when the respondents learned counsel insists that the appeal "should be dismissed". I would now examine this part of his argument. The first thing to be noted in this connection is that the rule itself does not provide for any penal action if the appellant proceeds to file an appeal by-passing the preliminary requirement of informing the respondent of the intended action. Nor the language of the rule is capable of spelling a bar to the filing of the appeal without such a notice as was the case with section 80, C.P.C. which was to the following effect before amendment:-

> *"No suit shall be instituted against the Government, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of."*

Rule 3 is couched in different language. The prohibitive concept attached to the right of filing a suit without notice is not there. While the right to file an appeal is preserved in tact, it is subjected to a rider of additional duty to be fulfilled before the right is exercised. But if the rider is shaken of and the appellant

[4] Haji Suleman Gowawala v. Usman (1985 CLD 168)

relying on the dictum laid down in the judgment of the High Court (P L D 1983 Kar. 387), which was yet under appeal before the Supreme Court, files the appeal in Court and the Court admits the appeal to regular hearing can or should the process be reversed. Stage of filing has passed. The compliance of the rule could be insisted upon at the time of filing/ entertainment of the appeal. The Court could refuse to entertain the appeal. But that stage has been passed. The appeal has not only been entertained but after a preliminary hearing admitted to regular hearing. The best that could be done was to recall any adverse order, rehear the matter after due notice to the respondents. No such grievance is raised and the main appeal has been heard in Court for five days or so and the respondents had full share out of this long time to put forth their point of view in Court.

Not being a case where orders are challenged under the doctrine of actions corum non judice, if admission order is recalled this appeal would dip down to a level of pre-admission stage to surface up again as soon as the rider of notice is lifted.

In my view, the disability in the present case relates to the initial and earliest stage and to borrow with respect the observations of his Lordship Dr.Nasim Hasan Shah in the case of Dino Manekji Chinoy "Any appeal which is not accompanied by such an affidavit and a copy of the acknowledgment receipt should not be entertained".

Now its a transaction past and closed. That stage is passed. If the respondents have suffered any prejudice or injury on account of the order of admission in absentia surely they are entitled to a redress and the Court would try to restore status quo anti as soon as such a prejudice, if any is brought to its notice. But no such prejudice is pointed out and in the circumstances, to refix the appeal for summary hearing would be nothing but an exercise in futility causing delay and thus defeating the very object for which the rule has been enacted.

It is no body's case that the appellants had no right to file this appeal or the Court lacked jurisdiction to hear and admit the appeal to regular hearing.

The appellant cannot be deprived of his valuable right of an appeal for violation of rule of procedure when no prejudice is shown to have been caused and the injury if any has been fully repaired by their own waiver to the notice of hearing in the earliest stages when no interim order was yet passed."

16. The next case in respect of the aforesaid provision of law is reported as 1997 MLD 2003, the only case that provides a different interpretation in terms of paragraph 14. Although there were prior interpretations available in terms of the case of Sindh Industrial Trading Estate and Dino Manekji Chinoy (Supra), both by Karachi Division Bench and Supreme Court, a contrary view could have been avoided and possibility of different/contrary view could be entrusted to a larger bench of the apex Court.

17. In our view no doubt the importance of Order XLIII Rule 3 has its own place which cannot be ignored but in consideration of justice to be dispensed, the procedural law gets eclipsed with substantive law. A proportionate balance of justice has to be carved out. In this case, the appeal was never admitted for regular hearing as only pre-admission notice was issued and counsel appeared from respondent's side. The right to contest admission is protected and thus no prejudice is caused. The issuance of notice of Order XLIII Rule 3 is meant for early disposal of High Court Appeals filed against interim/ ad-interim orders i.e. during pendency of appeal, which is being taken care of. The consequential effect of dismissal of appeal on this score alone is not the intention of legislature and thus it failed the mandatory test. The compliance/non-compliance of order XLIII Rule 3 CPC is to be adjudged in the sense that no substantive right be snatched on account of notice having not been delivered to the contesting respondent.

18. As far as maintainability of appeal, on the touchstone of it being an appeal against ad-interim order is concerned, we have seen the history of litigation. We are also mindful of the fact that lis with applications (injunction application) are still pending which requires application of mind by learned Single Judge first. The only cause which

could attract our attention is whether impugned order is mandatory or directory.

19. Without much commenting about the merits of the case we would like to discuss a letter of respondent No.1 dated 05.12.2024 filed as Annexure K/4 in response to a decision of Frequency Allocation Board (FAB) dated 29.11.2024, wherein the company SNL/respondent No.1 itself has surrendered the use of subject Radio Frequency Bandwidth in compliance of the decision of Frequency Allocation Board (FAB). Thus there was a complete disconnect/abandonment of use of the subject Radio Frequency Bandwidth and this could only be restored by a "direction" of the Court and not by a restraining order, which direction at the ad-interim stage could only be seen as mandatory injunction; just because it is mentioned in the order that the appellant/defendant No.2 in the suit be restrained to interfere, it does not become a case of an injunctive order alone; it is by all means a mandatory injunction since the disconnect of the use was "restored" not by so many words but by the intention of the order "impugned in this appeal". We, therefore, consider it to be a case where injunction could have been granted only by a mandatory injunction and since it was only an ad-interim order it could not have been done as tests prescribed for mandatory injunction are not available in the instant case[5].

20. It is indeed a settled principle of law that though in law there is no absolute bar in granting such relief and the Court should not lay down absolute proposition when such are not necessary and consequently forge fetters for itself, but such exercise of discretion should be limited to rare and exceptional cases. Such orders of injunctions or for that matter any interlocutory order of mandatory nature are passed where the rights sought to be protected are clear and/or based on

[5] PLD 2023 Sindh 11 (Haji Ibrahim v. Abdul Qadir)

comprehensive undisputed report and not where it is doubtful, cloudy or needed trial, as is in the instant case where the respondent No.1, vide letter referred above, has itself complied and/or accepted the order of FAB and subsequently filed the suit against the very order of FAB. An injunction cannot be granted to establish a new state of things differing from the state of things which existed on the date when proceedings were instituted.

21. Indeed, in view of above it is fit case in which prima facie it appears that there are no special circumstances for grant of mandatory injunction, and the instant case is not a clear case where the Court could thought the matter to be decided at once or there is a simple and summary act, which could be easily remedied or where the appellant/defendant has attempted to steal a march on the petitioner/respondent No.1. For granting the mandatory injunction the Court has also to see if a party in contravention of an order passed under Order XXXIX rules 1 and 2 CPC had done something to its advantage and to the prejudice of the other party as in that event the court could exercise its inherent power to bring back the party to a position where it originally stood before such contravention, since no party can be allowed to take advantage of his own wrong inspite of the order made by the court. Nothing of the sort has happened in the instant case hence the order passed by learned Single Judge is not sustainable subject to however final disposal order of application.

22. Hence in view of the above we are of the view that while the injunction application would remain pending, to be decided in accordance with law, the impugned order, which in fact is an exparte mandatory injunction on the first date when the matter was taken up, is set aside and recalled, however, considering the nature of the case it is expected that the pending applications/injunction application be heard

and decided by learned Single Judge within six weeks from the date of this judgment.

23. Appeal stands allowed in the above terms.

Dated: 10.02.2025 **Chief Justice**

Judge