

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial
Mr. Justice Qazi Muhammad Amin Ahmed

CIVIL APPEALS NO. 977 & 978 OF
2018 AND C.M.A. NO. 3658/2019
IN CIVIL APPEAL NO. 978/2018

*(Against judgment dated 26.02.2018 passed by
the Islamabad High Court Islamabad in F.A.O.
No.42/2016)*

***M/o Information Technology
and Telecommunications, Islamabad***
(in C.A. No.977/2018)

***The Pakistan Telecommunications Authority,
Islamabad***
*(in C.A. No.978/2018 & C.M.A. 3658/2019
inC.A.978/2018)*

...Appellant(s)

Versus

CM Pak (Pvt) Ltd. Islamabad & another
(in C.A. 977/2018)

CM Pak (Pvt) Ltd. Islamabad
(in C.A. 978/2018)

...Respondent(s)

For the Appellant/
Applicant(s)

Mr. Sajid Ilyas Bhatti, Addl. A.G.P.
M. Ayub, Ministry of I.T.
(in C.A. 977/2018)
Mr. Munawar Iqbal Duggal, ASC
Sajjad Latif, D.G. (Law) PTA
M. Khurram Siddiqui,
Director Law, PTA
M. Kashif, A.D. PTA
(in C.A. 978/2018)

For the Respondent(s):

Mian Shafaqat Jan, ASC
M. Sharif Janjuah, AOR
(in all cases)
Mr. Rashid Hanif, ASC
(in C.M.A. 3658/2019)

Date of hearing:

22.04.2020.

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ORDER

Umar Ata Bandial, J. The impugned judgment dated 26.02.2018 was passed by the learned High Court in a first appeal bearing No. FAO 42 of 2016 filed by the respondent telecom licensee under the Pakistan Telecommunication (Re-Organization) Act, 1996 (“**Act**”). The respondent licensee had challenged the suspensory direction dated 28.03.2016 issued by the appellant Pakistan Telecommunication Authority (“**PTA**”). However, the impugned judgment struck down the policy directive dated 26.12.2009 published by the Ministry of Information Technology (I.T. & Telecom Division) under Section 8(2)(c) of the Act. The impugned judgment held that the said policy directive failed to meet the criteria and conditions laid down in Section 54(2) and (3) of the Act.

2. Pursuant to this impugned policy directive dated 26.12.2009, PTA from time to time had issued directions whereby cellular services provided by telecom licensees were ordered to be suspended in specified areas for limited time on grounds of national security. To illustrate this point, certain suspensory directions issued by PTA are given below. Email dated 22.03.2016:

“all Mobile and Wireless (2G/3G/4G/LTE/CDMA/WiMax) Voice & Data Services would remain blocked in 20 kilometer radius around Multi Purpose Ground, Islamabad to avoid any untoward incident during Joint Services Pakistan Day Parade at Multi Purpose Ground”

Email dated 21.10.2015:

“the closure timing for closing of Mobile and Wireless Services (2G/3G/4G/LTE/CDMA/WiMax Voice & Data Services) in district/cities/areas forwarded vide trailing emails is: from 0630 Hours to 2000 Hours on 24th October 2015 (10 Muharram ul Haram). It is

pertinent to highlight that the area of Karachi is all five districts.”

3. It is common ground that the events that invite such directions are invariably related to national security or public safety. What is disputed by the respondent licensee who succeeded before the learned High Court is the extent of such restrictions in terms of time, space and type of services that are blocked. Specifically, the respondent licensee had challenged the suspensory directions dated 28.03.2016. The first direction was sent at 12.27 am:

“It is requested to block all cellular mobile (2G/3G/4G/LTE) Voice & Data services in 10km radius around D-Chowk, Red Zone, Islamabad to avoid any untoward incident by 0030 hrs on March 28 2016 and control spill over sites as well. The services would remain blocked till further notice.”

This was followed by a further direction at 06.24 am:

“Is requested to restore mobile services by 0700 hrs on March 28, 2016 and confirm through return email.”

There is agreement between the parties that national security or public safety priorities should justify the imposition of such restrictions and directions. However, the respondent licensee contends that the Federal Government ought to have settled procedures and benchmarks to regulate its discretion. This is urged because the respondent has a right to do business and the sudden curtailment of its rights has negative implications.

4. The impugned directions dated 28.03.2016 under the policy directive dated 26.12.2009 were not impeached by the respondent licensee before PTA but were straightaway challenged before the High Court in an appeal filed under Section 7(1) of the

Act. However, it appears that at the hearing the respondent licensee's challenge shifted to the policy directive. There is nothing on record to indicate that the respondent licensee expressed its grievance before the Federal Government or its concerned agencies about the said directive dated 26.12.2009 in the seven years that elapsed before the filing of its appeal. Be that as it may, the impugned judgment considered the provisions of the Act and concluded that Section 54(3) of the Act which authorises the suspension of services of telecom licensees is not attracted to the facts of the case. That the policy directive issued under Section 8(2)(c) of the Act is controlled by Section 54(3) *ibid* and therefore, the policy directive dated 26.12.2009 issued under the Act by the Government is *ultra vires*.

5. It would be useful at this stage to reproduce the relevant provisions of the Act:

“8. Power of the Federal Government to issue policy directives.- (1)...

(2) The matters on which the Federal Government may issue policy directives shall be—

(a)...

(aa)...

(b)...

(c) requirements of national security and of relationships between Pakistan and the Government of any other country or territory outside Pakistan and other States or territories outside Pakistan.”

(2A)...

(3)...

“54. National Security.-- (1) Notwithstanding anything contained in any law for the time being in force, in the interest of national security or in the apprehension of any offence, the Federal Government may authorise any person or persons to intercept calls and messages or to trace calls through any telecommunication system.

(2) During a war or hostilities against Pakistan by foreign power or internal aggression or for the defence or security of Pakistan, the Federal Government shall have preference and priority in telecommunication systems over any licensee.

(3) Upon proclamation of emergency by the President, the Federal Government may suspend or modify all or any order or licences made or issued under this Act or cause suspension of operation, functions or services of any licensee for such time as it may deem necessary;

Provided that the Federal Government may compensate any licensee whose facilities or services are affected by any action under this subsection.”

Having carefully perused the foregoing provisions of the Act, we are of the view that both sections cater to different circumstances. Section 54(3) confers powers on the Federal Government to modify or suspend all or any orders or licences in a situation where an Emergency is imposed by the President under Article 232 of the Constitution. On the other hand, Section 8(2)(c) empowers PTA to take steps pertaining to matters of national security, diplomatic protocols and State functions. The purpose of the two sections is distinct. Section 54(3) is reactive and defensive in nature, coming into the field when on account of grave circumstances in the country or its provinces a Proclamation of Emergency is issued by the President potentially involving suspension of Fundamental Rights and the Provincial Government(s). Conversely, Section 8(2)(c) contemplates pre-emptive action as it allows for the disruption of services before any perceived threat in a specified area materialises. Further, under Section 54(3) cellular services may according to the terms of the Emergency be disrupted for a lengthy period of time over an extensive area. In contrast, disruption of services under Section 8(2)(c) is likely to be event specific and localised, in effect applying only for a temporary

period of time across a limited area. Clearly then, both sections operate in separate spheres and situations with no conflict between them nor any primacy being given to one over the other.

6. As far as the policy directive dated 26.12.2009 is concerned, it has been issued by the Federal Government in exercise of its power under Section 8(2)(c) of the Act. Consequently, the said directive is a piece of delegated legislation. The purpose of such an executive instrument has been set out by this Court in **Muhammad Amin Muhammad Bashir Limited Vs. Government of Pakistan** (2015 SCMR 630) at para-7:

Para 7:... “[delegated legislation is] intended to enforce the law, not override it. [It] can fill in details but not vary the underlying statutory principles.”

The policy directive dated 26.12.2009 sets out the purpose, causes and parameters of suspensory action by PTA. It gives law enforcement authorities the power to forward written requests to PTA specifying the cellular services to be closed, the time and duration of closure and the specific area where such closure is to be implemented in case of significant threat of “hostilities against Pakistan by a foreign power” or “internal aggression by terrorists/groups.” It is obvious that these events are significant for public safety and national security. However, their limited and transient occurrence cannot justify the imposition of an Emergency under the Constitution which can continue uninterrupted for 60 days without sanction of the two Houses [Article 232(7) of the Constitution]. Therefore, there is nothing in the policy directive dated 26.12.2009 which contravenes any substantive provision of Section 54 of the Act. Instead, it complements and strengthens the purpose of the Act by attending

to national security situations that fall outside the ambit of Section 54(3).

7. Consequently, the only question arising before us for determination is whether PTA has exercised its power under the policy directive dated 26.12.2009 reasonably, fairly, justly and for the advancement of the purposes of the Act [ref: Section 24-A(1) of the General Clauses Act, 1897 (“**1897 Act**”)]. This test has been reiterated by this Court in the Muhammad Amin case (supra). Reasonableness and fairness are criteria that bear nexus with the factual matrix of a grievance and with the object of the law. In the present case, the factual background for the impugned exercise of such power vide PTA’s email dated 28.03.2016 has not been examined by the learned High Court. In our considered view, in a country where there is sectarian tension during the *Ashoora* in *Moharram* the *Zuljinah* procession ought to be protected from attacks and turmoil. This is attempted by PTA’s email dated 21.10.2015 which is necessary to ensure the religious freedom guaranteed to the citizens under Article 20 of the Constitution. Equally, the Pakistan Day Parade by the Armed Forces is an annual national event where apart from the Armed Forces personnel, the highest State and foreign dignitaries are assembled to view the military parade. This again is an event which deserves security protection. Indeed, PTA’s email dated 22.03.2016 seeks to ensure that. Similarly, the impugned directions of 28.03.2016 were issued during the protest which marked the Chehlum of Mumtaz Qadri. This protest had involved severe damage to public property (Danish Hussain, ‘D-Chowk Protestors End Sit-In After Successful Talks’ *The Express Tribune* (Islamabad, 31 March 2016)). Therefore to curtail further escalation of damage/violence

there was a legitimate need to suspend cellular services. These protective measures are taken on the request of law enforcement authorities in view of past experience of terrorist activities at similar events. If such events caused the issuance of the impugned directions then the same would be in the public interest, reasonable, fair, consistent with the object of the law and therefore valid. Accordingly, the exercise of power by PTA under the policy directive dated 26.12.2009 ought to be evaluated in the light of the threat that is anticipated.

8. To our minds, the power of PTA under the policy directive dated 26.12.2009 does not conflict with Section 54(3) of the Act which operates in a different field. In fact, it is regulated by Section 8(2)(c) of the Act read with Section 24-A(1) of the 1897 Act and the law laid down by this Court controlling the exercise of delegated authority. Apart from the aforesaid parameters, it is not within the province of a Superior Court to strike down or interfere with decisions taken by Federal Government bodies pursuant to the policy directive dated 26.12.2009.

9. Accordingly, for the reason that the impugned judgment has failed to examine the impugned suspensory directions dated 28.03.2016 in the context of the power conferred on PTA, we consider that the impugned judgment has arrived at a hasty and incorrect conclusion. The learned High Court has construed Section 8(2)(c) to be subservient to Section 54(3) of the Act. In reaching this decision, the learned High Court has misread the Act, specifically the provisions of Section 54, all of which serve an express purpose/function. Whilst these purposes/functions may incidentally be effectuated by the exercise of power under Section 8(2)(c) of the Act but this does not lead to the conclusion

that Section 54 *ibid* controls the exercise of such power. Consequently, the impugned judgment is set aside. If the respondent telecom licensee had any grievance regarding the manner in which the power under Section 8(2)(c) of the Act was exercised by PTA it should have taken up the matter in the first instance with the Federal Government. Therefore, its recourse to a Court of law straightaway was pre-mature and vexatious. The appeals are accordingly allowed.

C.M.A. No.3658 of 2019: Disposed of.

Judge

Judge

Islamabad, the
22th April, 2020
Approved for reporting
Ghulam Raza/ Meher LC