

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah and Yahya Afridi, JJ

PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY (PEMRA) through

Secretary---Petitioner

Versus

TRADE SERVE INTERNATIONAL (PVT.) LTD. LAHORE and others---Respondents

Civil Petitions Nos. 2459 to 2465 of 2017, decided on 1st October, 2019.

(On the appeal against the judgment of the Lahore High Court, Lahore dated 12.05.2017 passed in Writ Petitions Nos. 2446, 4366, 4367, 4368, 4369, 4370 and 4371 of 2013)

Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---

---S. 24(5)---Pakistan Electronic Media Regulatory Authority Rules, 2009, R. 12(c)---Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012, Reglns. 2(f), 2(h), 2(qq) & 9(2)---License for operating FM radio---Renewal license fee---Quantum---Prevailing applicable license fee---Where bidding had been carried out in granting licenses, the renewal fee for the same shall be the "prevailing applicable license fee" for the respective area and category of license sought to be renewed conjoined with the rate of inflation calculated as prescribed by the State Bank of Pakistan---Renewal license fee would be the last bidding price determined by the bidding carried out and approved by Pakistan Electronic Media Regulatory Authority (PEMRA) for the category and area of F.M. radio for which renewal of license was being sought plus the rate of inflation calculated as prescribed by the State Bank of Pakistan---Where after the grant of license by PEMRA to licensee, there had been no bidding for the category and area of F.M. radio for which license was sought to be renewed, then the renewal license fee for the next term, would be the bidding price approved by PEMRA in favour of the licensee plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

Salman Akram Raja, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record, Ali Zeeshan Haider, Head Legal PEMRA, Mohsin Hameed Dogar, DGM (Legal) and Wakeel Khan, D.G., Licenses B.M. for Petitioners (in all cases).

Qutb-ud-Din Saim Hashmi, Advocate Supreme Court and Muhammad Ali Raza, Advocate Supreme Court for Respondents Nos. 1 and 2 (in C.Ps. Nos. 2459 and 2462 of 2017).

Rasheed A. Rizvi, Advocate Supreme Court and Muhammad Kassim Mirjat, Advocate-on-Record for Respondent No. 1 (in C.Ps. Nos. 2460 and 2461 of 2017).

Qutb-ud-Din Saim Hashmi, Advocate Supreme Court for Respondent No. 2 (in C.Ps. Nos. 2460 and 2461 of 2017).

Date of hearing: 1st October, 2019.

JUDGMENT

YAHYA AFRIDI, J.---Through this single judgment, we shall dispose of the instant seven petitions for leave to appeal impugning common judgment dated 12.05.2017 rendered by the Lahore High Court in Writ Petitions Nos. 2446, 4366, 4367, 4368, 4369, 4370 and 4371.

2. The precise issue to be addressed in all seven petitions relates to the renewal license fee payable by a licensee seeking to renew the license for operating FM radio under Pakistan Electronic Media Regulation Authority Ordinance, 2002 ("Ordinance").

3. The stance of Pakistan Electronic Media Regulation Authority ("PEMRA") is that the renewal license fee should be the last approved bidding price for FM radio of the area for which renewal is sought, with the annual inflationary rate set by the State Bank of Pakistan. While the seven licensee-respondents contend that the same to be the original bidding price, they had rendered and was approved by PEMRA with the additional annual inflationary rate set by the State Bank of Pakistan. The latter

view contented by the seven licensee-respondents prevailed before the Lahore High Court, as recorded in the impugned judgment dated 12.05.2017. Hence, the instant petitions.

4. It would be appropriate to first understand; the subject matter of dispute between the parties, and the regulatory role of PEMRA envisaged under the applicable law.

Subject Matter

5. The subject matter of the dispute between the parties in the present petitions relates, generally to, information and communication technology ("ICT"), and in particular, radio frequency spectrum utilized for FM radios. ICT, including radio frequency spectrum, is regulated globally by International Telecommunication Union ("ITU"), a specialized agency of the United Nations mandated to maintain, standardize and allocate the rational use of telecommunication and radio frequency spectrum¹. ITU has divided the globe into three geographical regions for allocation of ICT and including radio frequency spectrums, Pakistan is a signatory of ITU and falls in Region 3 on its allocation map. FM radio in Pakistan allocated the range of 87- 108 Mhz².

6. In recent years, ICT has witnessed tremendous growth, and in particular, in the wireless applications, GPS, cellular phones, WiFi, satellite TV, and public safety communications, e-health, e-commerce, and intelligent transportation systems. This fast growth in wireless related applications has created an unprecedented demand for the limited radio frequency spectrum allocated for its application by ITU. Resultantly, radio frequency spectrum has become a invited resource, and the market forces have made the same very valuable, leading to what has been referred to as spectrum scarcity³.

7. The United States Supreme Court way back in 1943, acknowledged the marketability of the radio frequency spectrum and voiced its concern for the State to control and manage it⁴. Thereafter, many have cautioned that without such central administration, endemic interference between radio stations would produce chaos, and what has been dubbed as "a cacophony of competing voices."⁵ Gordon A. Gow and Richard K. Smith⁶ after analysing the Coase Theorem⁷ and The Ofcom Spectrum Framework Review (2004)⁸ concluded that: spectrum is subject to a condition of limited supply, which must be assigned in an efficient and equitable manner; and market forces can best ensure efficiency and equity for access to the available limited spectrum. This view has repeatedly resounded and urged the need for the limited spectrum of radio frequency to be under fair and equitable State regulation.

Regulatory Regime

8. To regulate and manage the telecommunication and radio frequency spectrum allocated by ITU to Pakistan, there are two essential enactments. Firstly, Pakistan Telecommunication (Reorganization) Act, 1996 ("Act of 1996"), which has created Pakistan Telecommunication Authority ("PTA")⁹, a regulatory body, with its essential purpose to establish, operate, maintain and grant licenses for telecommunication systems and services in Pakistan¹⁰. Secondly, the Ordinance of 2002, which has also created a regulatory body, PEMRA¹¹, to regulate the establishment and operation of all broadcast media and distribution services in Pakistan.¹² However, the actual allocations of the frequencies for telecommunication and broadcast services within the allocated bands, under the Act of 1996 and Ordinance of 2002, are carried out by the Frequency Allocation Board (FAB) created under section 12 of Act of 1996.¹³

Renewal of License

9. The legal regime regulating issuance and renewal of licenses of F.M. radio is generally dealt with under the Ordinance of 2002. However, for the resolution of the dispute in hand; we would restrict our attention to the renewal license fee for FM radio. In this regard, it is noted that a licensee desirous of renewal of a license of F.M. radio may six months before the expiry of the sanctioned term of the license, apply for the same to PEMRA under section 24(5) of the Ordinance, which mandates:

(5) The Authority may renew a license on such terms and conditions as may be prescribed and in case of refusal to renew a license reasons shall be recorded in writing.

(emphasis provided)

10. The above provision clearly provides, inter alia, for PEMRA to renew a license on such terms and conditions, as may be "prescribed". While the term "prescribed" has been defined in section 2(s) of Ordinance of 2002 to be an instrument framed by rules or regulations made by PEMRA.

What is interesting to note that Ordinance of 2002, leaves the matter of determination of the renewal license fee to delegated legislation. We, however, note a reference to the renewal license fee in Rule 12 of The Pakistan Electronic Media Regulatory Authority Rules, 2009 ("Rules of 2009"), which stipulates, inter alia, that:

Renewal of license on expiry of the license term;

.....

(c) payment of the prescribed fee prevalent at the time of renewal and payment of outstanding dues, if any;

(emphasis provided)

12. In this regard, our attention was drawn to Regulation 9(2) of the Radio Broadcast Station Operation Regulations, 2012 ("Regulations of 2012"), framed by PEMRA, and duly notified in terms of subsection (3) of section 4 read with section 2(s) of the Ordinance of 2002, which provides:

License renewal fee shall be prevailing applicable license fee for the respective area and category of license plus rate of inflation calculated as prescribed by the State Bank of Pakistan: Provided that if bidding has not been held for such license, the renewal fee shall be determined by the Authority.

(emphasis provided)

13. The terms "renewal fee" and "renewal of licence" have been defined under clauses (h) and (qq) of Regulation 2 of the Regulation of 2012, respectively, which read:

clauses (h)

"renewal fee" means fee payable for renewal of a licence on expiry of the term of the licence."

clauses (qq)

"renewal of licence" means grant/revalidation of a licence for a similar or another term after expiry of the original term."

14. Similarly, the term "applicable license fee" provided in Regulation 9(2), has been defined in clause (f) of Regulation 2 of the Regulation of 2009 in terms that:

"payment of renewal fee as applicable at the time of renewal."

15. The "applicable license fee" as defined above, in the context of the present cases, where bidding had been carried out leads one to the fee which is determined through bidding by PEMRA. However, the above definition of the said fee, is rather vague, as it does not cater to situations, where more than one bidding has been carried out by PEMRA for a particular category and area where F.M. radio license renewal is being sought. To render clarity and completeness to the provision, the word "prevailing" has correctly been employed before the words "applicable license fee". By doing so, it has clarified that in cases, where there have been bidding carried out by PEMRA in the grant of licenses, then it would be the then-current approved bidding fee that would apply to the renewal of the license. Hence, the conjunctive reading of the above stated provisions would reveal that, in cases where bidding has been carried out in granting licenses, the renewal fee for the same shall be the "prevailing applicable license fee" for the respective area and category of license sought to be renewed conjoined with the rate of inflation calculated as prescribed by the State Bank of Pakistan. Simply put, the renewal license fee would be the last bidding price determined by the bidding carried out and approved by PEMRA for the category and area of F.M. radio for which renewal of license is being sought plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

16. Undoubtedly, the intention of the legislature was to vest PEMRA with the authority to decide the criteria for determining the renewal fee for carrying out and regulating F.M. radio. However,

PEMRA opted to leave it for the market forces to determine the renewal license fee, and by doing so, surely left it for the principles of transparency, fairness and equity to prevail.

17. Now, when we review the impugned judgment, it is noted that a serious error crept in on account of restricting its consideration only to the "applicable license fee" as provided under Rule 2(f) of the Regulations of 2012, and the non-reading of the most crucial word "prevailing" as provided under Regulation 9(2) supra.

18. We have also noted that the impugned judgment has misread the term "base price" by referring to Table-II, Schedule B of the Rules of 2009, and applied the same to the renewal license fee, when the same clearly applies to the initial bidding process leading to the first license, which is issued for a particular category of license in a particular area¹⁴. In fact, for the renewal license fee, the impugned judgment did not consider the "base price", as expressly defined and dealt with under by regulation 2(k) of the Regulation of 2012, in terms: -

"base price" means the minimum fee determined by the Authority from time to time to conduct bidding for a particular category of the license.

19. Similarly, the impugned judgment has erred by mis-reading the term "annual renewal fee" provided in Table-II, Schedule B of the Rules of 2009, and applied the same to the renewal license fee for the next term sought by the licensee-respondents. Whereas, the "annual renewal fee", stated in the said Table, applied to the annual renewal fee within the sanctioned term, and not the next term, which was the subject matter of the dispute between the parties.

20. Accordingly, in view of the above discourse, we hold that:

- I. The renewal license fee for the next term sought by the licensee-respondents, would be the last bidding price determined by the bidding carried out and approved by PEMRA for the category and area of F.M. radio for which license is sought to be renewed plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.
- II. And in cases, where after the grant of license by PEMRA to licensee-respondents, there has been no bidding for the category and area of F.M. radio for which license is sought to be renewed, then the renewal license fee for the next term, would be the bidding price approved by PEMRA in favour of the licensee-respondent plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

21. For the reasons stated hereinabove, impugned judgment dated 12.05.2017 is set aside and these seven petitions are converted into appeals and allowed in terms of the above findings.

MWA/P-14/SC Petitions allowed.