

Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Ayesha A. Malik, JJ
Messrs FUN INFOTAINMENT (PVT.) LIMITED/ NEO T.V., LAHORE ---Petitioner

Versus

PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY through its Chairman,
Islamabad and others---Respondents

Civil Petition No.5438 of 2021, decided on 15th June, 2023.

(Against judgment dated 30.06.2021 passed by the Lahore High Court, Lahore in FAO No.32274 of 2021).

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

---Ss. 13, 26 & 29(6)---Delegation of powers of Pakistan Electronic Media Regulatory Authority (PEMRA) to Chairman PEMRA---Scope and principles---Council of Complaints ("COC")---Whether the Chairman PEMRA had the authority to approve the recommendations of the COC---Held, that as the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') gives discretion to PEMRA to delegate its powers, responsibilities or functions subject to conditions imposed by rules and the power to make rules is conferred on PEMRA, the validity of the exercise of discretion will be judged by the same principles as the exercise of any other administrative discretion---Any rules delegating PEMRA's powers, responsibilities or functions must meet the test of reasonableness and non-arbitrariness -- Act of delegation must align with the statutory purpose--PEMRA while delegating a power, responsibility or function shall not exercise the discretion of delegation in a manner that distorts the purpose of the statutory scheme---Conditions accompanying such delegation should possess rationality---Furthermore, the determination of the suitable recipient for delegation primarily rests within the purview of PEMRA---Nevertheless, it is imperative that the selection be not characterized by irrationality, as any instance of improper delegation shall be a matter for the courts to decide---Power to impose fine, which was the recommended action in the present case, resides in Section 29(6) of the Ordinance and belongs to PEMRA---It follows that the COC is to place its recommendation before PEMRA and the power to impose fine vests in PEMRA---In the instant case, PEMRA has placed reliance on a decision taken in a meeting held on 31.07.2007 wherein the powers to approve the minutes of meeting of the COC in terms of Section 26 of the Ordinance was delegated to the Chairman PEMRA [Notification No. PEMRA-1(2)/Secy.2007-44 dated 01.09.2007]---Delegation could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules---No rules have been framed whereby the authority to approve the recommendation of the COC has been delegated to the Chairman PEMRA---What PEMRA has done in its meeting dated 31.07.2007 has been to delegate the power in the very terms in which it was given to PEMRA to the Chairman PEMRA specifying no standards and leaving everything in the Chairman PEMRA's discretion---Public bodies in whom discretion is vested are under an obligation to confine and structure it by the promulgation of decisional criteria so as to strike the best balance in the context between rules and discretion---In the present case the Chairman PEMRA did not have any validly delegated authority to approve the recommendation of the COC---Petition for leave to appeal was converted into appeal and allowed.

PEMRA v. Pakistan Broadcasters Association 2023 SCMR 1043; Harry Woolf and others (eds), De Smith's Judicial Review (8th Edn., Sweet and Maxwell 2018) 331; Fazal Karim, Judicial Review of Public Actions (2nd edn, Pakistan Law House 2018) Vol 3, 1824 and Harry Woolf and others (eds), De Smith's Judicial Review (8th Edn., Sweet and Maxwell 2018) 335 ref.

Barrister Afzal Hussain, Advocate Supreme Court and Muhammad Talha, Advocate High Court for Petitioner(s).

Barrister Haris Azmat, Advocate Supreme Court, Barrister Syed Ali Asghar, Law Officer, Mohsin Hameed Dogar, Director Regulations and Tahir Farooq Tarrar, Head Legal for Respondent(s).

Hassan Riaz, Research Officer, SCRC, Research Assistance.

Date of hearing: 15th June, 2023.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The matter originated with a complaint filed before the Council of Complaints ("COC") of the Pakistan Electronic Media Regulatory Authority ("PEMRA") alleging that the

petitioner violated the Electronic Media (Programmes and Advertisements) Code of Conduct 2015 ("Code of Conduct") in a programme aired on its channel on 08.03.2021. After considering the reply of the petitioner, the COC in its meeting on 01.04.2021 found the contents of the programme to be violative of the Code of Conduct and recommended that a fine of Rs. 5,00,000/- be imposed on the petitioner. The said recommendation was approved by the Chairman PEMRA on 29.04.2021. The High Court dismissed the appeal filed against the order of the Chairman PEMRA. The petitioner now seeks leave of this Court to appeal against the order of the High Court.

2. We have heard the learned counsel for the parties and perused the record. The question posed before us is whether the Chairman PEMRA had the authority to approve the recommendations of the COC.

3. PEMRA is envisaged, in the Pakistan Electronic Media Regulatory Authority Ordinance 2002 ("Ordinance"), as an independent statutory body consisting of the Chairman and twelve members that would regulate electronic media in Pakistan.¹ The Ordinance hands out a distinct legal personality and operational autonomy to PEMRA. One of the objects identified in the preamble is to "improve the standards of information, education and entertainment". Thus, the Ordinance also establishes COCs under Section 26 with an adjudicatory-cum-recommen-datory role to address public complaints against any aspects of programmes broadcast or distributed by electronic media. The COC has powers to summon a licensee against whom a complaint has been made and call for explanation regarding any matter relating to their operation. The COC is supposed to render opinions on such complaints. Finally, in case of violation of the codes of programme content and advertisements, the COC may recommend appropriate action of censure or fine to PEMRA. However, the power to impose fine, which was the recommended action in this case, resides in Section 29(6) of the Ordinance and belongs to PEMRA. It follows that the COC is to place its recommendation before PEMRA and the power to impose fine vests in PEMRA.

4. The Ordinance expressly vests PEMRA with the power of delegation: Section 13 authorizes PEMRA to delegate, by general or special order, any of its powers, responsibilities or functions other than the power to grant, revoke or cancel a broadcast media or distribution service licence except Cable TV to the Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee of PEMRA subject to such conditions as it may by rules prescribe. It thus appears that there is an express authority to delegate, however, the power has to be duly delegated.

5. In the instant case, PEMRA has placed reliance on a decision taken in a meeting held on 31.07.2007 wherein the powers to approve the minutes of meeting of the COC in terms of Section 26 of the Ordinance was delegated to the Chairman PEMRA.² However, we note that this Court in *PEMRA v. Pakistan Broadcasters Association*³ has already held that "the delegation could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules." We are told that no rules have been framed whereby the authority to approve the recommendation of the COC has been delegated to the Chairman PEMRA. The word "delegate" must take its meaning from the context in which it appears and, when found in a statute, it ordinarily connotes a degree of formality especially when the provision requires that the delegation shall be in a particular form. A look at Section 26 of the Ordinance suggests that PEMRA has been given the power to delegate any of its powers, responsibilities or functions to the Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee of PEMRA, and in order to control the delegate in the exercise of delegated powers, responsibilities or functions the delegation has been subjected to such conditions as may be prescribed by the rules. The legislature has intended that the exercise of delegation envisaged under Section 13 of the Ordinance shall be structured with conditions prescribed under the rules framed with the approval of the Federal Government.

6. It is not for this Court to decide whether PEMRA should have exercised its power of delegation though it is certainly a question for this Court to decide if PEMRA has exercised it within permissible limits. What PEMRA has done in its meeting dated 31.07.2007 has been to delegate the power in the very terms in which it was given to PEMRA to the Chairman PEMRA specifying no standards and leaving everything in the Chairman PEMRA's discretion. Public bodies in whom discretion is vested are under an obligation to confine and structure it by the promulgation of decisional criteria so as to strike the best balance in the context between rules and

discretion.⁴ This is the reason that the legislature aimed to limit the delegation to the conditions prescribed by the rules.

7. The power to make rules is conferred to carry the enabling statute into effect, and that is an executive function. It is a function to administer the statute, which gives the power to make subordinate legislation. Thus, as the Ordinance gives discretion to PEMRA to delegate its powers, responsibilities or functions subject to conditions imposed by rules and the power to make rules is conferred on PEMRA, the validity of the exercise of discretion will be judged by the same principles as the exercise of any other administrative discretion.⁵ Any rules delegating PEMRA's powers, responsibilities or functions must meet the test of reasonableness and non-arbitrariness. The act of delegation must align with the statutory purpose. PEMRA while delegating a power, responsibility or function shall not exercise the discretion of delegation in a manner that distorts the purpose of the statutory scheme. Furthermore, the conditions accompanying such delegation should possess rationality. As already held in *Pakistan Broadcasters Association*⁶, the more important the power, responsibility or function being considered for delegation, the higher must be the "threshold" for PEMRA in deciding not to impose any conditions. Such threshold is to be gauged according to the importance of the power, responsibility or function that is being delegated, and as and when PEMRA decides to delegate more important powers, responsibilities or functions, the threshold, and in effect, the discretion to not impose conditions starts to dissipate. Furthermore, the determination of the suitable recipient for delegation primarily rests within the purview of PEMRA. Nevertheless, it is imperative that the selection be not characterized by irrationality, as any instance of improper delegation shall be a matter for the courts to decide.⁷

8. In view of the above, we come to the conclusion that the Chairman PEMRA did not have any validly delegated authority to approve the recommendation of the COC. Therefore, we convert this petition into appeal and allow the same.

MWA/F-20/SC Appeal allowed.