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Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case W.P. No. No.2581/2017

M/s. Leo Communications (Pvt.) **Versus** The Federation of
Ltd, etc. Pakistan, etc.

JUDGMENT

Date of hearing	18.07.2017
Petitioner (s) by	Ms. Asma Jahangir, Advocate for the petitioners.
Respondents by:	Mr. Tahir Mahmood Ahmad Khokhar, Deputy Attorney General for Pakistan. Mr. Mansoor Usman Awan, Advocate for the respondents/PEMRA alongwith Tahir Farooq Tarrar, Head Legal.
Research assistance by:	Mohsin Mumtaz, Civil Judge/Research Associate at LHCRC

Syed Mansoor Ali Shah C.J. Petitioner company holds a valid license¹ (for 15 years) to establish and operate satellite TV broadcast channel station, issued by Pakistan Electronic Media Regulatory Authority (“PEMRA” or “Authority”). The channel is operated under the name and style of *Filmazia*. Under the License, the petitioner company is allowed to air 6% Indian content (clause 7.2 of the license) of the programme mix. Through impugned Circular dated 19.10.2016, PEMRA has banned Indian content, so that while the channels can air foreign content, they cannot air Indian content. The grievance of the petitioner company is that the impugned Circular has unilaterally and unlawfully varied and altered the terms and conditions of the License in sheer violation of The Pakistan

¹ *category* – International Scale/ Entertainment, dated 27.05.2010

Electronic Media Regulatory Authority Ordinance, 2002
(“Ordinance”).

2. During the course of hearing, learned counsel for PEMRA informed the Court that Ministry of Information, Broadcasting & National Heritage, Government of Pakistan has issued Notification dated 31.01.2017² whereby permission has been granted to display International movies *including Indian films in Pakistani Cinemas*. According to the Notification, this decision was taken in the interest of the revival of the Pakistani Film Industry.

3. The License of the petitioner company allows for the following “programming mix:”

M/s. LEO COMMUNICATIONS (PRIVATE) LIMITED,
LAHORE
(FILMAZIA)

PERCENTAGE CONTENT

PROGRAMS	PERCENTAGE
ENTERTAINMENT <i>(Films/Movies)</i>	70%
Public Service Messages/Promos	10%
Advertisement	20%
Total	100%

Under clause 7.2 of the License, petitioner company is allowed 10% foreign content with the following breakup:

- i. 40% of 10% (4% of the overall) - English content
- ii. 60% of 10% (6% of the overall) - Indian content or other content.

² Placed on the record as Mark-A.

During the course of hearing, PEMRA vide letter dated 11.04.2017,³ unanimously approved the change in the programming mix of the Petitioner company, so as to include Music, Cooking Shows, Dramas, Soaps, etc under Entertainment.

4. Ms. Asma Jehangir, learned counsel for the petitioners, contends that the terms and conditions of the License, held by the petitioner company, have been unilaterally altered through the impugned Circular issued by PEMRA, in as much as, the petitioner has been prohibited from airing 6% of the *Indian content* allowed under the License. It is argued that the impugned Circular does not show any necessity in the ‘public interest’ as required under section 30(2) of the Ordinance. Further, the petitioner licensee was not served with a show cause notice before varying the terms and conditions of the License as required under section 30 (3) of the Ordinance. Learned counsel argued that once the Federal Government has allowed the display of Indian Films in Pakistani Cinemas and this decision has been accepted by PEMRA, there is no lawful justification of placing a ban on Indian plays and dramas.

5. Learned counsel for the petitioners also referred to order of the High Court of Sindh, Karachi dated 23.06.2017 passed in Suit No.1621/2017, whereby the competitors of the petitioner company approached the said court and obtained a stay order, wherein PEMRA has been restrained from taking any coercive action against the said licensees and according to the learned counsel the said licensees are airing Indian content (drama). It is submitted that on this score alone, the petitioner licensee stands discriminated.

³ Placed on the record as Mark-B.

6. Mr. Mansoor Usman Awan, Advocate for respondents-PEMRA submits that the petitioner company has no *locus standi* to maintain the instant petition, on the ground that being a licensee, the petitioner company is bound to follow the instructions and directions issued by PEMRA. He further submits that impugned Circular has been issued in order to safeguard *public interest*. In support of this contention he referred to Section 30 (2) of the Ordinance. Explaining *public interest* that formed the basis of the impugned Circular, learned counsel referred to the decision of the Authority taken in 120th Meeting of the Authority held on 19.10.2016. The relevant extract of the decision is as under:-

3 (ii) The Authority unanimously, in exercise of its powers conferred under Section 4 (3) and Section 19 of the PEMRA Ordinance-2002 as amended by the PEMRA (Amendment) Act, 2007 read with other enabling provisions of PEMRA laws, withdrew its earlier permission granted for allowing broadcast of six percent (6%) Indian Content of the overall content.

He also referred to the decision of the Authority taken in 132nd meeting of the Authority held on 06.06.2017 regarding airing of foreign content by licensees, which is as follows:-

The Authority unanimously approved the proposal contained in para 5 of working paper to the following effect:

Pursuant to the Notification of the Federal Government dated 31.01.2017 whereby the Federal Government has allowed to display international movies (including Indian movies) in Pakistani cinemas. Moreover, screening of Indian movies on Satellite TV channels in Pakistan does not affect the principle of reciprocity since Pakistani films are neither screened on cinemas nor are shown by Satellite TV channels in India. Keeping in view the foregoing, PEMRA, while revisiting its earlier decision of 19.10.2016, has decided to permit the licensees to air Indian movies

*subject to strict adherence to the terms and conditions of their licenses and in particular clauses 6.2 and 7.2 thereof, read with section 20 (f) & (g) of the PEMRA Ordinance, 2002, Electronic Media (Programs and Advertisements) Code of Conduct, 2015 and all other applicable provisions of law, rules and regulations. However, no Indian Soap, Drama, Game Show, Sitcom or any other Indian content is allowed to be broadcast and/distributed in Pakistan, **except on the basis of reciprocity by India.** (emphasis supplied)*

He candidly submits that the ground for placing the ban on Indian content (dramas, etc) by PEMRA was in reaction to the ban placed on Pakistani dramas by a private Indian channel. Hence, the consideration behind the impugned Circular was the *principle of reciprocity*.

Opinion of the Court

7. I have heard the arguments of the parties and gone through the relevant law, as well as, the record of this case.

8. Preliminary objection regarding *locus standi* of the petitioner company does not hold ground. Petitioner company has challenged the impugned Circular whereby the rights of the petitioner company under the License have been altered unilaterally, allegedly in violation of the Ordinance. Petitioner company has the *locus standi* to challenge the decision of the licensor. This preliminary objection, without further ado, is overruled.

9. Impugned Circular dated 19.10.2016 whereby licensees have been directed not to air *Indian content* is in reaction to the alleged ban imposed by India on Pakistani dramas and is based on the *principle of reciprocity* (as shown above).

Additional factual background

10. Learned counsel for PEMRA was asked to verify certain facts before the Impugned Circular could be examined on the constitutional and legal touchstone. Learned counsel was asked to show (i) whether the ban on Pakistani dramas in India was the decision of the Government of India or of the counterpart of PEMRA in India? PEMRA failed to place anything on the record to this effect. The only document placed on the record by PEMRA is the news item which simply shows that one private channel in India (Zee Zindagi) has decided not to air Pakistani dramas. (ii) whether, principle of reciprocity, has a statutory cover and is applied across the board. Are Pakistani dramas shown in all the countries, which have the permission to air their programs in Pakistan ? There has been an evasive response from PEMRA, so there is no across the board policy based on the principle of reciprocity. (iii) whether all the Indian dramas can be viewed easily online in Pakistan? Once again, PEMRA has failed to answer this question categorically. (iv) whether the Federal Government has issued a directive to ban Indian content? Infact, the Federal Government has allowed the screening of Indian movies and the same are being shown in cinemas all over Pakistan. In this factual backdrop, especially when there is nothing on record to show if the State of India has banned Pakistani dramas and that there is no principle of reciprocity applied across the board, I proceed to examine the constitutional and legal questions involved in this case.

11. The legal questions that require determination by this Court are (i) whether there was public interest that justified the varying of the terms and conditions of the License of the petitioner company under section 30(2) of the Ordinance and (ii) whether the public interest was sufficient to outweigh the fundamental right to free speech and expression under Article

19 of the Constitution? (iii) whether *principle of reciprocity* adopted by PEMRA constitutes *public interest* under the Ordinance?

Right to free speech and expression

12. Article 19 of the Constitution provides right to freedom of speech and expression. “Speech” means the expression or communication of thoughts or opinions in spoken words.⁴ An expression of or the ability to express thoughts and feelings by articulate sounds or a sequence of lines written for one character in a play.⁵ “Expression” means the action of making known one's thoughts or feelings; the conveying of feeling in a work of art or in the performance of a piece of music;⁶ writings, speech, or actions that show a person's ideas, thoughts, emotions or opinions.⁷ Any dramatic work is, therefore, a symbol of speech and expression. “The right to communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, theatre, dance, music, film, through a newspaper, magazine drama or book is an essential component of the protected right of freedom of speech and expression.⁸” The broadcast of ideas, culture, history, literature, opinions, thoughts, emotions and art through the medium of plays and dramas signifies freedom of speech and expression in a country. The arrangement and choice of dramas and plays to be broadcast by the petitioner company under the License, including Indian dramas, is a mark of freedom of speech and expression of the petitioner company. “The concept of freedom

⁴ Black's Law Dictionary page 1617- 10th Edition.

⁵ Oxford Dictionary.

⁶ Oxford Dictionary.

⁷ Black's Law Dictionary page 701-10th Edition.

⁸ *Ajay Gautam vs Union of India & others* (AIR 2015 Delhi 92)

of media is based on the premise that the widest possible dissemination of information from diverse and antagonistic sources is sine qua non to the welfare of the people. Such freedom is the foundation of a free government of a free people. Any attempt to impede, stifle or contravene such right would certainly fall foul of the freedom guaranteed under Article 19 of the Constitution of Pakistan.⁹”

13. “Freedom of speech (and expression) is the lifeblood of democracy.”¹⁰ The nature and extent of this freedom and fundamental right determines the quality and maturity of democracy in a country. Any unwarranted or arbitrary change in the content of the broadcast, abridges the fundamental right of the petitioner company under Article 19 of the Constitution. The balance between the fundamental right of freedom of speech and expression on the one hand and *public interest* on the other, defines the outlook, mindset and tolerance of the people of any country. Nations are enriched by the cross-currents of ideas and thoughts; they progress by expanding their frontiers of freedom; by encouraging plurality and diversity and not by being insular and inward looking. “Fundamental rights are the heart and soul of a living Constitution and must at all times be ready to embrace and protect the sensibilities and sensitivities of the people. They must be progressively and purposively interpreted to advance the frontiers of freedom, individual autonomy and free choice. Such vibrance and vitality is the hallmark of a living constitution in a democracy.” See *Pakistan Tobacco Co. Ltd. and others v. Government of N.W.F.P. through Secretary Law and others* (PLD 2002 SC 460)

⁹ *Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others* (P L D 2016 Supreme Court 692)

¹⁰ Per Lord Steyn, in *Regina v. Secretary of State for the Home Department, Ex Parte Simms* [1999] 3 All ER 400; [1999] UKHL 33

and Reference No.01/2012 (Reference by the President of Pakistan under Article 186 of the Constitution of Islamic Republic of Pakistan, 1973) (PLD 2013 SC 279).”¹¹ Right to choose a programming mix and air (6%) Indian content under the License is premised on the fundamental right to free speech and expression. PEMRA has to convincingly establish that there is an imminent threat or necessity of *public interest* that outweighs this fundamental right to justify the imposition of the ban or the existence of the impugned Circular.

Public Interest

14. “Public Interest or collective community interest is a basket of various public interests including public morality, public order, public health, national security and foreign policy of the country besides fundamental rights of the others.¹²” It is the “general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has a stake.”¹³ A thing is said to be in public interest if it contributes to the “wellbeing of the general public¹⁴”.

15. Nature of *Public Interest* in the context of free speech and expression finds its presence in the Constitution itself. The Constitution and then the Ordinance tell us how public interest can be endangered or jeopardized by a Licensee? Right to free speech and expression under the Constitution is subject to reasonable restrictions in order to protect and safeguard public

¹¹ Hafiz Junaid Mahmood v. Government of Punjab and others (P L D 2017 Lahore 1)

¹² Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others (P L D 2010 Lahore 230)

¹³ Black’s Law Dictionary page 1425 10th Edition.

¹⁴ American Heritage® Dictionary of the English Language, Fifth Edition. 2011. Houghton Mifflin Harcourt Publishing Company 21 Jul. 2017 <http://www.thefreedictionary.com/public+interest>

interest. The reasonable restrictions are; the interest of the glory of Islam or the integrity, security or defence of Pakistan, or friendly relations with foreign States, public order, decency or morality. Similarly under section 20 of the Ordinance, a licensee is to preserve the sovereignty, security and integrity of the Islamic Republic of Pakistan, and preserve the national, cultural, social and religious values and the principles of public policy as enshrined in the Constitution. The licensee is to ensure that programs and advertisements do not contain or encourage violence, terrorism, national, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred, pornography, obscenity, vulgarity or any other material offensive to commonly accepted standards of decency. Section 27 of the Ordinance provides that the Authority can prohibit any broadcast media from broadcasting if it is of the opinion that such program is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance of law and order or is likely to disturb public peace and tranquility or endangers national security or is pornographic, obscene or vulgar or is offensive to the commonly accepted standards of decency.

16. Similarly clause 6 of the License provides for the Programme standards and requirements in the following manner:

6.1 The Licensee shall ensure that the Licensed Service complies with the requirements of the Ordinance, Rules and Regulations, and in particular, that:-

- (a) Nothing is included in the Licensed Service which is pornographic or obscene or is likely to encourage or incite crime or to lead to public disorder or to be offensive to public feeling;

- (b) Due impartiality is exhibited by the Licensee in matters of social or industrial controversy or relating to public policy.;
- (c) ... any such program does not involve hatred, controversies and sectarianism and does not contain;
 - (i) exploitation of any susceptibility of the viewers of such programs,
 - (ii) offensive treatment of religious views and beliefs of those belonging to a particular sect, religion or religious denomination; or
 - (iii) any sectarian viewpoint of such topic as may generate controversies.
- (d) programs in the Licensed Service which are of a political nature or relate to industrial controversy or current public policy, are presented in an impartial and objective manner.
- (e) Any material that might seriously impair the physical, mental or moral development of children must not be broadcast;
- (f) The use and abuse of drugs, smoking etc. must not be featured, encouraged or glamorized in programs made primarily for children;
- (g) Violence, whether verbal or physical, that is easily imitable by children in a manner that is harmful or dangerous must not be featured in programs made primarily for children;
- (h) Dangerous behavior, or the portrayal of dangerous behavior that is likely to be easily imitated by children in a manner that is harmful must not be featured in programs made primarily for children;
- (i) Offensive language must not be used in programs made for younger children.

Code of Conduct for TV Broadcasters provided in the License provides:

- (1) No program shall be aired which:
 - (a) Passes derogatory remarks about any religion or sect or community or uses visuals or words contemptuous of religious sects and ethnic groups or which promotes communal and sectarian attitudes or disharmony;

- (b) contains anything pornographic, obscene or indecent or is likely to deprave, corrupt or injure the public morality;
- (c) contains an abusive comment that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race or caste, national, ethnic or linguistic origin, colour or religion or sect, sex, sexual orientation, age or mental or physical disability;
- (d) contains anything defamatory or knowingly false;
- (e) is likely to encourage and incite violence or contains anything against maintenance of law and order or which promotes anti-national or anti-state attitudes.
- (f) contains anything amounting to contempt of court.
- (g) contains aspersions against the judiciary and integrity of the armed forces of Pakistan;
- (h) maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country.
- (i) is against basic cultural values, morality and good manners.
- (j) brings into contempt Pakistan or its people or tends to undermine its integrity or solidarity as an independent and sovereign country.
- (k) promotes, aids or abets any offence which is cognizable under the Pakistan Penal Code.
- (l) denigrates men or women through the depiction in any manner of the figure, in such a way as to have the effect of being indecent or derogatory;
- (m) denigrates children;
- (n) contains anything which tends to glorify crime or criminals;
- (o) contains material which may be detrimental to Pakistan's relations with friendly countries; or

(p) contains material which is against ideology of Pakistan or Islamic values.

(2) Particular care should be taken to ensure that programmes meant for children do not contain objectionable language or are disrespectful to their parents or elders.

(3) Programmes must not be directed against the sanctity of home, family and marital harmony.

17. Reasonable restrictions in Article 19, the statutory terms and conditions of license and the prohibitions under sections 20 and 27 of the Ordinance, the requirements under Clause 6.1 of the License and the Code of Conduct for TV Broadcasters described above, constitute factors that endanger and jeopardize *public interest*, especially in the context of free speech and expression. *Principle of reciprocity* based on a reaction to a decision of a private Indian channel does not pass the test of reasonable restriction under Article 19 of the Constitution. The question whether prohibitions provided under the law or the License are attracted in this case, does not arise, as there has been no act or decision on behalf of the Licensee.

18. Even otherwise, there is a thin line between *in the public interest* and *against the public interest*. The right balance and equilibrium has to be maintained between the two. What might appear to many to be against the public interest can also be in the public interest, if looked at differently. For effective evaluation of the existence of *public interest*, we must filter the subject matter through our preambular constitutional values of democracy, freedom, equality, tolerance, social, political and economic justice, freedom of thought, expression, belief, faith, worship and association. Effort must be made to advance the frontiers of freedom by advancing inclusivity, diversity and

plurality in our society. In this digital age of connectivity, the planet is now but a global village and we cannot shut ourselves to ideas, thoughts, art, culture and literature that is all around us and just a click away. With this perspective, reasonable restrictions under the Constitution and the prohibitions under the law, are to be examined. Further, the restrictions must be substantive, real, proximate, tangible and immediate and not remote, conjectural or far fetched. Only if *public interest* exists in the above terms, can PEMRA take action under section 30(2) of the Ordinance. In the instant case, there is no act or violation on the part of the licensee. The basis of the impugned Circular is the act of a private Indian channel. The refusal to air Pakistani dramas by some private channel in India has prompted PEMRA to issue the impugned Circular restraining the Pakistani channels to follow suit. This is no more than a knee jerk response or *a tit-for-tat*. Is PEMRA authorized to do so? *Principle of reciprocity* might be a consideration for the State in formulating its foreign policy but is not available to PEMRA which is to function strictly within the ambit of the law. PEMRA must neither be piqued by misplaced emotions nor swayed by extra legal considerations. It matters less, how other countries or foreign private channels interpret their freedom of expression. PEMRA has to set its goals independently and define the freedom of speech and expression in light of the progressive ideals enshrined in our Constitution. Under the preamble to the Ordinance, PEMRA is to improve the standards of entertainment, enlarge the choice available to the people of Pakistan in the media for news, current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music, sports, drama and other subjects of national and public interest. While

PEMRA must be resolute and vigilant in safeguarding public interest, it must also guard the freedom of speech and expression with the same unwavering commitment and vigour. The only consideration that outweighs this freedom is a substantive, tangible, existing and sufficient *public interest* as described in the Constitution or the law. Refusal to air Pakistani dramas by a private Indian channel does not imperil or jeopardize any *public interest* in Pakistan. There is no evidence on the record to establish that the reasonable restrictions under Article 19 or the conditions mentioned in sections 20 and 27 of the Ordinance or any other clause of the License has been offended in the instant case. *Principle of reciprocity* does not constitute public interest under the Constitution or the law. Therefore, PEMRA had no constitutional or legal justification to alter or vary the rights of licensees and prohibit them to air Indian content under the license. Indian private channels may choose to be xenophobic and reactive, if they so decide. This should not dictate PEMRA's policy. We are the custodians of our own freedoms and are free to decide our road to progress and growth. Being open to other cultures, art, literature, ideas and thoughts is an attribute of a thriving and evolving nation. It is also in consonance with our constitutional values and policies which discourage parochial prejudices (article 33). In this background, the impugned Circular issued by PEMRA stands without any constitutional or lawful support.

19. For the above reasons, impugned Circular dated 19.10.2016 issued by PEMRA is set aside as being unconstitutional and illegal. It is, however, clarified that PEMRA is free to invoke section 30(2) of the Ordinance, in

appropriate circumstances, in order to protect and safeguard *public interest*, as discussed above.

20. This writ petition is allowed in the above terms with no order as to costs.

(Syed Mansoor Ali Shah)
Chief Justice

Iqbal/*

APPROVED FOR REPORTING