



A **FRIVOLOUS** LAWSUIT

Case Study on Court Settlement of Disputes in Pakistan



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“A Frivolous Lawsuit”: Case Study on Court Settlement of Disputes in Pakistan

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This case study is part of the project being undertaken by Policy Research Institute of Market Economy (PRIME) with support from Atlas Network. The aim is ‘Making Pakistan a Trusted Business Partner’ through improving Pakistan’s ranking and score in ‘Enforcing Contracts’ and to improve the overall ranking of the country in the World Bank’s Doing Business Index over 2016-18.

A lengthy, cumbersome and costly mechanism to seek enforcement of contracts is detrimental to the business environment of a country. Investors shy away from such economies where rule of law is weak and uncertainty looms large. Therefore it is important for achieving a favourable investment climate in the country that business contracts get honoured and where a dispute arises, it can be settled at a suitable cost and time duration.

All names mentioned in the case herein have been changed to protect privacy. Real court cases, where final order has been passed, have been picked for illustrating the nature of disputes and the issues with the contract enforcement mechanism in Pakistan. The case studies do not mean to comment on the justness or unjustness of the arguments presented by any party to a case.

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Introduction

Asad Malik became a cellular service subscriber of Herring Sky, a private limited company, in 2012. For this purpose, Asad executed the customer services agreement. He had a postpaid connection and had also subscribed to international roaming facility provided by Herring Sky. During July 2013, he went abroad on a business trip and was utilizing the international roaming facility provided by Herring Sky. While on the trip, he found out that his cellular service had been terminated. He contacted the customer services to inquire about the reason and was informed that his account services had been suspended because he had a liability of Rs. 55,000/-, which far exceeded his credit limit of Rs. 15,000/-.

Due to suspension of cellular service, Asad claimed that his clients were unable to contact him and made him accountable as to why he was unreachable while abroad, when he was sent for a specific purpose. They questioned his level of professionalism and even his motives for going abroad.

Asad contacted the customer services desk several times seeking an explanation for the ordeal he had to face, but claimed that the he received no satisfactory explanation. Therefore, he sent a legal notice to the Chief Executive Officer of Herring Sky on the 3rd of December, 2013. Upon receiving no reply even after passage of four months, on 21st June, 2014, Asad filed a lawsuit against Herring Sky.

Perspectives of parties to the case

As plaintiff Asad's stance was that he should have been notified by the service provider that his credit limit was about to reach the maximum limit, he would have paid the outstanding amount to revive his credit facility. He further said that why did his outstanding bill reach Rs.55,000/- when his account's maximum billing limit was Rs.15,000/-.

The plaintiff made a plea to the court that it should be declared that he was not liable to pay Rs.55,000/- bill outstanding against him as it exceeded his account's maximum limit. He alleged that it was negligence on the part of Herring Sky that they did not suspend his services when his credit limit reached Rs.15,000/-.

Moreover, he prayed to the court to award him his cost of litigation of Rs. 500,000; another Rs. 500,000 for financial losses due to his trip abroad becoming futile as his clients were unable to contact him; Rs. 2 million for the mental torture he had faced; Rs. 2 million as compensation for the loss to business he had to face; and Rs. 5 million to compensate him for the loss to his professional repute. This brought total claimed amount to Rs. 10 million.

Herring Sky, the defendant, replied through a written statement before the court that the suit was frivolous in nature and it was not maintainable. It argued before the court that the company does send automated text alerts to its customers when they or are about to reach their maximum credit limit. Furthermore, accounts are disabled once the accounting month comes to a close, therefore, customers can in some cases continue using their services even after they have reached their credit limit on postpaid connections. The defendant claimed that they have not breached any of their terms of service and that the suit has been filed merely to avoid payment of Rs. 55,000/- which was outstanding against the plaintiff.

Issues before the court

The court established four issues before it, which had to be determined.

1. Whether Asad was entitled for a decree of award of Rs. 10 million in damages, as per his claim?
2. Whether the lawsuit is non-maintainable and hence liable to be dismissed?
3. Whether Asad has not approached the court with cleanhands?
4. What relief shall the court provide to Asad?

For establishing the first issue of determining whether Asad was entitled to a claim of Rs. 10 million in damages or not, the burden of proof was placed on Asad. For determining issue number 2 and 3, the burden of proof was placed on Herring Sky.

Issue-wise findings of the court

Asad, the Plaintiff, had the onus to prove that he was entitled to damages to the tune of Rs. 10 million. However, he did not produce any witnesses for evidence in support of his claim despite availing several opportunities. He was also served a notice by the court and was given a number of opportunities to produce evidence, but even then, he failed to do so. Therefore, this issue of awarding damages to him was decided against him by the court.

As for issues 2-3, whether the case was non-maintainable and whether Asad did not approach the court clean-handed, the onus of proof was placed on the defendants- CEO and Regional Manager (Islamabad), Herring Sky. However, since Asad had failed to produce any witnesses for substantiating his claim, the need to decide these two issues had become redundant.

The judge ruled that since Asad had failed to substantiate his claim, the suit be dismissed for want of evidence. The last paragraph of the judgment read, "There is

no order as to costs" i.e. costs of suit.

Case timeline

The plaint was filed i.e. case was instituted on 21st of June, 2014. The case proceeded before the court of a civil judge 1st class, Islamabad, for about thirty-four months (408 days approx.). The court passed the verdict on 18th of April, 2017. As per the World Bank's 'Doing Business' report, 2017, it takes on average 1071.2 days in Pakistan to settle a commercial dispute through courts in Pakistan. Observation made in there port seems to be correct because in this case where the plaintiff did not even turn up to produce evidence in his favor, which also leads to a presumption that it was a frivolous case, it took the system over 400 days to pass an order of dismissal. This case did not involve the most significant processes of producing oral and documentary evidence, cross examination of witnesses, arguments and finally execution of the decree if it is passed in favor of plaintiff.

Commentary

Pakistan has five main cellular service providers that operate nation-wide. All five companies are majorly foreign owned. The number of cellular service subscribers in Pakistan during the year 2016-17 was reported to be above 139.75 million users. During the same period, the number of 3G and 4G internet subscribers had reached 42.08 million. The industry brought a net FDI of \$246.8 million (13% of total net FDI) during 2015-16. This sector contributed Rs.

159.65 billion to the national exchequer during 2015-16.

Under the Code of Civil Procedure, 1908, the court has power to determine costs of suit, by whom it is to be paid and out of what property it is to be paid; and it can give all necessary directions for the purposes aforesaid. Furthermore, under section 35(2), of the C.P.C, 1908, "Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing".

Asad Malik v Herring Sky is an example of a typical frivolous case involving unsubstantiated claims for loss and damages. The plaintiff had filed a lawsuit, but then did not assist the court in substantiating his claim, despite availing several opportunities. This was a waste of the court's time which could have been spent dispensing justice in some other case involving serious grievances and parties genuinely interested in arguing their case. Such cases which lack substance are one huge reason for the lengthy time it takes to settle cases in courts. As a result, the court is overburdened. By reducing the burden of unsubstantiated lawsuits, the courts can dispense speedier justice in cases which seriously require their

indulgence.

Not only do such cases adversely affect the court's efficiency and quality of work, but also hamper business activity. The time and cost spent by individuals and enterprises in defending themselves in such cases can be more productively put to use in pursuit of business activity instead of facing court processes and waiting to see the fate of cases. When multinationals find themselves involved too frequently in such court cases they have to reconsider their options vis-à-vis continuing operations in a country or retrenching from a particular market. Businesses are reluctant to invest in a country where written contracts are not honored and it is time consuming and costly to get them enforced through courts. Should such corporations choose to pullout from the country, it would result in loss of jobs in the economy, loss to national exchequer, decline in business for banks, insurers, and various suppliers of the business. Moreover, these are just the direct losses; significant indirect losses would also result such as the newly employed manpower failing to make payments on their car financing loans, house rent, educational expenses of children, and so on. When one major multinational closes shop in any economy, the reputation of market attractiveness of that country gets tainted, resulting in further decline in inward FDI.

In the case of *Asad Malik versus Herring Sky*, in contravention of section 35(2) of the C.P.C, 1908, the court did not state any reason for not awarding costs in its judgment. Reforms are needed to ensure that the courts do award costs to the party that wins the case and also impose a fine to be paid to the court for wasting its time. One reason for not making any order as to costs is that it absolves the court of the responsibility to determine the veracity of costs. However, with clear provisions included in statutes, for instance (i) counsels' fee invoices and proof of actual expenses incurred for bringing witnesses and documentary evidence etc., it can be done without much hassle.

Recommendations

The Cost of Litigation Act, 2017 received the Presidential assent on 23rd May, 2017. It is an act to further amend the Code of Civil Procedure, 1908. This act is only applicable in the jurisdiction of Islamabad Capital Territory.

The act amends section 35 of C.P.C, 1908; it requires that all parties to a case shall, before the announcement of judgment, submit the details of their actual costs of litigation. This cost should include but shall not be limited to, the court fee, stamp fee, fee paid to counsel and any other ancillary expense. The costs other than those

mentioned under clause (i) shall be in the court's discretion. The court shall have full power to determine out of what property such costs are to be paid and recovered and to give all necessary directions for the purposes aforesaid

The act requires courts to grant adjournment to any party to a case on the condition that the party seeking adjournment must pay the other party Rs. 5,000/- (or higher as may be prescribed) per adjournment, as the cost of adjournment; and the reasons for adjournment are to be recorded. If the court feels that the adjournment being sought is due to unavoidable reasons beyond the control of the party concerned, then the adjournment cost can be waived off by the court.

Under the newly introduced section 35B, if in any proceedings, the Court finds that any averment made by any party is false or vexatious to the knowledge of such party, the Court may award special costs to the opposite party against whom such averment has been made.

The Cost of Litigation Act, 2017, is a great step forward towards discouraging frivolous and weakly contested cases; addressing dilatory tactics by the litigants and/or their legal counsel; and towards providing for costs to be awarded to the litigants winning the case. This act has the potential to reduce the cost of doing business (with respect to litigation expenses), and the time taken to settle cases in courts is also expected to go down. Legislation on similar lines should also be undertaken by all the provincial legislatures of Pakistan to reform their justice systems.