

BY SPECIAL MESSENGER
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IN THE COMPETITION APPELLATE TRIBUNAL
2nd Floor, Federal Courts Complex, G-11/1, Islamabad.
Email Address: registrartribunal@gmail.com
Tel No: 051-9320208 Fax No: 051-9320209

No. 1184
Dated: 16-05-2017

From:-

The Registrar
Competition Appellate Tribunal,
Islamabad.

To:-

1. Bahria Town Private Limited,
Corporate Office-II, Phase-II,
Bahria Town (Pvt) Ltd,
Rawalpindi/Islamabad.
2. Competition Commission of Pakistan,
Government of Pakistan, 7th Floor,
ISE Towers, 55-B Jinnah Avenue,
Islamabad.
3. Nayatel (private) Limited,
GD Arcade, 73-E Fazal ul Haq Road
Blue Area, Islamabad.
4. Pakistan Telecommunication Company Limited,
PTCL Corporate Headquarters Block-E G-8/4,
Islamabad.

Subject:

APPEAL NO. 03/2017 JUDGMENT

Bahria Town (Pvt) Limited VS. Competition Commission of
Pakistan and others

Take notice that under rule 51 of The Competition Appellate Tribunal Rules, 2015, attested copy of the Judgment dated 10-05-2017 is attached herewith for information and record.

2. Given under my hand and stamp of the Tribunal, this
16th day of May, 2017.



M. Yousaf
REGISTRAR
REGISTRAR
Competition Appellate Tribunal
Government of Pakistan
Islamabad

A. No. 03/2017

BEFORE THE COMPETITION APPELLATE TRIBUNAL ISLAMABAD

Bahria Town Private Limited
Corporate Office-II, Phase-II
Bahria Town (Pvt) Ltd
Rawalpindi/Islamabad

Appellant

Versus

1. Competition Commission of Pakistan
7, 8 and 9 Floor
ISE Towers, 55-B
Jinnah Avenue
Islamabad
2. Nayatel (Private) Limited
GD Arcade, 73-E Fazal ul Haq Road
Blue Area
Islamabad
3. Pakistan Telecommunication Company Limited
PTCL Corporate Headquarters
Block-E, G-8/4
Islamabad

Respondents



Appeal under S. 42 of the Competition Act, 2010 (XIX of 2010) (the
"Competition Act") against the Order of the Commission dated 27 January
2017

Respectfully submitted:

1. Jurisdiction of the Competition Appellate Tribunal

Bahria Town Private Limited (hereinafter referred to as the "Appellant")
declares that the subject matter of the Appeal falls within the jurisdiction
of the Appellate Tribunal.

2. Limitation

The Appellant further declares that the Appeal is within the limitation
period of sixty days as prescribed in S. 42 of the Competition Act. The

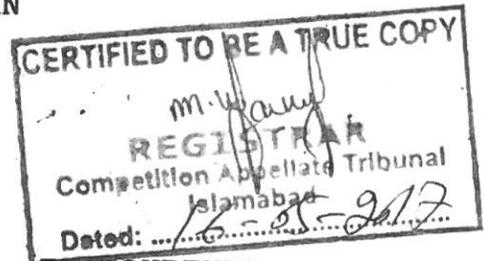
**BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD**

1. BAHRIA TOWN PRIVATE LTD,
CORPORATE OFFICE-II, PHASE-II,
BAHRIA TOWN (PVT) LTD,
RAWALPINDI/ISLAMABAD.
2. PAKISTAN TELECOMMUNICATION COMPANY LTD
PTCL CORPORATIONS HEADQUARTERS BLOCK-E,
G-8/4, ISLAMABAD.

.... APPELLANTS

VERSUS

1. COMPETITION COMMISSION OF PAKISTAN
7, 8 AND 9TH FLOOR ISE TOWERS, 55-B
JINNAH AVENUE ISLAMABAD.
2. NAYATEL (PVT) LTD GD ARCADE,
73-E, FAZAL UL HAQ ROAD, BLUE AREA
ISLAMABAD.



.... RESPONDENTS

Appeal Nos. 03/2017 & 04/2017

Present: Justice (R) Mian Fasih Ul Mulk, Chairperson
Mr. Ahmed Owais Pirzada, Member Technical.
Justice (R) Miftah-Ud-Din, Member Technical.

For the appellants: Mr. Azid Nafees Advocate.

For respondent No-1: Mr. Afnan Kareem Kundi, Advocate.

For respondent No-2: Mr. Sardar Ijaz Ishaq Khan, Advocate.

Date of hearing: 07.03.2017, 02.05.2017.

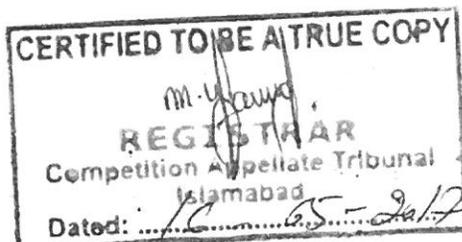
JUDGMENT

JUSTICE (R) MIFTAH-UD-DIN, MEMBER TECHNICAL.

1. Bahria Town Private Limited appellant in appeal No. 03 of 2017 and Pakistan Telecommunication Limited (PTCL) appellant in appeal No. 04 of 2017 have assailed the judgment and order dated 27th January 2017 of learned Competition Commission of Pakistan (CCP) by invoking the

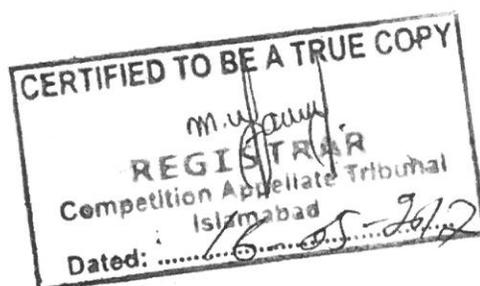
appellate jurisdiction of this Tribunal under section 42 of Competition Act, 2010.

2. The brief facts and back ground resulting in presentation of the above mentioned two appeals are that on 12th January 2016, respondent No-1 CCP received a complaint in the form of an e-mail from a resident of Bahria Town founded on the allegations that the residents of Bahria Town were deprived of any alternate cable Internet and Telephony (CIT) services provider forcing them to subscribe to the PTCL CIT services. Notice of the complaint was issued to appellant Bahria Town on 1st March 2016 with the direction to provide copies of agreements under which the existing operators were providing services in Bahria Town. The appellant Bahria Town on 16th April 2016 provided a memorandum of understanding signed by the two appellants. In the meanwhile, comments of Nayatel Private Ltd herein respondent No-2 were also invited. It was noticed by the CCP that no other options or substitutes CIT services providers were available because the management of appellant Bahria Town is refusing to grant no objection certificate (NOC) to Nayatel to operate in phase 1-6 of Bahria Town. A probe into the matter was conducted resulting in submission of an inquiry report on 17 June 2016. Pursuant

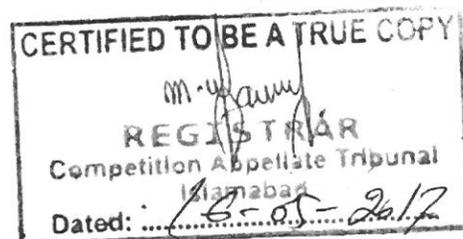


to the findings of the inquiry report a Show Cause notice was issued to appellant Bahria Town to explain about prima-facie abuse of its dominant position in contravention of section 3(1) read with sections 3(2) and 3(3)(e),(g) and (h) of the Competition Act. In the inquiry report it was recommended that PTCL be also made party to the present proceedings. After going through the comments of all the parties concerned, inquiry report and hearing the learned counsel for the parties, the learned Competition Commission of Pakistan came to the conclusion that appellant Bahria Town has abused its dominant position in the relevant market and imposed a penalty of rupees 20 Lacs on Bahria Town through the impugned Judgment and order dated 27th January 2017. Aggrieved from the same appellants Bahria Town and PTCL have preferred the above mentioned two appeals. As both the appeals are the outcome of the same Judgment and order of learned CCP, therefore, they are disposed off through the present single Judgment.

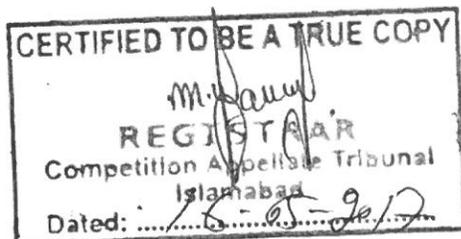
3. Mr. Azid Nafees Advocate, the learned counsel for the appellant contended that initially respondent CCP proceeded against appellant under section 4(1) of the Competition Act which deals with prohibited agreements but on the basis of the inquiry report the appellant was issued a



Show Cause notice under different penal provision i.e, section 3 of the Competition Act, which conduct of respondent is tainted with malice in law. He argued that PTCL was not associated at the stage of investigation with malafide intention. He argued that CCP has awarded punishment to appellant Bahria Town without waiting for survey report, therefore, the punishment of appellant Bahria Town is premature. He further contended that in present case complaint was made by a private resident / customer of Bahria Town which was non entertainable under section 37 (2) of Competition Act and the same exclusively falls under the consumer protection Act, hence the CCP was not justified to invoke jurisdiction in the present matter. He further contended that the complaint was malafidly treated under section 37 (1) of Competition Act to deprive the appellant of his remedy of appeal under section 37(2) of the Competition Act. The learned counsel for the appellant further submitted that the appellant Bahria Town is not the sole provider of grant of ROW for CIT services within the twin cities of Rawalpindi Islamabad, therefore, the learned CCP has wrongly declared Bahria Town to be a dominant undertaking in the relevant market. He further argued that neither the question of dominant position on the part of



Bahria Town arise nor it has the power and capacity to hinder fair and effective competition in the relevant market. Learned counsel for the appellant further argued that the memorandum of understanding between PTCL and Bahria Town took place on 30th April 2003 i.e. much more prior to the promulgation of competition Ordinance in 2007. He further submitted that section 62 of the competition Act makes the operation of the act valid from 2nd October 2007. Thus the arrangement between PTCL and Bahria Town was a valid agreement at that time, On account of which the validly accrued proprietary rights of PTCL cannot be interfered with or taken away by the provisions of competition Act 2010. The learned counsel for appellant further argued that relevant market in present case would be twin cities of Rawalpindi/Islamabad and the overall share of appellant Bahria Town in the relevant market is not exceeding 40 percent, therefore the learned CCP was not justified to declare the appellant to be having dominant position in the relevant market. He lastly argued that learned CCP has awarded punishment to the appellant Bahria Town without any cogent reasons and sufficient evidence. Therefore, the order of the learned CCP is liable to be set aside.



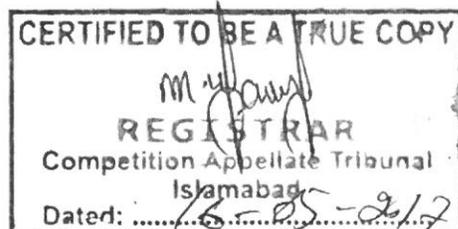
4. Mr. Sardar Ejaz Ishaq Khan, learned counsel for Nayatel respondent No-2 contended that the contention of learned counsel for the appellant regarding malice in law is wrong and unjustified. He further contended that appellant PTCL was given ample opportunity to put forward its case during adjudication stage therefore, none participation of PTCL during investigation or inquiry has not caused any miscarriage of justice to appellant. He further submitted that appellant Bahria Town in concert with PTCL engaged deliberately and wilfully in a persistent conduct in refusal to deal with respondent No-2 which resulted in exclusion of respondent No-2 from the relevant market. He further submitted that over a period of 16 months, the appellant is denying the right of way (ROW) to respondent No-2 by taking inconsistent and contradictory pleas regarding the availability of space for the infrastructure of CIT services which resulted in exclusion of Nayatel from the relevant market. He further submitted that relevant geographic market was Bahria Town and not at all the twin cities of Rawlapinidi Islamabad.

5. Mr. Afnan Kareem Kundi Advocate learned counsel for CCP while endorsing the contentions of Mr. Sardar Ejaz Ishaq Khan Advocate, learned counsel for



Nayatel respondent No-2 defended the Judgment and order of learned CCP. He submitted that the question raised by learned counsel for appellant are procedural and technical having nothing with the merits of the case and that sufficient opportunity of hearing was afforded to PTCL at the relevant stage of proceedings, therefore, the question of malice in law does not arise. He further submitted that learned CCP through an elaborate, detailed and well reasoned Judgment has found the appellant Bahria Town to have abused its dominant position and that the relevant market in the given facts and circumstances was Bahria Town and not the twin cities of Islamabad / Rawalpindi, therefore, CCP was quite justified in awarding punishment to the appellant Bahria Town.

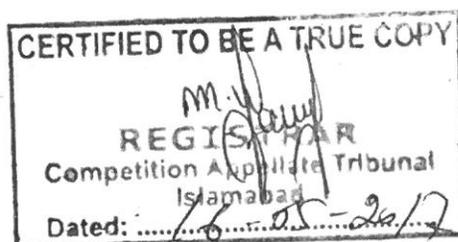
6. Taking up the contention of learned counsel for the appellant regarding notice u/s 4(1), and none participation of PTCL at investigation stage, no doubt after receiving information that residence of Bahria Town were deprived of any alternate cable Internet service provider and were force to subscribe to PTCL CIT services, initially notice was given to appellant Bahria Town u/s 4(1) to produce any agreement between appellant's, but when appellants produced MOU, subsequently a probe and investigation was



ordered to collect material regarding actual violations made by appellants involved in the relevant market. After receipt of inquiry report not only appellant PTCL was impleaded at the relevant stage but also appellant Bahria Town was confronted with actual nature of accusations and full opportunity of hearing and defence was awarded to appellant Bahria Town before awarding punishment. So far as none association of PTCL at the initial stage and affording an opportunity of hearing at the inquiry stage is concerned, it is not legally necessary to afford such an opportunity to individual during investigative or administrative proceedings. The record indicates that full opportunity of producing documents and hearing was afforded to PTCL at the adjudicative stage of proceedings in the present case. The right of hearing under the principle of natural justice is not attracted at investigation stage until and unless it is shown that on account of impugned order, PTCL has been deprived of property or liberty. It is obvious from the record that neither any show cause notice was issued to PTCL on the basis of inquiry report nor any punishment was awarded to PTCL at the time of final Judgment / Order, therefore, PTCL was not justified to prefer an appeal before this Tribunal as it was not at all an aggrieved party from the impugned order.

CERTIFIED TO BE A TRUE COPY
M. J. Khan
REGISTRAR
Competition Appellate Tribunal
Islamabad
Dated: 12.05.2012

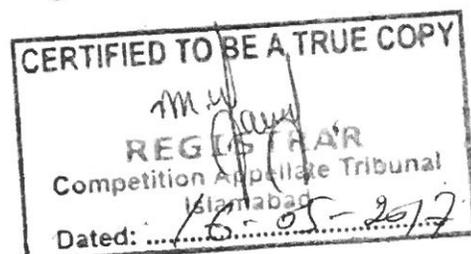
7. Similarly the contention of learned counsel for the appellant regarding non observance of proper procedure and malice in law is also without substance because nothing on the record exists that while taking action against the appellants, the CCP was not competent to do so or has acted beyond its power or in violation of the law applicable in the present case. Thus we hold that the contention of learned counsel for appellant in this connection is more procedural and technical than based on merits and justice. Justice demands that substantive rights of the parties be decided on merits and procedural lapses and technicalities must not be allowed to impede justice. Likewise the contention of the learned counsel for the appellant that the complaint made by a private resident/customer of Bahria Town was non entertainable under section 37 (2) of Competition Act but falls under the Consumer Protection Act is also without any merit and substance. The nature of accusation levelled by the residents of Bahria Town in a complaint are to the effect that they have been deprived of any alternate CIT service provider and were forced to subscribe to the PTCL CIT services by the Bahria Town are of such a nature which exclusively falls within the jurisdiction of CCP and not Consumer Protection Act, therefore, the CCP was justified to assume jurisdiction



in the matter. Similarly no remedy of appeal was available to the appellant under section 37(2) of Competition Act, as no statutory right of appeal exist against the order of investigation hence the contention of the learned counsel for the appellant in this connection is without any merit.

8. No doubt the memorandum of understanding between the appellants took place on 30th April, 2003 under the old arrangement but the same would not confer any permanent proprietary right on the appellants to claim exemption from proceedings under Competition Act for indefinite period. In the present case proceedings against the appellant were initiated on the basis of complaint dated 12th January 2016 i.e. after coming into force of Competition Act 2010. Therefore, in these circumstances no legal justification exists for appellant to claim perpetual exemption from proceedings under the Competition Act.

9. Taking up the contentions of learned counsel for appellant regarding the main controversy i.e. dominant position, abuse of dominant position, exclusionary conduct and verdict by learned CCP before survey report, we deem it proper to reproduce the relevant statutory provisions. According to section 2 (1) (e) of the Act "dominant position" of one undertaking or several undertakings in a relevant



market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

3. **Abuse of dominant position---** (1) no person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restricts, reduce, or distort competition in the relevant market.

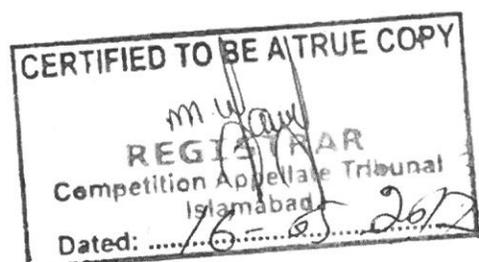
(3) The expression "practices referred to in sub section (2) shall include, but are not limited to ---

(e) Applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;

(g) Boycotting or excluding any other undertaking from the production, distributing or sale of any goods or the provision of any service; or

(h) Refusing to deal.

Keeping in view the above definitions of relevant provisions of Competition Act, we now refer to the relevant

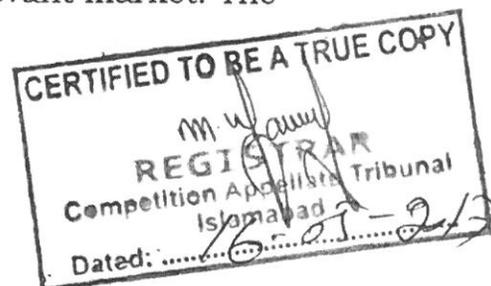


material available on the record. Appellant PTCL has been operating as sole provider of CIT services for the last 13 years in phase 1-6 of Bahria Town, clearly suggest that management of Bahria Town has granted de facto exclusivity to PTCL to operate in the relevant market. The fact that Bahria Town has denied granting NOC or right of way over a period of sixteen months on one pretext or the other to Nayatel to lay down its CIT infrastructure, clearly suggest that management of Bahria Town has exclusivity to grant NOC in utility corridors. The condition of competition are homogeneous in phase 1-6 in Bahria Town and obviously different than neighbouring areas where multiple CIT service provider are operating. Thus the residents of Bahria Town phase 1-6 cannot switch to CIT service providers in the neighbouring area DHA, CDA and RDA. The residence of Bahria Town phase 1-6 availing the CIT services of PTCL have no choice but to subscribe in response to relative change in prices, quality and other competitive variables. The relevant geographic market in the prevailing circumstance of the present case is phase 1-6 Bahria Town and not the twin cities of Rawalpindi / Islamabad, due to the reason that geographic neighbourhood becomes distinct once conditions of entry are in control of distinct legal entity.

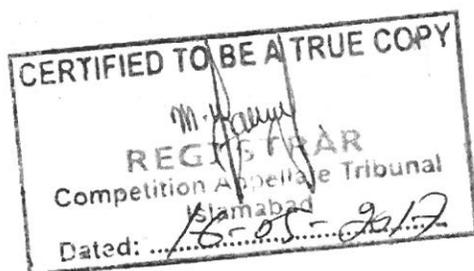


10. Now taking up the matter of dominant position, the management of Bahria Town has exclusive right not only to administer the Bahria Town but also to grant NOC or right of way for the provision of CIT services, thus having 100 percent share in the relevant geographic market i.e. phase 1-6 Bahria Town. The conduct of Bahria Town to refuse right of way to competitors of PTCL clearly suggest that it has the ability to behave independently of the customers, suppliers, alternate service providers including the residents of Bahria Town. All the above mentioned chains of circumstances and relevant material facts available on the record are of such a strong and un rebutted nature that presumption of dominant position has to be taken against Bahria Town. The appellant have failed to rebut or explain these presumptions on any other reasonable hypothesis, therefore, the contention of the learned counsel for the appellant that Bahria Town has less than 40 percent shares in relevant geographic market is baseless and unacceptable.

11. Now coming to abuse of dominant position by appellant Bahria Town, it is established on record that over a period of 16 months Bahria Town management is denying the right of way to Nayatel on contradictory and in consistent pleas to exclude Nayatel from the relevant market. The



relevant material available on the record reveals that on 25th October, 2014 Bahria Town has asked Nayatel to quote revenue sharing percentage payable for grant ROW to CIT services infrastructure in Bahria Town. This clearly suggest that space was available in Bahria Town to accommodate Nayatel but when Nayatel agreed to pay the same revenue percentage as PTCL was giving, the management of Bahria Town refused with strange plea that space for infrastructure is not available. This plea of Bahria Town is not supported by other material available on the record. Nothing on the record exists that any other CIT player has occupied the utility corridor space in Bahria Town within a span of sixteen months. It is thus established from the above mentioned circumstances that Bahria Town is deliberately and on unreasonable grounds refusing to deal with Nayatel hence responsible for exclusion of Nayatel from the relevant geographic market. Thus the learned CCP has rightly concluded that the conduct of management of Bahria Town is adversely affecting competition in the provision of CIT services within relevant market i.e. phase 1-6 Bahria Town. Bahria Town has also failed to provide any rational commercial or objective justification in term of efficiency gains for its exclusionary and anticompetitive conduct.



12. The contention of learned counsel for appellant that judgment of learned CCP is premature as survey report has yet to come, is not acceptable for the reason that this report is for regulating the future conduct of parties and other competitors in the relevant geographic market i.e. Bahria Town phase 1-6 to promote fair competition on reasonable fairs, prices and competitive terms as well as to meet the justified demand of residents of Bahria Town to avail alternate CIT service provider, so that they are not subscribed to PTCL alone. Thus we hold that survey report would have no bearing on past conduct of Bahria Town. Which is proved to have deliberately and wilfully refused to deal with Nayatel and excluded it from real market by undue favouring PTCL. PTCL in response has also tried to help out Bahria Town by filling an appeal in the present case despite the fact that PTCL is neither an aggrieved party nor any penal action has been taken by the learned CCP.

13. Before parting with this Judgment we would like to place on record of this case our appreciations for the help, valuable assistance and full cooperation rendered by the learned counsels for the parities, enabling this Tribunal to decide this appeal with in the period of two months.



14. As a sequel to our discussion in paras 6 to 12 above, we have come to the conclusion that the learned CCP through an elaborate, detailed and well-reasoned judgment based on proper appraisal of material available on the record has rightly held appellant Bahria Town responsible for abusing its dominant position and exclusionary conduct towards Nayatel. We therefore, maintain the punishment awarded to appellant Bahria Town and dismiss both appeals with no order as to costs.

Announced in open court
10.05.2017

Justice (R) Miftah-Ud-Din
Member Technical

Justice (R)
Mian Fasih Ul Mulk,
Chairperson

Ahmed Owais Pirzada
Member Technical

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| Applicant | PTCP |
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