

IN THE COURT OF MIRZA JAWAD A: BAIG,
DISTRICT & SESSIONS JUDGE,
PRESIDING OFFICER, DISTRICT CONSUMER COURT,
50-Z, MODEL TOWN, DERA GHAZI KHAN.

(PHONE: PTCL: 0642474100. FAX: 0642470496. VNTC: 0649239094).

Tameen Ali Hussain Versus Head Office U-Fone Multan & 2 others

Old Complaint/ Case No:	1477 / 180 / 11.
Date of Institution:	18-04-2011.
Date of 1 st Decision:	18-07-2011.
2 nd Old Complaint/ Case No:	1603 / 306 / 11.
Date of Restoration:	26-07-2011.
Date of 2 nd Decision:	26-01-2012.
New Complaint Case No:	2146 / 67 / 12.
Date of Restoration:	26-01-2012.
Date of Present Decision:	29-05-2012.

COMPLAINT ABOUT RESTORATION OF U-FONE CONNECTION

ORDER:

The claimant is represented by Malik Mohammad Sheraz Arshad Advocate while defendant No.1 is represented by Rana Mohammad Rashid Advocate and defendant No.2 by Mohammad Yasir Ali Khan Khosa Advocate & defendant No.3 by Sheikh Mohammad Saleem Advocate.

2. The case is at the stage of the **arguments**. I have heard the arguments and perused the record in the light of the arguments. Now I proceed to discuss and **dispose off** the complaint in accordance with the findings in the following paragraphs.

3. Briefly stated the **grievance** of the claimant is to the effect that he is government contractor and his mobile U-Fone sim bearing number 0331-4429240 being used for a large period for contact with his relatives and earning was abruptly closed and blocked and replaced in the night of 17-03-2011 at 12-20 AM by defendant No.3 i.e. U-Shop Chief Communication situated at Andhay Wali Pull and not restored by defendants No.2 & 3 despite liability to restore. It is alleged by the claimant that the defendant No.3 misbehaved with the claimant and claimed that the sim can be issued to any other person on payment of Rs.500/- and offered the claimant to take any other number. It is also alleged that the claimant has suffered the loss of Crores in his business due to closure of the sim and he has been embarrassed in his friends and relatives and also suffered mental tension. He has claimed two Lakh rupees from defendants No.1 to 3 jointly as damages and counsel fee in addition to the request for restoration of the sim. The legal notices issued by the claimant are said to be not responded by the defendants, hence this complaint.

4. Defendant No.1 namely Head Office U-FONE Multan has **contested** the complaint by filing its written statement in which it has raised certain preliminary objections and denied the receipt of legal notice and contended that the disputed sim was subscribed in the name of the petitioner on May 25, 2008; that service against his u-Fone number was suspended on stolen basis on petitioner own request on March 17, 2011 at 1152 hours from Shaigan Communication D.G.Khan and also duplicate SIM card issued on the same date from a mini Franchise i.e. Chief Communication Dera Ghazi Khan at 1218 hours to the petitioner himself against his own I.D Card. It is requested on behalf of defendant No.1 by its learned counsel in the written statement that the complaint be dismissed with costs and any other relief which the court deems fit may also be granted to respondent.

5. As far as the version of defendant No.2 namely U-FONE Franchise is concerned, the same is not on the file of the present case due to the reason that the complaint was disposed off as withdrawn at initial stage before summoning to the extent of defendant No.2 due to compromise on request on behalf of the claimant vide order dated 05-05-5011.

6. Defendant No.3 namely U-SHOP Chief Communication D.G.Khan has contested the complaint through one Farrukh Javaid by filing the separate written statement containing preliminary objections about maintainability, cause of action, non issuance of legal notice, no authority vested in it to block any sim or to restore any blocked sim. It is contended on behalf of defendant No.3 that the duplicate sim was got issued by the claimant himself on the basis of his own ID Card personally on 17-03-2011. It is requested that the complaint be dismissed and fine Rs.10,000/- with counsel fee Rs.20,000/- be awarded to defendant No.3.

7. It is pertinent to note that although **evidence** is necessary to be recorded under S.30 of PCP Act 2005 for disposal of the complaints by the Consumer Courts but since the procedural laws known as the Code of Civil Procedure, 1908; the Code of Criminal Procedure, 1898; the Qanun-e-Shahadat Order, 1984, the Bankers' Books Evidence Act, 1891; special rules of evidence u/s 118 of the Negotiable Instruments Act, 1881 are not strictly applicable to the proceedings of the Consumer Courts, as such the propriety demands that the regular evidence should not be recorded in such cases where the points for determination are mostly based on the copies of the admitted documents available in the file of the complaint or admitted in the pleadings however regular evidence has been recorded in the present case in accordance with Rule 6 (a) at page 37 of the Revised National Judicial Policy 2009 read with Order XXVI of CPC through the learned local commissioner (LLC) vide order dated 31-05-2011 by observing that evidence is necessary to be recorded for proper trial of the case although new sim on old number has been issued meanwhile because the claimant wanted to persue the case for recovery of damages and litigation charges along with counsel fee.

8. Oral evidence of the claimant consists of the cross examination as AW-1 on his affidavit produced as Ex.P-1 in lieu of examination in chief conducted by both learned counsel for contesting defendants No.1 & 3 respectively and recorded thorough the appointment of an Advocate as the Learned Local Commissioner (LLC).

9. Documentary evidence of the claimant consists of original affidavit of the claimant as Ex.P-1; three original postal receipts as Ex.P-2 to Ex.P-4; original stamped letter pad as Ex.P-5; another original stamped letter pad as Ex.P-6; and produced in rebuttal evidence plastic cover as Ex.P-7; sim card as Ex.P-8; copy of CNIC of the claimant as Mark P.A; three copies of legal notices as Mark P.B to Mark P.D; copy of taxpayer registration certificate as Mark P.E; copy of payer receipt as Mark P.F; copy of payment receipt as Mark P.G; copy of letter dated 12-08-2011 as Mark P.H; and rebuttal evidence consisting of the copy of the certificate of M. Asghar retailer as Mark P.I; original sim jacket as Ex.P-7.

10. Oral evidence has not been produced on behalf of defendant No.1.

11. Documentary evidence of defendant No.1 consists of the copy of CNIC of the claimant as Mark D.A; copy of customer service form as Mark D.B; copy of CNIC of the claimant as Mark D.C; another copy of CNIC of the claimant as Mark D.D; copy of customer service form as Mark D.E; copy of data form as Mark D.F.

12. Oral evidence of defendant No.3 consists of the cross examination as DW-1 on the affidavit of its representative produced as Ex.D in lieu of examination in chief conducted by learned counsel for the claimant and recorded thorough the appointment of

an Advocate as the Learned Local Commissioner (LLC).

13. Documentary evidence of defendant No.3 consists of the original customer service form as Ex.D-1; original fee certificate as Ex.D-2; copy of CNIC of the claimant as Mark D.G; copy of retailer certificate as Mark D.H; copy of order dated 16-06-2011 passed by Learned Consumer Court Multan as Mark D.I .

14. It is observed that the objections contained in ancillary application dated 16-06-2011 were treated as part of written statement on behalf of defendant No.1 vide order dated 09-07-2011. The main objection in the said application is about non impleading of the U-Fone company as party. I have observed that said objection has lost its significance because head office at Multan is impleaded as defendant No.1 but the complaint is being contested by the company secretary of Pak Telecom Mobile Limited (U Fone) and that the purpose of defending the case has been served.

15. One of other objections is about non receipt of the legal notices. I have observed that the postal receipts are produced in the evidence along with copies of the notices as substantial compliance of the requirement about sending legal notices and it is not necessary to prove the delivery of the notices, therefore said objection is not fatal for the maintainability of the complaint.

16. One of the objections of the contesting defendants is to the effect that the complaint is not maintainable and liable to be dismissed u/s 28 (4) of the Consumer Act which is to the effect that a claim by the consumer or the Authority shall be filed within thirty days of the arising of the cause of action. A perusal of the file shows that the cause of action arose in the middle of the night of 17th and 18th of March 2011 which is deemed to be dated 18-03-2011 while the complaint was filed on 18-04-2011; therefore I find that the complaint has been filed after 31 days.

17. I have observed that the objection about period of limitation is however misconceived because the period of 30 days is fixed as limitation in such cases only according to ^{2nd} proviso of S.28 in which period of guarantee or warranty is fixed while the period of limitation in all other cases is one year from the date of purchase of the product or providing of service if no period of guarantee or warranty is specified. In the present case no period is deemed to be specified as such I find that the complaint being within one year is within the period of limitation. No ruling about the period of limitation relating to consumer cases has been cited. The complaint being within one year is not time barred. The rulings of Honourable superior courts on limitation being about other laws are therefore not applicable on the facts of the present case. The objection under discussion is therefore rejected.

18. One of the objections of the contesting defendants is to the effect that the jurisdiction of this court is ousted by the jurisdiction of PTA. The contention is based upon the rulings of Honourable superior courts to the effect that the special law would prevail over general law and that general law is to apply in the event of inconsistency or where special law is silent. I have observed that since the provisions of the Consumer Act are in addition to and not in derogation of any other law as settled in S.3 of the Act therefore jurisdiction of this court is in addition to the jurisdiction of PTA and the claim can be settled by the both forums. The restriction in the law concerning PTA is to the effect that PTA or its officers should not be sued in any case. The objection against the jurisdiction of this court is therefore rejected.

19. One of the objections raised during the arguments is to the effect that the case does not fall within the definition of 'product; or 'services' as defined u/s 2 (j) and (k) of the Act, 2005. I have observed that the SIM is a product being sold by the Company while the software in the SIM and the connectivity of the SIM with network of the company is a service as such the Company is not only deemed to be the manufacturer of the product but

also the provider of services in the form of the activation of the software. The objection is therefore rejected.

20. As far as the effect of withdrawal of the complaint relating to defendant No.2 on the maintainability of the complaint relating to other defendants is concerned, I find that since no overt act is attributed to defendant No.2 as such the case was not maintainable against said defendant even otherwise and the withdrawal due to compromise is not fatal for maintainability of the complaint relating to the remaining defendants in the said situation.

21. Reliance has been placed by learned counsel for defendant No.1 on copy of order dated 16-06-2011 filed during the arguments which was issued by learned Consumer Court Multan relating to the case involving U-Fone company as party to argue that the principal is not responsible for frauds committed by agents in matters which do not fall within their authority as provided by S.238 of the Contract Act, 1872. I agree with the said contention and hold that defendant No.1 is not responsible for the fault of defendant No.3.

22. As far as the request of the claimant for action against the defendants is concerned, it is observed that it is settled law that the manufacturer or service provider is not liable for any damages except a return of the consideration or a part thereof and the costs, specifically where the consumer has not suffered any damages from the product or provision of service except lack of utility/ benefit.

23. It is pertinent to note that the grant of damages is curtailed even under Contract Act, 1872 in which it is provided in S.73 to 75 that the damages should be proportionate to the loss and not excessive by mentioning that such compensation for loss or damage caused by breach of contract is not to be given for any remote and indirect loss or damage sustained by reason of the breach. It is an embargo placed by the general law of contracts upon the powers of the courts about grant of damages.

24. It is also observed that further embargo on the quantum of damages to be awarded by the Consumer Court has been placed by the law provided in S. 4, 10, 13 & 15 of PCP Act by declaring that the manufacturer or service provider shall be liable to a consumer for damages proximately caused by anticipated use of the product or provision of services that have caused damage but he shall not be liable for any damages except a return of the consideration or a part thereof and the costs in such cases where the consumer has not suffered any damages from the provision of service except lack of benefit or loss of utility as such I find that the claimant is not entitled to recover the damages or compensation or counsel fee or litigation charges through this court under the law of consumers.

25. Without prejudice to the above findings relating to the restriction on the powers of this court for grant of damages, it is alleged in the affidavit of the claimant produced as Ex.P-1 that internet was used on the disputed sim on 22-04-2011 by issuance of the sim to some other person while the sim was restored afterwards in compliance with interim orders of this court and since there is no cross examination on behalf of defendant No.3 on this point as such the allegation is deemed to be admitted as correct in absence of the cross examination therefore it is observed that since it is proved on the record that the conduct of defendant No.1 was negligent therefore the claimant is entitled to recover damages and counsel fee from defendant No.3 only.

26. As far as the quantum of the damages is concerned, the fact that the claimant is a businessman being contractor is evidently deemed to have suffered in his business to some extent due to closure of the mobile phone, therefore considered to be entitled to recover at least Rs.50,000/- as damages from defendant No.3 as approximate damages.

27. As far as the mode of proof of the counsel fee is concerned, it is observed

that the recovery of the lawyer's fee is legalized by S.31(g) of PCP Act 2005 and the same is not necessary to be proved and no evidence is required from the counsel about the receiving of the same while the appearance of the learned counsel to conduct the case is the acknowledgement of the receipt of the legal fee, therefore the claimant is entitled to recover the counsel fee from defendant No.3 in accordance with the certificate to be filed after the decision.

28. As far as the liability of defendant No.1 being the Company is concerned, I find that there is no fault of the company itself proved on the record therefore the complaint is liable to be dismissed to the extent of defendant No.1.

29. In accordance with above discussion, the complaint having already been dismissed to the extent of defendant No.2 by withdrawal is hereby dismissed to the extent of defendant No.1 without costs while the complaint is partly accepted against defendant No.3 to the extent of the recovery of Rs.50,000/- as damages and counsel fee of the claimant in accordance with the certificate to be filed by the claimant while the complaint is dismissed to the extent of the remaining amount of damages.

30. *Defendant No.1 is left to bear its **own** costs.*

31. *This order would become final u/s 34 of PCP Act 2005, if the **appeal** is not preferred within period of 30 days under S.33 of PCP Act 2005 & Rule 18 of PCP Rules 2009 in accordance with the Rules of Procedure of Honourable High Court.*

32. *In case of **delay** in compliance, the claimant is entitled to get the order implemented by filing the application for implementation with reference to S.31, 32 & 36 of PCP Act, 2005, if so required with the warning to the representative of defendant No.3 that the **costs** to be incurred for and during the application for implementation would be liable to be recovered from him.*

33. *One attested **copy** each of this order is directed to be provided to the parties on filing the applications without **court fee tickets** even if on plain papers free of charges by entry with signatures in token of receiving in Dak Register with the clarification that extra copies would be liable to be issued at their own expenses.*

34. *The file of this complaint is to be **consigned** to the record room of this court duly page marked with proper index and after due completion and made available for issuance of attested copies and kept under safe custody till the period fixed for destruction in accordance with the Rules & Orders of Honourable Lahore High Court.*

Announced:
29-05-2012.

(MIRZA JAWAD A: BAIG)
D. & S. J. / P.O., D.C.C., D.G.K.,
PUNJAB, PAKISTAN.