

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Manzoor Ahmad Malik  
Mr. Justice Sardar Tariq Masood  
Mr. Justice Syed Mansoor Ali Shah

**Civil Appeals No.159-L to 214-L of 2018.**

*(on appeal from the judgment of Lahore High Court, Lahore dated 09.1.2018, passed in writ Petitions No.3973/2016, 41337/2017, 4665/2016, 4581/2016, 4666/2016, 4670/2016, 5419/2016, 5441/2016, 5785/2016, 5837/2016, 6091/2016, 6142/2016, 8071/2016, 8315/2016, 8399/2016, 8654/2016, 8729/2016, 14223/2016, 4405/2016, 4667/2016, 4669/2016, 4917/2016, 5001/2016, 5004/2016, 5022/2016, 5023/2016, 5047/2016, 5053/2016, 5054/2016, 5250/2016, 5370/2016, 5512/2016, 5647/2016, 8830/2016, 9271/2016, 12763/2016, 18641/2016, 23426/2016, 4596/2016, 4642/2016, 4671/2016, 4754/2016, 4919/2016, 5000/2016, 5052/2016, 5060/2016, 5413/2016, 5449/2016, 5777/2016, 5825/2016, 6012/2016, 6073/2016, 8827/2016, 8914/2016, 12452/2016 and 38147/2016 respectively)*

Sui Northern Gas Pipelines Ltd., Lahore (in all cases)

...Appellant

***versus***

Bulleh Shah Packaging (Pvt.) Ltd., Lahore, etc	(in CA No.159-L/2018)
Sargodha Spinning Mills Ltd., Lahore, etc	(in CA No.160-L/2018)
Nimir Industrial Chemical Ltd., Lahore, etc	(in CA No.161-L/2018)
Fawad Textile Mills Ltd., Lahore, etc	(in CA No.162-L/2018)
Crescent Textile Mills Ltd., Faisalabad, etc	(in CA No.163-L/2018)
Quetta Textile Mills Ltd., etc	(in CA No.164-L/2018)
Monnoo Industries Ltd., Lahore, etc	(in CA No.165-L/2018)
M/s. Rupafil Ltd., Sheikhpura, etc	(in CA No.166-L/2018)
M/s. Ittifaq Pvt. Ltd., etc	(in CA No.167-L/2018)
M/s. J. K. Spinning Mills Ltd., Lahore, etc	(in CA No.168-L/2018)
M/s. Khokhar Textile Mills Ltd., Lahore, etc	(in CA No.169-L/2018)
M/s. Ishaq Textile Mills (Pvt.) Faisalabad, etc	(in CA No.170-L/2018)
M/s. Sarfraz Yaqoob Textile Mills Pvt. Ltd., Kasur, etc	(in CA No.171-L/18)
M/s. Ghazi Fabrics International, Lahore, etc	(in CA No.172-L/2018)
M/s. Bismillah Textiles Ltd., Faisalabad, etc	(in CA No.173-L/2018)
M/s. Abu Bakar Textile Mills Pvt. Ltd., Lahore, etc	(in CA No.174-L/18)
M/s. Haroon Textile Industries, Gujranwala, etc	(in CA No.175-L/2018)
M/s. D. S Industries Ltd., Sheikhpura, etc	(in CA No.176-L/2018)
Sitara Chemical Industries, Faisalabad, etc	(in CA No.177-L/2018)
Sapphir Fibres Ltd., Islamabad, etc	(in CA No.178-L/2018)
M/s. North Star Textile Mills Ltd., etc	(in CA No.179-L/2018)
M/s. A. A. Spinning Mills Ltd., Faisalabad, etc	(in CA No.180-L/2018)
M/s. Sheikhpura Textile Mills Ltd., Lahore, etc	(in CA No.181-L/2018)
M/s. S N Textile Pvt. Ltd., Sheikhpura, etc	(in CA No.182-L/2018)
ICI Pakistan Ltd., Lahore, etc	(in CA No.183-L/2018)
Tanveer Spinning Weaving Mills, etc	(in CA No.184-L/2018)
Marral textile Mills Ltd., etc	(in CA No.185-L/2018)
Al Nasr Textile Ltd., Lahore, etc	(in CA No.186-L/2018)
Azam Textile Mills Ltd., Kasur, etc	(in CA No.187-L/2018)
Indus Layallpur Ltd., Faisalabad, etc	(in CA No.188-L/2018)
Allawasaya Textile & Finshing Mills Ltd., etc	(in CA No.189-L/2018)
Shahbaz Garments (Pvt.) Ltd., Faisalabad, etc	(in CA No.190-L/2018)

Nishat (Chunian) Ltd., Islamabad, etc	(in CA No.191-L/2018)
M/s. Al Rahber Ind., Lahore, etc	(in CA No.192-L/2018)
M/s. Sareena Industries & Embroidery Mills, etc	(in CA No.193-L/2018)
M/s. Ittifaq Sons Pvt. Ltd., etc	(in CA No.194-L/2018)
Galaxy Textile Mills Ltd., Lahore, etc	(in CA No.195-L/2018)
M/s. Zulaikha Textile Mills Ltd., Lahore, etc	(in CA No.196-L/2018)
Nishat Mills Ltd., Lahore, etc	(in CA No.197-L/2018)
Hira Textile Mills Ltd., Kasur, etc	(in CA No.198-L/2018)
Reliance Cotton Spinning Mills Ltd., Lahore, etc	(in CA No.199-L/2018)
Tritex Cotton Mills Ltd., Lahore, etc	(in CA No.200-L/2018)
M/s. Wisal Kamal Fabrics, Sheikhpura, etc	(in CA No.201-L/2018)
M/s. Bhanero Textile Mills, Sheikhpura, etc	(in CA No.202-L/2018)
Pak Kuwait Textiles Ltd., Lahore, etc	(in CA No.203-L/2018)
M/s. Chakwal Spinning Mills Ltd., Kasur, etc	(in CA No.204-L/2018)
Sajjad Textile Mills Ltd., Lahore, etc	(in CA No.205-L/2018)
M/s. Shams Textile Mills Ltd., Lahore, etc	(in CA No.206-L/2018)
M/s. Ravi Spinning Mills Ltd., Lahore, etc	(in CA No.207-L/2018)
Amtex Privat Ltd., Faisalabad, etc	(in CA No.208-L/2018)
Ruby Textile Mills Ltd., Lahore, etc	(in CA No.209-L/2018)
Eastern Spinning Mills Ltd., Lahore, etc	(in CA No.210-L/2018)
M/s. M. A Textile Dying Finishing Industry, etc	(in CA No.211-L/2018)
Colony Textile Mills Ltd., Lahore, etc	(in CA No.212-L/2018)
Gulshan Spinning Mills Ltd., Lahore, etc	(in CA No.213-L/2018)
Gulshan Weaving Mills Ltd., Lahore, etc	(in CA No.214-L/2018)

...Respondents

For the appellant:  
(in all cases)

Kh. Ahmed Hussain, ASC.  
Mr. Muhammad Ozair Chughtai,  
AOR

**For respondents:**

No.2,6,8&amp; 11 in CA-161-L/18

No.7 in CA-163-L &amp; 164-L/18

No.2 in CA-168-L/18

No.1 in CA-172-L,179-L,181-L,186-L &amp; 203-L/2018

No.1&amp;2 in CA-198, &amp; 199 &amp; 202-L / 18

Mian Mahmood Rasheed, ASC.  
Mrs. Tasneem Amin, AOR

No.1 in CA No.159 &amp; 183-L/18 Mr. Shahzad Ata Elahi, ASC

No.1 in CA No. 166 &amp; 170-L/2018 Mrs. Tasneem Amin, AOR/ASC

No.1 &amp; 4 in CA No.201-L/2018

No.1 in CA No.191-L/2018

Mrs. Tasneem Amin, AOR

No.1 in CA No.197-L/2018

Mr. Shahryar Kasuri, ASC

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For the Federation:  
(In all cases)

Mirza Nasar Ahmad, DAG  
Mrs. Hina Hafeez Ullah Ishaq,  
Asth. A.G.

For OGRA:

Mr. Haroon Dugal, Advocate

Date of hearing:

21.03.2019 (Lahore).

**JUDGMENT**

**Syed Mansoor Ali Shah, J.-** The pivotal question<sup>1</sup> before us is whether respondent consumers of natural gas, engaged in the manufacture of paper, paperboard, textiles and chemicals, generating in-house electricity for self-consumption, with or without co-generation (technology), are to be categorized as "industrial" consumers or "captive power" consumers, for the purposes of tariff (sale price of natural gas) notified under section 8(3) of Oil and Gas Regulatory Authority Ordinance, 2002 ("**Ordinance**") in terms of Notifications dated 01.01.2013 and 23.08.2013, respectively?

2. As a matter of background, respondent companies entered into contracts for the supply of natural gas with Sui Northern Gas Pipelines Limited (SNGPL) and are, therefore, "retail consumers of natural gas" under the Ordinance. These contracts were for supply of natural gas, primarily for Industrial use, with further sub-usage of natural gas for in-house electricity generation facility installed within the Industrial consumer (or captive power only for self-consumption). This in-house generation facility is either on co-generation<sup>2</sup> technology or

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<sup>1</sup> Consolidating the questions raised in the Leave Granting Order dated 19.11.2018.

<sup>2</sup> Co-generation is the production of electricity using waste heat (as in steam) from an industrial process or the use of steam from electric power generation



otherwise. Cogeneration technology helps use the single supply of natural gas for dual purposes i.e., for industrial use, as well as, for generation of electricity for self-consumption.

3. On the advise of the Federal Government, OGRA notifies the price of natural gas (tariff) for each category of retail consumer.<sup>3</sup> "Category of retail consumers for natural gas" means category of retail consumers of natural gas designated as such by the order of the Federal Government<sup>4</sup>. Since 2013, Respondent Industrial consumers have been paying tariff as "Industrial" consumers under Notification dated 01.01.2013. At this point of time, both categories of "industrial" and "captive power" had the same tariff (i.e., Rs.488.23 per MMBTU). The issue arose after Notification dated 23.8.2013, when tariff under the category of "captive power" was enhanced to Rs.573.28 per MMBTU. SNGPL sought clarification<sup>5</sup> from OGRA regarding the tariff applicable to the respondent industrial consumers using co-generation. OGRA through reply dated 11.07.2014 clarified that respondent consumers (with co-generation) were liable for the enhanced tariff under the category of "captive power." As a consequence, SNGPL raised a demand from the respondent industrial consumers on 05.08.2014 for the enhanced tariff, treating them in the category of "captive power" consumers.

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as a source of heat. Cogeneration—also known as combined heat and power, distributed generation, or recycled energy—is the simultaneous production of two or more forms of energy from a single fuel source. In practical terms, what cogeneration usually entails is the use of what would otherwise be wasted heat (such as a manufacturing plant's exhaust) to produce additional energy benefit. It's one of the principal ways in which countries intend to reduce their greenhouse-gas emissions so as to slow climate change.

<sup>3</sup>Section 8(1) of the Ordinance.

<sup>4</sup>Section 8(6)(a) of the Ordinance.

<sup>5</sup> Vide letter dated 05.12.2013

4. The impugned demand raised by SNGPL vide letter dated 05.12.2013 was challenged before the Lahore High Court, in the first round of litigation, but the matter was referred to OGRA, which decided the issue against the respondent industrial consumers on 14.01.2016. In the second round of litigation, the decision of OGRA and its earlier clarification vide letter dated 11.07.2014 were challenged before the Lahore High Court, which decided the matter in favour of the respondent consumers vide impugned judgment dated 09.01.2018, categorizing respondent consumers as "industrial" consumers instead of "captive power" consumers. Hence, these appeals filed by SNGPL with leave of the Court granted on 19.11.2018.

5. We have heard the learned counsel for the parties and have gone through record of the case. At the very outset we have noticed that Federation or OGRA has not assailed the impugned judgment of the High Court. The tariff structure is determined and regulated by OGRA under the advice of the Federal Government.<sup>6</sup> Categories of retail consumers of natural gas, in particular, are determined by the order of the Federal Government.<sup>7</sup> Federation and OGRA, being the co-authors of the tariff and its categorization, have not challenged the judgment of the High Court, implying acceptance of the definition of "Captive Power" as determined by the High Court. Even the learned counsel appearing on behalf of the Federation or OGRA did not lay any serious challenge to the impugned judgment. Secondly, we have noticed that the litigation before OGRA and the High Court has been primarily regarding captive power employing cogeneration technology. The correspondence between SNGPL and

<sup>6</sup>Section 8(3) of the Ordinance.

<sup>7</sup>see Section 8(6) (a) of the Ordinance.

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OGRA is also pertaining to cogeneration. However, there are industrial consumers before us who have captive power facility for self-consumption without cogeneration. The High Court while deciding the matter on the basis of the definition of "Captive Power" under NEPRA Regulations dealt with both the classes of captive power i.e., with or without cogeneration.

6. We have examined these cases in the general context of the question that prefaces this judgment and in the process have considered the difference between two classes of captive power for self consumption i.e., with or without cogeneration; import of the definition of "captive power plant" from another law; and underlying policy dimension of the issue before us.

7. We take up the definitional issue first. Regulation 2(k) of the National Electric Power Regulatory Authority (Licensing, Application and Modification Procedure) Regulations, 1999 ("**NEPRA Regulations**") provides as follows:-

**"Captive Power Plant** means Industrial undertakings or other businesses carrying out the activity of power production for self consumption, who intend to sell the power, surplus to their requirement, to a Distribution Company or bulk-power consumer." (emphasis supplied)

As there is no sale of surplus power/electricity by the respondent industrial consumers, the in-house facility of electric generation for self-consumption or captive power, purely for self-consumption, for the purposes of the NEPRA Regulations do not fall in the category of "captive power." First, we have noticed that Federation and OGRA (the co-authors of the tariff structure under the Ordinance) have not challenged the impugned judgment implying acceptance of the definition as given in NEPRA Regulations. Second, learned counsel for the appellant or the counsel for the respondent Federation or

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OGRA have not pointed us towards any definition or explanation of "captive power" provided by OGRA as a regulator. Third, the term "captive power" is common to both NEPRA and OGRA as both the Regulators tend to regulate this category in one form or the other. This interrelatedness of the two statutes in the context of "captive power" makes the cross contextual reference to Regulation 2(k) of the Regulations, permissible.

8. It has been pointed out by the learned counsel for the appellants that every retail consumer of natural gas falls under one of the categories specified by the Federal Government, for the purposes of tariff, and is then liable for the corresponding tariff. There is no provision allowing for the categorization of a single consumer under multiple categories or multiple gas meters for a retail natural gas consumer. With this limitation, the test to categorize a retail consumer is by considering the core business of the retail consumer. In the present case, the respondent consumers are in the core business of manufacturing paper, paper-board, textile and chemicals, therefore, the contracts for supply of natural gas with SNGPL, in these cases, are for Industrial<sup>8</sup> use.

9. Other than the definitional issue, we have noticed that the installation of in-house facility of electricity generation for self-consumption (with or without cogeneration) in an industrial unit is at best a part of the mechanical and industrial process of the respondent consumer, which helps improve its efficiency and profitability. With the single category and single meter requirement

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<sup>8</sup> All consumers engaged in the processing of industrial raw material into value added finished products irrespective of the volume of gas consumed ...excluding such industries for which a separate rate has been prescribed as per notification dated 01.01.2017.

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of the tariff structure, multiple usage of natural gas within the industrial unit (for the industry and the captive self-consumption) is an internal arrangement of the consumer; therefore, only core business of the consumer is to be recognized for the purpose of categorization. In other words, addition of a captive power for self-consumption to the industrial process of the respondent consumer does not alter the category or the tariff of the industrial consumer, unless and until the "captive power plant" assumes its own commercial identity and sells electricity to a third party duly licensed by NEPRA.

10. Natural Gas Allocation and Management Policy, 2005 ("Policy") provides the following in paragraph 3.1.6:-

"3.1.6 Gas supply to all consumers in Captive Power Sector will be made after first meeting the requirement of Domestic, Fertilizer, Commercial, Industrial, and Power (both WAPDA/KESC and IPPs) Sectors on the following basis:

- (a) Those dual fired power plants with a capacity of upto 50 MW, which employ combined cycle or cogeneration technology, shall be encouraged for allocation of gas. In order to ensure the optimal gas use for power generation, industrial units collectively setting up merchant power plants for self-consumption only **will also be included in this category.**
- (b) Gas supply for self-power generation would be on "as and when available basis" at different locations.
- (c) The pipeline extension, if required, would be at the cost of the sponsor of the industrial unit."

The above paragraph deals with prioritizing allocation of natural gas for the Captive Power Sector and states that any power plant for self-consumption will be included in the "Captive Power Sector," meaning thereby that it is not already under the said category and will be so considered for the purposes of allocation. This again supports the definition of NEPRA Regulation. Besides, the Policy






has no correlation with tariff and is limited to allocation of natural gas to various sectors.

11. It is clarified that demand raised against the respondent industrial consumers, on the basis of the tariff applicable to captive power is w.e.f 23.08.2013 till 31.08.2015 instead of 30.06.2014 as noted by the High Court. This is because, vide Notification dated 31.08.2015 tariff for categories of "Industrial" and "Captive Power" has been brought at par i.e., Rs.600 per MMBTU.

12. Categorization of natural gas consumers is a policy issue but if its application infringes the fundamental rights of the consumers, the courts do step in. In the present case, as explained above, the tariff policy or tariff structure in the context of "captive power" is unclear, confusing and deficient, resulting in infringing the fundamental rights of property and business of the consumers under the Constitution. Courts are well within their rights to interfere and correct the wrong, in the absence of any clarification from the authorities concerned.

13. Federation and OGRA may want to review the tariff structure and clearly provide the basis of categorization, factoring in technologies like cogeneration and distinguish between an industrial process and an independent business unit e.g. a captive power plant that also sells electricity.

14. On the basis of the record before us, we conclude that respondent consumers with a contract for supply of natural gas for industrial use and having in-house electricity generation facility for self-consumption (with or without cogeneration) fall in the category of industrial consumers and are subject to the corresponding tariff, unless the generation facility is a Captive Power Plant as per NEPRA



Regulations. For the above reasons, we find no reason to interfere with the judgment of the High Court, which is, therefore, upheld and these appeals are dismissed.

*Sd/- Manzoor Ahmad Malik, J*  
*Sd/- Sardar Tariq Masood, J*  
*Sd/- Syed Mansoor Ali Shah, J*

**Announced.**

Lahore,

10<sup>th</sup> May, 2019.

Not approved for reporting.

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*Sd/- Manzoor Ahmad Malik, J*

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11/5/2019