IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:
Mr. Justice Ijaz Ahmed Chaudhry
Mr. Justice Mushir Alam
Mr. Justice Sardar Tariq Masood

Civil Appeal No.1149 of 2015
Against judgment dated 28.05.2015 of Lahore High Court, Lahore, passed in Intra Court Appeal No.67 of 2015.

National Electric Power Regulatory Authority **Appellant(s)**

VERSUS

Faisalabad Electric Supply Company Limited **Respondent(s)**

For the Appellant(s) : Mr. Munawar-us-Salam, ASC
Syed Rafaqat H. Shah, AOR

For the Respondent(s) : Mir Afzal Malik, ASC
Ch. Akhtar Ali, AOR

Date of Hearing : 08.12.2015

JUDGMENT

Mushir Alam, J-. Through this appeal by leave of the Court, the Appellant-National Electric Power Regulatory Authority (NEPRA) has impugned the Judgment dated 28.05.2015, passed by a learned Division Bench of Lahore High Court, Lahore in ICA No.67 of 2015, also reported as National Electric Power Regulatory Authority v. Faisalabad Electric Supply Co. Ltd **(PLD 2015 Lahore 661)**, whereby Judgment dated 15.12.2014 passed by a learned Single Judge in Writ Petition No.28681 of 2014 was maintained setting aside the order dated 16.6.2014 made on a *'Motion for Leave to Review'* by three members Authority of NEPRA, as against total strength of five members and the Appeal was dismissed on the ground *inter alia* that *"it is clear from perusal of the Rule 16(6) of the NEPRA (Tariff Standards Procedure) Rules, 1998 that the law mandates for hearing of a Motion for Leave to review to be heard by the "full strength of the Authority"*.

2. Brief facts of the case appear to be that the NEPRA, appellant herein, is an Authority, constituted under Section 3 of the *Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997*, responsible for determining of tariffs and other terms and conditions for the supply of electricity by generation, transmission and distribution companies. It also confers jurisdiction for determination of the process and procedures for reviewing tariff and recommending tariff adjustment. The Authority is comprised of a Chairman to be appointed by the Federal Government and four members, one from each Province, to be appointed by the Federal Government after considering the recommendations of the respective Provincial Governments. Vice Chairman of the Authority is appointed from amongst the members for a period of one year by rotation. Sub Section (6) of Section 3 of the Act provides that no act or proceeding of the Authority shall be invalid by reason only for the existence of a vacancy in, or defect in, the constitution of the Authority. Section 5 ibid provides that meetings of the Authority shall be presided over by the Chairman or, in his absence, the Vice-Chairman. Three members shall constitute a quorum for meetings of the Authority requiring a decision by the Authority. Decision of the Authority is by majority of its members present, and in case of a tie, the person presiding the meeting has a casting vote. Section 6 mandates that all orders, determinations and decisions of the Authority are in writing and shall identify the determination of the Chairman and each member.

3. The Respondent-FESCO, under Rule 3(1) of the *NEPRA Tariff Standards and Procedure Rules, 1998,* (hereinafter referred to as NEPRA Rules, 1998) filed a Petition for the determination of Consumer Tariff for the Financial Year 2013-14 dated 28.06.2013. The matter was heard and decided by a three members Authority on 6.2.2014. Respondent being not satisfied, filed a *"Motion for Leave to Review,* as provided under sub rule (6) of Rule 16 of the *NEPRA Rules, 1998.* Review motion was admitted for hearing

and after hearing the Respondents-FESCO, Order on Review Motion was rendered on 16.6.2014 by the Vice Chairman (Sindh), and two members one from Balochistan and other from Punjab.

4. This order dated 16.6.2014 by the Authority, was challenged by the Respondent-FESCO. Contentious issue was the competence of the Authority to decide *"Motion for leave to Review"*, on the ground that the order has been passed by three members of the Authority, while Rule 16 (6) of the NEPRA Rules, 1998 requires that the Motion for Leave to Review was to be determined by "full strength of Authority". A learned Single Judge in Chambers in the High Court quoted Rule 16 ibid which reads as follows:-

> "*16. Decisions, etc., by the Authority. — (1) All orders, determinations and decisions of the Authority shall be taken in writing.*
> *(2)..*
> *(3)...*
> *(4)...*
> *(5)...*
> *(6) Within ten days of service of a final order, determination or decision of the Authority, a party may file a motion for leave for review by the full strength of the Authority of such final order, determination or decision, as the case be.*
> *(7) A motion for leave for review shall specify the grounds on which review is sought by the party. Parties to the proceedings shall be afforded a reasonable opportunity, orally or in writing as deemed fit by the Authority, to respond to a motion for leave for review.*
> *(8) The Authority shall act upon a motion for leave for review within ten days of receipts of such motion unless it gives notice to the parties, in writing that a longer period of time will be required and specifies the additional length of time necessary to consider the motion.*
> *(9) The Authority may refuse leave for review if it considers that the review would not result in the withdrawal or modification of the final order, determination or decision.*
> *(10) The Authority may grant leave for review on such conditions as deemed appropriate by the Authority including, without limitation, the conditions pertaining to any limits on time or additional evidence proposed to be presented in review."*

In paras 5 & 6 of the Judgment, dated 15.12.2014, it was held as under:-

> *"5. It is clear from a perusal of the Rule 16(6) that the law mandates for the hearing of a Motion for Leave to Review to be heard by the 'full strength' of the Authority. The term 'full strength' of the Authority does not present a complicated issue of construction of statute. It simply means that the said proceedings shall be taken and decided by all the members of the Authority sitting together and deciding such review. There is no cavil with the proposition that in the instant*

> *case the law does not even refer to a quorum but without equivocation requires the hearing by the 'full strength' of the Authority. It is settled as a basic canon of interpretation that if the intent of the legislature can be clearly gleaned then it must be given effect to without demur. In this case, there can be no two opinions on the requirement of the law and the meaning of the term 'full strength'. A dictionary meaning given to the term shall suffice. In Oxford Advanced Learner's Dictionary, 8th Edition, it is described thus:*
>
> > *'5[usually before noun] complete; with nothing missing'*
>
> *and strength as:*
>
> > *'10 [uncountable] the number of people in a group, a team or an organization'.*
>
> *6. There also seems to be a purpose for laying it as a condition that the Motion for Leave to Review be heard by the full strength of the Authority. And that seems to be that such a review is in the nature of an appeal and, therefore, the hearing should be by a complete strength of members sitting and deciding the review. This will lend due process to the entire procedure."*

5. The writ petition was accepted. The Appellant-NEPRA challenged the judgment of the learned Single Bench through ICA No.67 of 2015 and a learned Division Bench, vide judgment dated 28.05.2015, concurred with the above judgment of Single Bench and in paragraphs 12 TO 14 thereof and it was held as follow:-

> *"12. The term full strength under Rule 16(6) of the Tariff Rules is not the available strength but the statutory strength as provided under Section 3 of the Act i.e., five Members including a Chairman because under the said Rule, the Authority discharges one of its essential functions. Rule 16(6) simply reiterates this principle that the Authority has to act with full strength in matters which fall within the core essential functions of the Authority and where delegation is not permissible. It is important to highlight that it is not only at the time of hearing a motion for leave for review that the Authority must have full strength, but the full strength of the Authority must be there when the tariff is to be determined by the Authority or while performing the other functions issued under Section 12 of the Act.*
>
> *The Authority has other administrative Powers and functions listed under Section 7 of the Act. These administrative functions and its decisions are taken in the meetings of the Authority. Section 5 deals with this administrative character of the Authority and its secretarial provision, regulating the procedures for holding a meeting. These meetings and the decisions taken thereunder have no co-relation with the core and essential quasi-judicial powers and functions of the Authority e.g., the determination of tariff or deciding the motion for leave to review. Hence, the argument that if the quorum is complete the Authority can call a meeting and determine tariff, is hopelessly misconceived as it incorrectly mixes two different functions of the Authority. Section 5 deals with administrative meetings and is a secretarial provision with no nexus with the determination of tariff which is a quasi-judicial function of the Authority.*

> *Learned counsel for the Appellant has relied on Section 3(6) of the Act to argue that decisions of the Authority cannot be declared to be void if only three Members have made the determination of tariff or have decided the motion for leave to review: Section 3 (6) provides:*
>
> > *No act or proceeding of the Authority shall be invalid by reason only of the existence of a vacancy in, or defect in, the constitution of the Authority.*
>
> *This is an operational provision which applies once the Authority has been duly constituted in terms of Section 3 and its composition is complete. The reference to the terms "vacancy" and "defect" pertain to absence of the member or a procedural defect or irregularity in the membership. Both these disqualifications assume that the Authority has been fully constituted. Section 3(6) addresses a temporary problem and, therefore, protects the acts or proceedings of the Authority to allow smooth operability of the Authority. There could be a situation where a duly appointed member refused to attend the proceedings of the Authority for tariff determination or some irregularity in the appointment of any member who is part of these proceedings. The purpose of Section 3(6) is to ensure that such hiccups do not derail the Authority or its decisions. In the case of determination of tariff, while full strength is mandatory, there could be a situation where the Member is genuinely not able to attend the meeting or his appointment suffers from any irregularity making it difficult for him to attend, in such a situation, which should be duly recorded in the minutes of the proceedings, the Authority can proceed and determine the tariff or decide the motion for leave for review. This exception is few and far between but in the present case, Section 3(6) has no relevance as the Authority was not properly and lawfully constituted to begin with, as the Chairman and one other Member had not been appointed. Section 3(6) does not empower the Authority to proceed without proper constitution in terms of Section 3 of the Act. Any such interpretation can lead to absurd results, as the Chairman or a few Members, under the garb of Section 3(6) can proceed on their own and continue to determine tariff for the longest time. In such an eventuality, the Federal Government will have no incentive of obligation to appoint Members under the Act or complete the constitution of the Authority. Any such interpretation is also violative of the fundamental rights and the Constitutional vision as discussed above."*

6. It was contended by learned ASC that the Original order was passed by the Authority comprised of two members and a Vice Chairman, and order on Motion for Leave to Review was also heard and decided by same set of members and a Vice Chairman. It was vehemently argued that in terms of Section 5(2) of the Act, 1997 three member quorum is provided for the decision by the Authority which is a statutory requirement of the Act of 1997. It was urged that the Rules providing otherwise are to be read in conformity with the provisions of parent law and not in derogation thereto. It was urged that the learned Division Bench of the High Court has

taken a very strict view of sub rule (6) of Rule 16 of the NEPRA Rules, 1998 providing for the review by the "*full strength of the Authority"* should have been read in conjunction with Section 3(6) of the Act, 1997 whereby the Act, 1997 expressly provides and save the proceedings of the authority in event of the vacancy in, or defect in, constitution of the authority and in terms of Section 5(2) of the Act, 1997, which provides quorum of three members for decision of NEPRA. It was, therefore, argued with vehemence that Rule 16(6) of the NEPRA, 1998 not governs the Act, but it is vice versa, as power to Review was conferred on Authority under Clause (g) of sub-section (2) of Section 7 of the Act, 1997 through an Amendment in Act of 2011. In support of his contentions, he has placed reliance on Managing Director, SSGC Ltd v. Ghulam Abbas **(PLD 2003 SC 724 @ 751);** Reference No.1 of 2012 **(PLD 2013 SC 279 @ 329 and 330);** Muhammad Ashraf Tiwana v. Pakistan **(2013 SCMR 1159 @ 1192);** and Pakistan v. Aryan Petro Chemical Industries (Pvt) Ltd **(2003 SCMR 370 @ 388).**

7. It was further urged that decisions of the Authority are merely recommendatory and under Section 31 of the Act, 1997 it is upto the Federal Government to decide as it is or may require the Authority to reconsider its determination, and after such exercise within the contemplation of sub-section (4) of Section 31 of the Act, it is published in the Official Gazette. It was stated at bar that the Federal Government has accepted the determination on 01/11/2014, and further revision in tariff was made on 10.6.2015 to which the Respondent-FESCO has taken no exception.

8. Learned ASC for the Respondent-FESCO heavily relied upon sub-rule (6) of Rule 16 of the NEPRA Rules, 1998, reproduced hereinabove. According to him, for the purpose of Leave to Motion in Review per sub Rule (6) has to be determined by the full strength that is to say all five members. According to him, said sub-rule (6) ibid must

receive literal interpretation otherwise it would amount to violating the spirit of the law. In support of his contention, he relies on Sindh High Court Bar Association v. Federation of Pakistan **(PLD 2009 Supreme Court 879)**.

9. We have heard the arguments of learned counsel for the parties and perused the record. Leave to Appeal was granted on 06.11.2015 in the following terms:-

> *"Inter alia contends that under Section 5(2) of the NEPRA Act any decision in respect of the functions under the NEPRA Act can be taken by the petitioner in a duly convened meeting wherein minimum of three members of the petitioner are present; that Section 5(4) of the Act specifically mandates that the decision shall be taken by the majority of its present members; that the Act do not create a distinction or imposes a restriction for the purposes of tariff determination to be undertaken by the full statutory strength of the petitioner and that the above aspects of the matter have not been taken into consideration by the learned High Court.*
>
> *2. Having heard learned counsel for the petitioner at some length, leave is granted in this petition inter alia to consider the issues raised. Since a short point is involved, office is directed to fix the main appeal on 26.11.2015."*

10. Entire controversy revolves round the interpretation of sub-rule (6) of Rule 16 ibid; which runs as follows:-

> *"(6) Within ten days of service of a final order, determination or decision of the Authority, a party may file a motion for leave for review by the full strength of the Authority of such final order, determination or decision, as the case be."*

In order to examine the purport of the above rule, it would be advantageous to keep in sight the relevant provisions of the Act, 1997 that is to say Sections 3 to 6 of the Act, 1997 which read as follows;

> ***"3. Establishment of the Authority**. (1) As soon as may be, but not later than thirty days after the commencement of this Act, the Federal Government shall, by notification in the official Gazette, establish a National Electric Power Regulatory Authority consisting of a Chairman to be appointed by the Federal Government and four members, one from each Province, to be appointed by the Federal Government after considering the recommendations of the respective Provincial Governments.*
> *(2) There shall be a Vice-Chairman of the Authority, appointed from amongst the members for a period of one year, by rotation, in the following order, namely: (i) the member representing the Province of Baluchistan; (ii) the member representing the Province of North-West Frontier; (iii) the member representing the Province of the Punjab; and (iv) the member representing the Province of Sind.*

> *(3) [The Chairman shall be an eminent professional of known integrity and competence with at least twenty years of related experience in law, business, engineering, finance, accounting, economics, or the power industry].*
> *(4) Every member shall be a professional of known integrity and competence with at least fifteen years of related experience in law, business, engineering, finance, accounting, economics or the [power] business.*
> *(5) The Chairman and a member shall, unless he resigns or is removed from office earlier as hereinafter provided, hold office for a term of four years and shall be eligible for reappointment for similar term: Provided that a Chairman or a member shall not be appointed under sub-section (1) if he has attained the age of sixty-five years.*
> *(6) No act or proceeding of the Authority shall be invalid by reason only of the existence of a vacancy in, or defect in, the constitution of the Authority.*
> *(7) The principal office of the Authority shall be in Islamabad and it may set up offices at such place or places as it may deem appropriate.*
> ***4. Resignation and removal of Chairman, etc**. (1) The Chairman, or a member may, by writing under his hand, resign from his office.*
> *(2) The Chairman or a member may be removed by the Federal Government from his office if, on an inquiry by the Federal Public Service Commission, he is found incapable of performing the functions of his office by reason of mental or physical incapacity or has been found guilty of misconduct.*
> ***5. Meetings of the Authority, etc**. (1) The meetings of the Authority shall be presided over by the Chairman or, in his absence, the Vice-Chairman.*
> *(2) Three members shall constitute a quorum for meetings of the Authority requiring a decision by the Authority.*
> *(3) The members shall have reasonable notice of the time and place of the meeting and the matters on which a decision by the Authority shall be taken in such meeting.*
> *(4) Decision of the Authority shall be taken by the majority of its members present, and in case of a tie, the person presiding the meeting shall have a casting vote.*
> ***6. Decisions of the Authority.** All orders, determinations and decisions of the Authority shall be taken in writing and shall identify the determination of the Chairman and each member."*

11. NEPRA Rules, 1998 are framed by the Authority under Section 46 of the Act, 1997 with the approval of the Federal Government. Rules and or Regulations are the progeny or off spring of a Statute and are to be strictly in conformity with the provisions of the Statute where under same are framed. It is settled proposition of law that the rules framed under a Statute are to remain within the precinct of the Statute itself and cannot transgress the limits and parameters of the parent Statute itself. All efforts are to be made to interpret the rules so as to bring it in conformity and without injuring the intent and spirit of the Statute, where it is not possible then the rules in as much as it is injuring the

very intent and spirit which must yield to the Statute. This view finds support from a case reported as Ziauddin v. Punjab Local Government **(1985 SCMR 365 @ 368)**, wherein it was held as under:-

> *"Rules framed under the statute could not go beyond and over reach the statute itself. To make implementation of statutory provision consistent harmonious directory effect must be given to requirement of Rule".*

12. In another case reported as Pakistan v. Aryan Petro Chemical Industries (Pvt) Ltd **(2003 SCMR 370)** in paragraph 11 of the judgment, it was held that *"This is a settled principle that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section completes, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules framed under a statute if are inconsistent with the provisions of the statue and defeat the intention of Legislature expressed in the main statute, same shall be invalid".*

13. In somewhat similar situation, in a case reported as Isa Ammal v. Rama Kudumban **(AIR 1953 Madras 129)**, where the Petitioner applied for the issuance of a writ of *certiorari* to quash the proceedings and the decision of the Estates Abolition Tribunal at Madurai dated 22nd May 1950 in Revenue Appeal No.54 of 1950, on the ground *inter alia* that only two members of the Tribunal heard and disposed of the appeal filed by the petitioner under Section 9(4) of Madras Act XXVI of 1948 when the Tribunal as constituted by the Government was consisted of three members. The Settlement Officer Ramnad, acting under Section 9 of Madras Act XXVI of 1948 held an enquiry and declared the village not to be an inam estate as defined in Section 2 (7) of the said Act. Against his decision there was an appeal to the Estates Abolition Tribunal at Madurai by a ryot of the village. Two members of

the Tribunal set, heard and reversed the decision of the Settlement Officer and declared the village to be an inam estate. The Tribunal under Section 2 (14) of Madras Act XXVI of 1943 is constituted and in terms of Section 8 (2) each Tribunal shall consist of three members; one of them (who shall be its chairman) shall be a District Judge or an officer eligible to be appointed as a District Judge, another shall be a Subordinate Judge or an officer eligible to be appointed as a Subordinate Judge, and the third shall be a Revenue Divisional Officer or an officer eligible to be appointed as a Revenue Divisional Officer. In terms of Section 9 (4) (a) any person deeming himself aggrieved by a decision of the settlement Officer under Sub-section (3) may appeal to the Tribunal, whereupon the Tribunal hears the Appeal and gives decision [Section 9 (4) (b)]. Besides the jurisdiction to decide appeals from the decision of the Settlement Officer under Section 9, the Tribunal is also entrusted with several important duties and for carrying them out, large powers have been conferred on the Tribunals. Section 67 empowers the Government to make rules to carry out the purposes of the Act, and in particular rule 1 as regards the Tribunal provided, inter alia that “Not less than two members shall be necessary to constitute a sitting of a Tribunal”. In rule 2 it was provided that any matter before it, shall be decided according to the opinion of the majority of the members. If any matter has been heard by only two of the members and the members are divided in opinion as to the decision to be given, the matter shall be referred to the third member and decided according to the opinion which along with his constitutes the opinion of the majority, in rule 3 it was provided that when the Chairman of a Tribunal is ill or absent for any other reason the Second Judicial Member of the Tribunal shall act as the Chairman." Argument raised before the Court was that said rules, in so far as they purport to authorise two members of a Tribunal to sit and dispose of matters arising for the decision of the Tribunal are invalid as being ultra vires to the provisions of the Act. The Madras High Court on examining the provision of the Act and the Rules as

quoted above held that *"on a plain reading of the language of the material sections this contention must prevail. Under Section 9 (4) (b) it is the "Tribunal" which must hear and give its decision in an appeal preferred to it under Section 9 (4) (a). The Tribunal, according to the definition, means a Tribunal constituted under Section 8 and under Section 8 (2) it is expressly provided that each Tribunal shall consist of three members. When the substantive provision in the Act clearly lays down that the Tribunal shall consist of three members it is not open for the Government to provide by a rule that a Tribunal may consist of less than three members".*

14. It is to be noted that composition of the "Authority", the Quorum, required to attend and make decisions both administrative and or *quasi judicial*, as is required to be taken by any regulatory Authority, within the contemplation of Section 3 of the Act of 1997, is with great deal of flexibility from the strict rules of rigidity. Important nature of functions and duties of the Authority, that is required to take administrative and *quasi* judicial functions and duties, with promptitude desired informality and flexibility in its composition so that the working of the Authority may not be stifled and or strangulated in the rigors of strict norms of its composition and effect its performance of functions and duties. Section 5(1) thereof provides that meeting of the authority shall be presided over by the chairman or, in absence, the Vice chairman. And Section 5(2) ibid provides in clear terms that three members shall constitute a quorum for meetings of the Authority requiring decisions by the Authority. In order to dispel any doubt as to the effect and or merit of any act and or proceedings by the Authority, legislature has taken due care of eventuality in case where there happens to be any vacancy in, or defect in, the constitution of the Authority. Subsection (6) of Section 3 provides legal cover and any such act or proceedings could not be invalidated on such count. Object of sub-section (6) of section 3 ibid, is to keep the authority functional in all respects in performance of its all functions irrespective of any

vacancy but subject to maintaining minimum strength of quorum as three. There is no dispute that at the time when the original decision was rendered on 6.2.2014 and even at the time when the decision dated 16.6.2014 on Motion for Leave to Review was handed down, the Authority was comprised of two Members and a vice Chairman, that met the minimum requirement of three members quorum set down in terms of Section 5 (2) of the Act, 2007.

15. The Authority that has been conferred power under clause (g) of sub-section (2) of Section 7 to *"review its order, decision, or determination".* Power to Review was conferred on the authority as noted above under the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2011 and Rules were framed on 23 December 1998. Therefore, rules providing any other, strength of members for exercising its authority may it be executive, administrative and or *quasi* judicial, different than what is set down in the parent Statute itself, unless of course, such is permissible and provided for under the Act itself, must yield to the present Statute.

16. Every provision of the Act, 1997 is to be read harmoniously and rules are to be read keeping in sight the parameters of the parent statute. Therefore, rule 16(6) of the Rules 1998 requires order, determination on motion for leave for review is to be made by *"full strength",* within the contemplation of Rule 16(6) ibid means strength as set down in the Statute itself, that is minimum of three members within the contemplation of section 5 (2) of the Act, 1997. Act of 2007 does not admit of any classification of Authority viz. *statutory strength* and or *full strength*, and none should be created when the parent Statute does not permit so. One must not lose sight of the fact that rules are subservient to the Statute. Rules must be interpreted in a manner that it remains within the confine of the Statute itself and any interpretation that may outstretch the rules to take it out of pale of Statute should be avoided.

17. In view of the above discussion, we have no hesitation in holding that decision by as many members as were present not below *quorum* as required under Section 5(2) of the Act, 1997 is the *"the full strength"* of the Authority within the preview of the Rule 16(6) of the Rules, 1998. The decision of the Authority dated 6.2.2014 was therefore, well within the competence of the Authority. Accordingly, impugned Judgment dated 28.5.2015 passed by a learned Division Bench of the High Court in ICA No.67/2015 maintaining the judgment of the learned Single Judge dated 15.12.2014 is set aside. Resultantly, the appeal is allowed.

Judge

Judge

Judge

ISLAMABAD, THE
8th of December, 2015
ZR/*