

JUDGMENT

NISHAT CHUNIAN POWER LIMITED through Managing Director and others----
Petitioner

Versus

FEDERATION OF PAKISTAN through Ministry of Water and Power Islamabad and 2
others----Respondents

Writ Petitions Nos. 2226, 2227, 2229 of 2013

SHAUKAT AZIZ SIDDIQUI, J.----With this single order I intend to decide the above captioned writ petitions as these are directed against the orders of National Electric Power Regulatory Authority/respondent No.2 as identical facts and questions of law are involved.

2. Petitioners have invoked the constitutional jurisdiction of this court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 whereby they have challenged the impugned orders of respondent No. 2 and the demand of the disputed amount under the garb of impugned orders. In Writ Petition Nos. 2226, 2227 and 2229 of 2013 the petitioner has challenged the order dated May, 17th 2013, issued by the respondent No.2 whereby it dismissed the review application of the petitioner against the decision dated 06.03.2012 and 8th February, 2013 whereby it directed the petitioner to submit, consignment wise record of calorific value (hereinafter referred as CV) for its adjustment with respect to reference CV of 18,364 BTUs/lb supported with the copies of test reports certified by the fuels suppliers for the period covered from the stock of first consignment, received till 30.6.2011 and ultimately held through its decision dated 06.03.2012 that amounts of Rs.243.702 Million, 290.423 Million and 157.454 respectively were payable by the petitioner to the respondents.

3. The necessary facts are that the petitioners are the private limited companies having the principle activity to own, operate and maintain fuel fired power stations with gross capacity of approximately 200 MWs and the respondent No. 2 issued the generation license in favor of the petitioners. That the respondent No.2 issued a decision of 4th March 2009 whereby it fixed the reference CV as 18364 BTU/I6 for calculating the fuel cost component of the tariff payment at the time of initiating operation of plants of petitioners. That the said reference CV value was to be reviewed annually but it was never reviewed thereafter. That on 22nd July 2011 the respondent No. 2 issued another decision and directed the petitioners to maintain and submit annually a detailed record of consignment wise record of CV of the oil received and consumed by the petitioners for power generation for its adjustment with its respect to reference CV duly supported with the copies of test reports certified by the fuel suppliers. That on March 6th 2012 the respondent No.2 in complete deviation from its previous decisions and directions directed the petitioners to submit consignment wise record with respect to reference CV of 18364 BTU/I6 duly supported with the copies of test reports certified by the fuel suppliers for the period covered from the stock of first consignment received till 30th June, 2011. That being aggrieved the petitioners sought review of the impugned decision by filling a motion for leave to review under Rule 16(6) of NEPRA Tariff Standards and Procedure Rules, 1998 and the respondent No.2 dismissed the said applications through the impugned order dated May 17th 2013.

4. Learned counsel for the petitioner has argued that the direction of the respondent No.2 issued on 06.3.2012 are illegal, mala fide, invalid, without lawful authority and without jurisdiction having been passed due to extraneous considerations; that the impugned orders are against the fundamental rights of the petitioner and the impugned order dated 17.05.2013 is also coram-non-judice as a motion for leave to review should have been heard by the full strength of the authority whereas the said motion was disposed of by three members of the authority which order is liable to be set-aside on this ground alone. Learned counsel has further argued that the respondent No.2 ignored the relevant documents and jumped on to unjustified conclusions by dismissing the motion for leave to review, of the petitioners. It is further argued that there is no provision in the power generation licenses of the petitioner that they would have to submit the consignment wise record of CV and it is even otherwise impossible. Learned

counsel for petitioner has supplemented his arguments on the strength of the reported judgments Hamid Meer v. FOP and others (PLD 2013 SC 244), Reference No. 1 of 2012 (PLD 2013 SC 279), Al-Jehad Trust v. FOP (PLD 2011 SC 811) and Bank of Punjab and another v. Haris Steel and others (PLD 2010 SC 1109).

5. Conversely learned counsel for the respondents No.2 has argued that instant petition is without any substance as in Civil Appeal No.1149 of 2015 with the title of NEPRA v. FESCO, the Hon'ble Apex Court of Pakistan has held that any decision of the authority rendered by three members in terms of Section 5(2) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 is legally justified and it cannot be questioned on the ground that the decision should be rendered by the full strength of the authority under Rule 16(6) of NEPRA Rules, 1998. Learned counsel has further argued that the sole purpose of the petitioners is to protect the illegal gains and to deprive the authority and ultimately the public at large of the benefits resulting from the actual calculation of fuel consumption charges.

Arguments heard, record perused.

6. Perusal of the documents annexed with the petition reveals that respondent No.2 framed the rules National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 and Rule 16 (6) confers the rights upon an aggrieved person to file a motion for leave to review within 10 days of service of final order of the authority, by the full strength of the authority. The authority/respondent No.2 has been constituted by virtue of section 3 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 and its subsection (6) provides that no act or proceeding of the authority shall be invalid by reason only for the authority existence of a vacancy in, or defect in, the constitution of the authority. As per section-5 of Act of 1997 the meetings of the authority are to be presided over by the Chairman or in his absence, the Vice Chairman, three members to constitute a quorum for the meetings of the authority, requiring a decision by it. The main grievance of the petitioner is that the impugned order dated 17.05.2013 has been rendered by three members of the authority in violation to the procedure provided in Rule 16(6) of NEPRA Tariff Standards and Procedure Rules, 1998 whereas the Vice Chairman of the authority though was presiding over the meetings of the authority during the hearing of the motions for leave to review but he retired before the date of the impugned decision, hence in the absence of the vice Chairman the proceeding on the motion for leave to review were illegal, therefore, the said order is liable to be set-aside.

7. Having considered the respective contentions of the parties and having perused the case law, referred by the parties, it is observed that the Hon'ble apex Court of Pakistan in Civil Appeal No.1149 of 2015 with the title of NEPRA v. FESCO held that:-

"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 an regulatory Authority within the contemplation of Section 3 of the Act of 1997, is with great deal of flexibility form 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 strangled in the rigors of strict norms of its composition and effect its performance of functions and duties. Section 5 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 subsection (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, 1997.

The Authority that has been conferred power under clause (g) of subsection (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 23rd 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".

And ultimately the apex Court concluded that:-

"In view of the above discussion, we have no hesitation in holding that decision by as many members as were present not below quorum 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 ."

8. In view of the principles settled by the Hon'ble Supreme Court of Pakistan, it is held that that the impugned decision of the authority dated 17.5.2013 has been rendered by three members of the authority is not amenable to any interference merely on the ground that it has not been rendered by all the five members of the authority under rule 16(6) of the Rules, 1998.

9. As far as the other contentions of the learned counsel for the petitioners are concerned, it is observed that the petitioners being generation licensees of NEPRA are bound by the terms and conditions of the licenses, the directions, orders and decisions of the authority so far these are not illegal, mala fide and discriminatory. Perusal of the available material reveals that the petitioners have not been discriminated from other power Generation Licensees similarly placed as the Petitioners. Through its order dated 13th April, 2007, the authority prescribed a fuel price mechanism and directed the fuels suppliers to provide price adjustment mechanism due to variation in calorific value of the fuel being supplied to the licensees against the reference calorific value and ultimately the authority fixed the reference calorific CV of 18364 BTUs/lb. It is evident that the petitioners and the other licensees have been purchasing fuel from different oil marketing companies, therefore, the authority directed the petitioners and other licensees to provide the consignment wise record of CV for its adjustment with respect to reference CV of 18364 BTUs/lb duly supported with the copies of test reports certified by the fuel suppliers. The alleged inability on the part of the petitioners to supply the consignment wise test reports is superficial and is prima facie an effort to conceal the actual calorific value of fuel purchased by them. In terms of NEPRA Licensing (Generation) Rules, 2000 and NEPRA (Uniform System of Accounts) Rules, 2009 the petitioner and other license are required to ensure that they should prudently purchase fuel etc, and maintain the record and accounts of each and every procurement and cost even without the direction of the authority.

In view of the above discussion, it is held that the impugned orders of the authority are in accordance with the applicable rules, are not discriminatory and no fundamental legal/constitutional right of the petitioner has been infringed. Resultantly, these writ petitions are hereby dismissed.

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