

JUDGMENT

AAMER FAROOQ, J.---The instant appeal calls in question judgment dated 18.04.2016, whereby petition under Article 199 of the Constitution, filed by the respondent, was allowed.

2. The facts, in brief, are that at its request, the appellant granted Gujranwala Energy (Pvt.) Limited ("GEL") license for generation of electricity. The referred license was for a period of 25 years commencing from commercial operation date, however, it had two years of grace period as well. Under Article 5 of the Generation of License, GEL was required to pay annual generation license fee to the appellant and in default thereof, the same was susceptible to fine. The GEL paid license fee for few years, however, subsequently, defaulted in the same. Since it could not start its commercial operation, hence its name was deleted from array of the companies setting up power project in the year 2009 by Power Infrastructure Board. The appellant initiated proceedings against the respondent for payment of the annual license fee as well as levy of fine on the same under National Electric Power Regulatory Authority (Fines) Rules, 2002. In this behalf, a show-cause notice was issued on 04.07.2013 to the respondent which was duly contested and the matter was duly decided vide order dated 03.12.2013. Review Application was filed which also was dismissed vide order dated 14.05.2014. The respondent Company assailed order by way of a petition under Article 199 of the Constitution (W.P. No. 2817/2014), which was allowed vide impugned order.

3. Learned counsel for the appellant, inter alia, contended that impugned order is not tenable inasmuch as under terms of Generation License, the respondent Company was required to pay annual license fee which it defaulted; that since there was default, hence fine of Rs.100,000/- was imposed.

4. In response to the query of the Court regarding maintainability of the instant appeal in light of proviso 3(2)(b) of the Law Reforms Ordinance, 1972, learned counsel for the appellant contended that remedy of review is not available to the appellant. In support of his contentions, learned counsel placed reliance on cases reported as National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Limited (PLD 2015 Lahore 661) as well as Secretary to the Government of Punjab, Revenue Department and others v. Sajjad Ahmad and another (2012 SCMR 114).

5. Learned counsel for the appellant took the Court through various Rules and Regulations framed under National Electric Power Regulatory Authority (NEPRA) to contends that the appellant was well within the right to impose fine of Rs. 100,000/-.

6. Learned counsel for the respondent, inter alia, contended that the instant appeal is not maintainable in light of section 3(2)(b) of the Law Reforms Ordinance, 1972. In this behalf, it was contended that remedy of review is provided against original order which was duly availed, hence appeal is not maintainable. Reliance was placed on cases reported as Mst. Karim Bibi and others v. Hussain Bakhsh and another (PLD 1984 SC 344), Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore (PLD 1985 SC 107). It was further contended that term of Generation License, as per Clause 4.1, was for a period of twenty five years commencing from Commercial Operation Date, hence liability to pay the annual fee was from commercial operation date; that since the referred landmark was never achieved, hence there was no obligation on part of the respondent Company to pay the annual fee. In this behalf, learned counsel referred Rule 4 of the National Electric Power Regulatory Authority Licensing (Generation) Rules, 2000; Article 5 of the Generation License, National Electric Power Regulatory Authority (Fees) Rules, 2002.

7. Learned counsel for the parties have been heard and documents placed on record examined with their able assistance.

8. Since objection regarding maintainability of the appeal has been raised, hence the same shall be decided first. Under proviso 3(2)(b) of the Law Reforms Ordinance, 1972, where remedy of appeal, revision or review is provided against original order, against which petition under Article 199 of the Constitution has been filed, then Intra Court Appeal is not maintainable. The referred provision of law was elaborated lucidly in the landmark judgment

reported as Mst. Karim Bibi and others v. Hussain Bakhsh and another (PLD 1984 SC 344). The august Apex Court, in the referred judgment, observed as follow:-

"A plain reading of the proviso to subsection (2) of section 3 of the Law Reforms Ordinance, 1972 means that no appeal will be available or competent before a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court in a Constitutional petition, if such petition arises out of "any proceedings" in which the law applicable provided for at least one appeal against the original order. The reference is clearly to the proceedings taken under any statute which prescribes a hierarchy of officers or authorities for the carrying into effect the purposes of such statute including the enforcement of rights, if any, created thereunder. In such a case clearly the law envisages an original order against which the remedy of appeal was provided by the relevant statute."

Similar concept of original order was divulged in Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore (PLD 1985 SC 107), which is as follow:

"5. The above contention, however, can no longer be accepted, because a similar question has been elaborately examined by this Court recently in a settlement case, namely Mst. Karim Bibi v. Hussain Bakhsh and others (PLD 1984 SC 344), and it was held that the meaning of the expression 'original order' is the order with which the proceedings under the relevant statute commenced. It was observed that:-

"The crucial words are the "original order". It is clear from the wording of the proviso that the requirement of the availability of an appeal in the law applicable is not in relation to the impugned order in the Constitutional Petition, which may be the order passed by the lowest officer or authority in the hierarchy or an order passed by higher authorities in appeal, revision or review, if any, provided in the relevant statute. Therefore, the relevant order may not necessarily be the one which is under challenge but the test is whether the original order passed in the proceedings was subject to an appeal under the relevant law."

The conclusion was expressed that:-

"Apparently the meaning of the expression "original order" is the order with which the proceedings under the relevant statute commenced."

The proceedings against the respondent Company were initiated through a show-cause notice issued by the appellant dated 04.07.2013, which culminated in the proceedings and eventually an order by the appellant on 03.12.2013. Review Petition was filed under Rule 5 of National Electric Power Regulatory Authority (Fines) Rules, 2002 read with Regulation 3(2) of National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009. The crux of arguments in response to this objection, regarding maintainability, by the learned counsel for the appellant was that no remedy of review is provided to the Authority, hence appeal is maintainable. Under section 7(2)(g) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, one of the functions of the Authority/Appellant is to review its orders, decision or determinations. Pursuant to section 47 of the 1997 Act, various rules and regulations were framed by the Appellant including the National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009 vide S.R.O. No. 1144(I)/2009. Under 3(1) of the said Rules, the Authority/Appellant may, at any time, on its own motion, review any order passed by it and in so reviewing modify, reverse or confirm the same. Likewise, under section 3(2), any party aggrieved from any order of the Authority and upon discovery of new and important matter of evidence or on account of some mistake or error apparent on the face of record or from any other sufficient reasons, may file motion seeking review of such order. Under the said Regulations/Rules, remedy of review is available to the Authority as it can, on its own motion, review any order passed by it. Under Rule 5 of National Electric Power Regulatory Authority (Fines) Rules, 2002, any person upon whom fine has been imposed can file an application for review.

9. Bare reading of the proviso to section 3(2) of the Law Reforms Ordinance, 1972 shows that it is not the requirement of law that any party aggrieved should have remedy of

appeal, revision or review; it is sufficient that if the prescribed law provides remedy of review, appeal or revision, however, even otherwise as noted above, under 2009 Regulations, namely National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009, the Authority has suo motu power to review its decision, hence it has remedy of review. The law laid down by the Hon'ble Division Bench of Lahore High Court in case reported as National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Limited (PLD 2015 Lahore 661) is not applicable in the facts and circumstances of the case, as the facts therein are distinguishable. Even otherwise, we failed to bring ourselves in agreement with the ratio laid down in the said case regarding interpretation of section 3(2)(b) of Law Reforms Ordinance, 1972.

10. In view of the above position of law and facts, since remedy of review was available to the Appellant and the law concerned provides the same remedy, hence the instant appeal is not maintainable. Since the instant appeal is being decided on the question of maintainability, no finding is being rendered on merits.

11. For the above reasons, the present appeal fails and is accordingly dismissed.

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