

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 144 of 2014

National Electric Power Regulatory Authority

Vs

Registrar of Trade Unions, NIRC, etc.

DATE OF HEARING: 27-11-2014.

PETITIONER BY: Mr Rashid Hanif Advocate High Court.

RESPONDENTS BY: Raja Saif-ur-Rehman Advocate High Court.

ATHAR MINALLAH, J.- The National Electric Power

Regulatory Authority (hereinafter referred to as the “NEPRA”) has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the “Constitution”) assailing the order dated 07-11-2013, whereby application under Section 11 of the Industrial Relations Act, 2012 (hereinafter referred to as the “Act of 2012”) was dismissed by the respondent no. 1. NEPRA has also impugned the registration of respondent no. 2, granted vide Certificate dated 05-4-2012 and the Collective Bargaining Agent Certificate dated 05-6-2014. The respondent No. 2 applied for registration, and the respondent No. 1, accepting the application, issued the Certificate No. 16/2012 dated 05-4-2012, thereby registering the respondent No. 2 as a trade union under the Act of 2012. Through the Certificate issued under Section 19(1) of the Act of 2012, respondent no. 2 was declared as a Collective Bargaining Agent vide

Certificate No. 12/2012 dated 05-6-2012. NEPRA filed an application under Section 11 of the Act of 2012 for cancellation of the registration of the respondent No. 2, and the same was dismissed through order dated 07-11-2013; hence the instant petition.

2. *Mr Rashid Hanif, Advocate High Court*, appearing on behalf of the petitioner contends that; NEPRA is a regulatory authority established under Section 3 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (hereinafter referred to as the “NEPRA Act”); the petitioner is not an industry or an establishment for the purposes of the Act of 2012; the respondent No. 1 has no jurisdiction in the case of a regulatory authority not falling within the definition of an establishment or an industry; the registration granted to the respondent No. 2 is without jurisdiction/coram non-judice and therefore, the superstructure built thereon i.e. the CBA Certificate is also without jurisdiction; no appeal is provided nor any other alternate remedy is available under the Act of 2012 and therefore, the jurisdiction of this Court has been invoked; the functions and powers of NEPRA enumerated under the Act of 2012 are in the nature of performing functions, falling within the administration of the State; the impugned registration and the CBA Certificate, having been granted/issued without jurisdiction, are a nullity in law.

3. *Raja Saif-ur-Rehman, learned Advocate High Court*, appearing on behalf of the respondent No. 2 contends that; the petition is not maintainable as the NEPRA had filed an application under Section 11 of the Act of 2012 for the cancellation of the registration of respondent No. 2, and therefore an appeal would lie against such an order under Section 58 of the Act of 2012;

no cause of action has accrued in favour of the petitioner; Article 17 of the Constitution of the Islamic Republic of Pakistan, 1973 grants all citizens the right to form an association, which essentially includes the right to be registered as a trade union under the Act of 2012; relies on the case of *Union of Civil Aviation Employees, Lahore and another Vs. Civil Aviation Authority, Islamabad and 3 others* [PLD 1993 Lahore 306] arguing that the Collective Bargaining Agent is a democratic right recognized by the Act of 2012; the provisions of the Act of 2012 are for the benefit of a vulnerable class and, therefore, its provisions have to be interpreted liberally in favour of the beneficiary; NEPRA is not an entity involved in the administration of the State; under the NEPRA Act the role of the petitioner is limited to the powers expressly conferred on NEPRA; relies on the cases of *Inspector-General of Police Punjab, Lahore and others Vs. Mahmood Ikram* [1998 SCMR 765] and *State Bank of Pakistan, Lahore Vs. Ch. Muhammad Akhtar and 2 others* [1998 SCMR 2109] in support of his contention that it is erroneous to consider a person concerned with the implementation of the constitutional responsibility of the State as being employed for the administration of the State; the respondent No. 1 i.e. the Registrar of Trade Unions, NIRC afforded an opportunity of hearing before passing the impugned order dated 07-11-2013 and the same was appealable under Section 58 of the Act of 2012; NEPRA falls within the definition of "establishment" and therefore, the respondent No. 1 is vested with jurisdiction to exercise powers under the Act of 2012; relies on the cases of *Pakistan WAPDA Employees PEGHAM Union Vs. Member, NIRC, Islamabad and others* [2014 SCMR 1676], *Essa Cement Industries Workers' Union Vs. Registrar of Trade Unions, Hyderabad Region, and 4 others* [1998 PLC 500], *Messrs Dreamworld Family Resort through Secretary Vs. Registrar of Trade Unions and another* [2010 PLC

293], *Pakistan International Airline Corporation and others Vs. Tanweer-ur-Rehman and others* [PLD 2010 S.C. 676].

4. After hearing the learned counsels at length and perusing the record with their able assistance, the opinion of this Court is as follows:

5. The questions before this Court are two fold; whether in the case of NEPRA, the respondent No. 1 is vested with the jurisdiction to exercise powers, inter alia, of registration and issuance of a CBA Certificate, and whether an appeal is provided under the Act of 2012 against an order passed by the respondent No. 1 in the exercise of powers vested under Section 9 read with Section 19 of the Act of 2012?

6. In order to answer the above two questions, first of all, it is necessary to determine the status of NEPRA, and then to examine whether it would be treated as an entity falling within the jurisdiction of the respondent No. 1, so as to entitle the respondent no. 2 to be registered under the Act of 2012. NEPRA was established under Section 3 of the NEPRA Act. The object and purpose of the NEPRA Act, as declared in the preamble, is to provide for the regulation of generation, transmission and distribution of electric power, and matters connected there with and incidental thereto. The powers and functions of NEPRA are given in Section 7 of the NEPRA Act, which makes it exclusively responsible for regulating the provisions of electric power services. It may be emphasized that it "regulates" the services and does not provide the same. Pursuant to its regulatory powers and functions, it grants licenses, prescribes procedures and standards for investment programmes; prescribes and enforces standards and establishes a

uniform system of accounts. NEPRA has the power to determine tariff, rates, charges and other terms and conditions for the supply of electric power services by the generation, transmission and distribution companies, and recommend to the Federal Government for notification thereof. A plain reading of the provisions of the NEPRA Act makes it obvious that NEPRA is a regulatory authority, and does not produce and manufacture goods, nor provides services of a nature which would fall within the meaning of carrying on a business or being engaged as an industry.

7. Section 2(x) of the Act of 2012 defines 'establishment' while 'industry' is defined under clause 2(xvii). An 'establishment' has been defined as meaning any office, firm, factory, society, undertaking, company, shop or enterprise, which employs workmen directly or through a contractor for the purpose of carrying on any business or industry and includes all its departments and branches in the Islamabad Capital Territory. The essential ingredient to qualify as an "establishment" is 'to employ workmen directly or through a contractor for the purpose of carrying any business or Industry'. 'Industry' has been defined as including any business, trade, calling, employment or occupation for production of goods or provisions of services in the Islamabad Capital Territory and falling in more than one province, excluding those that are exclusively set up for charitable purposes. In order to qualify as an 'Industry' it is mandatory to be engaged in a business for the 'production of goods' or the 'provision of services'. The extent of the application of the Act of 2012 is provided under Section 1(3) thereof. It provides that it applies to all persons employed in any establishment or industry, in the Islamabad Capital Territory or carrying on business in more than one Province. Thus in order to attract the provisions of the Act of 2012,

it is mandatory to qualify as an 'establishment' or 'Industry' as defined therein. Section 1(3), clauses (a) to (e) provides the exceptions. It is, therefore, unambiguous that the Act of 2012 applies only to persons who are employed in an 'establishment' or 'industry' as defined in Section 2(x) & 2(xvii) respectively, except those which would fall in one of the exceptions provided under sub Section 3 of Section 1.

8. In order to fall within the definition of an industry, as defined under Section 2(xvii), the employment or occupation must be for the production of goods or provision of services, and essentially having a nexus with a business or industry. A distribution or generation company would fall within the definition of an establishment or an industry as it produces electricity and thereafter distributes and supplies the same to the consumer, for which the latter pays according to the tariff determined by NEPRA. WAPDA, LESCO, IESCO, PESCO and other such power distribution companies or entities are undoubtedly engaged in business and are providing services and, therefore, in their case the provisions of the Act of 2012 apply. However, NEPRA is neither engaged in any business, or production or manufacture of goods, or the provision of services.

9. On the other hand, NEPRA merely acts as a regulator and, inter alia, determines the tariff, rates, charges, etc. There is no power or function vested in NEPRA which even remotely would bring it within the definition of an 'establishment' or an 'industry' as defined in the Act of 2012. The regulation of the generation, transmission or distribution of electric power is a function within the realm of the administration of the State.

10. It is noted that the expression 'carrying on any business or industry' is a mandatory ingredient for attracting the definition of an 'establishment' provided in section 2 (x) of the Act of 2012 while for an 'Industry' a business, trade, calling, employment or occupation must be for the production of goods or provisions of services. Carrying on business is, therefore, an essential ingredient for both the definitions. In the case of *K. G. Old, Principal, Christian Technical Training Centre, Gujranwala Vs. Presiding Officer, Punjab Labour Court, Northern Zone and 6 others* [PLD 1976 Lahore 1097] the Lahore High Court interpreted the expression 'business, trade, manufacture, calling, employment or occupation' in the context of the definition of an 'industry' provided under the Industrial Relations Ordinance, 1969. The court held that the use of the expression is not in accordance with its ordinary dictionary meaning, but in line with its popular and conventional meaning. The entity as a whole is to be looked into so as to find out its purpose. This judgment was approved by the Supreme Court in case of *A.F. Ferguson & Co. Vs. The Sind Labour Court and another* [PLD 1985 SC 429] and *Livestock employees' Union and others Vs. Government of Balochistan, Livestock Department* [1996 PLC 577]. Nothing has been pointed out nor placed on record so as to bring NEPRA within the definition of an 'establishment' or an 'industry' as defined in the Act of 2012.

11. Since NEPRA is not an establishment or an industry for the purposes of the Act of 2012, it is, therefore, outside the scope of the application of the provisions thereof. The Act of 2012 can not be extended or invoked and, therefore, a trade union formed by its employees is also not liable to be registered under Section 9 of the Act of 2012. As a corollary it leads to the inevitable conclusion that the respondent No. 1 had no

jurisdiction relating to the application filed by the employees of NEPRA, let alone proceedings undertaken pursuant thereto by granting the registration and declaring the respondent no. 2 as a Collective Bargaining Agent. Moreover, the superstructure built on the basis of the certificate of registration issued to the respondent No. 2 is, therefore, also without lawful authority, jurisdiction and as such coram non iudice. The respondent no. 1 derives powers under the Act of 2012, and therefore such powers cannot be exercised in the case of the employees of NEPRA as they are not persons employed in any 'establishment' or 'industry'. Any entity, such as NEPRA, which does not qualify as an establishment or industry, is outside the jurisdiction of the respondent no. 1, as the Act of 2012 does not apply. There is no cavil to the proposition that the Act of 2012 has to be interpreted liberally in favour of the beneficiary. However, by no stretch of the imagination can the definition of an 'establishment' or 'industry' be extended to NEPRA so as to make the Act of 2012 applicable to the case of its employees.

12. Next, whether any alternate remedy was available to NEPRA under the Act of 2012? Section 12 provides for an appeal against the orders/decisions of the respondent No. 1 i.e. the Registrar. The right of appeal is restricted to a trade union, its members or an officer. An 'officer' is defined in Section 2(xxii). Section 12, therefore, does not provide a right of appeal to an employer even if the order is without jurisdiction. Section 58 provides for appeals against orders passed by any Bench of the Commission, and not to matters relating to the registration of a trade union passed by the respondent under the Act of 2012. However, in the present case, NEPRA has been able to make out a case of the impugned proceedings and orders being without jurisdiction and coram non-judice. Any act without jurisdiction is a nullity in

law and, therefore, the same is open to judicial review in exercise of the powers vested in this Court under Article 199 of the Constitution. The Supreme Court has held in case of *Essa Cement Industries Workers' Union Vs. Registrar of Trade Unions, Hyderabad Region, Hyderabad and 4 others* [1998 PLC 500] that jurisdictional facts are not immune from the scrutiny of the High Court in the exercise of its jurisdiction under Article 199 of the Constitution. It has already been held that the impugned orders are without jurisdiction and coram non-judice, and since an efficacious alternate remedy was not available to the petitioner, therefore, the petition is maintainable under Article 199 of the Constitution.

13. For what has been discussed above, the impugned orders dated 07-11-2013, the certificate of registration dated 05-4-2012 and the CBA Certificate dated 05-6-2014 have been passed/issued without jurisdiction and are therefore, coram non-judice. The instant petition is allowed and the impugned orders are accordingly set aside.

(ATHAR MINALLAH)
JUDGE

Announced in open Court, on 15th January, 2015.

JUDGE

Approved for reporting.

JUDGE

Tanveer Ahmed.