

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P. No.3243/2019

Fazal Steel (Pvt.) Ltd. v. FOP, etc.

W.P. No.3244/2019

M/s Siddiqui Steel Furnace v. FOP, etc.

W.P. No. 3245/2019

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Sethi Rural Flour & General Mills, etc. v. FOP, etc.

*and***W.P. No. 4127/2019**

Kohinoor Spinning Mills Ltd. v. FOP, etc.

Petitioners by: M/s Tayyaba Abbasi, Waqas Ali Malik, Nadeem Ahmed Shah, Aamir Zar Bhatti, Advocates in respective petitions.

Respondents by: Mr. Tariq Mehmood Khokhar, Additional Attorney General.
Mr. Saqlain Haider Awan, AAG.
Raja Muhammad Aftab Ahmad, AAG.
Raja Ishtiaq Ahmad, Addl. Director (Legal) IESCO.
Mr. Munawar Salam, Advocate for Respondents No.1 & 3 (W.P. No.3243/2019)
Mr. Muhammad Khalid Zaman, Advocate for IESCO.
Mr. Muhammad Shafiq, Advocate for NEPRA.
Zargham Eshaq Khan, Joint Secretary (Power Division).
Shamsul Haq, Section Officer (Power Division).

Date of Hearing: 30.12.2019.

MOHSIN AKHTAR KAYANI, J: Through this common judgment, I intend to decide all the captioned writ petitions arisen from a common decision of the NEPRA dated 14.06.2019 and notification dated 28.06.2019, issued by the Government of Pakistan, Ministry of Energy (Power Division).

2. Brief and consolidated facts referred in all these writ petitions are that all the petitioners are private limited companies or electricity consumers running their industries on the basis of electricity supply provided by respondent distribution companies under Tariff B-3 as determined by the NEPRA under Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997. All the petitioners are paying the electricity bills including taxes imposed

by the NEPRA. The petitioners have been charged by the distribution companies for the electricity consumed, which is ascertained through meter reading on monthly basis, however in the months of July and August, 2019, an amount was charged under the head of "*Qtr-Tre-Adj*" on the ground that the electricity tariff for the said two months was revised and notified through notification dated 28.06.2019, whereby the Government of Pakistan, pursuant to decision of the NEPRA authorities dated 14.06.2019, has allowed the distribution companies vide impugned notification dated 28.06.2019 to spread over the said "*Qtr-Tre-Adj*" in the next fifteen months billing cycle effective from 01.07.2019. Hence, the captioned writ petitions.

3. Learned counsel for petitioners advanced common arguments in all the captioned writ petitions and for having been on common footings, they have argued as under:

- a) That vide impugned notification, the respondents have revised electricity tariff in June/July, 2019 for the electricity already consumed by the petitioners during the months of July-December 2018 and as such, the claim by respondent is not permissible under the NEPRA Act, 1997.
- b) That the products manufactured by the petitioners companies have already been sold on a certain price factor keeping in view the cost of electricity in the relevant months, whereas the said amount could not be reclaimed by the petitioners from subsequent consumers as the cost was already passed on to the third parties in the past months, hence it is closed and past transaction.
- c) That imposition of Quarter Tariff Adjustment through NEPRA decision as well as through notification is *ultra vires* of the Constitution of the Islamic Republic of Pakistan, 1973.

- d) That under proviso to Section 21(7) of the NEPRA Act 1997, respondent No.2 can only make monthly adjustment to the approved tariff on account of any variation on fuel charges under policy guidelines issued by the Federal Government, such guidelines are silent qua the factor of "Quarter Tariff Adjustment", hence such imposition is beyond the scope of law.
- e) That imposition of Quarter Tariff Adjustment will affect the change in rate of electricity, which adversely affects the petitioners and they have not been given due opportunity of hearing while imposing the said Quarter Tariff Adjustment, which is violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.
- f) That impugned imposition of Quarter Tariff Adjustment is against the principle of legitimate expectation as the charges against the electricity consumed by the petitioners during the months of July-December, 2018 had already been paid leaving no due amount for those months, as such the right of legitimate expectancy arose in such situation and same could not be taken away by imposing additional amounts.
- g) That imposition of Quarter Tariff Adjustment will further adversely affect the business activity of petitioners and amounts to violation of Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973.
- h) That the mechanism of Quarter Tariff Adjustment was also challenged by different consumers before the Hon'ble Lahore High Court and an injunctive order was passed and as such, there was no alternative efficacious remedy to challenge the imposition of

Quarter Tariff Adjustment, except by invoking the writ jurisdiction of this Court.

4. Conversely, learned Additional Attorney General as well as learned counsel for the IESCO as well as NEPRA have raised a serious objection on maintainability of all captioned writ petitions by contending that the alternate remedy provided under the law against the decision of the Authority has not been availed in terms of Rule 16(6) of the NEPRA (Tariff, Standards and Procedure) Rules, 1998, which provides remedy against all orders, determination and decision of the Authority; that under Section 7(3) of the NEPRA Act, 1997, the NEPRA shall determine tariff, rates, charges and other terms and conditions for supply of electric power services followed by giving its recommendation to the Federal Government for notification; that as per mandate of Section 31 of the NEPRA Act, 1997, the Authority is to determine, modify or revise tariff for provision of electric power services and such tariff is to be notified by the Federal Government under Section 31(7) of the NEPRA Act, 1997; that in case of distribution licensee, Section 31(4) of the NEPRA Act, 1997 provides for determination by Authority of uniform tariff for the distribution licensee, wholly owned and controlled by common shareholders, on the basis of consolidated accounts, in the public consumer interest. It is lastly contended that majority of the petitioners have only challenged decision of the NEPRA dated 14.06.2019 together with notification dated 28.06.2019, whereby Quarter Tariff Adjustment has been applied for next 15 months billing cycle w.e.f. 01.07.2019, and as such, the principal decision of the NEPRA, dated 19.12.2018, along with the notification issued by the Federal Government, dated 01.01.2019, have not been assailed, which preclude the petitioners from raising any question against the subsequent decision of the NEPRA and notification issued by the Government as

the present decision of the NEPRA, dated 14.06.2019, and notification dated 28.06.2019, are based on the previous decisions, which have not been assailed.

5. Arguments heard, record perused.

6. Perusal of the record reveals that all the petitioners are industrial consumers in one way or other, and enjoying the electricity services supplied by different Distribution Companies ("*DISCOs*") on the basis of tariff determination by NEPRA under Section 7(3) read with Section 31 of the NEPRA Act, 1997 along with NEPRA (Tariff, Standards and Procedure) Rules, 1998. The precise facts referred on record reflect that the NEPRA had determined the tariff for seven XW-DISCOs for the years 2016-17 and 2017-18, individually, under Single Year Tariff (*SYT*) regime along with quarterly adjustment of Power Purchase Price (*PPP*) for the first two quarters of FY 2017-18. Subsequently, the Authority through its decision in the matter of periodical adjustment allowed the impact of verification in PPP and over/under recovery of allowed Distribution Margin (*D-M*) for remaining two quarters of the FY 2017-18 as Prior Year Adjustment (*PYA*). Similarly, for XW-DISCOs under the Multi Year Tariff (*MYT*) regime i.e. FESCO, IESCO and PESCO, the Authority through its decision regarding adjustment in tariff components for the FY 2016-17 and FY 2017-18 allowed PPP variations for FY 2017-18, and under/over recovery of allowed Distribution Margin (*D-M*) for the FY 2016-17 as Prior Year Adjustment, which was intimated to the Federal Government for notification in official gazette.

7. The Federal Government against the aforesaid determination filed a motion under Sections 7, 31(4) and 31(7) of the NEPRA Act, 1997 read with Rule 17 of the NEPRA (Tariff, Standards and Procedure) Rules, 1998 for recommendation of uniform consumers in tariff at national level, which was decided by the Authority on 19.12.2018. The uniform tariff so determined by the Authority was notified by the Federal Government vide SRO -1(I)/2019 to

SRO-12(I)/2019, dated 01.01.2019, effective from 01.01.2019. After the above referred decision of the NEPRA, the XW-DISCOs have filed their adjustment request on account of variation in Power Purchase Price including impact of T&D losses, etc. for the first and second quarter of FY 2018-19 i.e. July to September, 2018 and October to December, 2018. Notices were issued to the relevant stakeholders including the representatives of DISCOs, whereby the NEPRA vide impugned decision dated 14.06.2019 imposed adjustment in the approved tariff in the following manner.

“Based on the above, the Authority hereby determines the following Revenue requirements of each of the XWDISCOs for the FY 2017-18 inclusive of PPP adjustments for the period from July to December, 2018 (including impact of T&D losses on FCA).”

Description	Unit	ISCO	ESCO	PSCO	GPSCO	MPSCO	PPSCO	HSSCO	QESCO	SESCO	TSSCO	Total
Units Received	MkW/H	12,867	26,955	15,832	12,375	21,083	14,298	5,958	6,648	4,848	1,983	122,848
Units Sold	MkW/H	11,754	23,785	14,211	11,134	17,920	9,730	4,612	5,484	3,405	1,736	103,773
Units Lost	MkW/H	1,113	3,170	1,621	1,241	3,162	4,568	1,346	1,163	1,442	247	19,075
Units Lost	(%)	8.65%	11.76%	10.24%	10.03%	15.00%	31.95%	22.59%	17.50%	29.75%	12.47%	15.539%
Energy Charge		57,290	120,302	70,577	55,057	93,657	63,713	26,422	29,686	21,316	8,909	546,928
Capacity Charge		60,192	134,143	87,445	66,107	13,908	71,999	38,702	35,500	24,305	11,844	644,144
Transmission Charge & Market Operation Fee		3,746	8341	5,432	4,110	7,079	4,472	2,408	2,197	1,513	734	40,030
Power Purchase Price	(Mn.Rs)	121,227	282,786	163,453	126,274	214,644	140,183	48,631	67,383	47,134	21,486	1,231,101
Distribution Margin	(Mn.Rs)	17,369	28,622	21,244	14,418	20,619	19,176	10,639	10,257	7,788	2,666	163,788
PYA 2018	(Mn.Rs)	18,476	52,775	37,017	7,675	49,170	26,207	19,778	6,563	9,547	594	226,614
Quarter Adjustment 1 st & 2 nd Quarter 2018-19		18,427	38,292	26,894	15,853	34,633	25,120	11,984	10,390	6,593	1,453	169,638
Revenue Requirement	(Mn.Rs)	175,499	383,375	246,608	163,219	318,966	210,686	109,932	94,593	71,062	25,201	1,801,141

8. While considering the above decision of the NEPRA, every consumer has been issued with Quarter Tariff Adjustment on monthly basis while taking into account the above referred background of the DISCOs, which made the grievance of the present petitioners through the instant writ petitions.

9. The primary question raised before this Court through various writ petitions is as to whether the NEPRA can re-determine the tariff once it has been notified by the Government under the NEPRA Act, 1997? However, all the petitioners have been confronted regarding maintainability of the captioned writ petitions as to why they have not assailed the principal decision of the NEPRA, dated 19.12.2018, coupled with the notification issued by the Federal

Government, dated 01.01.2019 determining the tariff pursuant to the mechanism provided in the NEPRA Act, 1997, whereby the NEPRA, before proceeding further, invites objections through publication in national newspapers by way comments, reply or intervention request from interested persons. A public hearing is also conducted for which separate notices are being published in daily newspapers and consequent thereto, many experts and individuals put appearance before the NEPRA to determine tariff followed by its notification by the Federal Government.

10. The main reasons/factors on the basis of which the NEPRA had passed the earlier/principal decision, dated 19.12.2018, are as under.

- a) The National Power Policy, 2013, which was developed to support the current and future needs of energy;
- b) The policy was considered and approved by the Council of Common Interest (CII) through decision on Case No.1/03/2013, dated 31.07.2013, in consequence to same, the National Power Tariff and Subsidy Policy Guidelines, 2014 have been framed;
- c) Section 31(4) of the NEPRA Act, 1997 provides that the Authority shall, in the public consumer interest, determine a uniform tariff for distribution licensee wholly on and controlled by common shareholders, on the basis of their consolidated accounts;
- d) Revenue requirements of each XW-DISCOs determined by NEPRA on the basis of individual account of each XW-DISCOs are required to be consolidated;
- e) The Federal Government is interested for uniform tariff applicable for the provision of Section 31(4) of the NEPRA Act, 1997 which could be settled through appropriate guidelines;

- f) Uniform tariff is the reflect of Socio-Economic Policy of the Federal Government based on consolidated revenue requirements, which includes:
- i. Tariff differential subsidy and inter-distribution companies-tariff rationalization;
 - ii. Deferral of net hydel profit, which was approved by ECC; and,
 - iii. The cost of net hydel profit which was deferred for recovery from consumers requires a uniform tariff to settle the commercial loan received from WAPDA for payment to provinces so that the loan of WAPDA be discharged.
- g) The inter distribution companies tariff rationalization is not aimed at raising any revenues for the Federal Government;
- h) The cabinet has approved the proposed rate for uniform tariff for submission before the authority for consolidation and approval leading to determination of final tariff in terms of Section 31(7) of the NEPRA Act, 1997 for notification by the Federal Government in summary dated 24.10.2018; and,
- i) The Federal Government with respect to recommendations of consumers and tariff for the year 2016-17 and quarterly decision for the years 2017-18, including review decision under Sections 7, 31(4) and 31(7) of the NEPRA Act, 1997 read with Rule 7 of the NEPRA (Tariff, Standards and Procedure) Rules, 1998, issue the uniform schedule of tariff of the XW-DISCOs by incorporating targeted subsidy and inter distribution companies tariff rationalization pursuant to guidelines.
11. As a matter of fact, the NEPRA considered all the above factors in its decision dated 19.12.2018, which was subsequently notified by the Federal Government on 01.01.2019, but any of the petitioners² has not assailed the same,

therefore, the above decision has attained finality and the same could not be agitated through any subsequent proceedings.

12. The other important limb of the case in hand is that as to whether the subsequent proceedings, which are upshot of earlier decision of the NEPRA, could be assailed by way of writ petition? In order to adjudicate upon the said query, this Court has gone through Rule 16(6) of the NEPRA (Tariff, Standards and Procedure) Rules, 1998, which is reproduced as under:

16. Decisions, etc., by the Authority.

- (6) *Within ten (10) 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.*

13. The above referred provision spells out the alternate remedy and the same could be relevant for purpose of determination of tariff while considering all technicalities by the NEPRA and as such, the question raised through the captioned writ petitions together with the pleadings and the arguments, there is nothing for determination by this Court in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to resolve the grievance of the petitioners as a substantive remedy in terms of Section 12G of the NEPRA Act, 1997 has been provided, which establishes a tribunal in this regard. For the purpose of readiness, the same is reproduced as under.

12G. Appellate procedure. (1) *Any person aggrieved by a decision or order of the Authority or a single member thereof or a Tribunal established under Section 11 may, within thirty days of the decision or order, prefer an appeal to the Appellate Tribunal in the prescribed manner and the Appellate Tribunal shall decide such appeal within three months after the filing of the appeal.*

(2) *In examining an appeal under sub-section (1), the Appellate Tribunal may make such further inquiry as it may consider necessary and after giving the Authority or the Tribunal and an appellant an opportunity of being heard, pass such order as it thinks fit, confirming, altering or annulling a decision or order appealed against.*

Provided that if the decision under appeal is a determination of tariff by the Authority, then the Appellate Tribunal may in case of disagreement with the determination of the Authority, remand the matter back to the Authority with relevant guidelines, which shall be duly considered by the Authority which shall be bound to review its determination within one month of the receipt of such guidelines from the Appellate Tribunal.

(3) *The decision of the Appellate Tribunal shall be in writing, detailing the issues raised in the appeal and the arguments adopted by the appellant and the Authority or Tribunal as the case may be. The Appellate Tribunal shall also provide reasons for reaching its decision with reference to the provisions of this Act and the facts of the case.*

(4) *The Appellate Tribunal shall provide copies of its decision to all the appellants and the respondents including the Authority or Tribunal, as the case may be, not later than five days from the date of rendering its decision.*

(5) *A decision or order of the Authority or Tribunal, as the case may be, shall be given full force and effect during the pendency of any appeal of such determination.*

(6) *The decision of the Appellate Tribunal shall be appealable before the High Court having territorial jurisdiction.*

14. The above referred Appellate Tribunal has not yet been notified by the Federal Government and the learned AAG has taken a categorical stance that the same will be notified in due course of time after selection of its members, but this does not preclude the petitioners to exercise their remedy in terms of Rule 16 of the NEPRA (Tariff, Standards and Procedure) Rules, 1998. While considering this legal question, I am fortified with the view rendered in case reported as PLD 2017 Lahore 68 (JDW Sugar Mills Ltd. v. Province of Punjab), PLD 1972 SC 279 (Murree Brewery Co. Ltd. v. Pakistan), PLD 2012 SC 774 (Muhammad Azhar Siddique v. Federation of Pakistan), PLD 2010 SC 969 (Muhammad Abbasi v. S.H.O. P.S. Bhara Kahu), PLD 2010 SC 1066 (Rana Aftab Ahmad Khan v. Muhammad Ajmal) and 2000 SCMR 1699 (Mir Zaman vs. Sheda). Hence, these writ petitions are not maintainable.

15. Although, the petitioners have taken the stance that by directing the petitioners to approach the NEPRA authorities again amounts to placing the petitioners at the mercy of NEPRA, who had already disclosed their mind while

passing the earlier orders on the strength of PLD 2014 Sindh 443 (Farooqui Ice Factory, Gambat v. Revenue Officer SEPCO (Wapda), Ranipur, District Khairpur), which has been passed while relying upon PLD 1961 SC 537 (M/s Faridsons Ltd., Karachi v. Government of Pakistan) and PLD 2010 SC 969 (Muhammad Abbasi vs. S.H.O. P.S. Bhara Kahu, Islamabad), wherein it was held that there are certain guidelines for determination regarding adequacy of relief. For the purpose of clarity, the guidelines recorded in the case of *Farooqui Ice Factory, Gambat supra* are reproduced as under.

“15. In the aforesaid case, it was, as is clear from the above part of the Judgment, observed that alternate remedy is bar to invoke extraordinary constitutional jurisdiction of the High Court. Mr. David referred to Muhammad Abbasi's case, *ibid* as well. In that case, honourable Supreme Court was pleased to observe as follows:

“7. It is bounden duty of the learned High Court to examine the question as to whether the alternate remedy is adequate and efficacious remedy by considering the merits of each case and further to dilate upon the question as to whether such remedy would be more efficacious, beneficial or it would cause hardship to the petitioner. In this regard reference can be made to the case-law enunciated in a Full Bench decision of the Lahore High Court wherein the tests to be applied to determine the adequacy of the relief have been clearly stated in the following terms:

- (i) If the relief available through the alternative remedy in its nature or extent is not what is necessary to give the requisite relief, the alternative remedy is not an "other adequate remedy" within the meaning of Article 199.
- (ii) If the relief available through the alternative remedy in its nature and extent, is what is necessary to give the requisite relief, the 'adequacy' of the alternative remedy must further be judged, with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 199. But in making this comparison those factors must not be taken into account which would themselves alter if the remedy under Article 199 were used as a substitute for the other remedy.
- (iii) In practice the following steps may be taken:-
 - (a) Formulate the grievance in the given case, as a generalized category;
 - (b) the relief that is necessary to redress that category of grievance;

- (c) *See if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent;*
- (d) *If such a remedy is prescribed, the law contemplates that resort must be had to that remedy;*
- (e) *If it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, as far as lies in the power of the Court, that that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken over, that other organ will atrophy, and the organ that takes over, will break down under the strain;*
- (f) *If there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions are attached to it which for a particular category of cases, would neutralize or defeat it so as to deprive it of its substance, the Court should give the requisite relief under Article 199;*
- (g) *If there is such other remedy, but there is something so special in the circumstance of a given case that the other remedy which generally adequate, to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs, the Court should give the required relief under Article 199 Mehmoob Ali Malik v. Province of West Pakistan (PLD 1963 Lahore 575. Majibur Rehman v. Province of East Pakistan (15 DLR (WP) 129)."*

16. The above referred guiding principles recognize different concept of remedies along with its efficaciousness as well as its adequacy and if the same are applied in this proposition, it appears that the petitioners remained silent on the earlier decision of the NEPRA, dated 19.12.2018, even they have not assailed the notification issued by the Federal Government on 01.01.2019 in compliance of said decision of the NEPRA. Such state of affairs clearly demonstrates that the petitioners have not attended to the original proceedings despite the fact that their rights have been determined by the NEPRA under their law. In such eventuality, the review provided in Rule 16 of the NEPRA (Tariff, Standards and

Procedure) Rules, 1998 is the most appropriate remedy, which could not be denied at one's own sweet will, as Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 recognizes the concept of fair trial and due process, which includes the settlement issues through legal channel and as such, the legislative intent has to be followed in letter and spirit, especially when the law has provided remedy under Section 12G of the NEPRA Act, 1997 by way of Appellate Tribunal (which is not functional) as well as in terms of Rule 16 (Review) of the NEPRA (Tariff, Standards and Procedure) Rules, 1998, therefore, it is appropriate to direct all the petitioners to approach the NEPRA for exercise of the said remedy, which is exclusive domain of the NEPRA.

17. In view of above discussion, the captioned writ petitions stand **DISMISSED** with direction to the petitioners to approach the NEPRA, if so desired.

18. Before parting with this judgment, it is pertinent to mention that Kohinoor Spinning Mills Ltd. petitioner in writ petition No.4127/2019 earlier filed writ petition No.47575/2019 titled *Kohinoor Spinning vs. Federation of Pakistan etc.* on the same subject matter before Lahore High Court, Lahore, which was dismissed vide order dated 20.11.2019 alongwith connected matter i.e. writ petition No.48379/2019 titled *Ghani Global Glass Limited vs. Federation of Pakistan through Secretary Energy (Power Division), Islamabad etc.* The petitioner Kohinoor Spinning Mills Ltd. has filed writ petition No.4127/2019 by concealing the factum of earlier decision by Hon'ble Lahore High Court against them as such committed misrepresentation and this fact has been brought into notice of this Court by learned counsel for respondent/IESCO during the arguments. Hence, petitioner Kohinoor Spinning Mills Ltd. has deceived this Court and wasted precious time of the Court, therefore, cost of Rs.1,00,000/- (rupees one lac) is imposed upon petitioner Kohinoor Spinning Mills Ltd., which shall be deposited with SOS

Village, Islamabad and receipt shall be submitted before Deputy Registrar (Judl) of this Court. In case the cost is not paid by the petitioner, office shall place the matter on judicial side for appropriate action against the petitioner and its Directors.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 10.01.2020.

JUDGE

Khalid Z.