

**2005 Y L R 1834**

**[Supreme Court (AJ&K)]**

**Before Khawaja Muhammad Saeed, C. J. and Syed Manzoor Hussain Gilani, J**

**AZAD GOVERNMENT OF THE STATE OF JAMMU AND KASHMIR through Chief Secretary and 6 others---  
Appellants**

**Versus**

**KHASHMIR STEEL AND RE-ROLLING MILLS through  
Managing Director and 3 others---Respondents**

Civil Appeal No.27 of 2003, Criminal Original No. 10 of 2003, Criminal Original No. 17 of 2003, Civil Miscellaneous No. 81 of 2003, Civil Miscellaneous No.47 of 2004, Civil Miscellaneous No. 106 of 2004, decided on 4th March, 2005.

(On appeal from the judgment of the High Court, dated 17-10-2002 in Writ Petition No. 1 of 2002).

Subedar Fazal Hussain v. Qazi Muhammad Bashir and others  
PLD 1982 SC (AJ&K) 89 and Samano v. The State 1973 SCMR  
162 ref.

Ch. Muhammad Ibrahim Zia and Ch. Muhammad Reaz Alam,  
Advocates for Appellants (in Civil Appeal No.27 of 2003).

Liaquat Ali Khan, Advocate for Respondents (in Civil Appeal  
No.27 of 2003).

Liaquat Ali Khan, Advocate for Petitioner (in Criminal Original  
No. 10 of 2003).

Ch. Muhammad Reaz Alam, Advocate for Respondents (in  
Criminal Original No. 10 of 2003).

Liaquat Ali Khan, Advocate for Petitioner (in Criminal Original  
No. 17 of 2003).

Ch. Muhammad Reaz Alam, Advocate for Respondents (in  
Criminal Original No. 17 of 2003).

Liaquat Ali Khan, Advocate for Applicant (in Civil  
Miscellaneous No. 81 of 2003).

Ch. Muhammad Ibrahim Zia and Ch. Muhammad Reaz Alam,

Advocates for Respondents (in Civil Miscellaneous No.8; of 2003).

Liaquat Ali Khan, Advocate for Applicant (in Civil Miscellaneous No.47 of 2004).

Ch. Muhammad Ibrahim Zia and Ch. Muhammad Reaz Alam, Advocates for Respondents (in Civil Miscellaneous No.47 of 2004).

Ch. Muhammad Ibrahim Zia and Ch. Muhammad Reaz Alam, Advocates for Applicants (in Civil Miscellaneous No. 106 of 2004).

Liaquat Ali Khan, Advocate for Respondent (in Civil Miscellaneous No. 106 of 2004).

Date of hearing: 22nd February, 2005.

## **JUDGMENT**

**SYED MANZOOR HUSSAIN GILANI, J.**---This appeal with leave of the Court is filed against the judgment of a learned Single Judge of the High Court, dated 17-10-2002, in Writ Petition No. 1 of 2002, decided at Mirpur.

2. The facts culminating into the present appeal, are that respondent was allowed the electricity supply connection on 21-3-1988 on his application, dated 5-10-1987 and an agreement known as "abridged conditions of supply was agreed between the Electricity Department (licensee) and the respondent (consumer). The multiplying factor was determined as 80 after installation of metering equipment and supply of connection test report from the Executive Engineer (M&T) Division, Mr. Muhammad Saleem and Meter Test Inspector Mr. Sagheer Ahmed, respectively in 1988. The respondent-consumer was served with a notice by the Superintending Engineer Electricity, District Mirpur on 16-4-1988, for alleged violation of abridged conditions with the allegations that he has installed substandard panels, violated the time schedule agreed between the parties and failed to construct a room for metering panel in accordance with the terms of the agreement according to the prescribed drawing of WAPDA. According to the appellants, the respondent was time and again required to fulfil the conditions, but he delayed and finally submitted an intimation on 28-8-1993 for closing of factory and consequently the electricity connection was disconnected. Due to legal proceedings between the parties, an Arbitrator was also appointed under the provisions of section 52 of the Electricity Act, who resolved the matter and delivered the Arbitration Award on 30-4-1994, which is undisputed

between the parties, however, it did not end the differences between the parties.

3. The respondent obtained an order from the Prime Minister of AJ&K for reconnection which was sought to be implemented through a writ petition filed in the High Court. The matter was duly processed by the appellants and submitted to the Prime Minister for proper orders who constituted a Cabinet Committee (hereinafter to be referred as the Committee) for the matter vide notification, dated 3-4-2001 and ordered to place the matter before the Committee. The High Court in the meantime directed on 26-5-2001 that as the Committee is constituted for the purpose, let all the matters relating to tire arrears and reconnection be decided by the Committee. The Committee decided the matter on 13-12-2001, in the light of which a bill was issued to the respondent who, instead of paying the bill, filed another writ petition in the High Court on 2-1-2002, against minutes numbers 1(a), 3(a) and 3(b) of the decision of the Committee. The writ petition was allowed by the High Court through the impugned order declaring the above decision of the Committee as without lawful authority.

4. Ch. Muhammad Ibrahim Zia, the learned Advocate appearing on behalf of the appellants, contended that the learned Judge of the High Court has without considering the inspection report, dated 14-11-2001, held the report as not reliable on the ground that it is made without opening of the panel. The Court with the assistance of learned Advocate went through the report, dated 14-11-2001. According to the learned Advocate in view of the express report of the Committee, the learned Judge of the High Court was incorrect in coming to the present conclusion. He also contended that as panel remained in the custody of consumer respondent for more than eight years, its accuracy could not be relied upon. He also contended that the question of multiplying factor was not in dispute at all, as it was settled in 1988 which was accepted by the respondent-consumer by paying bills on the basis of that determined factor for more than 8 years. The learned Advocate referring to the record contended that the learned Judge of the High Court has misread the record in holding that Islamabad Electric Supply Company's (IESCO) verification is not reliable for the reason that it came into existence its the year, 2000, whereas this company is the successor of Area Electricity Board and the report is issued on the basis of record transferred from the Area Electricity Board to (IESCO). He also questioned the findings of the learned Judge on the requirement of the construction of room. According to him construction of room as well as change of meter panels is a requirement of law, and conditions laid down by the Electricity Supplier i.e. WAPDA, and this was demanded by the appellants since 1988. He contended that most of the illegalities and

violations of the agreement were brought into the notice of respondent by the department from time to time who failed to comply with the same while he was under legal obligation to comply with all the directions. According to the learned Advocate the cancellation of bill by the learned Judge of the High Court is also based on erroneous perception of fact and law that the bill was issued before the decision of Committee. He contended that fact of the matter is that bill was issued after consultation of an expert on 20-12-2001, after the decision of Committee, dated 13-12-2001. He also contended that the respondent had raised disputed questions of fact through which he wanted to resile from the agreed terms and conditions settled between the parties and the matter being of contractual nature, the writ petition was not maintainable. He also contended that respondent was estopped by his conduct from raising any dispute contrary to the terms and conditions settled between the parties and being acted upon from 1988 to 1993 through which he accepted the bills according to the multiplying factor 80. According to him the respondent is estopped on account of acquiescence. Mr. Riaz Alam, Advocate also argued the case supporting Ch. Muhammad Ibrahim Zia, Advocate.

5. On the other hand, Mr. Liaquat Ali Khan, the learned Advocate appearing on behalf of the respondent-mill, defended the order passed by the High Court. He contended that Electricity Department sanctioned a load of 3,000 K.V. whereas actual consumption was less than 2000 K.V. According to the learned Advocate when the Executive Engineer Electricity started sending bills over and above the actual consumption, the respondent approached the department for the correction of bills and in the meantime the electricity connection was disconnected. He contended that bill was sent to the respondent before the decision of Committee, dated 24-12-2001, which is in violation of the order of High Court. He also contended that none of the members of Committee visited the premises of the factory, instead made a report of inspection which was based on incorrect and misconceived facts. According to him the Committee travelled beyond its jurisdiction in deciding the matter particularly the construction of room for the purpose of installation of panels which was in fact constructed before the supply of Electricity. The learned counsel further contended that the report on which the Committee relied was based on incorrect facts as the panels were not opened by the Committee preparing the report.

6. After hearing the learned Advocates for the parties we have gone through two judgments of the High Court i.e. impugned before the Court and the earlier one, dated 26-5-2001, besides the report of Committee and Cabinet decision. Before dilating upon the merits of case, we would like to reproduce the relevant

decision of the Committee declared as without lawful authority by the learned Judge of High Court which are placed at page No. 62 of the paper book.

7. It is clear from the perusal of record that respondent was given electricity connection on 21-3-1988 and he continued enjoying the facility of electricity till 28-8-1993. The multiplying factor which is disputed by the respondent was determined as 80 vide report of Executive Engineer (M&T) Division and Meter Test Inspector, dated 15-9-1988, in the presence of representative of the respondent, which was not disputed by the respondent till the decision of the Committee. The matter was taken to the Committee due to the application filed by respondent to the Prime Minister of AJ&K and the respondent has not challenged the other items of the decision of Committee.

8. The above stated facts operate as estoppel against the respondent by his conduct in view of his acquiescence by accepting the terms and conditions and making the payments to the electricity department according to the electricity bills. Besides that, the respondent is to accept the decision of Committee, as such, as a whole or not at all, because the decision of Committee is outcome of his own conduct. A party cannot be allowed to blow hot and cold in the same breath.

9. Moreover, the respondent through a writ petition in the High Court, brought in dispute the agreed terms and conditions between the parties. Whether those terms and conditions were followed, acted upon or not are the disputed questions of fact and relate to the contractual obligation between the parties; and decision of the Committee called in question, necessitated detailed inquiry of facts, which was beyond the scope of the High Court under Constitutional jurisdiction. The High Court in such-like cases does not assume its jurisdiction.

10. The respondent, after having accepted the connection on the terms and conditions settled between him and the Electricity Department through an agreement placed on record as Annexure A-2, along with his affidavit, is, estopped from calling in question the orders, instructions and bills issued in furtherance thereof. Under the similar circumstances, discussing the principle of estoppel by conduct, it was held in the case titled *Muhammad Sharif v. Muhammad Manzoor and others* (1993 SCR 92), that a party may be estopped by his conduct in the proceedings by taking a specific position. The following para. from the commentary by Mr. M. Munir (Edition 1969) on the law of Evidence at pages 95 and 96 of the same Book is reproduced.

"It may be laid down as a broad proposition that one

who, without mistake induced by the opposite-party, has taken a particular position deliberately in the course of a litigation must act consistently with it one cannot play fast and loose. It is a well settled principle that a party litigant cannot be permitted to assume inconsistent position in Court, to play fast and loose, to below hot and cold, to approbate and reprobate, to the detriment of his opponent; and this wholesome doctrine applies not only to the successive stages of the same suit, but also to a suit other than the one in which the position was taken up, provided that second suit grows out of the judgment in the first suit.'

In a case reported as Abdul Qadir v. Abdul Karim and 4 others 1999 PLC (C.S.) 947, it was held that the writ jurisdiction of the High Court is equitable in nature and no relief is granted to a litigant, if he himself is instrumental in making of an order or if he acquiesces in it and equitable jurisdiction cannot be exercised in favour of a litigant with objectionable conduct.

Similar position was taken by this Court in the case of Ghulam Mustafa v. Azad Government and 2 others 1996 MLD 355, wherein it was held after discussing plethora of authorities on the point of acquiescence that "acquiescence even by conduct is fatal for invoking the Constitutional jurisdiction where a party participated in the proceedings with his consent and agreement."

11. The essence of writ petition filed by the respondent was to resile from the terms of the agreement between him and the Electricity Department. Whether those terms were onerous or the appellant has exceeded or gone beyond the limits of the agreed terms, is a question of enforcement of contractual obligation and determination of disputed questions of fact, which could not be entertained by the High Court. It was' held in a case titled Azad Government and others v. Neelum Flour Mills and others 1992 SCR 381, that writ jurisdiction is exercisable only, if petitioner before the High Court bases his grievance on violation of law and any grievance which is based on violation of contract, is excluded from the purview of the jurisdiction of High Court.

12. It is a settled principle of law that a writ petition under section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, can be issued only when there is violation of any law or legal obligation. Same was held in the case reported as Jawad Hussain Jafri v. Azad Govt. and 4 others 1999 MLD 33. It was neither pointed out or placed on record nor discussed by the High Court that as to which provisions of law, if any, are violated by the Committee in making the decision impugned before the Court. The legality of an action can be judged on the touchstone of law regulating the matter, not otherwise.

It is held in the case titled A.K. Trading Corporation v. Messrs Z.H. Construction and 2 others PLD 1998 SC (AJ&K) 7 that a writ can be issued under section 44 of the Interim Constitution Act, if an Act is without lawful authority or to direct a respondent to do which he is required by law to do, or to forbid him from doing an act, which is not allowed by law to do. The requirement is that the grievance must be based on law and writ lies, if law has been violated or when it is apprehended that it will be violated by the Government functionary. The terms of contract between the parties is not law. It is a commitment between the parties which if disputed' or violated, calls for some other action, before the other forum, not before the High Court.

13. The disputed questions of fact were raised by the respondent in the writ petition which, as said earlier, could not be resolved without the evidence and detailed inquiry. This point stands settled that questions of fact could not be resolved in exercise of writ jurisdiction by the High Court, unless the facts are admitted from both sides. We place reliance upon the following authorities in this behalf:--

(1) Raja Muhammad Hayat Khan v. Board of Revenue, AJ&K and 3 others 1999 YLR 147 and

(2) Abdul Qayyum and another v. Custodian of Evacuee Property and others (1993 SCR 162)

14. Having said so, we now revert to the items of the Committee's decision declared as without lawful authority by the High Court.

15. As far the first item is concerned, as said earlier, this stood determined in 1988 on the basis of report of the Executive Engineer (M&T) Division and the Meter Test Inspector, dated 15-9-1988. The formula for determining the multiplying factor discussed by the learned Judge is not based on any expert report. What should have been the multiplying factor or as to whether the multiplying factor in this case should have been 80 or not, ought to have been substantiated by a contrary report of an expert, in view of the express report of the connection test report in regard to the factor given by the experts of the department referred above, i.e., dated 15-9-1988 and report, dated 14-11-2001. The later report also states that `panel not properly secured and 11 K.V. panel installed is very old type, out of design. It was a disputed question of fact relating to inquiry by experts of the relevant field only, not by the Courts of law. The Courts of law, particularly the High Court or the Supreme Court, are to judge the validity of a decision on the touchstone of law, rule or on the basis of an admitted fact. In the absence of violation of any such

law or admitted question of fact, the Courts cannot substitute their judgment or wisdom for what the expert's have said or can say. Article 59 of the 'Qanun-e-Shahadat (10 of 1984)' is very much clear on the point which is reproduced as follows:--

"59. **Opinions of experts**.---When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in question as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts"

16. Commenting to this Article as it was section 45 of the Evidence Act of 1872, it was held in the case title Subedar Fazal Hussain v. Qazi Muhammad Bashir and others PLD 1982 SC (AJ&K) 89 in the following manner:--

"10. It is an accepted principle of law that the expert's evidence must always be received with great caution especially the opinion of the handwriting experts. The Court should not surrender its own opinion to that of experts who are called before it. Although such evidence has to be received with great caution, yet the evidence and reasons, on which it is based, are entitled to a careful examination before rejection."

It was held in the case reported as Samano v. The State (1973 SCMR 162), that opinion of an expert can be overridden by the opinion of other equally competent expert.

17. A detailed procedure is provided by the Electricity Act, 1910 in this regard and the authorities who are vested with the power to determine it are also given under the Act and rules made thereunder.

18. This item is declared as without lawful authority on other two grounds as well by the learned Judge of the High Court, firstly that the Committee which inspected the premises of the factory and meter, failed to determine the ratio of CT because the panel was not opened and secondly for the reason that it is based on a verification given by the Islamabad Electric Supply Company Ltd, (IESCO), dated 26-9-2000, hence it implies that multiplying factor was not determined. We are sorry to agree with it. The multiplying factor was not in dispute at all between the parties. It was worked out earlier, as stated above, and acted upon as such, hence there was no occasion for the Committee to investigate and report on it. As far the second reason is concerned, it was perhaps not brought to the notice of the learned Judge of the High Court that Islamabad Electric Supply



Company (IESCO) is the successor of Islamabad Area Electricity Board (IAEB) which had given the earlier reports. The learned Advocate has referred a General Order No.3 issued on 30th of May, 1998 by the Pakistan Water and Power Development Authority WAPDA House, Lahore, which testifies the fact that Islamabad Electric Supply Company (IESCO) is the successor of Islamabad Area Electricity Board (IAEB). Thus the finding of the learned Judge of the High Court is wrong on fact as well that this Company was not in existence when the report was given. The company keeps on changing the names and being merged with one another. In the modern era of corporate functioning of the State and Society, we have to see and believe the things as they are working, especially in the field of telecommunication and energy. Being successor of Islamabad Area Electricity Board (IAEB), all actions at IESCO shall be deemed actions of IAEB.

19. So far the next two items of Committee's decision are concerned, the agreement called as "abridged conditions of supply" signed by the respondent-consumer exhaustively contain the terms and conditions which the consumer is called upon by the Electricity Department to fulfil or comply. We may refer few of the clauses here:--

"(4) Inspection and Testing of consumers Installation.--- When the electrical installation work on the premises of an applicant/consumer has been completed, the applicant consumer or his wiring contractor shall furnish the Authority with full details of the energy consuming apparatus to be connected to the Authority's supply system, on the Authority's prescribed form. "Wiring Contractor's Completion and Test Report" (Form CP-07) obtainable free of charge from the local sub-division sub-office concerned of the Authority, accompanied by a plan of the said installation. The Authority shall not be responsible for the execution of any work on the applicant/consumer's premises. The inspection and testing of the applicant, consumer's installation by the Authority's employees being only for the purpose of protecting the Authority's own system of supply, the Authority's arrangements for supply to other consumers and to meet with the provisions of the Rules.

(7) Defects in consumer's Installation--In the event of any defect discovered in the consumer's wiring or apparatus connected to the Authority's mains or of any earth, or leakage occurring on any section of the circuits so connected, the consumer, in the absence of any of the Authority's authorized employees, shall immediately disconnect such part of the wiring or apparatus from the

Authority's circuits and notify the Authority; and the Authority shall have the right to disconnect, at any time, the defective section or part of the consumer's wiring or apparatus from its supply system until the defect or fault therein has been removed or remedied to the satisfaction of the Authority.

"9(e). The metering equipment, whether belonging to the Authority or the consumer shall be installed on the consumer's premises by the Authority at each point of supply at such place, and in such position, as the Authority may decide. The consumer shall not connect such metering equipment with the Authority's electric supply line nor disconnect the same from any such electric supply line without the previous written consent of the Authority. The Authority shall, however, reserve the right, at any time, to change the points of supply and the place or position of such metering equipment to conform with provisions of the Authority's Schedule of Electricity Tariffs in force from time to time. In addition, the Authority may provide one or more seals, locking hove or device to each metering equipment, as the Authority may decide, and the consumer shall not have the right to seal or unseal the metering equipment nor to change the place or position thereof.

9(h). Should the Authority, at any time, doubt the accuracy of any metering equipment on a consumer's premises, the Authority may, after informing the consumer, install another duly calibrated and tested metering equipment (check metering equipment) in series with the impugned metering equipment to determine the difference in consumption or maximum demand recorded by the check metering equipment and that recorded by the impugned metering equipment during a fixed period. If on such comparative test being made, the impugned metering equipment should prove to be not correct, the impugned metering equipment shall be removed from the premises, and the Authority shall, in the absence of any interference or alteration in the mechanism of the impugned metering equipment being detected by the Authority, adjust the consumer's account preceding the date of installation of check done on the basis of the reading recorded by the check metering equipment. For the purpose of adjustment of consumer's account, the whole error detected in the impugned metering equipment (and not only the difference beyond the permissible limit of error) shall be taken into account.

(k) The period of inaccuracy of any impugned metering

equipment shall be determined by the Authority keeping in view the consumption recorded by the impugned metering equipment and the average monthly consumption of the consumer based on consumer's connected load, load factor and power factor of his load. Except in the case of injured, damaged or tampered with metering equipment, the consumer shall have the right under section 26 read with section 24 of the Act, to make an appeal against any such action of the Authority, to the Electric Inspector concerned after completing the formalities provided therein.

(11) Restriction on use of energy, shedding of load and shut down of power.---The Authority may, at any time, on account of emergency, shortage of power or accidental break down of electric supply lines or works--

(a) impose restrictions on the use of energy by;

(b) require a consumer to shed his load;

(e) cause shut down of power in an area of supply without accepting liability of any compensation to affected consumers.

(26) Interpretation--These conditions of supply shall be subject to the Act or the Rules, but nothing in these conditions shall abridge or prejudiced the rights, powers and functions of the Authority under the Pakistan Water and Power Development Authority Act, 1958, or under any other law for the time being in force.

(27) Rights of Authority to Revise the Conditions of Supply, Schedules of Electricity Tariff Rates and Schedules of Service/General Charges etc.-Subject to clause 26 above, the Authority reserves the right, at any time, to amend, cancel or add at any of these conditions of supply, the Schedules of Electricity Tariffs and the Schedules of Service Charges, General Charges and Security Deposit without giving any previous notice to consumers to that effect."

These conditions are undertaken by the respondent to abide by through his affidavit, dated 29-2-1988, attached with the agreement reproduced above are a complete answer to the objections raised against the Committee's decision which found favour with the learned Judge of the High Court. In the presence of above terms and conditions of the agreement, the decision of Committee cannot be said to be without lawful authority, and it has wrongly been so declared.

20. The respondent in the meantime had been allowed temporary electricity connection by late learned Chief Justice, a member of the Bench, in the Chambers after the constitution of Bench. According to the respondent, he kept on making the payment of electricity bills in accordance with the terms of the order of learned Chief Justice but the department is bent upon charging fine, while according to appellant, Electricity Department, the respondent has not made the payment of electricity bills in accordance with the rules and the agreed terms between the parties.

21. As the matter was some-how regulated by an order of a learned Judge of the Bench, the respondent being unaware of the practice and procedure of the Court in such-like matters where the Bench constituted only could pass such order, not a Single Judge in the Chambers, be he the Chief Justice, however, respondent cannot be, said to be in according to the terms and conditions of the agreement. In the circumstances, of the case, we deem it proper that respondent shall not be subjected to fine for not making the payment in accordance with the terms of the agreement and laws and rules of the department after the order, dated 1-4-2004. He, however, is bound to pay the actual amount along with surcharge as admissible under rules short of fine.

22. So far the other miscellaneous applications filed on behalf of the appellants (Electricity Department), as well as respondent (consumer), are concerned; as the main appeal has been decided in the terms indicated above, therefore, all the miscellaneous applications connected with this case, stand disposed of accordingly. Contempt proceedings, in view of above are dropped.

In the light of what has been stated above, the order passed by the High Court on 17-10-2002, is hereby set aside and this appeal is accepted with costs.

Appeal accepted.