

## IN THE HIGH COURT OF SINDH, KARACHI

Present: Mr. Justice Muhammad Junaid Ghaffar  
Justice Ms. Sana Akram Minhas

1.	Const. P. 4066/2023	Amreli Steels Limited and Others <b>VS</b> Fed. of Pakistan and Others
2.	Const. P. 4130/2023	M/s Al-Abbas Fabrics Pvt Ltd and Others <b>VS</b> Fed. of Pakistan and Others
3.	Const. P. 4132/2023	Nadeem Textile Mills and Others <b>VS</b> Fed. of Pakistan and Others
4.	Const. P. 4139/2023	M/s Zarinatex & Another <b>VS</b> Fed. of Pakistan and Others
5.	Const. P. 4156/2023	M/s Proline (Pvt) Ltd and Others <b>VS</b> Fed. of Pakistan and Others
6.	Const. P. 4181/2023	Faraz Parvez & Others <b>VS</b> Fed. of Pakistan and Others
7.	Const. P. 4183/2023	M/s Globe Dyeing & Others <b>VS</b> Fed. of Pakistan and Others
8.	Const. P. 4188/2023	M/s Power Cement Ltd <b>VS</b> Fed. of Pakistan and Others
9.	Const. P. 4190/2023	Silver Textile Factory and Others <b>VS</b> Fed. of Pakistan and Others
10.	Const. P. 4191/2023	M/s Meskay & Femtee Trading (Pvt) Ltd <b>VS</b> Fed. of Pakistan and Others
11.	Const. P. 4206/2023	Laksons Textile Pvt Ltd and Others <b>VS</b> Fed. of Pakistan and Others
12.	Const. P. 4207/2023	Steelex Pvt Ltd <b>VS</b> Fed. of Pakistan and Others
13.	Const. P. 4209/2023	M/s Pelikan Knitwear <b>VS</b> Fed. of Pakistan and Others
14.	Const. P. 4241/2023	M/s Anis Apparel & Ors <b>VS</b> Fed. of Pakistan and Others
15.	Const. P. 4258/2023	Pinnacle Fiber Pvt Ltd & Others <b>VS</b> Fed. of Pakistan and Others
16.	Const. P. 4281/2023	Fayakun Textile Mills & Another <b>VS</b> Fed. of Pakistan and Others

**For the Petitioners:**

Through M/s. Haider Waheed, Ali Nawaz Khuhawar, Naeem Suleman, Arshad Hussain Shehzad, Qazi Umair Ali, Inziman Sharif, Munawar Juna, Muhammad Mustafa Mamdani, Zain A. Jatoi, Syed Mohsin Ali, Ameen M. Bandukda, Yousuf Junaid Makda, Sarmad Ail, Advocates.

**For the Respondents:**

Through M/s. Ayan Mustafa Memon, Kashif Hanif, Shaista Parveen, Syed Amir Ali Shah Jeelani, Advocates.

**Federation of Pakistan:**

Mr. G. M. Bhutto, Assistant Attorney General.

Mr. Syed Taqi Abidi, Deputy Director  
NEPRA.  
Mr. Syed Irfan Ali Shah, Director Legal  
K-Electric.  
Mr. Jan Mohsin Aftab DGM Legal K-  
Electric.  
Mr. Arshad Farooqui, Legal Assistant  
HESCO.

**Date of hearing: 20.09.2023.**

**Date of order: 20.09.2023.**

## **ORDER**

**Muhammad Junaid Ghaffar, J:** Through listed Petitions, the Petitioners have impugned Notification dated 27.07.2023 issued by Ministry of Energy, Government of Pakistan, on the sole ground that the same cannot be made applicable retrospectively. In some of the Petitions, additionally the Petitioners have also challenged determination / decision of National Electric Power Regulatory Authority / Respondent No. 2 (“**NEPRA**”) dated 25.07.2023. After issuance of notice(s) and passing of ad-interim order(s) in respective petitions, on 07.09.2023, an objection was raised regarding maintainability of these Petitions by learned Counsel for K-Electric Limited (“**KE**”) and Hyderabad Electric Supply Corporation (“**HESCO**”) on the ground that the Petitioners are required to avail alternate remedy under section 12G of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, (“**1997 Act**”); hence, these Petitions are not maintainable. Thereafter, on 20.09.2023, all learned Counsel were heard on maintainability of these Petitions.

2. Learned Counsel<sup>1</sup> appearing on behalf of Petitioners have jointly contended that the Notification in question was issued on 27.07.2023 giving it a retrospective effect from 01.07.2023 for which there is no authority in law conferred upon either the Ministry of Energy or for that matter NEPRA; hence, the Notification is illegal and liable to be declared so. They have further argued that

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<sup>1</sup> Mr. Haider Waheed & Ali Nawz Khuhawar Advocates, (others adopting)

petitioners have not challenged the decision of NEPRA dated 25.07.2023 and therefore, are not required to avail any alternate remedy as contended on behalf of the Respondents. It has been further argued that the Notification in question does not fulfil the requirements of Section 31(7)(ii) of the 1997 Act and hence, no appeal can be preferred against such Notification. According to them, the Tribunal is not the appropriate forum to determine as to whether, retrospective effect can be given to any such Notification, whereas, it does not have any powers to grant a restraining order, therefore, these Petitions are competent. It is their case that such retrospective effect of a Notification is without jurisdiction and ultra vires, therefore, the principle that an alternate remedy has to be availed would not apply. In support they have relied upon various judgments<sup>2</sup> of the Court(s).

3. On the other hand, learned Counsel appearing on behalf of K-Electric and HESCO have argued that it is the decision of NEPRA which has given some retrospective effect to the Notification in question, whereas, the said Notification is only a ministerial order and the Petitioners are required to impugn the decision of NEPRA before the Appellate Tribunal under Section 12(G) of the 1997 Act. According to them alternate remedy has been provided and the Petitioners can agitate all legal aspects before the Tribunal. They have further argued that in some of the Petitions, the very determination / decision of NEPRA has been impugned, therefore, these Petitions are incompetent. According to them, till such time the determination made by NEPRA including retrospective applicability of such determination with effect from 01.07.2023 remains in field, these Petitions are not maintainable as in that case they have to avail alternate remedy under Section 12(G) of the 1997 Act. It has also been argued that under Section 12(G) ibid any order of the authority can be challenged in appeal and therefore, the Petitioners

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<sup>2</sup> Anoud Power Generation Limited and others Vs. Federation of Pakistan and others (PLD 2001 SC 340), Messrs Gul Ahmed Textile Mills Ltd. Vs. The Collector of Customs (Appraisalment), Customs House, Karachi and 2 others (1990 MLD 126), Sindh Petroleum and CNG Dealers' Association and 15 others Vs. Federation of Pakistan and others (2020 CLC 851), Aman ullah Khan and others Vs. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092), Lt. Col. Nawabzada Muhammad Amir Khan Vs. The Collector of Estate Duty and another (PLD 1961 SC 119), Messrs S. A. Haroon and others Vs. The Collector of Customs, Karachi and the Federation of Pakistan (PLD 1959 SC 177), Nagina Silk Mill, Lyallpur Vs. The Income Tax Officer A-Ward Lyallpur and another (PLD 1963 SC 322) K-Electric Limited Vs. Federation of Pakistan and others (PLD 2023 SC 412).

are not justified to create any exception so as to file these Petitions under Article 199 of the Constitution. In support they have relied upon various judgments<sup>3</sup> of the Court(s).

4. We have heard all the learned Counsel and perused the record. Admittedly, NEPRA has rendered a decision / determination dated 25.07.2023 in the matter of Motion filed by the Federal Government under Section 7 and 31(7) of the 1997 Act, read with Rule 17 of NEPRA (Tariff Standards and Procedure) Rules, 1998 with respect to Recommendation of Consumer-end-Tariff and the said decision clearly states that pursuant to the submissions of the concerned Ministry to apply the tariff for all types of distribution companies, it shall have effect from 01.07.2023 and such request of the Government has been agreed upon by NEPRA. Based on this decision of NEPRA, the Ministry of Energy has issued the impugned Notification. It cannot be denied that this decision or determination by NEPRA has been given effect retrospectively, and it is in fact, the decision of NEPRA which provides that it is to be made effective retrospectively. Even if for the sake of arguments, it is accepted that the Notification dated 27.07.2023 can be impugned independently on the ground that it cannot be given effect retrospectively; the decision of NEPRA in question will still remain in field. Having said that it is also an admitted position that in some of the Petitions, the Petitioners have also made an attempt to impugn decision of NEPRA as well. Under Section 12(G) of the 1997 Act *any person aggrieved by a decision or order of the Authority, may within 30 days prefer an appeal to the Appellate Tribunal*. It very clearly reflects that an appeal is also provided against *any order of the authority*, and to that no exception has been made out except taking a plea that the Petitioners have not impugned the decision of NEPRA; but only the retrospective effect of the Notification issued by the Ministry of Energy. To that, we may observe that the Notification is based on the decision of NEPRA which requires to be challenged before the

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<sup>3</sup> Peshawar Electric Supply Company Ltd. (PESCO) and another Vs. SS Ployproplene (Pvt.) Ltd. Peshawar and others (PLD 2003 SC 316), Pfizer Pakistan (Pvt.) Ltd. Vs. Federation of Pakistan and 3 others (2019 MLD 1849), Dr. Sher Afgan Khan Niazi Vs. Ali S. Habib and others (2011 SCMR 1813), orders dated 11.08.2023 passed in C. P. No. 1590 of 2023 (Attock Cement Pakistan Limited and another Vs. Federation of Pakistan and others) and order dated 11.08.2023 passed in C. P. No. D-479 of 2023 (All Karachi Ice Factories Owners Welfare Associate (AKHOWA) and others Vs. Federation of Pakistan and others).

Appellate Tribunal under the 1997 Act; hence, it would not be appropriate for this Court to assume jurisdiction so vested in the Appellate Tribunal. The Tribunal is fully competent to look into this aspect of giving any retrospectivity to a determination / decision of NEPRA.

5. Per settled law the jurisdiction conferred upon this Court under Article 199 of the Constitution is discretionary and is not always available as a matter of right or rule. Rather, it is an exception instead of a rule. More so, when a statutory appeal has been providing in law. It is wholly wrong to consider that the Constitutional jurisdiction is designed to empower the High Court to interfere with the decision of a Court or tribunal of inferior jurisdiction merely because in its opinion the decision is wrong. In that case, it would make the High Court's jurisdiction indistinguishable from that exercisable in a full-fledged appeal, which plainly is not the intention of the Constitution-makers<sup>4</sup>.

6. In M Hamad Hasan<sup>5</sup>, very recently, it has been held by the Supreme Court that “*thus the legal position is that the Constitutional jurisdiction cannot be invoked as a substitute for revision or an appeal*” and “*the interference is on limited grounds as an exception and not the rule*”. In Peshawar Electric Supply Company Ltd<sup>6</sup> (which is a case arising from a Judgment of the Peshawar High Court, whereby, the petitions of the consumers were allowed and it was held that imposition of Fuel Price Adjustment (FPA) is unconstitutional and illegal), it has been held by the Supreme Court that firstly, the matter pertains to the exclusive domain of NEPRA under the 1997, Act, including the powers to issue guidelines and standard operating procedures outlining the mechanism through which various tariffs, including the ‘charges’ ought to be factored in the respective tariffs of the consumers, whereas, NEPRA after an elaborate, open and transparent process that involves hearing of all stake holders and after careful scrutiny of various components of the claimed rate of tariff suggests a uniform

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<sup>4</sup> Muhammad Hussain Munir and others v Sikandar and others (PLD 1974 SC 139)

<sup>5</sup> 2023 SC 197 (Supreme Court citation).

<sup>6</sup> Peshawar Electric Supply Company Ltd (PESCO) v SS Polypropylene (Private) Limited (PLD 2023 SC 316).

consumer tariff across the country in line with section 31(4) of the 1997 Act. It has been further held that the High Court under Article 199 of the Constitution lacks jurisdiction in such matters as they pertain to policy making and economic regulations; hence, falls within the domain of the Executive and High Court could not have assumed jurisdiction without first examining whether the alternate remedy mentioned above had indeed been exhausted and the High Court in an emotive manner, entertained a petition in which an alternate remedy exists and was admittedly not availed. Further, Appellate Tribunal of NEPRA consists of specialized members and must be resorted to in the first instance, whereas, a right of second appeal has also been given to the High Court concerned. It is well-settled that without availing/exhausting remedies provided by law, a party cannot directly invoke the constitutional jurisdiction of High Court more so in highly technical matters including those relating to determination of tariff. Similar view has been expressed in the case of K-Electric<sup>7</sup> v Federation of Pakistan and Cherat Cement<sup>8</sup>.

7. For the present purposes, in our view, the decision of NEPRA dated 25.07.2023 is a decision or order falling within the contemplation of Section 12G of the 1997, Act, against which an appeal lies, and therefore, we are not inclined to draw any exception to such rule while exercising our discretion; hence, in view of herein above facts and circumstances of these cases, on 20.09.2023 we had heard all the learned Counsel on the maintainability of these Petitions and had dismissed the same as being not maintainable. The above are the reasons thereof.

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<sup>7</sup> PLD 2023 SC 412

<sup>8</sup> PLD 2023 Peshawar 46