8/23

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MRS. JUSTICE AYESHA A. MALIK

(AFR)

Civil Appeals Nos.513 to 586 of 2014
And
CMA No.3671 of 2014 in Civil Appeal No.542 of 2014

Against judgment dated 17.12.2013 of Peshawar High Court, Peshawar passed in Writ Petition No.456-P/2012, W.P.462-P/2012, W.P.513-P/2012, W.P.474-P/2012, W.P.511-P/2012, W.P.504-P/2012, W.P.1010-P/2012, W.P.524-P/2012, W.P.459-P/2012, W.P.507-P/2012, W.P.510-P/2012, W.P.466-P/2012, W.P.517-P/2012, W.P.521-P/2012, W.P.515-P/2012, W.P.469-P/2012, W.P.476-P/2012, W.P.473-P/2012, W.P.501-P/2012, W.P.506-P/2012, W.P.464-P/2012, W.P.259-P/2012, W.P.597-P/2012, W.P.556-P/2012, W.P.528-P/2012, W.P.525-P/2012, W.P.530-P/2012, W.P.483-P/2012, W.P.526-P/2012, W.P.531-P/2012, W.P.502-P/2012, W.P.460-P/2012, W.P.481-P/2012, W.P.470-P/2012, W.P.467-P/2012, W.P.505-P/2012, W.P.465-P/2012, W.P.520-P/2012, W.P.475-P/2012, W.P.2526-P/2013, W.P.519-P/2012, W.P.529-P/2012, W.P.518-P/2014, W.P.522-P/2012, W.P.503-P/2012, W.P.533-P/2014, W.P.457-P/2012, W.P.484-P/2012, W.P.458-P/2012, W.P.463-P/2012, W.P.1063-P/2012, W.P.527-P/2012, W.P.534-P/2012, W.P.477-P/2012, W.P.485-P/2012, W.P.523-P/2012, W.P.512-P/2012, W.P.461-P/2012, W.P.480-P/2012, W.P.468-P/2012, W.P.514-P/2012, W.P.471-P/2012, W.P.479-P/2012, W.P.555-P/2012, W.P.486-P/2012, W.P.482-P/2012, W.P.472-P/2012, W.P.532-P/2012, W.P.478-P/2012, W.P.508-P/2012, W.P.509-P/2012, W.P.516-P/2012, W.P.557-P/2012, W.P.456-P/2012.

Peshawar Electric Supply Company Ltd (PESCO) — ***Appellants*** *(in CAs#513 to 585 of 14)*

The National Electric Power Regulatory Authority (NEPRA) — ***Appellants*** *(in CAs#586 of 14)*

VERSUS

SS Ploypropylene (Pvt) Ltd, Peshawar & others — ***Respondents*** *(in CA#513/14)*

M/s Two Star Marble Factory & others — ***Respondents*** *(in CA#514/14)*

Swabi Textile Mills (Pvt) Ltd & others — ***Respondents*** *(in CA#515/14)*

New Three Star Marble Factory & others — ***Respondents*** *(in CA#516/14)*

Amin Paper Bound Mills & others — ***Respondents*** *(in CA#517/14)*

Premier Formica Industries Ltd & others — ***Respondents*** *(in CA#518/14)*

Mclone Lubricants (Pvt) Ltd & others — ***Respondents*** *(in CA#519/14)*

Khyber Steels & others — ***Respondents*** *(in CA#520/14)*

Swat Ceramics Company (Pvt) Ltd & others — ***Respondents*** *(in CA#521/14)*

Sarhad Fron & Steel Mills & others — ***Respondents*** *(in CA#522/14)*

Khyber Spinning Mills (Gadoon Amazai) Ltd & others — ***Respondents*** *(in CA#523/14)*

M/s Zahid Marble Industry & others — ***Respondents*** *(in CA#524/14)*

Muhammad Daud Steel Industry & others — ***Respondents*** *(in CA#525/14)*

Janana De Malucno Textile Mills Ltd & others — ***Respondents*** *(in CA#526/14)*

Jaffar Industries (Pvt) Ltd & others — ***Respondents*** *(in CA#527/14)*

Khyber Match Factory (Pvt) Ltd & others — ***Respondents*** *(in CA#528/14)*

Frontier Foundry (Pvt) Ltd & others — ***Respondents*** *(in CA#529/14)*

City Polytex (Pvt) Ltd & others — ***Respondents*** *(in CA#530/14)*

Utman Ghee Industries (Pvt) Ltd & others — ***Respondents*** *(in CA#531/14)*

Leena Industries (Pvt) Ltd & others — ***Respondents*** *(in CA#532/14)*

Frontier Tech Industries (Pvt) Ltd & others — ***Respondents*** *(in CA#533/14)*

All Pakistan CNG Association (Khyber Pakhtunkhwa) Zone & others — ***Respondents*** *(in CA#534/14)*

Mezan Textile Industry & others — ***Respondents*** *(in CA#535/14)*

Babri Cotton Mills Ltd & others — ***Respondents*** *(in CA#536/14)*

Al Badar Manufacturing (Pvt) Ltd & others — ***Respondents*** *(in CA#537/14)*

Mohsin Mach Factory (Pvt) Ltd & others — ***Respondents*** *(in CA#538/14)*

Al Hafiz Crystoplast (Pvt) Ltd & others — ***Respondents*** *(in CA#539/14)*

Saif Textile Mills Ltd & others — ***Respondents*** *(in CA#540/14)*

Ithfz & others — ***Respondents*** *(in CA#541/14)*

Haripur Chamber of Commerce & Industry & others — ***Respondents*** *(in CA#542/14)*

Haripur Chamber of Commerce & Industry & others	***Respondents*** *(in CMA#3671/1*
Daudsons Armoury (Pvt) Ltd & others	***Respondents*** *(in CA#543/14)*
Peshawar Ceramics (Pvt) Ltd & others	***Respondents*** *(in CA#544/14)*
Royalo Textile Mills Ltd & others	***Respondents*** *(in CA#545/14)*
Libra (Pvt) Ltd & others	***Respondents*** *(in CA#546/14)*
Agro Pack (Pvt) Ltd & others	***Respondents*** *(in CA#547/14)*
Nizam Re-Rolling Mills & others	***Respondents*** *(in CA#548/14)*
M/s Olympia Paper & Board Mills (Pvt) Ltd & others	***Respondents*** *(in CA#549/14)*
Al-Jasmin (Pvt) Ltd & others	***Respondents*** *(in CA#550/14)*
Frontier Green Wood Industries (Pvt) Ltd & others	***Respondents*** *(in CA#551/14)*
M/s Aziz Ice Factory & Cold Storage & others	***Respondents*** *(in CA#552/14)*
Pan Asia Food Products (Pvt) Ltd & others	***Respondents*** *(in CA#553/14)*
Rais Ice Factory & others	***Respondents*** *(in CA#554/14)*
Abaseen Ice Factory & others	***Respondents*** *(in CA#555/14)*
Swabi Textile Mills & others	***Respondents*** *(in CA#556/14)*
Surgi Plast & others	***Respondents*** *(in CA#557/14)*
Asim Match & others	***Respondents*** *(in CA#558/14)*
Polyfine/Chempharma Industries & others	***Respondents*** *(in CA#559/14)*
Kohat Textile Mills Ltd & others	***Respondents*** *(in CA#560/14)*
Prime Polytex (Pvt) Ltd & others	***Respondents*** *(in CA#561/14)*
Multi Textile (Pvt) Ltd & others	***Respondents*** *(in CA#562/14)*
M/s Souvenir Tabacco Co. Ltd & others	***Respondents*** *(in CA#563/14)*
Zam Zam Ice Factory & others	***Respondents*** *(in CA#564/14)*
Prime Chpiboard Industries (Pvt) Ltd & others	***Respondents*** *(in CA#565/14)*

Frontier Ceramics Ltd & others	***Respondents*** *(in CA#566/14)*
T.K.M. Enterprises & others	***Respondents*** *(in CA#567/14)*
Mezan Textile (Pvt) Ltd & others	***Respondents*** *(in CA#568/14)*
Attar Textile Mills (Pvt) Ltd & others	***Respondents*** *(in CA#569/14)*
M/s Star Marble Factory others	***Respondents*** *(in CA#570/14)*
M/s Syntron Ltd & others	***Respondents*** *(in CA#571/14)*
Ciel Woodworks (Pvt) Ltd & others	***Respondents*** *(in CA#572/14)*
Bannu Woolen Mills Ltd & others	***Respondents*** *(in CA#573/14)*
M/s Shah Marble Industries & others	***Respondents*** *(in CA#574/14)*
M.K.B. Enterprises (Pvt) Ltd & others	***Respondents*** *(in CA#575/14)*
Sikandari Woolen Mills (Pvt) Ltd & others	***Respondents*** *(in CA#576/14)*
Sarhad Textile Mills (Pvt) Ltd & others	***Respondents*** *(in CA#577/14)*
Gadoon Textile Mills Ltd & others	***Respondents*** *(in CA#578/14)*
Peshawar Parcleboard Industries (Pvt) Ltd & others	***Respondents*** *(in CA#579/14)*
A.J. Textile Mills (Pvt) Ltd & others	***Respondents*** *(in CA#580/14)*
Lahore Steel Mills & others	***Respondents*** *(in CA#581/14)*
Effendi Steel (Pvt) Ltd & others	***Respondents*** *(in CA#582/14)*
Rehman Cotton Mills Ltd & others	***Respondents*** *(in CA#583/14)*
Nemra Steel Mills (Pvt) Ltd & others	***Respondents*** *(in CA#584/14)*
Rahim and Brothers Ice Factory & others	***Respondents*** *(in CA#585/14)*
SS Ploypropylene (Pvt) Ltd, Peshawar & others	***Respondents*** *(in CA#586/14)*

For the Appellants : Mr. Munawar us Salam, ASC
Syed Rifaqat H. Shah, AOR
(in CAs#513-585/2014)

Mr. Shamshadullah Cheema, ASC
Sh. Mehmood Ahmad, AOR
(in CA#586/2014)

For NEPRA : Mr. Muhammad Ashraf Majeed, ASC

On Court's Notice : Mr. Ayyaz Shaukat, DAG
Mr. Zahid Yousaf Qureshi, Addl.AG-KP
Ms. Mehnaz, Law Officer for Secy: Energy & Power Deptt, KP

For PESCO: Irfan Riayat, Chief law Officer
Muhammad Tofeeq, Law Officer

Date of Hearing : 14.09.2022

JUDGMENT

IJAZ UL AHSAN, J-. Through this consolidated judgment, we intend to decide Civil Appeals No. 513 to 586 of 2014 as they involve common questions of the law.

2. Through the instant appeals, the Appellants have challenged a consolidated judgment of the Peshawar High Court, Peshawar dated 17.12.2013 passed in the writ petitions mentioned in the schedule to this judgment. The Respondents, by filing their respective writ petitions, had challenged the imposition of Fuel Price Adjustment/Consumer-end Charges (hereinafter referred to as the "Charges"). The learned High Court vide the impugned judgment declared the imposition of Charges as unconstitutional and illegal.

3. The necessary facts giving rise to the present controversy are that the Respondents are industrial customers of the Appellant Company, which is an electricity distribution company licensed by NEPRA. The Appellant Company imposed Charges in the province of Khyber Pakhtunkhwa (hereinafter referred to as "KP") and the reason given for the imposition of the Charges was, *inter alia,* a rise in global fuel prices. Earlier, a writ petition was filed against

the imposition of Charges wherein, the High Court sent the matter to NEPRA. In the meantime, the imposition of the Charges was suspended. Subsequently, the Charges were resumed vide order dated 19.09.2011. Aggrieved, the Respondents approached the High Court by filing their respective writ petitions, which were allowed. Dissatisfied, the Appellants approached this Court for redressal of their grievances.

4. Leave to appeal was granted by this Court vide order dated 01.04.2014 in the following terms: -

> *"Having heard the learned counsel for the petitioners in CPs 312, 323 to 393 & 426of 2014 at some length, leave is granted in all these titled petitions inter alia to consider whether could the learned High Court allow the petitions filed by the respondents and interpret Articles 157(2) & 167(2) of the Constitution without prior notice to the learned Attorney General for Pakistan in terms of Order XXVII-A of the Civil Procedure Code; whether the Fuel Adjustment Charges levied by the petitioner in terms of Section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 could be declared ultra vires on Province specific grounds and whether the impugned judgment is violative of the law laid down by this Court in Gadoon Textile Mills v. WAPDA (1997 SCMR 641), Pakistan Flour Mills Association (Punjab Branch) v. WAPDA (PLD 2013 Lahore 182) and LESCO v. North Star Textile Mills (2014 CLC (Islamabad) 28)?"*

5. The learned ASC appearing on behalf of the Appellants has argued that the learned High Court erred in law in holding the imposition of the Charges to be ultra vires on a provincial basis since the same Charges are being recovered from consumers of other distribution companies all over Pakistan. The learned ASC has further argued that the right of the province to receive electricity is limited to Net Hydel Profit and, that too, is a matter between the province and the federation, which does not concern the consumer.

The learned ASC has further argued that the concept of Net Hydel Profit which may accrue to a province is different from the independent obligation of a consumer to make payment of consumer-end tariff, duly determined and notified by NEPRA. The learned ASC has further argued that the High Court overstepped its jurisdiction insofar as the determination of the Charges is concerned since the said matter must be decided by the Government in line with Article 161(2) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as "Constitution"). Further, because of Article 157(3) of the Constitution and the explanation to Article 161(2), if any grievance arises with respect to computation of Net Hydel Profit, the same may be raised by the province concerned in the Council of Common Interests, therefore, the jurisdiction of the High Court stands ousted. It has further been argued that the generation, transmission and distribution of electric power is not the domain of the province, rather, is managed by the Federal Government through institutions owned and/or controlled by the Federal Government.

6. The learned Counsel for the Respondents has supported the Impugned Judgment. Since the Impugned Judgment has within it all the main arguments of the learned Counsel for the Respondents, therefore, the arguments of the learned Counsel for the Respondents are not being reproduced here to avoid repetition.

7. We have heard the learned Counsel for the parties and perused the record. The following questions require a determination by this Court: -

(i) Whether NEPRA has the authority to impose the Charges on the Appellant-Company's consumers?

(ii) Was the determination of Charges payable by customers undertaken arbitrarily?

(iii) What is the command of the Constitution in matters pertaining to electricity?

(iv) Did the High Court correctly exercise jurisdiction in the matter at hand?

WHETHER NEPRA HAS THE AUTHORITY TO IMPOSE THE CHARGES ON THE APPELLANT COMPANY'S CONSUMERS?

8. The learned High Court has, through the Impugned Judgment, held that since the generation/production of electricity by KP far exceeds its consumption, therefore, the citizens of KP should not be made liable to pay Charges. The learned High Court has further held that the KP contributes copiously to the national grid and, despite this KP has not been paid its due share of Net Hydel Profit. Further, it has been held that it is the statutory duty of WAPDA to disburse KP's Net Hydel Profit on generation, however, despite a lapse of considerable time, WAPDA has failed to discharge its duties. In this respect, the High Court has primarily relied upon a directive of the President of the Islamic Republic of Pakistan dated 14-16.03.1978, the report of the National Finance Commission reconstituted on 25.07.1985 and, the Arbitration Award in favour of the province of KP.

9. To properly understand the aforenoted question, it is essential to first examine the various legal provisions applicable to the matter at hand. Previously, powers of generation, transmission and distribution of electricity were vested with WAPDA. Subsequently, a new institutional framework was established by separating the generation, transmission, and distribution functions of WAPDA's power wing. Under the new setup, the National Electric Power Regulatory Authority was established through the enactment of The Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (hereinafter referred to as "Act, 1997"). Resultantly, WAPDA was made a licensee of NEPRA and, Independent Power Producers (IPPs) and other generation companies known as "GENCOs" were responsible for the generation of power, including electricity, whereas the responsibility of transmission and distribution was entrusted to the National Transmission and Dispatch Company (NTDC) as a national grid company which dispatched electricity to various distribution companies, commonly known as "DISCOs". Under Section 7 of the Act, 1997, NEPRA has been assigned the exclusive power to regulate the provision of electric power services. One of the steps that NEPRA may take to regulate the electricity sector, is the determination of tariffs which, as per Act 1997, is a revenue requirement. This is provided in Section 7(2)(ac), which states that NEPRA is responsible for *inter alia*, ensuring efficient tariff structures for sufficient liquidity in the power markets. The exclusive

power of NEPRA to determine *inter alia*, tariff rates, is further provided in Section 7(3) which reads as follows:-

> *"(3) Notwithstanding the provisions of sub-section (2) and without prejudice to the generality of the power conferred by sub-section (1) the Authority shall—*
>
> *(a) determine tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend to the Federal Government for notification;"*

The aforenoted provision read with Section 7 and, the preamble of the Act, 1997, leaves no doubt in our minds that the determination of tariffs falls within the exclusive domain of NEPRA. This is also in line with Item No. 4 of Part II of the Federal Legislative List which lists electricity as a federal subject pursuant to which, the Act, 1997 was promulgated as well.

10. The learned High Court has held that NEPRA could not allow/add the Charges to the tariff since the definition of "Tariff" provided in Rule 2(m) of the NEPRA Rules, 1998 ("Rules, 1998") does not cover fuel adjustment charges. We are with all due respect unable to agree with this conclusion of the High Court. It is a cardinal principle of statutory interpretation that a law must be read holistically. Even if Rule 2(m) does not specifically mention the words "fuel adjustment charges", Section 7(2)(i) gives NEPRA wide powers to issue guidelines and standard operating procedures which comprehensively outline the mechanism through which various tariffs, including the Charges, ought to be factored in the tariff. This is provided in the NEPRA Determination of Consumer-end-Tariff (Methodology and Process) Guidelines,

2015 ("Guidelines, 2015"). Though the words fuel adjustment charges have not specifically been used, nonetheless, the concept of fuel adjustment charges are covered under the mechanism provided in the Guidelines, 2015 for monthly adjustments, which falls within the broad definition referred to by the High Court and serves the purpose of further explaining the said definition. The term "Consumer-end Tariff" is also defined in the Guidelines, 2015 which is the tariff under which adjustments are made and, technical formulae for the calculation of the said tariff, are also provided. As such, the findings of the High Court to the effect that the Charges could not be factored in since they are not mentioned in the definition of a "Tariff" are against spirit meaning and scope of the law and are therefore in our view, unsustainable.

11. Even otherwise, the concept of adjustments is not alien to the legal scheme of the Rules, 1998. Part II, Section 17(x) and (xi) thereof specifically cover the concept of adjustments, which read as follows: -

> *"(x) tariffs should take into account Government subsidies or the need for adjustment to finance rural electrification in accordance with the policies of the Government;*
>
> *(xi) the application of the tariffs should allow reasonable transition periods for the adjustments of tariffs to meet the standards and other requirements pursuant to the Act including the performance standards, industry standards and the uniform codes of conduct;" (Underlining is ours)*

It is crucial to mention that NEPRA, as per Section 3(2) of the Act, 1997 comprises experts from different fields such as finance and engineering. For example, the member tariff and finance, as per Section 3(2)(a) is required to be a

person holding a degree in the field of economics, corporate finance or chartered accountancy, and having 12 years of experience in the relevant field. It is further critical to mention that concept of adjustments in the price of electricity is highly technical and has therefore been intentionally left with the policymakers. It is not the role of the Courts to determine policies and especially those, in which the Court lacks technical expertise. It is the mandate of the Constitution and, is also trite that Courts must confine themselves to legal interpretation. The learned High Court must satisfy itself that there is a breach of fundamental rights vested constitutional/legal rights before any direction is issued. Such directions must not be based on an understanding of the law which is contrary to the Constitution. Doing so goes against the principle of trichotomy of powers and is against the mandate of the Constitution. The High Court could not, therefore, have interfered with the matter and that too, based on personal view of what the policy should be without legal or constitutional basis or backing.

WAS THE DETERMINATION OF CHARGES PAID BY CUSTOMERS IN THE SHAPE OF CONSUMER-END TARIFF(S), *UNDERTAKEN* ARBITRARILY?

12. It is essential to mention that the power of NEPRA to impose a consumer-end tariff(s)/ the Charges, has neither been questioned by the learned High Court, nor has it been challenged by the ASC for the Respondents. Rather, what has been challenged is the imposition of Charges by NEPRA on grounds *inter alia*, that they are imposed arbitrarily and

discriminatorily. Further, the learned High Court has mixed the powers of NEPRA with those of WAPDA. The question, therefore, is whether the said determination is arbitrary and, whether the High Court could equate the inefficiencies (if any) of WAPDA with the responsibilities of NEPRA.

13. Our attention has been drawn to the factors which are considered by NEPRA in determining consumer-end tariff(s). These, *inter alia*, include but are not limited to the fluctuating price of fuel, which is used in the generation of electricity. It may be noted that in the power mix of aggregate power available (Hydel, Thermal, Nuclear, Solar the maximum share is that of thermal power generation etc) which is wholly dependent on fossil fuels including oil and per unit generation cost is susceptible to fluctuation of fuel price in the international market. To avoid any interruption in the supply of electricity to the consumers, the same is supplied continuously. However, if during generation, the price of fuel rises/fluctuates, then, the same is adjusted/added in the bills which consumers receive. After consumers pay their bills to their respective DISCOs, payment is made. It is not the discretion of DISCOs to withhold payment of tariffs or, to exempt payment of the same since DISCOs must pay the price that is payable to GENCOs, who pay the price of fuel purchased from the international market at the price prevailing at the relevant time. The final tariff recoverable from the consumer is determined by NEPRA since DISCOs purchase electricity from the national grid.

14. The aforenoted scheme is provided in the Guidelines, 2015. Consumer-end tariff is defined in Section 6(d) which reads as follows: -

> *"Consumer-end Tariff" means a tariff to be charged to the end-consumer comprising of Power Purchase Price, and Distribution Margin adjusted for permissible Transmission and Distribution Losses, Cross-Subsidy (if any) and Inter-Region Subsidy (if any)"*

Further, Part 7 of the Guidelines, 2015 provides the Tariff Methodology. Rule 40 thereof outlines the factors determining the power purchase price, which include the fuel component, as discussed above. It is pertinent to mention that a comprehensive method is provided in the Guidelines, 2015 for determination *inter alia*, of the tariff/Charges. Section 50(1) of Part 7 is of crucial importance, which reads as follows: -

> *"50. Monthly Fuel Adjustments .*
> *(1) The adjustments on account of variation in fuel cost component of PPP would be done on monthly basis. This adjustment reflects in the consumers' monthly bill as Fuel Adjustment Charge." (Underlining is ours)*

The aforenoted Monthly Fuel Adjustments are made under a mechanism provided in Annexure II of Part 7. The learned High Court's entire discussion reveals around the fact that KP has been discriminated against and has not received the Net Hydel Profit due to the province and therefore, the imposition of Charges on consumers of electricity in KP is violative of their fundamental rights. We unfortunately unable to agree with this conclusion because the non-payment of Net Hydel Profit is an entirely different and distinct matter which does not concern consumer-end tariff, which is designed to ensure recovery of the revenue

requirement of the DISCOs. The fact that KP has not received Net Hydel Profits relates to a dispute between the Government of KP and the Federal Government which should more appropriately be raised before the appropriate forum, rather than the High Court. This does not mean that the High Court can allow the said dispute to intervene in the independent relationship between a consumer and a distribution company, which is entirely of a different nature and separate from the affairs of the Government. The Government and consumers/ power supply companies/DISCOS companies are distinct entities ought not to be interlinked.

15. Even otherwise, there is nothing on the record which shows that the mechanism for recovery of the Charges is either arbitrary or discriminatory. To the contrary, NEPRA after an elaborate, open and transparent process that involves hearing all interested stake holders and careful scrutiny of the various components of the claimed rate of tariff suggests a uniform consumer tariffs across the country in line with Section 31(4) of the Act, 1997 which is reproduced below: -

> *"(4) Subject to sub-sections (2) and (3), the Authority shall, on the basis of uniform tariff application, determine a uniform tariff for public sector licensees, engaged in supply of electric power to consumers, in the consumer's interest,] on the basis of their consolidated accounts."*

The aforenoted provision establishes that all consumers are charged a uniform tariff. The learned ASC for the Appellant-Company has taken us through various SROs which show that the Government has made efforts to subsidise electricity and the applicable tariff is less than the

determined tariff. As such, the argument that the mechanism through which the tariff is imposed is arbitrary, discriminatory, unreasonable or excessive is against the record and therefore legally and factually unsustainable. The learned High Court has declared the imposition of the Charges as ultra vires by ignoring the formulae given in the relevant rules and guidelines and, by inventing its own formula according to which, the Charges cannot be imposed since the province produces the maximum amount of Hydel power. The reasoning of the High Court is based upon the assumption, for which the impugned judgment does not disclose any basis that the means used to generate electricity have not been physically checked by NEPRA and, that NEPRA has not ascertained whether the fuel already available which was/could be used to generate electricity was fully consumed or not. As already explained above, the said factors could not have been determined by the High Court as these squarely and exclusively fell within the exclusive domain of a specialized regulator which is equipped with the entire data authenticated record and audited accounts alongwith highly specialized and trained manpower to sift through and *verify the same.* Being the exclusive domain of NEPRA to determine the aforesaid matters at best, NEPRA could have been directed to follow the law in case any legal or procedural lapse or defect had been discovered by the High Court rather than hold the Charges to be unconstitutional without any lawful basis, reason or justification. Further, despite the fact that the learned High Court has accepted that all the electricity

generated across the country through various modes goes into a national energy basket from where it is transmitted into the national grid by NTDC and eventually distributed by DISCOs. It has for reasons not entirely clear to us, proceeded to hold the imposition and recovery of charges to be illegal and unconstitutional. This brings us to the conclusion that no matter which province generates more electricity, it must first go into the national basket where the electricity is stored collectively rather than separately on a provincial basis on requirement and capacity basis. Thereafter, the units purchased by them are dispatched to DISCOs which then provide electricity to end consumers. The margins administrative costs, line loses repair and upkeep costs of DISCOs being part of the recoverable tariff are included in the tariff as their claims for such costs after due scrutiny and analysis and included in the consumer tariff by NEPRA. That electricity might be produced, for example, by Punjab, but, once it is in the basket, it belongs to every province. As such, the provincial basis which has been used to set aside the Charges, by the learned High Court, is not constitutionally sustainable.

16. Another objection which has been taken by the Additional Advocate General KP is that NEPRA ignored Section 7(5) of the NEPRA Act, 1997 which reads as under: -

> *"(5) Before approving the tariff for the supply of electric power by generation companies using hydro-electric plants, the Authority shall consider the recommendations of the Government of the Province in which such generation facility is located."*

The aforesaid provision that NEPRA has to *consider* the recommendations of the Government of KP. The findings of the learned High Court in this respect are that the recommendations made by the reconstituted National Finance Commission (also known as the A.G.N. Kazi Commission) were considered but not accepted.

It has further been held that the A.G.N Kazi Commission determined the criteria on the basis which WAPDA was required to prepare statements of accounts which were prepared erroneously. The High Court in this respect has concluded that the Charges in question could not be recovered from the people of KP while denying them the profit per unit price of electricity generated. Firstly, it is observed that according to the High Court the recommendations made by the A.G.N. Kazi Commission were considered but not accepted and, a different formula was devised. The entire focus of the impugned judgment is that WAPDA did not fulfil its legal obligations to pay the province of KP, the profits which was due to it.

It cannot be stated that representatives of the Government of KP were not heard by the NEPRA, This argument is against the record as reflected in determination made by NEPRA dated 20.01.2012. In the proceedings of the said determination, the Government of KP was an intervener and, was heard. The contentions raised by the government of KP were considered and rejected, which was within the domain of NEPRA as per the law. It is essential to note that the recommendations given by the A.G.N Kazi Commission

pertain primarily to the methodology of calculation of net profits. This is provided in the decisions of the Council for Common Interest dated *inter alia* 24.12.1990 and 12.01.1991. As such, the argument of the learned AAG to the effect that the Government of KP was not heard and its objections to the formula regarding fuel adjustment charges were not duly debated and is against the record and is therefore factually and legally unsustainable.

Once NEPRA has considered the point of view of the Government of KP, it is within its power to either accept or reject the same since the determination of tariff rates falls within the exclusive domain of NEPRA and, the power of NEPRA in this respect has neither been challenged nor can be usurped by any other authority. If at all, there was a violation by WAPDA insofar as non-payment of profit is concerned, the same is a separate matter altogether having no nexus or connection with the issue of tariff determination and in any event is outside the domain of NEPRA. The said dispute could not have been linked by the High Court with the question whether or the full adjustment Charges could be recovered by WAPDA from consumers. As discussed earlier, profits are entirely different from consumer-end tariffs and, the High Court linked the two together without any lawful basis or justification.

WHAT IS THE COMMAND OF THE CONSTITUTION IN MATTERS PERTAINING TO ELECTRICITY?

17. The learned AAG has argued that while determining and imposing the Charges, NEPRA ignored the

command of Article 157 of the Constitution. The learned High Court has agreed with the said argument and has held that the determination of tariffs falls in the exclusive domain of the Province under Article 157(2)(d) of the Constitution. For ease of reference, Article 157 of the Constitution is reproduced as under: -

> *"157 Electricity.*
>
> *(1) The Federal Government may in any Province construct or cause to be constructed hydro-electric or thermal power installations or grid stations for the generation of electricity and lay or cause to be laid inter-Provincial transmission lines*
>
> *Provided that the Federal Government shall, prior to taking a decision to construct or cause to be constructed, hydro-electric power stations in any Province, shall consult the Provincial Government concerned.*
>
> *(2) The Government of a Province may-*
>
> *(a) to the extent electricity is supplied to that Province from the national grid, require supply to be made in bulk for transmission and distribution within the province:*
>
> *(b) levy tax on consumption of electricity within the province;*
>
> *(c) construct power houses and grid stations and lay transmission lines for use within the province; and*
>
> *(d) determine the tariff for distribution of electricity within the province*
>
> *(3) In case of any dispute between the Federal Government and a Provincial Government in respect of any matter under this Article, any of the said Governments may move the Council of Common Interests for resolution of the dispute*

The learned High Court has further held that the province of KP could not be denied its profits as per the command of Article 161(2) of the Constitution. Article 161(2) reads as follows: -

> *"(2) The net profits earned by the Federal Government, or any undertaking established or administered by the Federal Government from the bulk generation of power at a hydro-electric station shall be paid to the Province in which the hydro-electric station is situated.*

> *Explanation -For the purposes of this clause "net profits" shall be computed by deducting from the revenues accruing from the bulk supply of power from the bus-bars of a hydro-electric station at a rate to be determined by the Council of Common Interests, the operating expenses of the station, which shall include any sums payable as taxes, duties, interest or return on investment, and depreciations and element of obsolescence, and over-heads, and provision for reserves."*

Reliance has been placed on the case of *Gadoon Textile Mills v. WAPDA (1997 SCMR 641)* to hold that the power to impose tariff vests with the Province. Reliance has also been placed on the directives issued by the President of Pakistan dated 16.03.1978 and the recommendations of the A.G.N Kazi comments dated 22.11.1986 to state that the net profit due to the province of KP should have been disbursed.

18. We will first analyse the case of *Gadoon Textile Mills (ibid).* The learned High Court has held that, in the aforenoted case, the power to determine tariffs has been given to the province. However, the learned High Court has failed to noticed that the said power is subject to certain conditions. The said conditions have been stated in the said judgment in the following terms:

> *"Government of a Province has power to levy tax on consumption of electricity within the Province irrespective of the fact that it has not purchased electricity in bulk for distribution in the Province or that it has not constructed power houses and grid stations and has not laid transmission lines for use within the Province. To put it differently, sub-clause (b) of clause (2) of Article 157 is independent and can be pressed into service without invoking other sub-clauses. However, sub-clause (d) of clause (2) is not independent. The Government of a Province can determine the tariff for the distribution of electricity within the Province under above sub-clause (d) only when it purchases electricity in bulk from the national grid under sub-clause (a) for distribution within the Province or when it constructs power houses and grid stations and lays transmission lines for use within the Province under above sub-clause (c). In other words, the operation of sub-clause (d) is depended on the factum whether the Government of a Province has acted under sub-clause (a) and/or under*

sub-clause (c) of clause (2) of Article 157 of the Constitution."
(Underlining is ours)

The above excerpt shows that the power of a Province under Article 157(2)(d) is premised upon two conditions. First, the province purchases electricity in bulk from the national grid for distribution and second, the province constructs power houses and grid stations and lays transmission lines for use within the province. In this respect, it is necessary to mention that the Appellant-Company is a public limited company, incorporated under the Companies Ordinance, 1984 under Certificate of Incorporation No. 09497 of 1997-98 dated 23.04.1998. It purchases electricity from the national grid and then distributes the same to consumers in KP. The learned Counsel for the Respondent(s) has not been able to show us anything from the record that establishes that PESCO is owned or controlled by the provincial government. It has also been demonstrated to us that PESCO is a department of the provincial government'. Since Article 157(2)(d) relates to the provincial government, it was essential for the learned High Court to first examine whether or not PESCO even falls within the definition of provincial government, given that it is incorporated as a limited company. Further, it is important to mention that nothing has been shown to us from the record which could establish that PESCO generates electricity and provides the same to end consumers. Rather, it has been established from the record that PESCO supplies electricity after purchasing the same from the national grid.

19. It has been held by this Court that Article 157(2)(d) of the Constitution is an enabling provision of the Constitution and, it is therefore not make it mandatory for Provincial Government to determine the rate of tariff. Reliance in this respect is placed on the judgment of *Gadoon Textile Mills (supra)* in which, this Court held as follows: -

> *"19. We may observe that Mr. Fakhruddin G. Ebrahim has rightly pointed out that it is not the case of any of the parties that the Governments of Punjab and N.-W.F.P. have been purchasing electricity in bulk from the national grid and have been distributing the same to the consumers within their respective Provinces nor it is the case of any of the parties that the Government of above Provinces have ever determined any tariff for electricity under sub-clause (d) of clause (2) of Article 157 of the Constitution. On the other hand, the case of the above Provinces is that WAPDA is competent to determine the tariff or the electricity. Furthermore, even otherwise, even if it is to be held that sub-clause (d) of clause (2) of above Article 157 is independent from the other above sub clauses, in that event also the Government of a Province is not under any Constitutional mandate to determine the tariff for distribution of electricity within the Province as pointed out hereinabove that Article 157 is an enabling provision and not a provision which mandates its carrying out."(Underlining is ours)*

There is nothing on the record to suggest that the province of KP fulfils the conditions provided in the aforenoted judgment. Further, it is an admitted position that after the unbundling of WAPDA, the National Transmission and Dispatch Company/ ("NTDC") was reasonable to dispatch electricity to all provinces from the national basket. It is important to note that the Act, 1997 applies to the whole of Pakistan per Section 1 of the said Act. There is nothing on the record which could show that there is provincial legislation in vogue which regulates the supply, distribution or generation of electricity. The only legislation in this respect is the Act, 1997. The vires of Act, 1997 has not been challenged on the touch stone of being beyond the legislature competence of the

federation. Even otherwise, it is important to note that even if any province legislates on the matter of electricity, the same would not only be against Part II of the Federal Legislative List but, in the event of any provision of provincial law dealing with the subject in conflict with being federal law; provisions of the latter would prevail. This interpretation of the law is in line with the Constitution and with the Act, 1997 which admittedly has an overriding effect as provided in Section 45 of the Act, 1997 which reads as follows: -

> *"45. Relationship to other laws.— The provisions of this Act, rules and regulations made and licences issued thereunder shall have effect notwithstanding anything to the contrary contained in any other law, rule or regulation, for the time being in force and any such law, rule or regulation shall, to the extent of any inconsistency, cease to have any effect from the date this Act comes into force and the Authority shall, subject to the provisions of this Act, be exclusively empowered to determine rates, charges and other terms and conditions for electric power services"(Underlining is ours)*

20. We have examined the licensing agreement of the Appellant Company with NEPRA. It is specifically provided in Article 6 of the said agreement that the licensee i.e., PESCO shall only charge such tariff as approved by the Authority from time to time. As such, PESCO/the Appellant-Company does not have any discretion to determine the Charges. Rather, it is required to recover the Charges fixed by NEPRA. Since PESCO is a licensee of NEPRA, it is bound by the terms of its agreement with NEPRA and cannot deviate therefrom. The license of PESCO, which outlines the said terms and conditions, has not been challenged and nor has the power of PESCO been questioned. The vires of the Act, 1997 and the Rules made thereunder have also not been challenged which

means that the said laws hold the field and must be applied in toto.

21. The learned Counsel for the Respondents has argued that the Council of Common Interests is vested with the exclusive authority to determine tariffs. This is an erroneous stance. It has been held by this Court in the judgment of *Gadoon Textile Mills* that the Council of Common Interests cannot interfere with the day-to-day affairs of an Authority which include the determination of tariffs. Reliance in this respect is placed on the finding of this Court in this respect from the case of *Gadoon Textile Mills* reads as follows:-

> *"28. We are unable to subscribe to M/s. Abdul Hafeez Pirzada and Khalid Anwar's above contention that the effect of the incorporation of Article 154(1) and/or Article 161(2) of the Constitution is that C.C.I. has the power to determine the tariff for distribution of electricity by WAPDA to the consumers directly. The object of the incorporation of clause (1) of Article 154 of the Constitution is reflected inter alia in para. 33 of the Constitution Committee's Report reproduced hereinabove in para. 18, namely, "to confirm to the spirit of Federalism, a new arrangement has been worked out to ensure effective participation of the Provincial Governments in sensitive and important spheres of national life". To achieve the above objective, C.C.I. consists of the Chief Ministers of the four Federating Units and an equal number of members from the Federal Government which generally includes the Prime Minister of Pakistan as provided under Article 153(21 of the Constitution. In the first case of Federation of Pakistan v. M/s. United Sugar Mills Ltd. (supra), the interpretation of Article 153 or 154 of the Constitution was not involved though observations as to its effect inter alia on the power of the Federal Government were made. In Khalid Malik, Tariq Rahim and Nawaz Sharif cases (supra), the Federating Units repeatedly requested Federal Government to summon the meeting of C.C.I. to iron out and to resolve the outstanding issues between the Federating Units and the Federation but the request was not acceded to. The failure on the part of the Federal Government to accede to the above request was pleaded by the President as one of the grounds in support of the impugned orders for dissolving the National Assembly and dismissing the Federal Cabinet. In fact in the above cases (except in Nawaz Sharif's case in which question of privatisation of WAPDA was involved) interpretation of clause (1) of Article 154 of the Constitution was not directly involved.*
>
> *In our view Articles 153, 154, 155, 160 and 161 of the Constitution provide an in-built self-adjudicatory and*

self-executory mechanism in the Constitutional set-up. The object seems to be to generate sense of participation among the Federating Units on sensitive issues of national importance referred to in the above Articles, and to ensure:--

(i) resolving of any dispute arising between one or more Federating Units inter se or between the Federation and a Federating Unit;

(ii) payment of the net proceeds of the Federal duty excise on natural gas levied at well-head and collected by the Federal Government to the Federating Units in which the well-heads of natural gas are situated;

(iii) payment of net profits earned by the Federal Government or any undertaking established or administered by the Federal Government from the bulk-generation of power at a hydro-electric station to the Federating Unit in which the hydro-electric station is situated;

(iv) carrying out direction issued by the Parliament in its joint session to C.C.I.;

(v) equitable distribution of Federal taxes among the Federating Units and resolving other financial issues (Article 160 of the Constitution).

29. We are inclined to hold that the matters referred to in Part II of the Federal Legislative List and Item 34 of the Concurrent Legislative List (electricity) are to be brought before C.C.I. for formulating and regulating policies. In Nawaz Sharif's case (supra), it was held (by one of us Ajmal Mian, J.) that before taking any action towards privatisation of WAPDA, it was mandatory to have brought the above matter before C.C.I. The rationale of the above conclusion was that hydro-power stations were situated in N.-W.F.P., which was then opposing privatisation of WAPDA. It would not have been proper on the part of the Federation to privatize above hydro-power stations and to create private interest in such sensitive installations situated in a Federating Unit without the participation of the Federating Units. So the forum for ironing out such a controversy was C. C. I.

30. Indeed in the case of Sharaf Faridi (supra), the High Court of Sindh has construed the expression "the supervision and control over the subordinate judiciary" used in Article 203 of the Constitution as exclusive in nature, comprehensive in extent and effective in operation. This was construed as such while keeping in view Article 175 of the Constitution, which mandated that the Judiciary shall be separated from the Executive within the period specified therein, which period in fact had expired. In this view of the matter, the above report is of no help for construing the above words used in clause (1) of Article 154 of the Constitution. Nor the other reports referred to hereinabove can be pressed into service as the words "regulate" and "control" have been construed therein with reference to the context in which they are employed in the relevant provisions of the statutes. The latter point has been dilated upon hereinafter in detail.

It may be observed that the words "formulate", "regulate", "policy" "control" and "supervise" employed in clause (1) of Article 154 of the Constitution carry wide connotations. The word "formulate" inter alia carries the meaning, set forth,

reduce to a formula; whereas the word "regulate" inter alia connotes control, subject to guidance. The word "policy" inter alia carries meaning, as the general principles by which a Government is guided in its management of public affairs. The word "control" inter alia connotes, to regulate or guiding or restraining power over; whereas the word "supervise" inter alia carries the meaning, to look over and to inspect. The above words cannot be construed in isolation, but the same are to be construed in the context in which they are employed. In other words, their colour and contents are to be derived from their context. PLD 1996 SC 324 at page 429, para.23 (Al-Jehed Trust case). Applying the above principle to the case in hand, we are of the opinion that C.C.I. is not required to make decision as to the day to day working of the Corporations mentioned in Part II of the Federal Legislative List and of the related institutions. It is supposed to formulate and regulate general policy matters as to their working, which may include general policy for the working of WAPDA. It may even include a guideline for fixation of tariff by WAPDA but such guideline cannot be inconsistent with subsection (2) of section 25 of the Act, which lays down statutory parameters for fixation of tariff. In our view, the C.C.I. is not required to determine tariff for the supply of electricity by WAPDA to the consumers and to vary the same from time to time as this comes within the ambit of day to day working. It may be pointed out that fixation of tariff of electricity depends on various factors, which regularly and frequently fluctuate warranting revision of tariff from time to time. It may further be observed that there are a number of other Corporations and related institutions under the administrative control of the Federal Government, which deal with manufacture and also of various goods/machinery. Can it be urged that it is mandatory that C.C.I. should fix the prices of the above items from time to time. The composition of C.C.I., which comprises Chief Ministers of the four Federating Units and four nominees of the Federal Government, which generally includes the Prime Minister as stated above, militates against taking of above exercise which if taken in respect of all the Corporations and related institutions referred to in Article 154 (1), will be a full time job, the Prime Minister and the Chief Ministers instead of running the Federation and the Federating Units will mostly be busy in the above exercise. The requirement under rule 5 of the Rules I of Procedure of C.C.I, to summon a meeting at least once in a year also lends support to the above view, which we are inclined to take." (Underlining is ours)

The aforenoted extract makes it abundantly clear that even if the Council of Common Interests devises guidelines for the imposition of tariffs, the same cannot contradict the legislation under which an authority functions. Since the legislature in its wisdom and under its authority provided by Article 70 of the Constitution, promulgated the Act, 1997 to specifically address matters pertaining to the supply, generation, and distribution of electricity, therefore,

any guideline which is issued must be in line with the Act, 1997 and not inconsistent therewith. As such, when NEPRA has been empowered by the legislature and its authority has not been questioned, then, the formulae based on which consumer-end tariff is determined could not have been called into question by the learned High Court since the said matter pertains to electricity, which is the domain of the Federal Government. This Court, as noted above, has already held that it is not the responsibility of the Council of Common Interests to determine tariffs. In this backdrop, the learned High Court could not have reached a conclusion which goes against a judgment of this Court.

22. The next question is the payment of profits to the provincial government of KP under Article 161(2) of the Constitution. In this respect, the learned High Court has held that the Federal Government was required to pay the said profits to the KP government in line with an arbitration award and, in line with the directives of the president dated 14-16.03.1978. Through the arbitration award, WAPDA was held liable to pay Rs.110 billion to the KP government as principal amount of Net Hydel Profit up to the year 2004-05 with 10% markup per year. The learned High Court has held that WAPDA till date (as per the Impugned Judgment) has not paid the said amount to the KP government. Similar directions were made in the president's directive which reads as follows: -

> *"CMLA directed that net profits of bulk electricity generation due to NWFP as provided in Article 161(2) of the Constitution be calculated and disbursed immediately. Ministry of*

Finance and WAPDA should immediately take action in consultation with the Provincial Government".

It is important to note that the aforesaid directives/ arbitration award and recovery/determination of tariff/fuel adjustment charges are two different and distinct matters. It is for this reason that the concept of net profits is covered by Article 161(2) whereas, the concept of tariffs is covered by Article 157 of the Constitution. If the Government of KP has not been paid net profits, the same ought to be taken up by the Government of KP at the appropriate level before the appropriate forum. The learned High Court could not have declared the Charges as ultra vires the Constitution on the basis that the province of KP has not been paid its dues. The said matter relates to policy and governance and ought to be raised before the appropriate forum. The High Court could not equate the failures of WAPDA to stultify or restrict the authority of NEPRA to perform its legal functions under the Act, 1997 and Rules/Guidelines made thereunder. As stated earlier, WAPDA is a licensee of NEPRA under the Act, 1997. Thus, it could not have been held that the failures of WAPDA could be attributed to NEPRA since the two entities function entirely differently. As such, the findings of the learned High Court in this respect are legally and factually unsustainable. Reliance in this regard is once again placed on *Gadoon Textile Mills (supra)* in which this Court held as follows:-

"34. From the above-quoted decision of the C.C.I. and the provisions of P.O.No.3 of 1991, it is evident that C.C.I. has discharged its Constitutional obligation as to the computation of net profits for payment of the same to the Federating Units concerned. There are sufficient documents on record to

indicate that some payments have been made towards profits inter alia to N.-W.F.P. pursuant to the above decision of the C.C.I. The formula adopted for working out of net profits to the Federating Units under above clause (2) of Article 161 cannot be made basis for determining the tariff for the supply of electricity b-WAPDA inter alia for the following reasons:---

(i) That it has come on record that the generation of electricity from the hydro-electric stations is to the extent of about 48% of WAPDA's total generation of electricity. The balance of about 52 % comes from generation of electricity from the thermal power stations,

(ii) The cost of installation of a hydro-electric station is high as compared to thermal power station but the cost of operation is less.

(iii) The net profits as per Explanation to clause (2) of Article 161 of the Constitution are to be computed on the basis of revenue which may accrue from the bulk supply of power from the bus-bars; whereas WAPDA has not only been generating electricity from hydro-electric stations but is also transmitting and distributing the same among the consumers and, therefore, the basis provided for in the above explanation to clause (2) of Article 161 cannot be adopted for determining the tariff for the supply of electricity to the consumers." (Underlining is ours)

23. The learned High Court erred in law in ignoring the dicta of this Court. The command of the Constitution dictates *inter alia* that judgments rendered by this Court shall be binding on all lower *fora*. Once this Court has held that the Council of Common Interests was not competent to determine tariff and, that Article 157 of the constitution is an enabling provision, then, the learned High Court's conclusion to the contrary is legally unsustainable and *ex facie* erroneous. While acting under Article 199 of the Constitution, the High Court must act in accordance with the Constitution. The High Court cannot go against judicial pronouncements of the Supreme Court of Pakistan in an emotive manner. The learned High Court in the instant matter has relied upon the aforesaid judgment without noticing that the said precedent settled the matter regarding tariff once and for all. As such, in

presence of binding precedent, the High Court could not have reached a different conclusion.

DID THE HIGH COURT CORRECTLY EXERCISE JURISDICTION IN THE MATTER AT HAND?

The learned ASC for the Appellant-Company has held that the Respondents had an alternate efficacious remedy available to them under the Act, 1997. In this respect, he has referred to Section 12-G of the Act, 1997 and Section 7(2)(g) of the Act, 1997 read with Rule 16(6) of the Rules, 1998. We have examined the said provisions and hold that the law clearly provides that in a situation where a dispute arises, the power to settle the same vests with NEPRA. In such a situation, the learned High Court could not have assumed jurisdiction without first examining whether the alternate remedy mentioned above had indeed been exhausted. The High Court in an emotive manner, entertained a petition in which an alternate remedy exists and was admittedly not availed. Appellate Tribunal of NEPRA consists of specialized members and must be resorted to in the first instance. 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 the Honourable High Court more so in highly technical matters including those relating to determination of tariff. Reliance in this respect is placed on *Tariq Transport Company Lahore v. Sargodha Bhera Bus Service (PLD 1958 Supreme Court 437)*

24. As noted above, the High Court appears to have arbitrarily interfered in a policy matters which it should have been reluctant to do considering that such matters concern complex factors which have a direct impact on the economy of the country. Where the legislature has expressly provided an authority for determination in such matters, in the shape of NEPRA, then, such authority allowed to perform its functions because it has technical knowhow owing to the fact that it comprises members from various technical fields. It has been held by this Court that in cases involving utilities and economic regulation, there are good reasons for judicial restraint and/or judicial deference to legislative judgment. It is not the responsibility of the Court to regulate economic policy. The responsibility of the Courts is limited to legal interpretation. The Court is expected to enforce fundamental rights reasonably and not in a manner which creates hurdles and unnecessary complications. In the instant case with all due respect, the learned High Court has overstepped its jurisdiction under Article 199 of the Constitution and, has overridden the policy/framework of NEPRA which matter is beyond the jurisdictional parameters of the High Court. In such a situation, the learned High Court was required to exercise self-restraint and defer the matter for determination to NEPRA. Reliance in this respect is placed on the case of *Elahi Cotton Limited v. Federation of Pakistan (PLD 1997 Supreme Court 582.*

25. It is settled law that Courts, while exercising constitutional jurisdiction, must do so on the touchstone of fairness, reasonableness and proportionality. Courts, while acting under the Constitution, must not encroach upon the domain of the executive branch unless there is violation of fundamental rights guaranteed under the Constitutional or the executive branch oversteps its legal and constitutional limits. *In the instant mat*ter, the learned High Court arrogated to itself matters of executive policy and by connecting two different matters namely non payment of share, profits of hydel power generation on the one hand and determination of tariff to be recovered from consumers/including the component of fuel adjustment surcharge delved into a legal and constitutional area which at best relates to the claim of a province against the federation. Even on that score the High Court lacked jurisdiction to do so. This was done by the High Court by ignoring the various formulae devised by NEPRA and, by ignoring the fact that an alternative remedy was available under the relevant law. As such, the learned High Court's findings are erroneous and therefore, cannot be *upheld.* Irrespective of whether KP generates the most hydel power or not, the said factor cannot be made a basis to determine whether NEPRA should deduct consumer-end tariff, which it has power to do, under the law. If at all, the province is aggrieved of the actions in respect of net profit not being given to KP, then, the province can under the law and the Constitution approach the relevant forum for redressal of its grievances.

26. For the reasons mentioned above, these appeals are allowed. The impugned judgment of the Peshawar High Court dated 17.12.2013 is set aside.

Announced in open Court on

ISLAMABAD THE
14th of September 2022
Haris Ishtiaq LC/*
Not Approved For Reporting.