

# IN THE HIGH COURT OF SINDH, KARACHI

Const. Petition No. **D -6386** of 2018

PRESENT:

**MR. JUSTICE AQEEL AHMED ABBASI.**  
**MR. JUSTICE ZULFIQAR AHMAD KHAN.**

***K- Electric Limited***

**Vs.**

***Federation of Pakistan & others***

***Petitioner:*** through Mr. Amel Khan Kasi,  
advocate.

***Respondents:*** through Mr. Khalid Rajpar, advocate.  
Ms. Lubna Pervaiz, DAG.

***Date of Hearing:*** 12.04.2019.

***Date of Order:*** 12.04.2019.

## **ORDER**

**Aqeel Ahmed Abbasi, J:-** Through instant petition, the K-Electric Limited petitioner company has impugned the recovery proceedings by the Customs Authorities in respect of duty and taxes in the sum of Rs.321.733 Million accrued in the year 1998 before its privatization, whereas, following relief(s) has been claimed:-

- i. Declare that the petitioner is not obliged or bound to pay the amount of Rs.321.733 Million accrued before its privatization or any part thereof to the respondents and the claim of respondent No.3 against the petitioner in this regard is illegal, unlawful, capricious and arbitrary;

- ii. Declare that the Order dated 11.06.2014 having been passed in pursuance of the claims of the respondent No.3 is unlawful, capricious, arbitrary and void abinitio;
- iii. Declare that recovery Notices dated 12.02.2007, 26.06.2013, 26.09.2013 and 24.12.2013 and all subsequent acts/orders/directions of the respondents No.3 & 4 leading to the blockage in customs clearance of the consignments/goods imported/exported by the petitioner, are illegal and of no legal consequence to the petitioner and remains a nullity in the eyes of law;
- iv. Declare that the amounts of demurrage charges (around 52 Million on the date of institution of the case) sustained by the petitioner during blockage arbitrarily imposed by the respondent Nos.3 & 4 are solely attributable to the respondents and should accordingly be paid to it with accrued markup;
- v. Permanently restrain the respondents, their agents, servants, or any person acting under or on their behalf from taking any coercive recovery measures against the petitioner including but not limited to blocking or delaying the consignments/goods imported/exported by the petitioner from and into Pakistan and those already lying at the port and in the process of clearance, under the pretext of non-settlement of the amounts allegedly claimed from the petitioner owing to the pre-privatization period;
- vi. Suspend the operation of order dated 11.06.2014 and the recovery notices issued prior and/or after that date in terms of the application being separately filed herewith;
- vii. Direct the respondents No.3 and 4 to cancel the indemnity bonds provided by the petitioner and to return the same forthwith to the petitioner as being no longer required;

- viii. Grant cost of the petition or any other relief or reliefs that this Honourable Court may deem fit and appropriate in the facts and circumstances of the present case.

2. Before dilating upon the merits of the case, it is pertinent to note that instant petition has been filed after withdrawal of Suit No.1002/2014, which was filed by the petitioner seeking similar relief as being sought through instant petition, wherein, stay was granted to the petitioner against recovery of the impugned demand as referred to hereinabove. However, the above suit has been withdrawn by the petitioner on 05.09.2018 in view of the judgment of the Hon'ble Supreme Court in Civil Appeal No.1171/2013 along with others in the case of ***M/s. Searle IV Solution (Pvt) Ltd. and others v. Federation of Pakistan and others (2018 SCMR 1444)***, whereby, Hon'ble Supreme Court of Pakistan has been pleased to hold that in tax matters suits are maintainable before the learned Single Judge of this Court while exercising civil original jurisdiction, however, subject to deposit of 50% of the disputed amount of duty and taxes before the concerned Tax Authorities. On 07.09.2018, when the matter was taken up for hearing in Court, learned counsel for the petitioner was put on notice to satisfy the Court as to maintainability of instant petition which has been filed after withdrawal of the Suit in respect of same cause and similar relief to avoid payment of duty and taxes pursuant to order of the Hon'ble Supreme Court in Civil Appeal No.1171/2013 as referred to hereinabove, and the matter was directed to be taken up along with other connected petitions, wherein, the similar question as to maintainability of Constitutional Petition was to be examined. On 18.09.2018, when instant petition was taken up along with other petitions following order was passed:-

“18.9.2018

*In response to a query of this Court as to maintainability of instant petition, which appears to have been filed after seeking withdrawal of the suits which were earlier filed by the Petitioners seeking similar relief in view of the recent judgment of the Hon'ble Supreme Court in **Civil Appeal No.1171 of 2013 along with others in the case of M/s Searle IV Solution (Pvt) Ltd & Others v. Federation of Pakistan & Others**, whereby the Hon'ble Supreme Court has been pleased to hold that in tax matters suits are maintainable before the learned Single Judge of this Court exercising Original Civil Jurisdiction, however, subject to deposit of 50% of the disputed amount of tax before the Tax Authorities, learned Counsel for the Petitioners have submitted that an aggrieved party is at liberty to seek remedy against any adverse order, action or inaction of the Tax Authorities, as may be available in law, therefore, Petitioners have approached this Court for seeking redressal of their grievance while invoking the constitutional jurisdiction of this Court under Article 199. It has been further contended by learned Counsel for the Petitioners that there is no bar provided either under the Constitution or in any other law, which may prevent an aggrieved party from approaching the forum of their own choice. Learned Counsel further argued that the condition of depositing the 50% of disputed amount of tax, as imposed by the Hon'ble Supreme Court in the aforesaid Civil Appeal, will apply only to the suits earlier filed before the learned Single Judge of this Court at Original Civil Jurisdiction, and has no bearing on these petitions, whereas, such suits have already been withdrawn by the Petitioners. It has been further contended by learned Counsel for the Petitioners that against the judgment of the Hon'ble Supreme Court, as referred to herein above, Review has also been filed, hearing of which, has been fixed on 26.9.2018, therefore, requested that till then, interim relief may be granted to the Petitioners in the instant petitions and Respondents may be restrained from taking any adverse action till instant petitions are finally decided.*

*We are not convinced with the submissions made by learned Counsel for the Petitioners with regard to maintainability of instant petitions under the above peculiar facts and circumstances, whereas, we are of the tentative view that instead of complying with the directions of the Hon'ble Supreme Court in the aforesaid Civil Appeal, and depositing the 50% of disputed amount of tax before the Tax Authorities, Petitioners have chosen to abandon such forum, and in order to frustrate the directions of the Hon'ble Supreme Court, have withdrawn the suits, and filed instant petitions, seeking similar relief. It may be further observed that constitutional jurisdiction of this Court under Article 199 is discretionary in nature, and can be invoked in exceptional cases seeking enforcement of fundamental rights guaranteed under the Constitution, or against violation of principles of natural justice and, further, where an aggrieved party can demonstrate that any order, decision, action or inaction on the part of the public functionary suffers from jurisdictional defect or the same is patently illegal and unlawful, and there is no alternate and efficacious remedy available for redressal of such grievance. Such aggrieved persons are further required to show that they have approached the Court promptly and with clean hands, whereas, in the instant cases, keeping in view the fact that before filing instant petitions Petitioners already availed a remedy of their own choice by filing a suit, however, when required to deposit 50% of the disputed amount of tax/duty, etc. pursuant to Hon'ble Supreme Court's order in the above Civil Appeals, have abandoned such forum, we are of the tentative view that Petitioners could not make out a case for seeking a discretionary relief from this Court, hence, still required to satisfy this Court as to maintainability of instant petitions. However, since a review has been filed by the Petitioner before the Hon'ble Supreme Court, it will be appropriate that before drawing any adverse inference, we may adjourn this matter for a date after 26.9.2018 when the learned Counsel for the Petitioners may satisfy this Court as to maintainability of instant petitions. Whereas, the Petitioners may be at liberty to seek clarification from the Hon'ble Supreme Court*

*with regard to the effect and implication of the judgment passed by the Hon'ble Supreme Court in the above Civil Appeals, if so advised.*

*To come up on 02.10.2018. In the meanwhile, comments/objections, if any, shall be filed by the Respondents with advance copy to learned Counsel for the Petitioners. Whereas, it is expected that Respondents shall conduct themselves strictly in accordance with law and before proceeding against the Petitioners proper opportunity of being heard may be provided to the Petitioners, and pendency of instant petitions may also be taken into consideration.”*

3. On 27.11.2018, learned counsel for the petitioner was again asked to assist the Court as to maintainability of instant petition, in response to which, learned counsel for the petitioner could not submit any reasonable explanation, however, while placing reliance in the cases of ***Salahuddin and 2 others v. Frontier Sugar Mills & Distillery Ltd and Syed Dost Ali v. Federation of Pakistan and 2 others reported as PLD 1975 SC 244 and 2016 CLC 367*** and argued that since suit has been withdrawn in view of above decision of the Hon'ble Supreme Court as petitioner could not deposit the 50% of the disputed amount of duty/taxes, therefore, there is no other remedy available to the petitioner, except to file Constitutional Petition under Article 199 of the Constitution. Without prejudice to above, learned counsel further submitted that the petitioner will be satisfied if the Committee constituted by the ECC would give its decision and will not press instant petition, whereafter the ECC may finally decide the fate of amount of Rs.321.733 Million, whereas, according to learned counsel, indemnity bond to this effect has already been submitted by the petitioner before the Customs Authorities in terms of Article 8.7 of the implementation agreement executed by the petitioner in this regard. Thereafter, instant petition

was taken up for hearing separately, from the other connected petitions, for the reason that similar petitions, which were filed after withdrawing the suit in view of the order of the Hon'ble Supreme Court of Pakistan in the aforesaid case requiring the petitioner to deposit 50% of disputed amount of duty and taxes before the Tax Authorities were dismissed by the Divisional Bench of this Court for being not maintainable. Reference in this regard can be made to the case of *M/s. Food Axis (Pvt) Ltd. v. Federation of Pakistan* (C.P.No.D-5986/2018), which was filed after withdrawal of Suit pursuant to order of the Hon'ble Supreme Court on the point of maintainability of Suit in tax matters passed in Civil Appeal No.1171/2013 along with others in the case of ***M/s. Searle IV Solution (Pvt) Ltd. and others v. Federation of Pakistan and others (2018 SCMR 1444)***, which was dismissed by Divisional Bench of this Court for being not maintainable for the reasons as disclosed in paragraphs No.2 & 3 of the said order, which reads as follows:-

*“2. As per record, before filing instant petition, the petitioner has chosen to avail the remedy by approaching learned Single Judge of this Court while filing a suit seeking stay against the recovery of impugned demand, which according to petitioner is subject matter of appeal before the Commissioner-IR (Appeals) in the instant case. However, it appears that in view of a recent judgment of the Hon'ble Supreme Court of Pakistan as referred to hereinabove on the point of maintainability of suit in tax matters, the petitioner was required to deposit 50% of the disputed amount before the tax authorities, but the petitioner, instead of complying with the directions of the Hon'ble Supreme Court, has chosen to withdraw the suit, and has filed instant petition seeking similar relief as sought in the suit, which, in our humble view, is an attempt to frustrate the order of Hon'ble Supreme Court requiring the petitioner to deposit 50% of the disputed amount of tax before Tax Authorities.*

3. *We may observe that in appropriate cases, extraordinary constitutional jurisdiction of this court can be invoked provided, there is no other alternate efficacious remedy available to the aggrieved party, against any adverse decision, order, action or inaction on the part of the public functionaries which either suffers from some jurisdictional defect, or the same is patently illegal and passed in violation of principles of Natural justice. However, while invoking constitutional jurisdiction, an aggrieved party is required to approach the Court promptly, with clean hands, while making out a prima-facie case for grant of a discretionary relief under Article 199 of the Constitution of Pakistan.”*

4. Reverting to the facts of instant case, it appears that similar relief was sought by the petitioner by filing suit before the learned Single Judge of this Court in the year 2014, wherein, petitioner succeeded to obtain ad-interim order in its favour against the recovery of the same amount of Rs.321.733 Million, which liability admittedly accrued in the year 1998 towards customs duty before privatization of Karachi Electric Supply Corporation (KESC) (acquired by K.E. Limited in the year 2005 through privatization), whereas, admittedly, petitioner has assumed the responsibility to clear all the liabilities, including duty and taxes, as per implementation agreement dated 14.11.2005. It will be advantageous to refer and to reproduce some of the paras of reply submitted and relevant correspondence filed on behalf of respondent No.4, to highlight the relevant facts relating to admitted long outstanding liability of Rs.321.733 Million since 1998 towards duty and taxes, failure of the petitioner to obtain any waiver certificate within the stipulated period letter of refusal dated 13.06.2014 by F.B.R. to waive outstanding dues i.e. customs duty (Rs.321.733), advice from the Ministry of Law, Justice and Human Rights, requiring the parties to comply with condition of implementation agreement dated 14.11.2005, whereas,



no rebuttal of such facts has been filed by the petitioner. Such paras of reply and the letters are reproduced hereunder:

“Parawise Reply by Respondent No.4

Para “C”. That it is respectfully submitted that the petitioner approached this Hon’ble Court with concealment of facts and false statements. Admittedly the petitioner has acquired the assets and liabilities of the KESC through the agreement with the Respondent No.2 (i.e.WAPDA). The matter of payment of legitimate revenue of Rs.321.733 Millions is part and parcel of the said agreements. The facts and circumstances of the case are proving that both the parties of the Agreement have undertaken before the respondent No.3 and 4 that the long outstanding payment, leviable on the assets, acquired by the petitioner, shall be paid if the concerned parties to the agreement failed to provide “Waiver” Certificate within the stipulated period. It is confirmed from the facts and circumstances of the case, that the ECC has not taken up this matter for any consideration, that is why, the parties of the Implementation agreement, obtained advise from the Ministry of Law, Justice and Human Rights. The Ministry/Division vide its O.M. No.F-1(22)/2014 -II dated 29.04.2014, has categorically stated to the parties to the Agreement to comply to conditions of the Implementation agreement and either get the waiver from the FBR / Respondent No.3 or make the payment to the Customs/Respondent No.4. The FBR/Respondent No.3 has refused to waive the outstanding dues, vide letter dated 13.06.2013 read with the O.M. C.No.10(9)L&P/2001 dated 20.01.2010 and directed the answering respondent to recovery the outstanding dues in accordance with law.

3. That the contents of para (3) of the petition are related to the Respondent No.1 & 2. It is further

submitted by answering respondents that it is candidly and vividly admitted by the petitioner through agreement as annexed in CP at page 77, para (p) of the petition “that an amount of Rs.321,733,000/- is to be paid to FBR within 90 days of said agreement, within stipulated time period, the same has not yet been paid till to date.

5. That admittedly the petitioner has taken over the company (KESC) in the year 2005, therefore, the petitioner has nothing to comment on veracity of the facts of the year 1998. However, undertaken in last lines of para (5) of the petition, the petitioner have assumed the responsibility to clear the liabilities as are Implementation Agreement, 2005. The clause (p) of Article 2.1 of the amended Agreement the petitioner was required to make payment of the outstanding dues after 90 days, if they failed to submit any “Exemption Certificate” in terms of Section 20 of the Act, for which they failed. It is further submitted that at this stage after release of goods on basis of indemnity bond/guarantees submitted by the petitioner at the time of clearance of goods candidly admitted the duty and taxes, hence raising question of examination of goods after clearance is baseless as admitted facts of duty need not to be proved same is on the record, hence there is no issue of assessment in this case. So after such acceptance of due duties and taxes by the petitioner Indemnity Bonds/Guarantees to the answering respondent. Therefore “Promissory Estoppel is Established”.
6. The contents of para 6 of the petition are clear and categorical admission of duty and taxes and an in lieu of which indemnity bond/guarantee was established and, in a way, promissory estoppel proved. Secondly that the “Minutes of Meetings” held on 19.09.2000, issued by the petitioner’s Finance Division confirms that the petitioner have

no case on merits and infact their case is not for exemption in accordance with law rather their claim is for mercy and waiver on the sympathetic consideration because as per their Finance Advisor's report at the relevant point of time their financial position was poor. The contents of para 1 of the Minutes of the Meeting are reproduce below for ease of reference:-

1. WAIVER OF IMPORT DUTY ETC. OF RS.312.852 MILLION PAYABLE TO CUSTOMS DEPARTMENT.

It was submitted by the undersigned that the KESC should be exempted from payment of Rs.312.852 Millions to the Customs Department on account of import duty, etc for the equipment imported for the 5<sup>th</sup> & 6<sup>th</sup> Power Projects by KESC on the basis of exemption granted to the IPPS. Moreover, the financial position of the KESC has been deteriorating for the last few years. KESC is, therefore, not in a position to pay the amount to get the indemnity bonds issued to the Customs Department in this regard. The Member (Customs), CBR however indicated that the exemption from import duty, etc was given to the IPPS which were involved in power generation only. It was not given for the power transmission and distribution equipment which was Imported by the KESC. Therefore, import duty at the minimum rate of 10% was imposed. With regard to the involvement of Engineering Development Board to the determine the local manufacturing of the equipment imported by KESC, the same was considered unnecessary as KESC would have to pay import duty at 25% if it was proved that the item were being manufactured locally. **The secretary, Water and Power as Chairman of the Committee explained in detail the poor financial position of KESC and non availability of funds for payment of import duty to clear the indemnity bonds.**

He indicated that the committee would recommend to the ECC that the indemnity bonds submitted by KESC should be deemed to have been paid/settled. The case will be recommended to be sent to the Cabinet for approval.”

5. From perusal of hereinabove factual position, which has not been disputed by the petitioner, there is no doubt with regard to long outstanding liability of Rs.321.733 Million towards duty and taxes against the petitioner acquired at the time of privatization of KESC in the year 2005, whereas, its payment is being deferred on one pretext or the other during all these years, whereas, the petitioner could not obtain any waiver or relaxation of the aforesaid amount of admitted liability of customs duty from the competent authority in this regard. Comments were also called from Cabinet Division relating to decision of Economic Coordination Committee (ECC), if any, regarding waiver or exemption from customs duty and sales tax on the equipment/material imported by KESC, in pursuant to which, learned DAG has placed on record letter dated 13.03.2019, issued by Cabinet Secretariat, Cabinet Division, Government of Pakistan, which read as follows:-

GOVERNMENT OF PAKISTAN  
CABINET SECRETARIAT  
CABINET DIVISION

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F.No.11/1/2019 Prog-II Islamabad the 13<sup>th</sup> March, 2019

From: Mr. Javed Akhtar,  
Section Officer (Progress-II),  
Ph No.051-9103581  
Fax No. 051-9224835

To: Lubna Pervez,  
Deputy Attorney General,  
2<sup>nd</sup> Floor, New Annexe Building  
High Court of Sindh,  
Karachi

Subject:- C.P. No. D-6386 of 2018 FILED BY K-ELECTRIC LIMITED VERSUS FEDERATION OF PAKISTAN & OTHERS IN THE HIGH COURT OF SINDH AT KARACHI.

Dear Sir,

Kindly refer to the office of Attorney General for Pakistan, letter No. Dy. 1237-K/19, AGP dated 01.03.2019, on the above subject.

2. It is stated that in the subject writ petition the petitioner i.e. M/s. K-electric Limited has quoted ECC decision under Case No.ECC-68/07/1998 dated 19-5-1998. The said ECC decision reproduced as under:

i. The Economic Coordination Committee of the Cabinet considered the Summary dated 18<sup>th</sup> April, 1998 submitted by the Ministry of Water and Power on “Exemption from Custom Duties and Sales Tax on Equipment/Material Imported by KESC” and did not approve the proposal contained in para 4 (four) of the Summary.

ii. The issue of payment of duties and taxes and demurrage Should be looked into by a Committee to be convened by Secretary Water and Power with Secretary Communication and Chairman by Central Board of Revenue as its members. The Engineering Development Board should also assist the Committee in identifying the goods manufactured locally. The levy of import duty and taxes etc. should be devised keeping in view the need to encourage domestic manufacturing industry. The import duty concessions allowed to Independent Power Projects (IPPs) should also be kept in view while deciding the case of KESC.

iii. It was further decided that KESC equipment lying at the port should be released immediately by the customs and port authorities, KESC should furnish an appropriate indemnity/guarantee to the CBR and KPT that it would clear its liabilities of duties/taxes and port charges in the light of the decisions of the Committee constituted in para-II above.

3. It is pertinent to mention that Cabinet Division only provides Secretariat support to the ECC of the Cabinet for convening its meetings. The cases for consideration of the ECC of the Cabinet are brought by the concerned Ministries/Divisions under rule 18(1) of Rules of Business 1973. The decisions of the ECC are conveyed to the Secretaries of the concerned Ministries/Divisions for implementation in light of Rule 24(4) of Rules of Business 1973. Accordingly, the decisions of the ECC under case No.ECC-68/07/98 dated 19-05-1998 [quoted in the subject petition] was communicated to the concerned quarter erstwhile i.e. Ministry of Water and Power [now Power Division] for implementation.

4. Office of the Attorney General is requested that if any further information is required, it may be obtained from the Power Division being concerned in the matter.

Yours faithfully  
sd  
(Javed Akhtar)

Copy to:

- i. The Secretary Power Division, Islamabad.
- ii. S.O (Lit-I), Cabinet Division w.r.t their u.o. Note NO. 1156(SHC)/2018-Lit-I dated 8-3-2019.”

6. We may now examine the terms of reference settled pursuant to decision of ECC vide Notification dated 07.09.2000 as well as new Article 8.7 inserted through amendment to the implementation agreement, upon which the petitioner has placed reliance which read as follows:-

“GOVERNMENT OF PAKISTAN  
MINISTRY OF WATER AND POWER

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Islamabad, the 7<sup>th</sup> September, 2000

NOTIFICATION

No.P-III-3(5)/99. Pursuant to the decision of the Economic Coordination Committee of the Cabinet (ECC) on case No.ECC-68/07/98 dated 19.05.98, a committee to settle issues of exemption from customs duties and sales tax KPT demurrage equipment and material imported by KESC, is hereby notified with the following composition:-

- i) Secretary Ministry of Water and Power – Convener
- ii) Secretary Ministry of Communication - Member
- iii) Chairman, Central Board of Revenue - Member

Terms of Reference

- a) Deliberate upon ways and means to settle payment of duties and taxes; and demurrage charges owed by KESC to Central Board of Revenue (CBR) and Karachi Port Trust (KPT), respectively.
- b) Engineering Development Board will assist the committee in identifying locally manufactured goods. The levy of import duty and taxes etc. shall be devised keeping in view the need to encourage domestic manufacturing industry. The import duty concessions allowed to the independent power projects (IPP's) shall also be kept in view while deciding the case of KESC.

(SARFRAZ TARIQ)  
Section Officer(P-III)

1. Secretary, Ministry of Water and Power, Govt. of Pakistan, Islamabad.
2. Secretary, Ministry of Communications, Govt. of Pakistan, Islamabad.
3. Chairman, Central Board of Revenue, Islamabad.
4. Chairman, Industrial Development, Govt. of Pakistan, Islamabad.
5. Chairman, Indigenization Committee (Vice Chairman/Chief Executive, EDB, (Dr. M. Akram Shaikh).
6. Mr. Javed Noel, Hony. Adviser, Minister of Finance, Islamabad.
7. Chairman, WAPDA/KESC, Karachi.

c.c.

1. Sr. Joint Secretary (W&P), M/o Water and Power, Islamabad.
2. Joint Secretary (Committees) Cabinet Division, Islamabad.
3. Managing Director, KESC, Karachi.
4. Financial Advisor, KESC, Karachi.”

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 “(p) The following shall be inserted as a new Article 8.7 of the Implementation Agreement:

‘GOP acknowledges that an amount of Rs.321,733 Million has been claimed from the Company by the Federal Board of Revenue, Government of Pakistan, which claim is disputed by the Company. In furtherance thereof, GOP agrees to take all such appropriate measures to get the issue resolved to the fullest extent possible, including, without limitation, all consents and approvals required to ensure that the matter is concluded on terms mutually acceptable to the GOP and the Company no later than ninety (90) days from the date of this Agreement.’

7. It is pertinent to note that as per terms of reference the Committee of ECC comprising of Secretary, Ministry of Water and Power as Convenor, Secretary, Ministry of Communication and Chairman, Central Board of Revenue (now FBR) was constituted to deliberate upon, whereas, a Commission to settle payment of the duty and taxes and demurrage charges owed by the C.B.R. and Karachi Port Trust respectively, whereas, the Committee appears to have not been authorized to examine the waiver of the outstanding liability of customs duty and taxes in the sum of Rs.321.733 Million. Learned counsel for the petitioner has not been able to point out any decision of the competent authority or even a proposal of the competent authority relating to waiver of outstanding liability towards customs duty and taxes nor could otherwise assist the Court as to under which provision of law any liability of State taxes outstanding against public limited company could be waived. It is regretted to note that in the absence of any decision by competent Court of jurisdiction setting aside the liability of customs duty and

taxes in the sum of Rs.321.733 Million outstanding against the KESC Limited, admittedly, acquired by petitioner/K.E. Limited at the time of its privatization in the year 2005, the said liability has not been recovered and/or paid by the petitioner for the last more than 20 years. During the course of hearing of instant petition, the petitioner K.E. Limited was asked to deposit atleast 50% of the outstanding liability in the public exchequer, so that for the remaining amount, respondents may be directed not to adopt any coercive measure for its recovery for another period of two months, to enable the petitioner to get the matter resolved with the Government, if possible. Learned counsel for petitioner sought adjournment to seek instructions, however, such proposal was not acceptable to the petitioner, who insisted that the respondents may be directed not to recover the aforesaid amount till decision by the ECC.

8. In view of hereinabove facts and circumstances of the case, we are of the opinion that petitioner has not approached this Court with clean hands, for the reason that before filing instant petition under Article 199 of the Constitution, petitioner, as per its own choice, availed the remedy against the same cause for similar relief by filing a Suit in the year 2014 before the learned Single Judge of this Court and obtained stay against recovery of Rs.321.733 Million towards admitted liability of customs duty and sales tax. However, once again, opted to withdraw the same, to defy the order of the Hon'ble Supreme Court in Civil Appeal No.1171/2013 (along with others), requiring the petitioner to deposit 50% of the disputed amount of duty and taxes before the Tax Authorities, and thereafter, filed instant petition, seeking similar relief, which in our humble view, is an attempt to frustrate and nullify the order of the Hon'ble Supreme Court on the one hand, and to further delay the payment of



legitimate duty and taxes outstanding since 1998. Without prejudice to hereinabove finding relating to maintainability of instant petition, we are also of the opinion that even on merits, the petitioner has not been able to make out any case requiring this Court to issue a declaration under Article 199 of the Constitution to the effect that lawfully created demand of customs duty and sales tax against its predecessor i.e. Karachi Electric Supply Corporation in the year 1998, could not be recovered from petitioner, who admittedly acquired all the assets and liabilities at the time of its privatization in the year 2005. Moreover, petitioner could not produce any agreement or correspondence between the petitioner i.e. K-Electric Public Ltd. Company and the Government, whereby, any assurance of waiver/exemption of Rs.321.733 Million toward customs duty and sales tax would have been given, nor the petitioner could produce any decision of ECC Committee in this regard inspite of lapse of twenty years from the date when such liability of customs duty and sales tax was accrued. It is pertinent to note that even Terms of Reference of the Notification dated 07.09.2002 relied upon by petitioner, whereby, pursuant to ECC decision, a Committee was notified to settle the issue, did not contain any mandate to waive/exempt the customs duty and sales tax, on the contrary, the task given to Committee was “Deliberate upon ways and means to settle payment of duties and taxes; and demurrage charges owed by KESC to Central Board of Revenue (CBR) and Karachi Port Trust (KPT), respectively.” There is no lawful justification for non-payment of long outstanding tax liability, which otherwise, in our humble view, cannot be waived through ECC decision or any executive order. Accordingly, instant petition being devoid of any merits was dismissed vide short order dated 12.04.2019 and these are the reasons for such short order.

***JUDGE***

***JUDGE***