IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition No. D- 479 of 2023

Date	Order with signature of Judge

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

Petitioners:	**All Karachi Ice Factories Owners Welfare Association & others. Through Mr. Abdul Moiz Jaferi, Advocate.**
Respondent No. 1:	**Federation of Pakistan Through Mr. G.M Bhutto, Assistant Attorney General**
Respondent No.2:	**National Electric Power Regulatory Authority (NEPRA) through Mr. Kashif Hanif, Advocate.**
Respondent No.3:	**K-Electric Through Mr. Ayan M. Memon, alongwith Mr. Hasaan Nadeem Qamar, Advocate.**
Date of hearing:	**11.08.2023**
Date of Order:	**11.08.2023**

O R D E R

Muhammad Junaid Ghaffar, J: Through this petition, the Petitioners (Running Ice Factories) have impugned Determination dated 22.07.2022 (in respect of Quarterly Adjustments of K-Electric charges) made by National Electric Power Regulatory Authority (**NEPRA**) and SRO 1175(I)/2022 issued pursuant thereto. However, at the same time the Petitioners have also filed Appeal bearing No. 74/2022 before the Appellate Tribunal (NEPRA) at Islamabad under Section 12-G of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, which is admittedly pending.

2. Learned Counsel for the Respondents have raised an objection as to maintainability of this Petition in view of the fact that an alternate remedy, as provided in law, has already been availed and when questioned, Petitioners' Counsel submits that the Appellate Tribunal (NEPRA) was required to decide the appeal within 90 days period, which has since lapsed; whereas, the said Tribunal cannot pass any interim orders in view of Section 12-G(5) of the 1997, Act; hence the Petition is maintainable.

3. We have heard all the learned Counsel on maintainability of the petition and have perused the record. It is not in dispute that impugned determination by NEPRA and Notification issued thereto has been challenged by way of a statutory Appeal before the Appellate Tribunal (NEPRA) in terms of Section 12-G of the 1997, Act. At the same time, instant petition has been filed and restraining orders have been obtained. Such practice on the part of the Petitioners does not appear to be a correct approach inasmuch as when the statute has provided a remedy, which stands availed, then notwithstanding the fact that the Appeal was not decided within 90 days or for the reasons that the Tribunal cannot pass any interim orders, the Constitutional jurisdiction of this Court cannot be invoked as a matter of right. Per settled law when the Legislature has shown its intention in restricting some remedy, either by way of an appeal; or for that matter curtailing powers of the Tribunal for passing any ad-interim orders, Constitutional jurisdiction under Article 199 of the Constitution, will not always be available as a matter of right. Rather, it is an exception instead of a rule. It is wholly wrong to consider that the Constitutional jurisdiction is designed to empower the High Court to interfere with the decision of a Court or tribunal of inferior jurisdiction merely because in its opinion the decision is wrong. In that case, it would make the High Court's jurisdiction indistinguishable from that exercisable in a full-fledged appeal, which plainly is not the intention of the Constitution-makers[1]. It is not that if no further appeal is provided in law, then a constitution petition can be treated as an appeal and matter could be argued as if this Court is the Appellate Court. Such concept is totally misconceived and uncalled for. Per settled law in case where any party resorts to statutory remedy against an order, then the same could not be abandoned or by passed without any valid and reasonable cause and cannot file constitution petition challenging the same action. Such practice, in cases where statute provides alternate and efficacious remedy up to the High Court could not be approved or encouraged[2]. The petitioner at his own sweet will and whims cannot be allowed to impugn the same cause of action in a writ petition filed before the Court and at the same time pursue the remedies available under the relevant law[3].

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[1] Muhammad Hussain Munir and others v Sikandar and others (PLD 1974 SC 139)
[2] Commissioner of Income Tax Vs. Hamdard Dawakhana (Waqf); (PLD 1992 SC 847)
[3] Arshad Hussain Vs. Collector of Customs and 2 others. (2010 PTD 104); same view has been reiterated in Pak Saudi Fertilizers Ltd., Vs Federation of Pakistan (2002 PTD 679), Bulk Shipping & Trading (Pvt) Limited Vs Collector of Customs (2004 PTD 509); BP Pakistan Exploration & Production Inc. Karachi Vs Additional Commissioner Inland Revenue (2011 PTD 647).

4. In *Arif Fareed*[4] it has been observed by the Supreme Court that that the right of appeal is the creation of the statute and hardly needs any authority, and when a right of second appeal is not provided to any party to the proceedings, the legislature intended to place a full stop on such litigation; and the practice of High Courts routinely exercising their extraordinary jurisdiction under Article 199 of the Constitution as a substitute of appeal or revision is not to be appreciated.

5. In *M Hamad Hasan*[5], very recently, it has been held by the Supreme Court that "*thus the legal position is that the Constitutional jurisdiction cannot be invoked as a substitute for revision or an appeal*" and "*the interference is on limited grounds as an exception and not the rule*". It has been further held that the right to appeal is a statutory creation, either provided or not provided by the legislature; if the law intended to provide for two opportunities of appeal, it would have explicitly done so and "*The purpose of this approach is to ensure efficient and expeditious resolution of legal disputes. However, if the High Court continues to entertain constitutional petitions against appellate court orders, under Article 199 of the Constitution, it opens floodgates to appellate litigation. Closure of litigation is essential for a fair and efficient legal system, and the courts should not unwarrantedly make room for litigants to abuse the process of law*". It has been further held that "*the acceptance of finality of the appellate court's findings is essential for achieving closure in legal proceedings conclusively resolving disputes, preventing unnecessary litigation, and upholding the legislature's intent to provide a definitive resolution through existing appeal mechanisms*".

6. In *Peshawar Electric Supply Company Ltd*[6] (which is a case arising from a Judgment of the Peshawar High Court, whereby, the petitions of the consumers were allowed and it was held that imposition of Fuel Price Adjustment (FPA) is unconstitutional and illegal), it has been held by the Supreme Court that firstly, the matter pertains to the exclusive domain of NEPRA under the 1997, Act, including the powers to issue guidelines and standard operating procedures outlining the mechanism through which various tariffs, including the 'charges' ought to be factored in the respective tariffs of the consumers, whereas, NEPRA after an elaborate, open and transparent process that involves hearing of all stake holders

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[4] 2023 SCMR 413
[5] 2023 SC 197 (Supreme Court citation).
[6] Peshawar Electric Supply Company Ltd (PESCO) v SS Polypropylene (Private) Limited (PLD 2023 SC 316).

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

7. Similarly in the case of ***K-Electric***[7] ***v Federation of Pakistan*** it has been held by the Supreme Court that tariff determination is a complex and technical process, for which, NEPRA has been established; a detailed regime exists with procedures, process and guidelines on tariff determination which in no manner empowers the Federal Government to determine or adjust the tariff and only the mandate of the Act has to be followed.

8. In ***Cherat Cement***[8] this very determination of NEPRA dated 22.7.2022 was challenged by way of Constitutional Petitions and it was held by the Peshawar High Court that alternate remedy under the 1997, Act, must be availed and the Court lacks jurisdiction. We are fully in agreement with such observation of the said Court.

9. Lastly, it may be observed that even if any determination is made and same is added or charged in the monthly bills of the consumers, the same is always subject to correction by the Appellate order of the Tribunal; to be duly adjusted. Therefore, even on that score, no prima facie case is made out to exercise our jurisdiction under Article 199 of the Constitution.

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[7] PLD 2023 SC 412
[8] PLD 2023 Peshawar 46

10. In view of the above, we are of the considered opinion that this Court lacks jurisdiction to entertain this Petition which otherwise appears to be misconceived and not maintainable; whereas, notwithstanding this, no further case for exercising our discretion in the matter has been made out. The Petitioners have already availed the remedy as provided under the 1997 Act; therefore, the petition stands ***dismissed*** as being not maintainable with pending applications, leaving the Petitioners to pursue the remedy already availed.

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