

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**  
(APPELLATE JURISDICTION)

**PRESENT:**

*Ch.Muhammad Ibrahim Zia, J.*  
*Raja Saeed Akram Khan, J.*

Civil appeal No.110 of 2016  
(PLA Filed on 28.05.2015)

M/s China Machinery Engineering Corporation (CMEC), Association of Persons (AOP), House No.8, Street No.41F-7/1, Islamabad, through Mr. SU GUANGLEI, Project Manager, Member of Association, Principal Officer and Chief Executive, Neelum Jhelum Project, Muzaffarabad.

....APPELLANT

**VERSUS**

1. Azad Jammu and Kashmir Council Board of Revenue, Azad Jammu and Kashmir Council Secretariat, F-5/2, Islamabad.
2. The Commissioner Inland Revenue, Azad Jammu & Kashmir, Azad Jammu and Kashmir Council Camp Office,

Income Tax Office, Mirpur.

3. Dr. Saqib Ahmed Khan, Deputy Commissioner Inland Revenue, (Companies) Circle, Mirpur Azad Kashmir.
4. The Director Inspection and Internal Audit, AJ&K Council Board of Revenue (Designate Commissioner Inland Revenue-Appeals in the case of the Appellant), House No.1-B, Street No.63, Sector G-6/4, Islamabad.
5. The Managing Director/Chief Executive Officer, Neelum Jhelum Hydro Power Company, WAPDA Staff College, Islamabad.

.....RESPONDENTS

(On appeal from the judgment of the High Court dated 31.03.2015 in writ petition No.2181 of 2014)

-----

FOR THE APPELLANT: Mirza Zahidullah,  
Advocate.

FOR THE RESPONDENTS: Raja Muhammad Hanif  
Khan and Haji  
Muhammad Afzal,  
Advocates.

Civil appeal No.111 of 2016  
(PLA Filed on 01.06.2015)

Commissioner Inland Revenue, Azad Jammu  
and Kashmir Council, Mirpur.

....APPELLANT

**VERSUS**

M/s China Engineering Corporation (CMEC),  
H.No.41, F-7/1, Islamabad (through its  
representative), Mr. Su. Guan Glei.

.....RESPONDENT

1. Azad Jammu and Kashmir Council Board  
of Revenue, Azad Jammu and Kashmir  
Council Secretariat, F-5/2, Islamabad.
2. Dr. Saqib Ahmed Khan, Deputy  
Commissioner, Inland Revenue, Circle-  
02 (Companies), Mirpur.
3. The Director Inspector & Internal Audit,  
AJ&K Council Board of Revenue  
(Designate Commissioner Inland  
Revenue-Appeals in the case of the  
appellant), House No.1-B, Street No.63,  
Sector G-6/4, Islamabad.
4. The Managing Director/Chief Executive

Officer, Neelum Jhelum Hydro Power  
Company, WAPDA, Staff College,  
Islamabad.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the High  
Court dated 31.03.2015 in writ petition  
No.2181 of 2014)

-----

FOR THE APPELLANT: Raja Muhammad Hanif  
Khan, Advocate.

FOR THE RESPONDENTS: Mirza Zaidullah Advocate.

Date of hearing: 17.05.2016

**JUDGMENT:**

**Raja Saeed Akram Khan, J.**— The captioned appeals by leave of the Court have been directed against the judgment of the High Court dated 31.03.2015, passed in the writ petition filed by M/s China Machinery Engineering Corporation. Since both the appeals arise out of the same judgment, therefore, these are being disposed of through this single judgment.

2. The facts as emerged from these appeals are that M/s China Machinery Engineering Corporation, (hereinafter to be referred as CMEC) is a Republic of China based Corporation which has been engaged by Neelum Jehlum Hydro Power Company to execute a contract for engineering work in connection with Neelum Jehlum Hydro Power Project in Azad Jammu and Kashmir. The CMEC has been assessed to income tax by the Deputy Commissioner Inland Revenue (hereinafter to be referred as DCIR), Mirpur for the year 2009, 2010 and 2012. The Commissioner Inland Revenue (hereinafter to be referred as CIR) (Appeals) upheld the assessment order passed by DCIR, Circle-II, Mirpur. Feeling aggrieved, CMEC filed a writ petition before the High Court for setting aside the assessment order passed by DCIR as well as CIR. The learned High Court vide impugned

judgment dated 31.03.2015, while modifying the order of the DCIR disposed of the writ petition in the following manners:-

“In view of what has been discussed above, we are of the opinion that learned CIR (Appeals) has passed the impugned order dated 8<sup>th</sup> September 2014 in accordance with law and the Pak-China Tax Treaty. However, it is worth mentioning that assessed income tax is subject to all deductions under Income Tax Ordinance, 2001. The order of Deputy Commissioner Inland Revenue to assess income tax of petitioner for the years 2009, 2010 and 2012 shall be modified from Division II, Schedule 1 Part 1 of Income Tax Ordinance, 2001, to Division 1 B of the aforesaid Schedule i.e. rate of tax shall be reduced from 35% to 25% from “*Company*” to “*Association of Persons*” alongwith all deductions. Writ petition filed by the petitioner

stands disposed off in the  
aforementioned terms.”

Feeling dissatisfied from the judgment of the High Court, both the parties filed instant appeals by leave of the Court.

3. Mirza Zaidullah, Advocate, the learned counsel for the appellant, CMEC argued that the impugned judgment of the High Court is against law and the facts of the case which is not sustainable in the eye of law. He contended that the learned High Court while passing the impugned judgment failed to understand the real controversy involved in the matter. He added that the DCIR, Mirpur, has only the jurisdiction to the extent of companies, whereas, the CMEC is not a company rather the same is an Association of Persons (hereinafter to be referred as AOP). In this way, the DCIR has no concern whatsoever with an AOP. He added that the DIRC, Mirpur,

issued the assessment order without lawful authority. He contended that the CMEC is working at Muzaffarabad as an AOP, therefore, he falls in the jurisdiction of DCIR, Muzaffarabad. The DCIR, Mirpur was not legally competent to exercise the powers vested with the DCIR, Muzaffarabad. He contended that the CIR (Appeals) and the learned High Court fell in error while not considering the point of jurisdiction. He further added that DCIR, Muzaffarabad who has the jurisdiction over the matter issued notice under section 114 (4) of the Income Tax Ordinance, 2001. The CMEC in compliance of the aforesaid notice, filed returns as an AOP, the DCIR, Muzaffarabad has never issued notice under section 120(3), thus, it is deemed that the income/loss declared by the CMEC has been accepted. He contended that the DCIR, Mirpur passed the orders in vacuum as the



definite information is mandatory requirement to proceed under section 122 of the Income Tax Ordinance, whereas, no such definite information was available to him at the time of passing the impugned orders. The learned DCIR, Mirpur specifically mentioned in its order that financial statement has not been filed by the appellant (AOP). If the most important document, i.e. financial statement, was not available with the learned DCIR, then how he proceeded with the matter under section 122, of the Income Tax Ordinance. The learned High Court failed to appreciate all these aspects of the case and passed the impugned judgment while applying the wrong statutory provisions. He lastly submitted that the learned High Court passed the impugned judgment on the basis of erroneous assumption of facts and law and misconstrued Article 7 of the Tax Treaty and section 107 and

105 of the Income Tax Ordinance. He prayed for acceptance of appeal and setting aside the orders passed by DCIR, CIR (Appeals) as well as the impugned judgment of the High Court. He has relied upon the cases reported as [2010 PTD (TRIB) 1777], *Dr. Muhammad Iqbal Qureshi v. Azad Govt. & others* [1993 SCR 111] and *Abdul Rehman and another v. Mukhtar Ahmad and another* [1985 CLC 1072].

4. On the other hand, Raja Muhammad Hanif Khan and Haji Muhammad Afzal, Advocates, the learned counsel for Azad Jammu and Kashmir Council Board of Revenue & others strongly controverted the arguments advanced by the learned counsel for CMEC and other. While raising the preliminary objection they submitted that the appeal of CMEC before CIR, writ petition before the High Court and the appeal before this Court is incompetent as the power of attorney dated 29.09.2014,

executed in favour of Mr. Su Guanglei is not attested or authenticated either in Pakistan or by Ambassador of Pakistan in Republic of China. As the said document has neither been testified or registered nor authenticated by any of the authorities prescribed under section 95 of Qanoon-e-Shahadat Order, 1984 read with section 32 and 33 of the Registration Act, 1908, therefore, no proceedings on the basis of such document are competent. They contended that the point regarding the jurisdiction of the DCIR (Company), Mirpur has not been raised before the High Court, therefore, the same cannot be agitated for the first time before this Court. They added that the point regarding the conversion of currency has also not been raised before the learned High Court, but the learned High Court while discussing the same granted the relief to the CMEC, beyond the pleadings which is not

permissible under law. They submitted that CMEC is not an AOP rather the same is a company. In continuation of the arguments they submitted that CMEC in the year 2012 got itself registered/listed in Hong Kong Stock Exchange as a public listed company which itself shows the status of CMEC is as a company. The CMEC suppressed the facts and has not come in the Court with clean hands. The taxpayer company without having any legal ground and document has got relief from the High Court. They further submitted that the CMEC cannot avail the benefit of avoidance of double taxation under section 107 read with clause 7 of the Treaty with China as the CMEC has not shown the payment of any tax in its home Country or details of expenses, but this aspect of the case escaped the notice of the High Court while passing the impugned judgment. They lastly submitted that the

scope of section 122(5) and powers of Tax Officer mentioned in section 176 of the Income Tax Ordinance have not been appreciated by the High Court in its true perspective. They have relied upon the cases reported as *Qurban Hussain and 2 others v. Hukam Dad* [PLD 1984 SC (AJ&K) 157], *Muhammad Mehrban v. Sadruddin and another* [PLJ 1996 SC (AJ&K) 9], *Aki Habara Electric Corporation (Pte.) Limited through Authorized signatory v. Hyper Magnetic Industries (Private) Limited through Chief Executive/Director/Secretary* [PLD 2003 Karachi 420], *National Bank of Pakistan and others v. Karachi Development Authority and others* [PLD 1999 Karachi 260], *Abdul Sattar and another v. Mian Muhammad Atique and another* [2010 YLR 616], *Muhammad Rashid Khan v. Noor Muhammad Khan and 2 others* [2001 SCR 319], *Shahida Khadim v. Secretary Education AJ&K and 5 others* [2002 SCR 315],

*Abdul Shakoor v. Mrs. Shamim Khalid and 5 others* [2003 SCR 351], *Azad Jammu and Kashmir Council and 3 others v. Muhammad Ikram & 3 others* [2007 SCR 155], *Muhammad Riaz Khan v. Inspector General of Police and 19 others* [2010 SCR 131], *The Secretary to the Government of West Pakistan, Communication & Works Department v. Gulzar Muhammad* [PLD 1969 SC 60], *Muhammad Tariq and others v. Mst. Shamsa Tanveer and others* [PLD 2011 SC 151], *Capital Development Authority through Chairman v. Raja Muhammad Zaman Khan and another* [PLD 2007 SC 121] and *Dr. Mobashir Hussan and others v. Federation of Pakistan and others* [PLD 2010 SC 265].

5. We have heard the learned counsel for the parties and gone through the record along with the impugned judgment. The learned counsel for the appellant,

Commissioner Inland Revenue, Raja Muhammad Hanif Khan and Ch.Muhammad Afzal Advocates, has raised a preliminary objection that CMEC, has filed the writ petition incompetently before the High Court and the appeal before this Court as the power-of-attorney on the strength of which the same have been filed, has not been executed in accordance with the relevant provisions of law. As it is one of the crucial points which goes to the roots of the case, therefore, before attending the merits of the case, we intend to consider the same at first.

6. In the case in hand, the power of attorney on the basis of which CMEC has filed writ petition as well as petition for leave to appeal before this Court, has been executed in Republic of China and we have to examine; whether the requisite requirements provided under law have been fulfilled while executing

the power of attorney or not. In this regard, it will be useful to reproduce here the relevant statutory provisions which deal with the execution of the power of attorney, i.e. Article 95 of the Qanoon-e-Shahadat Order, 1984, and section 32 and 33 of the Registration Act, 1908. Article 95 of the Qanoon-e-Shahadat Order, 1984, reads as under:-

“95. Presumption as to power-of-attorney. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, Pakistan COUNSUL or Vice-COUNSUL, or representative of the Federal Government, was so executed and authenticated.”

Relevant provisions of sections 32 and 33 of the Registration Act, 1908 read as under:-



“32. Persons to present documents for registration.--- Except in the cases mentioned in section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented.

- (a) by some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order or
- (b) by the representative or assign of such person, or
- (c) by the agent of such person, representative or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned.”

33. Power-of-attorney recognizable for purpose of section 32.--- (1) For the purposes of section 32, the following powers-of-attorney shall alone be recognized namely:--

(a) .....

(b) .....

(c) if the principal at the times aforesaid does not reside in Pakistan, a power-of-attorney executed before authenticated by a Notary Public, or any Court, Judge, Magistrate, Pakistan Counsel or Vice-Counsel, or representative of the Federal Government."

After going through the above referred statutory provisions of law, it transpires that the Court shall only presume a power-of-attorney as valid which has been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, Pakistan Counsel or Vice-Counsel, or representative of the Federal Government. It may be observed here that the provisions of Article 95 of the Qanoon-e-Shahadat Order, 1984 are mandatory in nature and the Court can only presume a power of attorney as valid if all the

necessary requirements for the proper execution of the power of attorney have been duly fulfilled. Where the power of attorney is executed before or authenticated by the functionaries or Court as envisaged by the provisions of Article 95 of Qanoon-e-Shahadat, Order, 1984, the Court is bound to presume that the same had been executed by the executant as laid down in a case reported as *Muhammad Aslam v. Mst. Gulraj Begum* [1989 SCMR 1] that:

“8. Section 85 on which also reliance was placed by the learned counsel relates to presumption as to execution and authentication of power of attorney if it is executed before or authenticated by the functionary or Court mentioned therein. If the power of attorney Ex.P/7 was executed before or authenticated by the functionaries or Court mentioned in the section,

the Court was bound to presume that Ex. P/7 was executed by the appellant.”

The word “power of attorney” has been defined in section 2(21) of the Stamp Act, 1899, in the following manners:-

“2(21) Power of attorney. “Power of Attorney” includes any instrument (not chargeable with a fee under the law relating to Court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it;”

The narrow study of the aforesaid provision of law shows that a power of attorney may be connoted to be a written authorization by which the principal appoints another person as his agent and confers upon him the authority to perform specified acts on behalf of the principal. The primary object of an instrument of this nature is to evidence the authority of

the agents to third parties with whom the agents deal. It is universal principle of law that the power of attorney must be strictly construed and strictly pursued. Reliance may be placed on a case reported as *Muhammad Mehrban v. Sadrud Din and another* [1995 CLC 1572], wherein it has been observed by this Court that:

“10. Reading para No.7 as a whole, we have come to the conclusion that this para, authorizes the attorney to purchase take on lease or otherwise acquire land or property in the name of principal and to institute any action of other legal proceedings necessary to preserve his rights in the property and to defend all actions that may be brought against the executant in connection with such property. Obviously no power vests in the attorney to institute any legal proceedings with regard to the suit

land on the strength of the power contained in recital No.7 of the attorney.

11. The General rule of construction is that powers of attorney must be constructed strictly as giving only such authority as those confer expressly or by necessary implication."

It may also be observed here that authentication is not mere an attestation but it is something more. It means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution. In brief, it can be said that only a presumption is attached if power of attorney attested under the provisions of Article 95 of the Order, 1984. In absence of that, the proceedings initiated on the strength of any power of attorney would be nullity in the eye of law and the person who acts on the strength of that power

of attorney can be said to be an unauthorized person. In Article 95 of the Qanoon-e-Shahadat Order, 1984 the word "executed before" has appeared in section 33(1) of the Registration Act, 1908 and section 85 of Evidence Act which provides that power of attorney must be signed by the executant or his thumb-impression is affixed on it in presence of the relevant authority or at least its contents must be admitted to be true by the executant. The execution of power of attorney before the authority concerned and its authentication are two distinct acts and must be performed according to the provisions of section 33 of the Registration Act for their validity. The authentication of the power of attorney is not merely an attestation of power of attorney, rather it implies that the person authenticating must satisfy himself not only about the identity of the executant but also

satisfy himself about the factum of execution as has been held by this Court in a case reported as *Qurban Hussain and 2 others v. Hukam Dad* [PLD 1984 SC (AJ&K) 157], that:

“Authentication of the power-of-attorney is not merely an attestation of power-of-attorney, rather it implies that person authenticating must satisfy himself not only about the identity of the executant but also satisfy himself amount the factum of execution. We are fortified in our view by a case reported as *Wali Muhammad Chaudhari and others v. Jamal Uddin Chaudhari* wherein it has been held that authentication under section 85 of the Evidence Act is not merely attestation but means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution.”



In the case in hand, the power of attorney on the basis of which the matter on behalf of CMEC has been brought before the Court, was executed in foreign country which has to be authenticated by any of the authorities mentioned in Article 95 of the Qanoon-e-Shahadat Order, 1984, i.e. the Notary Public, any Court, Judge, Magistrate, Pakistan Consul or Vice Counsel. It should also fulfill the requirement as provided under section 32 and 33 of the Registration Act, 1908, whereas, no such authentication is available on record. In a case reported as *Abdul Sattar and another v. Mian Muhammad Muhammad Attique and another* [2010 YLR 616], while dealing with the proposition it has been held that:

“6. Lastly the cause of the petitioners gravitates upon a general power of attorney Exh.P1, there are major discrepancies in its execution. It was executed in United

Kingdom without observing the legal or codal formalities of municipal law practiced there. It also is not tenable in law in Pakistan as it has not been endorsed properly nor was signed by the Court or vice counsel as required under Article 95 of Qanun-e-Shahadat Order, 1984, therefore, it is legally ineffective.”

7. After the survey of the statutory provisions and the case law, it appears that prior to the filing of suit, writ or appeal, etc., the power of attorney executed in the foreign country must be authenticated by any of the authorities mentioned in the Qanoon-e-Shahadat Order, 1984 and it should be attested by a competent officer of Embassy of Pakistan. In absence of fulfilling the requisite requirements, the Court cannot presume that the power of attorney was validly executed.

8. In the light of the statutory provisions and the case law discussed in the preceding paragraphs, we have examined the power of attorney, which is available at page No.43 of the paper book, in the appeal titled *M/s China Machinery Engineering Corporation v. AJK Council Board of Revenue and others*. The power of attorney shows that the same was executed at Beijing (China) through which one Li Jingkai Vice President, CMEC, authorized one Mr. Su Guanglei, to institute suits, file petitions, prefer appeals, make applications, submit written statements, file PLA/Appeal/Review Petition before Supreme Court and file any other pleadings for and on behalf of the Corporation (CMEC), before arbitrators, Courts of law, tribunals and Commissions, in all matters and manners of arbitration and litigation and further to engage and appoint and instruct counsel. From the

bare reading of the contents of alleged power of attorney, we failed to ascertain that from where the executant derived the powers to authorize Mr. Su Guanglei to initiate such proceedings. Even, the representative of CMEC despite undertaking in the open Court also failed to produce the memorandum-of-association or any other document authorizing the Vice-President, CMEC, to appoint attorney on behalf of CMEC. In this state of affairs and the conduct of CMEC, legally inference and presumption can be drawn that the document is deliberately withheld being non-supportive to the version of the CMEC. The study of the power of attorney further postulates that the same has not been authenticated by any of the authorities mentioned in Article 95 of the Qanoon-e-Shahadat Order, 1984. Thus, in such situation, it can safely be concluded that the power of attorney under consideration has

not been authenticated as provided under law, therefore, it cannot be said to be a valid power of attorney and the same does not confer any right upon Mr. Su Guanglei to file writ petition before the High Court or appeal before this Court.

9. Thus, keeping in view the circumstances of the case and the law on the subject, we are justified to hold that the writ petition before the High Court was incompetently filed on the basis of an invalid document, therefore, the same was liable to be dismissed on this sole ground. In a case reported as *WAPDA and another v. Muhammad Iqbal and 10 others* [2015 SCR 35], same proposition came under consideration of this Court and the following findings were recorded:-

“23. Thus we have reached the conclusion that resolutions of 1986

and 1997 empower the Chief Engineer/Project Director and Superintending Engineer (Resettlement) Mangla Dam Raising Project to conduct cases on behalf of WAPDA up to the Court of District & Sessions Judge, that too, involving the amount of less than Rs.500,000/- and the cases involving the amount of more than Rs.500,000/- have to be referred to the Law Division, WAPDA, for instructions. The Chief Engineer, Project Director and Superintending Engineer (Resettlement) are not authorized by WAPDA for filing appeal on behalf of WAPDA in the High Court or appeal or petition for leave to appeal in this Court. All the appeals filed by WAPDA through Chief Engineer/Project Director and Superintending Engineer (Resettlement) in the High Court and appeals and petitions for leave to appeal in this Court have been

filed without lawful authority and merit dismissal.”

As we have come to the conclusion that the writ petition before the High Court was filed incompetently, therefore, there is no need to discuss the other points raised by the parties as the same will be a futile exercise and it is now settled that judgment cannot be recorded by the Court mere for academic discussion. Our this view finds support from a case reported as *Muhammad Reaz Akhtar Chaudhary v. Sardar Karam Dad Khan and 14 others* [2015 SCR 92], wherein it has been observed that:-

“It is correct that all the legal questions which are raised before the Court have to be resolved by the Court but, when the Chief Justice, whose appointment was challenged resigned from the office and the senior most Judge also resigned and a new Chief Justice

was appointed, in such circumstances, the writ petition has become infructuous. In these circumstances, admission of the writ petition for regular hearing and sending it back to the High Court will be an exercise in futility. A judgment cannot be recorded by the Court for academic discussions.”

In the light of above discussion, while accepting the appeal filed by the appellant, Commissioner Inland Revenue, the appeal filed by CMEC before this Court and the writ petition before the High Court are hereby dismissed on the ground that the same have incompetently been filed. Consequently, the impugned judgment of the High Court is set aside. No order as to costs.

Rawalakot,

**JUDGE**

**JUDGE**

\_\_\_\_.06.2016