

IN THE HIGH COURT OF SINDH, KARACHI
HCA. No. 395 OF 2016

PRESENT:
MR. JUSTICE HASAN AZHAR RIZVI
MR. JUSTICE ARSHAD HUSSAIN KHAN

Jamshoro Joint Venture Limited
Vs.
Sui Southern Gas Company Limited

Appellant: Through Mr. Anwar Mansoor Khan, Advocate

Respondents: Through M/s. Sajid Zahid and Zeeshan Khan
Advocates

Date of hearing: 30.05.2018

JUDGMENT

ARSHAD HUSSAIN KHAN, J. Through instant High Court Appeal, the appellant has challenged the order dated 05.12.2016 passed by the Learned Single Judge of this Court in Suit No.1216 of 2016, on the application under Order XXXIX Rule 1 & 2 CPC, whereby the said application was dismissed.

2. Facts give arise to the filing of instant appeal is that appellant-Jamshoro Joint Venture Limited [JJVL] filed suit bearing No.1216 of 2016 for declaration and injunction under Section 56 of the Specific Relief Act read with Section 41 of Arbitration Act, on the original civil jurisdiction of this Court, inter alia, seeking perpetual injunction against the respondent-Sui Southern Gas Company Limited [SSGC] from cancelling the four (4) MoUs entered into between the appellant and respondent in respect of extraction of LPG and NGL from four Gas fields namely; (i) Kunnar & Pasakhi Deep [KPD], (ii) Sinjhor, (iii) Naimat Basal and (iv) Bobi, till the event contemplated in Article-1 of the contracts have occurred. Along with above said suit, CMA No.7995/2016 was also filed seeking an interim injunction for the suspension of the notices dated 04.05.2016 issued for the termination of MoUs till the final decision of the case/suit. The learned single judge

after hearing the counsel for the parties dismissed the said CMA, decision whereof has been challenged in the instant HCA.

3. The stance of the appellant/plaintiff in the case is that the appellant is a public limited company engaged in business of the extraction of LPG and NGL from various gas fields against the processing fee during the interim period of installation of OGDCL plant. For the aforesaid purposes of extraction Liquefied Petroleum Gas (LPG) from natural gas from five gas fields namely; (i) Kunnar & Pasakhi Deep [KPD], (ii) Sinjhoru Gas field, (iii) Naimat Basal Gas field, (iv) Badin Gas field and (v) Bobi Gas field and supplied to SSGCL, various agreements and MoUs were entered into between JJVL and OGDCL and SSGCL. In relation to (i) Kunnar & Pasakhi Deep [KPD], (ii) Sinjhoru, (iii) Naimat Basal (iv) Bobi, gas fields four MoUs were entered into between the appellant and respondent. Whereas for Badin gas fields interim arrangement continued in view of the observation of the Hon'ble Supreme Court. The above MoUs were entered into in the light of the judgment of Hon'ble Supreme Court of Pakistan, reported as **Khawaja Muhammad Asif vs. Federation of Pakistan [PLD 2014 SC 206]**. The dispute arose between the appellant and the respondent on various issues, and it is for the resolution of such disputes/issues the appellant and the respondent had agreed that instead of going further to severe relationships, the same should be settled through a dispute resolution mechanism, pursuant whereof it was agreed to refer the matter to arbitration. Thereafter, various correspondences were exchanged relating to the topics/issues and finally by letter dated April 2, 2016 JJVL conveyed to SSGCL their agreement as to the topics of dispute which would be the subject matter of Arbitration. Thereafter, JJVL nominated Mr. Justice R. Tariq Shamim, former judge of the Hon'ble Lahore High Court as Arbitrator whereas SSGCL nominated Mr. Justice (R) Munib Ahmed Khan, a former Judge of the Hon'ble High Court of Sindh as their Arbitrator in the proposed arbitration under Arbitration Act, 1940, and it was decided that the two Arbitrators will jointly appoint an Umpire. The plea of the appellant is that in presence of the agreement that the disputes needed to be settled by arbitration and that it was the dispute resolution manner that was agreed to

between the parties, the respondent, malafidely instead of proceeding with the arbitration, the CFO, the General Manager and the Managing Director of SSGCL, with ulterior motives, recommended to the Board of Directors, on the same issues which were in dispute, that instead of entering arbitration, the board should terminate all the MoUs and float another tender for the same five gas fields. The Board meeting was held on 18.04.2016 and a decision thereof was taken by the Board on misrepresented facts that they were suffering losses in relation to the rates quoted by the JJVL. In addition, the said Board of Directors was not made aware of the judgment rendered by the Supreme Court of Pakistan in above referred Khawaja Muhammad Asif case. That as a consequence of the illegal passing of the resolution of the Board of Directors of the Respondent, the respondent, issued five letters all dated 04.05.2016, cancelling/terminating the Memorandums of Understanding [MoUs] of all the five gas fields. It is alleged that said notices have been issued in contravention of the judgment of the Supreme Court, without authority, unlawfully, especially when the said arbitration proceeding had commenced upon the appointment of the arbitrators, and amounts to taking away vested rights of the appellant. The appellant challenged the said notices of termination in suit bearing No.1216 of 2016, inter alia, on the grounds that the agreement could not have been terminated as the terms of the MoU categorically provide for their acts that it would remain in force until either of the two events occur, mentioned in the agreement itself. Reference to the provision of termination being Article 6 would also be subject to Article 1 and, therefore, the action of termination under Article 6 only by giving a notice of termination is malafide and is an excessive use of lawful authority as the said respondent wants to wiggle out of the arbitration where they agreed to settle the disputes through arbitration. The appellant challenged the order dated 05.12.2016 passed by the learned Single Judge in the present High Court Appeal, whereby the injunction application filed by the appellant in the suit was dismissed.

4. Upon notice of the present appeal the respondent filed reply to the appeal and counter affidavit wherein while taking preliminary legal objections regarding maintainability of the appeal refuted the allegations levelled in the memo of appeal. It is also stated that

impugned order dated 5.12.2016 is a detailed and reasoned order which was passed after several hearings, in the course of which the Court considered each and every submission of the parties and finding no merit in the appellant's case dismissed the appellant's injunction application.

5. The stance of the respondent in the case is that the appellant and the respondent had entered into an 'Implementation Agreement' dated 12.08.2003 for the extraction of LPG/NGL from Badin Gas field. However, the Supreme Court in the above referred case of Khawaja Muhammad Asif had declared the implementation Agreement between the parties for LPG extraction from Badin Gas Field as null and void and set aside the same. Furthermore, the MoUs and the Badin Arrangement, which the Parties had entered into for the extraction of LPG/NGL only on an interim basis. The MoUs allow either party to terminate the MoUs without assigning any reason by giving fifteen days advance written notice to the other party, which effectively was done pertaining to KPD, Sinjhero and Naimat Basal Gas Fields. For Badin and Bobi Gas Fields, the respondent exercised its inherent right to terminate the said MoU/Badin Arrangement respectively. It is also stated that at the inception of LPG/NGL processing business, the margin of profit was high mainly due to high local producer prices of LPG. However, at the end of 2014 and onward, there was a downward trend in the prices of LPG because of which the respondent's margins in LPG/NGL business had drastically gone down, thus making the production of LPG/NGL uneconomical for the respondent. Moreover, the continuation of such arrangements would have compelled the respondent to increase the price of LPG (due to a higher processing charges), which would ultimately burden the end consumers. Since March 2016, the respondent had negative margins, which were also presented to the respondent's Board, where a decision was taken to terminate the MoUs and the Badin Arrangements as per their terms, in view of the respondent being subjected to negative margins in this business. Keeping in view the situation, the respondent had asked the Appellant to reduce the processing charges of LPG/NGL but the appellant refused to do so, leaving the respondent with no alternative but to exercise its right to terminate the MoUs and the Badin

Arrangement. It is also stated that the appellant's reference to the Supreme Court Judgment (Khawaja Muhammad Asif case) is totally misconceived as the Honorable Supreme Court or for that matter any Court could never direct a party to continue supplying a product at a loss to itself, more specifically, if it is a public-sector company managing public funds. All the more, the Honorable Supreme Court set aside the implementation agreement entered into between the appellant and the respondent with respect to the Badin gas field in the year 2003. The other gas fields were governed by MoUs signed between the parties in the year 2014 and have nothing to do with the Honorable Supreme Court's judgment reported as PLD 2014 SC 206.

6. During the course of arguments, learned counsel for the appellant has contended that the order impugned in the present proceedings is not sustainable in law and as such the same is liable to be set aside. It is further contended that Learned Single Judge while passing the impugned order has failed to consider the fact of termination of the subject MoUs **was** unlawful as the arbitration had already commenced and the abrupt termination was done for ulterior motives. The MoUs do not stipulate a termination until the happening of the events stated under Article-I, have taken place which is the essence of the contract, and that only on the happening of two events, provided in the said Article I (1) and (2), the MoUs could not be terminated. It is also contended that Learned Single Judge while passing the impugned order has erred in holding that the MoUs entered into between the respondent and the appellant were revocable in nature under the law even though the MoUs stipulated a conditional revocation based upon the happening of certain events. The learned Judge while passing the impugned order has also failed to consider that the subject MoUs were entered into between the parties in the light of Honorable Supreme Court's judgment reported as PLD 2014 SC 206, wherein it was observed that "the supply of LPG to a very large number of users, including those living in far-flung areas is a matter of public importance impacting their 'life' as defined by this Court. Such supply, therefore, needs to continue unabated." It is also argued that the Honorable Supreme Court in the said judgment also observed that "...avoidance of wastage through flaring is an important consideration

for the purposes of passing an order to ensure that precious and scarce mineral resources of the nation are not frittered away....” Hence wastage of mineral resources was also to be safeguarded, which would have resulted, if the extraction plant of the appellant was shut. In the light of this back ground the subject MoUs were entered into between the parties. It is also contended that the learned Judge while passing the impugned order has failed to consider the malafide on the part of the respondent wherein they appointed an Arbitrator on 02.05.2016 and terminated the MoU on 04.05.2016 even though there is a specific provision in the MoU which provides that during a resolution of any dispute the contractual obligation will be performed by both the parties. Further contended that the learned Judge failed to appreciate that the essence of subject MoUs was the interim arrangement which could persist until the respondent installed the LPG Extraction Plant and in the light of the same, it would not fall under Section 21 and Section 56 of the Specific Relief Act, 1877. Further contended that learned Single Judge, through the impugned order while deciding the injunction [being CMA No.7995 of 2016], in fact, dismissed the entire suit, which is untenable in law. It is also argued that in the impugned order, the interpretation adhered to by the learned Single Judge for interpreting the MoUs is in defiance of the principle of coherent and harmonious interpretation. Further argued that the Learned Single Judge has failed to notice the fact that the Board of Directors of the respondent had categorically stated that the MoU/Agreements be cancelled on account of the fact that the OGDCL Plant would commence operation as such, the intention of the Board to invoke Article-1 instead of Article 6(c). The management thus, acted beyond authority of the Board and could not have cancelled the same without assigning any reason. It is also argued that the subject MoUs were terminated with malafide intention and could not have been terminated when arbitration had already commenced under a dispute resolution mechanism. Even though, the arbitration was without intervention of the Court, nevertheless, under Section 41 of the Arbitration Act, the Honorable Supreme Court has powers to intervene and make orders in respect of any of the matters provided in the Second Schedule, which includes granting an injunction. Further argued that it is a settled law that the entire agreement has to be read as a whole and if there are contradictory

provisions then the same should be reconciled with rational meaning/interpretation. Lastly, argued that money is not an adequate remedy in the circumstances of the case and the stay application of the appellant was liable to be allowed. The learned counsel in support of his arguments has relied upon the following case law:

- (1) **1979 CLC 625** Messrs ASADULLAH KHAN & Co. LTD., KARACHI v. KARACHI SHIPYARD & ENGINEERING WORKS LTD. and another, (2) **2001 CLC 664** Ch. ABDUR RAUF v. Mrs. ZUBEDA KALEEM and others (3) **1979 CLC 307** ISLAND TEXTILE MILLS LTD., v. V/O TECHNOEXPERT and another, (4) **NLR 1992 CLJ 693** ORIX LEASING PAK LTD. v. ZAHID INDUSTRIES, ETC., (5) **2002 SCMR 1694** SOCIETE GENERAL DE SURVEILLANCE S.A v. PAKISTAN through Secretary Finance Revenue Division, Islamabad, (6) **2002 SCMR 1903** Messrs TRIBAL FRIENDS CO. v. PROVINCE OF BALOCHISTAN, (7) **2003 CLD 596** SAUDI-PAK INDUSTRIAL AND AGRICULTURAL INVESTMENT COMPANY (PVT.) LTD v. Messrs ALLIED BANK OF PAKISTAN and another, (8) **PLD 1977 Karachi 21** MUHAMMAD AZAM MUHAMMAD FAZIL & Co., KARACHI v. Messrs N.A INDUSTRIES, KARACHI. (9) **1982 CLC 2369** SWITZERLAND v. BANK OF CREDIT AND COMMERCE INTERNATIONAL LONDON AND OTHERS, And (10) **1995 CLC 1003** MUZAMMILULLAH v. PAKISTAN STEEL MILLS (PVT.) LTD and another.

7. Conversely, learned counsel for the respondent during the course of his arguments while reiterating the contents of his reply to the memo of appeal has contended that the order impugned in the present proceedings is a detailed and well-reasoned order which was passed after considering each and every submission of the parties, hence, the same does not warrant any interference in the present proceedings. It is also argued that the commencement of the process of arbitration, not envisaged under the MoUs, does not preclude the respondent from terminating the MoUs. Furthermore, the issue of Termination of the MoUs and the disputes in the ongoing arbitration, are two separate and independent matters and the appellant is deliberately with malafide intent to combine the two in an attempt to confuse the matters. Further argued that the stance of the appellant regarding the supply of LPG from its LPG extraction plant, continuing unabated in relation to all the gas fields is ex-facie a misinterpretation of the Supreme Court

judgment and self-serving. The Supreme Court judgment only related to the Badin gas field and even if the Supreme Court had directed the supply of LPG unabated to the consumers in relation to the Badin Gas field, this did not mean that such supply should only be routed through the appellant, notwithstanding its charging an exorbitant LPG extraction fee which made the cost of LPG exorbitant and commercially uneconomical for the respondent. It is also argued that Article-1 of the MoUs clearly stipulates that unless terminated earlier in accordance with its terms the MOUs shall remain in force until either of the two events stated therein occurred i.e. (i) any bidder under the Tender Enquiry mentioned therein was selected and commissioned the LPG Extraction Plant to receive Gas for extraction of LPG/NGL or (ii) SSGCL/OGDCL itself installed the LPG Extraction Plant. Whereas condition (i) became academic and not achievable in view of the Tender Enquiry, in the case of Bobi Gas Field having lapsed and in the case of the other three Gas Fields (KPD, Sinjhor and Naimat Basal) being cancelled, as regards condition (ii) regarding the establishment of the LPG Extraction Plan, OGDCL has already installed the LPG Extraction plant and is receiving gas from the KPD gas field and is processing the same for extraction of LPG/NGL, after the MoUs were terminated on 4.5.2016. It is also argued that plain reading of Article-1 of subject MoU read with Article-6, is amply clear that the term of the MoU with its two conditions was subject to Article-6, under which the MoU could be terminated earlier. Furthermore, Article-6 is clearly an independent provision of the MoUs, with Article-1 being subject to Article-6. More so, the conditions stipulated in Article-1 of the MoUs for their expiry would not alter the above legal position but, on the contrary, supports the position that the MoUs were revocable falls within the purview of Section 21 read with Section 56(f) of the Specific Relief Act. Further argued that it is settled law in terms of Section 21(d) read with Section 56(f) of the Specific Relief Act that where damages is an adequate remedy or where the agreement is revocable, amongst the other grounds listed therein, injunction does not lie. It is also argued that the MoUs and the Badin arrangement were in essence 'interim in nature', creating no vested rights in favour of Appellant. Furthermore, respondent lawfully terminated the MoUs and the Badin arrangement, in terms of Article 6(c) without assigning any reason in

the case of the three MOUs (KPD), Sinjhoru and Naimat Basal Gas Field) referred to above and under its inherent rights in relation to Bobi Gas Field for cogent reasons and under the terms of the MoUs the appellant is expressly precluded from lodging any claim in respect of same. It is also argued that the MoUs run into minute and numerous details, which depend on the personal qualifications of the parties and the MoUs and the Badin arrangement are revocable, as per the provisions of the MoUs, as such, the same cannot be specifically enforced. Further, in terms of Section 56(f) an injunction cannot be granted to prevent the breach of a contract, the performance of which not be specifically enforced. It is further argued that the Honorable Supreme Court in its judgment in the case of Khawaja Muhammad Asif (supra) ex-facie indicates that it was extremely keen to protect SSGC from losses, bearing in mind that it is a public-sector company managing public funds. Hence, it cannot be said that the Hon'ble Supreme Court would give direction to a public-sector company like SSGC to supply gas, even if it was making losses and was experiencing negative margins. Learned counsel emphasized that the respondent is entitled to terminate the MoUs in accordance with its terms which is clear and categorical and is not dependent on the OGDCL's plant coming into operation or any other reason whatsoever. Lastly argued that that the impugned order was passed after extended hearings and has addressed all the issues raised by the appellant in a detailed and convincing manner from which it is quite apparent that the appellant has failed to make out a prima facie case and neither the balance of convenience is on the side of the appellant and nor the dismissal of the injunction application would cause any irreparable loss to the appellant. Learned counsel in support of his arguments in the case has relied upon the following case law:

(1) **2015 YLR 2141** *BANK ALFLAH LTD. v. NEUMULTIPLEX AND ENTERTAINMENT SQUARE COMPANY (PVT.) LTD.*, (2) **PLD 2001 Karachi 185** *Messrs SHAKIL WAQAS & CO. and others, v. GENERAL MANAGER MARKETING, PAKISTAN RAILWAYS and others*, (3) **1995 MLD 384** *Messrs UNIVERSAL BUSINESS EQUIPMENT (PVT.) LTD v. Messrs KOKUSAI COMMERCE INC and others*, (4) **2010 MLD 800** *LAHORE STOCK EXCHANGE LTD through Managing Director and another v. Messrs HASSAN ASSOCIATES through Managing Partner*, (5) **PLD 1965 SC 83** *M.A NASER v. CHAIRMAN PAKISTAN EASTRN RAILWAYS and others*, (6) **2013 PLC (CS) 768** *GHULAM NABI SHAH v. PAKISTAN INTERNATIONAL AIRLINES CORPORATION*

through Managing Director and 4 others, (7) 1974 SCMR 519 MARGHUB SIDDIQUI v. HAMID AHMAD KHAN and 2 others, (8) 1986 SCMR 820 Messrs ASSOCIATED CONSTRUCTION LTD. v. ASIF H. KAZI and another (9) PLD 2014 SC 206 Khawaja MUHAMMAD ASIF v. FEDERATION OF PAKISTAN and other And (10) 2014 SCMR 1858 JAMSHORO JOINT VENTURE LTD v. Khawaja MUHAMMAD ASIF and others.

8. We have heard the learned counsel for the parties and have also perused their submissions in writing, material available on record as well as case law relied upon by the counsel for the parties in support of their stance in the case.

9. From the perusal of record, it appears that the Appellants filed a Suit for declaration, cancellation, permanent injunction, damages and possession, against the respondent. With the following prayers:

- “a) to declare that the Memorandum of Understanding pertaining to LPG and NLG extraction for Naimat Basal Gas Field, Sinjhoru and Kunnar Pasakhi Deep Field dated 26.05.2014, Bobi Gas Field dated 02.09.2012 and the interim arrangement in relation to Badin Gas Field in relation to the said five gas fields stated in Para-1, hereof are not liable to be terminated unilaterally, when the matter in dispute has already been referred to arbitration;
- b) to declare that Article 6 of the Memorandums and each of them are subject to Article 1 thereof and therefor, unless the events contained in Article 1, are in any way attracted only then would Article 6 of the said contract to be acted upon;
- c) to grant perpetual injunction, restraining the Defendants from cancelling any of the five Memorandums of Understanding interim arrangement, which have been acted upon by both the parties, till the event contemplated by Article-1 of the contracts have occurred;
- d) to grant cost of the suit;
- e) any further relief or reliefs that this Hon’ble Court may be pleased to grant in the facts and circumstances of the case.”

Along with the above said Suit the appellant also filed application bearing CMA No. 7995 of 2016, under Order 39 Rule 1 & 2 CPC for interim relief.

10. Learned Single Judge of this Court, after hearing counsel for the parties, passed the order dated 05.12.2016, dismissed the said application of the appellant, which is impugned in the present proceedings.

11. To facilitate understanding of the issues, it is appropriate to summarize briefly and in simple terms, some technical aspects of LPG and background of the case. The natural gas which is received by SSGCL under the GSA is made up of a mix of gases. These include propane, butane and methane. Butane and propane, when extracted from the mix, are liquefied and sold as LPG. As a result of extraction of LPG from natural gas, there is a reduction in the remaining volume and calorific value of natural gas which reduction is known in technical terms, as "gas shrinkage". On 12.08.2003 an Implementation Agreement was executed between respondent-SSGCL and Appellant-JJVL whereby the appellant was to establish a Plant for extraction of LPG from natural gas supplied to it by respondent JJVL was, inter alia, to pay a compensation price to SSGCL for gas shrinkage and also royalty payments on the LPG extracted by it. In the year 2011, one Khawaja Muhammad Asif, who was a member of the opposition in the National Assembly in 2011 approached the Honorable Supreme Court under Article 184(3) of the Constitution and challenged the extraction agreement awarded to Appellant-JJVL on the ground that same was neither lawful nor fair nor was it transparent. According to him, it was meant to extend illegal and undue favour to Appellant-JJVL at the cost of the State and the People of Pakistan. The said case (Khawaja Muhammad Asif vs. Federation of Pakistan and others) subsequently decided by the Honorable Supreme Court, vide its judgment dated 04.12.2013, whereby the implementation agreement entered into between respondent and appellant was declared invalid. For the sake of ready reference relevant portions of the said judgment are reproduced as under:

“36. Natural gas and LPG extracted therefrom are precious mineral resources vesting in the State and ultimately in the People. SSGCL is a State enterprise in which the majority shareholding is held by the Government. SSGCL is therefore, not free to deal with such assets whimsically or in utter disregard of the fiduciary duty owed to the nation. Nor, we may add, does SSGCL have unfettered discretion to

deal with national assets in a manner that does not protect and advance the best interests of SSGCL as a fiduciary and repository of the interest of the people of Pakistan who are, through the Government, beneficial owners, not only of the mineral resources of the country but also of a majority interest in SSGCL. It is also particularly important to note that LPG is being used in Pakistan by people who, for a variety of reasons either do not have access to, or are unable to obtain natural gas. In our recent judgment in Habibullah Energy v. WAPDA (Civil Appeals 149 and 150 of 2010), it has been explained that "public sector enterprises... are public assets which belong beneficially to the people of Pakistan. While the State is entrusted with the management of such enterprises, the State agencies responsible for management do not thereby become owners of the enterprise and its assets". We had also emphasized that "[r]ather than being owners of public sector enterprises, State agencies stand in a fiduciary relationship to the people" and also that the "basis of fiduciary relations is the exclusive benefit principle, according to which the fiduciary has a duty to act solely in the interests of the beneficiary".

37.The cardinal principle which has been kept in mind by this Court is that waste, plunder or wanton and heedless use of public resources and funds must be prevented and public wealth wherever squandered must be recovered. The importance of fair, even handed and open competitive bidding has also been repeatedly emphasized by us while exercising our jurisdiction under Article 184(3) of the Constitution. In the matter of Suo Motu Case No.13 of 2009: Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad (PLD 2011 Supreme Court 619), we have emphasized that the Government and its instrumentalities are expected to act fairly, justly and in a transparent manner. Transparency lies at the heart of every transaction entered into by or on behalf of a public entity such as SSGCL.....

38. As noted above, people all over the country who cannot obtain natural gas rely on supply of LPG for many of their needs. The supply of LPG to a very large number of users, including those living in far-flung areas is a matter of public importance impacting their 'life' as defined by this Court. Such supply, therefore, needs to continue unabated. This much has been accepted by the parties before us. In fact it was the contention of counsel on behalf of JJVL that the Implementation Agreement should not be terminated because LPG is so important to the people of Pakistan; and that termination of the said agreement would result in a highly detrimental disruption in the supply of LPG to a large body of consumers. Six LPG marketing companies who receive LPG from JJVL were also heard. Their counsel also emphatically stressed the importance of the continued supply of LPG to such consumers. These marketing companies do not have any privity of contract with SSGCL nor can they lawfully insist on supply of LPG to them in the event the Implementation Agreement comes to an end, but their submissions as to continued delivery of LPG to the end consumer have been taken into account by us.

39. It was also emphasized before us that if LPG extraction is discontinued, the components of LPG i.e. butane and propane will be wasted as these will have to be flared and will no longer remain available for supply to consumers. Although this does not explain the loss (through flaring) on account of the inordinate delays in implementing the Project in 2001-2003 by SSGCL and JJVL, avoidance of wastage through flaring is an important consideration for the purposes of passing an order to ensure that precious and scarce

mineral resources of the nation are not frittered away and nor is the majority interest of the Government in SSGCL used for mismanaging and wasting national assets or for exploitatively bestowing undue favours on some at the expense of the People. In this respect, we are guided by the exhortation that "the State shall ensure the elimination of all forms of exploitation ... " (Article 3 of the Constitution) and Article 38 of the Constitution which commands that "the State shall ... secure the wellbeing of the people ... by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest ... ".

40. We, therefore, for the reasons recorded above hold, declare and direct as under:--

(1) The Implementation Agreement dated 12-8-2003 was awarded to JJVL in gross violation of the bidding process as advertised and as set out in the tender documents, including Instructions to Bidders.

(2) The project was awarded by SSGCL in a highly non-transparent manner with the object of giving undue benefit to JJVL.

(3) The changes made in the Implementation Agreement which have been noted in paras 16 to 32 above, were made with the object of giving unfair and unlawful benefit to JJVL at the cost of the State, State enterprise SSGCL and ultimately, the People of Pakistan.

(4) The deletion of clause 18 of the Implementation Agreement and its substitution by a vague and meaningless clause was at the behest of JJVL and for the benefit of JJVL and its lenders at the expense of the general public interest.

(5) The basis for calculating royalty payments which had specifically been agreed was unlawfully altered to provide benefit to JJVL and heavy loss to SSGCL, the State and ultimately to the People of Pakistan.

(6) For the aforesaid reasons, the Implementation Agreement as executed between SSGCL and JJVL cannot be allowed to continue being based on illegalities from its very inception and is accordingly set aside with all consequential liabilities as are provided in the "corrected draft" Implementation Agreement dated 19-5-2003. All losses caused to and incurred by the State, State enterprise SSGCL and the People arising out of and as a result of the bidding process and during the tenure of Implementation Agreement are to be made good and recovered from JJVL and all persons who had actively participated and had made substantial decisions in the bidding process and making of the Implementation Agreement.

(7) A Committee comprising of (i) Mr. M. H. Asif, former Member, OGRA and, (ii) Mr. Shabbar Raza Zaidi, Partner of Messrs A.F. Ferguson and Co., Chartered Accountants, is constituted for the following purposes:--

(a) to calculate royalty payments (on the LPG extracted to date) on the basis of the Saudi Aramco reference price plus freight, for the full period during which the Implementation Agreement has been operational; this shall be done within 15 days from the date of this Order; an opportunity of hearing shall be afforded to SSGCL and JJVL while making the calculation;

- (b) to determine an acquisition price for the LPG extraction Plant, as nearly as possible in accordance with the LOI dated 28-6-2002 and clause 18 read with Schedule 5 of the draft Implementation Agreement dated 19-5-2003 relating to a JJVL Event of Default; this shall be done within 15 days from the date of this Order;
 - (c) to suggest a management mechanism to the Court for appropriate orders including, if necessary, for the appointment of an independent manager/receiver; this may be done within 15 days of this Order and until then the Plant shall be managed by two senior persons, one each to be nominated by SSGCL and JJVL respectively; any deadlock between them shall be resolved by a decision of the Committee;
 - (d) to obtain from SSGCL and JJVL such information and data as may be necessary for the Committee to fulfill its responsibilities;
 - (e) to suggest ways in which the supply of LPG to end consumers continues unabated and without disruption;
 - (f) to seek such clarifications or further orders from the Court as may be considered necessary by the Committee.
- [Emphasis supplied]

12. Learned counsel for the appellant laid much emphasis on the Supreme Court Judgment [Khawaja Muhammad Asif case (supra)] as according to him the subject MoUs were entered into between the parties keeping in view the observations of the Honorable Supreme Court in the said judgment. However, from the perusal of the Judgment of Honorable Supreme Court [Khawaja Muhammad Asif (Supra)] it appears, firstly; that the decision was in respect of Badin Gas filed wherein implementation agreement dated 12.08.2003, entered into between the respondent and the appellant, was held illegal and unlawful and further it has nothing to do with the subject MoUs, which are related to other gas fields and were entered into after the Supreme Court Judgments and secondly, the Honorable Supreme Court while dealing with the issue has not made any direction to respondent for supply of LPG to the end consumers unabated and without disruption. In fact, the Hon'ble Supreme Court directed the formation of a Committee comprising of two members to carry out certain fact-finding functions, details whereof are mentioned in sub-para 7 of paragraph 40 of the judgment. Though in sub-para 7(e) of paragraph 40 of the judgment, one of the Committee's functions was 'to suggest ways in which the supply of LPG to end consumers continues unabated and

without disruption.’, however, it does not construe that the respondent shall procure LPG from appellant-JJVL, and thirdly, the purpose and objective of the judgment was to prevent respondent-SSGC being Public Sector company managing public funds from incurring losses which the Honorable Supreme Court perceived would happen had the implementation agreement for the Badin Gas field been allowed to continue. Moreso, from perusal of the subject MoUs, it does not disclose the same were entered into in pursuance of the observations and directions of the Honorable Supreme Court Judgment. In the circumstance, plea of the learned counsel for the appellant that the MoUs were entered into between the respondent and appellant in view of the observations of the Honorable Supreme Court appears to be misconceived.

13. It is also the case of the appellant that MoUs do not stipulate termination until the happening of the events mentioned under Article-1 have taken place. In this regard before going into further discussions, it would be appropriate to reproduce the relevant articles of the subject MoUs here under:

MoUs in respect of KPD, Sinjhoru and Naimat Basal Gas fields, all dated 26.05.2014, inter alia, contain following clauses:

ARTICLE-1

TERM OF MEMORANDUM OF UNDERSTANDING

This MOU shall commence and be effective on the date hereof and shall unless, terminated earlier in accordance with its terms shall remain in force until either of the two events hereinafter stated occurs or takes place

- (1) Any Bidder under Tender Enquiry No. has been selected after due process under the Public Procurement Rules 2004 (PPRA), fabricated and commissioned the LPG Extraction Plant and is able to receive gas from the Gas Field and process the same for extraction of LPG/NGL or
- (2) If SSGCL/OGDCL itself installs the LPG Extraction Plant and is liable to receive gas from theGas Field and process the same for extraction of LPG/NGL

This MOU is an interim arrangement and subject to its term as per Article 1. This understanding about the interim nature of these arrangements is of the essence of this MOU and JJVL shall have no claims, whatsoever, for the expiry of the term of this agreement as per the provisions Article 1. In case any of the event takes place as above mentioned these arrangements can be terminated by either party upon giving 15 (fifteen) days’ notice.

.....

.....”

ARTICLE-5

DISPUTE RESOLUTION

“In the event that a dispute arises, the Parties shall attempt in good faith to settle such dispute by mutual discussion within thirty (30) Days after the date that the disputing Party gives written notice of the dispute to the non-disputing Party. During such mutual discussion and any resolution, the Parties shall faithfully continue to perform their respective obligations under this MOU. In the event of failure of mutual discussion, the respective Chief Executive Officer/Managing Directors (CEOs/MDs) of the parties will endeavor to resolve the issue through a final round of mutual discussion.

In case the dispute (s) difference(s) or question (s) cannot be settled amicably or satisfactorily after resorting to mutual discussions as above, it shall be referred to mediation before a KCDR accredited Mediator at the Karachi Centre for Dispute Resolution (KCDR), Mediation proceedings shall be held at Karachi and will be governed by the mediation rules of the Centre Each Party shall bear its respective costs.”

ARTICLE-6

TERMINATION

This MoU may be terminated by either Party in accordance with the following provisions:

- (a) In the event that a Party facing Force Majeure, as defined in Article 10, could only overcome the Force Majeure by incurring expenditure which could make it uneconomic for such Party acting as a reasonable and prudent operator to continue with its obligations hereunder, or circumstances or events caused by Force Majeure are in capable of remedy and in either case the delivery or acceptance of Gas is prevented, the Party affected hereby shall have the right to terminate this MOU upon giving Fifteen (15) days advance written notice to other Party.
- (b) In the event of a material breach of the terms of this MoU by a Party affected shall have the right to terminate this MoU upon giving Fifteen (15) days advance written notice to the other Party, provided that the material breach is not remedied within Fifteen (15) days from the date of notice.
- (c) Either Party may terminate this MOU without assigning any reason thereto by giving fifteen (15) days advance notice to the other Party.

[Emphasis supplied]

Whereas the clauses of MoU in respect of Bobi Gas field, dated 02.09.2012, though are same as that of MoUs of abovementioned other Gas fields yet the Article-1 and Article-6 does not contain the above underlined portions.

From the perusal of the MoUs, it transpires that all the MoUs contain termination clause whereas the MoUs for KPD, Sinjhor and Naimat Basal, which gave further right to the parties to terminate the MoUs without assigning any reason under Article 6(c) of the MoUs. Furthermore, Article-1 of the MoUs clearly stipulates that unless

terminated earlier in accordance with its terms, the MoUs shall remain in force until either of the two events stated therein occurred. From plain reading of Article-1, it also transpires that the term of the MoU with its two conditions was subject to Article 6, under which the MoU could be terminated earlier. Whereas, Article-6 is an independent provision of the MoUs, with Article-1 being subject to Article-6. Moreover, Article-1 cannot be read in isolation from an independent right of the principal to terminate the contract which otherwise is available in some of the contracts under Article 6(c). Such facts demonstrate that the MoUs are revocable in nature. Furthermore, no contract/agreement will be construed to continue indefinitely if there was no termination clause. In such a situation, the law allows either party to terminate the contract/agreement by way of an inherent right upon giving a reasonable notice.

14. Keeping in view the above and the fact that the MoUs and arrangements admittedly constituted 'interim arrangement' between the parties and as such creates no vested rights in favour of the appellant either to seek enforcement/continuation of the said MoUs and or to challenge the termination thereof. Thus, the MoUs being revocable, the revocation thereof cannot be prevented by injunction. It may also be pointed out that as contract cannot be specifically enforced, clause (f) of section 56 of the Specific Relief Act will operate as a bar to the grant of injunction. It would be advantageous for the sake of ready reference to reproduce Section 21 and 56 of the Specific Relief Act 1877 are reproduced as under:

21. Contracts not specifically enforceable.– The following contracts cannot be specifically enforced:-

- (a) a contract for the non-performance of which compensation in money is an adequate relief;
- (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;
- (c) a contract the terms of which the Court cannot find with reasonable certainty;
- (d) a contract which is in its nature revocable;
- (e) a contract made by trustees either in excess of their powers or in breach of their trust;
- (f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the

- promoters of such company, which is in excess of its powers;
- (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;
 - (h) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And, save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract other than an arbitration agreement to which the provisions of the said Act apply and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

- 56. Injunction when refused.**— An injunction cannot be granted—
- (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
 - (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;
 - (c) to restrain persons from applying to any legislative body;
 - (d) to interfere with the public duties of any department of the Federal Government or any Provincial Government], or with the sovereign acts of Foreign Government;
 - (e) to stay proceedings in any criminal matter;
 - (f) to prevent the breach of a contract the performance of which would not be specifically enforced;
 - (g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
 - (h) to prevent a continuing breach in which the applicant has acquiesced;
 - (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;
 - (j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;
 - (k) where the applicant has no personal interest in the matter.

[Emphasis supplied]

Since, we are of the view that the MoUs are revocable in nature and as adequate relief may be obtained by way of damages therefore, no perpetual injunction can be granted in the case.

15. It is also the case of the appellant that the MoUs were terminated with malafide and could not have been terminated when

arbitration had already commenced under a dispute resolution mechanism.

From perusal of the provision of dispute resolution mechanism provided in the MoUs, it appears that there is nothing in the provision that in case of any dispute arises between the parties the same will be resolved through arbitration proceedings. From the record, it also appears that after setting aside the implementation agreement by the Supreme Court, through its judgment dated 04.12.2013 in respect of Badin Gas Field, the respondent and appellant under interim arrangement were operating whereby respondent took ownership of Liquefied Petroleum Gas (LPG) and Natural Gas Liquid (NGL) with the arrangement being for SSGC to pay processing charges to appellant and in respect thereof certain disputes had arisen. The respondent and appellant though intended to resolve their disputes through arbitration proceedings, in this regard draft of dispute resolution agreement was also exchanged between the parties wherein schedule containing topics of dispute was also mentioned besides the parties have nominated their respective arbitrator as well, however there is nothing available on record, which could show that the said agreement was ever executed/signed by the parties. Without touching the issue relating to the commencement and or pendency of arbitration proceedings between the parties, as any observation/finding, at this stage, when the suit of the appellant is pending adjudication, would prejudice the case of either party on merits, it may be observed that an arbitration clause is a collateral term in the contract, which relates to the resolution of disputes and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement survives for the purpose of resolving disputes arising from or in connection with the contract. Thus, the contract even if having an arbitration clause and forms part of the contract, is independent of the other terms of the contract which include termination. In the present case, since the MoUs does not contain any arbitration clause, therefore, it appears that the MoUs have nothing to do with the pendency of the Arbitration proceedings, if any, pursuant to some other agreement between the parties.

16. The case laws cited by learned counsel for the appellant have been perused and considered with due care and caution but are found distinguishable from the facts of the present case and hence the same are not applicable to the present case. Whereas the case law cited by the respondent supports the stance of the respondent.

17. From the perusal of the order impugned in the present appeal, it appears that the learned Single Judge of this Court having considered and examined each and every arguments and fact of the case minutely and discussed the same in detail has correctly applied his judicial mind in deciding the CMA bearing No. 7995 of 2016 and we are of the view that no exception can be taken to the legal position explained in the impugned order in the facts of the present case. Consequently, for the forgoing reasons, we do not find any substance in the present appeal, which is accordingly dismissed with no order as to costs.

JUDGE

JUDGE

Karachi

Dated: 29.06.2018.