# IN THE HIGH COURT OF SINDH AT KARACHI

**SUIT NO. 1008 / 2018**

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| **Plaintiffs:** | **Hascol Petroleum Limited & another**<br>**Through Mr. Arshad Tayyabaly A/W Amel Kasi Advocates.** |
| **Defendant: No. 1.** | **Federation of Pakistan through Mr. Zahid F. Ebrahim Additional Attorney General.** |
| **Defendant: No. 2.** | **Oil & Gas Regulatory Authority through Mr. Asim Iqbal A/W Mr. Farmanullah Khan Advocates.** |
| **Defendant: No. 3.** | **Trustees of the Port of Karachi through Mr. Abdul Razzak Advocate.**<br>**Capt. Muhammad Nawaz Mirza Deputy JAG (South), Pak Navy.**<br>**Lieutenant Commander Nabeel Safdar Chohan ADLS-II, Pak Navy.**<br>**Lieutenant Commander Saba Rasool Pak Navy.** |

***For hearing of CMA No. 7590/2018.***

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| **Date of hearing:** | **04.03.2019, 18.03.2019, & 01.04.2019.** |
| **Date of order:** | **01.04.2019.** |

## O R D E R

**Muhammad Junaid Ghaffar, J.** This is a Suit for Declaration and Injunction and through listed application the Plaintiff seeks a restraining order against the Defendants from taking any coercive action pursuant to impugned Letters dated 5.3.2018 (by Ministry of Energy, Petroleum Division) and 8.5.2018 (by Oil and Gas Regulatory Authority **"OGRA"**).

2. Precise facts as stated are that Plaintiff No.1 is involved in the business of import supply and distribution of petroleum products including Gasoline / High Speed Diesel (HSD) / High Sulfur Furnace Oil / POL products, whereas, Plaintiff No.2 owns a Bulk Storage Tank

Terminal on Plot No. 43 Oil Installation Area, Kemari Karachi under leasehold rights from Defendant No.3 vide Lease Deed dated 25.03.2010. It is further stated that the Lease authorizes the use of the land for construction and operation of tanks for storage of Molasses, Edible Oil, Tallow, and Alcohol etc. for 25 years which now stands extended till 15.07.2040. It is further stated that Plaintiff No. 2 through its Letter dated 20.09.1995 approached the Naval authorities for obtaining NOC for running the tank terminal, whereas, in Mach 2014 Plaintiff No. 1 and Plaintiff No. 2 have entered into an Storage Agreement, whereby, Plaintiff No. 1 is utilizing the terminal for its refined oil products for onward delivery to its customers. It is the case of the Plaintiffs that all requisite NOCs have been obtained; but through impugned Letter dated 08.05.2018 issued by Defendant No.2, Plaintiffs have been directed to immediately stop the operation activity at the storage terminal purportedly on the basis of Letter dated 05.03.2018 issued by the Ministry of Petroleum for non-availability of NOC from Ministry of Defence.

3. Learned Counsel for the Plaintiffs submits that the impugned Letters have been issued for the first time to the Plaintiffs, whereby, suddenly Plaintiffs have been directed to halt / stop all its operations at the terminal and this has been done without any notice or hearing opportunity to present its case. Per learned Counsel, this is in violation of the settled principles of law that none should be condemned unheard, whereas, after insertion of Article 10-A in the Constitution of Pakistan, it is incumbent upon every Governmental authority to abide by the same. In support of this legal proposition, he has relied upon ***Messrs D.J. Builders and Developers through Partners and another V. Federation of Pakistan and 6 others (2016 P T D 1723),***

***Warid Telecom Pvt. Ltd. and 4 others V. Pakistan Telecommunication Authority (2015 S C M R 338)*** and ***Messrs Hashoo Pvt. Ltd V. Government of Sindh and 4 others (2011 M L D 1729)***. He has further argued that as to why suddenly Defendant No.2 has called upon to obtain NOC from Ministry of Defence is not stated in the impugned Letter; nor any reason has been assigned, whereas, Pakistan (Refining, Blending, Transportation, Storage and Marketing Rules, 2016, ("**2016 Rules**") have been issued on 22.1.2016, and therefore, are not applicable to the Plaintiff's terminal. Additionally, he has argued that the said rules only apply to new terminals, whereas, the Plaintiff's terminal is an old one; hence, this condition otherwise, does not apply. Per learned Counsel, the Plaintiffs are in possession of a proper Lease from KPT, NOC from the Deputy Commissioner, Explosive Department, Environmental Protection Agency as well as Customs Authorities; hence, they are running their terminal in accordance with law with all requisite permissions. According to him, the Plaintiffs are holding inventory of at least Rs. 2 billion at one point of time and this sudden issuance of impugned Letter, has seriously prejudiced the Plaintiff's business interest. According to him, for the first time the Plaintiffs have been given copy of Letter dated 28.4.2014 annexed with the written statement, wherein, Plaintiffs have been asked to furnish NOC from Ministry of Defence, whereas, under instructions he states that Plaintiffs were never served with this Letter. Per learned Counsel, Pakistan Petroleum (Refining, Blending and Marketing) Rules, 1971 ("1971 Rules") apply to the case of the Plaintiffs, and do not require the Plaintiff to obtain any NOC from Ministry of Defence. Insofar as obtaining NOC from Ministry of Defence is concerned, he further submits that notwithstanding the Plaintiff's case, the 2016 Rules have

already been impugned by various parties before this Court as well as other Courts of the Country, including Suit No. 58/2019, wherein, an order has been passed on 10.01.2019 directing the parties to maintain status quo. Learned Counsel has then referred to his rejoinder and submits that all requisite documents have been produced by the Plaintiffs, whereas, even an inspection by a third party was ordered by OGRA which has also been conducted and there is no adverse report against the Plaintiff's business operation; hence, it amounts to an implied NOC and permission given by the concerned authorities therefore, impugned Letters are not to be acted upon insofar as the Plaintiffs are concerned. He then submits that other oil refineries including Pakistan State Oil, National Refinery Ltd, Pak Arab Refinery Ltd. and others have their terminals in the same installation area and have been granted requisite permission; hence, the Plaintiffs are otherwise being discriminated. Lastly without prejudice, he submits that though the Plaintiffs have made out a prima facie case; however, if directed the Plaintiffs are willing to approach the concerned Ministry for obtaining necessary permission for which this Court may issue directions.

4. Learned Counsel appearing on behalf of OGRA / Defendant No. 2 submits that way back on 28.04.2014 a Letter was issued to the Plaintiffs for obtaining requisite NOC of Ministry of Defence, and now denial of this Letter is an afterthought, whereas, earlier the terminal was constructed by Plaintiff No. 2 for storage of Molasses and not for POL products. According to him, the NOC's available are not in respect of POL products, whereas, NOC from the Ministry of Defence is now mandatory; hence, no case is made out.

5. Learned Additional Attorney General appearing on behalf of the Ministry of Defence has referred to the decision of the Cabinet Committee dated 03.04.1984 and of Ministry of Ports dated 07.07.1990 and submits that it has been decided way back that no new terminal for POL products would be permitted to be constructed in the Oil installation area of Kemari, due to defence reasons, as after one incident in the year 1971, it is no more feasible nor practical to construct any further Tank Terminal for storage of Oil and Petroleum products in this area. According to him, the permission earlier granted by this Ministry is also in respect of Molasses and Alcohol, therefore, no case is made out on behalf of the Plaintiffs. He has then referred to correspondence as well as Letters dated 22.5.2018 and 9.2.2018 and submits that even Pakistan National Shipping Corporation was refused permission to construct a Tank Terminal for its own usage on this very ground after objection of the Ministry of Defence. Per learned Additional Attorney General, the reason for refusal is serious in nature being in respect of a security issue, whereas, as a Policy matter, it has been decided that Oil Terminals must not be constructed in one area. According to him the Plaintiffs are at liberty to construct and shift its terminal at Port Qasim area, Gawadar or any other place, but not in the Keamari area which is already saturated, and for security reasons, it is no more feasible or justifiable to permit the same.

6. Learned Counsel appearing on behalf of KPT has adopted the arguments of the Counsel for OGRA as well as Additional Attorney General. He has further contended that the lease was though granted for storage of crude oil and finished petroleum products; but was subject to No Objection Certificate of Naval authorities; whereas, other requirements of law including the Petroleum Act were to be fulfilled.

According to him after expiry of the lease, it has been extended on the same terms and conditions and if the lease conditions are violated, KPT can always take an appropriate action. Per learned Counsel, insofar as the Plaintiff No.1 is concerned, the KPT has no relationship with this Plaintiff as the lease and other documents are in the name of Plaintiff No.2; hence Plaintiff No.1 has no right to enter into any activity on the basis of purported assignment by Plaintiff No.2. According to him the relationship between Plaintiff No.1 & Plaintiff No.2 was neither disclosed to KPT nor was it approved, therefore, the Plaintiffs are bound to comply with the conditions provided in law including No Objection Certificate from Ministry of Defence.

7. While exercising his right of Rebuttal, learned Counsel for the Plaintiffs submits that admittedly the lease is for Crude Oil and Petroleum Products; whereas, the activity is continuing without any objection for the past many years and never ever the Plaintiffs were asked by KPT to produce any No Objection Certificate from Ministry of Defence. He has further contended that insofar as KPT is concerned, they have never issued any notice to the Plaintiffs; whereas, the relationship between the Plaintiffs is not an issue before this Court and any objection to this effect is not to be entertained.

8. I have heard all learned Counsel and perused the record. It appears to be an admitted position that insofar as lease by KPT is concerned, it is valid and also provides for storage and blending of crude oil and it's finished Petroleum Products. However, there is one condition attached to it that it is subject to NOC from Naval Authorities and admittedly, no such No Objection Certificate in the name of Plaintiff No.1 has been placed on record. In fact the NOC of Naval authorities

given in the year 1995 relates to storage of Molasses and Alcohol in favor of Plaintiff No.2, and not for Crude Oil and Petroleum products. It may also be noted that the lease in question has been executed in favor of Plaintiff No.2 and not in the name of Plaintiff No.1, which in fact is an approved Oil Marketing and Blending Company. Insofar as the relationship between Plaintiff No.1 & 2 is concerned, learned Counsel has relied upon some storage Agreement dated 17.03.2014 entered into between both the Plaintiffs, however, again it is a matter of record that this Agreement has been entered into without permission of the Lessor / KPT and / or the knowledge of the Lessor. Though according to the learned Counsel for the Plaintiffs, this is not a matter in dispute; however, I am of the view that this contention is misconceived and it is not so simple to say that for the present purposes, it has no relevance. It needs to be appreciated that the area in question belongs to KPT and is a *restricted area*. Notwithstanding the fact that the lease provides for storage of Crude Oil and Petroleum Products, however, this is subject to No Objection Certificate of the Naval Authorities and secondly, it is not in the name of Plaintiff No.1. For a party coming to the Court and seeking an injunctive relief, it is mandatory to first make out a prima facie case and establish before the Court that equity demands exercising discretion in its favor for grant of the relief being sought. Once it has come on record that Plaintiff No.1, which is an Oil Company in question and who has been asked to produce requisite No Objection Certificate from Ministry of Defence, is not by itself permitted to be in possession of the area in question and is not a Lessee of KPT, then such fact by itself must go against the party asking for an injunction. It does not, at least, fulfills the criteria of making out a prima facie case.

9. Insofar as the second objection of the learned Counsel for the Plaintiffs to the effect that the 2016 Rules in question are effective 22.1.2016, and therefore, they do not apply on the Plaintiffs is concerned, it may be observed that this contention again is misconceived inasmuch as it is settled law that procedural matters can apply retrospectively and considering the fact that the premises in question is in a restricted area and exposed to danger during emergency and war conditions; hence, this argument about any retrospective application of the rules is not well founded. Insofar as reliance on the 1971 Rules and that there is no requirement of obtaining any NOC from the Ministry of Defence is concerned, this again is not only contradictory but so also is baseless and devoid of any merits. It is of pivotal importance to note that the 1971 Rules were promulgated under Section 2 of the Regulations of Mines and Oil Fields and Mineral Development (Government Control) Act, 1948; whereas, now the Oil and Gas Regulatory Authority Ordinance, 2002 (**"OGRA Ordinance, 2002"**), has been promulgated and specifically provides and deals with all issues related to oil and gas including crude oil, marketing of refined oil products, petroleum products, refined oil products, refinery as well as regulated activity. Section-22 of the OGRA Ordinance, 2002 provides that the Authority shall have the exclusive power to be exercised in the manner prescribed in the Rules, to grant, issue, renew, extent, modify, amend, suspend, review, cancel and re-issue, revoke or terminate a license in respect of any regulated activity. Whereas, Section-23 deals with grant of licenses and provides that no person shall construct or operate any pipeline for oil; construct or operate any oil testing facility; oil storage facility; or oil blending facility; construct or operate any installation relating to oil; construct or operate any refinery; undertake

storage of oil; or undertake marketing of refined oil products. In terms of Section-41, the Authority has been conferred powers to make rules and in terms thereof, 2016 Rules have been promulgated. Therefore, for all legal purposes as of today, the Plaintiff's business is to be governed under the OGRA Ordinance, 2002 read with the 2016 Rules. In the said Rules definition of blending, lubricant, lubricant marketing company, oil testing facility, petroleum products, premises, refining, storage and standard petroleum products has been defined in Rule-2 of the said Rules. In Part-II of the Rules, a Refinery is required to obtain a license; whereas, Part-III requires a Blending Plant to obtain such license and in Part-IV persons involved in transportation of oil require an OGRA's License. Lastly, in Part-V storage is provided and Rule 28 states that no person shall construct or operate any oil storage facility or undertake storage of oil for the purpose of commercial storage of crude oil or petroleum products without obtaining license from the Authority. Similarly Rule 30 provides the criteria for grant of license to construct and operate a new oil storage facility or to store oil and in Sub-Rule "b" it is provided that the applicant must be in possession of the Site and must obtain NOC of the concerned Environmental Protection Agency, District Government or the Local Government, whichever is applicable, and *Ministry of Defence*. Whole confronted the learned Counsel for the Plaintiffs, besides his objections that these Rules came into force from 2016; hence not applicable, had also raised an argument that it is applicable only in respect of a ***new oil storage facility***; whereas, the Plaintiffs facility is already a constructed facility and not a new oil storage facility in any manner; hence on this ground also, according to him, the said Rules would not apply. Again I am of the view that this contention is also misconceived and not tenable inasmuch as Rule-31

clearly provides the criteria for grant of License for ***existing oil storage facility*** and provides a period of 90 days from the date of commencement of the OGRA Ordinance 2002, for all such facilities to obtain and get approved / renewed their already existed Licenses and storage facilities. It is an admitted position that neither any compliance was made by the Plaintiffs in response to the letter of OGRA dated 28.04.2014, nor in respect of Rule-31 ibid, which in view of the above facts and discussion fully applies to the case of the Plaintiffs. In these circumstances, the argument that 2016 Rules do not apply is misconceived and is hereby repelled.

10. Moreover, it is also a matter of fact that perhaps the Plaintiff No.1, in order to avoid obtaining requisite No Objection Certificate, and knowingly that fresh construction of Oil Storage Tank Terminals is prohibited in the subject area, has taken over the facility of Plaintiff No.2, who is a Lessee of the KPT for Storage of Molasses and Alcohol, on the basis of an Agreement and a private arrangement without bringing the same to the knowledge of KPT and obtaining any permission from it. This conduct has perhaps resulted in a situation when some of the requirements of obtaining NOCs have been dispensed with for the reason that Plaintiff No.2 is already holding the area for storage of Molasses and Alcohol. It appears to be an effort of Plaintiff No.1 to circumvent the requirement of obtaining NOC from Ministry of Defence. It is also a matter of record that Plaintiff No.2 vide its Letter dated 18.09.1995, approached the Assistant Chief of Naval, Head Quarters, Islamabad for obtaining No Objection Certificate for the construction of Oil Tanks in the Oil Installation Area of Keamari, Karachi Port Trust and *undertook that they will not store any kind of inflammable material whatsoever*

*other than Molasses and Edible Oil in the proposed area of oil installation*. This Letter was written when Plaintiff No.2 was constructing the Oil Terminal and Storage Tank for the purposes of storing Molasses and Edible Oil and admittedly both these materials are not inflammable and perhaps not as much as the petroleum and crude oil is. It is a matter of record that pursuant to issuance of notices by OGRA from time to time, the Plaintiff No.1 did approached OGRA with certain fulfillment of requirements and after carrying out third party inspection was never ever able to obtain requisite No Objection Certificate from Ministry of Defence and continued with its operations without such NOC. It is also a matter of record and notwithstanding the above observations, even the Permission dated 28.04.2014 granted by OGRA for construction of Oil Terminal/Storage facility at Keamari, was subject to the condition that the Company shall obtain prior NOC from the Ministry of Defence for security point of view as well as from all other concerned departments. This document has been brought on record on behalf of OGRA through Para-6 of their written statement. Same fact was reiterated by OGRA in their counter affidavit and in the affidavit-in-rejoinder, there is no disclosure as to when the requisite NOC of Ministry of Defence was ever obtained, or if not, then how come the permission from OGRA continued and Plaintiff No.1 kept on storing crude oil and petroleum products. In fact the Counsel for the Plaintiffs was confronted to produce any such document or any effort made thereafter pursuant to the purported grant of permission on 28.04.2014, but the Counsel has not responded satisfactorily. Even otherwise as noted hereinabove, in the affidavit-in-rejoinder evasive reply has been given to this stance of OGRA and no specific response is there as to the NOC from Ministry of Defence. Lastly, if the letter of

OGRA is denied as having not been received, then under what authority and permission or license, the operations were otherwise being continued by the Plaintiff No.1 for such a long period of time.

11. In view of hereinabove facts and circumstances of this case, I am of the view that for the present purposes, Plaintiffs have failed to make out a prima facie case, whereas, balance of convenience is also not in their favor. Even if, any irreparable loss is to be caused, an injunctive relief cannot be granted on this ground alone as the other two ingredients must also be present for grant of an injunction. As noted hereinabove, the Plaintiff No.1 in fact does not appear to have any locus-standi to even carry on the business of storage in Tank Terminals leased in favor of Plaintiff No.2 and for which KPT has never granted any permission, and therefore, the question of making out a prima-facie case or for that matter balance of convenience does not arise. In view of such position by means of a short Order dated 01.04.2019, the listed application was dismissed and these are the reasons thereof.

**J U D G E**

Ayaz