IN THE HIGH COURT OF SINDH
AT KARACHI

Suit 287/2015	: M/s. Quetta Textile Mills Ltd.
Suit 852/2015	: Fashion Knit Industries.
Suit 636/2015	: Unibro Industries Ltd.
Suit 2470/2015	: Nagina Cotton Mills Limited.
Suit 698/2015	: M/s. Bari Textile Mills Pvt. Ltd.
Suit 798/2015	: M/s. Khas Textile Mills (Pvt) Ltd.
Suit 797/2015	: M/s. Silver Textile Factory.
Suit 2545/2015	: M/s. Denim International.
Suit 2620/2015	: M/s. Regal Textile Industries (Pvt) Ltd.
Suit 730/2015	: M/s. Matco Food (Pvt) Limited.
Suit 2590/2015	: M/s. Bari Textile Mills (Pvt) Ltd.
Suit 683/2015	: M/s. Hamsons Industries.
Suit 731/2015	: M/s. Sajid Textile Industries (Pvt) Ltd.
Suit 814/2015	: M/s. Al-Hadi Textile Pvt. Ltd.
Suit 749/2015	: M/s. Polani Textiles.
Suit 682/2015	: M/s. Denim International.
Suit 750/2015	: M/s. Sohni Textile Industries.
Suit 699/2015	: M/s. Al Karam Towel Industries Pvt. Ltd.
Suit 2562/2015	: M/s. Fateh Textile Mills Ltd.
Suit 662/2015	: M/s. Crescent Cotton Mills Ltd.
Suit 759/2015	: M/s. Anwar Textile Mills Ltd.
Suit 732/2015	: M/s. Al Haseeb Textiles.
Suit 640/2015	: M/s. Suraj Cotton Mills Ltd.
Suit 2439/2015	: Indigo Textile (Pvt) Ltd & Others
Suit 2529/2015	: M/s. Gatron Industries Ltd., & Others.
Suit 684/2015	: M/s. Saleem Textile.
Suit 716/2015	: M/s. Chawlatex Industries.
Suit 681/2015	: M/s. Afroze Textile Industries Pvt. Ltd.
Suit 642/2015	: M/s. Equity Textiles Ltd.
Suit 2512/2015	: M/s. Mehran Plastic (Pvt) Ltd., & Others.
Suit 767/2015	: M/s. Jubilee Spinning & Weaving Mills Ltd.
Suit 2514/2015	: M/s. Allied Industries Hub Pvt. Ltd., & Others.
Suit 657/2015	: M/s. Zahra Textile.
Suit 2606/2015	: M/s. Premium Textile Mills Limited.
Suit 2564/2015	: M/s. Liberty Mills Ltd., & another
Suit 768/2015	: M/s. Cresox (Pvt) Ltd.
Suit 638/2015	: Amin Textile Mills (Pvt) Ltd.
Suit 641/2015	: M/s. N.P Cotton Mills Ltd.
Suit 637/2015	: Surriya Textile Mills (Pvt) Ltd.
Suit 689/2015	: M/s. Nadeem Textile Mills Ltd.
Suit 715/2015	: M/s. Regal Textile Industries (Pvt.) Ltd.
Suit 799/2015	: M/s. Standard Textile Mills.
Suit 639/2015	: M/s. Diamond International Corporation Ltd
Suit 2480/2015	: M/s. Stallion Textiles (Pvt) Ltd. & Others.
Suit 853/2015	: M/s. Kassim Textile (Pvt) Ltd.
Suit 2226/2016	: M/s. Seiko Enterprises
Suit 1767/2016	: M/s. The Times Press (Pvt) Ltd.
Suit 2018/2016	: M/s Imran Crown Corks (Pvt) Ltd & another
Suit 2387/2016	: M/s. Sind Feed & Allied Products & another.
Suit 1628/2016	: M/s. GE (NAVY) Logistics & another.
Suit 188/2016	: M/s. Younus Textile Mills Ltd. & Others.
Suit 2167/2016	: M/s. Sana Industries Ltd & another
Suit 634/2016	: M/s. Al-Hamza Trading & Shipbreaking Co. & others

Suit 502/2016 : M/s Bajwa Spinning Mills
Suit 400/2016 : M/s. Al Falah Filling & CNG Station.
Suit 389/2016 : M/s. Irfan Noman Bernas (Pvt) Ltd., & another.
Suit 73/2016 : M/s. Pearl Fabrics Company.
Suit 395/2016 : M/s. Feroze 1888 Mills Limited.
Suit 747/2016 : M/s. Adnan Apparel.
Suit 1775/2016 : M/s. Asia Generation (Pvt) Limited.
Suit 702/2016 : M/s. Al-Hamza Trading Co.
Suit 1486/2016 : M/s. Sanaullah Woolen Industries & another.
Suit 88/2016 : M/s. National Spinning Mills & Others.
Suit 1672/2016 : M/s. Muhammad Makki & Co.
Suit 393/2016 : M/s. Carisons Industries (Pvt) Ltd., & Others.
Suit 387/2016 : Lucky Textile Mills Limited.
Suit 2227/2016 : M/s. Popular Food Industries (Pvt) Ltd & others.
Suit 561/2016 : M/s. Saba Textile (Pvt) Ltd., & another.
Suit 484/2016 : M/s. Al Karam Towel Industries (Pvt) Limited.
Suit 2759/2016 : M/s. Fatima Weaving Mills (Pvt.) Ltd.
Suit 787/2016 : Dewan Textile Mills Ltd., Units 1 & 2 & Others.
Suit 266/2016 : M/s. Gamalux Oleochemicals Pvt, Ltd, & Others.
Suit 142/2016 : M/s. Al Noor Oil Extraction Plant & another.
Suit 1673/2016 : M/s. Star Paper Mills (Pvt) Ltd., & Others.
Suit 1531/2016 : Sultan Oxygen (Pvt) Ltd & Others
Suit 195/2016 : M/s. Alkaram Textile (Pvt) Ltd., & Others.
Suit 2793/2016 : M/s. Asia Generation (Pvt) Ltd.
Suit 225/2017 : M/s. A & Z Agro Industries Pvt. Ltd., & another.
Suit 1030/2017 : M/s. Taqees Private Limited & another
Suit 1803/2017 : M/s. Maqsood Sons Textile Mills (Pvt.) Limited
Suit 728/2017 : M/s. Home Care Textiles & another
Suit 502/2017 : M/s. Lakhany Textile International & Others.
Suit 1615/2018 : M/s. Z.K. Industries.

..... **Plaintiffs**

Versus

Federation of Pakistan & others (in all cases).....**Defendants**

Ms. Soofia Saeed, Advocate, for the Plaintiffs in Suit Nos. 287, 640, 641, 642, 639, 662, 657, 682, 683, 684, 689, 698, 699, 715, 730, 732, 750, 759, 781, 797, 798, 799, 814, 2545, 2590 and 2620 of 2015, and Suit Nos. 73, 395, 400, 484, 502, 747, 1775 and 2793 of 2016.

Mr. Ameen Bandukda, Advocate, for the Plaintiffs in Suits Nos. 852, 853, 2606 of 2015, and Suit Nos. 188 and 634 of 2016.

Syed Mohsin Ali, Advocate, for the Plaintiff in Suit Nos. 2480 and 2514 of 2015, and Suit Nos. 88, 266, 389, 561, 702, 1531, 1673, 1767, 2387, 2759, 2793, of 2016, 225 of 728 of 2017,

Ms. Navin Merchant, Advocate, for the Plaintiff in Suit 2227 of 2016.

Mr. Naeem Suleman, Advocate, for the Plaintiffs in Suit Nos. 2439, 2512, and 2564 of 2015, and Suit Nos. 634, 1486 of 2016, 502 and 1030 of 2017.

M/s Faiz Durrani, Samia Faiz Durrani, Ghulam Muhammad and Gharib Shah, Advocates, for the Plaintiff in Suit No. 387/2016.

Mr. Arshad Husain Shahzad, Advocate, for the Plaintiffs in Suit Nos. 2529 and 2606 of 2015, Suit Nos. 195, 393, 2167, 2226 of 2016, Suit No. 1803 of 2017, and Suit No. 1615 of 2018
Mr. Muhammad Idrees Sukhera, Advocate for the Plaintiff in Suit No. 1628 of 2016

Mr. Manzoor Ahmed Arain Advocate for Plaintiff in Suit Nos. 767 and 768 of 2015.

Mr. Darvesh K. Mandhan, Advocate for the Plaintiff in Suit Nos. 1672 and 2018 of 2016.

Syed Mehmood Abbas, Advocate for the Plaintiffs in Suit No. 640 of 2015, 787 of 2016.

M/s. Anas Makhdoom and Ahmed Faraaj, Advocates, for the Plaintiffs in Suit Nos. 636, 637, 638, and 2470 of 2015.

Mr. Muhammad Anwar Kamal, AAG, for the Federation.

Mr. Asim Iqbal, Advocate for the Oil and Gas Regulatory Authority and Sui Southern Gas Company Limited, Defendants.

Date of hearing: 27.11.2019

JUDGMENT

YOUSUF ALI SAYEED, J – The respective Plaintiffs are all consumers of Sui Southern Gas Company Limited ("**SSGCL**"), each having an independent contractual arrangement for the supply of gas, and the underlying dispute between them and SSGCL essentially gravitating around the applicability of the Notifications dated 01.01.2013 and 23.08.2013 (collectively the "**Subject Notifications**") issued by the Oil and Gas Regulatory Authority ("**OGRA**"), with a question arising as to whether the Plaintiffs are "industrial consumers", so as to be billed under that head in terms of the Notification dated 01.01.2013, or do any or all of them fall under the category of "captive power", so as to then be billed in accordance with a higher tariff subsequently introduced in respect of that category by OGRA vide the Notification dated 23.08.2013.

2. For the purpose of properly framing the controversy, it is pertinent to observe that vide the Notification dated 01.01.2013, the tariff for 'industrial' consumers was set by OGRA at the rate of Rs.488.23/- per MMBTU, subject to a minimum charge of Rs.16,463.14/- per month, with the Plaintiffs admittedly being billed accordingly until the advent of the Notification dated 23.08.2013, whereby a higher tariff for the category of 'captive power' was notified at the rate of Rs.573.28 per MMBTU, subject to a minimum charge of Rs.19,330.66 per month - that latter Notification reading as follows:

"**OIL AND GAS REGULATORY AUTHORITY**
****

Islamabad, the 23rd August, 2013

NOTIFICATION

SRO (I)/2013:- In exercise of the powers conferred by sub-section (3) of Section 8 of Oil and Gas Regulatory Authority Ordinance, 2002 (XVII of 2002), and in suppression of Oil and Gas Regulatory Authority's notification No. S.R.O 01(I)/2013, dated 1st January, 2013 to the extent of natural gas sold to Captive Power by Sui Northern Gas Pipelines Limited and Sui Southern Gas Company Limited, the Authority is pleased to notify the following sale price and minimum charges, for purposes of the said Ordinance with immediate effect, as under:-

XI. Captive Power:

Sale Price:
All off-takes at the flat rate of Rs.573.28 per MMBTU

Minimum Charges Rs.19,330.66 per month

(File No.10-3 (8)/2013)

(MISBAH YAQUB)
Joint Executive Director (Finance)."

3. The Subject Notifications remained in force until superseded by OGRA's further Notification dated 31.08.2015 whereby the tariffs for 'industrial' consumers and 'captive power' were brought on par - both being notified at the rate of Rs.600/- per MMBTU, subject to a minimum charge of Rs.20,232/- per month, and the distinction between the aforementioned categories thus being negated during its subsistence. However, it is the categorization of the Plaintiffs as 'captive power' and the application by SSGCL of the tariff under the Notification dated 23.08.2013 that has prompted the filing of these Suits, with such categorization and Notification being assailed and declarations elicited accordingly along with consequential relief for refund of the excess amount charged.

4. On 27.11.2019, upon the matter coming up in Court, learned counsel for the Plaintiffs and the main contesting Defendants (i.e. OGRA and SSGCL) had jointly stated that the Suits could be disposed of on the basis of a single issue that could be determined in light of the admitted material on record, without recording evidence, and had then proceeded with their submissions accordingly. The Order of that date reads as follows:

> "Learned counsel for the Plaintiffs and the main contesting Defendants (i.e. OGRA and SSGCL) are *ad idem* that in view of the backdrop encapsulated in the Order of 30.10.2019, the only point in dispute in all these connected Suits relates to the applicability of SRO NO. 737(1)/2013 dated 23.08.2013 issued by OGRA, notifying a tariff for consumers falling under the category of 'Captive Power'. They submitted that in view of the admitted facts, no evidence is required in that regard and seek that a legal issue be framed for determination, so that the Suits may be decided on that basis. As such, by consent and with the assistance of counsel, the following issue stands framed:

> "Whether, as consumers of SSGCL, the Plaintiffs fall under the category of 'Captive Power' for the purposes of SRO NO. 737(1)/2013 dated 23.08.2013 issued by OGRA and are liable to be billed as per the tariff notified thereunder for the period that such Notification remained in force."

> Ms. Navin Merchant, appearing for the Plaintiff in Suit 2227/16 and Mr. Asim Iqbal, appearing for OGRA and SSGC, have made detailed submissions in the matter. Counsel appearing for the Plaintiffs in other connected Suits have adopted the submissions made by learned counsel for the Plaintiff in Suit 2227/16. Counsel for those Defendants also submitted that the written statement(s) submitted in Suit Number 287/2015 and some of the other connected matters were to be treated, *mutatis mutandis*, as common to all Suits. Office to make note and act accordingly for purposes of the Note dated 23.11.2019. Judgment is reserved. Counsel may submit synopses of their submissions, if they so desire, with 7 days. Interim Order passed earlier to continue till announcement in such Suits as the same may be operating."

5. Learned counsel appearing on behalf of the respective Plaintiffs submitted that they (the Plaintiffs) were all industrial concerns which utilized the gas supplied to them by SSGCL solely to generate electrical power for their own consumption and use, and pointed out with reference to the bills issued to the Plaintiffs during the validity of the Notification dated 23.08.2013 that their customer class continued to be shown as "industrial".

6. They argued that the Plaintiffs did not cease to be 'industrial' consumers and could not be categorized as "captive power" by SSGCL merely by virtue of the fact that the gas supplied was used by them for generation of electrical power for their own consumption.

7. It was contended that the Subject Notifications had come up for consideration before the Honourable Supreme Court in the context of consumers of Sui Northern Gas Pipeline Limited ("**SNGPL**") in Civil Appeals No. 159-L to 214-L of 2018 ("**SNGPL's Case**") and the question arising for determination was covered by the ensuing Judgment.

8. Conversely, learned counsel appearing on behalf of SSGCL and OGRA contended otherwise, submitting that the case of the Plaintiffs was distinguishable from that of the consumers in SNGPL's Case (Supra), and, instead, fell within the scope of the judgment of a learned Divisional Bench of this Court in the case reported as Olympia Power Generation (Pvt.) Limited vs. Sui Southern Gas Company Limited PLD 2017 Sindh 73, upholding the judgment of a learned single Judge in the case reported as Messrs Bhanero Energy Limited vs. Sui Southern Gas Co. Limited PLD 2017 Sindh 520. It was contended that the principle laid down by the Honourable Supreme Court in SNGPL's Case (Supra) would not apply to the Plaintiffs as, per learned counsel, the consumers of SNGPL whose cases had come up before the Apex Court had a single 'industrial' connection, whereas the present Plaintiffs had obtained two connections, one being 'industrial' and the other for 'power generation', with a separate Supply Agreement for Power Generation having been executed in relation thereto in the standard form in the majority of cases. It was argued that whilst the tariff prescribed in the Notification dated 01.01.2013 would be applicable to an 'industrial' connection, the tariff applicable to a connection obtained for power generation would be that prescribed for 'captive power', which, in relation to the period between 23.08.2013 and 31.08.2015, would be governed under the Notification dated 23.08.2013, and that this would be so even though the Plaintiffs were not selling any power as was surplus to their requirement.

9. Attention was invited by learned counsel appearing for SSGCL and OGRA to a compendium filed by him during the course of proceedings, containing copies of the various Supply Agreements executed between SSGCL and the Plaintiffs, with it being pointed out that that, by and large, the same bore the caption "Sui Southern Gas Company Limited Contract For The Supply of Gas For Power Generation", it being contended on that basis that the connections governed under such agreements were for 'captive power', hence the relevant connections were properly being categorized accordingly and billed as per the tariff applicable to that category. It was also pointed out that in Civil Review Petitions No. 44-L to 99-L of 2019 filed against the judgment in SNGPL's case, it had been clarified that the principle laid down in the underlying judgment would "not apply to or cover the cases of those industrial consumers who had originally obtained licenses/connections for captive power generation".

10. Learned counsel for the Plaintiffs acknowledged that in a number of cases the Supply Agreements were indeed so titled, but pointed out that in each case there was a clause restricting the use of gas by the Plaintiffs to generate power for their own industrial activity at specific premises and prohibiting the sale of power to any other party, with SSGCL being entitled to proceed with disconnection without notice in the event of a breach. It was contended that under such circumstances, the Plaintiffs power generation facility could not be regarded as a 'Captive Power Plant', within the definition of that term as per the National Electricity Power Regulatory Authority (Licensing, Application and Modification Procedure) Regulations, 1999 (the "**NEPRA Regulations**"), which, per learned counsel for the Plaintiffs, was a *sine qua non* for the tariff notified by OGRA under that head to be applied, as per the principle laid down by the Apex Court in SNGPL's Case (Supra).

11. Having heard and considered the arguments advanced at the bar in light of the Subject Notifications and the admitted material on record in the form of the Supply Agreements executed between SSGCL and the Plaintiffs as well as the bills issued during the validity of the Notification dated 23.08.2013, it merits consideration with reference to the judgment in Bhanero's case (Supra), that in that case, unlike in the matter at hand, the Court was seized of a number of suits where the claimants were apparently seeking to avail the benefit of a tariff notified for the category of 'Independent Power Projects' ("**IPPs**"), on terms that were preferential at the time to the 'industrial' category or the category of 'captive power', and were therefore seeking a declaration that they ought to be accorded the status of IPPs rather than being designated as 'captive power'. Furthermore, in another bunch of suits, the same claimants were seeking a declaration that the closure notice of gas for Captive Power and Industrial consumers did not apply to them in view of the fact that their status was yet to be decided. Their contention as to being IPP's was repelled, with the learned single Judge of this Court observing as follows:

> "15. Simply generating and selling electricity in bulk either to sister concern or to any other independent entity is not sufficient to be categorized as IPP, it rather involves further execution of documents and tests prescribed. The license issued by NEPRA for the purposes of generating, transmitting, distributing and selling of electric power would not go on to prove that they have been given status of Independent Power Producer rather in addition it is to be supplemented by implementation of agreements executed between Islamic Republic of Pakistan and the IPP such as HUBCO and KAPCO etc.. All along the period ever since the defendant was supplying gas to the plaintiffs they were treating the plaintiff company and the one to whom they are supplying the bulk energy as one or the same in terms of the documents attached with the written statement such as annexures D-1, D-4, D-5 etc. The NEPRA has further provided the list of Independent Power Producers set up under Power Policy 1994 and under Policy 2002 as annexure D-8 and D-9 and none of the plaintiffs has been defined as Independent Power Producers. Again Natural Gas

Allocation and Management Policy 2005 does categorize two sets of users/consumers and the Captive Power were not given the privilege of having an uninterrupted gas supply yet they continued. These categories of power producers were in existence since 1994 when the power policy as was introduced. Despite these notifications and policies creating CPP and IPP the plaintiffs have never objected to their status as being of Captive Power/Industrial.

16. The defendant is no one to adjudge their status. The agreement i.e. available on record is purely for gas supply for industrial use. If at all the plaintiffs consider themselves to be Independent Power Producers they should have objected and sought inclusion of their names when the list was issued by the NEPRA if not in 1994 then at least in the year 2002 as apparently their agreement for supply of gas for industrial use was executed on 23.1.1995."

12. The learned single Judge in Bhanero's case (Supra) then went on to examine the dichotomy between a Captive Power Plant and an IPP, observing that:

"18. The Captive Power Plant is defined as those industrial undertakings or other businesses carrying out the activity of power production for self-consumption, who intends to sell the power, surplus to their requirements, to an entity or bulk Power Consumer whereas an Independent Power Producer generally involves generation facility set up by the private sector with the facilitation of the Governmental Agencies and provided with Government concessions including but not limited to Sovereign Guarantee Coverage, long terms contact with the Power Purchaser, execution of the project agreements. These entities IPPs have been offered incentives including exemption from duties and taxes and pass through custom duties, insurances, fuel cost, indexation and adjustments. These Independent Power Producers after executing all such agreements provide their energy being produced by them either to the national grid or to Bulk Power Consumers through national grid. The distinction between Captive Power and Independent Power Producer seems to be justified and logical as any corporate entity for the purpose of their sole benefit may incorporate any company for uninterrupted supply of energy to their sister concern and may at the same time claim concession as being Independent Power Producers which would not provide a fair opportunity to all other entities to thrive in this competitive market. Certainly these prerogative/concessions and indulgence are for the

> Independent Power Producers which provide energy to the National grid to overcome shortfall irrespective of their interest as to whom this energy is being provided. If they are allowed to sell electricity to the consumers of their choice and yet claim all sorts of concession then it could not justify the reasoning of creating IPPs who are to cater National Grid. The reasoning and the logics assigned to all such classes such as IPP, CPP and SPP are hence justified."

13. As such, it is apparent that Bhanero's case (Supra) is not germane to the present dispute, since the question presently arising for determination was not a point that arose for consideration before the learned single Judge, or, by extension, in Olympia's case (Supra), it being observed by the learned Divisional Bench in that matter as follows:

> "As it could be rightly seen from the foregoing, the entire dispute before the learned Single Judge was whether the appellants qualify to be treated as IPP or not? It could be noted that extensive rationale has been given in the impugned judgment where the learned Single Judge has eloquently discussed as to what amounts to be an IPP and by mere supplying electricity to their sister concern or to any third party a company producing electricity does not acquire the status of an IPP.
>
> As evident from the foregoing, IPPs and CPUs (or industrial units) are different breed of industrial undertakings and separate laws and procedures regulate them. Therefore, the appellants could not be provided any benefit accorded to IPPs in any form including special rates or manners (interruptability) at which gas or other supplies are provided to IPPs."

14. On the other hand, the judgment in SNGPL's Case relates to the Subject Notifications and specifically addressed the question of whether manufacturers using natural gas for generating in-house electricity for self-consumption are to be categorized as "industrial" or "captive power" for purpose of the separate tariffs notified thereunder, with the Apex Court observing as follows:

"The pivotal question before us is whether respondent consumers of natural gas, engaged in the manufacture of paper, paperboard, textiles and chemicals, generating in-house electricity for self-consumption, with or without co-generation (technology), are to be categorized as "Industrial" consumers or "captive power" consumers, for the purposes of tariff (sale price of natural gas) notified under section 8(3) of Oil and Gas Regulatory Authority Ordinance, 2002 ("**Ordinance**") in terms of Notifications dated 01.01.2013 and 23.08.2013, respectively?

2. As a matter of background, respondent companies entered into contracts for the supply of natural gas with Sui Northern Gas Pipelines Limited (SNGPL) and are, therefore, "retail consumers of natural gas" under the Ordinance. These contracts were for supply of natural gas, primarily for Industrial use, with further sub-usage of natural gas for in-house electricity generation facility installed within the Industrial consumer for captive power only for self-consumption). This in-house generation facility is either on co-generation technology or otherwise Cogeneration technology helps use the single supply of natural gas for dual purposes i.e, for industrial use, as well as, for generation of electricity for self-consumption.

3. On the advise of the Federal Government, OGRA notifies the price of natural gas (tariff) for each category of retail consumer. "Category of retail consumers for natural gas" means category of retail consumers of natural gas designated as such by the order of the Federal Government. Since 2013, Respondent Industrial consumers have been paying tariff as "Industrial" consumers under Notification dated 01.01.2013. At this point of time, both categories of "industrial" and "captive power" had the same tariff (i.e Rs.488.23 per MMBTU). The issue arose after Notification dated 23.08.2013, when tariff under the category of the "captive power" was enhanced to Rs.573.28 per MMBTU. SNGPL sought clarification from OGRA regarding the tariff applicable to the respondent industrial consumers using co-generation. OGRA through reply dated 11.07.2014 clarified that respondent consumers (with co-generation) were liable for the enhanced tariff under the category of "captive power". As a consequence, SNGPL raised a demand from the respondent industrial consumers on 05.08.2014 for the enhanced tariff, treating them in the category of "captive power" consumers.

4. The Impugned demand raised by SNGPL vide letter dated 05.12.2013 was challenged before the Lahore High Court, in the first round of litigation, but the matter was referred to OGRA, which decided the issue against the respondent industrial consumers on 14.01.2016. In the second round of litigation, the decision of OGRA and its earlier clarification vide letter dated 11.07.2014 were

challenged before the Lahore High Court, which decided the matter in favour of the respondent consumers vide impugned judgment dated 09.01.2018, categorizing respondent consumers as "industrial" consumes instead of "captive power" consumers. Hence, these appeals filed by SNGPL with leave of the Court granted on 19.11.2018.

5. We have heard the learned counsel for the parties and have gone through record of the case. At the very outset we have noticed that Federation or OGRA has not assailed the impugned judgment of the High Court. The tariff structure is determined and regulated by OGRA under the advice of the Federal Government. Categories of retail consumers of natural gas, in particular, are determined by the order of the Federal Government. Federation and OGRA, being the co-authors of the tariff and its categorization, have not challenged the judgment of the High Court, implying acceptance of the definition of "Captive Power" as determined by the High Court. Even the learned counsel appearing on behalf of the Federation or OGRA did not lay any serious challenge to the impugned judgment. Secondly, we have noticed that the litigation before OGRA and the High Court has been primarily regarding captive power employing cogeneration technology. The correspondence between SNGPL and OGRA is also pertaining to cogeneration. However, there are industrial consumers before us who have captive power facility for self-consumption without cogeneration. The High Court while deciding the matter on the basis of the definition of "Captive Power" under NEPRA Regulations dealt with both the classes of captive power i.e., with or without cogeneration.

6. We have examined these cases in the general context of the question that prefaces this judgment and in the process have considered the difference between two classes of captive power for self-consumption i.e., with or without cogeneration; import of the definition of "captive power plant" from another law; and underlying policy dimension of the issue before us.

7. We take up the definitional issue first. Regulation 2(k) of the National Electricity Power Regulatory Authority (Licensing, Application and Modification Procedure) Regulations, 1999 ("**NEPRA Regulations**") provides as follows:-

"**Captive Power Plant** means Industrial undertakings or other businesses carrying out the activity of power production for self-consumption, who intend to sell the power, surplus to their requirement, to a distribution Company or bulk-power consumer," (emphasis supplied)

As there is no sale of surplus power/electricity by the respondent industrial consumers, the in-house facility of electric generation for self-consumption or captive power, purely for self –consumption, for the purposes of the NEPRA Regulations do not fall in the category of "captive power." First, we have noticed that Federation and OGRA (the co-authors of the tariff structure under the Ordinance) have not challenged the impugned judgment implying acceptance of the definition as given in NEPRA Regulations. Second, learned counsel for the appellant or the counsel for the respondent Federation or OGRA have not pointed us towards any definition or explanation of "captive power" provided by OGRA as a regulator. Third, the terms "captive power" is common to both NEPRA and OGRA as both the Regulators tend to regulate this category in one form or the other. This interrelatedness of the two statutes in the context of "captive power" makes the cross contextual reference to Regulation 2(k) of the Regulations, permissible.

8. It has been pointed out by the learned counsel for the appellants that every retail consumer of natural gas falls under one of the categories specified by the Federal Government, for the purposes of tariff, and is then liable for the corresponding tariff. There is no provision allowing for the categorization of a single consumer under multiple categories or multiple gas meters for a retail natural gas consumer. With this limitation, the test to categorize a retail consumer is by considering the core business of the retail consumer. In the present case, the respondent consumers are in the core business of manufacturing paper, paper-board, textile and chemicals, therefore, the contracts for supply of natural gas with SNGPL, in these cases, are for industrial use.

9. Other than the definitional issue, we have noticed that the installation of in-house facility of electricity generation for self-consumption (with or without cogeneration) in an industrial unit is at best a part of the mechanical and industrial process of the respondent consumer, which helps improve its efficiency and profitability. With the single category and single meter requirement of the tariff structure, multiple usage of natural gas within the industrial unit (for the industry and the captive self-consumption) is an internal arrangement of the consumer; therefore, only core business of the consumer is to be recognized for the purpose of categorization. In other words, addition of a captive power for self-consumption to the industrial process of the respondent consumer does not alter the category or the tariff of the industrial consumer, unless and until the "captive power plant" assumes its own commercial identity and sells electricity to a third party duly licensed by NEPRA.

10. Natural Gas Allocation and Management Policy, 2005 ("Policy") provides the following in paragraph 3.1.6:-

"3.1.6 Gas supply to all consumers in Captive Power Sector will be made after first meeting the requirement of Domestic, Fertilizer, Commercial, Industrial, and Power (both WAPDA / KESC and IPPs) Sectors on the following basis;

a. Those dual fired power plants with a capacity of upto 50 MW, which employ combined cycle or cogeneration technology, shall be encouraged for allocation of gas. In order to ensure the optimal gas use for power generation, industrial units collectively setting up merchant power plants for self-consumption only will also be included in this category.

b. Gas supply for self-power generation would be on "as and when available basis" at different locations.

c. The pipeline extension, if required, would be at the cost of the sponsor of the industrial unit."

The above paragraph deals with prioritizing allocation of natural gas for the Captive Power Sector and states that any power plant for self-consumption will be included in the "Captive Power Sector," meaning thereby that it is not already under the said category and will be so considered for the purposes of allocation. This again supports the definition of NEPRA Regulation. Besides, the Policy has no correlation with tariff and is limited to allocation of natural gas to various sectors.

11. It is clarified that demand raised against the respondent industrial consumers, on the basis of the tariff applicable to captive power is w.e.f 23.08.2013 till 31.08.2015 instead of 30.06.2014 as noted by the High Court. This is because, vide Notification dated 31.08.2015 tariff for categories of "Industrial" and "Captive Power" has been brought at par i.e., Rs. 600 per MMBTU.

12. Categorization of natural gas consumers is a policy issue but if its application infringes the fundamental rights of the consumers, the courts do step in. In the present case, as explained above, the tariff policy or tariff structure in the context of "captive power" is unclear, confusing and deficient, resulting in infringing the fundamental rights of property and business of consumers under the Constitution. Courts are well within their rights to interfere and correct the wrong, in the absence of any clarification from the authorities concerned.

> 13. Federation and OGRA may want to review the tariff structure and clearly provide the basis of categorization, factoring in technologies like cogeneration and distinguish between an industrial process and an independent business unit e.g. a captive power plant that also sells electricity.
>
> 14. On the basis of the record before us, we conclude that respondent consumers with a contract for supply of natural gas for industrial use and having in-house electricity generation facility for self-consumption (with or without cogeneration) fall in the category of industrial consumers and are subject to the corresponding tariff, unless the generation facility is a Captive Power Plant as per NEPRA Regulations. For the above reasons, we find no reason to interfere with the judgment of the High Court, which is, therefore, upheld and these appeals are dismissed."

15. Apropos the matter, from a reading of the judgment in SNGPL's Case, it is apparent that the use of natural gas by an industrial consumer for 'power generation' is not the sole determinant for the test of whether such usage is to be categorized as 'Captive Power'. Indeed, the definition of a 'Captive Power Plant' under the NEPRA Regulations reflects that a key ingredient is that of intent to sell the power that is surplus to the consumers own requirement to a distribution Company or a bulk-power consumer.

16. As such, in the case of an in-house facility of power generation by an industrial consumer purely for self-consumption, where there is no sale of surplus power, the consumer would not fall in the category of 'captive power' for purpose of the NEPRA Regulations. The mere fact that in the present case the Supply Agreements of the consumer(s) are titled as being for 'Power Generation' rather than 'Industrial Use' is not of any particular consequence, as in substance the said Agreements expressly confine the use of the power generated to the consumers own industrial activity and militate against the sale of surplus power to any third party in the following terms:

> "The Company shall supply gas for power generation against unconditional undertaking by the consumer that power so generated will be used only at the above mentioned premises of the consumer will be for his own industrial activity and will not be sold to any other party. In the event of violation of this condition gas supply will be disconnected without notice and entirely at the risk and cost of the consumer."

Furthermore, it has also been specified in the particular Supply Agreements that no priority as to supply will be extended and, on the contrary, the Plaintiffs have been put on notice to make dual firing arrangements in preparedness of the periodic unavailability of gas.

17. From the aforementioned clause, it is apparent that the very Supply Agreements are not in consonance with the concept of 'Captive Power', as envisaged under the NEPRA Regulations, nor was it contended that the gas connections had been obtain in relation to licenses issued by NEPRA to the Plaintiffs for that category. As such, the connections of the Plaintiffs cannot be said to have originally been obtained for the purpose of 'captive power generation' and do not fall within the clarification made vide Civil Review Petitions No. 44-L to 99-L of 2019, which is only to that extent and therefore appears to exclude the benefit of the underlying judgment only to those consumers who had originally obtained connections that properly fall within the scope of 'captive power', but then nonetheless subsequently claim shelter under the lower 'industrial' tariff on the ground that they had since ceased sale of their surplus power, hence ought to benefitted accordingly.

18. However, under the given framework of these Suits, no intention to sell surplus power can be discerned on the part of the Plaintiffs, either at the time of their contracting with SSGCL in terms of the Supply Agreements or thereafter, and it is apparent that their in-house power generation in accordance with those Agreements does not meet the test of what constitutes a 'Captive Power Plant' for purpose of the NEPRA Regulations so as to attract the tariff for 'Captive Power'. Furthermore, no allegation as to any breach of the aforementioned condition set out in the Supply Agreements has been advanced, and in fact it was conceded by learned counsel for SSGCL that all of the Plaintiffs had remained and continued to be compliant in that respect. *A fortiori*, the Plaintiffs could not then have been migrated by SSGCL from the industrial tariff under which they were being charged in terms of the Notification dated 01.01.2013 to the higher tariff for 'Captive Power' subsequently introduced by OGRA in terms of the Notification dated 23.08.2013.

19. For the foregoing reasons, the issue framed for determination in these Suits is answered in the negative, and the Suits are accordingly decreed in favour of the respective Plaintiffs(s) with it being declared that for purposes of the Subject Notifications, the Plaintiff(s) properly fall within the category of industrial consumers rather than 'Captive Power', and remained subject to the industrial tariff in terms of the Notification dated 01.01.2013 rather than the tariff prescribed under the Notification dated 23.08.2013, with SSGCL consequently being directed to adjust/refund any excess amount(s) as may have been received by billing the Plaintiffs as per the latter Notification during its subsistence.

JUDGE

Karachi
Dated _____