

**HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

R.A. No. 335 of 2023

Applicant : Oil & Gas Development Company Ltd, through Muhammad Hashim Leghari, Advocate

Respondent No.1 : M/s. Shah Latif CNG through Zubair Ahmed and Ayatullah Khowaja, Advocates

Intervener (M.A. 899/24) : Seico Private Limited, through Ali Akbar Junejo, Advocate

Intervener (M.A.1654/24) : Data Engineering Private Limited, through Muhammad Arshad S. Pathan, Advocate

Date of hearing : 26.04.2024, 30.04.2024 and 14.05.2024

ORDER

YOUSUF ALI SAYEED, J.- This Revision stems from F.C. Suit No. 1025 of 2023 pending before the 3rd Senior Civil Judge Hyderabad (the “**Suit**”) filed by the Respondent No.1, impugning a notice dated 06.07.2023 issued by the Applicant, inviting bids from parties interested in purchasing low pressure gas from the Pasakhi Gas Field situated in District Hyderabad, Sindh, where an Application filed by said Respondent under Order 39, Rules 1 and 2 CPC to forestall the auction and preserve the continuation of its business activities was dismissed vide an Order dated 19.07.2023, but Civil Miscellaneous Appeal No. 17 of 2023 preferred in the matter by the Respondent No.1 was then allowed by the 9th Additional District Judge, Hyderabad on 24.10.2023, with that Order thus being impugned through this proceeding.

2. The backdrop to these proceedings, to the extent relevant from the standpoint of the aforementioned application, is that following a tender process where the Respondent No.1 had proven successful, the Applicant and Respondent No.1 had entered into an Agreement on 11.11.2015 for the sale/purchase of Low-Pressure Gas from the Pasakhi (Additional) Field, with Clause 3.1 thereof providing for the supply of 0.25-0.30 MMSCFD during the term thereof, which was specified in Article II as being 3 years.

3. That Agreement came to be extended vide addenda executed between the parties from time to time, as chronicled in the recitals to Addendum-IV dated 11.07.2023 ("**Addendum-IV**"), being the last such supplement, which read as follows:

“WHEREAS, the Parties have executed Pasakhi (Pasakhi-I/Pasakhi Additional) Field Low Pressure Gas Sale/Purchase Agreement" Original Agreement" on November 11, 2015 for a period of three (03) years (effective from November 11, 2015 upto November 11, 2018),

WHEREAS, the Parties have executed Addendum-1 dated July 23, 2020 to Pasakhi (Pasakhi-I/Pasakhi Additional) field Low Pressure Gas Sale/Purchase Agreement to extend the Agreement for a period of three years w.e.f. November 11, 2018 to November 10, 2021.

WHEREAS, the Parties have executed Addendum-II dated September 14, 2021 to Pasakhi (Pasakhi-I/Pasakhi Additional) field Low Pressure Gas Sale/Purchase Agreement to extend the Agreement for a period w.e.f. November 11, 2021 to September 19, 2022,

WHEREAS, the Parties have executed Addendum-III dated September 05, 2022 to Pasakhi (Pasakhi-I/Pasakhi Additional) field Low Pressure Gas Sale/Purchase Agreement to extend the Agreement for a period w.e.f. September 20, 2022 till such time the re-auction process for sale of gas from Pasakhi Field, as per company procedure under the Flare Gas Guidelines 2016 is completed and further gas becomes available to either the existing or a new buyer under a new GSPA.

AND WHEREAS, the Parties hereto by mutual consent have determined and agreed to this Addendum-IV and amended certain terms of the Agreement as clearly mentioned and defined here.”

4. As it transpires, Clause 3.1 of the Agreement was amended through Addendum-IV, the substantive provisions of which envisaged that:

"Subject to Articles-VIII, X and XIII of this Agreement, the Seller shall supply to the Buyer a total quantity of approximately upto 1.4 mmscfd including the additional quantity of 0.7-0.8 mmscfd subject to its availability for sale till such time the re-auction process for sale of gas from Pasakhi field, as per company procedure under the Flare Gas Guidelines, 2016 is completed and further gas becomes available to either the existing or a new buyer under a new GSPA".

Except as expressly modified through this Addendum IV, all other terms and conditions of the Agreement dated November 11, 2015, Addendum-I dated July 23, 2020, Addendum-II dated September 14, 2021 and Addendum-III dated September 05, 2022 shall remain unchanged, enforced, effective and applicable to the parties hereto."

5. Be that as it may, upon publication of a notice by the Applicant on 06.07.2023, inviting bids from parties interested in purchasing low pressure gas from the Pasakhi Gas Field, the Respondent No.1 resorted to the Suit, praying *inter alia* that the trial Court be pleased to:

- "a) Declare that Notification/advertisement dated 06-07-2023 and any other publication (if any) for auctioning the sale of gas at Pasakhi gas field Hyderabad for approximate quantity of 1.4 MMSCFD is void, illegal, unlawful and in contravention of the policy, rules and sops for the sale of flare gas.
- b) Declare that as per SOPs agreement reached between the plaintiff and defendant for additional flare gas of approximate quantity of 0.8 MMSCFD shall be for 5 years period initially or reservoir life whichever is earlier.
- c) Grant Permanent injunction against the Defendant restraining them from causing any disturbing in carrying on business by plaintiff over Pasakhi Gas Field under legal contracts and restrain the defendants, their agents, men whatsoever from auctioning gas over the Pasakhi gas field Hyderabad.
- d) ..."

6. The underlying Application under Order 39, Rules 1 and 2 CPC was filed by the Respondent No.1 within that framework, seeking that the Court

“...be pleased to grant ad- interim injunction against the defendants, restraining and prohibiting them from causing any interference into peaceful possession/operations/ Business activities of the plaintiff and further they may be restrained from auctioning or any other publication (if any) for auctioning the sale of gas at Pasakhi gas field Hyderabad any manner whatsoever may be by themselves through men, agents, servants or any other person, except after due process of law pending disposal of the suit.”

7. That Application was dismissed by the trial Court on 19.07.2023 in view of Addendum-IV, with it being observed that it clearly envisaged that the arrangement between the parties was “enforceable till re-auction process for the sale of Gas from the Pasakhi field...” and under such circumstances an injunction was barred under Clauses (d) and (F) of Section 56 of the Specific Relief Act.

8. However, the Appellate Court was then pleased to take a contrary view while making the impugned Order, the operative part of which reads as under:

“5. From perusal of the record it appears that appellant filed this suit alongwith all documents and the veracity of documents be scrutinize by the trial court at the time of evidence. At this stage while hearing injunction application court only make tentative assessment, moreover court have to observe whether three conditions regarding the grant of temporary injunction are existing.

01. Prima Facie case, meaning Prima Facie case meant arguable case.

02. Balance of conveyance means whether it is creating in- connivance to a party.

03. Irreparable loss means any loss which could not be compensated.

6. I am of the humble view that all the three ingredients are existing in favour of the appellant who has filed the instant appeal for injunction. In the case in hand the averments made in the plaint and allegations leveled against the respondents are serious in nature and shows reasonable concern and grounds that huge investment being wasted if temporary injunction shall not be granted. However, the performance of contract on the part of appellant is revealed satisfactorily as apparent from extensions of subsequent addendums between both parties, in the light of above discussion I am of the humble view that the appellant have a good prima facie case and balance of convenience, also lies in his favour by granting of temporary injunction, while at this stage refusal of granting, temporary injunction would certainly cause irreparable loss to the appellant which could not be compensated in any manner. Consequently, the impugned order dated 19.07.2023 is hereby set-aside; the appeal in hand is allowed accordingly.

9. Proceeding with his submissions, learned counsel for the Applicant contended that the Appellate Court had failed to appreciate the scope of the Agreements executed between the parties, particularly Addendum-IV. He argued that the procurement process advertised and sought to be undertaken by the Applicant was in consonance with the understanding encapsulated in Addendum-IV and in keeping with the Standard Operating Procedure (“**SOP**”) devised by the Applicant on 02.08.2002 for the Sale of Flare Gas (Low Pressure Gas) From Oil & Gas Producing Fields, in light of the Flare Gas Utilization Guidelines 2016 notified by the Ministry of Petroleum and Natural Resources, Government of Pakistan, vide SRO107(I)/2017, as published in the Gazette of Pakistan on 20.02.2017. It was also pointed out that the Respondent No.1 had participated in the auction proceedings, with it being argued that it was thus estopped from challenging the procurement process. It was prayed that the impugned Order therefore be set aside.

10. By way of opposition, it was contended on behalf of the Respondent No.1 that a substantial investment had been made on the strength of the Agreement dated 11.11.2015 and addenda that followed, which would be set at naught if the arrangement was not continued. Learned counsel for the Respondent No.1 relied on the SOP, particularly Clauses 8.1, 11.1 and 11.2 thereof, to argue that the actions of the Applicant ran contrary to what was envisaged therein and that the Respondent No.1 was therefore entitled to an injunction. He argued that those clauses of the SOP operated so as to confer a subsisting right in favour of the Respondent No.1, as espoused in terms of Prayer Clause (B), hence the proposed auction was misconceived and further proceedings in pursuance thereof ought to remain stayed pending final determination of the Suit. However, on query posed, it was conceded that the Respondent No.1 had participated in such auction proceedings, but remained unsuccessful.

11. Two separate corporate entities also submitted their Applications under Order 1, Rule 10 CPC seeking to be joined as respondents, one on the ground that it was the successful bidder in the auction that had been conducted pursuant to the tender process and which had since been stayed by the Appellate Court, while the other sought to argue that it had entered into contractual relations with the Respondent No.1 for the onward supply of gas for own its commercial operations. As such, while one intervener sought to support the Applicant, the other sought to support the Respondent No.1, but on query posed learned counsel appearing on their behalf candidly conceded that neither entity had even applied as yet to the trial Court to be added as a party to the Suit.

12. Having heard the arguments and examined the material placed on record, it merits consideration that the decision to grant or refuse an interlocutory injunction is a discretionary exercise, and an appellate court must not interfere solely because it would have exercised the discretion differently. As such, the scope of inquiry in the exercise of appellate jurisdiction is not to second guess the exercise of judicial discretion by the trial Court, but to merely be satisfied that such exercise was judicious, in terms of being reasonable.

13. On that very score, a learned Divisional Bench of this Court observed in the case reported as *Roomi Enterprises (Pvt.) Ltd. v. Stafford Miller Ltd. and others* 2005 CLD 1805 that:

‘The Court at this stage acts on well-settled principle of administration on this form of interlocutory remedy which is both temporary and discretionary. However, once such discretion has been exercised by the trial Court the Appellate Court normally will not interfere with the exercise of discretion of Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored certain principles regulating grant or refusal of interlocutory injunction. The Appellate Court is not required to reassess the material and seek to reach a conclusion different from one reached by the Court below solely on the ground that if it had considered the material at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner, same should not be interfered in exercise of appellate jurisdiction.’

14. The function of an appellate court in such a case was also considered by Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, with it being observed that:

“An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge’s grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship’s House, is not to exercise an independent discretion of its own. It must defer to the judge’s exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge’s exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge’s decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge’s exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.”

15. The same view was taken in *Garden Cottage Ltd. v. Milk Marketing Board* (1984) 1 A.C. 130, where the House of Lords was seized of a matter where the Court of Appeal had interfered with the refusal of the commercial judge to grant an injunction in the exercise of his discretion. Again, Lord Diplock observed that an appellate Court must defer to the trial Judge's exercise of discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. Whilst discharging the injunction granted by the Court of Appeal, it was reiterated that:

... The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstance after the judge made his order that would have justified his according to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so abhorrent that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

16. As such, it is manifest that where on a consideration of the respective cases of the parties and the documents laid before it, the Court of first instance has refused an injunction, an appellate Court ought not to interfere with the exercise of discretion unless such exercise is found to be palpably incorrect or untenable. In other words, as long as the view of the trial Court is a possible view, the Appellate Court ought not to interfere with the same.
17. In the matter at hand, the reasons that weighed with the learned trial Court, as noted, were grounded in law and do not indicate that the view taken for withholding an injunction was capricious or untenable.

18. On the contrary, the impugned Order of the Appellate Court appears to lack proper reasoning in as much as the learned ADJ has merely stated the ingredients for the grant of an injunction without dwelling into the facts of the case so as to make any assessment as to how those ingredients are satisfied under the given circumstances. Indeed, the initial Agreement and each Addendum that followed specified a defined term, with Addendum-IV then contemplating continuation of supply until completion of a reauction process, hence, prima facie, that Agreement does not confer any right beyond what appears to have been contemplated and agreed to. The assertion flowing from Prayer Clause (B) that the SOP serves to advance the cause of the Respondent No.1 so as to confer a right for a period of 5 years or the life of the reservoir, whichever be earlier, also appears fallacious in as much as the SOP merely sets out the Applicant's own procedural mechanism for moving onwards and does not represent an agreement between it and the Respondent No.1. Even if it were to be accepted that the SOP operates so as to bind the Applicant from the date that the same came into being (i.e 02.08.2002), it is apparent that Clauses 8.1, 11.1 and 11.2 thereof do not operate in the manner that has been asserted by the Respondent No.1, in as much as the cited clauses provide that:

8.1 Commercial Department will process the case for auction by preparing TORS along with draft Gas Sale Purchase Agreement (GSPA). Previously initial agreement term in GSPAs was fixed for three (03) years, however given the cost involved in setting up the initial infrastructure the term of the initial agreement may be fixed for five (05) years or the reservoir life whichever is earlier. Clause-5 of the Flare Gas Policy 2016 defines separate regime of gas sale and purchase agreement to be notified by the regulator, OGDCL vide letter dated 6th August, 2020 asked OGRA for the model GSPA. In response OGRA vide letter dated 1st September 2020 clarified that no such model GSPA has been provided, therefore GSPAs finalized & executed between the buyer and seller be submitted to OGRA. The company will follow the same process for compliance till such time the model GSPA is provided by the Regulator.

11.1 Commercial Department will process the case well before expiry of the existing contract. However in order to avoid flaring of gas, the sale of gas to the existing buyer may be continued on the same terms and conditions of the original GSPA by signing an immediate addendum duly approved by the competent authority till such time the already initiated negotiations/process of sale of gas as per company procedure and under. Flare Gas Guldelines-2016 is completed and further gas becomes available to either the existing or a new buyer under a new GSPA.

11.2 In number of cases, OGDCL has previously entered into contract with buyers till life of the reservoir. In case of expiry of the existing contract, the reservoir is no more supportive for further term of five (05) years, then the existing contract may be extended with the same buyer through an addendum for the reservoir life at a negotiated price.

19. From a plain reading of those clauses, it can at best be gathered that contracts henceforth arising out of the tender process contemplated in terms of Clause 8.1 would be for a period of 5 years, and that if it came to the fore upon the expiry of such a contract that the life of the relevant reservoir could not support a further 5-year period, then the existing contract may be extended with the same party for the life span of the reservoir at a negotiated price. However, in the instant case, the arrangement between the parties had even otherwise already been in place for well over 5 years when Addendum-IV was executed, the terms of which appear to be in accordance with Clauses 8.1 and 11.1, and it not even having been asserted that the life of the particular reservoir is such as would trigger Clause 11.2.

20. As for the general assertion in the plaint regarding a substantial investment having been made by the Respondent No.1 for purposes of the Agreement and that the same would be imperiled if the arrangement thereby put in place were to be discontinued, no details have been set out as to the nature of such investment in the form of plant and machinery beyond a generalized reference to the installation of compressors, generators, pipe lines, and civil works, etc, and it cannot be said that the same entirely represents a sunk cost. Even otherwise, that aspect ought to have been within the contemplation of the Respondent No.1 when entering into the initial Agreement and to have been borne in mind at the time of executing Addendum-IV.
21. In view of the foregoing, it is apparent that the impugned Order reflects a flawed approach on the part of the Appellate Court which fails to properly consider and apply the principles laid down by the superior Courts relating to temporary injunctions, hence presents a material irregularity in the exercise of jurisdiction.
22. That being so, the Revision stands allowed with the impugned Order of the Appellate Court being set aside.

JUDGE

Karar_Hussain/PS*

