

ORDER SHEET
HIGH COURT OF SINDH AT KARACHI

**Suit No. 75, 254, 321, 346, 347, 461, 503, 672, 820,
831, 832, 850, 880, 978, 1146, 1147, 1148, 1149
1713, 1714, 1726, 1737, 1738, 1749, 1753, 1760,
1761, 1799, 1804 and 2345 of 2017**

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Present:

Mr. Justice Muhammad Ali Mazhar

1. M/s.Rashid Silk Mills
2. M/s.Dairyland (Pvt.) Ltd. & another
3. M/s.Ismail Industries Ltd.
4. Anoud Textile Mills Ltd.
5. Anoud Power Generation Limited.
6. M/s.Popular Food Industries (Pvt.) Ltd. & others.
7. M/s.Hassan Ali Rice Export Co. Ltd. & another
8. M/s.English Biscuit Manufacturers (Pvt.) Ltd.
9. Pakistan Beverage Pvt. Ltd. & others
10. Lucky Textile Mills Ltd.
11. Yunus Textile Mills Ltd.
12. M/s.Orient Textile Mills Ltd. & others
13. Sukkur Beverages Pvt. Ltd.
14. M/s.Nadeem Textile Mills Ltd. & others
15. Al-Muqet Textile (Pvt.) Ltd.
16. Beltexco Limited
17. Prime Safety Limited.
18. Feroze1888 Mills Ltd.
19. M/s.Fateh Textile Mills Ltd. & others.
20. M/s.Al-Momin Packaging Ind. Pvt. Ltd. & others
21. Metco Textile Mills (Pvt.) Ltd.
22. Zahra Textile
23. Premium Textile Mills Ltd.
24. M/s.Indus Dyeing & Mfg. Co., Ltd. & others
25. Mekotex (Pvt.) Ltd.
26. Kassim Textile (Pvt.) Ltd.
27. M/s.Lucky Cement Ltd.
28. Sami Pharmaceuticals (Pvt.) Ltd. & others.
29. Naveena Industries Ltd. & others
30. Khurram Salman.....Plaintiffs

Versus

Federation of Pakistan & others.....Defendants

For hearing of Injunction Applications [CMAs No.445, 1398, 1752, 1942, 1944, 3627, 3895, 2503, 3224, 5243, 5246, 5350, 5029, 6052, 7260, 7263, 7266, 7269, 10420, 10428, 10505, 10550, 10553, 10606, 10621, 10636, 10641, 10819, 10858 & 15522 of 2017].

Date of hearing: 30.11.2017 and 28.5.2018

Mr. Ovais Ali Shah, Advocate for the Plaintiffs in Suit No.820/2017.

Mr. Faiz Durrani & Ms. Samia Faiz Durrani, Advocates for Plaintiffs in Suit Nos. 831, 832, 1146, 1147, 1148, 1149, 1726, 1737, 1738, 1753, 1760 and 1761 of 2017.

Mr. Ameen M. Bandukda & Mr. Salman Ahmed, Advocate for Plaintiffs in Suit Nos.1799 & 1804 of 2017.

Mr. Shahzad Nizam, Advocate for Plaintiff in Suit No.880/2017.

Syed Mohsin Ali, Advocate for Plaintiffs in Suit Nos. 850, 978, 1713, 1714 & 1749 of 2017.

Mr. Abid Naseem, Advocate for Plaintiff in Suit Nos. 346 & 347 of 2017.

Ms. Navin Merchant & Mr. Salman Yousuf, Advocates for Plaintiffs in Suit No.461/2017.

Mr. Shahzad Rahim, Advocate for Plaintiff in Suit No.672/2017.

Mr. Naeem Suleman, Advocate for Plaintiff in Suit Nos.75, 254, 321 & 503 of 2017.

None present for the plaintiff in Suit No.2345/2017

M/s. Asim Iqbal, Farmanullah Khan, Tahir Abbasi, Akbar Sohail & Ms. Maryam Riaz, Advocates for Defendant (Sui Southern Gas Company Ltd.)

Mr. Salman Talibuddin, Additional Attorney General along with Ms. Alizeh Bashir, Advocate.

Mr. Abdul Qadir Leghari, Assistant Attorney General.

Muhammad Ali Mazhar, J. These civil suits have been brought to entreat declaration that the plaintiffs are entitled to uninterrupted supply of natural gas and the disruption/closure by the defendant on Sundays and/or holidays is unlawful. The plaintiffs have also moved miscellaneous applications for securing injunctive orders against the defendants from disordering the gas supply on

Sundays and or other holidays.

2. The short-lived facts of the case are that all the plaintiffs are industrial concerns and engaged in the manufacturing process of different merchandises and commodities. They allegedly depend on the supply of natural gas for their respective industrial operations and some of the plaintiffs also make use of natural gas for the production of electricity for self-consumption. It has been alleged that the natural gas closure on Sundays causes huge loss of production. In order to address the issue, the plaintiffs had filed earlier Suit No.299/2016 which was decreed on 14.02.2017. The court ordered that the impugned Sunday closure notices are illegal and ultra vires the Constitution. However the defendants preferred an appeal by means of H.C.A. No.141/2017 and the operation of the impugned judgment has been suspended on 14.01.2017. Since the defendants again issued a gas holiday notification therefore the instant suits have been preferred being a fresh cause of action as alleged.

3. The learned counsel for the plaintiffs argued that the Province of Sindh has an abundance of gas production. This court in Suit No.299 of 2016 held that *“24.The consumption as shown in the statistics of Pakistan Economic Survey of 2014-2015 shows the average production of gas in the province of Sindh as 69% of the total production of Pakistan and the average consumption, as shown in the Pakistan Economic Survey is 42%. A plain reading of this Economic Survey would show that there is no scarcity of gas in Sindh.”*

4. Much emphasis were made that dictates of Article 158 of the Constitution commands that the Province in which a well head is situated shall have precedence over other

provinces in meeting its requirement. There being an abundance of gas within the Province of Sindh so the industrial undertakings within Sindh have precedence over other provinces insofar as the supply of gas is concerned. The notices were followed by several others and some of notices were issued for two days. The impugned notification predicates the notice of closure on the decision of the ECC of the cabinet and also under Clause 14 of the General Sales Agreement (GSA).

5. It was further contended that the institution of present proceedings are based on fresh cause of action. The reason given in the impugned notification makes it adequately clear that due to higher off-take, availability of gas has decreased resulting in depletion of line pack and low pressure in the system. They also argued that Clause 14 is applicable only when the event cannot be foreseen. The learned counsel referred to the case of **Lucky Cement vs. Federation** reported in **PLD 2011 Peshawar 57** in which the court held that *“the petitioner entered into agreements with respondent No.4 wherein they themselves agreed for supply of gas for nine months but these agreements being against the mandate of the Constitution shall have no force altogether, especially when it is not disputed that the gas produced in the Province is more than its requirements. Needless to say that only those agreements are binding on the parties which are in accordance with law of the land in general and provisions of the Constitution in particular.”*

6. The learned counsel for the plaintiffs further argued that Articles 4 and 5 of the Constitution collectively enshrine the rights of citizens to be dealt with in accordance with law and as per the express mandate of the Constitution. The impugned notification is in direct

conflict with Article 158 of the Constitution. They referred to the case of **Watan Party and another vs. Federation of Pakistan & others, PLD 2011 S.C. 997** in which the apex court held that “as far as Fundamental Rights/civil rights of the citizens are concerned, those are to be enforced by the Executive and if it fails to do so, they have to face the consequence envisaged by the Constitution. The Executive functionaries who have also taken oath both in the Province and the Federation to protect and preserve the Constitution cannot be allowed to defeat any provision of the Constitution, whatever the circumstances may be. At this juncture, reference to Article 5 of the Constitution is relevant and appropriate, which commands that loyalty to State is the basic duty of every citizen and obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be, and of every other person for the time being within Pakistan. Thus, the Executive/public functionaries are bound to enforce the Constitution while protecting the Fundamental Rights of the citizens without any fear or favour or compromise for subjective purpose”. In the case of **Shahid Orakzai vs. Pakistan, PLD 2011 S.C. 365**, the court held that Article 5 (2) of the Constitution has mandated an obligation that “obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and every other person for the time being within Pakistan”. In the case of **Corruption in Hajj Arrangement PLD 2011 S.C. 963**, the apex court held that the exercise of Constitutional Powers by the High Court and Supreme Court are categorized as power of judicial review. Every executive and/or administrative action of the state/public or other statutory bodies is open to judicial scrutiny. The apex court in the case of **Workers Welfare Fund vs. Chrome Tannery, PLD 2017 S.C. 28**, held that the exercise of Constitutional Powers by the High

Court and Supreme Court are categorized as power of judicial review. Every executive or administrative action of the State or other statutory bodies is open to judicial scrutiny. They also referred to the case of Corruption in Rental Power Plants, reported in **2012 SCMR 773**, in which honourable supreme court held that Energy/electricity is essentially one of the significant facilities required by the citizens for manifold purposes, namely, uplifting of their social and economic status. Non-supply of electricity to the citizens regularly is tantamount to depriving them of one of the essentials of the life including the security of economic activities, which are relatable to their fundamental rights protected under Articles 9 and 14 of the Constitution.

7. The learned counsel further argued that being an abundance of gas within the Province of Sindh, the plaintiffs should be given preference over other entities situated in other provinces. They relied upon the case of **Al-Makkah CNG Station vs. Government of Pakistan Ministry of Petroleum**, reported in **2011 CLD 1554** wherein the court held that the respondent No.2 has fallen in error while refusing grant of marketing license to the petitioner. The Federal Cabinet in its policy decision has provided that supply of gas shall remain uninterrupted in the areas producing gas, including the Province of Baluchistan. It is provided under Article 158 of the Constitution that a Province, in which a well head of natural gas is situated shall have precedence over other part of Pakistan in meeting the requirements from the well-head. In the case of **Shandar Petroleum/CNG vs. Federation of Pakistan & others**, reported in **2012 CLD 1714**, the court held that the ownership of gas was with the Federal Government, but still priority was given to the Province where the well-head of the natural gas is

situated.

8. The learned counsel further addressed that the impugned notification, insofar as it relies on the directives of the ECC, is unlawful since ECC has no authority to make such decisions and even otherwise the rules of business have been violated and as such the decision if any is of no legal consequence. ECC is not competent to enforce and/or approve any Sectorial Priority Order. At best the ECC can be termed as a Committee of the Cabinet. The Rules of Business 1973 govern the conduct and operation of such committees and outline in the procedure that is to be adopted. Moreover, the present notification being one that deals with national economic policy, rightfully falls within the domain of the National Economic Committee. They referred to the case of **M/s. Mustafa Impex, Karachi vs. Federation of Pakistan & others (PLD 2016 SC 808)**. In this case the apex court held that the Prime Minister and the Federal Ministers, which, in turn, means the cabinet. The cabinet is a composite concept and its components are the Prime Minister and the Federal Ministers. Together they constitute the cabinet. In this case the appellants had challenged withdrawal of exemptions from sales tax on the ground that notification was not issued by Federal Government rather by Additional Secretary who was not competent to do so. The learned counsel further contended that Article 172 of the Constitution was introduced through 18th amendment but Article 158 was not amended in the same way and no priority was given to any province or federal government. The export/supply of natural gas outside the province of Sindh is depriving the said province and its inhabitants from their constitutional rights. The gas production in Sindh is more than the actual consumption which is clearly shown in figure 8 of

the Energy Year Book 2014-2015 and OGRA's Petroleum Report 2015-2016. The data provided in the Energy Year Book reveal that the Province of Sindh and Baluchistan jointly contribute 93% of the total production of gas whereas consumption is only 42% and 29% respectively. The Chief Minister Sindh who is the key member of CCI was never consulted while taking an important decision regarding allocation of the gas to the provinces neither was he communicated the closure of the gas for the industries nor while formulating the so called policy.

9. The learned counsel for the Sui Southern Gas Company Ltd. argued that the hon'ble Supreme Court of Pakistan has taken the cognizance of shortfall in gas in the country and has directed to opt for the measurement to be undertaken in order to utilize the gas to its full benefits. In Human Rights Case No.14392/2013, reported in **2014 SCMR 220**, the apex court in paragraph 36 (v) of the judgment held that *"..... However, as far as Captive Power Plants are concerned, the policy must be revised and without any justification they cannot be allowed supply of gas to produce electricity because they supply electricity at much higher than the NEPRA rate instead of subsidized rate to NTDC. Therefore, the supply of gas to captive power plants should be revised to a lower priority and not at subsidized rate."* He further argued that the natural gas is a finite non-renewable fossil fuel, its continuous use is resulting in its depletion day by day. Natural gas reached its peak point, which means that its maximum global production has been attained. Pakistan is no exception to this phenomenon, there is an ever-increasing gap between demand and supply of natural gas. It is also common knowledge that various industrial, commercial domestic sectors of the country's life and economy are heavily dependent on natural gas. The defendants are guided by

the utilitarian principle of “greatest good of the greatest number” to implement the fundamental rights guaranteed under Articles 9 and 14 of the Constitution. Countries all over the world are engaged in formulating policies that ensures that fossil fuels, including natural gas, are consumed in efficacious and value-adding ventures rather than activities which only consume natural gas and provide no additional benefit.

10. It was further contended that the decisions regarding allocation are routed through the Economic Coordination Committee (ECC) of the Cabinet and are based on various factors including the demand for natural gas in a particular area, economic visibility of connecting natural gas in particular network as well as the geographical location of the area where natural gas has been discovered. The policies relating to its efficient utilization through load management have assumed great importance. It is now the endeavor of Federal Government to ensure formulation and implementation of a policy that would lead to maximum use of natural gas in sectors which contributes the most to the economy as well as the welfare of the general public. The formulation of policies is not grounded in populism or profit maximization but about the most efficient use of available natural gas in the larger national interest. The defendant No.1 is a public limited company and majority shares are held by the Government of Pakistan. Defendant company is the only integrated natural gas company in Pakistan whose transmission/distribution system and it is responsible for providing distributing natural gas to the Province of Sindh and Baluchistan. It is pertinent to mention that once natural gas is discovered and is capable of being supplied, Federal Government, acting through ECC, allocates natural gas to defendant’s company for transmission and

distribution through its infrastructure. Federal Government has exclusive control over formulating natural gas allocation and management policies and these policies have to be and are followed in letter and spirit by defendant No.1. OGRA is the regulatory body for oil and gas establishment under the OGRA Ordinance, 2002. To cope with diminishing natural gas availability in Pakistan and to make effective and efficient use of existing resources, Federal Government introduced a Natural Gas and Management Policy 2005 which is amended from time to time. In pursuance of the policy, Federal Government through Ministry of Petroleum and Natural Resources examined and evaluated the demand for natural gas and introduced a load management program. It was decided that domestic and commercial consumers (Commercial consumers means small shopkeepers and not large industries) be given priority over other gas consumers. The fertilizer sector is also accorded high preference because natural gas is the only raw material (feed stock) used for the production of fertilizers and fertilizer by itself is used for the development of agriculture, so it is a value added commodity.

11. It was further averred that the plaintiffs are fully aware of the terms of the contract as well as Natural Gas Allocation Management Policy, 2005. Need for curtailment of gas to industry sector arose due to widening of gap between the demand and supply matrix which has intensified with decrease in the temperatures. In view of the current circumstance, it is even not possible to meet the demands of the sectors, placed at the top of the list of sectorial priority order. The Federal Government is facing huge gas shortfall on its system following severe depletion of the major gas fields of the country. The gap between demand and supply has widened so much that the

transmission system of the defendant company is being operated at a critical level with a gas pack below minimum requirement. It is pertinent to mention herein that further reduction in gas pack due to huge gap in demand and supply may lead to total collapse of the answering defendant transmission system leading to inability such as uplift gas from sources due to tripping of Compressor stations and no gas supplies to other gas consumers or defendant's system. To cope up with the situation, the defendant company is undertaking heavy load curtailment in the CNG sector.

12. He further argued that the defendant company has no infrastructure to stop the gas supply of hundreds and thousands of individuals except going to each and every individual and cut-off supply at their respective premises on which the gas meters are installed. The only way to provide gas to the plaintiff is to cease the supply to other consumers on the system and thereafter if the defendant company would shut down the main supply it would cause extreme hardship to domestic users, who have a top priority over all others.

13. It was further contended that the plaintiffs are using gas only for production of electricity on holidays which is not the alternate fuel. The plaintiff can use electricity on Sunday if they want to run their plants. One cannot be compelled to do an act which it possibly cannot do. The defendant cannot be compelled to do an act which it cannot perform. Reliance is placed on 2003 SCMR 1772, PLD 2004 S.C. 690, PLD 1993 Lahore 673 and PLD 1985 S.C. 28. Domestic users are prioritized and commercial/captive/industrial users are at the bottom of priority list. Public interest supersedes the interest of an individual or individuals. It is pertinent to mention here

that the defendant prioritizes the allocation of gas in terms of Natural Gas Allocation Management Policy, 2005. Ref: PLD 2016 SC 961 and PLD 2016 ISL 32. Keeping in mind the principal of separation of powers, courts are not to interfere with the Government policy. Ref: 2016 SCMR 2012, 2013 SCMR 1687, 2016 SCMR 442 and 2014 SCMR 220.

14. The learned Additional Attorney General argued that the notices were issued pursuant to the Natural Gas Allocation and Management Policy 2005 (as amended from time to time). This court may not interfere in the policy making domain of the Executive and should permit the CCI where this dispute has been brought by the Government of Sindh and is pending determination to resolve the issue of gas allocation between the provinces. The suits are premised entirely on the judgment passed in Suit No.820/2017 which has been suspended in H.C.A. No.141/2017. The suspension order is an order in rem, hence the policy and closure notices issued pursuant thereto, remain valid and binding until such time as the suspension so granted is lifted or until final disposal of HCA No.141/2017.

15. It was further contended that in the case of Shandar Petroleum/CNG vs. Federation of Pakistan [2012 CLD 1714], the court upheld the policy and observed that it is neither arbitrary nor unreasonable. The policy imposes a restriction, taking into account the larger public interest, as the object of the policy is to benefit all consumers. In Pakistan Muslim League (N) vs. Federation of Pakistan [PLD 2007 SC 642], the apex court held that while interpreting Fundamental Rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A

balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable. In the case of *Shaheen Cotton Mills vs. Federation of Pakistan* [PLD 2011 Lahore 120], the court held that the Constitution must be interpreted as a whole and no part should be read in isolation.

16. It was further contended that the relief, if granted, shall also serve to the grave detriment of non-industrial consumers i.e. the general public of Pakistan, who shall be deprived of their most basic energy requirements. The plaintiffs entered into contracts with SSGC on the understanding that the supply of gas may be interrupted from time to time. The question whether any 'excess' or 'surplus' natural gas is being produced in Sindh and whether the said Province is producing more than its consumption, cannot prima facie be made out from the pleadings. He added that the Pakistan Economic Survey 2012-2013 shows a sharp increase in the shortfall of natural gas during 2004-2005. There exists a constrained demand for natural gas of 6,000 MMCFD against a supply of 4,000 MMCFD or more than double the current domestic production. The shortfall has already hit a segment of the population disproportionately, with many areas facing gas load-shedding all year around. The learned counsel also cited the case of *Hajj Organizers Association of Pakistan and others vs. Federation of Pakistan and others* (2017 MLD 1616), *Al-Tamash Medical Society vs. Dr. Anwar Ye Bin Ju and others* (2017 MLD 785) and *Roche Pakistan Limited vs. Pakistan and others*

(PLD 2018 Sindh 222).

17. Heard the arguments. A constitution is a set of fundamental principles or established precedents according to which a state is governed. It guarantees, secures and protects the fundamental rights of the citizen. It is an organic and fundamental law of a nation or state establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments and prescribing the extent and manner of the exercise of sovereign powers. Within states, a constitution defines the principles upon which the state is based, the procedure in which laws are made and by whom. All units of Federation of Pakistan may have various common points and interests for the prosperity of the whole country. The views are exchanged to discuss inter-Provincial harmony which is a basic tool for National Harmony. Though under Article 158 of the Constitution, the Province in which a well-head of natural gas is situated has precedence over other parts of Pakistan but a vital change has been effected through Constitution (Eighteenth Amendment) Act, 2010, whereby new Article 172 (3) has been inserted pursuant to which ownership of oil and gas resources has been vested jointly and equally in the Federal Government and the relevant Provinces. For the ease of reference, Article 158 and 172 of the Constitution of Islamic Republic of Pakistan are reproduced as under:-

“158. Priority of requirements of natural gas. The Province in which a well-head of natural gas is situated shall have precedence over other parts of Pakistan in meeting the requirements from the well-head, subject to the commitments and obligations as on the commencing day”.

“172. Ownerless property. (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.

(2) All lands, minerals and other things of value within the continental shelf or underlying the ocean ¹⁰⁵[beyond] the territorial waters of Pakistan shall vest in the Federal Government.

(3) Subject to the existing commitments and obligations, mineral oil and natural gas within the Province or the territorial waters adjacent thereto shall vest jointly and equally in that Province and the Federal Government.”

18. The impugned Sunday closure notice and the cause of issuing such closure notice is also relevant. The text of impugned notice is reproduced as under:-

“Monday, February 20, 2017
Attention:
All Industrial Sector Associations

Dear Sir(s)

One day Industrial Gas Holiday Notification For: Sunday February 26, 2017

Due to higher off-take, availability of gas has decreased resulting in depletion of line pack and low pressure in the system. Consequently as authorized vide Clause No:14 of GSA for Industrial Customers approved by OGRA and allowed by ECC of the Cabinet to manage Gas Load according to approved Sectorial Priority Order, all industries including Captive Power Plants will remain closed according to the below mentioned schedule. [Emphasis added]

Sunday, February 26, 2017 From 7.00 a.m. to Monday, February 27, 2017 till 7.00 a.m. (24) hours.

SSGC surveillance team will be monitoring compliance and have been fully authorized to disconnect gas supply for 48 hours of any customer found violating the above schedule.

Your cooperation/full support will be highly appreciated.

With regards

DGM (CNG & Coordination).”

19. Much emphasis and reliance made up by the defence side on Clause 14 of the GSA which is in essence a force majeure clause to deal with different incidences and exigencies. Since this clause has also some nexus and close proximity to the issue in hand, therefore I feel it appropriate to reproduce it as under:-

“14. COMPANY’S RIGHT TO REDUCE/INTERRUPT/CURTAIN SUPPLIES

(i) As the production of natural gas from wells, purification plants and conveyance of it over long distances are subject to accidents, interruptions and failures and the lines and equipment to malfunctioning, breaking, failures and closing which cannot be foreseen or prevented by any reasonable care or expenditure and as the supply of natural gas and transportation facilities are limited, the Company does not by this Contract undertake to furnish to the Consumer a full and uninterrupted supply of natural gas but only to furnish such supply and for such length of time as it reasonably can; and it is expressly agreed to

by the Consumer that the Company shall not be liable for any loss, damage, or injury that may result either directly or indirectly from shortages or interruptions in the supply of natural gas, or from discontinuance, thereof due to said reasons or as a result of labor strikes, lockouts, riots, civil commotions, hostilities wars, epidemics, calamities, natural disasters or causes beyond the ordinary reasonable control of the Company. The Company shall in its sole judgment have the right to reduce or interrupt or completely suspend natural gas supply due to any other aforesaid reasons to the Consumer and shall be the sole judge with regard to such conditions.

(ii) The Company shall have the right to close or interrupt natural gas supply to the Consumer's premises for short periods for carrying out necessary extension/repair and/or alteration, work in the Company's pipeline, equipment and devices with the prior notice to the Consumer.

(iii) The Company shall have the right to curtail and/or to discontinue deliveries of natural gas to the Consumer whenever and to the extent necessary in its sole judgment for the protection of service to its other Consumers it may require. The Company shall be the sole judge with regard to such conditions and curtailment of deliveries.

(iv) The gas shall be supplied as per the Natural Gas Allocation Policy or any other relevant policy issued by the Government or any other Authority from time to time."

20. Under the Natural Gas Allocation & Management Policy, 2005 issued by Ministry of Petroleum & Natural Resources, Government of Pakistan a load management policy has been delineated and in Paragraph No.4, it is inter alia enumerated as under:-

"4. PROPOSED LOAD MANAGEMENT POLICY

To ensure optimal utilization of natural gas for the best socio-economic development of the country, the merit gas dispatch order outlined in sub-sections below will be observed during high demand and/or short supply periods.

4.1 For the consumers connected to the system, following priority order will be observed by Gas Utility Companies:

S.No	Category of Consumers	Priority Order
1	Domestic and Commercial Sectors.	First
2	i) Fertilizer Sector; and ii) Industrial Sector to the extent of their process gas.	Second
3	Independent Power Plants as well as WAPDA and KESC's Power Plants having firm gas supply commitment under GSAs.	Third
4	General Industrial and CNG Sectors.	Fourth
5	i) WAPDA's and KESC Power Plant other than those listed against S. No.3 above. ii) Captive Power Sector.	Fifth
6	Comment Sector.	Sixth

4.2. For the consumers on independent network, gas supply will be made in the following priority order:

S.No	Category of Consumers	Priority Order
1	Fertilizer Plants;	First
2	Power Sector including WAPDA, KESC and IPPs having firm gas supply commitment under GSAs.	Second
3	Power Sector other than those listed against S. No.2 above.	Third

However, the Economic Coordination Committee of the Cabinet vide Case No. ECO-32/04/2013 dated 22nd February 2013 revised sectorial priority which was notified vide letter dated 1.3.2013 by the Director General Gas,

Ministry of Petroleum and Natural Resources, Government of Pakistan as under:-

“No. NG(I)-7(158)/12-LS-Vol-IV
Government of Pakistan
Ministry of Petroleum and Natural Resources
(Policy Wing)
Directorate General Gas

Islamabad, the 1st March, 2013

The Managing Director
Sui Northern Gas Pipelines Limited
Lahore

The Managing Director
Sui Southern Gas Company Limited
Karachi

Subject: NATURAL GAS LOAD MANAGEMENT

Dear Sir(s),

I am directed to refer to this Ministry's letter of even number dated 06.02.2012 and to state the Economic Coordination Committee of the Cabinet vide Case No. ECO-32/04/2013 dated 22nd February 2013, has revised sectorial priority order as under:

S #	Category of Consumers	Priority Order
1.	Domestic and Commercial Sectors.	First
2.	Power Sector	Second
3.	General Industrial, Fertilizer and Captive Power.	Third
4.	General Sector including its Captive Power.	Fourth
5.	CNG Sector	Fifth

Yours sincerely,
Sd.
(Dr. Shahab Alam)
Director General (Gas)”

21. There is no doubt that under Article 158 of the Constitution, the Province in which a well-head of natural gas situated shall have precedence over other parts of country in meeting the requirements from well-head. Even under sub-Article 3 of Article 172 it is clearly provided that subject to the existing commitments and obligations, mineral oil and natural gas within the Province or the territorial water adjacent thereto shall vest jointly and equally in that Province and Federal Government. Much emphasis has been made by the learned counsel for the plaintiffs in tandem that notices were issued for Sunday closure of the industrial units and captive power is ultra vires the above Articles of the Constitution. In my view, there is no dispute to the constitutional mandate and or command. There is also no cavil to the dictum laid down by the superior courts in this regard as cited by the counsel for the plaintiffs in support of their arguments but

here the facts are somewhat different. Under the Natural Gas Allocation and Management Policy 2005, paragraph No.4 relates to the Proposed Load Management Policy. In paragraph No.4.1 certain priorities were settled for the consumers connected to the system. Under the priority, the Captive Power Sector was placed under priority order No.5, whereas, the domestic and commercial sector is first in the priority list, however, on 01.03.2013, a letter was communicated by the Director General Gas, Ministry of Petroleum and Natural Resources (Policy Wing), Government of Pakistan to the Managing Director, Sui Northern Gas Pipelines Limited and Managing Director of Sui Southern Gas Company Limited. This letter germane to Natural Gas Load Management and in which the Director General informed that Economic Coordination Committee of the Cabinet revised the sectorial priority order. In this priority order again the domestic and commercial sector were placed in first priority, however, the general sector including its captive power were placed from fifth priority order to fourth priority order, whereas, CNG Sector was placed at fifth priority.

22. Seemingly, the impugned closure notice was not issued in violation or contravention of constitutional mandate or denying the right of province having well head but it was issued as a result of higher off take due to which the availability of gas has decreased resulting in depletion of line pack and low pressure in the system. Depletion means a reduction in something, exhaustion, the use or consumption of a resource, especially a natural resource, faster than it is replenished. Before going ahead, it is also indispensable to comprehend the exact meaning of the phrase “Line pack”:

What is Line Pack?

1. Volume of fluid in the pipe at flowing pressure and temperature; increased

volume of a fluid within a given pipe due to increased pressure. *Source: IADC UBO / MPD Glossary, December 2011. Global Standards. <http://www.iadclexicon.org/line-pack-or-linepack>.*

2. A pipeline is said to be "packed" when withdrawal from it is at a minimum and when, therefore, for a constant supply of gas, the discharge pressure is a maximum. A pipeline is "unpacked" when withdrawals are at maximum and pressure is at minimum for a constant supply of gas to the line.

3. Line pack refers to the volume of gas that can be "stored" in a gas pipeline. Thinking back to basic chemistry, gas can be compressed (unlike liquids). Think of the classic example of compressing air in a bicycle pump. The air can be compressed into a smaller volume, or more air could also be squeezed into a fixed volume for example a tyre.

4. The operational implications of line pack mean that the volume of gas injected into a pipeline (at the inlet), can be greater than the volume of gas withdrawn from the pipeline (at the outlet). This frequently occurs due to the unpredictable nature of end-user operations and hence, their gas demand. However, when gas is 'stored' in the pipeline by compressing it, the pressure exerted on all parts of the pipeline increases. The quantity of additional gas volume that can be stored in a pipeline depends on the pressure rating of the pipe, flanges, non-return valves, compressors etc., as well as the ability for equipment upstream (before the inlet) and downstream (past the outlet) to respond to a sudden surge in pressure if inlet or outlet valves failure. This event is called a high-pressure/low-pressure breakthrough. When the pipeline pressure is high, it becomes increasingly difficult to inject additional gas into it. Compressors are used to increase gas pressure by injection. <https://www.equitylifting.com/single-post/2017/10/25/Linepack>.

23. The Force majeure is a common clause in various commercial or industrial contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties. Force majeure is generally intended to include occurrences beyond the reasonable control of a party. A force majeure may also be the overpowering force itself, which prevents the fulfillment of a contract. In that instance, it is actually the impossibility or impracticability defenses. If a party asserts Force Majeure as an excuse for failure to perform the party's obligation, then the nonperforming party must prove that the party took reasonable steps to minimize delay or damages caused by foreseeable events, that the party substantially fulfilled all non-excused obligations and that the other party was timely notified of the likelihood or actual occurrence of an event described in Clause. Generally speaking for events to constitute force majeure, they must be unforeseeable, external to the parties of the contract, unavoidable, irresistible and must be unforeseeable circumstances that

prevent someone from fulfilling a contract. It means the causes or events beyond the reasonable control and without the fault or negligence of the party claiming force majeure.

24. Much emphasis was made by the defence lawyers that natural gas is a finite non-renewable fossil fuel and its continuous use is resulting in its depletion day by day and due to increasing gap between demand and supply. The decision of Economic Coordination Committee (ECC) is based on numerous considerations including the demand for natural gas in a particular area, economic viability of connecting natural gas in particular network as well as the geographical location of the area where natural gas has been discovered. The Federal Government through Ministry of Petroleum and Natural Resources evaluated the demand and then decided that domestic and commercial consumers be given priority over other gas consumers. The defence further articulated that the gap between demand and supply has widened so much that the transmission system of the defendant company is being operated at a critical level with a gas pack below minimum requirement. The further reduction in gas pack due to huge gap in demand and supply may lead to total collapse of the answering respondent transmission system. In order to manage the situation, heavy load curtailment has been made in the CNG sector.

25. To cope up the load management, ECC issued directions in accordance with the approved Sectorial Priority Order. It was not an independent direction but it was based on the difficulties and turbulence encountered and suffered by the defendant's company due to higher off-take and depletion of line pack/low pressure in the system. The contention raised vice versa can only be

resolved after recording evidence in the above suits. However at this stage, the court has to see whether the plaintiffs have made out a prima facie case along with other rudimentary ingredients required to be satisfied before claiming injunctive relief. The entire superstructure of plaintiffs case is wandering and roaming around Article 158 of the Constitution with the plea that they have no concern whatever the difficulties and snags being faced by the defendant Company in their system and supply, they should be distributed natural gas for their plants uninterruptedly as a vested rights and ECC has no jurisdiction to issue any Sunday closure directions but in my considerate outlook, ECC first well-thought-out and ruminated the plights and predicaments of the defendant company and then in order to avoid further depletion in line pack/low pressure in the system due to higher off-take sanctioned the Sunday closure. The plaintiffs have failed to contend with or encounter this specific plea but remained entangled with the plea of production in the province and preferential right of supply in terms of Article 158 of the Constitution.

26. In the load management policy, the preferential right has been given to the domestic consumers which is quite sensible and logical. The industrial and captive power enterprises have been allocated different priorities in the load management policy so they cannot ask the same treatment as being meted out to the domestic and small commercial establishments or small shops. Even in the CNG sector, public at large is also victim of load shedding to optimize load management. In juxtaposition, the plaintiffs are industries and manufacturers of different products so during load shedding/management on Sunday, they may operate and run their plants/machinery through electricity for which they

must have made the provisions including this cost element in their books of account as expense.

27. En masse, the troublesomeness of the Gas Company cannot be disregarded that shortfall and low pressure of gas is also being complained by several domestic consumers in different parts of the provinces of Sindh and Baluchistan and the company is consistently encountering a shortfall so with the aim of ensuring an unhindered and unimpeded supply of natural gas to the domestic consumers who are first in priority the measure of Sunday closure was implemented which was inescapable in no doubt to administer and control depletion of line pack for the survival otherwise, the entire transmission system and supply infrastructure of the defendant company would be on stake and peril but in unison and unwaveringly, I cannot ignore an essential attribute of the case that the plea of Sunday closure is merely based on depletion of line pack/low pressure in the system which on itself means that this is not a permanent cause but in a temporary situation the management decided to issue closure notice on holidays with particular dates so I am of the firm view that this closure notice cannot be issued for an unlimited period of time nor for permanent basis. Being a gas distribution company, it is the responsibility of defendant company to rectify the defect in the system and ensure uninterrupted supply of gas except in the circumstances beyond their reasonable control however the depletion of line pack/low pressure in the system should not become the excuse of all time and immediately on control of line depletion, the company should discontinue the gas closure on holidays and bring their transmission system to normal condition.

28. The present impugned Sunday closure notices have

been issued in the larger public interest so that the colossal magnitude of domestic consumers may not be affected or deprived of natural gas supply which is an essential need and amenity of life. The term public interest is expended in a widespread diversity of circumstances. This also connotes wide-ranging welfare of the public that warrants recognition and fortification of this right in the matters in which the public all together has a stake. This also means the people's general welfare, wellbeing and something in which the populace as a whole has the stake. Contrariwise, private interest can be described the interests of an individual. While it can be described the interests of an individual, it can also be used to describe a small bound together group of individuals which may not to all intents and purposes an entity together but linked for business or personal gain reasons. In the judgment **(authored by me)** in case of **Abu Dhabi Medical Devices Co. L.L.C vs. Federation of Pakistan** reported in **2010 CLC 1253**, I held that the expression "**public importance**" is not capable of any précised definition. It can only be defined by process of judicial inclusion or exclusion. Each case has to be judged in the circumstances of that case as to whether the question of public importance is involved but it is settled that public importance must include a purpose or aim in which the general interest of the community as opposed to the particular interest of the individual directly or widely concern. Public Interest is very wide expression and embraces public security, public order and public morality. Expression Public Interest in common parlance means an act beneficial to general public and action taken in public interest necessarily means an action taken for public purpose. It further leads general social welfare or regard for social good and predicating interest of the general public in matters where regard was social good is

of the first moment.

29. The gist of the judgment authored by me in the case of Hajj Organizers Association of Pakistan versus Federation of Pakistan (2017 MLD 1616), Al-Tamash Medical Society versus Dr. Anwar Ye Bin Ju (2017 MLD 785), MTW Pak Assembling v/s Shahzad Riaz Industries Pvt. Ltd. (2017 CLC 1140), Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority (2010 MLD 1267), Shahzad Trade Links versus MTW Pak Assembling Industries (Pvt) Ltd. (2016 CLC 83) and Roche Pakistan Limited Vs. Pakistan (PLD 2018 Sindh 222), bring to light that the phrase *prima facie* case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted than to the plaintiff from withholding it in the event of the legal right proving to be in his favour, the injunction may not be granted. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. The existence of *prima facie* case is to be judged or made out on the basis of material on record at the time of hearing of injunction application and such material should be of the nature that by considering the same, court should or ought to be of the view that plaintiff applying for

injunction in all probability likely to succeed. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendant, if the injunction is granted.

30. In the wake of above discussion, I feel no disinclination in my mind to hold that the impugned Sunday closure notices cannot deem to have been issued in violation or contravention of Article 158 of the Constitution of Islamic Republic of Pakistan but due to circumstances beyond the reasonable control of the defendant (Sui Southern Gas Company Ltd). Consequently all injunction applications are dismissed. However the defendant (Sui Southern Gas Company Ltd) shall make all best possible efforts to control depletion of line pack in their transmission system within two months' time and submit a compliance report. After securing optimum level, the defendant (Sui Southern Gas Company Ltd) shall discontinue the Sunday closure notice which cannot be allowed to continue permanently or for an unlimited period of time in all circumstances as general practice, trend or excuse.

Karachi:-
Dated.12.10.2018

Judge