

IN THE HIGH COURT OF SINDH AT KARACHI

| S.NO. | SUIT NOS & YEAR | PARTIES | REMARKS |
|-------|-----------------|--|---------------------------|
| 1. | 1145/2008 | M/s. Bhanero Energy Ltd. v. SSGC | Classification of IPP/CPP |
| 2. | 1146/2008 | M/s. Nadeem Power Generation Pvt Ltd. vs. SSGC | Classification of IPP/CPP |
| 3. | 1147/2008 | M/s. Olympia Power Generation Ltd. vs. SSGC | Classification of IPP/CPP |
| 4. | 1148/2008 | M/s. Adnan Pvt Ltd. vs. SSGC | Classification of IPP/CPP |
| 5. | 1149/2008 | M/s. Jubilee Energy Pvt Ltd. vs. SSGC | Classification of IPP/CPP |
| 6. | 1150/2008 | M/s. TATA Energy Pvt Ltd. vs. SSGC | Classification of IPP/CPP |
| 7. | 1263/2008 | M/s. Lucky Energy Pvt Ltd. vs. SSGC | Classification of IPP/CPP |
| 8. | 1307/2008 | M/s. Gulistan Power Generation Pvt Ltd. vs. SSGC | Classification of IPP/CPP |

(Suits in Bunch-I)

| S.NO. | SUIT NO. & YEAR | PARTIES NAME | REMARKS |
|-------|-----------------|--|------------------------------------|
| 9. | 367/2014 | M/s. Olympia Power Generation Ltd. vs. SSGC | Closure notice/ Gas Curtailment |
| 10. | 1616/2014 | M/s. Gulistan Power Generation Pvt Ltd. vs. SSGC | Closure notice/ Gas Curtailment |
| 11. | 1783/2014 | M/s. Nadeem Power Generation Pvt Ltd. vs. SSGC | Closure notice/ Gas Curtailment |
| 12. | 192/2015 | M/s. Bhanero Energy Ltd. v. SSGC | Closure notice/ Gas Curtailment |
| 13. | 572/2015 | M/s. TATA Energy Pvt Ltd. vs. SSGC | Closure notice/ Gas Curtailment |

(Suits in Bunch-II)

Date of Hearing: 27.05.2015

Plaintiffs: Through M/s. Makhdoom Ali Khan & Hyder Ali Khan Advocates in Suit No. 1145/2008

Mr. Ghulam Murtaza Advocate in Suit No.1263/2008

M/s. Muhammad Ameen Bundukda & Muhammad Ishaq Advocates in Suit No.572/2015

Defendants: Through Mr. Asim Iqbal & Farmanullah Advocates

J U D G M E N T

Muhammad Shafi Siddiqui, J.- The first bunch of the suits i.e. suits at serial No.1 to 8 are filed for declaration and permanent injunction that they be treated as IPP, whereas in the second bunch of suits i.e. suits at serial No. 9 to 13 the plaintiffs seek declaration that the notices of closure do not apply to them in view of the fact that their status as being Captive Power (CP) and industrial consumer is yet to be decided and hence the closure notice of gas supply may not be implemented upon them till then.

2. The plaintiffs and defendants in suits at serial No.1 to 8 by consent agreed in terms of order dated 09.10.2012 that the entire suits be disposed of as they only involve question of law and the parties including the plaintiffs would not lead evidence in this regard. Thus, in pursuance of order dated 09.10.2012 two issues were framed as under and on which the counsels for the parties have argued the matter:-

1. Whether the plaintiff is independent power project (IPP) hence the tariff for captive power unit does not apply to the plaintiff?
2. What should the decree be?

3. It is the case of the plaintiff that they were incorporated with the object of generating and selling electricity whereas the defendant is engaged in the business of transmission and distribution of natural gas, besides construction of higher power transmission and low pressure distribution systems. It is urged that the plaintiff in Suit No.1145/2008 has two power generating units. The first of such unit is situated at Plot E/2, Site, Kotri and the other at Sheikhpura, Faisalabad (hereinafter called as Unit No.1 and Unit No.2 respectively) whereas the defendant supplies natural gas to Unit No.1 only. For the purpose of this suit Unit 1 is important and it is claimed that the electricity generated by the plaintiff through this unit is sold and consumed by the consumers other than plaintiff. Likewise other plaintiffs in the first bunch of suits plead accordingly.

4. It is argued that on 23.02.1995 plaintiff entered into an agreement with the defendant wherein the defendant agreed to supply natural gas at the plaintiff's Unit 1 for purpose of power generation at the rate agreed and specified in the agreement which was subject to notification by the government. It is contended that being power generating company the plaintiff entered into several contracts with different consumers and for a considerable period the tariff rate fixed by the plaintiff for sale of electricity to its consumers for industrial use was same as that prescribed by WAPDA to its industrial consumers i.e. Tariff B-3. The plaintiffs in rest of the suit pleaded the same but with different date of execution of contract with defendant.

5. It is claimed that in January, 2002 the plaintiff was granted generation license under section 15 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 which led the

plaintiff to engage in the electricity generation business for delivery and sale to consumers.

6. It is further claimed that in the year 2004 Oil & Gas Regulatory Authority (OGRA) introduced a new category as Captive Power (CP) which is classified as an industrial concern which was generating electricity for its own use and had installed a power generation unit at their manufacturing and processing unit and was classified and treated as Captive Power. It is argued that since the plaintiff was not generating the electricity for their own use therefore they were not classified by the defendants in this category i.e. (CP) and they were continued with the industrial tariff. Counsel however clarified that both industrial consumers and Captive Power were charged with the same tariff rates.

7. The dispute arose when on 30.06.2008 OGRA issued a notification whereby it created yet another category of Independent Power Projects (IPP) and provided a different tariff rate for it. It is further claimed that the IPP is engaged in the generation and production of electricity for sale to others. In pursuance thereof the plaintiff approached the defendant on 28.07.2008 that they should now be categorized as IPP and should not be required to pay more than what was required to be paid by other IPPs. Thus the grievance of the plaintiff in nutshell is that after such notification they are still being categorized other than IPPs and they were refused to be called as IPP. Thus the plaintiff submitted that they had a right to be classified as IPP ever since this category was introduced by OGRA. Other Counsels appearing for plaintiffs in the connected suits adopted the arguments of Mr. Hyder Ali Khan.

8. The defendants on the other hand denied all such contentions and at the very outset stated that such was never the intention of the

plaintiff at the time of entering into a relationship when contract was signed. Learned counsel for the defendant relied upon Annexure D/1 to the written statement which provides that the plaintiff in the Inquiry Form stated that Bhanero Energy Limited (plaintiff) is a company which is engaged in the product line of yarn and that the power generation is to be for self-consumption of plaintiff.

9. Learned counsel further relied upon letter dated 09.08.1994 Annexure D/4 which again provide that the power generation shall be purely for their (plaintiff) own industrial use i.e. for our sister concern M/s Bhanero Textile Mills Ltd. Plot No.E/2, Site, Kotri. Counsel has again relied upon Annexure D/6 issued by the plaintiff seeking amendment in an earlier letter of 01.09.2003 issued by Bhanero Textile Mills Limited which was for the extension of gas supply for plaintiff. The amendment is sought to the extent that the letter may be deemed to be issued by Bhanero Energy Limited, which is an entity for generating the electricity for Bhanero Textile Mills Ltd.

10. Learned counsel has further relied upon the annual report of NEPRA which has enlisted different categories of companies producing energy such as Small Power Producers (SPPs) Isolated Generating Companies (IGPs), Independent Power Producers (IPPs) etc. and the plaintiff has not been categorized in the list of IPPs.

11. He further relied upon a draft implementation agreement which provides prerequisites of being an IPP. Learned counsel submitted that one of the salient features of such implementation agreement categorizing such energy producers company as IPP is the guarantee by the Government of Pakistan of the repayment obligation of the power purchaser under the power purchase agreement in the form of Schedule

'C' i.e. all those who would be provided with the energy for its onward supplies to the consumers, the amount of such energy was guaranteed by Government of Pakistan. He submitted that in substance it seems that the energy is either to be linked with the National Grid or to be supplied to WAPDA, KESC etc. and that is why the Government of Pakistan was inclined to provide a guarantee to the distributor IPP. He submitted that with this background it is inconceivable that the plaintiff who has undertaken to provide electricity to different individuals and consumers would be guaranteed by government of Pakistan. He submitted that it also provides some project agreements such as implementation agreement, power purchase agreement, O&M Agreement, OPC Contract, Fuel Supply Agreement, Financing documents and guarantees etc. and since such prerequisites are missing therefore the plaintiffs under no stretch of imagination could be considered to be within the definition of IPPs. He further relied upon the policy which provides that gas supply for heavy power generation would be on as and when available basis at different locations and since the plaintiffs have not been assured of an uninterrupted supply through them therefore, they cannot be defined as IPP. He also submitted that in priority such IPPs as well as WAPDA and KESC having firm gas supply commitment under GSA, were to be given the gas supply uninterruptedly which are not the terms of plaintiffs' contract. He further relied upon clarification issued by NEPRA wherein all the plaintiffs i.e. plaintiff in this suit and in connected suits have not been categorized as IPPs and that since they are not catering the National grid pursuant to the project agreements therefore, they are not to be treated and categorized as IPP rather they are closer to the definition of Captive Power Producers.

12. Heard learned counsel and perused the material available on record.

13. The first bunch of these suits relates to a declaration that the plaintiffs be given the status of Independent Power Projects and should not be treated as Captive Power for the purposes of tariff rate whereas the second connected bunch is in fact was filed by some of the same plaintiffs seeking declaration that the closure notice of gas for Captive Power and industrial consumers do not apply to the plaintiffs in view of the fact that their status as being Captive Power and industrial consumer is yet to be decided and hence the closure notice of gas supply or gas closure may not be implemented till then. The issue that was framed for the disposal of the first bunch could decide the fate of second bunch from serial No.9 to 13 in the chart on first page.

14. Hence in this regard on the basis of arguments and the available record it is only to be determined as to whether the plaintiffs are to be treated as independent Power Project. For this purpose plaintiff has relied upon annexure-B-1 which is an agreement with Sui Southern Gas which contract is substantially for supply of gas for industrial use. They further filed an agreement with M/s. Bhanero Textile Mills Limited & others to whom they claimed to have been supplying energy and similar is the instance of other plaintiffs in the connected suits. They further relied upon the letter issued by NEPRA granting the generation license which was issued in pursuance of section 15 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 with further authorization to sell to bulk power consumers. It appears that M/s. Bhenaro Energy Limited Project-I was authorized to sell the electricity to M/s. Bhenaro Textile Mills. Pursuant to such authorization which is available at page 195 and 197 the plaintiff has further specified that their directorship is common in terms of their own documents filed along with the plaint as plant details at page 213. Although the category

of Captive Power was introduced much later however since the industrial and the Captive Power rates were same at the time when Captive Power was introduced therefore, for the purpose of tariff rate the parties have not agitated. The dispute arose when in pursuance of the subsequent notification dated 30.6.2008 the tariff rate of IPP was specified as 251.55 per MMBTU which prompted the plaintiff to initiate proceedings for such declaration. Now since Independent Power Producers have been provided with different tariff rate therefore, it is to be seen as to whether the plaintiffs in these connected suits would fall within such frame of Independent Power Producer.

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 & 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.

17. The implementation agreement which is in relation to Independent Power Producers is available on record which provides certain perquisites before acquiring such status of IPP. Neither the guarantee by the Government of Pakistan of the payment and the obligation to the Power Purchase under Power Purchase Agreement has been executed nor the project agreements which have been defined such as implementation agreement, power purchase agreement O&M Agreement, OPC Contract, Fuel Supply Agreement, Financing documents and guarantees have ever been signed. Although this category of IPP was in existence when the gas supply agreement was executed, however to consider the plaintiff as that of IPP he has to fulfill all such prerequisites which are prima facie missing and are required. The plaintiffs have no intention at all insofar as the status of IPP is concerned as since 2002 when the subsequent policy was introduced they never attempted to adjudge themselves as IPP. Perhaps for the reason that only Independent Power Plants, WAPDA and KESC were given the firm commitment of

uninterrupted gas supply under Gas Supply Agreement as well as under policies in vogue. The contract of gas supply which is available as annexure B-1 further suggests that there is no commitment of such uninterrupted or firm gas supply.

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 contract 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.

19. The other aspect i.e. to be applied is the Principle is Estoppel. The person or entity shall not be permitted to blow hot and cold with reference to transaction or insist for different treatment at different time. Since 1995 and more importantly since the Policy of 1994 and 2002 was introduced they have never considered themselves to be an IPP. It would be highly inequitable if an entity is allowed to repudiate a former instance or act to deny a constant approach of another entity or person who has been all along insisting on it constantly.

20. In view of above, I am of the view that the plaintiffs cannot be considered under present facts and circumstances as Independent Power Producers and they have failed in attempt to establish that they are so and hence I would decide issue No.1 against the plaintiffs and accordingly the suits are dismissed.

21. Insofar as the second bunch from serial Nos. 9 to 13 are concerned, since their suits seeking declaration that they are Independent Power Producers have been dismissed as above consequently they could not be given uninterrupted gas supply and shall be treated according to the agreements and policies invogue, the connected suits of the plaintiffs are also dismissed, having become infructuous.

JUDGE