

THE HIGH COURT OF SINDH, KARACHI

Suit No. [-] 2134 of 2022

[Lucky Cement Limited versus Pakistan and others]

Plaintiff : Lucky Cement Limited through Mr. Farogh Naseem, Advocate.

Defendants 1 & 3 : The Secretary, Ministry of Energy, Petroleum Division and the Secretary M/o. Commerce, Govt. of Pakistan, through M/s. Malik Sadaqat Awan, Additional Attorney General and Mr. Khaleeq Ahmed, Deputy Attorney General for Pakistan.

Defendant 2 : Sui Southern Gas Company Ltd, through M/s. Waqar Ahmed and Ijaz Ahmed, Advocates, alongwith Mr. Bilal Farooq Alvi, Deputy Chief Manager (Legal) SSGC, Raja Love Kush, Deputy Manager (Legal) SSGC and Ammar Saleem Butt, Manager (Legal) SSGC.

Defendants 4-6 : Nemo.

Dates of hearing : 06-12-2022, 07-12-2022, 12-12-2022, 16-12-2022, & re-hearing on 19-07-2023.

Date of decision : 05-09-2023

ORDER

Adnan Iqbal Chaudhry J. - The office objection is that the Plaintiff had filed C.P. No. D-7344/2022 for similar relief. The Plaintiff's reply was that it had already filed an application to withdraw that petition. Per learned counsel, the petition was subsequently withdrawn on 05-12-2022. Under the circumstances, the office shall register the suit.

2. The Plaintiff is a cement manufacturer with a Captive Power Plant [CPP] for generating and supplying electricity to its factory. The CPP is fueled by natural gas supplied by the Sui Southern Gas Company Ltd. [SSGC] under a Gas Supply Agreement [GSA] for 'Power Generation' dated 20-02-2006.

3. The cause of action for the suit was a notice dated 10-11-2022 issued by the SSGC intimating to the Plaintiff that gas-supply to the CPP will remain closed during winter from 15-11-2022 to 28-02-2023 [**gas-closure notice**]. The Plaintiff prayed for a declaration that the gas-closure notice was unlawful, and for a mandatory injunction to restore gas-supply. By CMA No. 18141/2022, a temporary injunction was sought to the same effect. For reasons recorded in the order dated 12-07-2023, said CMA could not be decided while the gas-closure notice subsisted. When said CMA was fixed for re-hearing on 19-07-2023, learned counsel for the Plaintiff submitted that though the gas-closure notice had subsequently expired and gas-supply was restored, the cause is a recurring one in that now the SSGC usually resorts to gas-closure for industries every winter, and therefore he prayed that the relief sought in CMA No. 18141/2022 may be moulded as relief sought against gas-closure for the coming winters. In the said circumstances I am inclined to accept the prayer for moulding the relief and proceed accordingly.

Though the Plaintiff has also moved an application to amend the plaint, but on the request of learned counsel for the Plaintiff the hearing thereof was deferred until after a decision on the injunction application.

4. The reasons for gas-closure as set-out in the impugned notice were as follows:

"Dated 10th Nov, 2022

To M/s. Lucky Cement Ltd.

.....

SUBJECT: NOTICE FOR CLOSURE OF GAS STARTING FROM 15TH NOVEMBER 2022 TO 28 FEBRUARY 2023

Dear Sir(s),

This is with reference to the Contract for the Supply of Gas entered between the Parties which expressly states that:

"Gas supply will be provided by the Company on 'as and when available' basis only during the period from March to November each year. The Consumer will make dual firing arrangements to avoid loss of production as and when Gas is

not available during March to November and also during December to February when the Company will keep the Consumer's Gas supply disconnected at his cost, each year."

In adherence to Ministry of Energy (Petroleum Division), Government of Pakistan's priority order for gas load management, where domestic sector tops the list and to serve the domestic customers with even more care and consideration, especially those in Balochistan already experiencing the winter season.

With the advent of winter season, SSGC is facing severe shortage in the indigenous gas receipts from producers every passing day resultantly depleting line pack and simultaneously, SSGC is also experiencing increased gas consumption in the Domestic Sector that peak during winter season and ultimately causes low gas Pressure in the System. Catering to such eventuality, SSGC follow the guidelines, as circulated vide Load Management Policy of October 2018 to tackle such situations.

Currently, SSGC is facing severe shortage of supply of gas due to depletion of existing gas reserves, details whereof is reproduced here in tabulated form for the better understanding of gas crisis.

.....

.....

Below Table showing the demand, supplies and shortfall in the winter period (November 2022 to February 2023) for 2022-2023 in MMCFD:

.....

.....

It may be noted that in Balochistan, supply of additional gas is a must for the survival of human lives since gas services as a LIFELINE to scores of populace needing to keep themselves warm through water and space heating gas appliances in the extremely low temperatures.

In view the gas shortage and in adherence to the Federal Government's policy of priority allocation to the domestic sector, gas supplies under "Contract for the Supply of Gas", are being discontinued from 15-11-2022 to 28-02-2023 as already provided in the aforesaid Contract.

.....

.....

The volume of gas saved from this arrangement would be diverted to domestic customers for them to cater their enhanced gas loads in context of the winter season.

.....

.....

*Yours sincerely,
For: Suit Southern Gas Company Limited"*

5. As against clause 1 of the GSA, reproduced in the gas-closure notice above, the case set-up in paras 14 and 16 of the plaint is that prior thereto the SSGC had never discontinued gas-supply during December to February, and therefore Mr. Farough Naseem, learned counsel for the Plaintiff submitted that clause 1 of the GSA stood "waived" by conduct of the SSGC and it was estopped from invoking

the same. For that he placed reliance on *Abdul Hameed v. Muzamil Haq* (2005 SCMR 895).

6. The second leg of the Plaintiff's case, pleaded in paras 22 and 26 of the plaint, and which was the primary submission of the Plaintiff's counsel, is a challenge to the priority order in gas-supply notified by the Federal Government as follows:

"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 15th October, 2018

01. The Managing Director
Sui Northern Gas Pipeline Ltd.,
Lahore.

02. The Managing Director
Sui Southern Gas Company Ltd.,
Karachi.

Subject: **GAS ALLOCATION AND MANAGEMENT POLICY
2005 - REVISION IN PRIORITY ORDER.**

Dear Sir(s),

I am directed to inform that the ECC of the Cabinet in its meeting held on 17.09.2018 vide case No.ECC-86/17/2018 dated 17.09.2018 while considering a summary submitted by Petroleum Division regarding Natural Gas Sale Pricing inter-alia directed as under:

(III) The priority of allocation of system gas will be revised to bring the five zero-rated sectors at second priority along with the power sector.

2. In pursuance of the above ECC decision, the revised priority order under Natural Gas Allocation and Management Policy, 2005 will be as under:

S #	Category of Consumers	Priority Order
1.	Domestic and commercial Sectors	First
2.	Power Sector, *Zero-Rated General Industry	Second
3.	General Industrial, Fertilizer & Captive Power	Third
4.	Cement Sector including its Captive Power	Fourth
5.	CNG Sector	Fifth

* Textile (Including jute) carpets, letter, sports and surgical goods

Yours truly,
sd/-
Deputy Director (Gas)"

7. Thus, under the subsisting Gas Allocation and Management Policy, only five types of zero-rated or export-oriented industries are

accorded priority No.2 in gas-supply after domestic consumers, and which does not include the Plaintiff's cement industry. Per the Plaintiff, those five industries receive gas even during the winter months; that since the Plaintiff too is an exporter of cement, it's non-inclusion in that list is discriminatory, an infringement of Article 25 of the Constitution of Pakistan. Mr. Farough Naseem submitted that confining priority No.2 only to five types of exporters was picking and choosing and not reasonable classification especially when the Plaintiff too generated foreign exchange for the country, and thus such policy could be interfered with by the Court. Reliance was placed on *I.A. Sherwani v. Government of Pakistan* (1991 SCMR 1041). He submitted that during gas-closure the use of electricity increases the cost of production to the point where exports become unfeasible and that amounts to a financial ouster of the Plaintiff.

I note here that Mr. Farough Naseem had confined his submissions to the above points so as to distinguish his case from the case of *Shujabad Agro Industries (Pvt.) Ltd. v. Federation of Pakistan* (SBLR 2022 Sindh 1585) decided by this Bench to dismiss suits brought by other industries against similar gas-closure notices.

8. M/s. Waqar Ahmed and Ijaz Ahmed, learned counsel for the SSGC submitted that the fact that gas was previously supplied during winter months when it was available, does not amount to a waiver of clause 1 of the GSA; that the GSA had stipulated that the Plaintiff would maintain a dual firing arrangement for the CPP which was keeping in view that gas-supply may not be possible during the winter months. They submitted that under the gas policy priority No.1 has always been domestic consumers, and during the winter when the demand of domestic consumers exceeds, particularly in Balochistan, even the export-oriented industry does not receive uninterrupted gas-supply. They submitted that in view of section 56(d) of the Specific Relief Act, 1877 no injunction can issue to interfere with Government policy. Reliance was also placed on the

case of *Shujabad Agro Industries*. The learned Assistant Attorney General for the Federation adopted these submissions.

9. Heard learned counsel and perused the record.

10. Under clause 1 of the GSA, the obligation of the SSGC to supply gas to the Plaintiff was always on '*as and when available*' basis, and that too only for the months March to November, there being no obligation to supply gas during the winter months from December to February. Therefore, the argument that the SSGC had waived clause 1 of the GSA by supplying gas in the past during the winter months, is entirely misconceived. The doctrine of waiver, also embodied in section 63 of the Contract Act, 1872, and as discussed in *Abdul Hameed v. Muzamil Haq* (2005 SCMR 895), allows a contracting party to voluntarily relinquish or abandon a right or claim. It does not operate to create an obligation under the contract when there was none.

11. Clause 1 of the GSA is a reflection of the Gas Policy of the Federal Government which stipulates *inter alia* that:

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

Therefore, neither the Gas Policy nor the GSA between the Plaintiff and SSGC had ever committed indefinite or uninterrupted supply of gas to the Plaintiff's CPP during the winter months. In such circumstances, the Plaintiff cannot assert a 'right' to receive gas during such period, and reliance on the doctrine of promissory estoppel and vested rights is misconceived.

12. The Natural Gas Allocation & Management Policy, 2005 [**Gas Policy**] was made by the Federal Government to manage the increasing demand of natural gas on depleting gas reserves. Consequently, clause 4.1 of the Gas Policy laid down a priority order for supplying gas to various categories of consumers. The Federal Government revised that priority order from time to time, but always keeping domestic and commercial consumers at priority No.1, the last

such revision having been made *vide* notification dated 15-10-2018 reproduced in para 6 above. It is apparent that the impugned gas-closure notice was by way of implementing the above mentioned priority order in gas-supply so as to divert gas to domestic consumers in view of a shortfall in gas-supply from the source coupled with the increased demand of domestic consumers during winters.

13. As manifest in the notification dated 15-10-2018, the Gas Policy accords priority No.2 in gas-supply only to the power sector and five types of zero-rated industries, namely textiles (including jute), carpets, leather, sports and surgical goods. The Plaintiff's industry, *viz.* cement along with its CPP was expressly at priority No. 4. Subsequently, by decision of the Federal Government dated 03-12-2019, circulated by the Ministry of Commerce by memo dated 13-12-2019, only the aforesaid five zero-rated industries i.e textiles (including jute), carpets, leather, sports and surgical goods, were reclassified as "export-oriented sectors", not the cement industry. The Plaintiff acknowledges that even though it had made a representation to the Federal Government to be classified as an export-oriented industry for the purposes of gas-supply, such request was declined by letter dated 17-11-2022.

14. Thus, the Federal Government has made a conscious decision to keep exporters of cement such as the Plaintiff at priority No.4 for gas-supply. The decision that cement exports are not as feasible to the country as exports of textiles, carpets, leather, sports and surgical goods so as to warrant the same priority in the supply of a depleting natural resource, is clearly a matter of Government policy. It is then settled law that a Court will not readily interfere with a matter of Government policy unless it is demonstrated that such policy infringes fundamental rights.¹ As already discussed, the Plaintiff had no right under its GSA, let alone a fundamental right, to receive gas during the winter months. I do not see how the Plaintiff's

¹ *Watan Party v. Federation of Pakistan* (PLD 2013 SC 167); and *Dossani Travels (Pvt.) Ltd. v. Travel Shop (Pvt.) Ltd.* (PLD 2014 SC 1).

fundamental right to equal protection under Article 25 of the Constitution is infringed when it is not its case that other cement exporters have been given a different treatment.

15. Having seen that the impugned gas-closure notice for the Plaintiff's CPP during the winter months was in line with the Plaintiff's GSA and the Gas Policy of the Federal Government, and that the latter does not infringe the Plaintiff's fundamental rights, the Plaintiff does not have a *prima facie* case for a temporary injunction to restrain a like gas-closure in future. Therefore, CMA No. 18141/2022 as moulded aforesaid, is dismissed.

JUDGE

Karachi
Dated: 05-09-2023

Announced by & on