

**JUDGEMENT SHEET.**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT**

***Intra Court Appeal No.73 of 2012***

***OCEAN PETROLEUM LTD. ETC.***

***Vs***

***FEDERATION OF PAKISTAN, ETC.***

*Date of hearing:* 30.09.2014

*Appellant By:* M/S Jawad Hussain, Umair Saleem and Maryma Mamdoot, Advocates for Appellant No.1.  
Syed Naeem Bukhari, ASC M/s Ijaz Janjua, Yousaf Anjum and Immad Khan, Advocates for Appellant No.2.

*Respondents by:* M/s Ahmer Bilal Soofi, Omer Raza and Mian Sami-ud-Din, Advocates for Respondent Nos.3 & 4.  
Mr. Faisal Rafique Malik, DAG and Khawaja Muhammad Imtiaz, Standing Counsel.  
Mr. Nazir Malik, Director Law & Mr. Ghulam Akbar, DAD, M/o Petroleum & Natural Resources.

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**SHAUKAT AZIZ SIDDIQUI, J:** The brief facts surrounding the controversy of the parties are that the Appellant M/s Ocean Pakistan Limited filed a Writ Petition bearing No. 941/2011 in this Court which was dismissed by a learned single judge, vide order dated 31-01-2012. The Appellant assailed the said Order through Instant ICA which was dismissed by the learned Division Bench vide judgment dated 29.01.2013. Feeling aggrieved, Appellant invoked the jurisdiction of august Supreme Court through Civil Petition Nos.389 & 390 of 2013, and vide order dated 10.12.2013 Hon'ble Supreme Court of Pakistan by recording certain observations which issued following directions:

**“having heard the learned counsel for the parties at some length, we find that the learned Division Bench of the Islamabad High Court has neither discussed the arguments raised during Intra Court Appeal or taken in the body of the appeal nor the judgment of the learned Single Judge in Chambers was discussed. We find that the learned Division Bench while, dismissing the Intra Court Appeal did not advert to the real controversy in issue, which was subject matter of the Writ Petition. In the afore referred circumstances, it would be in the interest of justice if the matter is remanded to the learned Division Bench to decide the Intra Court Appeal afresh after hearing the parties”.**

2. Learned counsel for Appellant contended that the learned Single Judge failed to appreciate that the working interest of M/s PETRONAS Respondent No. 3 in Mehar Block was acquired by M/s OMV in contravention of the rules. The said sale did not comply with Pakistan Petroleum [Exploration and Production] Rules, 1986) which were applicable in the instant matter and the NOC dated 17-01-2011 by the DGPC Respondent No. 2 was issued in contravention of the relevant rules particularly rule 8 and 9. Moreover, a detailed procedure in pursuance of rule 8 and 9 is given in the Petroleum Concession Agreement and Joint Operating Agreement for disposal of the petroleum rights, which was not followed. Thus lawful rights of the Appellant were infringed. No reply was filed by Respondent No. 1 and 2 in the proceedings before the learned single judge regarding the averments made in the Writ Petition. Therefore, the stance of the Appellant was to be accepted. The court has the authority to judicially review the actions of the execution in order to ensure implementation of the rules and regulations. Further, the appellant has no other remedy except to file a Writ Petition against the violation of the relevant rules.

3. Learned counsel for Appellant No.2 (ZPCL) contended that the case of Appellant is simple and straightforward without a dispute on facts which are admitted by all. Following are the facts.

- (i) Petronas Carigali (Pakistan) Ltd. owned by the Malaysian National Oil Company applied for approval of acquisition of its shares by OMV Maurice Energy GMBH (OMV Maurice) through letter dated 27.09.2010.
- (ii) OPL, one of the Appellants, claimed right of first purchase under clause XII (5) of the Joint Operating Agreement through letter dated 29.09.2010, also marked to DGPC.
- (iii) Petronas Carigali responded to the letter by asserting that there was no acquisition of any Working Interest, except sale of shares of Petronas Carigali Pakistan Ltd. (Letter dated 4.10.2010).
- (iv) At the backdrop of every other Working Interest Owner, Petronas Carigali moved another application to DGPC on 26.11.2010 under Rule 9 and as per First Schedule of Exhibit I of Pakistan Petroleum (Exploration and Production) Rules 1986. The DGPC had thus two applications before it; one for transfer of shares and the other for disposal of Working Interest.

- (v) Without even asking for and examining Shares Purchase Agreement between Petronas International Corporation Limited and OMV Maurice Energy GMBH, the DGPC granted permission under Rule 68 (d) of the 1986 Rules. (Approval dated 19.01.2011).
- (vi) The second application dated 26.11.2010 in respect of which the right of first purchase arose automatically was swallowed by the DGPC in flagrant violation of his statutory duties to ensure compliance with the Rules, Petroleum Concession Agreement and Joint Operating Agreement.
- (vii) The connivance of the DGPC is manifestly floating on the surface and is acknowledged by OMV in its letter dated 11.05.2011.
- (viii) The approval which was granted vide memo dated 19.01.2011, requires to be nullified.
- (ix) The DGPC is required to attain the 75 % Working Interest of Petronas Caragali (Pakistan) Ltd. which is to be offered first to the other Working Interest Owners as their right of first purchase or refusal.
- (x) Any Investment made in the interregnum by OMV was at its own risk and forms the asset of all the Joint Venture Partners. OMV is certainly welcome to seek recovery from the Federal Government whose statutory functionary has acted illegally and exercised unlawful authority.
- (xi) Petronas Carigali (Pakistan) Ltd. may have been created in Mauritius and its parent company may be in Malaysia but it functioned and functions in Pakistan bound by the Deed of Assignment, 1986 Rules, Petroleum Concession Agreement and Joint Operating Agreement.
- (xii) OPL (formerly OPI) has filed Civil Suit No. 130 / 2011 in this Honourable Court in which Interim Relief against cash calls was not only sought (pages 191 / 192 of CM No. 4905 / 2012) but status quo was ordered on 26.05.2011 (page 199 of CM 4905 / 2012). This Suit is still pending.
- (xiii) Civil Suit No. 64 / 2011 claiming compensation / damages, amounting to US \$ 37 Million against Petronas Carigali (Pakistan) Ltd. is also pending in this honourable Court.
- (xiv) Cash Calls by OMV were refused because the Appellants did not accept it as a de jure operator rather as a usurper; who has taken over the operatorship illegally. Cash Calls by the Malaysians were not only disputed but there were counter claims for wilful misconduct and change of operatorship.

4. The learned counsel for Respondent No. 3 and 4 contended that the matter is only of sale and purchase of shares rather than of working interest. Therefore, rule 8 and 9 or the provision of the Petroleum Concession Agreement

or Joint Operating Agreement are not attracted. Further, it was submitted that factual disputes are involved, therefore, the Writ Petition is not maintainable. Regarding the applicability of the rules, the learned counsel contended that only Rule 68(d) was applicable and the NOC issued by the DGPC for disposal of the shareholding had been issued as per law. Learned Counsel for Respondent Nos.3 & 4 further pointwise argued as under:-

The NOC dated 19 January 2011 is legally valid because:

- a. Rule 68(d) of the Pakistan Petroleum (Exploration and Production) Rules 1986 ("the 1986 Rules") has been correctly applied by DGPC (Respondent No. 2).
- b. On 20 September 2010, Petronas Malaysia entered into a Share Purchase Agreement ("SPA") with OMV Austria, whereby OMV Austria took control of Respondent No. 3.
- c. The SPA was only for the purchase of Respondent No. 3's shares.
- d. There was no assignment whatsoever of any petroleum right/working interest (which is different than shares) of Respondent No. 3. The Appellants have shown no supporting document to the contrary.
- e. In fact there could be no assignment by Respondent No. 3 because Respondent No. 3 was not a party to the SPA. Respondent No. 3's property cannot be considered to be the property of its parent company. The law recognises Respondent No. 3 as a separate and distinct legal entity from its parent company (formerly Petronas Malaysia then OMV Austria).

Reliance is placed on:

- *Ikram Bus Service and others versus Board of Revenue, West Pakistan and others*, PLD 1963 SC 564 at 595-596
- *Saloman versus Saloman*, 1897 AC 22
- *Avolin Scott Ditcham versus James J Miller*, AIR 1931 PC 203
- *EBN Company Limited versus Dominion Bank*, AIR 1937 PC 279

- f. Accordingly, Respondent No. 3's petroleum right/working interest remains with it and has not been transferred/assigned/disposed of anywhere. There is a distinction between shares and working interest. A working interest/petroleum right is not the same as shares in a company.
- g. Rule 8 pertains to assignment of the working interest from one party to another, whereas in the present case the subject working interest has remained with the same party i.e. Respondent No. 3. Working interest is defined in the PCA, Art. 1.40 as "undivided interest in the Petroleum Concessions, rights and obligations and liabilities imposed by this [Petroleum Concession] Agreement, the License and any Lease(s) ... including the enjoyment of the exclusive right to explore and prospect for, develop, produce, sell and otherwise dispose of Petroleum from the Area...".
- Assignment: Black's Definition: "The transfer of rights or property. An assignment is a transfer or setting over of property or of some right or interest therein, from one person to another; the term denoting not only the act of transfer but also the instrument by which it is effected."
- h. Accordingly, Rule 8 and 9 of the Petroleum Rules 1986 does not apply.
- i. Respondent No. 3 in mid 2011 has merely changed its name from Petronas Carigali (Pakistan) Ltd. to OMV Maurice Energy Limited ("OMEL"). The change in name was approved by the Registrar of Companies of the Republic of Mauritius on 26 July 2011. The change in name has also been acknowledged by the Securities and Exchange Commission of Pakistan ("SECP"). This is evident that Respondent No. 3 remains the same entity as it was before.
- Copies of Written Resolution, Certificate of Change in Name, Acknowledgment of SECP and BOI are annexed at pg 42 of the 1<sup>st</sup> Paperbook of documents submitted by Respondent 3 and 4.*

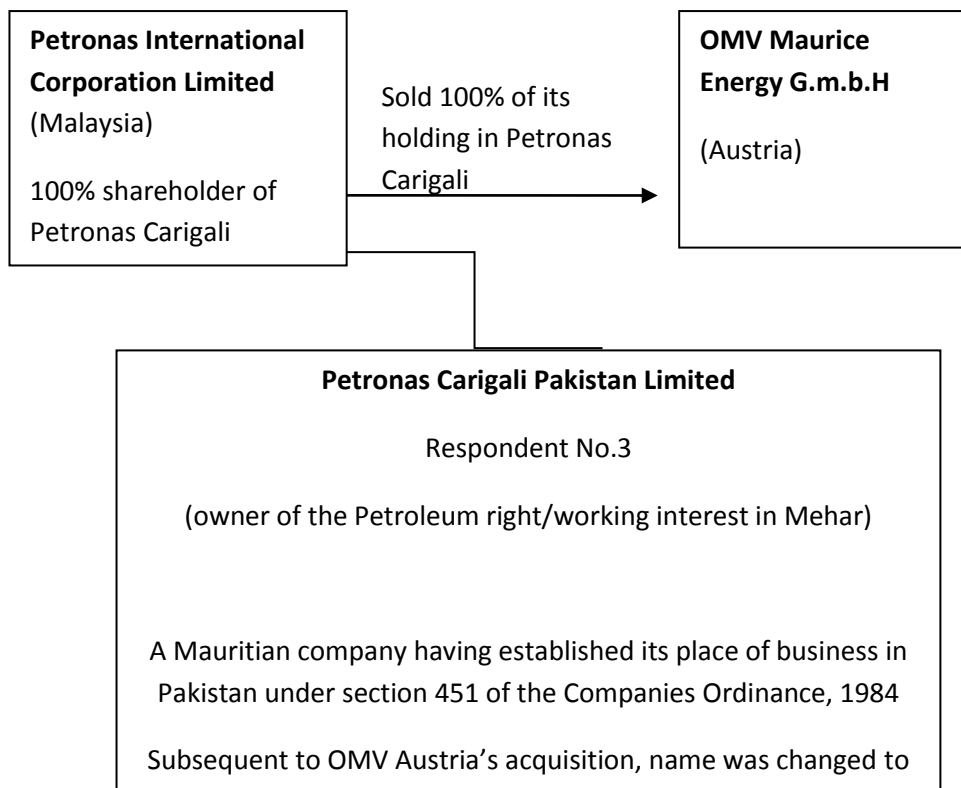
In addition to the above, it is pertinent to note that there is no legal bar whatsoever on the shareholders

(Petronas Malaysia and OMV Austria) of a company (Respondent No. 3) possessing a working interest in a concession from selling and transferring shares in that company to any other party. There is no such bar in:

- j. The Regulation of Mines and Oil Fields and Minerals Development (Government Control) Act 1948 (“the Mines Act 1948”);
- k. The Petroleum Rules 1986;
- l. The PCA;
- m. The JOA;
- n. The Farmout Agreement; or
- o. Any other relevant instrument.

Hence, under Article 4 of the Constitution the SPA is legally valid and the NOC dated 19 January 2011 is legally valid.

That accordingly, the share purchase between Petronas Malaysia and OMV Austria, and the name change of Respondent No. 3 may be demonstrated as follows:



If the Appellants interpretation of the Rules is accepted then Rules 68(d) shall become redundant.

6. Learned counsel further argued that the issuing of NOC under Rule 68(d) in like circumstances is a consistent and binding departmental practice of the DGPC. The DGPC have consistently applied Rule 68(d) and they have the record of all such cases. The Honourable Court may direct the DGPC to produce such examples of practice. The long standing departmental construction of the Rules should not be interfered with as it will affect the rights of many other holders of a petroleum right in the other gas fields throughout Pakistan. Reliance is placed on *PLD 1970 SC 453*, *1988 CLC 377*, *1985 CLC 1757*, *Crawford's Statutory Construction, 1940 Edn., pg. 399*. That it is also well settled that the rules and regulations and their interpretation is the prerogative of the concerned administrative authority and the Honourable Courts should normally not interfere with such interpretation. Reliance is placed on *2013 CLC 1351*. Some examples of the departmental practice are apparent from the Appellant No. 1's own cases regarding share purchase of companies with petroleum rights. Accordingly, Appellant No. 1 is estopped by its own inconsistent actions as on the one hand in the present case it claims application of Rule 8 and 9 and claiming that there has been an assignment. However, on the other hand in its own case with exact similar facts it has previously claimed only the application of Rule 68(d). This is apparent from the application concerning Occidental Pakistan Limited and Tullow Pakistan (Developments) Limited. In both cases an NOC was sought under Rule 68(d) because the company owning the petroleum right was being purchased by the Appellant No. 1. The *mala fide* intentions of the Appellants are apparent from their claim. The Appellants so-called first right of refusal in Article 12 of the JOA is nowhere present in statute or in the Petroleum Rules 1986. The JOA is an agreement between the working interest owners only. This Honourable Court in its constitutional jurisdiction under Article 199 of the Constitution can only enforce the law which is the Mines Act and the Petroleum Rules 1986.

7. It is further argued that the Appellants are abusing the court process by trying to enforce the JOA through the constitutional jurisdiction of this Honourable Court. Reliance is placed on, *PLD 2011 SC 44*, *2010 SCMR 1057*, *PLD 2007 SC 642*, *1994 CLC 919*. The Appellants are seeking to prevent the Respondent No. 3, which is the legally valid Operator and majority working interest owner, from carrying out its obligations in respect of the Mehar Field, by obtaining the nullification of the NOC dated 19 January 2011 issued by the Government through misrepresentation of facts and filing of frivolous claims.

Arguments heard. Record perused.

11. Various issues have been raised in the memo of the appeal; however, the vital and central issue is whether the NOC dated 17-01-2011 by Respondent No. 2 DGPC was issued as per law or not? For convenience, the relevant rules i.e. 8,9 and 68(d) of Pakistan Petroleum (Exploration & Production ) Rule 1986 are reproduced as follows:

***Petroleum right not assignable without consent.***-A Petroleum right or any participating share therein shall not be assigned without the previous consent in writing of the Government.

***Method of making application for assignments.***-An application by the holder of Petroleum right for consent to the assignment of a Petroleum Concessions, shall be accompanied by a fee of Rs. 5,000. With the application, the applicant shall furnish the like particulars in respect of the proposed assignee as required to be furnished in the case of applicants for a Petroleum right.

***68. Power of revocation.***- In addition to other grounds for revocation stated in these Rules, the government may revoke a Petroleum right if:

(a)

(b)

(c )

(d) without the prior consent of the Government there is a disposition of the share capital of the holder in consequence of which any person who is prior to that disposition has affective control of the holder ceases to have such effective control.

12. The examination of the above rules makes it evident that the Rule 8 and 9 discuss the holding of Petroleum rights and if needed be assigned to other parties. The prior consent of the government is required for any such assignment of the working interest.



13. The Article VII of the Petroleum Concession Agreement, however, contains detailed provision for disposal of the interest in a Concession. The relevant portion of the said Article is given below:

**“7.1 In accordance with Rule 8 of the rules, neither OPI nor GOVERNMENT HOLDINGS (or their respective assignees) shall sell, assign, transfer, convey or otherwise dispose off all or any part of its rights or working interest under the agreement, license or any Lease without the previous consent in writing of the Government.**

**7.2 a) In the even GOVERNMENT HOLDING or OPI wishes to sell, transfer, convey or otherwise dispose off, or assign all or any part of its right or Working Interest to a third party or an affiliate, the request for such assignment shall be processed in accordance with rule 9 of the Rules. The terms and conditions of any assignment shall also be subject to the approval of the Government.**

14. The Article 12 and 13 of the Joint Operating Agreement also include further provisions with respect to disposal of the interests of a Working Interest Owner. The provisions are reproduced hereunder:

**“12.1 No working Interest Owner shall have the right to assign, transfer, convey, encumber, hypothecate or otherwise, dispose off its Working Interest or part thereof, except in accordance with the provisions of Articles 12 and 13 hereof and Article VII of the Concession Agreement.”**

**12.5 After the Effective Date and subject to the provisions of the Concession Agreement, if any Working Interest owner wishes to dispose off all or part of its Working Interest other than to an Affiliate, it shall notify each of the other Working Interest Owners of its desire to do so stating the price and all terms upon which it is offering to dispose of such Working Interest or part thereof and give to each of them thirty (30) days within which to accept such offer.**

15. The above referred contractual provisions make reference to the rule 8 and 9 mentioned hereinabove, which provide a procedure for disposal of Working Interest. In existence of the said provisions, the disposal of Working Interest in contravention thereof, directly or indirectly, cannot be permitted as the rules and the contractual provisions have been made to ensure legal rights of all the parties. If a party attempts to circumvent the rules and contractual provisions by devising scheme, such scheme being against the law cannot be

accepted. It is settled law that a thing required by law to be done in a particular way must have to be done in that way. It is an established law that a thing which cannot be done directly cannot be done indirectly. Reliance is placed on 2001 SCMR 838.

16. In this respect it is important to note here that previously Appellant himself assigned its Working Interest to M/s PETRONAS and a Special Purpose Vehicle (SPV) company namely M/s PETRONAS Carigalli (Pakistan) Respondent No.3 was formed to which the Working Interest was transferred. For this purpose a deal of assignment dated 11<sup>th</sup> May, 2000 was executed to which all the Working Interest Owners in Mehar Block including the Government were a party.

17. However, when PETRONAS decided to divest its Working Interest in the year 2010, it did not adopt the procedure earlier adopted and did not offer its Working Interest to other Working Interest Holders. Rather, in order to circumvent the provisions of rules 8 & 9, it decided to sale the 100% shareholding in the SPV which formed to hold the Working Interest of M/s PETRONAS. The Appellant was also deprived of its Right of First Refusal.

18. Admittedly, there is no procedure devised in the rules for disposition of the shareholding of a company. There is only a penalty clause under rule 68[d] stipulating that if the approval of the government is not obtained for disposition of share capital then a penalty may be imposed. However, it certainly does not allow depriving the parties from their valuable Right of First Refusal.

19. The Contractual provision referred above, contain a language which is wide enough to cover the disposal of share capital through sale of shares. However, Respondent No.3 did not abide by the contractual provisions and sold its shareholding without taking into confidence the other Working Interest Owners. Most amazing aspect of the matter is that, at no stage of proceedings before DGPC, agreement between M/s PETRONAS and M/s OMV was produced. It was shocking to note that during the pendency of matter before this court and Honorable SC, no party placed the agreement on record until we directed vide order dated 15.09.2014. Merely this aspect is sufficient to believe that DGPC acted negligently and for considerations alien to law, making himself

liable to penal actions. This agreement itself shows that transaction was between two different entities and not within the Organization as claimed by Respondents.

20. The net effect of the transaction executed by M/s PETRONAS and M/s OMV was that the SPV holding the Working Interest was sold by PETRONAS to OMV, the name of the SPV was changed and the management of the SPV was also changed. Thus the ultimate owner of the working interest was changed by circumventing the requirement of rule 8 & 9 read with the contractual provisions. We are constrained to observe that through cryptic approach, manipulating dubious transaction and enigmatic dealings, strategic assets of Pakistan handed over to an alien company, by execution of an agreement outside Pakistan. It is highly disappointing that DGPC failed to seek for agreement through which Working Interest or Shares were being transferred. It appears that executive functionaries exhibited laxity under the lucrative influence of ultimate beneficiaries.

21. At this juncture, we need to mention that the SPV was actually owned by a large group M/S PETRONAS based in Malaysia whereas the purchaser of the said SPV is another group M/s OMV which is based in Austria. Therefore, it is vivid that the Working Interest owned by the SPCV has exchanged hands albeit indirectly from one hand to another. The name of SPV has been changed as well as its management which shows the real nature of the transaction, therefore, it was hard for this Court to allow circumvention of law and the consummation of the transaction by the parties while the order of maintaining status quo was in field. It is interesting to note here that the learned single bench issued Status Quo order on the first date of hearing. However, the Respondent No. 3 completed the sale of its shareholding in the beginning of July, 2011 despite being in field an order to maintain Status Quo. A contempt petition was also filed in this respect.

22. It is important to note here that if the transaction was completed in accordance with rule 8 & 9, Article VII of the PCA and Article 12 and 13 of the JOA, then the sale of working interest will be taxed and due to the above

mentioned circumvention public exchequer was deprived of the revenue which was to be paid as a result of the transaction.

23. The impugned order has not discussed the applicability of the Pakistan Petroleum [Exploration and Production] Rules, 1986 and whether the aforesaid rules have been complied with by the respondents while issuing the NOC or at the time of execution of the transaction between M/s PETRONAS and M/s OMV. This was the real legal question involved in the dispute of the parties, which was not adverted to, by the learned single judge. Therefore, the impugned order is not sustainable in the eyes of law.

24. In view of the above discussion, we hold that the rules 8 and 9 of Pakistan Petroleum [Exploration & Production] rules, 1986 are applicable to the transaction in hand and Respondent No.3 and 4 are required to take approval of the Government under the said rules. Judgements relied by learned counsel for respondents are not attracted to the facts and circumstances of instant matter.

25. Further, the contractual provisions particularly Article VII of the PCA and Article 12 and 13 of the JOA are also required to be followed under rule 68[d]. The aforesaid NOC could not have been issued as the said rule contains only penal clauses and not procedure for disposition of the share capital.

26. The instant ICA is allowed and the impugned order of learned single judge is set aside.

27. As a consequence, the NOC issued by the Government, the transaction executed during the pendency of the Writ Petition and during subsistence of the order of Status Quo is illegal and futile. The Respondent No. 2 is hereby directed to ensure compliance with the rules and contractual provisions.

28. The Parties are left to bear their own costs.

**(SHAUKAT AZIZ SIDDIQUI)**  
**JUDGE**

**(ATHAR MINALLAH)**  
**JUDGE**

***Announced in the Open Court on***

***JUDGE***

***JUDGE***

***Approved for Reporting.***

*“Waqar Ahmad”*

