

HCJD/C-121
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Writ Petition No.797 of 2021

Gas & Oil Pakistan Ltd.

Versus

Oil and Gas Regulatory Authority and another

Petitioner by : **M/s Raheel Aslam and
Maruf Ahmed Ali,
Advocates.**

Respondents by : **M/s Azra Batool Kazmi,
Mohammad Shoaib and
Uzair Hsahim, Advocates.**

**Syed Jaffer (Law Officer),
Mr. Ishtiaq (JED) and Mr.
Imdad Khatak (DAED),
OGRA.**

Date of Hearing : **06.09.2022**

Babar Sattar, J:- The petitioner is aggrieved by show case notice ("**SCN**") dated 03.06.2020, the order passed by respondent No.1/Oil and Gas Regulatory Authority ("**OGRA**") dated 11.06.2020 pursuant to which penalty of Rs.5 Million was imposed under Section 6(2)(p) of the Oil and Gas Regulatory Authority Ordinance, 2002 ("**OGRA Ordinance**"), for breach by the petitioner of Rule 53(x) of the Pakistan Oil (Refining, Bending, Transportation, Storage and Marketing) Rules, 2016 ("**Rules**") and order passed by OGRA in review dated 12.01.2021, by which the penalty amount was reduced.

2. Learned counsel for the petitioner stated that in the SCN an allegation was made against the petitioner that it had acted in breach of Section 53(x) of the Rules and had abandoned supply of petroleum products and was therefore liable under

Section 6 of the Act. Pursuant to the said SCN a penalty of Rs.5 Million was imposed vide order dated 11.06.2020. The petitioner then filed a review petition against respondent No.1, which is the only statutory remedy available under the OGRA Ordinance and the penalty was reduced to an amount of Rs.1.25 Million. Learned counsel further stated that the petitioner has already deposited half of the original penalty imposed and an amount of Rs.2.5 Million remained with respondent No.1. He further stated that the penalty was actually imposed on the basis that there was a dry-out of certain petroleum products in the Province of Khyber Pakhtunkhwa (KP), according to the report issued by KP government, and in view of such report the penalty was imposed. Learned counsel for the petitioner further stated that this ground was not mentioned in the SCN and consequently in passing the impugned orders respondent No.1 travelled beyond the allegation made in the SCN and breached the law as laid down in **Caretex Versus Collector Sales Tax And Federal Excise (PLD 2013 Lahore 634)**. He further stated that there was no basis for the finding that the petitioner had abandoned supply of petroleum products as in the review petition data had been produced before respondent No.1, which established that the average supply of petroleum products by the respondents in any given month was approximately 9% to 10% of the total supply in the market and at the relevant time period (i.e. June, 2020) the petitioner's market share went up to 11%, which was more than its average market shares. In view of this fact, the learned counsel for the petitioner stated that the SCN suffered from illegality and the impugned orders passed in pursuance of such SCN also suffer from illegality.

3. Learned counsel for the petitioner explained that the charge against the petitioner was that it had abandoned its regulatory activity and further that it had failed to provide supplies at its gas stations inviting penalty under Section 53(x) of the Rules. He submitted that the show cause notice did not mention the period for which such failure in discharge of regulated activity was being alleged and neither confronted the petitioner with any material on the basis of which such allegation was being asserted by respondent No.1. He further submitted that by order dated 11.06.2020 a penalty of Rs.5 Million was imposed on the basis that the petitioner had failed to supply petroleum products at its gas stations and gasoline was not available at thirty seven gas stations and such finding was delivered on the basis of media reports as well as a report submitted by KP government dated 08.06.2020. He submitted that the material on the basis of which the penalty was imposed was not mentioned in the show cause notice and consequently the impugned order imposing the penalty could not have been passed on the basis of such material in breach of requirements of natural justice without first confronting the petitioner with such material. He further submitted that the petitioner filed a review before respondent No.1, which was accepted and 3/4th of the penalty imposed was waived off. But even in the review order it was found that there was a mere 3% decline in the overall supply of gasoline products by the petitioner. During such adjudication, the supply in the month of May 2020 was compared with the supply in the month of June 2020. And on the basis of such comparison it could not be concluded that the petitioner had failed to maintain adequate petroleum supplies at

various gas stations. He submitted that there were various factors that contributed to the 3 percent decline in the supply of petroleum products, including, Covid-19, Eid holidays as well as the requirements imposed by the Government of Pakistan not to import gas to save foreign exchange and acquire the same from refineries within Pakistan. He submitted that the petitioner became the second largest supplier in the period under consideration even though in ordinary circumstances it was the fourth largest gas supplier. He submitted that the forecast for sale of the gas for the period of June was 60,000 Metric Tons and in the first two days of June the petitioner had sold over 10,000 Metric Tons reflecting that it had oversold gasoline in comparison to the forecast.

4. Learned counsel for respondent No.1 argued that the petition was not maintainable as a challenge against an order passed by OGRA could only be brought before this Court on the basis of a jurisdictional error on part of OGRA, which had not been alleged in the present case. He submitted that the petitioner was challenging the impugned orders passed by OGRA and raising a factual controversy regarding the state of supply of petroleum products by the petitioner, which controversy could not be resolved by this Court in its constitutional jurisdiction. Learned counsel further submitted that there was a dry out in the supply of petroleum products in the Province of KP and the KP government had filed a complaint dated 08.06.2020 stating that various Oil Marketing Companies, including the petitioner, were delinquent in their obligation to maintain supply of petroleum products. He further submitted

that OGRA had taken into account complaints filed on Pakistan Citizens Portal stating that Oil Marketing Companies did not have adequate supply of petroleum products and it was on the basis of such reports that the SCN was issued. He submitted that while initially a penalty of Rs.5 Million was imposed on the petitioner, the said penalty was reduced to 25% through the review order in view of the fact that the decline of the supply of petroleum goods was around 3% of the supply for the same period in the previous year and the penalty was therefore reduced in view of the principle of proportionality.

5. The picture that emerges from the pleadings and the arguments of the parties is that the petitioner was granted a 24 hour period to respond to the SCN. The allegations in the SCN was quite dire i.e. that the petitioner had abandoned supply of petroleum products in breach of Rule 53(x) of the Rules. The SCN, however, did not state the period during which the petitioner had abandoned a regulated activity and discontinued supply of petroleum products without prior permission from OGRA. The SCN also did not state the exact allegation and the information on the basis of which the SCN had been issued. Clause 4 of the SCN generally referred to electronic/print media reports and complaints received from the general public. Admittedly, the complaints received from the general public were not processed in accordance with Complaint Resolution Procedure [For Natural Gas, Liquefied Petroleum Gas (LPG) And Compressed Natural Gas (CNG)] Regulations, 2003 ("**Regulation**"), Regulation 5 of which requires OGRA not to accept complaints unless the complainant has sought redressal

of the complaint from the licensee and has failed to obtain such redress. The SCN did not put to the petitioner any allegation made by the KP government or the Hydrocarbon Development Institute of Pakistan (HDIP), whose reports according to the learned counsel for OGRA, were taken into account while passing the impugned order dated 11.06.2020. It is salutary principle of natural justice that no one can be punished on the basis of an allegation that has not been shared with the party against whom such allegation has been made and without affording such party an opportunity to defend itself. As any allegations lifted from reports put together by HDIP or the KP government was not part of the SCN, no penal action could have been taken on such basis. The adjudicatory process also suffers from infirmity and falls foul of the guarantee of Article 10-A of the Constitution as a 24-hour period provided to respond to the SCN making serious allegations was not sufficient or reasonable time.

6. Neither the SCN nor the impugned order stated the period which was taken into account for purposes of the finding rendered in the impugned order dated 11.06.2020, in which the petitioner had allegedly discontinued supply of petroleum products. The impugned order stated that there was non-availability of petroleum products at 27 out of 35 pumps of the petitioner in KP. Such finding is in contradiction to the finding in the review order which held that there was a mere 3% decline in the petitioner's sale in KP in June, 2020. Such finding in the order dated 11.06.2020 is also in contradiction with the material placed on record establishing that the market share of the

petitioner during the month of June had gone up in relation to other Oil Marketing Companies. And such fact was neither taken into account nor denied by OGRA in the impugned order. This Court repeatedly asked OGRA to share the basis on which factual determinations were made by OGRA and a conclusion drawn that the petitioner had discontinued supply of petroleum products across 27 of its 35 gas pumps. Learned counsel for OGRA was unable to produce any data. What emerged from the submissions of OGRA was that no one on behalf of the regulator actually undertook a factual inquiry or investigation or even fact-finding to determine whether or not there was an actual dry-out or non-availability of petroleum products at the gas pumps being managed by the petitioner. Despite repeatedly asking OGRA to satisfy the Court as to what verification mechanism is adopted by OGRA in exercising its regulatory authority to ensure that Oil Marketing Companies continue to discharge their obligations pursuant to the conditions of the licenses issued to them no satisfactory response was received. It turns out that OGRA lacks a verification mechanism. The impression that this Court garnered from the submissions made on behalf of OGRA, after providing OGRA repeated opportunities to educate the Court with regard to the complaint verification mechanism in relation to the charge of abandonment and discontinuation of supply of petroleum products for purposes of Rule 53(x) of the Rules, was that such determination was backed largely by conjecture and not by any considered mechanism leading to verification or determination of facts. The impugned order itself reflects that there is no reasoned finding regarding abandonment or discontinuation of supply of

petroleum products by the petitioner. The dicta in the impugned orders reflects that the actual charge was that of insufficient supply of petroleum products and not discontinuation of supply or abandonment of a regulated activity. The impugned orders also reflect that OGRA simply did not engage with the arguments presented to it in the response to the SCN and did not impose a penalty after considering and rejecting all of the arguments put forth by the petitioner. The impugned orders are not just perfunctory but also betray a lack of application of mind to the facts or the law.

7. The impugned orders suffer from procedural impropriety for not affording the petitioner the right to a fair trial by putting to it the allegations on the basis of which it was threatened with the penalty or giving it ample opportunity to file a response and defend itself. The impugned orders also suffer from irrationality as the penalty is backed neither by reasoning nor by an actual factual determination on the basis of which the liability has been imposed. Further, it suffers from illegality as OGRA has itself determined that the case against the petitioner is that there was a decline of 3% in the supply of petroleum products during the month of June. But the SCN was issued on 03.06.2020, and for purposes of rendering a finding of declining supply the entire month of June was taken into account. Further, even OGRA itself in its order did not conclude that the petitioner abandoned any regulatory activity and had discontinued supply of petroleum products. While finding that supply of petroleum products by the petitioner had declined, a penalty was imposed under a charge for abandonment of supply.

8. The petition is **allowed** as the petitioner has succeeded in establishing that the impugned orders suffer from illegality, irrationality and procedural impropriety and are liable to be judicially reviewed. Consequently, the impugned order is **set aside** and OGRA will refund the penalty recovered from the petitioner within a period of 30 days. OGRA will also pay a cost of Rs.100,000/- as cost of litigation within a period of 30 days. Learned counsel for OGRA will file a certificate with the Deputy Registrar (Judicial) of this Court stating that the order granting cost has been complied with by or before the expiry of 30-day period.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 23.09.2022.

JUDGE

M.A. Raza