

HCJD/C-121  
**ORDER SHEET**

**ISLAMABAD HIGH COURT**  
**ISLAMABAD**

**OGRA PETITION NO. 02/2015.**

**SUI NORTHERN GAS PIPELINES LIMITED**  
through its Deputy Chief Law Officer.

*VERSUS*

**THE OIL & GAS REGULATORY AUTHORITY**  
through its Chairman & another.

Petitioner by : Mirza Mahmood Ahmed, ASC, Mr. Fahad Malik, Khwaja Tariq Rahim and Mr. Muhammad Azhar Siddique Advocates.

Respondents by : Mr. Yaser Aman Khan Advocate, Mr. Muhammad Rizwan-Ul-Haq (E.D. Litigation), Ms. Misbah Yaqoob (E.D. Finance & Accounts), Mr. Shahzad Iqbal (E.D. Gas), Mr. Amir Nusrat (D.E.D. Gas), Mr. Basit Qureshi (Registrar), Mr. Ahmed Ata-Ur-Rehman, Advocate (Amicus).

Dates of Hearing : 01-12-2015, 02-12-2015, 03-12-2015, 08-12-2015, 09-12-2015, 10-12-2015 & 11-12-2015.

**ATHAR MINALLAH, J.-** Through this consolidated order, I shall decide the instant appeal along with Writ Petitions No. 3696/2015, 3697/2015, 3698/2015 and 3699/2015 as common questions of law and fact are involved.

2. The Sui Northern Gas Pipelines Limited i.e. the petitioner is a juridical person, incorporated under the Companies Ordinance 1984 and, inter alia, engaged in the business of transmission, distribution and sale of natural gas. The

petitioner has been granted a licence by the Oil and Gas Regulatory Authority (*hereinafter referred to as the 'Authority'*) pursuant to powers vested under the Oil and Gas Regulatory Authority Ordinance 2002 (*hereinafter referred to as the 'Ordinance of 2002'*). The instant appeal has been filed under section 12(2) of the Ordinance of 2002 assailing the Determination dated 06-11-2015 made by the Authority. The said impugned Determination has been made by the Authority on the petition submitted by the Company for determining the Final Revenue Requirements for the financial year 2013-2014. In the connected petitions filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the "Constitution"*), the petitioners, who are the shareholders of the Company, have assailed the Determination dated 05-11-2015 made by the Authority, determining the Final Revenue Requirements for the financial year 2012-2013.

3. The learned counsels, appearing on behalf of the petitioners, had concluded their arguments, followed by arguments advanced by the learned counsel appearing for the Authority. The latter brought to the attention of this Court that on 03-12-2015 the Company filed review petitions against both the impugned Determinations under section 13 of the Ordinance of 2002. Copies of the respective review petitions were also submitted. Perusal of the review petitions makes it obvious that the Company has mainly challenged the manner in which the Authority has dealt with 'Unaccounted for Gas' while making the respective Determinations. The grievance of the petitioners in the instant petitions also essentially relates to the manner in which 'Unaccounted for Gas' has been treated by the Authority for the purposes of making the Final Determination. The main argument of the petitioners is based on a recent

judgment of the august Supreme Court of Pakistan dated 26-10-2015, passed in Civil Petition No. 2093 of 2015. It is the case of the petitioner Company that 'disallowance' of 'Unaccounted for Gas' is in the nature of a penalty and, therefore, the benefit ought to be given in the light of Rule 20 of the Natural Gas Tariff Rules, 2002. The petitioner, therefore, seeks relief in terms of the said Rule. The second limb of the argument raised on behalf of the petitioner Company relates to its claim that the Authority has a statutory duty to ensure that it achieves the rate of return provided in its licence, as mandated under section 8 of the Ordinance of 2002. The foundation of the arguments advanced on behalf of the Company stems from the manner in which the Authority has treated and calculated the 'Unaccounted for Gas' in the two impugned Determination orders.

4. The learned counsel for the Authority has, therefore, raised an objection regarding the maintainability of the petitions, on the ground that an alternate remedy under section 13 has already been availed, and review petitions are pending before the Authority, and hence the instant petitions are not competent and liable to be dismissed. The learned counsels appearing on behalf of the petitioners, on the other hand, have contended that the matters raised before this Court are not part of the review petitions filed and pending before the Authority. The question, therefore, arises whether a petition under section 12(2) of the Ordinance of 2002 or under Article 199 of the Constitution would be maintainable when resort has already been made to invoking the power of review vested in the Authority under section 13 of the Ordinance of 2002.

5. The Ordinance of 2002 is a comprehensive and self contained statute which, according to its preamble, was promulgated with

the objective to foster competition, increase private investment and ownership in the midstream and downstream petroleum industry, to protect the public interest, while respecting individual rights, and to provide effective and efficient regulations. The Ordinance of 2002, therefore, has established the Authority to perform its functions as a Regulator in respect of the activities or subjects which falls within the purview of its powers, authority and jurisdiction. Admittedly, the petitioner Company has been granted a licence and is engaged in such business activities which fall within the ambit of the powers and jurisdiction vested in the Authority. The two impugned orders have been passed pursuant to powers conferred on the Authority under sections 6, 7 and 8 of the Ordinance of 2002. The Ordinance of 2002 provides for two stage remedies to a person aggrieved on account of a determination made by the Authority under the Ordinance of 2002. Section 13 empowers the Authority to review, rescind, change, alter or vary any decision, or to rehear an application before deciding it in the event of a change in circumstances or the discovery of evidence which, in the opinion of the Authority, could not have reasonably been discovered at the time of making the decision, or at the time of the original hearing. The change in circumstances or discovery of the new evidence should be of a nature which would have materially altered the decision if it had been considered by the Authority at the relevant time. The powers of the Authority are expansive but circumscribed by the scope of review. The power of review under section 13, vested in the Authority, can be exercised to review, change, alter, rescind or vary any decision, provided the circumstances exist as have been described in section 13 of the Ordinance of 2002. If the Authority is of the opinion that there has been a change in circumstances or there has been a discovery of some new evidence which

could not have reasonably been discovered at the time of the decision, then the Authority may exercise its powers to rescind, review, change, alter or vary any decision.

6. In the instant case, the edifice of the arguments advanced by the learned counsels for the petitioners is based on the judgment of the august Supreme Court dated 27-10-2015, passed in Civil Petition No.2093 of 2015. The said judgment was obviously passed, and its certified copies must have been delivered to the petitioner Company after the impugned Determination orders had been made by the Authority. The second limb of the argument, relating to the manner in which 17.5% of return on assets ought to have been calculated, also appear to fall within the scope of powers of review vested in the Authority under section 13 of the Ordinance of 2002. Both the said arguments and other grounds taken by the petitioner Company in the instant petition appears to be covered within the scope of the power of review. I am afraid that there is no force in the arguments of the learned counsel for the petitioner that as the said grounds have not been included in the review petitions; therefore, the instant petition under section 12(2) of the Ordinance of 2002 and the connected petitions under Article 199 of the Constitution are competent. As already noted, all the grounds raised in the petitions before this Court can be competently considered by the Authority, in exercise of powers under section 13 of the Ordinance of 2002.

7. The instant petition has been filed under section 12(2) of the Ordinance of 2002, while the connected petitions have been filed by the shareholders of the petitioner Company under Article 199 of the Constitution. The legislature, in its wisdom, has worded section 12(2) of

the Ordinance of 2002 in similar language as that of Article 199 of the Constitution. The powers under section 12(2) of the Ordinance of 2002, or Article 199 of the Constitution, have been made subject to the satisfaction of the High Court that no other adequate remedy is provided. As far as section 12(2) of the Ordinance of 2002 is concerned, this Court is satisfied that section 13 provides for an adequate remedy to the petitioner Company, and admittedly review petitions were filed on 03-12-2015 and the same are pending before the Authority. The Authority is competent to consider all the grounds raised in the instant petition and to decide the pending review petitions.

8. The Authority is the Regulator, established under the Ordinance of 2002, while the petitioner company has been granted a licence in connection with its business, which falls within the ambit of regulatory activities. The adequacy of the remedy under section 13 of the Ordinance of 2002 is, therefore, unquestionable in the circumstances. Likewise, the exercise of power under Article 199 of the Constitution is also subject to the satisfaction of the Court that no other adequate remedy is provided under the law. The petitioner Company has already filed review petitions under section 13 of the Ordinance of 2002 which, as noted above, is an adequate remedy and, therefore, the petitions under Article 199 of the Constitution are also not competent. Needless to mention that the petitioners in the connected petitions are shareholders of the petitioner Company. The Determination impugned by the shareholders is in respect of the Company. As it has already been held, this Court is satisfied that an adequate remedy is provided under the Ordinance of 2002 and, therefore, the petitions under Article 199 of the Constitution are not maintainable. I need not dilate on the question whether shareholders

were competent to challenge the Determination made by the Authority under the provisions of the Ordinance of 2002.

9. The august Supreme Court in a chain of decisions has settled the principles and law relating to the scope and jurisdiction of the High Court while exercising powers under Article 199 of the Constitution when an adequate remedy is provided under the law. The principles and law may, therefore, be summarized as follows.-

- (i) The rule that the Court will not entertain a petition under Article 199 when other appropriate remedy is available is not a rule of law barring the jurisdiction of the Court.
- (ii) When the law provides an adequate remedy, constitutional jurisdiction under Article 199 of the Constitution will be exercised in exceptional circumstances.
- (iii) The exceptional circumstances which may justify invoking jurisdiction under Article 199 of the Constitution when adequate remedy is available are when the order or action impugned is palpably without jurisdiction, malafide, void or coram-non-judice.
- (iv) The tendency to bypass the remedy provided under the relevant statute by resorting to the Constitutional

jurisdiction of a High Court is to be discouraged so that the legislative intent is not defeated.

(v) Constitutional jurisdiction under Article 199 cannot be readily resorted to when the matters amenable to the jurisdiction of an exclusive forum is mandated by the Constitution itself or when hierarchy provided under a statute ends up in appeal, revision or reference before a High Court or directly the apex Court.

(vi) The High Court in exercising its discretion will take into consideration whether the remedy provided under the statute is illusory or not.

Reference in the above principles may be made to the cases of '*Tariq Transport Company, Lahore vs. The Sargodha-Bhera Bus Service, Sargodha and others*', [PLD 1958 SC 437], '*Lt. Col. Nawabzada Muhammad Amir Khan vs. The Controller of Estate Duty and others*', [PLD 1961 SC 119], '*The Muree Brewery Co.Ltd vs Pakistan through the Secretary to Government of Pakistan, Works Division and 2 others*', [PLD 1972 SC 279], '*Abdur Rehman vs Haji Mir Ahmad Khan and another*' [PLD 1983 SC 21], '*Commissioner of Income Tax, Companies-II and another vs. Hamdard Dawakhana (Waqf), Karachi*', [PLD 1992 SC 847], '*Income-Tax Officer and another vs. M/s. Chappal Builders*', [1993 SCMR 1108], '*Ch. Muhammad Ismail vs Fazal Zada, Civil Judge, Lahore and 20 others*', [PLD 1996 SC 246], '*Khalid Mehmood vs Collector of Customs, Customs House, Lahore*', [1999 SCMR 1881], '*Collector of Customs, Customs House, Lahore and 3 others Vs. Messrs S.M. Ahmad & Company (Pvt) Limited*,



*Islamabad'*, [1999 SCMR 138], '*Commissioner of Income Tax vs. Messrs Eli Lilly Pakistan (Pvt) Ltd'*, [2009 SCMR 1279],

10. It is also pertinent to refer to the principles enunciated by the august Supreme Court in the case of '*Commissioner of Income Tax, Companies-II and another v. Hamdard Dawakhana (Qaqf), Karachi'* PLD 1992 SC 847 and the relevant portion is as follows.-

*"Before parting with the judgment we may observe that in cases where any party resorts to a statutory remedy against an order he cannot abandon or bypass it without any valid and reasonable cause and file Constitution petition challenging the same order. Such practice, in cases where statute provides alternate and efficacious remedy upto High Court, cannot be approved or encouraged. In a recent judgment of this Court in C.A. No.79-K of 1991, one of us (Ajmal Mian, J.) in similar situation observed as follows:*

*"We may now revert to the question whether the appellant was justified to file above Constitution petition against the order of the Tribunal instead of invoking section 136 of the Ordinance for making a reference to the High Court. According to Mr. Rehan Naqvi, a reference under the above provision would not have been adequate and efficacious remedy as it would have taken years before it could have been heard. The same could be true for a Constitution*

*Petition. The tendency to bypass the remedy provided under the relevant statute and to press into service Constitutional jurisdiction of the High Court has developed lately, which is to be discouraged. However, in certain cases invoking of Constitutional jurisdiction of the High Court instead of availing of remedy provided for under the relevant statute may be justified, for example when the impugned order/action is palpably without jurisdiction and/or mala fide. To force an aggrieved person in such a case to approach the forum provided under the relevant statute may not be just and proper.*

*In the present case, the appellant had opted to avail of the hierarchy of forums provided for under the Ordinance upto the stage of filing of appeal before the Tribunal and, therefore, it would have been proper on the part of the appellant to have invoked section 136 of the Ordinance for making a reference to the High Court instead of filing a Constitutional petition. In our view, once a party opts to invoke the remedies provided for under the relevant statute, he cannot at his sweet will switch over to Constitutional jurisdiction of the High Court in the mind of the proceeding in the absence of any compelling and justifiable reasons.”*

11. It is, therefore, embedded in law that once a person has opted for and availed an adequate remedy available under the law, then resort cannot be made to invoking jurisdiction under Article 199 of the Constitution. The same principles would also apply in case of a petition filed under section 12(2) of the Ordinance of 2002, as the legislature has made it subject to the satisfaction of the Court that no other remedy is provided under the Ordinance of 2002.

12. For the reasons mentioned above, the petitions are not maintainable and are accordingly ***dismissed***. It will be open for the petitioner company to raise all the grounds as described in these petitions before the Authority in the proceedings under section 13 of the Ordinance of 2002. It is noted that observations made in this order shall not in any manner prejudice the proceedings before the Authority. The Authority shall independently decide the pending review petitions in accordance with law and taking into consideration the grounds raised before it by the company.

13. The petitions are ***dismissed*** without any order as to costs.

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

Announced in open Court on 16-12-2015.

**JUDGE**

**Approved for reporting.**