

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.S NO: 51/2012

OCEAN PAKISTAN LTD. VERSUS FEDERATION OF PAKISTAN ETC

Serial No. of order of proceeding.	Date or order of proceedings	Order with signatures of judge, and that of parties or counsel, where necessary.
1	2	3

Date of Hearing:
21-12-2012

D. Khan
Mr. M. Bilal, learned Sr. ASC, Mr. *M. Shamim* &
Mr. Babar Bilal, learned ASCs for defendants-
applicant,
Mr. Mansoor Usman Advocate for respondent-
plaintiff:

ORDER
CM NO. 218-2012

This order shall dispose-of application Under **Order VII, Rule 11 CPC** filed in captioned suit on behalf of the defendant No**2** for rejection of the plaint.

2. Brief facts, relevant for disposal of this Civil Misc., are that the plaintiff filed a suit for declaration, permanent injunction, damages and set-off Under Section 73 of the Contract Act, 1873 praying for a decree in the sum of Rs.3,061,493,612/- plus penalty and default Surcharge along with mark-up with further prayer to permanently restrain the defendants to demand any amount in the form of taxes upon transfer of plaintiff's working interest and other rights under the Petroleum Concession Agreement's (hereinafter to be refereed as PCA] licences and leases. The plaintiff also prayed for a declaration to the effect that only procedural and beneficial substantive provisions of the Income Tax Ordinance, 2001 shall be applicable to the plaintiff in terms of Article 29.6 the PCA's

and Section 24 of the Ordinance, 2001 is violative of the PCAs.

3. It is the case of the plaintiff that the plaintiff under two petroleum concession agreements dated 29.12.1999 with the President of Pakistan was granted petroleum concessions and other rights under the PCAs to conduct petroleum exploration, prospecting, development and production operation including the transportation, storage and sale of petroleum. After the grant of licence, the plaintiff executed a joint operating agreement with other parties for carrying on joint petroleum development and production activities under the terms & conditions of PCA's.

4. It is further his case that effective from 1.1.2009, the plaintiff, with the prior approval of D.G Petroleum concession sold the entire working interest and rights titled and interest in the Mirpur Khas and Khapro PCA's to B.P Pakistan Exploration and Production IUC.

5. According to the plaint, the new working interest owner remains liable for the due taxes etc in terms of the PCA's which is termed as immovable property while the defendant No.3 classified it to be an interest intangible as opposed to an interest in immovable property and issued a show cause notice dated 12.10.2011 which was properly replied but due to an advance ruling from the F.B.R dated 11.2009 to the effect that the working interest in the PCA belonging to the tax payer is not an immovable property rather an intangible asset. The defendant No.3 rejected the plea of the plaintiff on 29.5.2012 and issued a

demand notice dated 29.5.2012 requiring depositing tax within fifteen days.

6. The plaintiff has challenged the actions on the grounds that Article 29.6 of the PCA's protects the plaintiff from the negative impact of any subsequent legislation and full freezing clause offers maximum protection as opposed to a limited freezing clause.

7. It is further contended that in his case Ordinance, 1979 is applicable to the extent of changing provisions while Ordinance, 2001 shall be applied only to the extent of the procedure for the purpose of the payment of due, taxes and an activity not taxable under Ordinance, 79 cannot be made taxable by Ordinance, 2001.

8. It is further averred that the working interest in PCA is not only to explore, develop and produce petroleum from the concession area but to own and sell the same, thus the plaintiff had a specific right to enjoy benefits arising out of the land and an interest in immovable property is an interest in rem.

9. It is further submitted that the Advance Ruling of FBR is in contravention of the Section 24-A of G.C.A and has been passed in an arbitrary manner without any justifiable reason while the definition of "intangible" in Section 24 of Ordinance, 2001 is only relevant, in a completely different contract of "amortization deduction for the cost of intangibles" and even otherwise the issuance of demand notice Under Section 24 (8) of the Ordinance, 2001 is not applicable to the plaintiff.

10. Along-with plaint, an application Under Order XXXIX, Rules 1 & 2 CPC on the same facts and grounds was filed for suspension of demand notice dated 29.5.2012 and restraining the defendants from taking any coercive measures against the plaintiff. Notices for filing of written-statement rejoinder to applications were issued to the defendants.

11. The defendant No.3 vehemently contested the suit as well as stay application through written reply dated 25.6.2012 by raising preliminary objections on the very maintainability of the suit by stating that the order dated 29.5.2012 has been impugned before the Land Commissioner Inland Revenue [Appeal-II], Islamabad but without waiting for its order and without joining the Land Commissioner as party, present suit was filed which is liable to be dismissed on this score alone.

12. It was further submitted that the proceedings Under Section 122 (5-A) of the Income Tax Ordinance, 2001 had been initiated against the plaintiff for recovery of taxes on a gain of Rs.10,572,423,356/- for selling working interest and **Section 227 (i) of the Income Tax Ordinance, 2001 provides that no suit or other legal proceedings shall be brought in any civil Court against any order made under the Income Tax Ordinance.**

13. It was further contended that the petroleum Concession Agreement dated 29.12.1999 was not incorporated through legislation in the laws of the country and, therefore, the rights there from cannot be enforced through Civil Courts in Pakistan and even otherwise under Chapter XXVIII Para 20.1 to 20.3 of the said agreement, the dispute arising out

of the terms between the parties, the matter would **be referred to Arbitration.**

14. It was also submitted that the plaintiff has suppressed and concealed the facts regarding dismissal of Writ-Petition No. 2958/2011 on 11.4.2012 by this Court and dismissal of CPLA No.773/.2012 on 23.5.2012 by the Honourable Supreme Court on 15.5.2012 and lastly Writ-Petition No. 1703/2012 was also dismissed in limine on 7.6.2012 wherein the suspension of the impugned order dated 29.5.2012 had been solicited, hence the present suit is liable to be dismissed.

15. The suit was contested on merits as well by stating that the gain on sale of "working interest " cannot be attributed to the sale of "Immovable property" as owned by the petitioner because the Government had issued licence/lease in favour of the company to undertake the petroleum exploration/productions activities in concession areas while the said right was subsequently sold by the plaintiff to another concern gaining billions of rupees and, therefore, the taxes on these gains cannot be eroded as the sale of working interest being "**Intangible**" does not fall within the scope of PCA.

16. The defendant No.2 on the same day i.e 25.6.2012 filed an application Under Order VII, Rule 11 CPC for rejection of plaint on the grounds that there is a bar to file civil suit Under Section 227 (1) of the Income Tax Ordinance, 2001, for availing alternate legal remedy; no jurisdiction of the Civil Courts to enforce rights and obligations arising out of the agreement, 1999; not resorting to the Arbitration proceedings under Chapter XXVIII

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Para 28.1 to 28.3 of the said petroleum Concession Agreement dated 29.12.1999 and for dismissal of plaintiff's Writ Petitions as well CPLA no.773/2012 for the same relief. Learned counsel in support of this Civil Misc., placed reliance upon case laws cited as 1973 SCMR 282, 2003 YLR 196, 2012 PTD 1590, 2009 SCMR 1279, PLD 1994 Supreme Court 693, 2002 SCMR 1694 which are on the point that international agreement between the nations, if signed by any country is always subject to rectification, but same can be enforced as law only when legislation is made by the country through its Legislature. **In case 1973 SCMR 282, it was held that the Income-Tax Act is a complete Code by itself and any grievance in regard to the assessment can be remedied within the four corners of that Act.**

17. The plaintiff contested the application through their reply dated 19.12.2012 on the grounds that the application is hit by the law of estoppel as the defendant No.3 had moved C.M no.219/2012 for becoming a party to the titled suit and after the Petroleum Concession Agreements PCA's, the defendant becoming a party to the suit cannot ask for the protection of Section 227 (1) of the Income Tax Ordinance, 2001.

18. It is further submitted that the defendants No.2 and 3 are proforma defendants and the main claim is against the defendant No.1 who had executed the PCA's on behalf of the President of Pakistan. The next preliminary objection on the maintainability of the application was that the suit cannot be considered barred by any law, because the actions taken by the officers of Inland Revenue

are not in good faith and malafidies have been attributed to the acts of defendants No.2 and 3.

19. On merits, it was submitted that the PCA's and other documents were executed under Income Tax Ordinance, 1979 and, therefore, the Income Tax Ordinance, 2001 shall not be applicable in the case.

20. It is next submitted that the definition of working interest cannot be treated in isolation as the concessions granted to the plaintiff were with respect to specific areas for exploration of oil underneath the lands and the transfer of interest would mean a transfer of interest in the immovable property falling within the concession area and no taxes are leviable on immovable properties.

21. It was lastly submitted that the application Under Order VII, Rule 11 CPC is an attempt to delay the proceedings of the case, because the questions involved cannot be decided without evidence from both sides and since the damages have also been claimed, the questions of alternate remedies under the Arbitration Act or through Income Tax appeals do not arise.

22. Heard & Record Perused.

23. It is admitted position of the case that the plaintiff had sold the working interest for the said area against a sum of Rs.10,572,423,356/- for which the defendant No.3 had issued a notice to pay the taxes and the plaintiff filed an appeal to the Commissioner against the demand for payment of tax. The appeal is still pending, and before the disposal of the appeal on income Tax side, the present suit has been filed.

24. It is also and admitted position that a Writ Petition No.2958/2011 was filed before this Court,

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whereby the issuance of show cause notice dated 12.10.2011 under Section 122 (9) read with Section 122(5-A) of ITO, 2001 was challenged, against which, a declaration has been sought through the present plaint. The said Writ Petition was dismissed by order dated 16.4.2012 by observing that the show cause notice was neither without jurisdiction nor coram non-judice and there is no malafide on the part of respondents in issuing the show cause notice.

25. According to record the order dated 16.5.2012 was impugned before the Honourable Supreme Court in Civil Petition No.773/2012, but the same was also dismissed by maintaining the findings recorded by the learned Single Judge vide order dated 16.4.2012.

26. The record also reveals that the plaintiff had filed another Writ-Petition No.1703/2012, whereby the suspension of the operation of the impugned notice dated 29.5.2012 was sought, but the said Writ-Petition was also dismissed and the show cause notice dated 29.5.2012 remained in the field.

27. All these admitted facts lead to the conclusion that the plaintiff could not establish the malafidies or lack of jurisdiction on the part of defendant No.3 for demanding the taxes vide show cause notice dated 29.5.2012.

28. The factum of availing alternate remedy through appeal is also not denied, which was availed by the plaintiff and the appeal is still pending for disposal and in case of its decision, the aggrieved party shall have further remedies in the same hierarchy i.e Under the Income Tax Ordinance, 2001.

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29. As far as the dispute regarding the issue of working interest as immovable property or intangible is concerned, the same shall be decided by the Inland Revenue Authorities as held by this Court as well as by the Honourable Supreme Court through the Judgment *ibid* and in presence of those judgments, at this stage, no interpretation of the terms can be made.

30. For the foregoing reasons, the application Under Order VII, Rule 11 CPC is accepted and plaint in captioned suit is rejected with no order as to costs.

MUHAMMAD ANWAR KHAN KASI
JUDGE

Announced in Open Court, on this 19th day
of February, 2013.

JUDGE

M. Suhail
19-2-2013

APPROVED FOR REPORTING

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