JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.113/2018
Dewan Petroleum (Pvt.) Ltd.
Versus
Oil and Gas Investment Ltd.

Dates of Hearing:	20.02.2019 & 22.03.2019
Appellant by:	Malik Qamar Afzal and Mr. Saad Khan, Advocates.
Respondent by:	Mr. Ammar Athar Saeed, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide First Appeal from Order ("F.A.O. No.113/2018") and Civil Revision Petition("C.R.No.322/2018"), since they entail common questions of law and fact.

2. Through F.A.O.No.113/2018, the appellant, Dewan Petroleum (Pvt.) Ltd., impugns the order dated 25.09.2018, passed by the learned Civil Court to the extent of allowing the respondent's application under Section 20 of the Arbitration Act, 1940 ("the1940 Act"), and referring the matters in dispute between the appellant and respondent to arbitration.

3. Through C.R.No.322/2018, the petitioner, Dewan Petroleum Pvt. Ltd., impugns the said order dated 25.09.2018, passed by the learned Civil Court to the extent of allowing the respondent's application for interim injunction under Section 41 of the 1940 Act read with Order XXXIX, Rules 1 and 2 and Section 151 of the Civil Procedure Code, 1908 ("C.P.C.").

4. The order dated 25.09.2018 passed by the learned Civil Court was a composite order disposing of the respondent's application under Section 20 of the 1940 Act as well as its application for interim injunction. Dewan Petroleum (Pvt.) Ltd. shall be referred to as "the appellant".

5. The facts essential for the disposal of the said appeal and revision petition are that on 18.01.2002, the President of the Islamic Republic of Pakistan ("the President") granted a petroleum exploration licence for block No.3070-10 (Safed Koh) to

M/s Scimitar Hydrocarbons Pakistan Limited and M/s MESA Petroleum (Pvt.) Ltd. The President had also entered into a Petroleum Concession Agreement ("PCA") with the said parties. The parties with whom the President had executed the PCA had executed a Joint Operating Agreement ("JOA").

6. M/s Scimitar Hydrocarbons Pakistan Limited was entirely owned by M/s Scimitar Hydrocarbons Corporation. After M/s Rally Energy Corporation acquired 100% equity of M/s Scimitar Hydrocarbons Corporation, the said licence, PCA and JOA were amended so as to replace the name of M/s Scimitar Hydrocarbon Pakistan Ltd. with M/s Rally Energy Pakistan Ltd. ("R.E.P.L"). Vide deed of assignment dated 15.07.2004, R.E.P.L. assigned 22.5% of its working interest to Rally Energy Safed Koh Ltd. ("R.E.S.K.") and 75.1% to the appellant. Furthermore, M/s MESA Petroleum (Pvt.) Ltd. also assigned its 12.5% working interest to the appellant.

7. Through deed of assignment dated 29.01.2005, R.E.P.L. assigned 10% of its working interest to Oil and Gas Investment Ltd. ("the respondent").The operatorship under the said license, PCA and JOA was also transferred from R.E.P.L. to the appellant with effect from 29.01.2005.

8. The working interest owners had made a commercial discovery of petroleum and vide letter dated 23.01.2006, the Government of Pakistan had approved such discovery and the development plan in relation thereto. The Government of Pakistan also granted a development and production lease to the working interest owners over the area where the discovery had been made.

9. Through deeds of assignment dated 19.10.2006, R.E.P.L. transferred and assigned its entire 40% working interest in the lease, licence, PCA and JOA to the appellant. Through deeds of assignment dated 17.02.2007, M/s MESA transferred and assigned its entire 7.5% working interest in the lease, licence, PCA and JOA to R.E.S.K. The current position of the working interest owners under the JOA is as follows:-

The appellant (Dewan Petroleum (Pvt.) Ltd.)	***60%***
R.E.S.K.	***30%***
The respondent (Oil and Gas Investment Ltd.)	***10%***

10. As mentioned above, the appellant was designated as the Operator by the working interest owners for carrying out of the joint operations pursuant to the provisions of the PCA and the JOA. It is not disputed that the appellant's nomination as the Operator had been approved by the Government of Pakistan under the provisions of the Pakistan Petroleum (Exploration and Production) Rules, 2001.

11. Under the terms of the PCA and the JOA, a joint account was maintained by the Operator in accordance with the agreed accounting procedure and normal accounting practices. The Operator was under an obligation to record all charges, expenditures and credit made by it in carrying out the joint operations under the said agreements which were chargeable and creditable to the working interest owners.

12. Article 6 of the JOA provides *inter-alia* that the joint operations conducted by the Operator and all expenditure incurred from the joint account in connection therewith shall be performed and incurred only pursuant to an approved work programme and budget. The expenditures for the approved work programme are to be on the basis of the cash calls made by the Operator. Each working interest owner is required to pay its full share of the cash calls in accordance with the agreed accounting procedure.

13. The respondent stopped making payments against the cash calls due to its reservations on the manner in which the appellant had been utilizing the funds from the joint account. The respondent's concerns centered around the general and administrative costs being charged by the appellant through cash calls from the other working interest owners, including the respondent. Vide e.mail dated 12.09.2017, the respondent gave notice to the appellant and R.E.S.K. about its intent to conduct audit of the Safed Koh's joint account for the years 2015 and 2016. Vide e.mail dated 10.12.2017, the appellant informed the

respondent that except three cash calls, the respondent had been in default of obligations to pay all the cash calls raised over the last decade. The appellant took the position that it had exercised restraint in initiating default proceedings against the respondent.

14. It is not necessary to narrate the details of the allegations made by the appellant and the respondent against each other. For the present purposes, suffice it to say that disputes and differences developed between the said parties arising from and related to the provisions of the JOA.

15. Article 17 of the JOA provides that the disputes arising out of the JOA shall be dealt with *mutatis mutandis* in accordance with Article 28 of the PCA. Article 28.3 of the PCA provides *inter-alia* that in the event of a dispute between the Pakistani working interest owners inter se, arbitration shall be conducted in accordance with the Arbitration Act, 1940.

16. Vide letter dated 06.06.2018, the respondent nominated the Hon'ble Mr. Justice (Retired) Khilji Arif Hussain as the sole arbitrator and required the appellant to give its consent to the said nomination within a period of ten days. The appellant, in its letter dated 11.06.2018, took the position that since the respondent's letter dated 06.06.2018 does not make reference to any dispute between the parties, no cause of action could be considered to have accrued to the respondent against the appellant. Furthermore, it was stated that any unilateral commencement of arbitration would be unlawful and shall have no legal effect. The respondent, vide letter dated 21.06.2018, informed the appellant that if no response was received within a period of seven days from the latter, the Hon'ble Mr. Justice (Retired) Khilji Arif Hussain would be considered as the sole arbitrator and the arbitration proceedings will accordingly commence.

17. On 30.06.2018, the appellant gave a notice under Article 4.2 of the JOA for the operating committee meeting scheduled to be held on 18.07.2018 to discuss *inter-alia* the status of cash calls payments and the joint account. In the operating committee

meeting held on 23.07.2018, it was resolved that a last attempt would be made for an amicable resolution of the matter regarding cash calls payments and other issues with the respondent. It was also resolved that if no positive results are achieved, a formal default notice would be issued to the respondent. The respondent did not attend the operating committee meeting dated 23.07.2018.

18. On 28.08.2018, the respondent filed an application under Section 20 of the 1940 Act before the Court of the learned Civil Judge, Islamabad, praying for the matters in dispute between the appellant and the respondent to be referred to arbitration. Along with the said application, the respondent also filed an application for interim injunction under Section 41 of the 1940 Act. Vide composite order dated 25.09.2018, the learned Civil Court allowed the said applications, and directed the parties to file the names of the arbitrators within a period of fifteen days.

19. As mentioned above, the said order dated 25.09.2018 to the extent of allowing the application under Section 20 of the 1940 Act, has been assailed by the respondent in F.A.O. No.113/2018, whereas the said order to the extent of allowing the application under Section 41 of the 1940 Act, has been assailed in C.R.No.322/2018.

20. Learned counsel for the appellant, after narrating the facts leading to the filing of the said appeal and revision petition, submitted that the learned Civil Court should not have allowed the respondent's application for interim injunction; that by reason of the said injunction, the respondent has been relieved from paying its share under the cash calls made by the Operator; that the provisions of the JOA provide for the measures to be taken against a working interest owner who defaults in making payments against the cash calls made by the Operator; that by reason of the injunctive order, the Operator and the other working interest owners cannot take recourse to the contractual provisions so as to proceed against the respondent for defaulting in making payments against the cash calls; that a Court cannot rewrite or interfere with contractual provisions; that the dispute

regarding non-payment against the cash calls is a fiscal dispute, and therefore, the question of irreparable loss to the respondent does not arise; that all the three ingredients for granting an injunction were missing in the case at hand; and that the appellant would have no objection if this Court appoints an arbitrator who is proficient in the field of auditing. Learned counsel for the appellant prayed for the F.A.O.No.113/2018 to be disposed of by appointing an arbitrator; and for the C.R.No.322/2018 to be allowed by setting-aside the impugned order dated 25.09.2018 to the extent of allowing the respondent's application for interim injunction.

21. On the other hand, learned counsel for the respondent submitted that the respondent's primary concerns were with respect to the unjustified and unauthorized general and administrative costs being charged by the appellant through cash calls from the other working interest owners, including the respondent for the Safed Koh project; that the cash calls made by the appellant were to fuel the operations of the appellant's sister concerns such as Dewan Drilling Limited and to further its own oil and gas exploration projects; that the discrepancies in the accounts had been highlighted by the respondent in various operating committee meetings, including the ones held on 29.10.2010, 27.11.2013 and 28.11.2013; that the respondent had raised its concerns in e.mails dated 20.06.2017 and 08.07.2017; that the auditors of the Safed Koh project had also raised concerns with respect to the unjustified and unauthorized charging of the general and administrative costs; that on several occasions, the respondent had requested the appellant to conduct audit of accounts of the Safed Koh project from the stage when the respondent had become a working interest owner; that the said request had been made to determine the authenticity of the expenses incurred for the Safed Koh project, including the general and administrative costs charged by the appellant through cash calls; that the respondent's said request had not been acceded to; that the respondent was justified in not making

any payment against the cash calls made by the appellant; that by reason of the injunctive order passed by the learned Civil Court, the respondent will not make any payment against such cash calls; and that the respondent would have no objection if this Court appoints an Arbitrator. Learned counsel for the respondent prayed for the revision petition to be dismissed.

22. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the appeal and the revision petition have been set out in sufficient detail in paragraphs 5 to 19 above and need not be recapitulated.

23. Learned counsel for the appellant candidly admitted that since the dispute raised by the respondent, in its application under Section 20 of the 1940 Act, arose from and was related to the terms of the JOA, the same warranted resolution in accordance with the dispute resolution mechanism enshrined in Article 17 of the JOA read with Article 28 of the PCA. The learned Civil Court had allowed the respondent's application under Section 20 of the 1940 Act and had directed the parties to submit the names of Arbitrators. Since the learned counsel for the contesting parties are in unison on their submission that this Court may appoint a sole arbitrator who is proficient in the field of accounting, therefore, Mr. Rashid Ibrahim, Senior Partner, Septentrio Global Consulting, is appointed as such. The learned sole arbitrator shall determine his own fee and the venue for arbitration shall be at Islamabad. Accordingly, F.A.O. No.113/2018 stands disposed of in the above terms.

24. As regards the revision petition against the learned Civil Court's order dated 25.09.2018 to the extent of allowing the respondent's application for interim injunction, it appears that the sole ground on which the said application was allowed, was that the disputes between the parties had been referred to arbitration. For the purposes of clarity, paragraph 7 of the said order dated 25.09.2018, is reproduced herein below:-

> ***"As far as application under Section 41 of Arbitration Act, 1940 is concerned as the dispute has been referred to Arbitration, hence***

refusal of application under Section 41 of Arbitration Act, 1940 will cause irreparable loss to the petitioner, if default notice is issued. Therefore, the instant application is accepted. Now to come up for 13.10.2018."

25. Clause 6.5 of the JOA provides the consequences for the working interest owner who defaults in paying its full share of any cash calls by the due date in accordance with the agreed accounting procedure. Where a working interest owner defaults in making payments of any cash calls, the shortfall in the payment caused by such default is to be made good by the remaining working interest owners. In such circumstances, the Operator is also empowered to borrow the necessary finance from outside sources. Where the default persists beyond six months from the date on which the Operator notifies such default, the defaulting working interest owner is not entitled to receive its entitlement of petroleum, attributable to its working interest share. During the continuation of the default, the defaulting working interest owner is not entitled to be represented at the meetings of the operating committee and shall have no access to any data and information related to joint operations.

26. The respondent, in its application under Section 41 of the 1940 Act, had prayed for the maintenance of *status quo*. It was also prayed that the appellant be restrained from taking any coercive or adverse action against the respondent including but not limited to the issuance of a default notice pursuant to Article 6 of the JOA. The injunctive order granted by the learned Civil Court insulates the respondent from the consequences of the default in making payments of any cash calls contemplated by Article 6 of the JOA. Courts usually refrain from granting injunctions to restrain the performance of contractual obligations.

27. It is well settled that temporary injunction cannot be granted in cases where applicant did not have a good *prima-facie* case; the balance of convenience was not in his favour; and that the loss he would suffer if the injunction was not granted was not irreparable and could be measured in terms of money. It appears that the learned Civil Court did not apply its judicious mind to the

principles on which an interim injunction can be granted. There is, for instance, no mention in the said order as to the three ingredients for the grant of an interim injunction having been satisfied.

28. Under Section 41(b) read with the Second Schedule to the 1940 Act, the Court has the power to issue interim injunctions for the purpose and in relation to arbitration proceedings. The principles for the grant of an interim injunction under Section 41(b) read with the Second Schedule of the 1940 Act are the same as the ones applicable to interim injunctions granted under Order XXXIX, Rules 1 and 2, C.P.C. In the case of Pakistan Railways Vs. Four Brothers International (Pvt.) Ltd. (PLD 2016 SC 199), it has been held that an injunctive order against the recovery of amounts passed under Section 41(b) of the 1940 Act without examining the three ingredients for the grant of injunction i.e. *prima-facie* arguable case, balance of convenience and irreparable loss, is not sustainable in law. In the said case, the matters in dispute between the parties were referred to arbitration, but the interim injunction passed by the learned Civil Court as well as the learned Revisional Court were vacated.

29. It will be for the respondent to prove in the arbitration proceedings that the appellant had breached the provisions of the JOA by making unjustified cash calls or that the amounts paid by the respondent in response to such cash calls had not been used in furtherance of the obligations of the working interest owners in the Safed Koh project. In the event the respondent is able to prove this, it would have a case for the recovery for an ascertained amount against the appellant. In this view of the matter, it cannot be held that if the interim injunction was not granted to the petitioner, it would suffer irreparable loss. In the cases of Tauseef Corporation (Pvt.) Ltd. Vs. Lahore Development Authority (2002 SCMR 1269), Al-Tamash Medical Society Vs. Dr. Anwar Ye Bin Ju (2019 CLC 1), and Maxim Advertising Company (Pvt.) Ltd. Vs. Province of Sindh (2007 MLD 2019), the Superior Courts have held that where loss was ascertainable in terms of money, then it could

not be treated as a case of irreparable loss. In the case of Haji Khan Vs. Government of Sindh (1990 MLD 155), the Hon'ble Mr. Justice Wajihuddin Ahmad (as he then was) had the occasion to hold as follows:-

> ***"The crucial point in the case was the question of irreparable loss. Since money was involved and loss, if any, to the plaintiffs could have been assessed in terms of money, question of irreparable loss hardly arose but all that the learned Judge said on the subject was that "valuable right has been created in favour of the plaintiffs, by the said contract, therefore, in my humble opinion breach of the said contract cannot be adequately compensated in terms of money". Manifestly, contracts involving collection of monetary benefits, which themselves have been obtained on specific monetary considerations, on principle, cannot involve irreparable loss because such loss, inherently, means and implies only such loss as is incapable of being calculated on the yardstick of money. Unless all the required ingredients of prima facie case, balance of convenience and irreparable loss to the aggrieved party are found to subsist, no Injunction under Order 39, Rules, 1 and 2, C.P.C. can issue."***

30. It is well settled that all the three ingredients for the grant of an injunction must co-exist and if any one of such ingredients is missing in the case, the litigant would not be entitled to the grant of a temporary injunction. Reference in this regard may be made to the law laid down in the cases of Puri Terminal Ltd. Vs. Government of Pakistan (2004 SCMR 1092), Imtiaz Ahmad Vs. Muhammad Shoaib Shah (2015 CLC 1121), Mst. Azra Parvez Vs. Sheikh Ashfaq Hussain (2015 CLC 1695), M.Y. Corporation (Private) Ltd. Vs. Erum Developers (PLD 2003 Karachi 222), Managing Committee, Revenue Employees Cooperative Housing Society Vs. Secretary, Cooperative Societies, Government of Punjab (2001 CLC 838), Zakaria Dada Vs. Maneck Byramji Javat (1992 CLC 345) and Haji Khan Vs. Government of Sindh (1990 MLD 155).

31. In the case at hand, the learned Civil Court granted an interim injunction in the respondent's favour without giving any finding regarding the existence of the preconditions necessary for the grant of an interim injunction. The learned Civil Court did not bother to give any finding regarding the existence of a *prima-facie* arguable case, balance of convenience or accrual of irreparable loss.

32. When the respondent alleges that the appellant had made unjustified cash calls insofar as they related to the general and administrative costs, it is in fact alleged breach of contract on the appellant's part. Since the loss, if at all any, occasioned by the respondent on account of such a breach on the appellant's part, is ascertainable in terms of money, the instant case is not one of irreparable loss.

33. In view of the above, C.R.No.322/2018 is allowed; the impugned order dated 25.09.2018 to the extent of allowing the respondent's application for interim injunction is set-aside; and the respondent's application for interim injunction is accordingly dismissed. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING

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