

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3823/2016

Petroleum Exploration (Private) Limited

Versus

Federal Government of Pakistan through Secretary Ministry of
Petroleum & Natural Resources and others

Date of Hearing: 04.10.2019

Petitioner by: Barrister Yousaf Khosa, Malik Omair
Saleem and Barrister Sereena Khan.

Respondents by: Mr. Tariq Mahmood Khokhar, learned
Additional Attorney-General.
Ch. Hafeez Ullah Yaqoob and Ms. Zaitoon
Hafeez, Advocates for respondent
No.4/S.N.G.P.L.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Petroleum Exploration (Private) Limited, is aggrieved by the inaction on the part of respondent No.2/Director General Petroleum Concessions (“D.G.P.C.”) to extend the benefit of the *“incentive price of gas”* under the provisions of the Petroleum Exploration and Production Policy, 2012 (“the 2012 Policy”). The petitioner seeks a direction to the respondents to implement the 2012 Policy with respect to the Badar Gas Field by giving the incentive price to the petitioner. The petitioner also seeks a direction to respondent No.3 (Director General, Gas) to execute a supplemental agreement to the Badar Gas Pricing Agreement (“G.P.A.”). The petitioner also impugns the letter dated 04.09.2018 issued by the D.G.P.C.

2. The facts essential for the disposal of the instant petition are that Pakistan Petroleum (Production) Rules, 1949 (“1949 Rules”) were made by the Government of Pakistan in exercise of the powers conferred by Section 2 of the Regulation of Mines and Oilfields and Mineral Development (Federal Control) Act, 1948. On 15.07.1986, the President of Pakistan, in exercise of the powers under the 1949 Rules, granted an exploration and prospecting licence over the Karachi Block covering an area of 1,375 square miles to (i) Canada NorthWest Energy Limited, (ii) Rio Alto Exploration Limited, and (iii) Oil and Gas Development Corporation (“working interest owners”).

Simultaneously, with the grant of the said licence, the President of Pakistan and the working interest owners entered into a petroleum concession agreement (“P.C.A.”). Subsequently, the working interest owners relinquished the Karachi Block and in lieu thereof were granted an exploration and prospecting licence for the Ghauspur Block located in Jacobabad and Sukkur Districts, Sindh Province. In this regard, the agreement to transfer the Karachi Block work commitment to Ghauspur Block was executed between the President of Pakistan and the working interest owners on 20.09.1992.

3. Through deeds of assignment, the working interest owners assigned their respective shares in the Ghauspur Block. Presently, the working interest owners in the Ghauspur Block are: (i) the petitioner, who is also the Operator; (ii) Oil and Gas Development Company Limited; (iii) Sherritt International Oil and Gas Limited; and (iv) Spud Energy Pty. Limited.

4. In February 1994, an exploratory well called Badar-1 was drilled in the Ghauspur Block. In March 1994, the Petroleum Policy, 1994 (“the 1994 Policy”) was announced by the Government of Pakistan. Paragraph 2.3(c) of the 1994 Policy made the upstream incentives in the said Policy applicable to Exploration and Production companies (“E&P companies”) that signed petroleum concession agreements after the announcement of the said Policy as well as to “*new exploration efforts*”. In order to give effect to the incentives under the 1994 Policy, supplemental agreements were required to be entered into between the Government of Pakistan and the eligible companies that were willing to accept the terms and conditions of the said policy as a package. “*New exploration efforts*” were defined in the 1994 Policy to mean exploration wells spudded after 01.01.1994.

5. Since Badar-1 Well was drilled in February 1994, the working interest owners applied to the D.G.P.C. for the grant of the additional incentives under the 1994 Policy. In order to grant the additional incentives under the 1994 Policy to the working interest owners, a supplemental agreement was executed on 12.07.1997 between the President of Pakistan and the working interest owners.

6. On 13.03.2002, the working interest owners issued a declaration of commerciality. On 18.09.2003, mining lease

No.151/PAK/2002 (**“Badar Mining Lease”**) over the Badar Gas Field covering 47.1 square miles in District Jacobabad, Sindh was executed pursuant to Rule 29 of the 1949 Rules and Article 5 of the P.C.A. between the President of Pakistan and the working interest owners which included the petitioner. The said lease was for a term of five years with effect from 13.03.2002. Vide letter dated 11.07.2006, the D.G.P.C. granted an extension in the initial term of the said lease for a period of seven years with effect from 13.03.2007. Vide letter dated 07.07.2014, the D.G.P.C. renewed the said lease for a further period of five years with effect from 13.03.2014.

7. On 18.07.2003, a gas sale and purchase agreement for the Badar Gas Field was executed between the working interest owners and respondent No.4/Sui Northern Gas Pipelines Limited (**“S.N.G.P.L.”**) for the sale and purchase of gas produced from the said gas field. On 18.08.2004, a gas price agreement with respect to the said gas field was executed between the working interest owners and the President of Pakistan. S.N.G.P.L. was also a party to the said agreement.

8. On 30.08.2012, the 2012 Policy was notified by the Ministry of Petroleum and Natural Resources (**“M.P.&N.R.”**). One of the objectives of the said Policy was to accelerate exploration and production activities in Pakistan with a view to achieve maximum self sufficiency in energy by increasing oil and gas production. The incentives under the 2012 Policy were to apply to the E&P companies that applied for new petroleum rights after the said Policy came into effect as well as to those E&P companies that opt for conversion to the said Policy in accordance with Section VI thereof.

9. Under paragraph 13.1 of the 2012 Policy, the option for conversion to the said Policy was available to all *“new exploration efforts”* made under the exploration licences and leases: (a) that stand granted/executed; or (b) for which provisional award has already been made; or (c) for which applications are pending and bids have been invited before the date of the approval of 2012 Policy. Paragraph 13.2 of the 2012 Policy explains that *“new exploration efforts means “Exploration Wells” under drilling and/or spudded, after the Effective Date of the petroleum exploration and production*

Policy, 2007 (i.e. 27th November 2007) and have not declared commerciality". Paragraph 13.3 of the 2012 Policy provided that for all conversions to the 2012 Policy pursuant to paragraph 13.1 thereof, the gas price allowed for new exploration efforts under the respective exploration licences and leases shall be the 2012 Policy.

10. Paragraph 13.6 of the 2012 Policy provided *inter alia* that the companies desirous of opting for conversion to the 2012 Policy shall be required to submit their written request to the D.G.P.C. within ninety days from the date of the announcement of the 2012 Policy failing which they will not remain eligible for conversion. Furthermore, it was provided that the option once exercised shall be final and that a supplemental agreement to give effect to the conversion shall be executed as soon as possible but not later than six months from the date of the exercise of the option.

11. Under paragraph 13.8 of the 2012 Policy, the gas price under the said Policy was to be extended to that E&P companies who would give additional 10% production over and above the committed volumes in the development plan approved by the Government. The gas price under the 2012 Policy was for additional production only. For the purposes of clarity, paragraph 13.8 of the 2012 Policy is reproduced herein below:-

"The gas price of Policy 2012 will also be extended to those E&P Companies who will give additional 10% production over and above the commitment in accordance with approved development plan by the Government to the extent of additional production only."

12. Vide letter dated 05.09.2012, the petitioner, as the Operator of the Badar Joint Venture ("Badar J.V."), applied to the D.G.P.C. for the gas price to be allowed in terms of paragraph 13.8 of Section VI of the 2012 Policy.

13. Vide letter dated 11.10.2012, the D.G.P.C. informed the petitioner that the Government of Pakistan had allowed the incentive to the petitioner pursuant to paragraph 13.8 of the 2012 Policy if the additional volume produced from the Badar Gas Field was more than the 10% threshold. The petitioner was requested to approach the Director General (Gas), M.P.&N.R. for fixing the gas price under the 2012 Policy for the additional volumes produced from the Badar Gas

Field. This incentive was allowed to the petitioner subject to the following conditions:-

- “i. This incentive will be applicable to E&P companies after the date of the notification of Petroleum Policy 2012 i.e. 30-08-2012 for which they will execute a Supplemental Agreement to effectuate the incentive.*
- ii. 10 % production over and above the commitment will be the minimum threshold which triggers the applicability of the incentive provided in Clause 13.8 of the Policy, 2012.*
- iii. The corresponding level of production committed in Development Plan will be taken with effect from the date of filling of application by the operator E&P Company.*
- iv. 3rd Party Reserves Certification will be provided by the applicant company with the application to the effect that the E&P company is producing more than 10 % in addition vis-à-vis commitment to the existing production profile on the effective date.”*

14. The petitioner, along with its letter dated 31.10.2012, submitted the draft of the first supplemental agreement to the gas price agreement dated 18.08.2004 to the D.G.P.C./ Director General of Gas in M.P.&N.R with a request that the same be executed between Badar J.V., the President of Pakistan and the S.N.G.P.L. so as to give effect to paragraph 13.8 of the 2012 Policy. It is an admitted position that a supplemental agreement was not executed at any material stage.

15. Vide letter dated 20.11.2012, the petitioner applied to the D.G.P.C. for conversion of the Badar Mining Lease to the 2012 Policy for the purpose of *“new exploration efforts”* in accordance with Section VI of the said Policy.

16. Paragraph 13.8 of the 2012 Policy was amended through notification dated 23.09.2013 (S.R.O.813(I)/2013). The amended paragraph 13.8 of the 2012 Policy is reproduced herein below:-

“The gas price of Policy 2012 will also be extended to the entire incremental gas production, subject to meeting the minimum threshold of 10% addition in the current production or the volumes committed in approved development plan, whichever is higher. For this purpose, the current production will mean maximum gas production of any day during last six months immediately preceding the date of approval of this Summary by the CCI i.e. 31st July, 2013. The producer will be required to produce third party certification that the said activities will not adversely affect the total recoverable reserves or damage the reservoir as a whole. The third Party Consultants will be appointed by Ministry of Petroleum and Natural Resources for which cost will be borne by the concerned E&P Company.”

17. Vide letter dated 11.11.2013, the D.G.P.C. informed the petitioner that the M.P.&N.R. appreciates the keenness of Badar J.V.

to drill a second well in the Badar Gas Field to increase production of natural gas from the said Field. The D.G.P.C. also confirmed that the additional gas from the said Field shall be allowed additional gas price under the 2012 Policy if it qualifies in accordance with the parameters stipulated in paragraph 13.8 of the 2012 Policy as amended by notification dated 23.09.2013.

18. Vide letter dated 03.01.2014, the D.G.P.C. issued a Well Commencement Notice in respect of Badar-2 Well, and on 16.01.2014, a revised Well Commencement Notice with respect to the said Well was issued.

19. Vide letter dated 21.05.2014, the petitioner informed the D.G.P.C. that Badar J.V. had drilled a second well in the Badar Gas Field and was expecting to complete the same by July, 2014. The increase in the gas production was estimated to be by 12 to 15 MMCFD. The position taken by the petitioner was that the plan, with respect to the second well, would be implemented subject to the execution of the first supplemental agreement to the Badar G.P.A. or the provisional notification of the gas price under 2012 Policy for the gas being produced from the Badar Gas Field over and above 3.6 MMCFD, which was the volume committed in the approved development plan at the time of the submission of the first supplemental agreement, i.e. 31.10.2012.

20. Vide letters dated 30.06.2014, 16.07.2014 and 20.08.2014, the petitioner requested the Director General of Gas, M.P.&N.R to execute the first supplemental agreement to the Badar G.P.A.

21. Badar-2 Well is said to have come on production in April 2016 with an initial production at gas rate of 8.5 MMCFD. On 27.06.2016, the M.P.&N.R. submitted a summary for the Economic Coordination Committee of the Cabinet ("E.C.C.") proposing that up to 9.5 MMCFD of natural gas from Badar-2 Well be allocated to the S.N.G.P.L.

22. As per the contents of the said summary, the working interest owners of the Badar Gas Field had carried out extensive geological and geophysical surveys which resulted in the drilling of a new well (Badar-2) along with the infrastructure development of the field to connect Badar-2 to the existing gas system at an investment of nearly US \$ 10 Million. It was also stated that Badar Gas Field's potential

had improved to produce gas at a higher rate and for a longer period with balance recoverable reserves estimated at 42.9 BCF as in December 2015. Reference in the said summary was also made to the revised production profile from Badar-1 and Badar-2 which provides for a cumulative production of over 17 MMCFD during the year 2016. In the said summary, it was also stated that the Badar Gas Field was already connected to the S.N.G.P.L.'s system and gas from Badar-1 Well was being supplied to the S.N.G.P.L. which had requested for allocation of gas from Badar-2 Well owing to the mounting demand and supply gap on their system. More importantly, it was stated that *"the price of gas will be as per the applicable Petroleum Policy"*.

23. On 01.07.2016, the E.C.C. decided to approve the proposal made by the M.P.&N.R. in paragraph 5 of its summary dated 27.06.2016 with the direction that *"the price of gas will be determined by the Regulator in accordance with the Petroleum Policy, 2012"*. For the purposes of clarity, paragraph 5 of the said summary is reproduced herein below:-

"5. It may be noted that Badar field is already connected to SNGPL's system and gas from Badar-1 is being supplied to SNGPL. In view of request of M/s SNGPL for allocation of gas from Badar-2 owing to mounting demand & supply gap on their system and availability of nearest transmission network, Ministry of Petroleum & Natural Resources proposes that upto 9.5 MMCFD gas from Badar-2 may be allocated to M/s SNGPL. The price of gas will be as per the applicable Petroleum Policy."

24. Vide letter dated 14.07.2016, the Directorate General (Gas), M.P.&N.R. informed the petitioner as well as the S.N.G.P.L. as to the E.C.C.'s decision dated 01.07.2016.

25. A copy of the note file of the M.P.&N.R. was brought on record by the petitioner and annexed at page 368 of the petition. Paragraph 115 of the note file shows that the proposal made by the M.P.&N.R. was that the price of gas would be determined as per the *"applicable Petroleum Policy"* whereas the E.C.C. had decided that the gas price would be determined by the Regulator in accordance with the 2012 Policy.

26. Vide office memorandum ("O.M.") dated 17.08.2016, the Director General (Gas) requested the Secretary, Cabinet Division to amend the E.C.C.'s decision dated 01.07.2016 so as to make it in conformity with the proposal made in paragraph 5 of the summary

dated 27.06.2016. The Director General (Gas) apprehensions in the said O.M. dated 17.08.2016 were expressed in the following terms:-

“...the proposal contained in Para-5 of the subject summary clearly stated that the price of gas will be as per the applicable Petroleum Policy. Further the matter was also deliberated during the ECC meeting held on 01.07.2016 and the esteemed forum was apprised that the applicability of relevant Petroleum Policy on gas price will be decided by the concerned regulator. However, the decision so conveyed by the Cabinet Division confers gas producer entitlement of Petroleum Policy, 2012 irrespective of the fact as to whether producer is entitled to the Petroleum Policy or otherwise. This may give rise to serious legal and financial repercussions, as on the basis of said ECC decision the gas producer will claim gas price of subject field under the Petroleum Policy, 2012 leaving no room for the regulator to decide the matter of applicability of respective Petroleum Policy.”

27. Vide O.M. dated 09.09.2016, the Cabinet Division informed the M.P.&N.R. that the E.C.C.'s decision dated 01.07.2016 had been correctly recorded in light of the summary submitted by the M.P.&N.R. and discussion held during the meeting, and that the decision had been issued with the approval of the Chairman, E.C.C. Furthermore, it was stated that if the M.P.&N.R. feels that an amendment in the decision was required to be made, a summary for the E.C.C. could be submitted afresh as only the E.C.C. was competent to amend its earlier decision. It is an admitted position that neither did the M.P.&N.R. submit a fresh summary to the E.C.C. nor was the E.C.C.'s decision dated 01.07.2016 amended at any stage. Instead, the D.G.P.C. made a reference on 07.04.2017 to the Law, Justice and Human Rights Division for an opinion. In the said reference, the position taken by the D.G.P.C. was that the mining leases granted under the Pakistan Petroleum (Production) Rules, 1949 (“the 1949 Rules”) do not have any subsurface boundaries whereas the leases granted under the subsequent rules restrict the leaseholder's rights to produce from a specific subsurface geological formation. On this basis, the view taken by the D.G.P.C. was that in development and production leases, the E&P companies can undertake “new exploration efforts” for the purposes of the 2012 Policy whereas this is not possible within a mining lease. Accordingly, in the said reference, it was stated that mining leases were not entitled to convert to the 2012 Policy, and that the incentives under the said Policy were not applicable to the mining

leases. After stating all this, the questions posed for the opinion of the Law, Justice and Human Rights Division were as follows:-

“a) Whether the Supplemental Agreement executed with the Ghausper WIOs on July 12, 1997 has the effect of allowing WIOs the right to carry out new exploratory efforts in the Mining Lease granted on September 18, 2003 which otherwise is not allowed to the holders of the Mining Lease?

If answer to the above question is affirmative then,

b) Whether the new exploratory efforts allowed through the execution of the Supplemental Agreement were restrictive only to avail the gas price incentives under the 1994 Policy or the same also entitle WIOs of the said mining lease for availing the gas price incentives under the 2012 Policy?”

28. The D.G.P.C. as well as the M.P.&N.R. are trying to avoid acting in accordance with the E.C.C.’s said decision by taking the plea that the matters relating to the applicability of the 2012 Policy price fall within the domain of the D.G.P.C. and that any summary for the approval of the 2012 Policy price could have been initiated by the D.G.P.C. and not by the M.P.&N.R.

29. The instant writ petition was filed on 22.10.2016. The reference by the M.P.&N.R. to the Law, Justice and Human Rights Division was made during the pendency of the instant petition. The Law, Justice and Human Rights Division, in its response dated 02.04.2018, supported the view point of the Law Section of the M.P.&N.R. who opined that since the licence granted to the working interest owners of the Ghauspur Block had expired on 12.12.1997, the petitioner could not drill an exploration well under the mining lease granted on 11.09.2003 since the incentives under the 2012 Policy were only with respect to new exploratory efforts. Another crucial development which took place during the pendency of this petition was that vide letter dated 04.09.2018, the D.G.P.C. informed the petitioner that the Ghauspur working interest owners were not entitled to convert to the 2012 Policy due to the non-availability of new rules which was stated to be a *sine qua non* for the entitlement to convert under Section VI of the 2012 Policy. Furthermore, it was stated that Section VI of the 2012 Policy provides that the option for conversion to the 2012 Policy will be available to all “new exploration efforts” made under the exploration licences and leases that stood granted/executed. It may be mentioned that the D.G.P.C.’s said letter dated 04.09.2018 was in

response to the petitioner's letter dated 21.03.2016. After the D.G.P.C.'s said letter was brought on record, the petitioner amended the writ petition so as to challenge the same.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-

30. Barrister Yousaf Khosa, learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that after the announcement of the 2012 Policy the petitioner, vide letter dated 05.09.2012, applied to the D.G.P.C. for Badar J.V. to be allowed the gas price in terms of paragraph 13.8 of Section VI of the 2012 Policy for natural gas produced over and above the committed volumes; that the D.G.P.C., vide letter dated 11.10.2012, allowed the incentive to the petitioner pursuant to the said provisions of the 2012 Policy subject to the conditions mentioned in the said letter; that the four conditions set out in the D.G.P.C.'s said letter dated 11.10.2012 had been satisfied by the petitioner; that after the petitioner was allowed the price incentives under the 2012 Policy by the D.G.P.C., vide letter dated 11.10.2012, the latter was estopped from denying the petitioner benefits of the incentive; that since the petitioner's application for the grant of the incentive price under the 2012 Policy had already been approved by the D.G.P.C., it only needed to be effectuated; that on the basis of the D.G.P.C.'s letter dated 11.10.2012, valuable rights had accrued in the petitioner's favour for the execution of a supplemental agreement providing for an incentive price for production over and above the committed volumes by 10%; that along with its letter dated 31.10.2012, the petitioner had forwarded a draft of a supplemental agreement to the D.G.P.C. and the M.P.&N.R.; that the said letter was not responded to; that in order for the petitioner to be given the benefits under the 2012 Policy, an amendment in the gas sales and purchase agreement was required but not in the petroleum concession agreement; that even if a supplemental agreement on the gas price was not executed, the petitioner could nonetheless be given the new price incentive under the 2012 Policy for the additional volumes of gas beyond the committed volumes; that the requirement to execute a supplemental agreement is only a procedural requirement; and that the E&P companies that were given the 2012

Policy incentives had executed supplemental agreements in order to gain incentives under the said Policy.

31. Furthermore, it was submitted that the date on which the petitioner submitted its application for the incentives (i.e. 05.09.2012), the petitioner's commitment was to produce 3.6 MMCFD; that for any additional volumes beyond 3.6 MMCFD, the petitioner was entitled to be given the incentive price under the 2012 Policy; that in reliance on the representations contained in the 2012 Policy (especially paragraph 13.8 of Section VI thereof), the petitioner took steps to drill a second well in the Badar Gas Field in order to increase production of natural gas from the said Field; that in this regard, a Well Commencement Notice in respect of Badar-2 Well was duly approved by the D.G.P.C. on 03.01.2014; that the petitioner drilled Badar-2 Well with an additional investment of nearly US \$ 10 Million and this resulted in cumulative production of over 17 MMCFD during the year 2016 from Badar-1 and Badar-2 Wells; and that presently, about 13 MMCFD additional volume over and above the committed volumes in the approved development plan is being produced which qualifies for the incentive price under the 2012 Policy.

32. He further submitted that since after 2012 Pakistan was gas-deficient, its policy was to encourage licencees and lessees to enhance gas production; that after October 2012, the petitioner had additional volumes in order to qualify for the incentive of higher price but in order to maintain those additional volumes, the petitioner had to drill another well; that under the gas sales and purchase agreement, liquidated damages are imposed on the petitioner if the production falls below committed volumes; that since the petitioner had been given an approval letter by the D.G.P.C. on 11.10.2012, it could not reduce its production; that the petitioner had drilled a second Well but is being denied the higher price for the enhanced production beyond its committed volumes; that the petitioner did not have to drill a new well for such an incentive since even an upgradation of the plant which resulted in the enhancement of the production profile entitled the petitioner to the incentive price; that all that the petitioner had to do was to enhance its production profile

in order to get an incentive price under the 2012 Policy; and that the D.G.P.C., in its letter dated 11.11.2013, had taken the position that the additional gas from the Badar Gas Field shall be allowed the gas price under the 2012 Policy if it qualifies in accordance with the parameters stipulated in paragraph 13.8 of the 2012 Policy.

33. It was further submitted that the Badar-2 Well came into production in April 2016; that the E.C.C., vide decision dated 01.07.2016, approved the proposal in the M.P.&N.R.'s summary dated 27.06.2016 to allocate up to 9.5 MMCFD gas from Badar-2 Well to the S.N.G.P.L.; that the E.C.C. also directed that the price of gas will be determined by the Regulator in accordance with the 2012 Policy; that the E.C.C.'s said decision has not been withdrawn at any material stage; that since vested rights had accrued to the petitioner under the 2012 Policy, its subsequent amendment on 23.09.2013 could not adversely affect the petitioner's rights; and that paragraph 12.4 of the 2012 Policy provided that changes in the Policy will not affect any right that may have previously accrued under the Policy. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

CONTENTIONS OF THE LEARNED ADDITIONAL ATTORNEY-GENERAL:-

34. Mr. Tariq Mahmood Khokhar, learned Additional Attorney-General, submitted that the instant petition was not maintainable inasmuch as the alternative remedy of initiating arbitration proceedings against the D.G.P.C. and/or the M.P.&N.R. was available to the petitioner under Rule 40 of the 1949 Rules; that clause 61 of the mining lease dated 18.09.2003 provided that any dispute arising between the parties thereto regarding the interpretation of the lease or any clause thereof which could not be settled by mutual agreement shall be referred to arbitration pursuant to Article 22 of the petroleum concession agreement; and that Article 17 of the gas sales and purchase agreement dated 18.07.2003 also provides for the disputes between the parties thereto to be resolved in accordance with the rules for conciliation and arbitration of the International Chamber of Commerce.

35. Furthermore, it was submitted that the petitioner was not entitled to the relief prayed for in the writ petition; that paragraph 13.6 of the 2012 Policy provided *inter alia* that conversion to the said Policy will be opted as a package; that since the petitioner has a mining lease and not an exploration licence, it was not eligible to opt for conversion to the 2012 Policy; that the D.G.P.C. does not deny the issuance of the letter dated 11.10.2012 but the petitioner has not fulfilled the conditions listed therein for conversion to the 2012 Policy; that a supplemental agreement to give effect to the conversion has not been executed at any stage with the petitioner; that a third party reserves certification has not been provided by the petitioner; that even otherwise the incentives under the 2012 Policy are applicable only to the E&P companies; that the petitioner is a petroleum mining company and holds a petroleum mining lease; that the petitioner does not hold a valid exploration licence; that the petitioner's exploration licence expired in the year 1997; that the 2012 Policy applies only to "*new exploration efforts*" made under the exploration licences and leases; that in the writ petition, the petitioner has not alluded to "*new exploration efforts*" made by it pursuant to the 2012 Policy; that out of the 199 companies that applied for conversion to the 2012 Policy, 187 were holding valid development and production leases; that 12 companies, including the petitioner, were holding a petroleum mining lease; that none of the companies holding a petroleum mining lease were given incentives under the 2012 Policy; that the 100 companies with whom supplemental agreements were executed for incentives under the 2012 Policy were not holders of petroleum mining leases; that it is not disputed that the petitioner was producing more gas than its committed volumes but so were other companies that had been granted petroleum mining leases; and that it would not be in the public interest to grant relief to the petitioner.

36. Furthermore, it was submitted that the petroleum mining lease was granted to the petitioner by the President of Pakistan under the 1949 Rules; that clause 1 of the Badar Mining Lease allows the petitioner to enter upon 47.1 square miles to search, bore for, win and work all or any petroleum lying or being within, under or

throughout the said lands; that the 2002 Rules do not cater to the petroleum mining companies holding a lease to apply for undertaking exploration within the lease area; that the petitioner cannot be granted relief by invoking the doctrine of legitimate expectation; that at best, the petitioner could have a legitimate expectation for a prescribed procedure to be followed by a public authority; that the 2012 Policy sets out the procedure to be followed for conversion to the said Policy; and that the D.G.P.C.'s letter dated 04.09.2018, whereby the petitioner's application for conversion to the 2012 Policy was turned down, is well-reasoned and does not suffer from any legal infirmity. Learned Additional Attorney-General prayed for the writ petition to be dismissed.

37. I have heard the contentions of the learned counsel for the petitioner as well as the learned Additional Attorney-General and have perused the record with their able assistance.

38. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 29 above, and need not be recapitulated.

39. I propose, in the first instance, to deal with the objection taken by the learned Additional Attorney-General to the maintainability of this petition on the ground that the petitioner had the alternative remedy of instituting arbitration proceedings against the D.G.P.C. and the M.P.&N.R. Rule 40 of the 1949 Rules provides *inter alia* that questions or disputes regarding the licence or lease or any matter or thing connected therewith shall be referred to the Government of Pakistan in the appropriate Ministry, whose decision shall be final, provided that the disputes on the following matters shall be determined by two arbitrators, one to be nominated by the Government and the other by the licensee/lessee, or in case of disagreement between the arbitrators, by a Judge of the Supreme Court of Pakistan to be appointed as an Umpire by the two arbitrators:-

- “(1) *the right of the licensee to an oil prospecting license or lease or*
- (2) *its cancellation for any violation of the undertaking given in accordance with rule 4 (6) or any breach of the provisions of the license or lease or*

- (3) *any dispute connected with the price of crude oil pre-empted by Government or*
- (4) *price of plant purchased by Government at the expiration or sooner determination of the mining lease or*
- (5) *compensation payable to the lessee for any loss or damage that may be proved to have been sustained by the lessee by reason of Government taking control of works, plant and premises of the lessee or*
- (6) *compensation payable to the lessee on Government taking over all the rights of the lessee under any mining lease or*
- (7) *renewal of a mining lease or*
- (8) *approval of programme of work by the [Director of Petroleum].”*

40. Clause 61 of the Badar Mining Lease provides that any dispute arising between the parties thereto regarding the interpretation of the said lease of any clause thereof which cannot be settled by mutual agreement shall be referred to arbitration pursuant to the terms of Article 22 of the Concession Agreement. The gas sales and purchase agreement dated 18.07.2003 was executed between the working interest owners of the Badar Gas Field and the S.N.G.P.L. In the instant petition, the petitioner has not sought any relief against the S.N.G.P.L. Since clause 17 of the said agreement provides that disputes and differences arising between the parties to the said agreement be settled in accordance with the rules for conciliation and arbitration of the International Chamber of Commerce, and since the petitioner is seeking the implementation of the provisions of the 2012 Policy and has not agitated any dispute or difference arising from and related to the terms of the said agreement, this petition cannot be held to be not maintainable on the basis of the arbitration clause in the said agreement.

41. Through the instant writ petition, the petitioner was not seeking the enforcement of any contractual right under the Badar Mining Lease dated 18.09.2003 or the petroleum concession agreement dated 15.07.1986 or the gas sale and purchase agreement dated 18.07.2003 or the gas price agreement dated 18.08.2004 but rather the enforcement of a commitment made by the Government in Section VI of the 2012 Policy. The subject matter of the instant petition is clearly not any of the matters which are required by Rule 40 of the 1949 Rules to be referred to arbitration. Hence, the said Rule has no bearing on the maintainability of the instant petition. A dispute that may arise between the Government and the holder of a

petroleum mining lease or a party to a petroleum concession agreement regarding the implementation of the Government's petroleum policy cannot be termed as a dispute arising from and related to the agreement containing an arbitration clause. The denial by the D.G.P.C. or the M.P.&N.R. to give the benefit of Section IV of the 2012 Policy is not a contractual dispute which could be referred to arbitration. Consequently, the said objection raised by the learned Additional Attorney-General is spurned.

42. I now proceed to decide the case on merits. Section VI of the 2012 Policy titled "*Conversion to 2012 Policy*" sets out the mechanism, procedure and time limit for conversion to the 2012 Policy by the E&P companies. This Section is comprised of paragraphs 13.1 to 13.9. It also sets out the purpose for which the conversion would be made. Paragraph 13.1 of Section VI of the 2012 Policy provides *inter alia* that the option for conversion will be available to all "*new exploration efforts*" made under the exploration and production licences and leases. Paragraph 13.2 of the said Policy explains that "*new exploration efforts*" means "*Exploration Wells*" under drilling and/or spudded after the effective date of the Petroleum Exploration and Production Policy, 2007 (i.e. 27.11.2007) and have not declared commerciality. The gas price under the 2012 Policy was only for the "*new exploration efforts*" under the respective exploration licences and leases for the companies that convert to the 2012 Policy. This is explicitly provided in paragraph 13.3 of the said Policy.

43. The vital question that needs to be answered is whether the petitioner had carried out "*new exploration efforts*" in terms of paragraph 13.2 of the 2012 Policy so as to claim the gas price for such efforts under paragraph 13.3 of the said Policy.

44. The petitioner has drilled Badar-2 Well which is located within the 47.1 square miles for which the Badar Mining Lease was granted. Badar-2 Well is the second well drilled in the Badar Gas Field and is about 2.24 kilometer north-west of Badar-1 Well. The said Well is a "*Development Well*" and not an "*Exploration Well*". The documents pertaining to the Operators Committee Meeting dated 28.02.2011 described Badar-2 Well as a "*Development Well*". The Well

Commencement Notice with respect to Badar-2 Well submitted by the petitioner on 07.01.2014 and approved by the D.G.P.C. on 16.01.2014 also describes Badar-2 Well as a *“Development Well”*.

45. *“Exploration Well”* is neither defined in the 2012 Policy nor in the 1949 Rules. However, Rule 2(xi) of the Pakistan Onshore Petroleum (Exploration and Production) Rules, 2009 (“the 2009 Rules”) defines an *“Exploration Well”* as *“a well which tests clearly a separate geological entity, be it of structural, lithologic or facies of pressure nature, penetrating all prospective intervals at the particular location.”* The 2009 Rules were in vogue when the 2012 Policy was announced by the Federal Government. Since the enhanced production by the petitioner is not through *“new exploration efforts”* by drilling or spudding *“Exploration Wells”*, and since Badar-2 Well was admittedly a *“Developmental Well”* and not an *“Exploratory Well”*, the petitioner had no valid basis to opt for conversion to the 2012 Policy or seek an incremental gas price under the said Policy for the additional volumes produced through the Badar-2 Well. It is reiterated that under paragraph 13.1 of the 2012 Policy, the option for conversion to the said Policy is available to all *“new exploration efforts”*.

46. As per Collins English Dictionary, a development well is a well drilled for the production of oil or gas from a field which is known to be suitable because appraisal drilling has already been done. Development wells are drilled after hydrocarbons have been discovered by successful exploration. Normally, the intent behind drilling a development well is to maximize economic production and recovery of known reserves from a reservoir. On the other hand, an exploratory well, also known as a wildcat well, is one that is drilled with the intent to discover a new petroleum reservoir or to find oil or gas in an unproven area. An exploratory well determines whether oil and gas are present in a prospective reservoir. Since geology and subsurface conditions are uncertain, there are high risks of complications during exploratory drilling unlike development drilling. Exploratory wells are known to have a success rate of about one in five. The difference between a development well and an exploration well and the difference in the costs and risks associated

with their drilling must be appreciated in order to understand why the policy makers gave the option for conversion to the 2012 Policy only for all “*new exploration efforts*”. If the intent of the policy makers was to give the gas price under the 2012 Policy to production from development wells, the meaning of “*new exploration efforts*” in paragraph 13.2 of the said Policy would not have been restricted to “*Exploration Wells*” but would also have included “*Development Wells*”.

47. Although paragraph 13.8 of the 2012 Policy provides that the gas price under the said Policy will also be extended to those E&P companies that will give additional 10% production over and above the commitment in accordance with the approved development plan by the Government to the extent of additional production only, but it is my view that for an existing E&P company to gain premium of the incremental gas price under the 2012 Policy for the additional production, conversion to the 2012 Policy is a mandatory prerequisite in terms of paragraph 12.6 of the said Policy, which reads as follows:-

“The incentives of this Policy shall apply to E&P companies who will apply for new petroleum rights after this Policy comes into effect as well as to those E&P companies who opt for conversion to this Policy in accordance with section VI thereof.”

48. The petitioner and/or the working interest owners are admittedly not companies that applied for new petroleum rights after the 2012 Policy came into effect. A read of paragraph 12.6 of the 2012 Policy shows that a *sine qua non* for obtaining the incentives under the said Policy is the option for conversion to the said Policy in accordance with Section VI thereof. The petitioner, vide letter dated 20.11.2012 addressed to the D.G.P.C. applied for the conversion of the Badar Mining Lease to the 2012 Policy for the purpose of “*new exploration efforts*”. This letter is a clear acknowledgement on the petitioner’s part that the conversion to the 2012 Policy is only for “*new exploration efforts*”. Vide letter dated 04.09.2018, the D.G.P.C. turned down the petitioner’s application for conversion to the 2012 Policy.

49. The petitioner, in its earlier letter dated 05.09.2012, did not apply for conversion to the 2012 Policy in terms of paragraph 13.1

thereof. In the said letter, the petitioner applied to the D.G.P.C. for the gas price under the 2012 Policy for gas produced over and above the committed volumes. The position taken by the petitioner in the said letter was that Badar Gas Field was producing gas at the rate of about 14 MMCFD against the committed production level of 3.6 MMCFD for the period between 13.03.2012 to 12.03.2013. The petitioner considered itself and/or Badar J.V. entitled to avail the gas price incentive under the 2012 Policy on the ground that its current production from Badar Gas Field through *“cost intensive production techniques”* was over and above the committed level of production. This stance of the petitioner appears to be based on a misreading of Section VI of the 2012 Policy inasmuch as under paragraph 13.1 of the said Policy, the option for conversion to the 2012 Policy was available to all *“new exploration efforts”*.

50. There is no reference to any *“new exploration effort”* in the said letter dated 05.09.2012. Indeed, the learned counsel for the petitioner had emphasized that even an upgradation of the plant which resulted in the enhancement of the production profile entitled the petitioner to the incentive price. The petitioner has proceeded on the assumption that as long as production from Badar Gas Field is over and above the volumes committed in the development plan, the petitioner was to be paid the gas price under the 2012 Policy for the additional production. This assumption is based on an isolated read of paragraph 13.8 of the 2012 Policy. Paragraph 13.8 finds its place in Section VI of the 2012 Policy and has to be read conjunctively with and not in isolation from the other paragraphs of Section VI. The cumulative reading of paragraphs 13.1 to 13.3 and 13.8 of the 2012 Policy shows that the incremental gas price under the 2012 Policy is for the additional 10% production by the E&P companies through *“new exploration efforts”* made only through drilling and/or spudding of exploration wells after 27.11.2007. If the petitioner's contention that for the incremental price under the 2012 Policy to be paid it was not essential for the petitioner to carry out *“new exploration efforts”* is to be accepted this Court would have to altogether ignore paragraph 12.6 in Section V and all other paragraphs save paragraph 13.8 in Section VI of the 2012 Policy. While interpreting paragraph

13.8 of the 2012 Policy, the said Policy has to be read as a whole. In the case of Aurangzeb Vs. Muhammad Jaffar (2007 SCMR 236), it was held that a document must be read as a whole. In the case of Anwar ul Haq Vs. Federation of Pakistan (1995 SCMR 1505), it was held that in construing a document one has to read the same as a whole and not by picking and choosing a particular paragraph or portion thereof. In the case of Abdur Razzaq Vs. Shah Jahan (1995 SCMR 1489), it was held that Courts, in order to determine the true nature of a document, have to read the document as a whole and to look at the substance and not the form of its title.

51. Since the petitioner has not made any *“new exploration efforts”* as defined in paragraph 13.2 of the 2012 Policy so as to qualify for conversion to the 2012 Policy, and since Badar-2 Well is not an Exploration Well, it is held that the petitioner is not entitled to the gas price under the said Policy. The D.G.P.C.’s letter dated 11.10.2012 as well as the direction contained in the E.C.C.’s decision dated 01.07.2016 that *“the price of gas will be determined by the Regulator in accordance with the Petroleum Policy, 2012”* are in absolute derogation and based on misreading of the mandate in paragraphs 12.6, 13.1 to 13.3 of the 2012 Policy. It would be apt to mention that there is no force in the D.G.P.C.’s stance that a summary on the matter regarding the supply of gas from Badar-2 Well to the S.N.G.P.L. could only have been moved by the D.G.P.C. and not by the M.P.&N.R. This is because the D.G.P.C. is one of the Directorates of the Policy Wing of the Petroleum Division of the Ministry of Energy, and therefore an adjunct and alter ego of the Ministry of Energy (formerly M.P. & N.R.). The D.G.P.C. is not the creature of a statute and does not have a legal personality independent of the Ministry of Energy.

52. Even otherwise, paragraph 13.8 of the 2012 Policy provides that the gas price under the 2012 Policy would be paid for the 10% of production over and above the commitment in accordance with an *“approved development plan”*. The existence of an approved development plan is essential for a party to be given the benefit of the incremental price under paragraph 13.8 the 2012 Policy. Article 5.3 of the petroleum concession agreement dated 15.07.1986,

supplemented by the transfer agreement dated 20.09.1992, with respect to the Ghauspur Block, provides that within twelve months from the date of the grant of any lease the working interest owners are obliged to submit a development plan to the President. Furthermore, it is provided that the development plan shall have been approved by the Operating Committee and have been prepared in accordance with sound engineering and economic principles of the international petroleum industry and shall contain details to the extent of the discovery, the proposed development scheme, a production forecast, estimates of the investment and expenses involved, and an estimate of the time required to complete each phase of the development plan. The President is required to consider and adopt the development plan within thirty days from the date of its submission.

53. The petitioner brought on record its application for the approval of a development plan submitted to the D.G.P.C. in January 2002. Apparently, this application was approved by the D.G.P.C. on 13.03.2002. I say this because clause 9 of the Badar Mining Lease dated 18.09.2003 provides that the lessees will produce natural gas in accordance with the development plan approved by the D.G.P.C. vide letter dated 13.03.2002 and any material amendment to the development plan will require prior approval of the D.G.P.C. This development plan is only with respect to production from the Badar-1 Well and envisages a production profile 16 MMCFD in the first year and 6 MMCFD in the 5th year. There is no “*approved development plan*” for the period when the 2012 Policy came into force. At least there is none on the record.

54. The learned Additional Attorney-General, in his arguments, had emphasized that the petitioner’s development plan approved by the D.G.P.C. on 13.03.2002 had come to an end in the year 2007 and after that a development plan with respect to the Badar Mining Lease had not been approved by the Government. Learned counsel for the petitioner was asked time and again to show the approved development plan for the period beyond 2007 but he would refer the Court to the petitioner’s letters dated 05.05.2006 and 05.09.2012 in which a production profile for seven years was referred to. Learned

counsel for the petitioner brought the attention of the Court to its letter dated 05.09.2012 and submitted that the “*committed production profile*” on the second page of the said letter is the development plan for the period from 13.03.2007 to 12.03.2014, and that for the period between 13.03.2007 to 12.03.2008, the petitioner’s commitment was to produce 16 MMCFD whereas for the period between 13.03.2012 to 12.03.2013 (when the 2012 Policy came into force), the petitioner’s commitment was to produce 3.6 MMCFD. Furthermore, it was stated that for production beyond 3.6 MMCFD, the petitioner was liable to be paid the gas price under the 2012 Policy.

55. Vide letter dated 05.05.2006, the petitioner had applied for an extension in the Badar Mining Lease for a period of seven years from 12.03.2007. In the said letter, the petitioner had not asked for an approval of a development plan on the basis of the production profile for seven years. It was not mentioned whether the production profile was approved by the Operating Committee or prepared in accordance with sound engineering and economic principles of the international petroleum industry. There is also no mention of any details regarding a proposed development scheme, a production forecast, estimates of the investment and expenses involved and an estimate of the time required to complete each phase of the development plan. This letter cannot be termed as an application for the approval of development plan beyond 2007.

56. Vide letter dated 11.07.2006, the D.G.P.C. granted an extension in the term of the said lease for a period of seven years with effect from 13.03.2007. There is no reference in the said letter to a development plan and/or its approval. The petitioner, while applying for the gas price under the 2012 Policy, vide its letter dated 05.09.2012, proceeds on the assumption that the extension in the period of the Badar Mining Lease for a period of seven years with effect from 13.03.2007 granted by the D.G.P.C., vide letter dated 11.07.2006, is also an approval of the petitioner’s proposed development plan submitted along with its letter dated 05.05.2006 for an extension in the lease period. The D.G.P.C.’s letter dated 11.07.2006, whereby an extension in the Badar Mining Lease was

granted cannot, by any stretch of imagination, be equated with an approval of a development plan. It is, therefore, safe to hold that there was no approved development plan with respect to the Badar Mining Lease after 2007. This leads me to conclude that there was no benchmark for determining what the additional production from the Badar Gas Field would have been for the petitioner to gain the benefit of paragraph 13.8 of the 2012 Policy.

57. The petitioner has also agitated the doctrine of *“estoppel and legitimate expectation”* in the grounds of the petition. Before claiming promissory estoppel against the Government, one has to specifically plead and furnish materials as to how they had been induced and then altered their position by virtue of that representation. The petitioner’s stance was that the petitioner was entitled to be paid the gas price under the 2012 Policy for the additional gas produced over and above the committed volumes and that with Badar-2 Well coming to production on 22.04.2016, the total production from the Badar Gas Field had increased to 16 MMCFD. A *sine qua non* for invoking the doctrine of promissory estoppel or legitimate expectation for the issuance of a writ of *mandamus* directing the Government to fulfill its commitment under a policy is that in reliance on the representation or promise in the policy, the petitioner altered its position to its detriment. In the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P. (AIR 1979 SC 621), it is held that *“we do not think it is necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise...”* In the case of Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector & ETIO ((2007) 5 Supreme Court 447), it was held that *“the doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff.”*

58. Now the petitioner had not decided to embark on drilling Badar-2 Well in reliance on the representations contained in the 2012 Policy.

This is because the drilling of Badar-2 Well was approved in the Operators Committee Meeting dated 28.02.2011, i.e. prior to the 2012 Policy coming into force. Since the petitioner had taken the decision to drill Badar-2 Well prior to the announcement of the 2012 Policy, the doctrine of promissory estoppel or legitimate expectation has no application in the case at hand.

59. As regards the amendment made in paragraph 13.8 of the 2012 Policy through notification dated 23.09.2013 (S.R.O.813(I)/2013), learned counsel for the petitioner had stressed that the said amendment was not applicable to the petitioner as vested rights had accrued in its favour when in accordance with paragraph 13.6 of the 2012 Policy, it applied for conversion to the said Policy from the date of its announcement. The learned Additional Attorney-General did not contest this since he had taken the position that the petitioner was not even eligible to opt for the 2012 Policy or to claim the incremental gas price for the additional volumes from Badar-2 Well. Therefore, without adjudicating upon the question whether the amendments made through the said notification dated 23.09.2013 were applicable to the petitioner, I have to proceed on the assumption that they do not apply to the petitioner since it is not a contentious matter between the contesting parties.

60. The D.G.P.C.'s stance was that the petitioner, being a holder of a mining lease, is not entitled to the incentives under the 2012 Policy because the mining leases granted to companies under the 1949 Rules do not have subsurface boundaries and that it is not possible for holders of such mining leases to undertake "*new exploration efforts*". Such leaseholders can drill to the core of the earth in order to explore or exploit any formation within the subsurface boundaries of the leased area. This contention does not appeal to reason. I do not see how the absence of subsurface boundaries for holders of mining leases under the 1949 Rules could prevent them from carrying out "*new exploration efforts*" provided they have a valid and subsisting exploration licence over the petroleum concession block. There is no specific bar in the petroleum concession agreement or in the 1949 Rules to the said effect. Companies holding a petroleum mining lease have a right to drill wells to explore and exploit

petroleum to any depth and produce all or any petroleum within the leased area. This is implicit in the adoption of the words *“search, bore for, win and work all or any petroleum lying or being within, under or throughout the said lands”* in clause 1 of the Badar Mining Lease. However, in the case at hand, the petitioner did not drill an “exploration well” but a “development well”, and is therefore not entitled to the incentive price for the additional production from Badar-2 Well under the 2012 Policy.

61. In the result, the petition fails and is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2019

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**