

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A. No.324 of 2021
Bukhari Gas & Oil Private Limited
Versus
Government Holdings Private Limited and another

Appellant by: Mr. Khaliq-uz-Zaman Khan, Advocate
Respondent no.1 by: M/s Abuzar Salman Khan Niazi and Wasim
Abid Advocates
Respondent no.2 by: Syed Muhammad Tayyab, DAG
Date of Hearing: **14.03.2022**

Sardar Ejaz Ishaq Khan, J: This intra court appeal is against the judgment dated 06.07.2021 whereby writ petition no. 1947 of 2021 was dismissed as the alternative remedy of arbitration was available to the appellant/petitioner under his contract with respondent no.1, Government Holdings (Pvt). Limited (**GHPL**).

2 The relevant facts are set out in the impugned judgment and need not be repeated, except for that the writ petition owed its existence to the right claimed by the petitioner, qua a *Successful Bidder Marketing Company*, to the award of additional lots of surplus/leftover LPG by GHPL out of its share from Makori Gas Field. The petitioner was a successful bidder for a lot of 'Leftover LPG' at the auction held by GHPL in 2014. The tender documents and the instructions to bidders constituted the contract between the parties. The impugned judgment found clause 3(e) to be pivotal, which reads as follows:

If one or more lot of the SELLER'S SHARE remains unsold after BIDDERS have been offered to match the highest signature bonus as aforementioned, the SELLER may withdraw the unsold lot(s) and conclude the bidding process or offer the quantity of LPG in the remaining lot(s) to all successful bidders equally. (emphasis supplied)

3 The appellant claims that there are in existence remaining lots/ additional lots which were not being allocated in violation of the applicable law and in violation of the aforesaid contractual stipulation. The appellant

also claimed that even the volume in the lot currently allocated to the petitioner had been reduced by GHPL. In the arguments before us, the appellant's learned counsel asserted that the first limb of the first issue noted above, namely, that the additional lots were not being disposed of by GHPL in accordance with law, had not been properly appreciated and addressed in the impugned judgment. We are afraid we do not agree with this submission, now reframed in appeal with a twist, for the reason that the writ petition in tenor and substance was for the enforcement of the petitioner's contractual right for the allocation of additional lots, for which the impugned judgment rightly found arbitration to be the appropriate remedy. To elaborate, we turn to the material contents of the writ petition:

- i) The core of the petitioner's case is set out in paragraph 21 of the memo of the writ petition which reads as follows

Grievance in instant matter is related to the Leftover LPG from the respondent's share over which the petitioner has vested, accrued and preferential rights.
(emphasis supplied)

- ii) Paragraph 22 of the memo of petition states that

...at present it is only the Petitioner who is the Successful Bidder Marketing Company of the Respondent No.1 in the Field; therefore, the Petitioner has the exclusive right until bidding over the entire Respondent's Share in the LPG produced from the Field. (emphasis supplied)

- iii) The memo of petition goes on to say at paragraph 24 that

...the Respondent no.1 is not marketing the LPG equal to the Respondent's Share rather has even curtailed the allocation of the portion of Leftover LPG that it was allocating for about 6 years. The Respondent no.1, who is estopped by its conduct, tender and law, is lawfully required to allocate the Leftover LPG to the Petitioner who is entitled to such assignment towards optimal use of the natural resource. (emphasis supplied)

- iv) Out of the four prayers in the prayer clause, the first two pray for allocation of the Leftover LPG to the petitioner to satisfy the petitioner's *accrued, preferential and natural rights*. The third prayer is for a direction to GHPL to act in accordance with law, and the fourth is for respondent no.2, the Federal Government, to ensure that GHPL acts in accordance with law.

4 The writ petition therefore was all about the petitioner's asserted exclusive entitlement to additional quantities of LPG owing to its asserted contractual claim for being the only *Successful Bidder Marketing Company* in the field, and the prayer for disposal of any additional lots of LPG in accordance with law was in aid of this asserted contractual claim. The impugned judgment notes, and this has not been controverted, that the petitioner had earlier agitated its entitlement in correspondence with GHPL to the entire 15 lots of Leftover LPG but this claim was not accepted by GHPL. Not surprisingly, the impugned judgment found that the petition disclosed a dispute arising out of and resting on a contractual relationship for which arbitration was the appropriate remedy.

5 In his submissions before us, learned counsel sought to argue that there was in fact surplus leftover LPG that was not being put to auction as required under, *inter alia*, the LPG Policy 2016, LPG (Production & Distribution) Rules, 2001, and the Public Procurement laws, and that this breach of law is what the impugned judgment overlooked. This has been flatly denied by GHPL both before the Single Bench as well as before us at the bar. That is to say, this Court is being called upon to ascertain the factual position by discovery of actual production numbers and the particulars of its disposal, which is patently a factual inquiry entailing this Court to venture into the quantities of production and the various contracts for the sale thereof and, per the counsel's submissions, into the transparency of all those contracts. It is not explained as to why the factual inquiry whether there is in fact any leftover LPG available for auction to which the petitioner may lay its entitlement cannot be undertaken in arbitration.

6 Learned counsel relies on Airport Support Services versus Airport Manager, Quaid-e-Azam International Airport (1998 SCMR 2268) to assert that the existence of an arbitration agreement is no bar to the exercise of Constitutional remedy for enforcement of the obligation to dispose of public assets through a transparent bidding process. We do not find that an apposite citation because in the said case the question before the Court was whether the reentry by the Civil Aviation Authority into the licensed premises after termination of the license was governed by the Central Government Lands and Buildings (Recovery of Possession) Ordinance 1965. The High Court had dismissed the writ petition because of the existence of an arbitration

clause, and the Supreme Court, after observing that an arbitration clause does not per se preclude the exercise of Constitutional remedies where the lis turns on the enforcement of a legal duty, nonetheless declined to interfere for the reason that the grant of contract therein was not transparent. The observation of the Hon'ble Supreme Court in Airport Support Services case to the effect that the existence of an arbitration clause does not come in the way of Constitutional remedies where enforcement of statutory obligations in connection with award of contract was concerned, was nonetheless conditioned by the observations that a Constitutional Court would be slow in extending relief where the contract itself may not be enforceable due to sub-Constitutional legislations such as the Specific Relief Act, 1877. The writ petition against which we hear this appeal was in substance for the enforcement of a contractual obligation which could be open to objection of not being specifically enforceable, with damages being an appropriate remedy, though we hasten to add that the foregoing is only an observation and not a finding. Airport Support Services case also went on to note that:

The jurisdiction under Article 199 of the Constitution being discretionary, the Court, where equities require, may, even in the best of cases, choose to decline interference.

7 With the foregoing background, it was for good reason that the Hon'ble Single Bench found that:

The petitioner's assertion that respondent no.1 is to sell the leftover LPG only to it is on the basis of a clause in the agreement/instructions to bidders and such matter can be resolved through the Dispute Resolution Mechanism provided therein.

8 In view of the foregoing, we find no reason to interfere with the impugned judgment. Resultantly, this intra court appeal is **dismissed**.

Chief Justice

(Sardar Ejaz Ishaq Khan)
Judge

Imran

Announced in open Court on 16.05.2022.

Chief Justice

Judge