JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.3024 OF 2022

Shaheen Freight Service

VS.

MOL Pakistan Oil & Gas Co. B.V. and others

WRIT PETITION NO.3175 OF 2022

MOL Pakistan Oil and Gas Co. B.V.

VS.

Federation of Pakistan and others

PARTIES ARE REPRESENTED BY:

Mr. Misbah ul Mustafa, Advocate.
(for Petitioner in W.P. No.3024/2022 and for Respondent No.4 in W.P. No.3175/2022)

M/s Umair Majeed Malik and Noman A. Farooq, Advocates.
(for Respondent No.1 in W.P. No.3024/2022 and for the Petitioner in W.P. No.3175/2022)

Syed Sabee-ul-Hassan, Advocate.
(for Respondent No.2 in W.P. No.3024/2022 and for Respondent No.5 in W.P. No.3175/2022)

Mr. Khurram M. Hashmi, Advocate.
(for Respondent No.7, 8, 9, and 10 in W.P. No.3024/2022 and for Respondent No.5 in W.P. No.3175/2022)

Ms. Azra Batool Kazmi, AAG.

Respondents No.3 and 5 in W.P. No.3024/2022: Ex-parte

Respondent No.4 in W.P. No.3024/2022: Nemo

Date of hearing : 06.02.2023.

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SAMAN RAFAT IMTIAZ, J.

1. Through the instant judgment, I propose to decide both the above titled cases as similar questions of law and facts are involved.

W.P. No.3024/2022

2. The Petitioner [Shaheen Freight Service] in W.P. No.3024 of 2022 (hereinafter referred to as the **"Petitioner"**) is a registered partnership firm engaged in the business of providing transportation services.

3. A Petroleum Concession Agreement (hereinafter referred to as the "**Petroleum Concession Agreement**") for Tal Block located in Karak, Kohat and Bannu Districts, Khyber Pakhtunkhwa was executed by the President of the Islamic Republic of Pakistan and Respondent No.1 [MOL Pakistan Oil and Gas Co. B.V.]; Respondent No. 2 [Oil and Gas Development Company Limited]; Respondent No. 3 [Pakistan Petroleum Limited]; and Respondent No. 5 [Government Holdings (Private) Limited] as Working Interest Owners who subsequently assigned some rights thereunder to Respondents No.4 [Pakistan Oil Fields Limited]. Under the terms of the Petroleum Concession Agreement, the Working Interest Owners have been granted Petroleum concessions and other rights including but not limited to conducting or causing to be conducted petroleum exploration, development and production operations including the transportation (whether by pipeline or otherwise), storage, export and sale of petroleum. The Petroleum Concession Agreement envisages designating an "Operator' to carry out joint operations thereunder. The Respondent No.1 has been appointed as the Operator pursuant to a Joint Operating Agreement executed by and between the Working Interest Owners. As such the Respondent No.1/MOL Pakistan caused an advertisement to be published in the newspaper on 21.02.2021 soliciting Expressions of Interest from experienced contractors for the purpose of hiring their services for transportation of crude oil and condensate from its processing facilities in Khyber Pakhtunkhwa to refineries located in different areas of Pakistan.

4. The Petitioner was one of the successful bidders as per the technical evaluation criteria whereas the financial bids were allegedly not opened publically as required but were evaluated in a clandestine and non-transparent manner. The Petitioner learned from market sources that Respondents No.7 to 10 have been declared the lowest Financial Bidders despite the fact that the Petitioner claims to have issued the lowest bid.

5. Respondents No.2, 3, and 5 collectively hold 65% of the major shareholding in Tal Block. It has been alleged that they are beneficially owned by the Federal Government hence any procurement by them for Tal Block comes within the ambit of public procurement. Consequently the Petitioner filed a complaint vide letter dated 25.01.2022 titled *'Redressal of Grievance Against Finalization of Bid Tender Number SA/24943/21'* to the Manager Procurement of Respondent No. 1/MOL Pakistan which was rejected vide Ref: MOL/20127/2022

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dated 15-02-2022 (**"Grievance Redressal Committee/GRC Order"**) as being without merit.

6. Being aggrieved of the rejection, the Petitioner filed an appeal under Rule 48(7) of the Public Procurement Rules, 2004 ("**Procurement Rules**") before the Respondent No. 6 [Public Procurement Regulatory Authority] (**"PPRA"**) which has been decided vide Order dated 16.03.2022. The Respondent No. 6 vide the said Order has held that Procurement Rules are applicable as alleged by the Petitioner nevertheless the Order fails to substantively decide the grievance of the Petitioner or the dispute between the parties.

7. The Petitioner has invoked the Constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 praying for a declaration that the GRC Order dated 15.02.2022 passed by the Respondent No. 1/MOL Pakistan is null and void. The Petitioner also seeks a direction to Respondent No. 1/MOL Pakistan to award the contract to the lowest bidder or in the alternate to declare the subject procurement as mis-procurement with direction for fresh bidding process to be initiated.

W.P. No.3175/2022

8. The Petitioner in W.P. No.3175/2022 is the Respondent No. 1 in W.P. No.3024/2022 (for the sake of convenience herein after referred to as "Respondent No. 1/MOL Pakistan"). According to the Memo of Petition in the instant writ, the Respondent No. 1/MOL Pakistan invited Expressions of Interest for hiring services of contractors for transportation of crude oil and condensate from its processing facilities in Khyber Pakhtunkhwa to different refineries in Pakistan. After completion of prescreening process/prequalification, Respondent No.1/MOL Pakistan issued private tender documents to six contractors including the Petitioner.

9. Six bidders including the Petitioner submitted their bids. In accordance with the Tender Documents, Respondent No. 1/MOL Pakistan firstly opened the Technical Bids. After thorough evaluation, all six bidders were found technically qualified. Thereafter, Respondent No. 1/MOL Pakistan opened the Financial Offer envelopes of all six bidders including that of the Petitioner. The following Bid Prices were received by Respondent No. 1/MOL Pakistan from the bidders:

Name of Bidder	Bid Price (PKR/BBL)	Score	Ranking
Pakistan Tankers Company (Respondent No.7 in W.P. No.3024/2022)	193.00	100%	1
Said Ullah Shah (Respondent No.9 in W.P. No.3024/2022)	200.00	96.37%	2
Malik Associates (Respondent No.8 in W.P. No.3024/2022)	210.00	91.19%	3
Rasch Private Limited (Respondent No.10 in W.P. No.3024/2022)	234.21	78.65%	4
Shaheen Freight Services (Petitioner in W.P. No.3024/2022)	235.84	77.80%	5
National Logistics Cell	244.71	73.21%	6

10. The financial offer / bid price of the Petitioner ranked fifth. Thereafter, Respondent No. 1/MOL Pakistan received a letter dated 17.01.2022 from the Petitioner stating that the bid price offered by it included the provincial sales tax and its bid price was actually Rs.205.07. It has been emphasized that nowhere in its financial bid / offer, did the Petitioner mention that its bid price was inclusive or exclusive of the provincial sales tax. Respondent No. 1/MOL Pakistan vide letter dated 24.01.2022 informed the Petitioner that Respondent No. 1/MOL Pakistan had already opened and evaluated the financial bids of all bidders and the bidding process had been finalized. It was further informed that after evaluation of the financial bids no clarification of price or negotiations of rates could take place with the Petitioner at the belated stage, which would change the original ranking.

11. Respondent No. 1/MOL Pakistan received another letter dated 25.01.2022 titled *'Redressal of Grievance Against Finalization of Bid Tender Number SA/24943/21'* addressed to the Manager Procurement of Respondent No. 1/MOL Pakistan from the Petitioner wherein it is again reiterated its position and tried to offer an explanation and clarification regarding its bid price. Respondent No.1/MOL Pakistan vide letter dated 15.02.2022 informed the Petitioner that its grievance was devoid of merits. (This response from the Respondent No. 1/MOL Pakistan has been described as GRC Order by the Petitioner in W.P. 3024 of 2022).

12. The Petitioner filed an appeal before the Respondent No.3 [Public Procurement Regulatory Authority, who is the Respondent No. 6 in W.P. 3024/2022] (for the sake of convenience herein after referred to as "Respondent No. 6 /PPRA"). Respondent No. 1/MOL Pakistan filed an application for rejection

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of the said appeal for want of jurisdiction which was also replied to by the Petitioner. However, vide Order dated 22-06-2022 (referred to as "**Impugned Order**" in W.P. 3175 of 2022) Respondent No. 6/PPRA has accepted the appeal by holding that the Procurement Rules do apply.

13. Being aggrieved of the Impugned Order Respondent No. 1/MOL Pakistan has invoked the Constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 through writ petition No.3175/2022 praying for setting aside of the Impugned Order and declaration that the Respondent No.6/PPRA has no jurisdiction and lawful authority to regulate the private tender and procurement of the Respondent No. 1/MOL Pakistan and has no authority or jurisdiction to entertain, hear and adjudicate the appeal filed by the Petitioner under Rule 48 (7) of the Procurement Rules and to quash the appellate proceedings pending before the Respondent No.6/PPRA being *coram non judice*, without lawful authority, without jurisdiction and abuse of process of law.

14. The learned counsel for the Petitioner contended that the GRC Order dated 15.02.2022 is a decision by the Grievance Redressal Committee of the Respondent No. 1/MOL Pakistan and as such an appeal was filed before Respondent No.6/PPRA which has been decided vide the Order dated 22.06.2022. He submitted that the Order passed by Respondent No.6/PPRA is correct and in favour of the Petitioner to the extent that it holds that the Public Procurement Rules are applicable. The learned counsel for the Petitioner submitted that under the Petroleum Concession Agreement Respondents No. 1 to 3 are Working Interest Owners who collectively hold 70% of the Working Interest. The Petroleum Concession Agreement envisages 'Joint Operations' to be conducted by the Respondents No. 1 to 3 which by definition includes 'transportation'. The expenditure incurred in connection with or incidental to the conduct of 'Joint Operations' is to be shared and borne by the Working Interest Owners in proportion to their Working Interest. The Respondent No.1/ MOL Pakistan is the 'Operator' defined as the entity designated to carry out the 'Joint Operations'. In view of the foregoing, he argued that the expenditure on transportation was being incurred proportionally by all the Working Interest Owners i.e. Respondent No.1/MOL Pakistan, Respondent No.2/OGDCL, Respondent No.3/PPL. The learned counsel submitted that Respondent No. 2/OGDCL and Respondent No.3/PPL are undisputedly public procurement agencies, therefore, he argued that

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the funds of Respondent No. 2/OGDCL and Respondent No. 3/PPL utilized for expenditure on transportation fall within the ambit of 'Public Funds' as defined in the Public Procurement Regulatory Authority Ordinance, 2002 ("**PPRA Ordinance**"). The contention of the Petitioner is that the advertisement issued by Respondent No. 1/MOL was within the purview of public procurement laws due to the involvement of public funds. To that extent the Order dated 22.06.2022 passed by Respondent No.6/PPRA validates the position of the Petitioner and as such the Petitioner is not aggrieved by the said Order, which is why no relief has been claimed against the same by the Petitioner in the prayer clause of its writ petition. However, despite holding that PPRA Rules apply, Respondent No.6/PPRA has failed to decide the dispute between the parties and to that extent the Petitioner has challenged the Order dated 22.06.2022 passed by Respondent No.6/PPRA being deficient in granting relief. In support of such contention he referred to the contents of the Memo of Petition which explicitly state that the Petitioner has challenged the Order dated 22.06.2022 passed by Respondent No.6/PPRA being deficient in granting appropriate relief to the Petitioner.

15. On the other hand the learned counsel for Respondent No.1/MOL Pakistan raised two preliminary arguments challenging the maintainability of W.P. 3024 of 2022: (i) that the petition has not been filed and instituted by an authorized person; and (ii) that the Petitioner has only challenged the letter dated 15.02.2022 sent by Respondent No.1/MOL Pakistan, which is not a person performing functions in connection with the affairs of the Federal Government and as such not amenable to writ jurisdiction. He argued that the letter dated 15.02.2022 sent by Respondent No.1/MOL Pakistan termed as the GRC Order by the Petitioner has not been passed by a 'procuring agency' whereas Petitioner has neither impugned the Order passed by the Respondent No. 6/PPRA nor prayed for any relief against the same, therefore W.P. 3024 of 2022 is not maintainable.

16. On merits the learned counsel for Respondent No.1/MOL Pakistan argued that the PPRA laws only apply to public companies owned and controlled by the Federal Government whereas Respondent No.1/MOL Pakistan is not a 'procuring agency' as defined in the PPRA Ordinance as it is neither owned nor controlled by the Federal Government. He relied upon *Ghani Gases Limited Vs. Federation of Pakistan*, PLD 2016 Lahore 207, wherein it was held that PARCO was not a 'procuring agency' despite the fact that 60% of its shareholding was owned by Federal Government simply because it was not controlled by the Federal

Government. In view thereof, he argued that none of the provisions of the PPRA Ordinance or Rules apply to Respondent No.1/MOL Pakistan as they all envisage a 'procuring agency'. He stressed on the fact that the tender was called by Respondent No.1/MOL Pakistan alone and all acts pursuant to the tender were undertaken by Respondent No.1/MOL Pakistan which is private company whereas under the public procurement laws it is a 'public procurement agency' that enters into negotiations and contracts etc. Therefore he argued that the subject procurement is a private procurement which is not covered by PPRA Ordinance and its Rules. He referred to clause 14.2 of the Joint Operating Agreement whereby each Working Interest Owner shall be individually responsible only for his own obligations. He submitted that merely because they are Working Interest Owners and conducting 'joint operations' together does not mean that 'public funds' as defined in PPRA laws are involved in carrying out individual obligations under the Petroleum Concession Agreement. By way of example he submitted that the Working Interest Owners are not responsible for the salaries of the employees of the other Working Interest Owners. As such, he vehemently argued that the Respondent No. 6/PPRA has erred in holding vide the Impugned Order that PPRA Rules apply and as such is liable to be set aside. Lastly he submitted that in any event the Petitioner was not the lowest bidder and to that extent W.P. 3024 of 2022 involves disputed questions of fact which cannot be adjudicated upon in exercise of Constitutional jurisdiction. The learned counsel for Respondent No.1/MOL Pakistan relied upon *Salahuddin Vs. Frontier Sugar Mills & Distilery Ltd.*, PLD 1975 SC 244, *Pakistan International Airlines Vs. Tanveer ul Islam*, PLD 2010 SC 676, *Pakistan Olympic Association Vs. Nadeem Aftab Sindhu*, 2019 SCMR 221, *Dr. Muhammad Khan Shar Vs. President, Pakistan Medical Association Center*, 2022 MLD 626, *Abdul Wahab Vs. Habib Bank Ltd.*, 2013 SCMR 1383, *Noor Badshah Vs. United Bank Limited*, 2015 PLC (C.S.) 468, *Anoosha Shaigan Vs. Lahore University of Management Sciences*, PLD 2007 Lahore 568, *Aown Abbas Bhatti Vs. Forman Christian College*, PLD 2018 Lahore 435, *Salman Rashid Vs. University of Management & Technology*, 2002 CLC 1328, *Printing Corporation of Pakistan Vs. Province of Sindh*, PLD 1990 SC 452, *Creative Electronics (Pvt.) Limited Vs. Government of Pakistan*, PLD 2020 Islamabad 319, *National Institutional Facilitation Technologies (Pvt.) Ltd. Vs. The Federal Board of Revenue*, PLD 2020 Islamabad 378, *West Bengal Electricity Board Vs. Patel Engineering*, AIR 2001 SC 682.

17. The learned counsel for Respondents No.2/OGDCL, Respondents No.7/Pakistan Tankers Company, Respondent No.8/Malik Associates, Respondent No.9/Said Ullah Shah and Co. and Respondent No.10/Rasch Private Limited adopted the arguments advanced by the learned counsel for Respondent No.1/MOL Pakistan.

18. Arguments advanced by the learned counsel for the parties have been heard and the record has been examined with their assistance. I will start by addressing the preliminary objections raised by the Respondent No. 1/MOL Pakistan in respect of the maintainability of W.P. 3024/2022 filed by the Petitioner.

Preliminary Objection No.1: W.P. 3024/2022 filed by Unauthorized Person

19. The Petitioner is stated to be a registered partnership firm, which has not been denied or disputed by the Respondents. The petition has been filed through its G.M., Mr. Nizar Ahmed under the authority of a Board Resolution dated 04.08.2022 purportedly signed by all three partners of the Petitioner. It has not been denied that Mr. Nizar Ahmed and the signatories of the Board Resolution are partners of the Petitioner. The objection raised on behalf of Respondent No.1 is that a partnership firm does not have a board and as such the so called Board Resolution dated 04.08.2022 has no legal significance. He argued that the Petitioner has not attached the partnership deed with the Memo of Petition without which it cannot be established whether or not the signatory of the Memo of Petition is the G.M as claimed and whether G.M. is empowered to institute legal proceedings on behalf of the partnership firm. He further highlighted that the so called Board Resolution is neither attested nor notarized and as such does not even constitute a power of attorney.

20. The Petitioner on the other hand submitted that the Board Resolution dated 04.08.2022 is signed by all the partners and is therefore sufficient authority for purposes of a Constitutional petition but that even otherwise it qualifies as a power of attorney. He argued that in any event the same constitutes a curable defect and in this regard relied upon *Rana Basit Rice Mills Private Limited Vs. Shaheen Insurance Company*, 2021 SCMR 1413.

21. I have considered the arguments in light of the Partnership Act, 1932 ("**Partnership Act**"). Under Section 18 thereof, a partner is an agent of the firm.

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According to Section 19, a partner enjoys implied authority as agent of the firm. The said provision is reproduced herein below:

> ***19. Implied authority of partner as agent of the firm:*** *(1) Subject to the provisions of section 22, the act of partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.*
>
> *The authority of a partner to bind the firm conferred by this section is called his "implied authority".*
>
> *(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to –*
>
> *(a) submit a dispute relating to the business of the firm to arbitration,*
>
> *(b) open a banking account on behalf of the firm in his own name,*
>
> *(c) compromise or relinquish any claim or portion of a claim by the firm,*
>
> *(d) withdraw a suit or proceeding filed on behalf of the firm,*
>
> *(e) admit any liability in a suit or proceeding against the firm,*
>
> *(f) acquire immoveable property on behalf of the firm,*
>
> *(g) transfer immoveable property belonging to the firm, or*
>
> *(h) enter into partnership on behalf of the firm.*

22. As may be seen from the above, an act of a partner binds the partnership firm except that such implied authority does not empower him to take the steps as are listed under sub-section 2 of the Section 19 of the Partnership Act. Filing of a Constitutional petition is not included amongst the steps which a partner is not empowered to take pursuant to his implied authority. I am fortified in my view by the judgment passed in *Creative Electronics and Automation Vs. Commissioner Lahore*, 2013 CLC 1547 in which it was held as follows:

> *"The partners are the owners of the firm and the rights and liability of the firm are the rights and liability of the partners. Each partner is an agent of the firm under section 18 of the Partnership Act, 1932. Under section 19 of the said Act, each partner has the implied authority to carry on business in the usual way and bind the firm. Section 19(2) provides for the exclusions to the implied authority. Under these sections implied authority does not empower a partner to submit a dispute relating to the business of the firm for arbitration, or relinquish any claim by the firm, admit any liability in a suit by or against the firm or withdraw the suit proceedings filed on behalf of the firm. These subject-matters have been specifically excluded from the implied authority of a partner.* ***Filing of a constitutional petition has not been mentioned in the exclusion clauses.*** *These clauses relate specifically to contractual disputes of the firm. In the instant petition, the petitioner seeks to enforce a right against the respondent to make certain payments which are due to it. In this regard, the petitioner seeks a direction to the respondents to decide upon its application pending before the respondents.* ***Therefore, since a partner has the implied authority to act and carry on business in the usual way and can***

bind his firm, Mr. Sajjad Ahmad Khan can file this constitutional petition on behalf of the other partners without written authorization from the other partners*."* [Emphasis added]

23. I am also guided by the case of *Messrs Fine Enterprises Traders through Partner/Representative Vs. Messrs Constellation Co-Operative Housing Society Limited*, 2019 CLC 1472. The Sindh High Court in this case was dealing with a suit in respect of which Order XXX, Rule 1, C.P.C., clearly provides that any two or more partners can sue or be sued in the name of the firm. An objection was raised by the defendants in such case that other partners of the firm have not authorized one of the partners to file the suit. Yet the suit was held maintainable by holding that no adverse consequences are provided for non-compliance of Order XXX, Rule 1, C.P.C., and also by specifically taking in view the provision of Section 19 of the Partnership Act. The relevant extract from the said judgment is reproduced herein below:

"I have carefully gone through the judgment of the honourable Supreme Court with the assistance of learned counsel for the Plaintiff. ***Honourable apex Court has clearly held that there is no requirement for a partner to have an authority from other partners before initiating any action by way of a suit.*** *Same principle was followed by the learned Lahore High Court in the subsequent case (ibid).*

The close examination of the provisions itself shows that no adverse consequence is mentioned in the provision of Order XXX, Rule 1 of C.P.C., if the compliance is not made. *Similarly, no judgment has been cited today by the learned counsel for the Defendants to fortify the arguments that the Courts have interpreted this provision as mandatory with an adverse consequence. One of the exclusions mentioned* ***under section 19 of the Partnership Act, 1932,*** *inter alia, in clauses (c) and (d) refers to relinquishing/compromise of a claim and/or withdrawal of suit or proceeding filed on behalf of the Firm by a partner, that is, a partner can neither relinquish a claim of the firm nor withdraw a suit or proceeding without the authorization or endorsement of the other partners of a Firm, but* ***it is nowhere mentioned that the proceedings can also not be instituted*** *(underlined to add emphasis)* ***by one of the partners.*** *If the arguments of the Defendants' side is accepted and for the arguments' sake, this suit is dismissed or is held to be not maintainable on account of non-compliance (as alleged) of the provisions of Order XXX, Rule 1 of C.P.C., then it means that the Court is reading in the statute something which is not expressly provided. All the more, this strict interpretation cannot be laid down, because it is an established rule that such kind of consequence is to be expressly mentioned. In this context, the submission of learned counsel for the Plaintiff has substance that Court in such a situation cannot fill up the omission, intentionally omitted by the legislature. Principle of 'casus omisus' is applicable here. Taking guideline from the aforementioned judgment of the honourable Supreme Court, I am of the considered view that present proceeding as instituted is maintainable, which is further approved by all the partners as mentioned in the extract of Resolution dated 11.07.2016 and the disclosure of all the names of the partners of the Plaintiff-Firm were there when the suit was filed as it was accompanied by the Certificate of the Registrar of Firms, which is fortified further by filing a Statement today."*[Emphasis added]

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24. Therefore, in my opinion, the instant petition has been instituted by an authorized person being a partner of the Petitioner.

Preliminary Objection No.2: So-called GRC Order impugned in W.P. 3024/2022 not passed by a 'procuring agency'

25. In this regard the objection raised by the counsel for Respondent No.1/MOL Pakistan was that Respondent No.1/MOL Pakistan being a private foreign company is not a 'procuring agency' under the PPRA Ordinance therefore the letter dated 15.02.2022 impugned by the Petitioner is not a Grievance Redressal Committee Order as incorrectly termed by the Petitioner. He argued that even otherwise since the Petitioner claims that Respondent No.1/MOL Pakistan's letter dated 15.02.2022 constitutes a Grievance Redressal Committee Order, an alternate remedy by way of appeal lies before the Respondent No.6 pursuant to sub-rule (7) of Rule 48 of the Procurement Rules. He submitted that although such remedy was availed by the Petitioner the Order passed thereunder has not been challenged. The prayer in W.P. 3024 of 2022 is in respect of letter dated 15.02.2022 written by Respondent No.1/MOL Pakistan which is not a person perfuming functions in connection with the affairs of Federal Government therefore, the instant petition is misconceived.

26. On the other hand the learned counsel for the Petitioner argued that the Respondent No.1/MOL Pakistan is performing functions in connection with the affairs of the Federation by virtue of the Petroleum Concession Agreement awarded by the President of the Islamic Republic of Pakistan. He argued that even otherwise the Memo of Petition clearly and categorically states that despite holding that PPRA Rules are applicable the Respondent No.6/PPRA failed to consider the violation of Procurement Rules and to declare the subject procurement as mis-procurement. He explained that in fact the appeal was accepted but without giving substantive relief to the Petitioner therefore the Order is being challenged only to the extent as being deficient in granting appropriate relief. In view of the thereof he argued that the matter may be remanded to Respondent No.6 since it has failed to decide on merits. Regarding why there is no specific prayer in respect of such order, he argued that effective and ancillary relief may be granted even if not prayed for and in this regard he relied upon *Syed Ali Raza Kirmani Vs. Election Tribunal, Punjab Bar Council*, 2019 CLC 340; *Ahmad Nawaz Khan Vs. Muhammad Jaffar Khan*, 2010 SCMR 984; and *Syed Phool Badshah Vs. ADBP through Manager, Peshawar Branch*, 2012 SCMR 1688.

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27. I have anxiously considered the submissions made by both sides. The Respondent No.1 is not only a private company but also a foreign company, which is neither owned nor controlled by the Government of Pakistan. Therefore it cannot be stated to be performing functions in connection with the affairs of the Federation by any stretch of imagination.

28. Be that as it may, the Petitioner has impleaded PPRA as Respondent No.6 which is admittedly a person performing functions in connection with the affairs of the Federal Government. As far as not challenging any act or omission of Respondent No.6/PPRA is concerned, the contents of the petition sufficiently establish that the Order dated 22.06.2022 passed by the Respondent No. 6/PPRA is being challenged to the extent it has failed to grant substantive relief to the Petitioner. The Petitioner has specifically prayed for any other fit and appropriate relief. Therefore I am not convinced that failure to expressly impugn the said Order in the prayer clause is fatal. In view of the aforementioned contents of the Memo of petition and the arguments submitted by the legal counsel for the Petitioner in its oral submissions, I am of the view that this Court is not precluded from passing judgment in respect of the Order dated 22.06.2022 passed by Respondent No.6/PPRA as additional relief if available on merits. I am fortified in my view by the judgment passed in *Syed Ali Raza Kirmani; Ahmad Nawaz Khan; Syed Phool Badshah (Supra); Mst. Zahida Begum Vs. Ashfaq Ahmed*, PLD 2020 Lahore 684 and *Mst. Noor Elahi Vs. Muhammad Abbas*, 2022 YLR 2383 wherein it has been held that any additional or adequate relief may be granted even if not specifically prayed for if borne out of the contents of the pleadings as a Court, in aid of justice, is vested with unfettered powers.

29. Coming to the merits of the case, initially the argument submitted by the learned counsel for the Petitioner was that the Respondent No.1/MOL Pakistan is a 'procuring agency' as per the definition ascribed to such term under sub-section (j) of Section 2 of the PPRA Ordinance. This was refuted by the Respondent No.1/MOL Pakistan by submitting that the Respondent No.1/MOL Pakistan is not a 'procuring agency' of the Federal Government as it is neither owned nor controlled by the Federal Government The learned counsel for the Respondent No. 1/MOL Pakistan relied upon *M.S. Ghani Gases Limited Vs. Federation of Pakistan*, PLD 2016 Lahore 207 to argue that the test is whether the entity is owned and controlled by the Federal Government which the Petitioner has utterly failed to show how a foreign company can be owned and controlled by the Federal Government of Pakistan. This argument of the Petitioner did not find

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favour with this Court as it is undeniable that Respondent No.1/MOL Pakistan is neither a Ministry, Division, Department, Office of the Federal Government nor an authority, corporation, body or organization established by or under a Federal law or which is owned and controlled by the Federal Government.

30. The learned counsel for the Petitioner therefore changed tack and instead argued that the advertisement caused to be published by the Respondent No.1/MOL Pakistan for procurement of transportation services for purposes of the Petroleum Concession Agreement was not in its individual capacity but was in fact on behalf of all Working Interest Owners including Respondent No.2/OGDCL and Respondent No.3/PPL who are admittedly 'public procurement agencies' being corporations owned and controlled by the Federal Government. He relied upon the definitions of 'Public Fund' and 'Public Procurement' as given in the PPRA Ordinance to argue that the acquisition of transportation services for purposes of Petroleum Concession Agreement was to be financed partly out of the Public Fund as pursuant to the provisions of the Petroleum Concession Agreement all the Working Interest Owners including Respondent No.2/OGDCL and Respondent No.3/PPL would contribute toward the expenditure of transportation proportionately.

31. In response the learned counsel for the Respondent No.1/MOL Pakistan read out the preamble of the PPRA Ordinance to show that it only applies to the public sector. As per Rule 3 of the Procurement Rules the Rules shall apply to all procurements made by all procuring agencies *of* the Federal Government. He emphasized that Respondent No.1/MOL Pakistan is neither a 'procuring agency' nor does its funds fall within the definition of 'public fund'. He insisted that the tender documents were not issued by or on behalf of Respondent No.2/OGDCL and Respondent No.3/PPL and that the Contract for the Provision of Services for Haulage of Crude Oil / Condensate was also to be executed between Respondent No.1/MOL Pakistan and the successful bidder. He referred to several of the Procurement Rules to highlight that the scheme of the law is between the 'procuring agency' and bidder. He therefore submitted that the Impugned Order by Respondent No.6 whereby it has been held that Procurement Rules are applicable upon Respondent No.1 is erroneous.

32. The controversy is based on whether the PPRA Ordinance and its Rules are applicable upon the procurement of transport services by the Respondent No.1/MOL Pakistan pursuant to the Petroleum Concession Agreement or not. Therefore in order to resolve the issue the first thing to look at is Rule 3 of the

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Procurement Rules which provides its scope and as such is reproduced herein below:

> ***3. Scope and applicability:-***
> *Save as otherwise provided, these rules shall apply to* ***all procurements made by all procuring agencies of the Federal Government*** *whether within or outside Pakistan.* [Emphasis added]

33. It bears emphasis that Rule 3 of the Procurement Rules includes two essential terms *'procurements'* and *'procuring agencies'*. Therefore it is necessary to see the definitions of *'procuring agency', 'public fund',* and *'procurement'*. It may be noted that some of the definitions have recently been amended by way of the Public Procurement Regulatory Authority (Amendment) Act, 2023. However, the said act has been promulgated after the institution of the instant petition therefore the definitions as they existed prior to the recent amendments are being used for purposes of this case, which are reproduced herein under:

> *(j) "procuring agency" means-*
> *i. any Ministry, Division, Department or any Office of the Federal Government;*
> ***ii. any authority, corporation, body or organization established by or under a Federal law or which is owned or controlled by the Federal Government;***
> *(k) "Public Fund" means the Federal Consolidated Fund and the Public Account of the Federation* ***and includes funds of enterprises which are owned or controlled by the Federal Government;***
> *(l) "public procurement" means* ***acquisition of*** *goods,* ***services*** *or construction of any works* ***financed wholly or partly out of the Public Fund,*** *unless excluded otherwise by the Federal Government;* [Emphasis added]

34. As may be seen from the definition of 'public procurement' the acquisition of services need not be wholly out of the 'public fund'. Such acquisition would fall within the definition of 'public procurement' even if partly out of the 'public fund' unless excluded otherwise by the Federal Government. As far as 'public fund' is concerned, it includes *inter alia* funds of enterprises which are owned or controlled by the Federal Government. It is not denied that Respondent No.2/OGDCL and Respondent No.3/PPL are enterprises which are owned and controlled by the Federal Government. Therefore, if acquisition of the transport services involved in the case at hand is financed wholly or partly by the funds of Respondents No.2 and 3 such acquisition would qualify as 'public procurement'.

35. Examination of the Petroleum Concession Agreement shows that it is by and between the President of Islamic Republic of Pakistan and Respondents No.1 to 3 and 5, who are described as Working Interest Owners. The President has granted to the Working Interest Owners, Petroleum concessions and other rights including but not limited to conducting or causing to be conducted petroleum

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exploration, development and production operations including the transportation (whether by pipeline or otherwise), storage, export and sale of petroleum. Clause 2.3 of the Petroleum Concession Agreement categorically states that it contemplates 'Joint Operations'. The term 'Joint Operations' has been defined in clause 1.2 of the Petroleum Concession Agreement to mean various activities conducted by Working Interest Owners and includes other transportation, storage or other ancillary activities necessary to facilitate the production, processing, storage, transportation and disposal of petroleum. Pursuant to clause 15.7 of the Petroleum Concession Agreement, the Working Interest Owners have the right to transport petroleum either through transportation facilities owned wholly or partly by them or through transportation facilities owned by third parties.

36. Respondent No.1 is the entity designated as 'Operator' which term is defined under clause 1.34 as the entity designated to carry out 'Joint Operations'. Nevertheless, Clause 15.3 contained in Article XV of the Petroleum Concession Agreement titled 'Management and Operations' provides that all important matters concerning the Joint Operations shall be submitted for approval to the Operating Committee composed of at least one representative of each Working Interest Owner. Article 18.1 of the Petroleum Concession Agreement provides that all 'Expenditure' on 'Joint Operations' shall be shared and borne by the Working Interest Owners in proportion to their Working Interest. Clause 18.1 of the Petroleum Concession Agreement provides that each Working Interest Owner shall pay to the Operator its proportionate share of the Expenditures whereas the term 'Expenditures' under clause 1.17 means and includes expenditure incurred in connection with or incidental to the conduct of Joint Operations.

37. The above summary of the relevant provisions of the Petroleum Concession Agreement indicates that though 'Joint Operations' will be carried out by the Respondent No. 1/MOL Pakistan as the Operator, the expenditure on the 'Joint Operations' including transportation would be financed by each of the Working Interest Owners in its proportionate share. It has therefore been argued on behalf of the Petitioner that the acquisition of transportation services pursuant to the Petroleum Concession Agreement shall be financed at least partly out of funds of enterprises which are owned and controlled by the Federal Government and as such out of the 'public fund'.

38. Having said that pursuant to Rule 3 the Procurement Rules do not simply apply to 'procurements' instead the Procurement Rules apply specifically to all 'procurements' made by all 'procuring agencies'. Therefore we must see

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whether the procurement in this case has been made by a 'procuring agency'. There is no gainsaying that Respondent No.1/MOL Pakistan does not fall under the definition provided for 'procuring agency' under clauses (i) or (ii) of sub-section (j) of Section 2 of the PPRA Ordinance. On the other hand it is just as clear that Respondent No.2/OGDCL and Respondent No.3/PPL do fall within the definition of Procuring Agency as given under clause (ii) of sub-section (j) of Section 2 of the PPRA Ordinance. However, the advertisement inviting Expression of Interest for transportation services required under the Petroleum Concession Agreement was issued by Respondent No.1 and not by Respondents No.2 and 3. Similarly, the contract to be entered into for such services by the successful bidder would be executed by Respondent No.1 and not Respondents No.2 and 3.

39. Be that as it may, in my opinion merely the fact that the steps toward the 'procurement' are being carried out by the Operator designated under the Petroleum Concession Agreement to carry out the Joint Operations who is not a 'procuring agency' does not mean that such procurement is not a 'public procurement' made by a 'procuring agency' as defined in the PPRA Ordinance. The fact remains that the Joint Operations including transportation are conducted and financed by all three of the Working Interest Owners pursuant to the Petroleum Concession Agreement and not just the Operator. In simple words one entity out of the three Working Interest Owners has been designated for carrying out the leg work involved in the Joint Operations but essentially it is all three of the Working Interest Owners who conduct the Joint Operations and finance them. Therefore, any step carried out by the Operator toward the Joint Operations is on behalf of itself as well as the other Working Interest Owners.

40. The learned counsel for the Respondent No. 1/MOL Pakistan argued that under clause 14.2 of the Joint Operating Agreement, each Working Interest Owner is responsible for its own obligations. However, he failed to show how the transport services sought to be acquired are for the obligations of Respondent No.1/MOL Pakistan alone. Perusal of the advertisement issued by the Respondent No. 1/MOL Pakistan shows that it is for procurement of services for the transport of crude oil and condensate from their processing facilities to refineries. 'Joint Operations' by definition include *inter alia* transportation to facilitate production, processing, and disposal of petroleum. There would have been some merit to the argument raised if it could be shown that transport was required only for crude oil and condensate to the extent of the Working Interest of Respondent No. 1/MOL Pakistan. However, there is no material before me to reach such conclusion.

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Therefore, I am constrained to hold that the transportation services sought to be acquired by way of the advertisement issued by Respondent No. 1/MOL Pakistan are part of the Joint Operations conducted by the Working Interest Owners, which as we have seen are to be financed partly by funds of such Working Interest Owners who are owned and controlled by the Federal Government. Therefore, acquisition of such transport services in my view falls within the definition of 'procurement' by 'procuring agencies' as per the PPRA Ordinance notwithstanding that it is carried out by the Operator which is not a 'procuring agency'. To hold otherwise would allow all 'procuring agencies' to conduct 'public procurement' by appointing agents who are not procuring agencies in order to avoid the application of PPRA Ordinance and its Rules.

41. The learned counsel for Respondent No.1 during the arguments asked specifically as to what would be the outcome in case the Operator designated in the Petroleum Concession Agreement was Respondent No.2/OGDCL or Respondent No.3/PPL instead of Respondent No.1/MOL Pakistan and as such procurement of transportation services was carried out by one of the former instead of the latter. However the learned counsel for the Respondent No.1 had no satisfactory response as to why PPRA Ordinance would apply in such case but not in the case where the funds are partly coming from Respondent No.2/OGDCL or Respondent No.3/PPL but the leg work would be done by a non-procuring agency. This Court is of the opinion that the application of the PPRA Ordinance cannot be avoided by simply by changing the face representing the Working Interest Owners as for all practical purposes the procurement of transportation services as part of the Joint Operations under the Petroleum Concession Agreement is conducted and financed by all the Working Interest Owners including those that are 'procuring agencies'.

42. In short the Impugned Order has correctly concluded that Procurement Rules are applicable to the procurement of transportation services under the Petroleum Concession Agreement. However, it has been argued that an appeal lies under sub-rule (7) of Rule 48 of the Procurement Rules to Respondent No. 6 /PPRA Authority against a decision of the Grievance Redressal Committee of a Procuring Agency whereas in this case grievance was referred by the Petitioner to Respondent No. 1/MOL. It has already been concluded that the Respondent No.1 is not a procuring agency. Having said that as Operator under the Petroleum Concession Agreement, the Respondent No. 1/MOL Pakistan was carrying out the Joint Operations to be conducted by the Working Interest Owners. As such the complaint sent by the Petitioner to Respondent No.1/MOL Pakistan

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was for all intents and purposes a grievance to the Grievance Redressal Committees of the Working Interest Owners who are 'procuring agencies' i.e., Respondent No.2/OGDCL and Respondent No. 3/PPL and the decision of the Respondent No.1/MOL Pakistan constitutes the decision of such Respondents against which an appeal has been provided for under sub-rule (7) of Rule 48 of the PPRA Rule.

43. For all the foregoing reasons W.P. 3175 of 2022 is **dismissed** whereas W.P. 3024 of 2022 is **allowed** and the matter is remanded to Respondent No.6/PPRA Authority to decide the Petitioner's grievance on merits.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on this 19th day of April, 2023.

JUDGE

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Approved for Reporting
Blue Slip added.

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