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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No: W.P. 10809/2008

Arshad Waheed **Versus** Province of Punjab etc.

JUDGMENT

Dates of hearing	22.04.2010, 28.04.2010, 3.6.2010, 23.06.2010 and 24.06.2010
Petitioner by	Ch. Amir Rehman, Advocate
Respondents by:	Khawaja Muhammad Haris, Advocate General, Punjab, assisted by M/s Muhammad Zubair Khalid, Additional Advocate General, Shan Gul and Khawaja Salman Mahmood, Assistant Advocate Generals Rao Manzar Hayat, ex-Managing Director, Punjab Mineral Development Corporation.

Syed Mansoor Ali Shah, J:- The instant petition was filed by one Arshad Waheed describing himself as the Chief Executive Officer (CEO) of M/s. Earth Resources (Pvt) Limited (“ERPL”). Later on through an application (C.M.886/2008) it was prayed that Arshad Waheed “inadvertently” filed the petition and the name of the Petitioner be amended so as to be replaced and read as ERPL. The said application was supported by Resolution of the Board of Directors of ERPL in favour of Arshad Waheed dated 19-8-2008. This application was allowed

by this court vide order dated 23-2-2010. Therefore, the petitioner before this court is ERPL.

2. Brief facts are that ERPL (also interchangeably referred to as the “Company” hereinafter) was incorporated as a private limited company vide Certificate of Incorporation dated 24.4.2007. Form 29 under the Companies Ordinance, 1984 shows the constitution of the first Board of the Directors of the Company placed on the record by the petitioner is dated 30.6.2007, showing Mr. Arshad Waheed to be the director and Chief Executive Officer of the company. Memorandum of Association shows the subscribed paid up capital of the Company to be Rs.2,500,000/- (Rs.2.5 million) divided into Class A shares of Re. 1 (one) each as on 20-4-2007. (There is no other corporate record placed on the file showing increase of paid up capital after incorporation or conversion of share denomination from Rs. 1 to Rs. 10, as discussed later).

3. It is contended by the Petitioner that in October, 2006 (before incorporation of the Company), Arshad Waheed approached Punjab Mineral Development Corporation (“PUNJMIN” or “Corporation”) as well as the Secretary, Mines and Minerals Department, Civil Secretariat, Lahore. Para 3 of the petition states:-

“...During discussions, it revealed to him that the respondent Corporation was facing serious problems in exploiting the Iron Ore reserves in their leased areas at Rajoa and Chiniot, as their technical expertise and resources were extremely deficient. Despite spending millions of rupees the project could not bear fruit, as the Respondent Corporation could not reach deep down to the Iron Ore deposits with its existing technical and financial resources. The Petitioner, being a son of a patriot mining engineer, showed interest in making engagement with the Corporation in order to make the project successful, with the dream to explore Iron Ore, establish mining operations and ultimately set up a steel mill, resulting in great economic activity, extended tax base and numerous employment opportunities for the homeland. The then MD of the Corporation and the Secretary of the Mines & Mineral Department responded to the proposal very positively; and negotiations started between the parties.”

4. According to the petitioner, the first formal offer by ERPL was made to the Minister for Mines and Minerals, Punjab on 23-3-2007 for a proposed Joint Venture between ERPL and PUNJMIN for the establishment of Hematite and Magnetite Mining Operation at Chiniot and Rajoa (now district Chiniot, Punjab). It is contended that Joint Venture Proposal was presented to PUNJMIN on 20-6-2007 by the Company. The scope of the Joint Venture as explained in the said proposal was as under:

ERPL's vision is to set up a world-class mining operation which is not only profitable but is of great service to the nation of Pakistan. With our access to capital, expertise, a proven methodology, and demonstrated successes of our alliance partners and technical subcontractors in critical mining application support engagements, we are confident that the proposed joint venture will be very successful.

The proposed Joint Venture between ERPL and PUNJMIN shall accomplish the following in three phases:

- 1) Complete the exploration activities and prepare the techno-economic feasibility report;
- 2) Establish and commission a world class mining operation;
- 3) Establish a steel mill.

5. On 31.07.2007 a Technical Committee headed by Chief Inspectorate Mines, Government of the Punjab submitted its Report recommending the Joint Venture Agreement with ERPL. Thereafter the Board of PUNJMIN in its 69th Board Meeting held on 19-9-2007 directed PUNJMIN to negotiate with ERPL and put up the case to Secretary Mines & Minerals Department with agreed Memorandum of Understanding ("MOU") for further approval of the Government of the Punjab. A Summary was put up before the Chief Minister, Punjab on 16-11-2007 by the then Secretary, Mines and Minerals (Mr. Imtiaz Ahmed Cheema), which was routed through Minister for Mines and Minerals, Chairman P & D, and Chief Secretary, Punjab. All these public functionaries approved the contents of the Summary and therefore supported the proposed Joint Venture.

6. The Chief Minister, Punjab approved the Summary on 24-11-2007 and finally Joint Venture Agreement was entered between ERPL and PUNJMIN on 6-12-2007. An undated confirmation of handing over and taking over of all tangible and intangible assets pertaining to the Chiniot and Rajoa Iron Ore fields has been placed on the record which has been signed by the General Manager (Planning & Operations) on behalf of PUNJMIN (it is however admitted position between the parties that none of the assets were handed over to ERPL).

7. According to the Petitioner, 5 million Class A shares of ERPL (representing 20% equity) of Rs 10 each, were transferred to PUNJMIN as consideration under the Joint Venture Agreement on 31-3-2008. According to the petitioner, PUNJMIN was to have one director on the Board of ERPL alongwith 20% Class A Shares in lieu of the transfer of its leases and licenses alongwith transfer of tangible and intangible assets pertaining to the project. It is contended by ERPL that it had to invest US\$ 2.5 million to US\$ 5.0 million in the first phase of exploration and preparation of a bankable document for attracting investment for future operations; US\$ 40 million to US\$ 70 million in the second phase for commencement of mining operations and preparation of commercially viable

business plan, and US\$600 million in the third phase for establishment of a Steel Mill.

8. Vide Letters dated 31-5-2008, 12.7.2008 & 22.7.2008 ERPL wrote to PUNJMIN complaining that undue delay is taking place in the transfer of leases and licenses from PUNJMIN to ERPL. Similar grievance was agitated vide letter dated 9.7.2009 sent to the Chief Minister, Punjab. However, vide impugned Notice dated 16-8-2008 PUNJMIN invited ERPL to a meeting to discuss the possible termination of the Agreement under clause 5.1 of the Agreement. The said Notice dated 16.8.2008 has been challenged before this Court through the instant petition.

9. Learned counsel for the petitioner contends that the impugned Notice dated 16-8-2008 shows that respondents are bent upon terminating the contract of the petitioner, which is based on *malafide* and amounts to political victimization. It is submitted that the petitioner has a lawfully concluded contract in its favour. Petitioner prays that impugned notice dated 16.08.2008 may be declared to be without lawful authority and PUNJMIN be restrained from terminating the Agreement dated 6.12.2007 with the further direction that PUNJMIN be directed to perform its obligations under the said Agreement and as a consequence transfer lease and license in the name of ERPL.

10. Khawaja Muhammad Harris, learned Advocate General Punjab, appearing on behalf of the respondents raised preliminary objection regarding the maintainability of the writ petition. He submitted that the petitioner has no cause of action as no adverse action or order has been passed against the petitioner. He further argued that the so-called grievance of the petitioner arises out of a contract as the petitioner seeks specific enforcement of the same through the instant proceedings. It is submitted that the prayer made by the petitioner besides being premature is not amenable to writ jurisdiction. It is further submitted that allegation of *malafide* is misconceived and misplaced, because respondent PUNJMIN has issued notice under clause 5.1 strictly in accordance with the Agreement while PUNJMIN could have invoked clause 5.2 of the Agreement and terminated the Agreement.

11. Learned Advocate General, Punjab made the following submissions on the merits of the case;

- a. That PUNJMIN is an autonomous statutory Corporation incorporated under the Punjab Mineral Development Corporation Act, 1975 (“Act”) and has been established to promote mineral development in the Province of the Punjab. It has an independent Board of Directors

that has to function keeping in view commercial and national considerations

- b. Under the Rules of Business, 1974 of the Provincial Government, PUNJMIN is an autonomous body attached with the Department of Mines and Minerals. It is submitted that the Board of Directors of PUNJMIN never approved the signing of the Joint Venture Agreement with ERPL.
- c. He referred to section 18 of the Act to submit that the Corporation is to draw up “Schemes” for the development, surveying, prospecting, exploring, mining, processing, industrial exploitation and purchase and sale of minerals including their import and export and submit the same to the Government for approval and that no Scheme was drawn up in this case which forms the subject matter of the Joint Venture Agreement.
- d. He submitted that PUNJMIN has already spent a sum of Rs 117.59 million on the Project (under the Lease and the License granted by the Government).
- e. Agreement for exploration and mining of Iron Ore worth US \$ 30 to 35 Billion (current value over US \$ 93 Billion) was finalized in favour of ERPL without considering the commercial and national consideration as provided under section 4 (2) of the Act. The covenants of the Agreement are

absolutely unfair and lop-sided and not in the national interest.

- f. He submitted that ERPL was not short-listed and was awarded the contract without any public advertisement or without floating any national or international tenders.
- g. He submitted that ERPL has no past experience in the exploration, excavation or development of minerals or iron ore and referred to the *curriculum vitae* of Mr. Arshad Waheed which has been placed on the record by the petitioner, which neither shows any expertise of Mr. Waheed in the mining business nor any past experience in the area.
- h. He contended that registered office of the company as described in the corporate record is non-existent and is operated by the petitioner (one man) from his house in Gujranwala. The Company has no bank balance and no investment has been shown to have been made by the Company to date.
- i. The letter issued by KASB (Bank) has no date and it does not indicate the amount of funds made available for the Petitioner. It also does not mention if the Company maintains an account with the Bank.
- j. ERPL has shown to have provided 5 million Class A shares of Rs 10 each to PUNJMIN when under the Articles of Association Class A shares are of Re 1 each.

k. That after the signing of the Joint Venture Agreement, Rao Manzer Hayat, the Managing Director of PUNJMIN and later on the Secretary, Mines and Minerals Department, Government of the Punjab pointed out the flaws in the Joint Venture Agreement and urged for a review of the matter resulting in the setting up of a Committee by the Chief Minister which recommended that the Agreement be terminated with mutual consent.

l. The actual physical possession or the lease-hold rights have never been actually transferred in the name of the petitioner and no expenditure or investment has been made by the Company to date.

12. The then Managing Director of PUNJMIN, Rao Manzer Hayat, who signed the Joint Venture Agreement on behalf of PUNJMIN was also summoned by the Court. Other than the submissions made in Court, the Ex-Managing Director of PUNJMIN requested the Court to grant him a hearing *in camera* in the presence of the counsel for the parties. However, instead of in camera hearing the said officer submitted his written submission in confidence in a sealed envelope. Summary of his submissions made in Court and recorded in his sealed note are as under:

i. That the Corporation is run by a Board of Directors constituted under Section 5 (1) of

the Act comprising of the Chairman i.e., the Minister for Mines and Minerals; Managing Director; Chairman Planning & Development (P& D); Secretary, Mines & Minerals Department, and Secretary Finance Department. He submitted that under section 6 (2) (b) of the Act he (Managing Director) was only to perform his duties specified and assigned to him.

- ii. He submitted that in the 69th meeting of the Board of Directors of PUNJMIN dated 19.09.2007, it was resolved that PUNJMIN had to negotiate with ERPL and put up the case to Secretary, Mines & Minerals Department with a mere MOU for further approval of the Government of the Punjab. Submits that no such case was put up before the Secretary Mines & Minerals Department. However, the Secretary Mines & Minerals Department initiated a Summary on his own before the Chief Minister with the proposal to enter into joint venture with M/s ERPL. The Summary was routed through Minister, Mines and Minerals, Chairman P&D and Chief Secretary, Punjab to incorporate their views. He contended that Minister for Mines and Minerals, Chairman P&D, Chief Secretary, Punjab and then finally Chief Minister Punjab approved the said Summary. Thereafter, after the approval of the Chief Minister, Punjab the

Summary was marked back to the Secretary, Mines and Minerals Department through the Minister, Mines and Minerals, Chief Secretary, Punjab and Chairman P&D. The Secretary, Mines and Minerals Department noted on the said Summary that the Agreement ought to be finalized and signed with the concerned company so that exploration development work can be taken ahead. He submitted that duly approved Joint Venture Agreement was forwarded to him for signatures under written direction to do so. He submitted that he had no choice but to implement the orders of his superiors.

- iii. He contended that at this stage there was no other legal recourse available with him so he marked the Agreement to the Law Department for comments. Even the Law Department approved the same on 4.12.2007.
- iv. He submitted that due to his persistent efforts the lease or license were not transferred to ERPL.
- v. He submitted that he was threatened a couple of times and told not to oppose the Agreement or else will face serious consequences.

- vi. He safeguarded the financial interests of the Provincial Government running into Billions of Rupees.
- vii. Resultantly, the said officer was posted to an insignificant post of Secretary, Population Welfare, Government of the Punjab.
- viii. He contended that he put up a note before the Secretary, Mines and Minerals Department dated 12.03.2008 requesting that the Joint Venture Agreement should be made operational only after incorporating certain clauses and after the approval of the competent authority. However, nothing was heard of the said note. He was later on promoted as Secretary, Mines and Minerals and in this capacity the said officer once again moved a Summary before the Chief Minister on 5.7.2008 requesting the Government to accord approval to the handing over of the Iron Ore lease and license of Chiniot and Rajoa, respectively to M/s ERPL as well as permission for national/international tender.
- ix. A high powered Committee was constituted by the Chief Minister to look into the matter and through working paper prepared by the applicant concerns of PUNJMIN were placed before the said Committee. The Committee decided that PUNJMIN will invoke clause 5 of the Joint Venture

Agreement for its termination with mutual consent. Hence the impugned notice dated 16.08.2008.

13. The main emphasis of the arguments of the ex Managing Directors, PUNJMIN was that once all the approvals had been granted by the high-ups namely Chief Minister, Minister, Mines and Minerals, Chief Secretary, Punjab, Chairman P&D and Secretary Mines and Minerals, he had no choice but to execute the Joint Venture Agreement. He, however, took pains to explain that after the said signing he did not let go and continuously pursued the matter, which resulted in the constitution of the high powered Committee and the issuance of the impugned Legal Notice.

14. Arguments heard, record perused.

15. The pleadings and the arguments of the parties have raised the following legal and factual questions;

- (i) Power of PUNJMIN to negotiate and enter into a joint venture agreement with a private third party?
- (ii) Power of the Government (Mines & Minerals Department) under Punjab Mining Concession Rules, 2002, to endorse and bless a Joint Venture Agreement between PUNJMIN and a private third party?

- (iii) Selection of ERPL by Government and PUNJMIN without an open public process of national and international public tendering?
- (iv) Maintainability of the instant petition and the power of this Court to probe further into the legality of the Joint Venture Agreement, in case the petition is held to be non-maintainable?

16. In order to address the above questions, sequence of facts, necessary to understand the scope of the case, as culled out from the record and the submissions of the parties is as under:

- (a) PUNJMIN on the basis of pre-feasibility studies had identified underground Iron Ore in Rajoa and Chiniot in District Jhang (now falling within the limits of the newly constituted District Chiniot). Two Schemes prepared by PUNJMIN for exploration and evaluation of the reserves in the said area were approved by the Provincial Government in 2005. The Schemes were for Techno Economic Feasibility Study on Iron Ore for Chiniot reserves at an estimated cost of Rs.90 million and Exploration and Evaluation Study of Rajoa Iron Ore at an estimated cost of Rs.45 million.

- (b) Thereafter, Mining Lease for Iron Ore under Rule 42 of the Punjab Mining Concession Rules, 1986 for an area measuring 586.77 acres was granted to PUNJMIN on 26-8-1998 situated near Chiniot, District Jhang (as it then was) and Prospecting License under Rule 119 of the Punjab Mining Concession Rules, 2002 was granted to PUNJMIN on 14-9-2004 for 500 acres for land situated near Rajoa, also in District Jhang (as it then was).
- (c) Admittedly the reserves of Iron Ore at the abovementioned two sites and their valuation is as under:

<i>area</i>	<i>capacity</i>
Chiniot Iron Ore	110 million metric tonnes
Rajoa Iron Ore	<u>500 million metric tonnes.</u>
	<u>610 million metric tonnes</u>
Value:	<u>US\$ 48.8 billion</u>
(610 million metric tonnes x US\$ 80 per metric tonne).	
<hr/>	
<u>Present Day value</u> (as per the Advocate General, Punjab)	
<u>US\$ 70.150 billion</u> (610 Million metric tonnes x US\$ 115 per metric tonnes) i.e, <u>Rs 596 billion</u> (@ US\$ 1 = RS 85)	

- (d) Petitioner ERPL enters the stage and insinuates itself in around this time riding high on some hidden but powerful political support. Lack of transparency, disregard of law and undue haste in entering a Joint Venture Agreement of public natural resources (public property) in the tune of US\$ 70 billion without batting an eyelid compels this Court to draw this negative inference.
- (e) ERPL solicits and enters into a dialogue with the PUNJMIN, as well as, the Government (Mines and Mineral Department) regarding a proposed Joint Venture pertaining to the two iron ore reserves mentioned above. PUNJMIN, as well as, the Government without any lawful authority, in total disregard of the governing law and due process entertain ERPL and initiate negotiations on the possibility of a joint venture agreement with PUNJMIN.
- (f) A Working Paper was prepared for the Board of PUNJMIN by the management of PUNJMIN, which stated as under:

<p>Punjmin is presently engaged to carry out implementation on two approved ADP schemes titled “Exploration and Evaluation of Iron Ore Deposit in Rajoa area near Chiniot District Jhang” & “Techno-Economic Feasibility Study for Mines Development of Chiniot Iron Ore and its Industrial Utilization District Jhang.”</p>
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M/s ERPL has approached Punjmin and shown interest for joint venture to exploit and develop the said iron ore deposits of Rajoa & Chiniot and to establish a steel mills to cater the steel product demand of northern region from Multan to Peshawar.

In this regard, Punjmin had several meetings with M/s ERPL and the said party also had discussion with worthy Minister and Secretary, Mines & Minerals Department Lahore and Managing Director, Punjmin. In the light discussions held, certain modalities have already been evolved. The broader outline of the agreement has been prepared with the joint efforts of the legal advisors of both the parties for finalization. M/s ERPL will invest US\$ 666 million on this project where US\$ 6 million shall be incurred in the exploration phase, US\$ 60 million in the development phase and US\$ 600 million at the time of establishment of steel mill.

If the public/private joint venture is materialized, it will be one of the mega Project in exploration history of Pakistan. The said party has expressed its intention to bring Chinese technology leading to transfer of technology especially in shaft sinking and aquifer through water bearing strata. This expertise/narrow specialization is not available in Pakistan.

We have as yet not finalized the equity issue for which Punjmin needs further negotiations however Punjmin is persuading to finalize the equity issue at 20:80 ratio, where Punjmin's share would be 20.

The matter is placed before the Board of Directors to formally allow Punjmin to hold negotiations with M/s ERPL to finalize the equity at 20:80 ratio and other issues and sign the agreement for joint venture. This joint venture will expand the tax base in the country and shall be a source of employment for thousands of skilled, semi skilled and unskilled workers in Punjab.

17. From the above it is clear that ERPL has shown interest in a joint venture to exploit and develop the iron ore deposits in Rajoa and Chiniot (now District Chiniot). The Working Paper does not refer to any provision of law under which this Joint Venture with ERPL is possible. It also fails to highlight whether PUNJMIN is assigning its existing rights under the Lease and License issued by the Government. There is no verification (as no reference is made to any financial or technical due diligence)

by PUNJMIN of ERPL especially when ERPL (as per the Working Paper) is to invest US\$ 666 million on the Project whereas US\$ 6 million was to be incurred in the exploration phase, US\$ 60 million in the development phase and US\$ 600 million at the time of establishment of the steel mill.

18. Through the Working Paper, the Board of Directors of PUNJMIN are requested to formally allow PUNJMIN to negotiate with ERPL and finalize equity at a ratio of 20:80 (PUNJMIN 20% and ERPL 80%) and sign the Agreement for a joint venture.

19. In its 69th Board Meeting held on 19-9-2007 the Board of Directors of PUNJMIN passed the following inchoate Resolution on Agenda item no.1:

“The Board directed PUNJMIN to hold negotiations with ERPL and put up case to Secretary Mines with agreed MOU for further approval of Government of the Punjab.”

20. Rao Manzar Hayat, Ex Managing Director, PUNJMIN, categorically submitted that no case was put up before the Secretary, Mines and Minerals Department by PUNJMIN after the passing of the above Resolution by the Board of Directors. In the absence of any summary initiated by PUNJMIN, a Summary was moved by the Secretary, Mines and Minerals

Department on his own initiative before the Chief Minister, Punjab, which gave the following justification for the joint venture. The learned Advocate General appearing for the Provincial Government did not controvert this fact.

“The work on Rajoa Iron Ore scheme which is essentially of preliminary exploratory nature is underway. But PUNJMIN is facing serious difficulties in the implementation of Techno Economic feasibility scheme of Chiniot because of non availability of technical know how for large sized shaft sinking which is the major component of the scheme. It is quite doubtful that PUNJMIN with its existing capability and resources will be able to successfully implement this development project which ultimately aims at mining and marketing of iron ore and establish a steel mill in Chiniot-Rajoa mining area.” (*emphasis supplied*)

21. The Summary further describes the scope of work of the Joint Venture as:

<p><u>Phase-1</u> Complete exploration & preparation of bankable techno economic feasibility (<i>cost Rs 250-300 million</i>)</p> <p><u>Phase-2</u> Mining Operation (<i>cost Rs 3-4 billion</i>)</p> <p><u>Phase-3</u> Establishment of Steel Mill (<i>cost Rs 35-40 billion</i>)</p>

22. The Summary further states:

“....Managing Director, Punjab Mineral Development Corporation after necessary negotiation with M/s ERPL has submitted an agreed Memorandum of Understanding

(MOU) placed at Annexure-D which provides for completion of all three phases of the project by ERPL at their own cost. Punjmin will hold 20% equity in the project in consideration of its previous exploratory work and transfer of its lease rights to M/s ERPL. A Draft Agreement between ERPL and Punjmin has also been reached which is placed at Annexure-E.”

23. The facts presented in the Summary are different from the Working Paper placed before the Board of Directors of PUNJMIN. The inability to carry out the lease and license is not mentioned in the Working Paper of PUNJMIN but is mentioned in the Summary prepared by the Secretary, Mines and Minerals Department.

24. The Summary appears to travel on the assumption that the matter has been initiated by PUNJMIN. It fails to discuss how such a proposal could have been initiated by PUNJMIN and whether the Government had the authority under the law to endorse the said Joint Venture Agreement with a private sector third party without undergoing the process of open public tendering, public participation and competitive bidding.

25. The Summary also ignores the fact that PUNJMIN holds a mining lease and a prospecting license. PUNJMIM has no lease to do mining operation in Rajoa area as it holds only a prospecting license for the said area. Further, PUNJMIN has

not prepared any Scheme relating to a joint venture, which was put up before the Government for approval under section 18 of the Punjab Mineral Development Corporation Act, 1975.

26. Further, PUNJMIN never had the permission (lease or license) to set up a steel mill (and whether under the law PUNJMIN could setup a Steel Mill as discussed later in the judgment) and therefore how could the said right be transferred/assigned and subsequently endorsed by the Government?

27. The Working Paper of PUNJMIN, as well as, the Summary prepared by the Secretary, Mines and Minerals Department and blessed by the Chief Minister and others is inconsistent besides silent regarding the provisions of law authorizing the Government and PUNJMIN to enter into such a transaction.

28. The Summary received the approval of the Chief Minister on 24-11-2007 and also of the other senior public functionaries mentioned above and thereafter the Joint Venture Agreement was entered on 12-6-2007 duly signed by the Managing Director, PUNJMIN. The salient features of the Joint Venture are reproduced hereunder for ready reference:

AGREEMENT BETWEEN

PUNJAB MINERAL DEVELOPMENT CORPORATION

AND

EARTH RESOURCES PRIVATE LIMITED

This Agreement is made at Lahore on this 6th day of the month of December, 2007

.....

AND WHEREAS, ERPL affirms its capability of bringing the required funding as well as the equipment and technical expertise to conduct the feasibility study and exploration activities in order to ascertain commercial availability of iron-ore at Chiniot and Rajoa fields of PUNJMIN and upon its completion, launch a successful mining operation as well as establish a steel mill when commercially feasible;

.....

AND WHEREAS, it is agreed by and between the parties that to achieve the common objective of the parties of further exploration of iron-ore and development of successful mining operation as well as establishment of steel mill when commercially feasible, PUNJMIN shall transfer the existing Mining lease and Licence to and in favour of ERPL upon signing of this agreement as per terms hereof;

.....

AND WHEREAS Government of the Punjab endorses the transfer of existing leases and licences by PUNJMIN in favour of ERPL, and agrees to grant renewals of the said leases and licences for further periods of time as detailed in this agreement, and also agrees to give itself and assist in obtaining from the Federal Government, throughout the currency of this agreement, all necessary permissions, approvals, licences and support for establishment of a steel mill in the Punjab Province.

.....

1.0 EQUITY OF PUNJMIN:

1.1 Upon signing of this Agreement, PUNJMIN shall transfer to ERPL all its rights including lease hold rights to its iron-ore fields and mining areas at Chiniot and Rajoa as well as the other tangible and intangible assets pertaining to these fields, as described and itemized in the Schedule to this Agreement, subject to the following:

a. In the event of insolvency, bankruptcy or breakdown or otherwise alienation from the project of ERPL, or termination of this Agreement in any manner and for any reason whatsoever, the assets and rights so transferred to ERPL shall revert back to PUNJMIN.

- b. No encumbrance whatsoever, by way of charge, lien, mortgage, pledge, hypothecation or otherwise, shall be created upon these assets and rights during Phase-I of the project. Transfer of any right attached to these assets and rights before successful completion of Phase-I of the project, in any manner whatsoever, shall be void.
- c. Transfer of these assets and rights, to ERPL, shall become absolute upon successful completion of Phase-I of the project.

1.2 In consideration of this transfer, as agreed vide 1.1 above, ERPL shall issue to PUNJMIN, a total of 5,000,000 (five million) shares, 20% Class A shares of stock based on related valuation of movable and immovable tangible and intangible assets of PUNJMIN. The shares, so issued, shall be subject to a ten year lock-up which prohibits PUNJMIN from selling, assigning, transferring, conveying, or otherwise alienating them for a period of ten years from the date of issuance.

.....

4.1.3. Phase-III ESTABLISHMENT OF STEEL MILL

After successful commencement of mining operation, as and when it would seem feasible and is determined by the commercially viable business plan, ERPL shall bring and put in an estimated investment of US\$ 600 million to establish a steel mill in Phase-III.

29. The Joint Venture Agreement was marked to the Law, Parliamentary Affairs and Human Rights Department (the “Law Department”) by the Ex-Managing Director, PUNJMIN for vetting prior to its execution (according the M.D. this was the last legal recourse available to him to stall the Agreement).

30. The Law Department approved the Joint Venture Agreement on 4-12-2007. The approval of the Law Department states as follows:

“...the parties are validly competent to enter into and sign the agreement ...”

31. It is surprising that the Law Department without verifying the law and without giving any reasons advised that the parties were competent to enter into a Joint Venture Agreement. The Law Department, Government the Punjab, as the principal legal advisor to the Government, should have looked at the whole transaction more meticulously and formulated a more holistic opinion, especially when public property (natural resources) worth billion of dollars were in question. Law Department, therefore, failed in discharging its obligations under the Provincial Rules of Business, 1974.

32. In spite of the Agreement, the physical possession of the site was not transferred to ERPL. It appears from the record that Rao Manzer Hayat, the then M.D. PUNJMIN wrote a Note to the Chief Secretary on 10-3-2008, followed by another Note on 31-5-2008 and then as Secretary, Mines and Minerals Department, put up a Summary to the Chief Minister on 5.7.2008. According to the M.D. PUNJMIN, these efforts stalled the implementation of the Joint Venture Agreement and resulted in the constitution of a high level committee under the Chairmanship of the Additional Chief Secretary, Government of the Punjab and comprising, Secretary Finance Department, Secretary Law and Parliamentary Affairs & Human Resources Department, Secretary Mines and Minerals Department and

Additional Secretary Commerce and Investment, Government of the Punjab was constituted to look into the Joint Venture. The Committee met on 2-8-2008 and made the following observation:

- | | |
|------|--|
| i) | ERPL does not have any technical know how base about mining iron ore. |
| ii) | ERPL does not have required technical staff. |
| iii) | The financial commitment as issued by the KASB Bank does not have any date on it. Moreover it does not provide any proof of specific financial commitment for the Company. |
| iv) | ERPL is being operated by Mr. Arshad Waheed from his residential address in Gujranwala. There is no regular base of this Company as such. |
| v) | The office in Gujranwala does not have any technical manpower/technical knowledge to sponsor projects of this magnitude. |
| vi) | There is no experience of ERPL about undertaking mining projects as such. |
| vii) | Company is not registered under Stock Exchange and its shares issued to Punjmin are verified by securities commission which are fake and issued illegally to Punjmin. |

33. The Committee finally recommended to invoke clause 5 for the termination of the Agreement, which led to the issuance of the impugned Notice dated 16-8-2008.

MAINTAINABILITY OF THE PETITION

34. The contents of the impugned Notice dated 16-8-2008 reveal that it simply invites the petitioner to a meeting. Therefore, no cause of action arises due to the same. The petition is, therefore, premature as writ cannot be maintained on

the basis of apprehensions. Reliance is placed on Mian Muhammad Shahbaz Sharif vs. Federation of Pakistan through Secretary, Ministry of Interior, Government of Pakistan, Islamabad and others (PLD 2004 SC 583), “National Steel Rolling Mills and others v. Province of West Pakistan” (1968 SCMR 317(2), “Messrs Nawaz Enterprises through Sole Proprietor and another v. Habib Bank Ltd. and 5 others” (2007 CLD 952) and “Liaqat Ali v. City Nazim and others” (2003 MLD 1635).

35. Even, if it is accepted for the sake of argument that the Government had decided to terminate the Joint Venture Agreement and the proposed meeting was just a sham, still the subject matter of the petition emanates from a contract and the enforcement of the same does not confer legal character so as to invoke the constitutional jurisdiction of this court. The petition is hopelessly misconceived and is therefore not maintainable. Reliance is placed on “Hazara (Hill Tract) Improvement Trust through its Chairman and others v. Mst. Qaisra Elahi and others” (PLJ 2005 SC 925), Messrs Airport Support Services vs. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268), Messrs Ramna Pipe and General Mills (Pvt.) Limited vs. Messrs Sui Northern Gas Pipe Lines (Pvt.) and others (2004 SCMR 1274), “Brig.

Muhammad Bashir v. Abdul Karim and others” (PLD 2004 SC 271), Malik Asad Ali vs. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad and 2 others (1998 SCMR 130), Dr. Muhammad Munir-ul-Haq and others vs. Dr. Muhammad Latif Chaudhry and others (1992 SCMR 2135), Dr. Ashiq Muhammad, etc. vs. Govt. of N.W.F.P., etc. (NLR 2002 Service 33), Bayindir Insaat vs. Pakistan through Ministry of Communications and 3 others (PLD 2001 Lahore 426), Network Television Marketing Ltd. Vs. Government of Pakistan and another (2001 CLC 681), “Mst. Rukhsana Yasmeen v. Muhammad Iqbal Mirza” (2001 YLR 2759) and “Lahore Cantonment Cooperative Housing Society Limited Lahore Cantt through Secretary v. Dr. Nusrat Ullah Chaudhry and others” (PLD 2002 SC 1068).

36. NON MAINTAINABILITY OF THE PETITION AND THE POWER OF THIS COURT TO PROCEED FURTHER

Non maintainability of the petition on merits does not oust the jurisdiction of this court to address other violations of public law, which have come to fore during the course of arguments on the petition and after the perusal of the record. Stark violations in the disposal and transfer of public property and heartless breach of public trust by the public functionaries (public trustees) cannot be over looked. This Court is under

oath to preserve, protect and defend the constitution and in all circumstances do right to all manner of people without fear and favour. For the Court to dismiss the petition on the ground of maintainability alone would not only result in failure of justice, it would also make the Court and its constitutional jurisdiction hostage to technicalities, which cannot be allowed. Once grave violation of law and transparency in the disposal/transfer of public property comes before this court, it transforms the *lis* into public interest litigation conferring inquisitorial jurisdiction on this Court. No constitutional court can shy away from fully discharging this responsibility. It is useful here to revisit Article 199 (1) (a) (ii) of the Constitution, which provides that on an application of the aggrieved person, the court can make an order “declaring that **any** act done or proceedings taken within the territorial jurisdiction of the Court have been done or taken without lawful authority and is of no legal affect”. Again under Article 199 (1) (c) this court can “make an order giving such directions to any person” within territorial jurisdiction of the Court for enforcement of fundamental rights conferred under the Constitution. These are loud reminders of the jurisdictional expanse enjoyed by this Constitutional Court. This Court is, therefore, at all times equipped with the jurisdiction to probe into any public wrong

affecting public at large, when the same has come before it through a petition. It does not matter if the said wrong has been specifically agitated or has coincidentally surfaced during the proceedings. This jurisdiction should not be confused with *suo moto* jurisdiction exercised by the august Supreme Court of Pakistan under Article 184 of the Constitution, as in the present case jurisdiction of this court has been invoked through a petition placed before the Court by an aggrieved party. I, therefore, proceed further to assess if the Joint Venture Agreement entered into between PUNJMIN and ERPL passes the test of law and transparency.

ROLE AND SCOPE OF POWERS OF PUNJMIN

37. I, first take up the role and scope of powers of PUNJMIN. PUNJMIN is established under the Punjab Mineral Development Corporation Act, 1975 [Punjab Act no. XXXIII of 1975] (the “Act”) for promoting mineral development in the Province of Punjab. The Act applies to all minerals except mineral oil, natural gas and mineral resources necessary for generation of nuclear energy. Sections 2(a) and 5(1) of the Act provide that PUNJMIN shall have a Board of Directors and shall consist of a Chairman and Managing Director (who are appointed by the Government) along with the following directors:

- (i) The Chairman, Planning and Development Board of Government;
- (ii) Secretary to the Government, Mines and Mineral Department, or his nominee not below the rank of a Deputy Secretary; and
- (iii) Secretary to the Government, Finance Department, or his nominee not below the rank of a Deputy Secretary.

38. Chapter-III (Section 18) of the Act provides the functions of the Corporation (PUNJMIN) and Chapter IV relates to Finance. Sections 18 and 19 of the Act are reproduced hereunder for ready reference:

FUNCTIONS OF THE CORPORATION	
18-	<p>(1) The Corporation shall draw up schemes, with objects confined to the Province of the Punjab, for the development, surveying, prospecting, exploring, mining, processing, industrial exploitation and purchase and sale of minerals including their import and export and for the improvement of communications, water supply, power and such other ancillary matters as may be conducive to the attainment of these purposes in the areas selected by the Corporation for any such development and submit the same to Government for approval.</p> <p>(2) The Corporation shall, as soon as may be, proceed to give effect to any Scheme approved by Government, and in particular may:-</p> <ul style="list-style-type: none">(a) form and establish companies to manage and run the projects as are established by the Corporation; Provided that before sponsoring any such company the Corporation shall obtain the approval of Government to the Company's capital structure;(b) manage on behalf of Government the shares purchased by Government in the issued capital of companies established by the Corporation;(c) subscribe to the capital of these companies to such extent as may be necessary;(d) act as Managing Agents of the Companies established by the Corporation;(e) give short and medium term loans or furnish guarantees to the scheduled banks for loans to the companies established by the Corporation in the manner aforesaid; and

(f) establish, manage and run the projects under its direct control.

(3) The Corporation may, if it considers expedient, sell or transfer all or any of the shares subscribed by it under sub-section (2):

Provided that the Corporation shall not without the previous sanction of Government, sell or transfer such shares at a rate below the par value of such shares, or below the prevailing market rate if such rate is higher than the par value of such shares.

FINANCE

19- The Corporation shall be deemed to be a local authority under the Local Authorities Loans Act. 1914, for the purpose of borrowing money under the said Act and the making and execution of any scheme under this Act shall be deemed to be a work which such authority is legally authorized to carry out.

39. Primary function of PUNJMIN under the Act is to draw up Schemes for the development, surveying, prospecting, exploring, mining, processing, industrial exploitation and purchase and sale of minerals. Once the Scheme has been drawn up the same is put up before the Government for approval. Thereafter, if the Scheme is approved, lease or license relating to particular area for mining or exploration is granted to PUNJMIN by the Mines and Mineral Department of the Government under the Punjab Mining Concession Rules, 2002 (“Rules”).

40. In order to give effect to the Schemes, under section 18(2)(a), PUNJMIN is permitted to establish companies to manage the projects. However, before sponsoring any such company the Corporation shall obtain the approval of Government to the company’s capital structure. Under sub-sections 18(2)(b) and (c), PUNJMIN can also manage on behalf

of the Government the shares purchased by the Government in the issued capital of companies established by the Corporation and subscribe to the capital of these companies to such an extent as may be necessary.

41. Under sub-sections 21(2)(a) to (h) of the Act, the Punjab Mineral Development Corporation Fund shall consist of:-

- (a) investment made by government;
- (b) grants made by Government;
- (c) loans obtained from Government;
- (d) charges for the management of companies under the direct control of the Corporation;
- (e) managing agency commission in respect of companies managed by the Corporation;
- (f) loans obtained from the scheduled banks;
- (g) foreign loans obtained by the Corporation; and
- (h) all other sums received by the Corporation.

42. PUNJMIN Fund cannot hold or entertain any private equity or private investment. Needless to mention that section 21(2)(h) of the Act will have to be read *ejusdem generis* with the prior sub-sections and therefore cannot mean to include private investment.

43. PUNJMIN can set up companies but cannot take a private equity partner. The above provisions of the Act show

that only PUNJMIN and Government can be sponsors in the companies established by PUNJMIN.

44. There is no provision for joint venture agreements with the private party under the Act, hence it is not permissible for PUNJMIN to have a public private partnership for the execution of a Scheme. It is only under section 27(2)(c) of the Act where the Government can make rules for the appointment of consultants and experts, etc for PUNJMIN which is not the case here.

45. In the present case ERPL has not been established by PUNJMIN and is therefore not a company envisaged under section 18(2)(a) of the Act. Further, there is no provision under the Act, which permits PUNJMIN to enter into a joint venture, in particular, with any private party. Even, if the present transfer of rights under the Lease or License by PUNJMIN is considered to be assignment under Rule 60 of the Rules, setting up of a Steel Mill was never a right granted to PUNJMIN. No such right could have been granted to PUNJMIN as the said Corporation deals in minerals which are defined in Rule 2 (xxvi). The Joint Venture Agreement is, therefore, in violation of the Act. The Working Paper put up before the Board of Directors of PUNJMIN is therefore against the law.

POWERS OF GOVERNMENT (MINES & MINERAL DEPARTMENT)

46. Now coming to the power of the Government to approve the execution of the Joint Venture Agreement. Under Rule 60 of the Rules, Licensing Authority can approve assignment of rights under a Lease or License held by an exiting Lessee or Licensee. Even if it is assumed that the Government proceeded under Rule 60, the question that arises is why only ERPL? Was there any competitive bidding as per Rule 76 of the Rules to select ERPL? Was there any public tendering or public auction that resulted in selecting ERPL?

47. Mines and Mineral Department, Government of the Punjab, as well as, PUNJMIN are public institutions. Any property held by public institutions is held in trust on behalf of the people of Pakistan and public functionaries are trustees and custodians of the said public property. In the present case, the public property is the minerals, which are surface and sub-surface natural deposits of ore and metals. This natural resource belongs to the people of Pakistan and stands protected under the Public Trust Doctrine. Being custodians of natural resources (minerals), the Mines and Minerals Department (Government) and PUNJMIN assume a far higher standard of responsibility. No private party can solicit its way into the corridors of these public institutions unless they have passed through a transparent,

limpid, open and clear public competitive selection process of public advertisement, public tendering, public auction and competitive bidding. Disposal of Public Property cannot be allowed without public participatory process, unless otherwise provided under special law. No one including the Chief Minister or the Chief Secretary of the Province have the right or the authority to transfer, lease or license out even an inch of public property without public tendering, unless law permits otherwise or there are exceptional reasons duly recorded in writing for holding a negotiated sale, which is not the case here.

48. “The government in itself has no “private” interest of its own. The government exists for the sake of individuals. The government does not exist for its “own” sake. Those who represent the government have no “self ” interest that must be protected. They must act to achieve the collective interest. Indeed, there is a serious concern - a concern that history has repeatedly validated - that representatives of the government will develop their own interests and use the tremendous power granted them for purposes that did not reflect that collective good. The duty of loyalty seeks to prevent that. The duty of loyalty seeks to guarantee that the government takes care of the public and not itself; the general duty of loyalty seeks to

guarantee that the government takes care of the public and not itself.”¹

49. The disposal or transfer of public property without public participation is abuse of public trust. Public Property sold or transferred behind closed doors by public functionaries to some select few undermines the venerated role of trusteeship. Good governance is fundamentally pillared on trust and confidence of the people in the government, public institutions and more importantly in the public functionaries at the helm of the affairs. If this public trust is hemorrhaged, the entire edifice of public administration loses its credibility, which weakens governments and discredits democracy.

50. In “Shri Sachidanand Pandey and another vs. The State of West Bengal and others”, (AIR 1987 SC 1109) at p.1133, O. Chinnappa Reddy, J. after considering almost all the decisions on the subject summarized the propositions in the following terms:

“On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and ¹principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is

¹ The Judge in a Democracy by Aharon Barak (Page 220-221), Princeton University Press, 2006

considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism”.

51. In “Haji T.M. Hassan Rawther v. Kerala Financial Corporation” (AIR 1988 S.C. 157) Jagannatha Shetty speaking for the Supreme Court of India said:-

“The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be above board. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favoritism or nepotism. Ordinarily, these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly. But that is not the only rule. As O.Chinnappa Reddy, J. observed, “that though that is the ordinary rule, it is not an invariable rule.” There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience.”
(emphasis supplied)

52. In “Fertilizer Corporation case”, (AIR 1981 SC 344) at p.350 the Court speaking through Chandrachud, C.J., observed:

“We want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property, when the intention is to get the best price, ought to take place publicly. The vendors are not necessarily bound to accept the highest or any other offer, but the public at least gets the satisfaction that the Government has put all its cards on the table.”

(emphasis supplied)

53. In “Ram & Shyam Company vs. State of Haryana” (1985 (3) SCC 267), it has been laid down :(vide p.277, para 12)

“.....On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. The welfare State may be able to expand its beneficent activities by the availability of larger funds.But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, or affinity, kinship, empathy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property.”

(emphasis supplied)

54. Reliance is placed on good authority to establish that public property cannot be transferred without open procedure of

public advertisement, public tender and public auction, unless law provided otherwise. Malik Atta Muhammad and another v. Government of Punjab through Secretary, Local Government and Rural Development, Lahore and others (2007 SCMR 178), Mirza Muhammad Arif and others v. Chief Engineer and others (PLD 2009 LAH 489), Muhammad Irshad and another v. Tehsil Municipal Administration through Tehsil Nazim, Lodhran and 3 others (2006 CLC 1902), Mubashir Iqbal v. Secretary, Excise and Taxation, Government of Punjab, Lahore and 5 others (PLD 2005 Lahore 728), Sardar Sultan Ahmed Khan v. Government of Punjab through Project Director, Department of Agriculture Punjab, Lahore and 4 others (2001 MLD 1013), Petrosin Products Pakistan (Pvt.) Limited vs. Federtion of Pakistan through Secretary, Privatization Commission, Ministry of Finance, Government of Pakistan Islamabad and 5 others (2001 CLC 820), “Muhammad Shafique Khan v. Secretary to the Government of Punjab Local Government and Rural Department, Lahore and 2 others” (1996 CLC 2045), Administrator, Municipal Committee, Sahiwal vs. Member Colonies, Board of Revenue, Punjab, Lahore and 2 others (2007 CLC 1858), Messrs Noor Shah Filling Station (Regd.) through Manager (Administration) v. Auqaf Department through Secretary/Chief Administrator

Auqaf, Punjab and 4 others (2009 CLC 1148), *Shaukat Ali and others v. Government of Pakistan through Chairman, Ministry of Railways and others* (PLD 1997 SC 342), *Shaukat Ali vs. Secretary, Industries and Mineral Development, Government of Punjab, Lahore and 3 others* (1995 MLD 123), “*Syeda Shahida Tasleem v. The Province of Punjab and others*” (PLD 1995 Lahore 110), “*Ali Raza v Chairman, Punjab Cooperative Board for Liquidation, Lahore*” (2010 YLR 356), *Maqsood Khan and others v. Province of Sindh and others* (2007 YLR 28), From the Indian jurisdiction reliance is placed on: *Aggarwal & Modi Enterprises Pvt. Ltd. & Anr. V. New Delhi Municipal Council* (AIR 2007 SC 3131), *Chenchu Rami Reddy and another v. The Government of Andhra Pradesh and others* (AIR 1986 SC 1158), *State of Haryana and others v. Jage Ram and others* (AIR 1983 SC 1207), *M/s Kasturi Lal Lakshmi Reddy, etc. v. The State of Jammu & Kashmir and another* (AIR 1980 SC 1992), *Ram and Shyam Company, v. State of Haryana and others* (AIR 1985 SC 1147), *Ramana Dayaram Shetty v. The International Airport Authority of India and others* (AIR 1979 SC 1628), *Shri Sachidanand Pandey and another v. The State of West Bengal and others*” (AIR 1987 SC 1109), *State of U.P. v. Shiv Charan Sharma and others* (AIR 1981 SC 1722), “*Fertilizer Corporation v. Union of India*” (AIR 1981 SC 344),

and Haji T.M. Hassan Rawther vs. Kerala Financial Corporation (AIR 1988 SC 157).

55. Disposal of Public Property without reaching out to the public is a breach of public trust and is therefore facially and ex-facie discriminatory. By giving preference to a select few amounts to treating equals unequally. This offends fundamental right of equality under article 25 of the Constitution.

56. Further, such closed and opaque process adopted for the sale or disposal of public property limits public access to new business prospects and restricts economic activity in the hands of a select few. This goes against the grain of fair competition and fundamental right guaranteed under article 18 of the Constitution. Right of a person (public) to enter a lawful business is impaired if he is deprived of the opportunity to participate. Reliance is placed on Human Rights Cases No.4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759).

57. It is important to set out guidelines to be adhered to by government, semi government and autonomous public institutions for the disposal or transfer of public property. In our country the closest legislature has come to providing for

disposal of public property is under the rubric of Privatization Commission Ordinance, 2000. The Privatization (Modes and Procedure) Rules, 2001 read with Privatization Commission (Hiring of Valuers) Regulations, 2001 provides a fairly comprehensive and elaborate checklist (discussed hereunder) that is essential to discharge the public trust reposed in public institutions. Further, there is a detailed law relating to public procurement in the country namely; The Public Procurement Rules, 2004 framed under the Public Procurement Regulatory Authority Ordinance, 2002. The principles of public procurement can also act as useful guidelines when public property is to be disposed of or transferred. Some of the salient principles/guidelines that can be culled out of the above laws for the disposal (which includes sale, lease, license, etc) of public property are as follows:

- (a) **Disposal Planning**. Advanced planning for disposal of public properties by public institutions based on a well reasoned cost benefit analysis. Any such planning will be guided and structured solely to achieve public and institutional interest;
- (b) **Due Diligence**: Disposal Planning must be based on legal, technical and financial due diligence of the public property being disposed of;
- (c) **Independent Valuation**: To assess fair and independent valuation of the public property before it is put to sale;

- (d) **Public Advertisement**: Disposal of public property shall be widely advertised to get maximum publicity (also be advertised on the website of the public institution concerned);
- (e) **Pre-qualification**: of prospective bidders prior to floating the tenders keeping in view the institutional need and interest;
- (f) **Open Competitive bidding**.

58. In the present case, for the reasons and law discussed above Joint Venture Agreement dated 4.12.2007 is against law, public policy, national interest, public transparency and proper exercise of discretion. For the above reasons the said agreement is set aside as being void ab-initio. Reliance is placed on Human Rights Cases No.4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759); Moulvi Iqbal Haider v. Capital Development Authority and others (PLD 2006 Supreme Court 394); Messrs Airport Support Services vs. The Airport Manger, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268); Messrs Shams and Brothers vs. Government of Pakistan and others (2007 CLD 125) and Sheri-CBE and others vs. Lahore Development Authority and others (2006 SCMR 1202), Muhammad Afzal vs. Shahzad Asghar Dar and others (2003 SCMR 280), Messrs Ittehad Cargo Service and 2 others vs. Messrs Syed Tasneem Hussain Naqvi and others (PLD 2001 SC 116) and “Messrs PACIFIC

Multinational (Pvt.) Ltd. v. Inspector-General of Police, Sindh Police Headquarters and 2 others” (PLD 1992 KAR 283).

59. Public functionaries being trustee should stand as pillars against abuse of law and process. To all the said officers, the words of founder of the nation, Quaid-e-Azam Muhammad Ali Jinnah, might be a timely reminder:

“The first thing that I want to tell you is this, that you should not be influenced by any political pressure, by any political party or individual politician. If you want to raise the prestige and greatness of Pakistan, you must not fall a victim to any pressure, but do your duty as servants to the people and the State, fearlessly and honestly. Service is the backbone of the State. Governments are formed, Governments are defeated, Prime Ministers come and go. Ministers come and go, but you stay on, and, therefore, there is a very great responsibility placed on your shoulders. You should have no hand in supporting this political party or that political party, this political leader or that political leader – this is not your business.¹”

60. Again while addressing to the Gazetted Officers at Chittagong on 25th March 1948, the founder of our nation said:

“...I know we are saddled with old legacy, old mentality, old psychology and it haunts our footsteps, but it is up to you now to act as true servants of the people even at the risk of any Minister or Ministry trying to interfere with

¹ (Talk to Civil Officers at Government House, Peshawar) Jinnah Speeches and Statements 1947 – 1948 - OXFORD

you in the discharge of your duties as civil servants. I hope it will not be so but even if some of you have to suffer as a victim – I hope it would not happen – I expect you to do so readily.”¹

61. It is essential for the public functionaries to understand the importance and meaning of a democratic welfare state. “What is democracy? ...It rests on two bases. The first is the sovereignty of the people. This sovereignty is exercised in free elections, held on regular basis, in which the people choose their representatives, who in turn represent their views. This aspect of democracy is manifested in majority rule and in the centrality of the legislative body through which the people’s representatives act. This is the formal aspect of democracy. It is of central importance, since without it the regime is not democratic...The second aspect of democracy is reflected in the rule of values (other than the value of majority rule) that characterize democracy. The most important of these values are separation of powers, the rule of law, judicial independence, human rights, and basic principles that reflect yet other values (such as morality and justice), social objectives (such as the public peace and security), and appropriate ways of behaviour (reasonableness, good faith). This aspect of democracy is the rule of democratic values. This is a substantive aspect of

¹ Jinnah Speeches and Statements 1947 – 1948 - OXFORD

democracy. It too is of central importance. Without it, the regime is not democratic.”²

62. “For people in the West, democracy means “liberal democracy”: a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. But this bundle of freedoms – what might be termed “constitutional liberalism” – has nothing intrinsically to do with democracy and the two have not always gone together, even in the West. After all, Adolf Hitler became chancellor of Germany via free elections. Over the last half-century in the West, democracy and liberty have merged. But today the two strands of liberal democracy, interwoven in the Western political fabric, are coming apart across the globe. Democracy is flourishing; liberty is not”.³

63. Real democracy cannot take ground in Pakistan, unless liberty and freedom of the citizens is safeguarded and respected while accountability of public institutions is strictly enforced. There is little doubt in my mind that Agreement with ERPL was for the benefit of the few and not in the public interest. Public functionaries are custodians of public property; they must

² The Judge in a Democracy by Aharon Barak (Page 24), Princeton University Press, 2006

³ The future of freedom: illiberal democracy at home and abroad / Fareed Zakaria (1st Edition p. 17) W.W. Norton & Company Ltd.,

protect and safeguard public property like a lioness guards her cubs. Therefore, even a slight lapse on behalf of the public functionaries in the stewardship of this sacred trust and public confidence, calls for strictest of accountability in the larger interest of justice and institutional building. Reliance is placed with advantage on Human Rights Cases No.4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759), Moulvi Iqbal Haider v. Capital Development Authority and others (PLD 2006 Supreme Court 394), Arshad Mehmood and others vs. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 SC 193), Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others (1999 SCMR 2883); Iqbal Hussain vs. Province of Sindh through Secretary, Housing and Town Planning, Karachi and others (2008 SCMR 105) and Bangalore Medical Trust, vs. B.S.Muddappa and others (AIR 1991 SC 1902).

64. I, therefore, direct Chairman, NAB, to hold a detailed inquiry in the matter regarding the award of Agreement to ERPL. Chairman, NAB will submit his Inquiry Report along with the actions taken before this court within six months from the receipt of this order.

65. Advocate General, Punjab will ensure that copy of this judgment is circulated amongst public institutions in Punjab as a guideline in order to ensure proper disposal of public property.

66. Office is directed to dispatch a copy of this judgment to Chairman, NAB and place the Report of Chairman, NAB, before this court through separate file on the judicial side on 14/02/2011.

67. For the above reasons Agreement dated 6-12-2007 entered between PUNJMIN and ERPL is declared to be void *ab-initio*. Government will ensure that PUNJIM effectively performs the lease and license regarding the iron ore reserves in Rajoa and Chiniot or else Government shall take appropriate remedial action under the Rules so that this immense natural resource is put to best use in the public interest and for the benefit of the people of Pakistan.

(Syed Mansoor Ali Shah)
Judge

Iqbal

APPROVED FOR REPORTING