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Judgment Sheet

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

Case No: I.C.A No.105/2010

Atta Ullah Khan Malik **Versus** Federation of Government
of Pakistan etc.

JUDGMENT

Dates of hearing	08.03.2010, 06.04.2010, 3.5.2010, 25.05.2010, 26.05.2010, 01.06.2010, 02.06.2010, 03.06.2010 and 10.06.2010
Petitioner by	Mian Javaid Iqbal Arain, Advocate
Respondents by:	Mr. Aamir Rehman, Deputy Attorney General, Mr. Abbas Mirza, Advocate for respondent No.2 Mr. Muhammad Raza Qureshi, Advocate for respondent No.4 Muhammad Saeed Khawar, Director (Property and Land) Pakistan Railways Lahore and Muhammad Arif, Joint Director

SYED MANSOOR ALI SHAH J. It is contended by the appellant that he is a citizen of Pakistan and it is his duty to save the public exchequer from loss and to point out corrupt practices of public functionaries. In this case the appellant highlights that plots (land) owned by Pakistan Railways have been leased out in a clandestine and a non-transparent manner to respondent no.4 without a public tender or

an open public auction. The W.P. is therefore in the nature of Public Interest Litigation.

2. Detailed facts of the case are that respondent Pakistan Railways decided to lease out plots (“PLOTS”) for a term of ten years extendable by another term of five years for the construction of shops in various areas including the seven plots of various sizes located between Qaidabad-Bandial Stations, Malakand through an OPEN PUBLIC AUCTION vide Letter dated 16.6.2005 issued by the Divisional Superintendent, Pakistan Railways (plots in question are mentioned at serial No.6 of the said Letter). The said open public auction was publically advertised in Daily “Ausaf” Islamabad on 18.6.2005. However, later on in response to several public complaints and vigilance reports against the auction, Pakistan Railways through Divisional Superintendent, Rawalpindi cancelled all the auctions made during the period 1.6.2005 to 5.7.2005 vide his Letter dated 20.7.2005. As the auction of the PLOTS also fell within this time period it also stood cancelled.

3. Vide Letter dated 27.12.2005 the bidders were to be informed to collect the refund of their bid money,

which was prepared in the shape of pay orders. Pay Order in the sum of Rs.1,43,500/- was also prepared in favour of Respondent no.4 as per the above Letter (counsel for Respondent no.4 states that the bid money was never refunded to the said respondent). Thereafter, the matter pertaining to auction of the PLOTS for commercial purpose i.e., for the construction of shops, came to an end.

4. After a lull of over two years, without any public tendering or public auction, the (same) PLOTS were leased out to Respondent No.4, through the backdoor, for agricultural purposes vide Letter dated 8.9.2007 of Director, Property & Land, Headquarters Office, Pakistan Railways, Lahore. The said Letter refers to Respondent no.4 as the Highest Bidder (even though admittedly no public auction for the lease of the PLOTS took place). Thereafter, respondent Pakistan Railways entered into an AGREEMENT FOR THE LICENSING OF RAILWAY LAND FOR AGRICULTURAL PURPOSES AND NURSERIES with Respondent no.4 on 24.9.2007.

5. Subsequently, the competent authority converted the Agricultural Lease of Respondent No.4 into a

COMMERCIAL LEASE. This was communicated to Respondent no.4 vide Letter dated 25.6.2009 and a fresh AGREEMENT FOR LEASE/RENT OF RAILWAYS LAND FOR COMMERCIAL PURPOSE/SHOPS (THROUGH OPEN AUCTION) AT KM 211/4 TO 212/2 BETWEEN QAIDABAD-BANDIAL STATIONS was entered on 21.8.2009 between Pakistan Railways and Respondent No.4.

6. Appellant challenged the grant of lease in favour of respondent No.4 in W.P. No.3151/2010 which was disposed of on 19.02.2010 with the following order:-

“Let the petitioner move an appropriate application with respondent No.1. If and when such application is moved, respondent No.3 shall entertain the same, hear the petitioner and decide the same within a period of thirty days from the date when the application is moved.”

Aggrieved of the said order, the appellant has preferred this appeal.

7. It is contended by learned counsel for the appellant that the lease granted to Respondent no.4 after the cancellation of the auction for commercial purposes is without any public tender or a public auction and, therefore, against the rules and regulations of Pakistan Railways besides being against transparency and good

governance which a public authority like Pakistan Railways is bound to ensure.

8. Learned counsel for Pakistan Railways confirmed the above facts. However, explaining the reasons for the grant of lease, Mr. Muhammad Saeed Khawar, Director (Property & Land), Pakistan Railways submitted that recommendation was moved by the Deputy Superintendent to the effect that there was apprehension that the said land could be encroached upon and, therefore, the land was leased out to the “highest bidder” i.e., respondent No.4. (When asked how Respondent No.4 was the “highest bidder” when no public tender or public auction took place for the lease of the said land, he without much remorse said that Respondent No.4 had the highest bid in the open public auction for shops in the year 2005, which was subsequently cancelled, as mentioned above).

9. Director, (Property & Land) placed on record a policy letter dated 12.8.2000 titled LICENSING OF RAILWAY LAND FOR AGRICULTURAL PURPOSES which provides in clause 2:-

“The Railway land for agricultural purposes outside Municipal Corporation limit can be leased out through open public auction for a period of three years on year to year basis and extendable for another

period of three years on 20% increase over the approved bid.” (emphasis supplied)

10. When asked how the said lease of public property was granted to Respondent no.4 without the process of public auction, the said officer had no answer. He, however, contended that because Respondent no.4 was the highest bidder (in an auction held two years ago which was cancelled by Pakistan Railways due to violations reported), therefore, it was felt appropriate that the land ought to be leased out to the said respondent. When further asked how lease for agricultural purposes was converted into a lease for commercial purposes, the officer again had no answer. The officer also failed to show any rules or regulations of Pakistan Railways that permitted the grant of lease in question without a public tender or public auction.

11. Learned counsel for Respondent no.4 raised the preliminary objection that this matter cannot be taken up in the constitutional jurisdiction under the banner of public interest litigation as the appellant has not approached this Court with clean hands, as he is a political rival of respondent no.4. He placed reliance on Maulana Abdul Haq Baloch and 2 others v. Government of Balochistan through Secretary

Industries and Mineral Development, Quetta and 6 others (PLD 2007 Quetta 118) and Ashok Kumar Pandey v. State of West Bengal and others (AIR 2004 SC 280). He, other than orally raising the said objection did not place on record any document that supported this contention. This submission was, therefore, made rather half-heartedly.

12. Learned counsel for respondent no.4, however, vehemently argued that what needs to be seen at the end of the day is whether Pakistan Railways is getting the best price for the land. He submitted that the present bid in the sum of Rs. 2,87,000/- per annum is the highest bid ever received and, therefore, Respondent no.4 is entitled to the said lease.

13. Arguments heard. Record perused.

14. At the very outset learned counsel for Respondent No.4 submitted that the petitioner has no *locus standi* to maintain this petition. He also submitted that the petitioner is a political rival in the area and this petition in the garb of public interest litigation is tainted and is being used to settle a personal score (this was not supported by any evidence).

15. It is settled on good authority that in matters pertaining to public interest litigation (also known as “PIL”) the rule of “standing” or “*locus standi*” or “aggrieved person” has received a liberal interpretation over the years and any person/citizen having “sufficient interest” (in the context of larger public interest) can maintain a petition and pass as an “aggrieved person” under article 199 of the Constitution, subject to satisfying other requirements of the said article. Reliance is placed on “Muhammad Tariq Abbasi and others v. Defence Housing Authority and others” (2007 CLC 1358), “Muhammad Yar v. Muhammad Tariq” (2007 YLR 2430), “Moulvi Iqbal Haider v. Capital Development Authority” (PLD 2006 SC 394), “Javed Ibrahim Paracha v. Federation of Pakistan and others” (PLD 2004 SC 482), “Khurram Khan, Advocate v. Government of Punjab through Chief Secretary & 6 others” (PLD 2009 LAH 22). “Ardeshir Cowasjee and 11 others v. Sindh Province and others” (2004 CLC 1353), “Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others” (1999 SCMR 2883), “Mushtaq Ali v. Government of Sindh through Chief Secretary, Sindh,

New Sindh Secretariat, Karachi and 11 others” (PLD 1998 KAR 416), “Democratic Workers’ Union C.B.A. v. State Bank of Pakistan and others” (2002 PLC (CS) 614), “State v. M.D. WASA and others” (2000 CLC 471), “Province of Punjab through Collector Faisalabad and 8 others v. Muhammad Yaqoob” (1992 CLC 2065) “Ardeshir Cowasjee and others v. K.B.C.A. and others” (2001 YLR 2403) “Maulana Abdul Haq Balock and 2 others v. Government of Balochistan through Secretary Industries and Mineral Development, Quetta and 6 others” (PLD 2007 QUETTA 118).

16. Any citizen or person (part of the public) has “sufficient Interest” and is, therefore, an aggrieved person under article 199 of the Constitution, if public property is being acquired, held, used, or disposed of by public functionaries in violation of the law. Public functionaries as trustees of the people, cannot have any personal interest in any public property, therefore if there is any abuse of trust or violation of law, it qualifies any member of the general public as an “aggrieved person” with the right to invoke the constitutional jurisdiction of this court, subject to fulfilling other requirements of article 199.

17. The significance of *public interest litigation* has special importance in our country. Even after 63 years of Independence, we still have fledgling public institutions because unfortunately they could not be nurtured under the shade of democracy due to repeated usurpation of our political space by unelected forces. Lack of democracy over years has taken a toll on our institutions. Absence of basic democratic values and democratic culture within public institutions threatens rule of law and due process breeding unchecked corruption. Disappointed with the undemocratic mindset of public functionaries, people have time and again resorted to courts for judicial review through public interest litigation.

18. 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, which 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 democracy. It too is of central importance. Without it, the regime is not democratic."¹

19. Ronald Dworkin wrote, "true democracy is not just *statistical* democracy, in which anything a majority or plurality wants is legitimate for that reason, but *communal* democracy, in which majority decision is legitimate only if it is a majority within a community of equals. That means not only that everyone must be allowed to participate in politics as an equal, through

¹ The Judge in a Democracy by Aharon Barak (Page 24), Princeton University Press, 2006

the vote and through freedom of speech and protest, but that political decisions must treat everyone with equal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or moral or way of life.”²

20. Justice Iacobucci of the Canadian Supreme Court observed: “ the concept of democracy is broader than the notion of majority rule, fundamental as that may be.”³ This internal morality of democracy consisting liberty, freedom, rule of law, supremacy of the constitution and due process must be allowed to permeate through the corridors of public administration and be the bedrock of good governance of public institutions in our country. It has been observed that democracy without justice is “demon-crazy⁴”

21. Public Interest Litigation is therefore a judicial tool to help resurrect or jump start public institutions on the road to healthy democratic values and traditions. Unless substantive democracy takes root in our public

² Ronald Dworkin, A Bill of Rights for Britain 35-36 (1990).

³ Vriend v. Alberta [1998] 1 S.C.R. 493, 566 (Can.)

⁴ Arundhati Roy in Listening to Grasshoppers.

administration and our institutions flourish with democratic maturity, court dockets will continue to be filled with public interest litigation. However, the courts will continue to redress public grievance, with the hope that public institutions will soon come of age.

22. The real test, therefore, in Public Interest Litigation is the subject matter of the petition or the abuse of public trust complained of. Once the court assesses that breach of trust and violation of law by a public institution has taken place, the court must immediately proceed further to rectify the breach, the identity or antecedents of the petitioner pale into insignificance. If, on the other hand, the court finds the petition to be without merit, camouflaged to foster personal disputes, said petition is to be thrown out. Public Interest Litigation should not be allowed to be “Publicity Interest Litigation” or “ Private Interest Litigation” or “Politics Interest Litigation.” [Reliance is placed on Ashok Kumar Pandey v. State of West Bengal and others (AIR 2004 SC 280)] However, if the court is convinced that violation of law has taken place pertaining to public property or public interest, it should matter less who brought the complaint before the court.

Locus standi in such matters stands diluted carrying only cosmetic significance. This is also so because, Public Interest Litigation converts adversarial nature of the proceedings into inquisitorial proceedings. The Court, as guardian of public interest investigates to decipher the truth. This unique remedy is the hallmark of a welfare democratic State, which rests on the principles of social and economic justice enshrined in our Constitution.

23. This advance has been incorporated in one of the latest constitutions of the world. Section 38 of the Constitution of the Republic of South Africa, 1996 provides as follows:

“38. Enforcement of rights.-Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

24. Article 19A of the Constitution is a recent and welcome addition to the chapter of fundamental rights under the Constitution. The article provides that:

“Every citizen shall have the right to have access to information in all matters of public importance subject to regulations and reasonable restrictions imposed by law.”

25. Right to information is another corrective tool, which allows public access to the working and decision making of the public authorities. It opens the working of public administration to public scrutiny. This necessitates transparent and structured exercise of discretion by the public functionaries. Article 19A empowers the civil society of this country to seek information from public institutions and hold them answerable. Article 19A, therefore, entuses fresh life into Public Interest Litigation.

26. The rules of standing/locus standi have a close connection and nexus with the rule of law. Closing the doors of the court on a petitioner who warns of a public institution's unlawful action means giving that public body a free hand to act without fear of judicial review.

27. Lord Diplock in Inland Revenue Commissioner, National Federation of Self-Employed and Small Business Ltd. [1982] A.C. 617 (at 644).

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”

28. For the above reasons, we overrule the preliminary objection pertaining to *locus standi* and hold that the appellant has the *locus standi* to maintain the writ petition.

29. Coming to the merits of the case, the open public auction for the lease of PLOTS in question for construction and running of SHOPS on commercial basis advertised through public advertisement on 18.6.2005 came to an end because of public complaints received and, therefore, the auction conducted on the basis of the said advertisement was cancelled vide order dated 20.7.2005 of the Divisional Superintendent, Pakistan Railways, Rawalpindi and the bid money was refunded vide Letter dated 27.12.2005 of the Assistant Executive Engineer, Pakistan Railways, Sargodha,

which provides that pay orders of the bidders were prepared to be collected.

30. Once the open public auction of the PLOTS on commercial basis was cancelled in the year 2005, automatically all the bids thereunder also stood cancelled. However, after two years of cancellation of the open public auction, surprisingly under the same “subject” i.e., OPEN PUBLIC AUCTION OF SURPLUS RAILWAY LAND TO BE LEASED OUT THROUGH OPEN PUBLIC ACUTION FOR COMMERCIAL PURPOSES SHOPS AT KM 211/4 TO 212/2 BETWEEN QAIDABAD BANDIAL STATIONS ON KDA-KHB SECTION the PLOTS in question (now land) were LEASED OUT to Respondent no.4 for AGRICULTURAL PURPOSES, admittedly without any public tender, public participation or open public auction. Letter dated 8.9.2007 refers to Respondent no.4 as the “highest bidder” while no auction took place for the lease of the said PLOTS for agricultural purposes. The terms of the lease include a lease period of 10 years extendable for another 5 years. One of the main conditions is that the said land shall be utilized for Agricultural Purposes and not for

construction of Shops or any other commercial use unless approved by the competent authority. Letter dated 19.9.2007 records that Respondent no. 4 has deposited a crossed cheque bearing no. 3950862 dated 19-9-2007 in the sum of Rs 1,43,500/- on account of balance of 50% of the 1st year rent (this negates the position taken by respondent No.4 that the bid money deposited in the year 2005 was never received back by respondent No.4, if that were so, why fresh (and same) amount was being deposited in the year 2007). It is also not clear how the rent for the land in question was determined. However, it is clear that the amount in the sum of Rs.1,43,500/- is exactly the same bid amount given by respondent no.4 in the auction held in the year 2005 and is so recorded in Letter dated 27.12.2005 whereby the said bid money was refunded to respondent no.4. An Agreement for the licensing of Railway Land for Agricultural Purposes & Nurseries was entered into with Respondent no.4 by Pakistan Railways on 24.9.2007.

31. The matter does not end here. Vide Letter dated 1.6.2009 Director (Property an Land), Headquarters Office, Pakistan Railways, Lahore wrote to the Joint

Director/Civil Engineering, Ministry of Railways
(Railway Board), Islamabad, the following letter:

<p>DIRECTORATE OF PROPERTY & LAND PAKISTAN RAILWAYS HEADQUARTERS OFFICE LAHORE</p> <p>No.473-W/340(P&L) Dated 01.06.2009</p> <p>The Joint Director/Civil Engg, Ministry of Railways (Railway Board) Government of Pakistan <u>Islamabad.</u></p> <p>Sub:- <u>OPEN PUBLIC AUCTION OF SURPLUS RAILWAY LAND TO BE LEASED OUT FOR COMMERCIAL PURPOSE (SHOPS) AT KM211/4 TO 212/2 BETWEEN QUAIDABAD-BANDIAL STATIONS ON KDA-KHB SECTION.</u></p> <p>Ref: <u>Ministry of Railways Letter No.W-II/2008-LA/8(6) dated 30.12.2008</u></p> <p>Kind attention is invited to Headquarters letter of even number dated 23.12.2008 on the above subject whereby directive of Ministry was solicited on the request of Divisional Superintendent Rawalpindi for deposit of rental charges by the lessee for the period from 25.9.2008 to 24.9.2009. The reply from Ministry of Railway is however awaited.</p> <p>It is further submitted that lessee has been approaching to Divisional as well as Headquarters Office with the request to review his case <u>for restoration of commercial lease for which he originally bid for.</u> His contention is that his auction case for commercial leasing was initiated prior to enforcement of restriction of leaving 100 feet distance from track. It is also mentioned that recently the Steering Team of Ministry of Railways in its meeting dated 14.4.2009 has recommended that restriction of 100 feet distance from the track for commercial structures can be relaxed by competent authority on case to case basis. He has also indicated his willingness to enhance his offer substantially through negotiations. (<i>emphasis supplied</i>)</p> <p style="text-align: center;">Sd/- (MUHAMMAD ARIF) For Director/Property & Land Ph #-9201802</p>

32. Thereafter vide Letter dated 25.6.2009 the competent authority converted the lease into a Commercial Lease from an Agriculture Lease in the following manner:-

<p>GOVERNMENT OF PAKISTAN MINISTRY OF RAILWAYS (RAILWAY BOARD) ***</p>	
<p>No.W-II/2008-LA/8(6) Islamabad the 25th June, 2009</p>	
<p>The Divisional Superintendent, Pakistan Railways, <u>Rawalpindi.</u></p>	
<p>Sub:-</p>	<p><u>OPEN PUBLIC AUCTION OF SURPLUS RAILWAY LAND TO BE LEASED OUT THROUGH OPEN PUBLIC AUCTION FOR COMMERCIAL PURPOSE (SHOPS) AT KM211/4 TO 212/2 BETWEEN QUAIDABAD-BANDIAL STATIONS ON KDA-KHB SECTION.</u></p>
<p>It has been approved by the competent authority as follows:-</p>	
<p>a). Lease of Mr. Muhammad Shoaib Bandial be converted as “Commercial” instead of “Agricultural”. <u>The lease bids for the land in question were originally demanded for Commercial purpose and the lessee had applied for the same. Disturbing the arrangement afterwards is neither appropriate nor covered by any rules. (emphasis supplied)</u></p>	
<p>b). The lease amount may be re-negotiated with Mr. Bandial as per his own willingness indicated in Director/P&L’s letter No.473-W/340(P&L) dated 1.6.2009 (copy enclosed) after re-assessing the Commercial worth of the land.</p>	
<p>2. Necessary action may be taken as indicated in paras above.</p>	
<p>DA/As above.</p>	
<p>Sd/- (S.Najmul Hasnain Naqvi) Director Technical</p>	

33. The Letter states that the lease bids for the land were originally demanded for commercial purposes and that it is not appropriate to disturb the said “arrangement”. Thereafter, respondent no.4 entered into a fresh Agreement for Lease of the Land for commercial purpose. The title of the Agreement is as follows:-

AGREEMENT FOR LEASE/ RENT OF RAILWAY LAND FOR COMMERCIAL PURPOSE/SHOPS **(THROUGH OPEN AUCTION)** AT KM 211/4 TO 211/2 BETWEEN QUIADABAD-BANDIAL STATIONS.

34. Public functionaries at Pakistan Railways had the temerity and audacity to misrepresent the facts and lie on the face of the record. In spite of the auction to have been cancelled in the year 2005, the subject (caption) used in all the correspondence initiated after two years of the cancellation of open auction has been intentionally referred to as; OPEN PUBLIC AUCTION OF SURPLUS RAILWAY LAND TO BE LEASED OUT THROUGH OPEN PUBLIC AUCTION FOR COMMERCIAL PURPOSE (SHOPS) AT KM211/4 TO 212/2 BETWEEN QUAIDABAD-BANDIAL STATIONS ON KDA-KHB SECTION. Even though no auction took place for the lease of agricultural land and no reason or justification given for converting the

said lease into a commercial lease bestowing the same benefits on Respondent No.4 which were denied to him in the year 2005, due to public complaints, when the open commercial auction was cancelled.

35. It is vividly borne out from the record before us that deliberate efforts were made to ensure that the record was intentionally packaged to show that the agricultural lease and the conversion to commercial lease was under the lawful banner of OPEN PUBLIC AUCTION and Respondent no.4 was the “Highest Bidder.” This false labeling is not only incorrect as no public tender or public auction took place it also amounts to fabricating and manufacturing fake public record in order to transfer public property to their favourite i.e., Respondent no.4 at the disadvantage of Pakistan Railways.

36. Later on conversion of Agricultural Lease into a Commercial Lease demonstrates the machination and corruption of the public functionaries who went all out to defraud their own institution i.e., Pakistan Railways. It is clear without an iota of doubt that Pakistan Railways through the public functionaries incharge were determined to favour Respondent no.4 at all cost.

37. Public Property held by public authorities is held in trust. Public functionaries (civil servants or officers of any public authority) are the TRUSTEES of the said property on behalf of the people of Pakistan. No public officer, how high up he may be in a public institution, has the right, authority or power to sell, lease or transfer even a single inch of public property unless it is strictly in accordance with law and meets the public standard of open public tender and open public auction. “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. That 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.”⁵

38. 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 selected few undermines this venerated 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. ³If this public trust is hemorrhaged, the entire edifice of public administration loses its credibility, which weakens governments and discredits democracy.

39. Disposal of Public Property without reaching out to the public is a breach of public trust and is facially discriminatory. By giving preference to a selected few from the general public, equals are treated unequally, offending fundamental right of equality under article 25 of the Constitution.

40. Further, such closed and opaque process adopted for the sale or disposal of public property limits public

⁵ The Judge in a Democracy by Aharon Barak (Page 220), Princeton University Press, 2006

access to new business prospects and restricts economic activity to the selected 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 not informed of such an opportunity or his access to such an opportunity is kept behind closed doors.

41. It is important to set 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 provide 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 checklist (discussed hereunder) that appears to be 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 under the Public Procurement Regulatory Authority Ordinance, 2002. The principles of public procurement can be used as useful guidelines

when public property is to be disposed of or transferred. Some of the salient principles/guidelines which 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**: Allow 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**.

Submission of counsel for respondent No.4 that the bid given by said respondent was the highest bid ever received by Pakistan Railways is misconceived and flawed. Without public tendering and without inviting competitive bidding it cannot be ascertained that the bid given by the petitioner was the highest.

42. Public functionaries are custodians of public property; they must protect and safeguard public property like a lioness guarding 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 v. 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 v. Province of Sindh through Secretary, Housing and Town Planning, Karachi and others” (2008 SCMR 105); “Banglore Medical Trust v. B.S. Muddappa and others” (AIR 1991 SC 1902).

43. The entire process of grant of lease to Respondent no.4 for agricultural basis and then conversion of the same into commercial basis; the unlawful use of the term open public auction in all public correspondence, just to mask the under the table transaction with a stamp

of legitimacy and transparency and the violation of the Policy Letter of Pakistan Railways dated 10-7-2008 establishes beyond doubt that the two Agreements in favour of respondent no.4 were tainted, colourable, based on malafide, misrepresentation, fraud and against public policy. The said agreements, are patently against the Constitution, public interest, public policy besides being collusive are hereby held to be void ab-inito. Pakistan Railways is directed to immediately take possession of the PLOTS (land) in question from Respondent no.4. Reliance is placed on “Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others” (1998 SCMR 2268); “Messrs Shams and Brothers v. Government of Pakistan and others” (2007 CLD 125), “Sheri-CBE and others v. Lahore Development Authority and others” (2006 SCMR 1202) “Muhammad Afzal v. Shahzad Asghar Dar and others” (2003 SCMR 280), “Messrs Ittehad Cargo Service and 2 others v. 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).

44. The said land and any other public land held in trust by Pakistan Railways can only be sold through a transparent public auction keeping in view the guidelines given above.

45. The public functionaries and Respondent no.4 who have initiated and assisted in execution of the above Lease Agreements cannot go home without accountability. It is important to note that:

Transparency = Power – Accountability.

46. We, therefore, direct Chairman, Pakistan Railways to hold a detailed inquiry against the public functionaries of Pakistan Railways associated with this case as well as grant a hearing to Respondent no. 4 and file his Report with this Court in six months from today alongwith the actions taken. The said report will be placed before this Court on the judicial side as a “REPORT CASE” on 14.02.2011 when a responsible officer of Pakistan Railways will also be present.

47. In future, Pakistan Railways is free to deal with the PLOTS (land) in question in accordance with law and the process set out in this judgment. Respondent No.4 will not be allowed to participate in any auction of Pakistan Railways unless and until he stands exonerated in the inquiry to be conducted by the Chairman, Pakistan Railways.

48. For the above reasons, this appeal is allowed and order dated 19.2.2010 of the learned single judge is set aside.

(Muhammad Yawar Ali) (Syed Mansoor Ali Shah)
Judge Judge

*S.Zahid/Iqbal/M.Tahir**

APPROVED FOR REPORTING