IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Jawwad S. Khawaja
Mr. Justice Sh. Azmat Saeed

CIVIL APPEALS NO.149 AND 150 OF 2010.
(On appeal from the judgments of the High Court of Sindh, Karachi, dated 07.05.2008 & 28.02.2008, passed in CPs No.D-442 & D-441 of 2007, respectively)

Habibullah Energy Limited — In CA.149/2010.

Zonal Labour Union Lakhra and others. — In CA.150/2010.
… Appellants

VERSUS

WAPDA through its Chairman and others. — In CA.149/2010.

Federation of Pakistan through Secretary M/o W&P and others. — In CA.150/2010.
… Respondents

For the Appellants (s) : Miangul Hassan Aurangzeb, ASC
Mr. Arshad Ali Ch., AOR
(in CA.149/2010)

Mr. Tariq Mehmood, Sr. ASC
(in CA.150/2010)

On Court's Notice : Mr. Shah Khawar, Addl. AGP

For Chairman, WAPDA & Lakhra Power Generation	:	Mr. Shahid Hamid, Sr. ASC
For M/o W&P	:	Raja Abdul Ghafoor, ASC/AOR Mr. Saifullah Chatha, Secy., W&P Mr. Zargham Ishaq, MD, PEPCO Barrister Asghar Ali, Sr. Legal Consultant
For the Privatization Commission	:	Mr. Abdul Haseeb Khan, Sr. Legal Consultant
For NEPRA	:	Kh. Muhammad Naeem, Chairman
For the Associated Lakhra Energy	:	Mr. Wasim Sajjad, Sr. ASC Mr. Mehr Khan Malik, AOR
Date of Hearing	:	19-21.08.2013.

JUDGMENT

SH. AZMAT SAEED, J.- The Water & Power Development Authority (WAPDA) granted 20-years lease to M/s. Associated Group (M/s. AG) in respect of GENCO-IV Lakhra Power Generation Company Limited on 11.09.2006. The said transaction was challenged by M/s. Habibullah Energy Limited (M/s. HEL) before the learned High Court of Sindh by filing Constitutional Petition No.D-442 of 2007, which was dismissed vide judgment dated 07.05.2008. Being aggrieved, M/s. HEL challenged the aforesaid judgment through Civil Petition for Leave to Appeal No.545 of 2008 before this Court.

2. The grant of lease on 11.09.2006 by WAPDA to M/s. AG was also challenged by the Zonal Labour Union, Lakhra

(ZLU) and others before the learned High Court of Sindh through Constitutional Petition No.D-441 of 2007, which was also dismissed vide judgment dated 28.02.2008. Being aggrieved, the said ZLU invoked jurisdiction of this Court through Civil Petition for Leave to Appeal No.351 of 2008.

3. In both the afore-mentioned Civil Petitions for Leave to Appeal, this Court vide Order dated 08.03.2010 granted leave to appeal and the said Petitions were converted into Appeals i.e. Civil Appeals No.149 and 150 of 2010. The relevant portion of the Leave Granting Order is reproduced herein below:

> "After having heard the learned counsel on behalf of the parties at length, we feel that there are certain legal, Constitutional and factual ticklish questions which need some discussion and accordingly leave to appeal is granted, *inter alia*, on the question as to whether the process has been completed in a fair and transparent manner. …".

4. Both the aforesaid Civil Appeals involving common questions of law and fact were heard together and were allowed by this Court vide short Order dated 21.08.2013 in the following terms:

> "We have heard the learned counsel for the parties at length and have examined the pleadings/documents placed before us for ascertaining as to whether transaction between the parties i.e. the Lease for 20-years in respect of Lakhra Power Station GENCO-IV, dated 11.09.2006, followed by Power Purchase Agreement dated 15.12.2007 had been entered into in a transparent manner following the PEPRA

> Rules and allowing open opportunity to interested parties to participate in the competition for acquiring the said Leasehold Rights.
>
> 2. The conclusion is that the transaction noted herein above between M/s. Associated Group (AG) and the Water and Power Development Authority (WAPDA) is not sustainable being non-transparent and also suffers from irregularities, illegalities, omissions and commissions as well as violates the relevant Rules as well as precedents set-forth by the superior Courts.
>
> 3. Therefore, while setting aside the transaction noted herein above, we direct the Federal Government of Pakistan to conduct an inquiry/probe to fix the civil and criminal liability upon the persons/beneficiaries, etc in accordance with the law as a result of above conclusion.
>
> 4. For the reasons to be recorded later, both the appeals are allowed with costs throughout."

The detailed reasons of the above-said Order are as follows:

5. The brief facts necessary for adjudication of the *lis* at hand as gleaned from the voluminous record made available by the parties are that apparently the Coal Fired Lakhra Power Plant consisting of three (03) Generating Units of 50 MW each (total 150 MW) were set up by WAPDA in Kashmore, District Jamshoro, Province of Sindh. The said Plant i.e. Coal Fired Lakhra Power Plant apparently became operational in 1995. In February, 2002, the Lakhra Power Generation Company Limited (LPGC) was incorporated as a subsidiary of WAPDA in which the said Plant vested.

6. In the meeting held on 12.06.2001, the Task Force on Thar Coal decided that the Government of Sindh should take necessary action/steps to privatize the Lakhra Power Plant in consultation with WAPDA. Perhaps it was pursuant to the aforesaid decision that the LPGC was incorporated. On 26.07.2003 an advertisement was issued on behalf of LPGC, *inter alia*, in the Daily Dawn, News and the Nation inviting applications for Pre-qualification/Expression of Interest for privatization of 150 MW Fluidized Bed Combustion Coal Fired Power Plant Lakhra near Khanote in District Jamshoro, Sindh. The salient features of the said advertisement were that a decision had been taken by the Federal Government to privatize the Lakhra Power Plant through the Sindh Privatization Commission (Commission). However, the said Power Plant required major rehabilitation for which an Internationally experienced Operator for Rehabilitation, Operation, Maintenance and Management (ROMM) was to be appointed. The offers were invited only for the Pre-qualification for appointment as a ROMM Operator. Pursuant to the aforesaid advertisement, 17 parties purchased the Information Package, 8 parties responded/submitted their Expression of Interest disclosing their experiences and financial standings. However, only two parties i.e. M/s. Muhammad Ismail

& Company (Pvt) Limited, Hyderabad and M/s. Habibullah Energy Limited, Karachi (the Appellant in Civil Appeal No.149 of 2010) submitted the Pre-qualification documents before the due date.

It may be pertinent to mention that M/s. AG neither submitted any Expression of Interest nor any Pre-qualification documents pursuant to the afore-said advertisement.

7. The offers made pursuant to the advertisement dated 26.07.2003 were not found satisfactory and in this behalf objections were also raised by the Commission. Consequently, on 17.03.2004 the Water & Power Development Authority decided to terminate the process and to undertake an inhouse maintenance programme, so as to increase the capacity and feasibility of the said Power Plant. In pursuance of the aforesaid decision, the Purchase Orders, both local and international, were placed for the procurement of material for rehabilitation of the Lakhra Power Plant.

8. M/s. Rupali Polyester Limited vide letter dated 22.06.2004 expressed its interest in lease of the said Power Plant. The said request was turned down by WAPDA, thereafter, on 20.08.2005 M/s. AG apparently wrote a letter to WAPDA expressing its interest to get a lease of the said Power Plant.

Pursuant to the said letter, as per the case of the Federation before us, a meeting was held in October, 2005 in the Presidency between M/s. AG and the Chief of Staff to the President, followed by a meeting with the then President on 29.11.2005.

9. In the above backdrop M/s. AG wrote a letter on 06.01.2006 to the Chairman, WAPDA which is reproduced hereunder for reference:

> "To
> Chairman WAPDA
> WAPDA House,
> Lahore
>
> Sub: Lease of Lakhra Coal Fired Power Project - Presentation/Documents
>
> Dear Tariq Bhai,
>
> We appreciate your cooperation in giving us opportunity to present 3 x 50 MW Lakhra Fluidized Bed Coal Power Project assessment study executive summary by PIC Marubeni Energy Group tomorrow at 3 PM. However, due to the presentation scheduled tomorrow for Prime Minister in Islamabad on the same subject will request you to kindly reschedule the presentation for next week?
>
> Per the proper protocol we wanted to brief you about our work before meeting the Prime Minister tomorrow but you have been tied up in other meetings. Our presentation covers the detailed work that has been carried out and give you a good overview of the project.
>
> For your information and review please find the Plant Condition Assessment Report and a draft MOU. We look forward to meeting you.
>
> Thank you very much,
>
> Sincerely yours,

Sd/-
Iqbal Z. Ahmed
Chairman"

10. A perusal of the Memorandum of Understanding (MOU) appended with the letter dated 06.01.2006 indicated that the lease would be for a period of 20-years and in case of privatization, M/s. AG would have the first right of refusal. In response, WAPDA vide letter dated 19.01.2006 asked M/s. AG to submit its technical and financial proposals. On 09.03.2006 the Representatives of M/s. AG met with the then Federal Minister for Water & Power and gave a presentation.

11. A meeting was convened on 22.03.2006, the Minutes whereof are available on the record wherein the then President and the Prime Minister, *inter alia*, took the following decision:

> "WAPDA to finalize terms and conditions for leasing Lakhra Power Plant to Associated Group within one week."

12. WAPDA addressed a letter dated 25.03.2006 to six of the Companies which had shown interest pursuant to the advertisement dated 26.07.2003 for Pre-qualification for appointment as a ROMM Operator, to submit their proposals for lease of the Lakhra Power Plant within four weeks, which time was subsequently extended up to 22.05.2006. M/s. AG did not submit any fresh proposal purportedly in view of the decision

dated 22.03.2006 referred to above. In a subsequent meeting dated 12.05.2006 chaired by the then President of Pakistan, it was decided that M/s. AG should be given the first right of refusal in respect of lease of the Coal Fired Lakhra Power Plant. The said decision was communicated vide Prime Minister's Secretariat letter dated 25.05.2006. M/s. HEL, Appellant in Civil Appeal No.149 of 2010, was the only Firm which submitted its proposal by due date i.e. 22.05.2006. Another meeting was held in the President House at Islamabad on 13.07.2006, in pursuance whereof vide letter dated 17.07.2006, both M/s. Habibullah Energy Limited and M/s. Associated Group were advised to submit their revised bids by 21.07.2006 to be opened on the same date. Such revised bids were submitted and opened. M/s. AG made two separate offers based on two separate proposals. One of the offers of M/s. AG after some adjustments through negotiations with WAPDA was approved by the Board of Directors of LPGC on 19.08.2006. The Government of Sindh vide letter dated 24.08.2006 conveyed its No Objection. The offer was approved by the WAPDA Board on 06.09.2006 whereupon a Lease Deed was executed in favour of M/s. AG on 11.09.2006. Pursuant thereto, we are informed that a Power Purchase Agreement dated 15.12.2007 has since been executed.

13. The grant of lease to M/s. AG was challenged variously, both by the M/s. HEL and the ZLU through two separate Constitutional Petitions filed before the learned High Court of Sindh. Both the Constitutional Petitions were dismissed by two separate judgments dated 07.05.2008 and 28.02.2008. Feeling aggrieved, M/s. HEL and the ZLU invoked jurisdiction of this Court through two separate Civil Petitions for Leave to Appeal No.545 and 351 of 2008, which were converted into instant appeals i.e. Civil Appeals No.149 and 150 of 2010, respectively.

14. We have heard the learned counsel for the parties as well as the learned Additional Attorney General for Pakistan.

15. It is contended by the learned counsel for the Appellant-M/s. HEL that the advertisement dated 26.07.2003 was for inviting applications for Pre-qualification/Expression of Interest for appointment as a ROMM Operator only. The said Appellant was one of the two Companies which had submitted its Pre-qualification documents as is evident from the record. In the circumstances, the Respondents-WAPDA/LPGC were bound to pre-qualify the Appellant. M/s. AG did not even participate in the pre-qualification process and in the absence of such pre-

qualification it was a rank outsider whose bid could not even be considered by WAPDA/LPGC.

16. The learned counsel further contended that no specific advertisement was issued inviting bids for lease of the said Power Plant and in absence of such an advertisement for information of public-at-large the entire process was liable to be set aside. Even otherwise, the offer submitted by M/s. AG was unsolicited, therefore, invalid. Furthermore, the bid submitted by M/s. AG contained two alternative proposals, which is not permitted in law and such bid should have been treated as non-responsive and rejected. It is added that the documents on record illustrate that M/s. AG had easy and exclusive access to the persons involved in the decision making process for grant of lease, as a consequence whereof the entire process was far from transparent. The learned counsel further added that a decision to award the Contract to M/s. AG was taken on 22.03.2006 at the highest level, whereafter with *mala fide* intention and by way of deception, notices were issued on 25.03.2006 to some of the Companies which had participated in the pre-qualification process for appointment of a ROMM Operator. Even then, the notices were not issued to all the parties who had shown their interest in response to the advertisement dated 26.07.2003 mentioned above. It is further

added that M/s. AG was exclusively granted the first right of refusal which was not available to any other bidder.

The learned counsel further contended that the transaction for the lease of the Lakhra Power Plant fell squarely within the purview of the Privatization Commission Ordinance, 2000 (Ordinance, 2000) and could only be effected by the said Privatization Commission in accordance with the mode of privatization prescribed in the Ordinance, 2000 and the Rules framed thereunder as in view of Section 42 of the said Ordinance, 2000, the provisions thereof would override any other law for the time being enforce. In short, it is contended that the transaction was carried out by an Institution which had no jurisdiction in a manner not provided by law. The learned counsel added that the provisions of the Public Procurement Rules, 2004 (Rules, 2004) were not adhered to especially with reference to Pre-qualification. In view of the above, it is contended that the award of the Contract to M/s. AG was not sustainable in law.

17. In support of his contentions, the learned counsel placed reliance on the judgments, reported as Wattan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006 SC 697), Petrosin Corporation (Pvt) Limited and others v. MOL

Pakistan Oil and Gas Co. and others (PLD 2008 SC 472) and Messrs Subhan Deepwell Corporation, Bahawalpur v. Project Director, Punjab Rural Water Supply and Sanitation Project HUD and PHE Department, Lahore and another (2001 CLC 1762). He also referred to the various provisions of the Rules, 2004 as well as the PCO 2000 and the Privatisation (Modes and Procedure) Rules, 2001.

18. The learned counsel for the Appellant-Zonal Labour Union, Larkana and others echoed the contentions raised on behalf of M/s. HEL and further added that the process for appointment of a ROMM Operator had been formally terminated and a specific decision in this behalf had been taken which is on the record. Therefore, grant of lease to M/s. AG was the outcome of a separate and independent procedure which had been initiated without the issuance of a public advertisement inviting offers and in the absence of such public advertisement, the entire process is illegal and invalid in view of the law laid down by this Court. He further contended that the offer of M/s. AG was unsolicited and non-responsive and the Contract had been obtained by it through unfair means and by exercise of influence on account of its connections with the decision making Authorities at the highest level which is self-evident from the record. The learned counsel

further submitted that the award of the Contract was illegal and void, and should be declared as such.

19. The learned counsel for M/s. AG controverted the contentions raised on behalf of the Appellants. He further contended that the mode, process and the procedure to be adopted was the prerogative of WAPDA/LPGC and M/s. AG participated in the same, hence, cannot be penalized for the irregularity, if any, in the process. He laid great stress that the offer made by M/s. AG was financially more beneficial to WAPDA/LPGC than any other offer received by them at any point of time. The offer made by M/s. AG is also in the public interest, as it would help in generating electricity at a very economical cost.

20. The learned counsel for WAPDA at the very outset stated that perhaps it would have been more appropriate to issue an advertisement, inviting bids for grant of lease of the Generating Plant, however, in the peculiar facts and circumstances which existed the most efficient and fair procedure was adopted. He further contended that three (3) Generating Units at Lakhra desperately needed rehabilitation involving a large input of fresh capital. A decision to privatize the same was taken and as a precursor to such privatization, it was decided to appoint a ROMM Operator. The response to the advertisement in this

behalf was very poor and impractical. Consequently, a decision to explore alternative possibilities was made and an offer was received from M/s. AG for lease of the said Plant which also included a large investment by the lessee. All the Firms and Companies which showed any interest in the Lakhra Power Plant were invited and the offers therefrom solicited. M/s. HEL participated in the said process but the offer made by M/s. AG admittedly was more economical, hence, it was accepted after some adjustments for the benefit of WAPDA and LPGC. It is further contended that the Contract as awarded is *bona fide* and in the public interest, therefore, minor inconsequential irregularities cannot be made basis for invalidating the Contract awarded. It was also the case of the learned counsel, that in view of the failure to find a ROMM Operator for the Coal Fired Lakhra Power Plant for the purpose of rehabilitating the same as a preclude to its eventual privatization an alternative way forward had to be found. The peculiar facts and circumstances necessitated the leasing of the Plant and in this behalf the offer of M/s. AG was accepted through a proper process. Such offer was not only economical for the WAPDA but also in the public interest, therefore, minor deviation, if any, neither adversely effect the integrity of the process nor furnished a legal basis for judicial review. It is

emphasized that the offer made by M/s. AG was more attractive than any other offer received from any other party, including M/s. HEL (Appellant).

21. The learned counsel was of the view that the transaction in question had been carried out in exercise of the powers conferred under Section 8(2)(vii) read with the explanation to Section 8(2)(v) of the WAPDA Act, 1958 and did not come within the purview of the Ordinance, 2000.

22. In support of his contentions, the learned counsel relied upon the judgment, reported as Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455). The learned counsel also disputed the *locus standi* and *bona fide* of the Appellants.

23. The learned Additional Attorney General for Pakistan appearing on behalf of the Federation disowned the award of the Contract to M/s. AG. On instructions, he stated that the Federal Government is of the view that the entire leasing transaction is without lawful authority and in excess of jurisdiction. A number of irregularities and serious lapses were committed, impairing the transparency, with the sole purpose of benefiting a particular party/beneficiary at the cost of the State and the people.

24. Heard. Available record perused.

25. Adverting first to the legal objection raised by the learned counsel for WAPDA regarding the *locus standi* of the present Appellants to invoke the constitutional jurisdiction of the learned High Court, it may be noted that such objection is with reference to M/s. ZUL (Appellant in Civil Appeal No.150 of 2010) and not with regards to M/s. HEL (Appellant in Civil Appeal No.149 of 2010). Since both the Constitution Petitions from which the instant two Appeals arose had been filed to challenge the same transaction of the contract/lease granted in favour of M/s. AG for which M/s. HEL had also submitted a bid, the said legal objection pales into insignificance and looses all relevance. Even otherwise, as has been repeatedly held the jurisdiction of the Superior Courts of Judicial Review for the enforcement of Fundamental Rights is not a “closed shop” particularly, in the context of Public Interest Litigation (PIL), therefore, the contentions of the learned counsel even on a stand alone basis with reference to Civil Appeal No.150 of 2010 are rather suspect, more so as the jurisdiction had been invoked by the workers employed in a public Asset to question the proprietary and integrity of the process of the transfer of rights in such Asset.

26. The nature, scope and extent of the power of judicial review by the superior Courts of administrative actions and the grounds on the basis whereof such actions can be set aside has evolved with the passage of time and its contours stand clearly defined especially in the context of the award of the contracts by the State or its instrumentalities. In the case, reported as Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268), the following was held:

> "Further a contract, carrying elements of public interest, concluded by functionaries of the State, has to be just, fair transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises that public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation. Deviations, if of substance, can be corrected through appropriate orders under Article 199 of the Constitution. In such behalf even where a contract, pure and simple, is involved, provided always that public element presents itself and the dispute does not entail evidentiary facts of a disputed nature, redress may be provided. A number of precedents have contextually come to occupy the field and, inter alia, may be noted (1) Anjuman-e-Ahmadiya, Sargodha v. Deputy Commissioner, Sargodha, PLD 1966 SC 639, (2) The D. F.O. South Khari v. Ram Sanehi Singh, 1971 (3) Supreme Court Cases 864-AIR 1973 SC 205; (4) Rashid A. Khan v. West Pakistan Railway Board PLD 1973 Lahore 733; (5) The Majilisi-lntizamia, Jamia Masiid, Ghulam Muhammad Abad Colony v. Secretary to Government of West Pakistan,

> Communication and Works Department, PLD 1975 SC 355, (6) Muhammad Ashraf Ali v. Muhammad Naseer and 2 others 1986 SCMR 1096 (7) M/s. Dwarkadas Marfatia & Sons v. Board of Trustees, Bombay Port, AIR 1989 Supreme-Court 1642; (8) M.H. Abidi v. State Life Insurance Corporation, 1990 MLD 563; (9) Mahabir Auto Stores v. Indian Oil Corporation, AIR 1990 Supreme Court 1031; (10) Shrilekha Vidyarthi v. State of U.P. AIR 1991 Supreme Court 537; (11) M/s Pacific Multinational (Pvt.) Ltd v. Inspector-General of Police Sindh PLD 1992 Karachi 283; (12) Messrs Presson Manufacturing Ltd. v. Secretary Ministry of Petroleum & Natural Resources and 2 others 1995 MLD 15 (Lahore) and (16) Shoaib Bilal Corporation v. Government of Pakistan KLR 1997 Rev. Cas. 27 Lahore."

The aforesaid judgment was noted and followed by this Court in the case, reported as Messrs Ramna Pipe and General Mills (Pvt) Limited v. Messrs Sui Northern Gas Pipe Lines (Pvt) and others (2004 SCMR 1274).

27. This Court, in the case, reported as Raja Mujahid Muzaffar and others v. Federation of Pakistan and others (2012 SCMR 1651), has held as under:

> "31. Public funds, public property, licenses, jobs or any other government largesse is to be dealt with by public functionaries on behalf of and for the benefit of the people. Public authority must necessarily be examined in accordance with law keeping in view the Constitutional Rights of the citizens. Thus, this Court has not hesitated in the exercise of its jurisdiction of judicial review …".

In Suo Motu Case No.13 of 2009 (PLD 2011 SC 619), this Court held as follows:

> "24. It is well-settled that in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However, in such matters, judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process. It is also a well-settled principle of law that since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides. …"

It was further held as follows:

> "32… The Governmental bodies are invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner. Transparency lies at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids is a prerequisite. The reservations or restrictions, if any, in that behalf should not be arbitrary and must be justifiable on the basis of some policy or valid principles, which by themselves are reasonable and not discriminatory."

In the case, reported as Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary, Industries and Mineral Development and others (PLD 2013 SC 641), the following was held:

> 117. As regards the power and jurisdiction of the municipal courts to nullify any action of the

> Government where it is established that the decision-making authority has exceeded its powers; committed an error of law or breach of the rules of natural justice; reached a decision which no reasonable forum would have reached; or abused its powers, …".

In the case of Corruption in Hajj Arrangements (PLD 2011 SC 963), this Court has held as under:

> "29. The jurisdiction of this Court is always exercised judiciously and with judicial restraint. All those cases which are quoted hereinabove clearly indicate that in the matter of exercise of power of judicial review in Pakistan we have not travelled so far as is the position in the neighboring country. By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled. Indisputably, if the action or decision is perverse or is such that no reasonable body of persons, properly informed; could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. [Commissioner of Income Tax v. Mahindra (AIR 1984 SC 1182)]. The exercise of constitutional powers by the High Court and the Supreme Court is categorised as power of judicial review. Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Articles dealing with Fundamental Rights, every executive action of the Government or other public bodies, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of the Superior Courts and can be validly scrutinised on the touchstone of the Constitutional mandates.

> [Common Cause, A Regd. Society v. Union of India (AIR 1999 SC 2979)]. In the case of Union Carbide Corporation v. Union of India [AIR 1992 SC 248 = 1991 SCR (1) Supl. 251].

In the case of Stretching Computers Ltd v. Messers M. and N. Publications Ltd (AIR 1996 SC 51), it was also held as under:

> "… It has also been pointed out that for securing the public interest one of the methods recognized is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and due to compelling reasons which must stand the test of Article 14 of the Constitution, departure of the aforesaid rule can be made. …"

28. An overview of the judgments reproduced or referred to herein above leaves little room for doubt that it is now a well-settled principle of law that all public functionaries must exercise public authority, especially while dealing with the public property, public funds or Assets in a fair, just, transparent and reasonable manner, untainted by *mala fide* without discrimination and in accordance with law, keeping in view the Constitutional Rights of the Citizens. This would hold true even in the absence of any specific statutory provisions setting forth the process in this behalf. Therefore, it is not really relevant whether the transaction in question was governed by the Ordinance, 2000 or the Rules, 2004 or neither. It is an equally well settled principle of law that such actions of public functionaries are always subject to

Judicial Review. No doubt, while exercising its jurisdiction, the Superior Courts neither sit in appeal over the administrative actions nor interfere on account of inconsequential deviations, as has been observed in Dr. Akhtar Hassan Khan's case (*supra*). However, where the administrative authority acts in a discriminatory manner and action fails the test of reasonableness, transparency and/or is otherwise unjust and unfair or suffer from *mala fide*, the Courts not only are vested with the jurisdiction to set aside such action but any failure in such an eventuality to exercise the power of Judicial Review, when invoked, would make the Court a party to such unreasonable, unfair, *mala fide* and illegal action.

29. Examining the transaction, the subject matter of the instant case in the light of the principles of Judicial Review enumerated hereinabove, it appears that the original process initiated through the advertisement dated 26.07.2003 was for the appointment of a ROMM Operator and was commenced through the Government of Sindh in consultation with WAPDA. The said process was formally terminated on 17.03.2004. The disputed contract of lease was a result of independent process undertaken by WAPDA unrelated to the procedure initiated pursuant to the advertisement dated 26.07.2003. No fresh public advertisement

was issued. Such an advertisement is universally accepted as a condition precedent for ensuring a free, fair, open, competitive and transparent process for transfer of public assets or rights therein. In fact no compelling reasons have been pleaded at the bar by WAPDA for not issuing such an advertisement. The absence of such an advertisement, alone in fact and under the circumstances of the case, is fatal to the transaction in question.

30. M/s. Rupali Polyester Limited vide letter dated 22.06.2004 expressed its interest to lease the said Power Plant, which was turned down and rightly so by WAPDA. However, when M/s. AG approached WAPDA in this behalf, it was welcomed with open arms.

31. The admitted record also reveals that M/s. AG was unilaterally given prior access to the Power Plant evidencing the availability of an unfair advantage and access to the decision making authorities at the highest level not only in WAPDA but also in the Presidency.

32. The documents and facts, as made available by WAPDA, revealed that no formal decision was taken by WAPDA on its own to lease out the Power Plant that too for a period of 20 years. In fact, such decision was taken for WAPDA by M/s. AG,

as it is apparent from the MOU appended with the letter dated 06.01.2006.

33. The decision in principle to award the contract to M/s. AG was taken on 22.03.2006 at the highest level by the President of Pakistan, Prime Minister of Pakistan and the Chairman, WAPDA. Thereafter, without issuing any advertisement for the information of the public at large, some of such firms, which had originally shown their Expression of Interest for being appointment as a ROMM Operator, pursuant to the advertisement dated 26.07.2003 were contacted. Such procedure was not only illegal but in fact a farcical and *mala fide* attempt to clothe the transaction with some semblance of legality. The said process and the subsequent approval by the Board of WAPDA to M/s. AG appears to be an infertile attempt to paper over the illegalities.

34. The aforesaid deviations are not trifle but go to the very heart of the matter. The omissions and commissions make it clear and obvious that by no stretch of the imagination, the transaction in question is legal, transparent, fair, open or the result of a competitive and fair process. The Power Plant is a public asset and those entrusted therewith were sadly found wanting. The transaction has not only been disowned by the Federal Government of which the WAPDA is an instrumentality but it has

also categorically taken the stand that the transaction was beset with irregularities, and serious lapses were committed impairing its transparency with the sole purpose of benefiting the beneficiary i.e. M/s. AG. The learned counsel appearing for M/s. AG found himself, unable to defend the process culminating in the transaction in question, leaving WAPDA floundering alone in the sea of its own irregularities and illegalities.

35. Thus, for the foregoing reasons, these appeals are allowed with costs through out, the impugned judgments are set aside and the transaction of lease with M/s. AG and the Power Purchase Agreement executed in pursuance thereof held to be not sustainable and the direction was issued to the Federal Government to fix the civil and criminal liability.

Chief Justice

I agree and have also added a separate concurring note. Judge

Islamabad
21.08.2013. Judge

'APPROVED FOR REPORTING'
Mahtab/*

Jawwad S. Khawaja, J. I have had the benefit of going through the reasoning of my learned brother Azmat Saeed, J., in support of the short order dated 21.8.2013. While in agreement with his conclusions, I am writing this concurring opinion to provide additional reasons in support of the said order.

2. At the outset, it is important to clarify a fundamental principle regarding the nature of public sector enterprises which seems to have eluded learned counsel for the respondents. Public sector enterprises, such as the power plant at Lakhra, are public assets which belong beneficially to the people of Pakistan. While the state is entrusted with the management of such enterprises, the state agencies responsible for management do not thereby become owners of the enterprise and its assets. While public sector enterprises do not have shareholders like private corporations, this does not mean that the agency responsible for the management of the enterprise can exercise unbridled discretion in managing the enterprise.

3. In order to ascertain the proper role of state agencies in the management of public sector enterprises, it is of critical importance to understand the nature of government as defined by our constitutional system. Constitutional democracy is premised on a contractual theory of government, whereby power is delegated by the people to the government in accordance with the terms of the Constitution. The preamble to the Constitution stipulates, inter alia, "*that it is the will of the people of Pakistan to establish an order*." State agencies responsible for the management of publicly owned companies are part of the order established by the will of the people, and thereby possess merely delegated authority.

4. Rather than being owners of public sector enterprises, state agencies stand in a fiduciary relationship to the people who are the beneficial owners of the publicly owned assets. The idea that rulers owe a fiduciary obligation to the ruled is at least two millennia old. The Roman philosopher and politician Cicero defined the nature of government as follows in *De Officiis*, "*The guardianship of the state is a kind of trusteeship which should always be managed to the advantage of the person [or body which has] entrusted rather than of those to whom it is entrusted.*" We have on numerous occasions emphasized the fiduciary nature of the interaction between the state and the citizen. In *Muhammad Yasin v. Federation of Pakistan* (PLD 2012 SC 132), we held that "*holders of public office…are first and foremost*

fiduciaries and trustees for the people of Pakistan. And when performing the functions of their Office, they can have no interest other than the interests of the honourable People of Pakistan." The basis of fiduciary relations is the exclusive benefit principle, according to which the fiduciary has a duty to act solely in the interests of the beneficiary. Fiduciary obligations depend on the complete commitment of the fiduciary to act in the best interest of the principal.

5. It is important to note that a fiduciary obligation is not merely an ethical precept. As a legal imperative, fiduciaries must act in the best interests of the principal, performing their functions with care and complete fidelity. In the private law context, where fiduciary duties are routinely enforced by the courts, elections alone are not considered sufficient to hold company directors responsible to shareholders and align their interests. Instead, in the area of corporate law, there is a recognition that the interests of elected directors and shareholders may diverge. Given that shareholders are numerous and diffuse, it may be difficult for them to effectively monitor the decisions taken by the board. Further, because of collective action problems, the shareholders may find it difficult to coordinate and respond to abuse of discretionary authority by the directors. Hence, corporate law employs a judicial mechanism, the enforcement of fiduciary duties, to align the interests of the shareholders and their agent, the board of directors. The structure of the principal-agent problem is the same in the case of state agencies, such that public officials may have an incentive to advance their own interests at the expense of the citizens' interests. In fact, the need for a judicial mechanism is even more acute in the case of state agencies, since the principal, the people, is even more numerous and diffuse than the shareholders of a company.

6. At this point, it is important to note that not all decisions by state functionaries are to be subjected to an exacting judicial oversight. This is because the principal, (the people), has in fact vested state agencies with discretionary power of an administrative nature. Such delegation of authority by the principal is essential to the efficient functioning of the government. However, given the possibility of the agent's deliberate or negligent deviation from the best interests of the beneficiary, the court will enforce fiduciary obligations under certain circumstances. A breach of the duty of loyalty, such as in the case of a self-dealing transaction or one involving conflict of interest, will trigger

heightened scrutiny by the court. Further, if public officials fail to exercise the duty of care that is expected of a prudent manager, the court will assess the underlying action or transaction to ascertain whether the state functionaries have breached their fiduciary obligations to the people of Pakistan.

7. The respondent state agency that conducted the leasing process of the Lakhra Power Generation Company failed to meet the high standard of loyalty and care that is expected of a fiduciary. Rather than privileging the interests of a particular company interested in utilizing publicly owned assets for its own benefit, the respondent state functionaries ought to have acted solely in the interests of their principal, the people of Pakistan. As elaborated in the lead judgment by my learned brother, the interests of the principal would have been best served if the requirement of pre-qualification for the bidding process would have been uniformly applied to all interested companies, and if a proper advertisement that specially mentioned the intent to 'lease' the publicly owned assets had been published by the respondent authorities. These requirements could have been met without any administrative burden to such authorities and would have greatly enhanced the fairness of the bidding process. The failure to uniformly apply rules to all participants in the bidding process or to publish proper advertisement to give notice to potential bidders, suggests that the responsible state authority exercised improper oversight during the leasing process. State agencies have not been entrusted with publicly owned assets so that its functionaries can at their will rubber-stamp a decision without proper review and consideration of its merits. Moreover, favouring one participant in the process over the others suggests that the process has not been conducted in good faith by the public officials responsible for the leasing of the power plant at Lakhra.

8. While the defects in the bidding process are evident, as has been discussed in the lead judgment in this case, we have been urged by counsel for the respondents to condone the tainted transaction in the name of 'public interest'. Of particular concern is the following submission by Mr. Shahid Hamid, Sr. ASC on behalf of respondents Nos. 1 and 5 (C.M. No. 646 of 2011 in C.A. No. 149 of 2010, emphasis added):

> "It is highly unlikely that any re-bidding will lead to a rate better than the rate… approved on 12.8.2006… Consequently *even if there has been any procedural lapse*, the same merits to be *condoned in the public interest*, as, despite

all hurdles and difficulties, there was no unfairness/inequity/impropriety in the *final stage* of the bidding and its evaluation."

9. In the above cited excerpt, the learned counsel has urged this Court to accomplish the impossible: to condone a breach of the rule of law in public interest. If this Court takes upon itself to selectively condone infractions of obligations owed by the state to the people, any semblance of the rule of law in this country will evaporate. Further, learned counsel has erred in submitting that certain circumstances make it impossible to get a rate comparable to the one approved in August 2006. If state authorities such as WAPDA were perfectly adept at knowing *ex ante* what the highest bidding rate will be, there would be no need for conducting the bidding process. Finally, learned counsel has argued that since the *final stage* of the bidding process was free of procedural defects, we should condone the lapses in the earlier phases of the process. This is at best a questionable assertion, and at worst deeply inimical to the idea of the rule of law. To begin with, who shall decide what the 'final' stage of the bidding process will be? A protracted series of defective decisions followed by a final procedurally adequate decision will not lead to a lawful outcome. If the courts focus only on the final stage of the process, it will give *carte blanche* to the state agencies to abuse the discretion that has been delegated to them by the principals i.e. the honourable people of Pakistan.

10. In asking this Court to 'condone' a violation of the fiduciary duties owed by the state agency to the people, the counsel for respondents is implicitly resorting to the now defunct 'doctrine of necessity.' In *Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265) we stated emphatically that "*the path of expediency and subjective notions of 'State necessity' are dead and buried.*" The idea that this Court ought to base its decisions on the consequences of government action alone without consideration of the decision-making process is a frontal assault on the very concept of the rule of law. The idea of a "beneficial" deviation from core fiduciary duties of undivided loyalty, prudence, and reasonableness, which the state functionaries owe to the people of Pakistan must be rejected in the strongest terms.

11. This brings me to another misconception in the arguments of Mr. Wasim Sajjad Sr. ASC for the Associated Group. In the name of expediency, the Court has been urged to exercise judicial restraint by condoning the defective aspects of the leasing process and

the lease agreement in this case. Judicial restraint and activism are value-laden concepts often employed in the media and in public discourse, to understand the impact of Court decisions. The Court itself, however, does not operate in the framework of these concepts. For the Court, as guardian and interpreter of the Constitution, the only concept that matters is that of the rule of law. The Court will not condone an illegal action by the state just because it will be perceived as an activist institution. The Constitution defines the role of the judiciary as upholding the rule of law, and that is the only consideration the Court will have while adjudicating the matters before it. Further, in the present case, the concept of judicial restraint is wholly inapplicable, as the case has reached this Court in its appellate jurisdiction. As an aggrieved party, the petitioner has challenged the judgment of the High Court of Sindh and we have granted leave to appeal. Exercising restraint in such a case would be tantamount to denying the opportunity to an aggrieved party to have an unfavorable judgment reversed by a higher court and would also amount to denial of due process to such aggrieved party.

12. In conclusion, I would reiterate that the basis of discretionary power of state functionaries is the delegation of authority by the principal, the people of this country. The state's legal authority is derived from this fiduciary relationship. If the state or its instrumentalities deviate from their fiduciary obligations, the underlying authority of the state to administer and enforce the law is thereby eroded. If this happens, the citizens, as legal subjects of the state, can no longer be expected to obey the law since the state itself has reneged on its public fiduciary duties. We, therefore, cannot condone violations of public fiduciary duties, because doing so will lead to an erosion of the basis of the state's legal authority and the rule of law.

(Jawwad S. Khawaja)
Judge

جسٹس جواد ایس خواجہ:

مجھے مختصر حکم نامے مورخہ 21.08.2013 کی تفصیل میں فاضل جسٹس عظمت سعید کے تحریر کردہ فیصلے میں بیان شدہ استدلال پر نظر ڈالنے کا موقع ملا۔ ان کے اخذ شدہ نتائج سے عمومی اتفاق کرتے ہوئے میں یہ تائیدی فیصلہ مذکورہ حکم نامے کے لیے مزید دلائل پیش کرنے کے لیے لکھ رہا ہوں۔

2۔ ابتدا ہی میں عوامی و سرکاری اداروں کی حیثیت کے بارے میں ایک بنیادی قاعدے کی وضاحت ضروری ہے جو کہ مدعا علیہان کے فاضل وکلا کی نظروں سے اوجھل رہا ہے۔ لاکھڑا کے بجلی گھر کی طرح کے سرکاری ادارے عوامی اثاثے ہیں جو درحقیقت پاکستان کے عوام کی ہی ملکیت ہیں۔ گو کہ ریاست کو ان اداروں کے انتظامی امور چلانے کے لیے اختیار دیا گیا ہے، تاہم یہ منتظم ریاستی ایجنسیاں اس بنا پر ان اداروں کے اثاثہ جات کی مالک نہیں بن جاتیں۔ سرکاری ادارے اور ان اداروں کے افسران جو انتظام و انسرام پر مامور ہیں اپنے عمل میں اور انتظامی فیصلوں میں مطلق العنان نہیں اور نہ ہی ان کی صوابدید بے لگام ہے۔ وہ عوام کے امین ہیں۔

3۔ عوامی اداروں کا انتظام چلانے میں ریاستی ایجنسیوں کی صحیح حیثیت متعین کرنے کے لیے اس امر کی وضاحت ضروری ہے کہ ہمارے دستوری نظام میں حکومت کے لئے کیا حیثیت متعین کی گئی ہے۔ دستوری جمہوریت کا بنیادی اصول یہ ہے کہ حکومت آئین کی صورت معاہدے کے نتیجے میں وجود میں آتی ہے جس کے ذریعے عوام دستور کے مطابق حکومت کو اختیارات سونپ دیتے ہیں۔ دستور کے ابتدائیے میں، دیگر امور کے ساتھ یہ بھی قرار دیا گیا ہے کہ ''یہ پاکستان کے عوام کا ارادہ ہے کہ وہ ایک نظام تشکیل دیں۔'' ان اداروں کا، جو دراصل عوام کی ملکیت ہیں، انتظام چلانے والی ریاستی ایجنسیاں اس نظام کا حصہ ہیں جسے پاکستان کے عوام نے تشکیل دیا ہے اور اس بنا پر وہ صرف تفویض کردہ اختیار رکھتی ہیں۔

4۔ ریاستی ایجنسیاں سرکاری اداروں کی مالک یا مختار کل نہیں ہیں بلکہ ان کی نگہبان محافظ و امین ہیں جو اِن عوامی ملکیت کے اثاثہ جات کے حقیقی مالک و منتفع (beneficial owner) ہیں۔ یہ تصور کہ حکمران عوام

کے سامنے ان کے اوران کے اثاثہ جات کے محافظ کی حیثیت رکھتے ہیں کم ازکم دو ہزار سال پرانا ہے۔ رومی فلسفی اور سیاستدان سیسرو (Cicero) نے De Officiis میں حکومت کی حیثیت ان الفاظ میں واضح کی ہے: ''ریاست کی سربراہی ایک طرح کی امانت ہے جس کی بجاآوری ہمیشہ اس طور پر کرنی چاہیے کہ اس کا فائدہ اس شخص یا ہیئت کو ہو جس نے ذمہ داری سونپی ہے، نہ کہ ان کو جن کو ذمہ داری سونپی گئی ہے۔'' اسلامی قانون نے بھی واضح طور پر یہی قرار دیا ہے کہ حکومت کا اختیار ایک امانت ہے اور حکمران اور حکومتی ادارے قوم کے نائب اور وکیل کے طور پر اختیارات کا استعمال کرتے ہیں۔ اس طرح کے دوسرے کئی احکام کی بنیاد پر مسلمان ماہرین قانون نے اسلامی قانون کا یہ عام اصول وضع کیا ہے کہ حکمران کے کسی بھی فیصلے کا جواز اس امر پر منحصر ہے کہ کیا وہ لوگوں کی بہتری کے لیے کیا گیا ہے۔ (تصرف الامام بالرعية منوط بالمصلحه ۔) ہم نے متعدد مواقع پر ریاست اور شہریوں کے درمیان نگہبانی کے اس تعلق پر زور دیا ہے۔ محمد یاسین بنام وفاقِ پاکستان (PLD 2012 SC 132) میں ہم نے قرار دیا تھا کہ ''عوامی عہدوں پر تعینات افراد۔۔۔اولاً اور اصلاً پاکستان کے عوام کے نگہبان اور امین ہیں؛ اور اپنے عہدوں کی ذمہ داریاں پوری کرنے کے دوران ان کا پاکستان کے معزز عوام کے مفادات کے سوا کوئی مفاد نہیں ہوسکتا''۔ نگہبانی کے اس قاعدے کی بنیاد اختصاصی مفاد کا اصول ہے جس کی رو سے نگہبان کا فرض ہے کہ وہ صرف منتفع (beneficiary) کے مفاد میں قدم اٹھائے۔ نگہبانی کی ذمہ داریوں کا دارومدار اس امر پر ہے کہ نگہبان پورے خلوص سے عوام کے بہترین مفاد کے لیے کام کرے۔

5۔ یہ بات قابلِ توجہ ہے کہ نگہبانی ذمہ داری محض ایک اخلاقی تصور نہیں ہے۔ بلکہ یہ ایک قانونی فریضہ ہے اور اس حیثیت سے نگہبانوں پر لازم ہے کہ وہ اپنے فرائض احتیاط اور مکمل وفاداری کے ساتھ انجام دیتے ہوئے عوام الناس کے بہترین مفاد کے لیے کام کریں۔ پرائیویٹ قانونی اصولوں کے تناظر میں، جہاں عدالتیں ایک عام معمول کے طور پر نگہبانی ذمہ داریوں کی تنفیذ کرتی ہیں، کمپنی کے منتظم (ڈائریکٹران) کی حصہ داران کے سامنے جواب دہی اور دونوں کے مفادات میں مطابقت پیدا کرنے کے لیے محض انتخابات کو کبھی کافی نہیں سمجھا جاتا۔ جب کہ کارپوریٹ لا کے حوالے سے، یہ بات تسلیم کی جاتی ہے کہ منتخب شدہ منتظم (ڈائریکٹران) کے مفادات حصہ داران کے مفادات سے مختلف ہوسکتے ہیں۔ چونکہ حصہ داران تعداد میں زیادہ اور منتشر ہوتے ہیں

اس لیے ممکن ہے کہ ان کے لیے ڈائریکٹران کے فیصلوں کی موثر نگرانی مشکل ہو۔ نیز اجتماعی اقدام کے مسائل کی وجہ سے حصہ داران کے لیے یہ کام کافی مشکل ہوسکتا ہے کہ وہ ڈائریکٹران کے صوابدیدی اختیار کے غلط استعمال کے خلاف کوئی مربوط اقدام اٹھائیں۔ چنانچہ حصہ داران اوران کے نمائندہ، یعنی بورڈ آف ڈائریکٹرز، کے مفادات میں مطابقت پیدا کرنے کے لیے کارپوریٹ لا ایک عدالتی طریق کار، یعنی نگہبانی ذمہ داری کی تنفیذ، وضع کرتا ہے۔ ریاستی ایجنسیوں کے معاملے میں بھی عوام الناس اوران کے منتخب نمائندگان کے درمیان تعلق کی نوعیت یہی ہے کہ شہریوں کے مفادات کی قیمت پر سرکاری عہدیدار اپنے مفادات کو ترجیح دینے کی پوزیشن میں ہوتے ہیں۔ درحقیقت ریاستی ایجنسیوں کے معاملے میں ایک عدالتی طریق کار کی ضرورت اور بھی بڑھ جاتی ہے کیونکہ کسی کمپنی کے حصہ داران کے مقابلے میں عوام الناس، یعنی عوام، تعداد اور انتشار دونوں لحاظ سے بہت زیادہ ہوتے ہیں۔

6۔ اس مقام پر یہ بات بھی قابل ذکر ہے کہ ریاستی عہدیداروں کے تمام فیصلوں پر عدلیہ کی جانب سے کڑی نگاہ نہیں رکھی جاتی۔ اس کی وجہ یہ ہے کہ عوام الناس نے درحقیقت ریاستی ایجنسیوں کو انتظامی نوعیت کا صوابدیدی اختیار تفویض کیا ہے۔ حکومتی فرائض کی بہتر بجاآوری اور انجام دہی کے لیے اس نوعیت کی تفویض ضروری ہے۔ تاہم اس امکان کو مدِ نظر رکھتے ہوئے کہ وکیل منتفع (beneficiary) کے مفادات کو جان بوجھ کر نظر انداز کرسکتا یا اس سلسلے میں کوتاہی کا مرتکب ہوسکتا ہے، عدالت بعض حالات میں نگہبانی ذمہ داریوں کی تنفیذ کرے گی۔ وفاداری کے فریضے کی خلاف ورزی، مثلاً ذاتی مفاد کے معاملے یا مفادات کے تصادم کی صورت میں کڑی عدالتی چھان بین کی جائے گی۔ مزید برآں، اگر سرکاری عہدیدار اس معیار پر احتیاط کا فریضہ ادا نہ کرسکا جس کی توقع ایک معقول منتظم سے کی جاتی ہے تو عدالت متعلقہ فعل یا معاملے کا جائزہ لے گی تاکہ یہ جان سکے کہ کہیں ریاستی اہلکاروں نے پاکستان کے عوام کے لیے نگہبانی فرائض کی خلاف ورزی تو نہیں کی۔

7۔ لاکھڑا پاور جنریشن کمپنی کے پٹہ پر دیئے جانے کی کارروائی عمل میں لانے والی مدعاعلیہ ریاستی ایجنسی وفاداری اور احتیاط کے اس اعلیٰ معیار پر پورا نہیں اتر سکی جس کی توقع ایک نگہبان سے کی جاتی ہے۔ ریاستی اہلکاروں کو یہ چاہیے تھا کہ وہ کسی خاص کمپنی کے مفادات کا خیال نہ رکھے جو عوامی ملکیت کے اثاثے اپنے مخصوص

مفاد میں استعمال کرنا چاہتی تھی بلکہ وہ صرف اور صرف پاکستان کے عوام کے مفادات کو ترجیح دیتے۔عوامی مفادات کا بہتر خیال اس صورت میں رکھا جاتا اگر دلچسپی رکھنے والی تمام کمپنیوں پر نیلامی کے طریق کار کے لیے ابتدائی اہلیت اور ابتدائی معیارِ اہلیت کی شرائط کا اطلاق یکساں طور پر کیا جاتا اور اگر مدعا علیہان حکام ایک مناسب اشتہار شائع کرتے جس میں عوامی ملکیت کے اثاثہ جات کے پٹہ (lease) پر دیئے جانے کا خصوصی طور پر ذکر کیا جاتا۔متعلقہ حکام پر مزید انتظامی بوجھ ڈالے بغیر بھی ان شرطوں پر عمل ہوسکتا تھا اور اس کے بعد نیلامی کا عمل بہت زیادہ شفاف ہو جاتا۔نیلامی میں حصہ لینے والے تمام فریقوں پر قواعد یکساں طور پر لاگو نہیں کیئے گئے، نہ ہی مناسب اشتہار دیا گیا جس کے ذریعے نیلامی میں حصہ لینے کے اہل افراد یا کمپنیوں کو اطلاع مل جاتی۔اس سے معلوم ہوتا ہے کہ ذمہ دار ریاستی ادارے نے اپنے فرائض بہتر انداز میں نہیں سرانجام دیئے۔ ریاستی ایجنسیوں کو عوامی ملکیت کے اثاثہ جات کی ذمہ داری اس لیے نہیں سونپی گئی کہ وہ کسی فیصلے کے مناسب جائزے اور اس کی درستی پرکھے بغیر اپنی مرضی سے اس پر مہر لگاتے رہیں۔مزید برآں، نیلامی کے معاملے میں ایک فریق کو دوسرے فریق پر فوقیت دینے سے معلوم ہوتا ہے کہ لاکھڑا پاور پلانٹ کے پٹہ پر دیے جانے کے ذمہ دار سرکاری عہدیداران کا یہ عمل نیک نیتی پر مبنی نہیں ہے۔

8۔ نیلامی کے معاملے میں خامیاں بالکل واضح ہیں، جیسا کہ اس مقدمے میں جناب جسٹس عظمت سعید کے تحریر کردہ فیصلے میں ذکر کیا گیا ہے، لیکن مدعا علیہان کے وکلا کی جانب سے ہم سے استدعا کی گئی ہے کہ ہم ''عوامی مفاد'' میں اس مشکوک معاملے سے چشم پوشی کریں۔اس ضمن میں مدعا علیہان نمبر 1، (C.M. No. 646/10 اور 5 الفاظ خط کشیدہ کیے گئے ہیں) کے وکیل جناب شاہد حامد، سینئر ایڈووکیٹ سپریم کورٹ، کی درج ذیل بات بالخصوص قابلِ توجہ ہے:

> ''اس بات کا بہت کم امکان ہے کہ دوبارہ نیلامی کی صورت میں۔۔۔ 12 اگست 2006 کو منظور شدہ شرح سے بہتر شرح مل سکے گی۔۔۔ اس بنا پر خواہ طریق کار میں کہیں نقص پایا بھی جائے تو عوامی مفاد میں اس نقص سے چشم پوشی کی جائے کیونکہ، تمام رکاوٹوں اور مشکلات کے باوجود، نیلامی کے آخری مرحلے اور اس کی قیمت اور شرح کے تعین میں کوئی غیر مناسب بات نہیں تھی۔''

9۔ مذکورہ بالا اقتباس میں فاضل وکیل نے عدالت سے ناممکن کو ممکن کر دکھانے کی استدعا کی ہے: کہ وہ عوامی مفاد کے نام پر قانون کی حکمرانی کی خلاف ورزی سے صرفِ نظر کرے۔ اگر یہ عدالت عوام کے لیے ریاست پر عائد ہونے والے فرائض کی بجا آوری سے امتیازی بنیادوں پر صرفِ نظر کرنے لگے تو اس ملک میں قانون کی حکمرانی کی کوئی جھلک باقی نہیں رہے گی۔ نیز فاضل وکیل کا یہ بیان بھی درست نہیں کہ اگست 2006 میں منظور ہونے والی شرح سے بہتر شرح نہیں مل سکے گی۔ اگر واپڈا جیسے ریاستی ادارے نیلامی کی بلند ترین شرح اس طرح قبل از وقت جان لینے کے اتنے اچھے ماہر ہوتے تو پھر نیلامی کی ضرورت ہی نہ پڑتی۔ فاضل وکیل کا کہنا ہے کہ چونکہ نیلامی کے آخری مرحلے میں طریق کار کی کوئی خرابی نہیں تھی اس لیے ہمیں اس معاملے کے ابتدائی مراحل میں موجود کوتاہیوں اور نقائص سے چشم پوشی کرنی چاہیے۔ استدعا کو بہترین معانی دیے جائیں تب بھی اسے زیادہ سے زیادہ ایک متنازعہ دعویٰ کہا جائے گا اور بدترین تاویل کی صورت میں اسے قانون کی حکمرانی کے تصور سے براہ راست متصادم قرار دیا جائے گا۔ پہلی بات تو یہ ہے کہ یہ کون طے کرے گا کہ نیلامی کے معاملے کا آخری مرحلہ کیا ہوگا اور کون سا ہے؟ ناقص فیصلوں کے ایک طویل سلسلے کے اختتام پر محض طریق کار کی خامیوں سے پاک ایک آخری فیصلہ، قانونی طور پر جائز نتیجہ نہیں دے سکتا۔ اگر عدالتیں تمام معاملات کے صرف آخری مرحلے ہی دیکھیں گی تو اس کا واضح مطلب یہ ہوگا کہ انہوں نے سرکاری اداروں کو کھلی چھٹی دے دی ہے کہ وہ پاکستان کے معزز عوام کے تفویض کردہ اختیار میں جو من مانی چاہیں کریں۔

10۔ اس عدالت سے عوام کے لیے ریاستی ایجنسیوں پر عائد ہونے والی نگہبانی ذمہ داریوں کی خلاف ورزی سے صرفِ نظر کرنے کی استدعا کرتے ہوئے مدعا علیہان کے فاضل وکیل ضمناً ''نظریۂ ضرورت'' سے استدلال کر رہے ہیں جب کہ وہ نظریہ تو متروک ہو چکا ہے۔ مبشر حسن بنام وفاقِ پاکستان (PLD 2010 SC 265) میں ہم نے تاکید کے ساتھ یہ صراحت کی ہے کہ ''*مصلحت کا راستہ*'' اور ''*ریاستی ضرورت*'' کے غیر معروضی نظریات مردہ اور مدفون ہیں۔'' *یہ خیال قانون کی حکمرانی کے عین تصور پر ہی براہ راست حملہ ہے کہ اس عدالت کو چاہیے کہ وہ صرف حکومتی اقدام کے نتائج کو مدنظر رکھتے ہوئے فیصلے کرے اور فیصلہ سازی کے مراحل اور طریق کار سے صرفِ نظر کرے۔ لازم ہے کہ پاکستان کے عوام کے لیے ریاستی*

اہلکاروں پر عائد ہونے والے نگہبانی فرائض کامل وفاداری، احتیاط اور معقولیت سے انحراف کے خیال کو سخت ترین الفاظ میں مسترد کیا جائے۔''

11۔ یہ بات مجھے ایسوسی ایٹڈ گروپ کے وکیل جناب وسیم سجاد، سینئر ایڈووکیٹ سپریم کورٹ، کے دلائل میں موجود ایک غلط فہمی کی طرف لے آتی ہے۔ مصلحت کی بنیاد پر عدالت سے استدعا کی گئی ہے کہ وہ عدالتی تحمل (restraint) سے کام لیتے ہوئے متدعویہ پٹہ کے معاملے اور اس مقدمے میں پٹہ کے معاہدے کے ناقص پہلوؤں سے چشم پوشی کرے۔ عدالتی تحمل (restraint) اور فعالیت (activism) شخصی اقدار پر مبنی اصطلاحیں ہیں جو عموماً عدالتی فیصلوں کے اثرات سمجھنے کے لیے میڈیا میں استعمال کی جاتی ہیں۔ البتہ عدالت بذاتِ خود ان تصورات کے سانچے میں کام نہیں کرتی۔ عدالت دستور کی محافظ اور شارح ہے۔ اس حیثیت میں عدالت کے لئے صرف ایک نکتہ اہمیت رکھتا ہے اور وہ ہے قانون کی حکمرانی کا تصور۔ ریاست کے کسی غیر قانونی کام سے عدالت اس بنا پر چشم پوشی نہیں کرے گی کہ پھر اس کو فعالیت (activism) قرار دے دیا جائے گا۔ دستور نے عدلیہ کو قانون کی حکمرانی یقینی بنانے کی ذمہ داری دی ہے اور یہ وہ واحد معیار ہے جسے عدالت اپنے سامنے موجود امور نمٹانے میں مدِ نظر رکھتی ہے۔ نیز موجودہ مقدمے میں عدالتی تحمل کا تصور ممکن نہیں کیونکہ عدالت اس مقدمے کی سماعت بطور عدالتِ اپیل کر رہی ہے۔ اپیل کنندہ نے متاثرہ فریق کی حیثیت سے سندھ ہائی کورٹ کے فیصلے کو چیلنج کیا ہے اور عدالت نے اسے سماعت کے لئے منظور کیا ہے۔ ایسے کسی مقدمے میں تحمل کا مظاہرہ کرنے کا مطلب تو یہ ہوگا کہ متاثرہ فریق کے اس حق کا انکار ہوگا کہ وہ اپنے خلاف فیصلے کو عدالتِ عظمیٰ کے ذریعے چیلنج کر سکے اور یہ متاثرہ فریق کو قانونی طریق کار سے محروم کرنے کے مترادف بھی ہوگا۔

12۔ بحث کو سمیٹتے ہوئے میں یہ بات دہرانا چاہتا ہوں کہ ریاستی اہلکاروں کے صوابدیدی اختیار کی بنیاد اس ملک کے عوام کی جانب سے تفویضِ اختیار ہے۔ ریاست کے قانونی اختیار کا سرچشمہ یہ نگہبانی تعلق (fiduciry relationship) ہے۔ جب ریاست اپنے نگہبانی فرائض سے انحراف کرتی ہے تو اس کے نتیجے میں قانون کی حاکمیت اور نفاذ کے بارے میں ریاست کا اختیار محدود ہو جاتا ہے۔ ایسی صورت میں شہریوں سے، جن پر ریاست کے قانونی اختیار کا اطلاق ہوتا ہے، مزید یہ توقع نہیں کی جا سکتی کہ وہ قانون کی اطاعت

کریں کیونکہ ریاست خود اپنے اختیار کی پامالی کرتی ہے۔ چنانچہ ہم عوامی نگہبانی کی ذمہ داری کی خلاف ورزیوں سے چشم پوشی نہیں کر سکتے۔

(جواد ایس خواجہ)

جج