

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Jawwad S. Khawaja
Mr. Justice Gulzar Ahmed

Constitution Petition No.5 of 2011

Khawaja Muhammad Asif. ... Petitioner(s)

Versus

Federation of Pakistan, etc. ... Respondent(s)

AND

Human Rights Case No.15744-P of 2009

(Application by Mr. Imran Mughal for taking action on high-prices of LPG)

For the Petitioner(s): Mr. Rashdeen Nawaz Kasuri, ASC with
Khawaja Muhammad Asif, petitioner

For Respondent No.1: Mr. Shah Khawar, Addl. AGP
Mr. M. Nazir Malik, Director (Law)

For Respondent No.2: Mr. Abid Hassan Minto, Sr. ASC
Mr. Asim Hafeez, ASC
Mr. Arshad Ali Chaudhry, AOR

For Respondent No.3: Khawaja Ahmed Tariq Rahim, Sr. ASC
Mr. Uzair Karamat Bhindari, ASC
Mr. M. S. Khattak, AOR

For Respondent No.4: Nemo.

For Respondent No.5: Mr. Shahid Hamid, Sr. ASC

For Respondent No.6: Mr. Muhammad Munir Paracha, ASC
Mr. Mehmood A. Sheikh, AOR

For Respondent No.7: Mr. M. Farooq, Dy. Director

For the Applicant(s): Mr. Irfan Qadir, ASC (in CMAs-622023/13)
Mr. Salman Akram Raja, ASC (in CMA-6235/13)
Mr. Azhar Siddique, ASC (in CMAs-6247/13)
Nemo. (In CMA-6327/13)

Dates of hearing: 8.10.2013, 10.10.2013, 21.10.2013 &
22.10.2013.

J U D G E M E N T

Jawwad S. Khawaja, J. Although the record of this case is voluminous, the relevant facts necessary for its disposal are fairly simple. Pakistan has been blessed with a vast array of natural resources including mineral oil and natural gas. The people of Pakistan are the ultimate owners of such resources through their Governments and State enterprises such as Sui Southern Gas Co. Ltd. This petition filed under Article 184(3) of the Constitution raises issues of public importance relating to such natural resources with reference to the enforcement of the fundamental rights guaranteed by the Constitution.

Parties and Background.

2. The matter relates to the award of a project through competitive bidding, by respondent No. 2 namely, Sui Southern Gas Company Limited (SSGCL) to the respondent No. 3 namely, Jamshoro Joint Venture Limited (JJVL). SSGCL is a State enterprise incorporated under the Companies Ordinance, 1984. SSGCL has an authorized capital of Rs. 10 billion of which Rs. 6.7 billion is issued and fully paid up. The Government alongwith State owned entities owns more than 67% of the shares of SSGCL. In 2003 when the aforesaid contract was awarded all 14 Directors on the Board of SSGCL were Government appointees. Today, 11 out of the 14 Directors are nominees of the Government. SSGCL is a public limited Company listed on the Karachi Stock Exchange.

3. JJVL is an unlisted limited Company incorporated under the Companies Ordinance, 1984. It was incorporated for the purpose of making a bid for the aforesaid project which was aimed at extraction of Liquefied Petroleum Gas (LPG) from natural gas mined in Badin and supplied to SSGCL under a Gas Sales Agreement (GSA) dated 12.08.2003. The contract was awarded to JJVL in circumstances which are considered below and provide the subject-matter of the petition.

4. To facilitate understanding of the issues arising in this petition it is appropriate to summarize briefly and in simple terms, some technical aspects of LPG. The natural gas which is received by SSGCL under the GSA is made up of a mix of gases. These include propane, butane and methane. Butane and propane, when extracted from the

mix, are liquefied and sold as LPG. As a result of extraction of LPG from natural gas, there is a reduction in the remaining volume and calorific value of natural gas which reduction is known in technical terms, as "gas shrinkage". The volume of gas shrinkage is a factor to be considered in deciding the terms for awarding the project for extraction of LPG. LPG is presently being used in Pakistan amongst others, by persons who for various reasons are not receiving or using natural gas.

5. We can now state some relevant facts which, in the main, are not disputed. SSGCL invited Expressions of Interest (Eoi) through public advertisements *inter alia*, in the Daily "Dawn" dated 13.3.2000. Bids for pre-qualification of prospective bidders were invited through public advertisements through the press, including the Daily "Express" dated 11.11.2000. The invitation to bid was for an LPG extraction Plant on a "Build Operate Own" (BOO) basis. Although bidding documents were obtained by nine parties only six of these were pre-qualified and from these only JJVL submitted a bid. It may be noted that this bid was made without a bid bond although this was an essential pre-requisite for a valid bid as per requirements of clause 5.0 of the Instructions to Bidders.

6. Notwithstanding the aforesaid defect in the bid made by JJVL, SSGCL decided to accept the defective bid and to enter into negotiations with JJVL whereafter the two parties executed an Implementation Agreement (IA) on 12.8.2003. Under the IA, JJVL was to establish a Plant for extraction of LPG from natural gas supplied to it by SSGCL. JJVL was, *inter alia*, to pay a compensation price to SSGCL for gas shrinkage and also royalty payments on the LPG extracted by it. The rate of royalty and the differences between SSGCL and JJVL in respect of the same is an important aspect of this case as will be examined shortly.

7. The petitioner before us is Khawaja Muhammad Asif, who was a member of the opposition in the National Assembly in 2011 when this petition was filed. Currently he is a part of the Government being the Minister for Water and Power in the Federal Cabinet. Learned counsel for some of the respondents contended that the proceedings could not continue subsequent to the Petitioner being appointed a Federal Minister. We, however, are of the opinion, for reasons appearing below, that this petition raises issues of vital public importance impacting the fundamental rights of the people, and

therefore, must be heard. It is by now well-settled that the Court's jurisdiction under Article 184(3) can be exercised even without a petitioner when information is laid before the Court which justifies the exercise of such jurisdiction. Therefore, the proceedings can continue in the same manner as before.

8. The petitioner has approached this Court under Article 184(3) of the Constitution. It is his case that the extraction agreement awarded to JJVL was neither lawful or fair nor was it transparent. According to him, it was meant to extend illegal and undue favours to JJVL at the cost of the State and the People of Pakistan. He referred firstly; to the acceptance of the bid submitted without a bid bond; secondly, to the calculation of royalty payments by JJVL at rates different from those agreed, thus causing a very substantial loss to SSGCL and; thirdly, to the changes made in the draft Implementation Agreement (forming part of the bid documents) to extend undue benefits to JJVL.

9. We can now consider these aspects and the respective contentions of learned counsel representing the parties.

Lack of Bid Bond.

10. At the outset it may be stated that as per Instructions to Bidders the bid submitted by JJVL on 12.9.2001 could not have been treated as valid because it was not accompanied by a bid bond. Part C Clause 5.0 of the Instructions to Bidders expressly stipulated that the "*bidder at its cost shall submit a Bid Bond as part of its Bid for an amount of US\$ 100,000 (United States one hundred thousand) or in equivalent Pakistani Rupees based on prevailing inter bank exchange rate*". The bid bond was to be submitted as part of the Technical Proposal. The absence of a Bid Bond constituted a major defect in JJVL's bid because the Bid Bond constituted an integral aspect of the Bid. The envelope containing the Financial Proposal could not have even been opened when the Technical Proposal was not accompanied by the mandatory Bid Bond. This is apparent from Part C, Clause 5.4 of the Instructions to Bidders, which reads, "*Any Bid not accompanied with Bid Bond of required amount will be considered as non-responsive, rejected by SSGC and returned to the Bidder.*" It will thus be seen that rejection of the bid made by JJVL was obligatory. The unjustified acceptance of such bid also constituted unfairness and illegality in the

bidding process inasmuch as other potential pre-qualified bidders were never informed that they could submit bids without bid bonds. It appears from the record that a bid bond was subsequently furnished when JJVL became sure that the other prequalified bidders had not submitted bids. Neither SSGCL nor JJVL were able to proffer any explanation to justify such a material departure from the requirements of a valid bid. Learned counsel on behalf of JJVL argued that the lack of a bid bond was a mere technical irregularity which could not be a ground for striking down the whole transaction. This contention cannot be accepted. As stated above, furnishing the Bid Bond was clearly an essential condition of the bid and therefore, could not be deviated from. It is apparent from this circumstance that the bidding process leading to the award of the LPG extraction project to JJVL was tainted from its very inception and was geared towards advancing benefits and unfair advantage to JJVL by eliminating potential pre-qualified bidders who were not afforded the same favourable treatment as had been given to JJVL.

11. There is another significant aspect of the case, arising from the failure of JJVL to submit a bid bond as required by clause 5.0 (Bid Bond) of the Instructions to Bidders. We have noted that in the 311th meeting of the Board of Directors of SSGCL held on 15.11.2001, one of the Directors had suggested re-bidding for the extraction project. This suggestion was not accepted and it was decided *"to let the management proceed with evaluation and take the decision when the matter would [come to the Board] with management's recommendations"*. It is important to note that the decision of the Board of Directors of SSGCL was based on a note prepared by the management of SSGCL. This note dated 13.11.2001, quite strangely, did not inform the Directors that the bid submitted by JJVL could not have been treated as valid because it was not accompanied by the mandatory bid bond. It does appear that the aforesaid material defect was deliberately concealed from the Board of Directors with the object of eliminating competition and giving undue benefit to JJVL. The Board itself was kept in the dark and if informed, would surely have taken note of the defective bid submitted by JJVL. There was no explanation forthcoming during the arguments advanced on behalf of JJVL as to why an essential condition of the bid had not been met by JJVL. Nor is there any justification given by

SSGCL as to why such bid had not been rejected for this reason. It is pertinent to observe that the Note to the Board of Directors dated 13.11.2001 detailing the acceptance of JJVL's bid does not mention the fact that JJVL did not submit a bid bond. Thus, it appears that an attempt was made from the start, to conceal the fact that JJVL did not submit a valid bid. It is quite clear that such concealment could not have occurred in a transparent and fair transaction.

Royalty Payments.

12. We can now take up the matter of royalty payments. According to the petitioner the royalty payments under the IA were to be calculated with reference to the Saudi Aramco reference price. The essential feature of the tender documents, *inter alia*, was that the bidder offering the highest amount of royalty and compensation for gas shrinkage etc., for the gas processed would be the successful bidder. Our attention was drawn to a letter dated 28.4.2003 written to SSGCL by Iqbal Z. Ahmad, Chairman/CEO of JJVL. In this letter it had been agreed that the Saudi Aramco ex-refinery price would be used as the basis for calculating royalties payable to SSGCL. It was also specifically stated in the said letter that "[f]or an apple-to-apple comparison, it is required that the Local Ex-Plant prices be compared with Saudi Aramco's Ex-Plant prices and not with C&F Karachi price that includes various third party costs and government fees & levies etc."

13. It is relevant in this context to note the letter from JJVL to SSGCL dated 05.09.2002, wherein JJVL had expressly agreed to the following: "Reference price of LPG should be Saudi Aramco's prices of Propane and Butane in the ratio of 60:40 published in international Butane-Propane Newsletter plus LPG freight cost or local refineries cost other than PARCO, whichever is higher shall be taken for calculation of royalty." (emphasis added). Most importantly, as per Instructions to Bidders in relation to royalty payments, it was stipulated that "the bidders will be required to propose the maximum amount of such royalty on a per-MCF basis". A Letter of Intent (LOI) was to be issued to the successful bidder. As noted elsewhere in this opinion, the LOI in terms of the Instructions to Bidders was issued to JJVL by SSGCL on 28.06.2002. The LOI was duly accepted by JJVL and as per accepted and agreed terms, the royalty payments were to be made on the basis of Saudi Aramco reference price plus freight if such price was higher than the price of locally

produced LPG. It is thus abundantly clear that JJVL had been willing and had agreed not only to pay the Saudi Aramco price, but also to pay the freight cost if the same was higher than the local price. However, this entire scheme of royalty payments suddenly and inexplicably was altered in favour of JJVL in the final Implementation Agreement, clause 9.2 of which reads: *"9.2. Royalty shall be calculated with reference to a "Reference Price". The highest ex-plant/ex-refinery price in Pakistan for LPG during a Month of one of the producers identified in Schedule 9 hereto will be used as the reference price for calculation of Royalty for such Month subject to a minimum price of US \$250 per metric tonne."* (emphasis added). There is no correspondence on record nor was any explanation offered on behalf of JJVL as to why this change occurred in the final Implementation Agreement despite the fact that JJVL had clearly agreed on multiple occasions to reference the royalty payments to the Saudi Aramco price with freight cost or local price, whichever is higher. This material change has, according to SSGCL, caused loss to it, of an amount in excess of Rs. 22 billion to date. Thus, it is clear that the Implementation Agreement was entered into in a non-transparent and highly questionable manner resulting in undue benefit to JJVL and very heavy losses to the State enterprise SSGCL and consequently to the People of Pakistan.

14. It is not disputed that since the date of the Implementation Agreement, JJVL is paying royalty at a rate which is well below the reference price based on the Saudi Aramco price plus freight cost as had been specifically agreed. This has caused billions of rupees worth of loss to the State enterprise SSGCL and this, in turn, has adversely impacted, *inter alia*, its ability to invest in the improvement of its facilities and services to its consumers. Instead of the pricing formula agreed as above, the ex-refinery price of LPG produced in Pakistan has been used even though it is substantially lower than the Saudi Aramco price plus LPG freight cost. When confronted with this material deviation from the agreed basis for royalty payments, learned counsel for JJVL could not dispute the deviation but stated that even in respect of the Saudi Aramco reference price, the same had to be on FOB basis and according to him, if so calculated, no loss had been caused to SSGCL. This submission is wholly contrary to the agreed basis which

provided for royalties to be calculated on higher of the two i.e. FOB Saudi Aramco plus freight and the ex-refinery price of LPG produced in Pakistan.

15. SSGCL has calculated the difference in royalty payments on the agreed basis and those made so far. If this figure is taken as an approximation, JJVL owes more than Rs. 22 billion by way of royalty payments if freight is calculated at US \$50 or over Rs. 23 billion if freight is calculated at US \$60. For reasons appearing in the concluding paragraphs of this opinion, it is not necessary for us to determine in this opinion, the exact amount of short payment. We do, however, note that the royalty payments have not been made by JJVL to SSGCL in accordance with the agreed basis referencing such payments to Saudi Aramco prices FOB plus freight. Clause 9.2 of the Implementation Agreement constitutes a gratuitous and unlawful favour bestowed on JJVL. Furthermore, it must be noted that the first draft of the Implementation Agreement dated 06.11.2002 contained the wording of the letters dated 28.4.2003 and 05.09.2002 mentioned above; i.e. that JJVL would use the Saudi Aramco rate as reference price and also pay freight cost. However, with no justification or explanation, the "corrected draft" of the Implementation Agreement dated 19.5.2003 (less than a month subsequent to the letter dated 28.4.2003) removed this stipulation of royalty that JJVL had expressly agreed to. There is no correspondence or minutes on record to indicate why this material change occurred which allowed JJVL to pay a much lower amount of royalty. The Implementation Agreement executed between SSGCL and JJVL thus represents a significant loss to the State owned utility and thus ultimately to the People of Pakistan.

Material Changes to the Implementation Agreement.

16. The next issue arising in the case relates to changes which were made in the Form of the Implementation Agreement. Such Form had been made part of the bid documents provided to the pre-qualified bidders. According to the petitioner, these changes were of a material nature and were meant to alter the terms of the Implementation Agreement to the advantage of JJVL. Learned counsel for JJVL did not dispute the fact that these changes constituted deviations from the Form of the Implementation Agreement which had been given to interested bidders. He, however, contended that such deviations were not of a material nature and further that the

changes did not bestow any advantage on JJVL. For reasons considered below, we have found these submissions to be untenable being without merit.

17. In order to examine the importance of the Implementation Agreement and the relevance of the changes made therein after the conclusion of the bidding process, it is necessary to set out the significant aspects of the bid documents, the bidding process and the form of the Implementation Agreement which was the most important element in the bidding documents. In the case of a fair and transparent process of competitive bidding, the bid documents constitute the basis on which assessments, calculations and the bid itself are prepared by the bidders. This is meant to ensure that the bidding is even-handed and provides for a fair, transparent and objective evaluation of bids received.

18. As noted above, the bid documents in the present case included a draft format of the Implementation Agreement which was to be the main instrument setting out the respective rights and obligations of SSGCL and the successful bidder. It is understandable that some parts of the Implementation Agreement have to be filled in on the basis of bids received, for example the royalty payment formula, compensation for gas shrinkage, compensation for acquisition of the plant etc. or to accommodate language etc. which does not materially alter the terms of the Implementation Agreement. If material changes are brought about in the Implementation Agreement subsequent to the bidding, this will in fact negate the notion of a fair and open competitive bidding process. In the present case, it has all along been urged by JJVL that the bidding for the LPG extraction plant was competitive i.e. that bids were to be submitted on the basis of the bidding documents (including the draft Implementation Agreement) which were given to all pre-qualified bidders. The fact, however, is that the Implementation Agreement which was executed by SSGCL in favour of JJVL was very substantially and materially different from the draft Implementation Agreement. As will be apparent from the changes made in the draft Implementation Agreement, all such changes as have been discussed below were material in nature and had been made to benefit JJVL. These changes were never available to other pre-qualified parties.

19. It is necessary to examine what these changes were to appreciate the submissions of the petitioner and JJVL. The Form of the Implementation Agreement which was part of the bidding documents defined GSA to mean *"the Gas Sales Agreement between BP Pakistan Exploration & Production Inc., Oil and Gas Development Company Limited, Occidental Petroleum (Pakistan) Inc. and Government Holdings (GOP) dated 28.11.1988, as amended from time to time."* This clause was altered in the Implementation Agreement which was executed between SSGCL and JJVL so that the last few words of the definition of GSA would read *"as amended and extended from time to time"* (emphasis added). The record before us, which is considered below, provides the context within which the significance and materiality of this change can be very easily seen. Likewise, Article 2 of the draft Implementation Agreement was changed. In the Form issued with the bidding documents given to all bidders, Article 2 stipulated that the Implementation Agreement *"shall commence and be effective on the date hereof, and shall, unless terminated earlier in accordance with its terms, continue in full force and effect until the validity of the GSA, which is currently valid up to the 3rd of February, 2011"* (emphasis added). To this stipulation of the Implementation Agreement, the words *"It is agreed that the Agreement shall continue on the same terms and conditions for any extension of the GSA beyond 3rd February, 2011"* were added.

20. According to the petitioner, the above noted two changes made in the Implementation Agreement were meant to bestow undue favour and advantage to JJVL because these modified terms were materially in favour of JJVL but the same advantageous terms had not been provided to other potential bidders. It is thus clear that the Implementation Agreement which was finally executed between SSGCL and JJVL was significantly different from the Form of the Implementation Agreement which was handed out to at least six pre-qualified bidders who had received the bidding documents.

21. We can now examine the submissions made on behalf of the parties in the context of circumstances which emerge from the record. No reason whatsoever has been given as to why SSGCL would give up its potential and possibilities beyond 3rd February, 2011 on which date the Implementation Agreement was to expire. It was not

argued on behalf of JJVL that it was at a disadvantage by continuing with the Implementation Agreement on the same terms and conditions, after 3rd February, 2011. In fact, to the contrary, JJVL filed a suit in the Sindh High Court (Suit No. 151/2011) seeking *inter alia*, an injunction to restrain SSGCL from terminating the Implementation Agreement. The plaint in the suit as well as the order dated 1.2.2011 passed by the Sindh High Court granting a temporary injunction make it abundantly clear that JJVL placed reliance on the wording which had been added to Article 2 whereby it had been agreed that the Implementation Agreement “*shall continue on the same terms and conditions for any extension of the GSA beyond 3rd February, 2011*”. In this regard, it is useful to reproduce an extract from paragraph 14 of JJVL's plaint which avers “*that by virtue of Article 2 thereof, the term of the Implementation Agreement is linked to the validity of the GSA. In plain words, Article 2 states that the Implementation Agreement will continue beyond 3 February 2011 on the same terms and conditions if the GSA is extended beyond the said date...*”(emphasis added). There can be no clearer proof of the fact firstly; that JJVL considered the aforesaid changes in the Implementation Agreement to be material and secondly; that these changes were favourable to JJVL and thirdly; that even today JJVL is receiving undue benefit (i.e. extension of the Implementation Agreement) after 3.2.2011 which would not be available to it but for the unwarranted and unlawful additions made in the Implementation Agreement noted above.

22. The learned Bench of the Sindh High Court, in its order dated 1.2.2011, has granted the interim injunction sought by JJVL, as a result of the changes introduced in the Form of the Implementation Agreement. This is evident from the fact that the said Order has prominently reproduced and relied on the aforesaid changes in the Implementation Agreement. JJVL is still continuing to operate the LPG extraction plant because of the changes made, *inter alia*, in Article 2 of the Implementation Agreement after the competitive bidding process had been concluded and even though the other pre qualified bidders had been given no opportunity of basing their bid on the Implementation Agreement as modified for JJVL. These circumstances substantiate the point that JJVL itself considers the aforesaid deviations to be material and also to its advantage. We, therefore, are unable to accept the contention of learned counsel for JJVL

that the deviations were insignificant or that the same did not make any material change in the Implementation Agreement to favour JJVL. Considering that these changes were made gratuitously, and in a non-transparent manner, the same were not lawfully made and cannot be allowed to stand.

23. In addition to the above, we may also refer to the correspondence between JJVL and SSGCL which shows clearly that the changes, referred to above, made in the Implementation Agreement were actively sought by JJVL. This is evident *inter alia*, from the minutes of the meeting between JJVL and SSGCL dated 24.01.2003. JJVL reiterated its desire for the said changes *vide* letter dated 19.02.2003; and SSGCL finally acquiesced to the same *vide* fax dated 04.03.2003. If indeed, the changes sought by JJVL had no advantage for it or had no material bearing on the Implementation Agreement (as claimed by JJVL), there would have been no reason for JJVL's insistence and avid desire for the above referred changes.

24. The most significant deviation from the Implementation Agreement, however, was in relation to clause 18 and the accompanying schedule (Schedule 5) to the Implementation Agreement. Clause 18 of the draft Implementation Agreement provided SSGCL the option of acquiring the extraction plant in the event of JJVL's default as defined in Article 17 of the Implementation Agreement. This stipulation ties in directly with the short payments of royalty as discussed above. Schedule 5 set out the agreed basis on which such acquisition could be affected. The relevant fact is that clause 18 was a significant part of the Implementation Agreement and ensured that on the termination of the Implementation Agreement on account of JJVL's default, including its failure to make the agreed royalty payments, the extraction plant could be acquired by it on the basis of an agreed formula for working out the acquisition price. It is also important to bear in mind that the basis of the bid made by JJVL was the bid documents and the most significant bid document undoubtedly was the Form of the Implementation Agreement. It is in this context important to note that the changes made therein by redefining the GSA and the significant change made in Article 2 *ibid* as to the term of the Implementation Agreement, had a direct nexus with the deletion of clause 18 of the Implementation Agreement as these changes were meant to skew the said agreement in

favour of JJVL. Correspondence between SSGCL and JJVL (discussed below) also shows that the financial bid submitted by JJVL was conditional inasmuch as the lenders of JJVL had strong reservations in respect of clause 18 of the Implementation Agreement and were not prepared to finance the Project because of clause 18 *ibid*.

25. We have gone through the documents and correspondence placed on record by SSGCL and JJVL. On 21.6.2002, a meeting between JJVL and SSGCL was held in Karachi. Consistent with the terms of the draft Implementation Agreement, SSGCL pointed out *"that in the light of clauses 17 and 18 of the draft Implementation Agreement, SSGC would need extensive details and verification of the proposed plant ..."* The details required were to be furnished by JJVL and the verification thereof was to be made by SSGCL. The scheme of the bidding process as incorporated in the Instructions to Bidders followed the accepted best practices for award of such contracts and the same were meant for the purpose of ensuring fairness. From the Instructions to Bidders it is evident that the Implementation Agreement was the most crucial element of the tender documents because it was this agreement which was to govern the contractual relationship between SSGCL and JJVL. The Instructions to Bidders also specifically stated that *"failure to furnish all information required or submission of a bid not substantially responsive to the tender documents shall be at the bidder's risk and may result in the rejection of such bid"*. To ensure openness and equal treatment for all bidders they were instructed to seek any clarifications or to seek a pre-bid meeting with SSGCL for additional information for the preparation of their bids.

26 Bidders were required to prepare their bids *"under two separate covers, Technical Proposal and Financial Proposal"*. The outlines of the requirements of the Technical and Financial Proposals were included in the Instructions to Bidders. The financial proposal was specifically required to include the proposed financing plan. Such financing plan, in order to be responsive to the invitation to bid, was to be put in place by the bidders on the basis of the tender documents at their own responsibility. There was no question of any concessions being sought by a bidder after the conclusion of the bidding process for the purpose of accommodating its lenders/financiers. It was a clear violation of the Instructions to Bidders that the financing plan submitted by JJVL was not in place on the basis of the tender documents and it is for this reason that correspondence (considered

below) relating to clause 18 of the Implementation Agreement was initiated by JJVL to accommodate the requirement and security for financing, sought by JJVL's lenders. The Bid (even though invalid) had been made on 12.9.2001 evidently without a firmed up financing plan or commitment from lenders. As late as 10.6.2003 JJVL wrote to SSGCL that it *"is undertaking [the] Project being fully aware of the risks but is only requesting SSGC to provide the minimum level of comfort which will make the Project financeable". (emphasis added). We find it quite inexplicable that even 21 months after the Bid, JJVL was still unable to raise or firm up its financing and was seeking further indulgence from SSGCL for the comfort of JJVL's lenders.*

27. In this context, we now consider the Letter of Intent (LOI) dated 28.6.2002 issued by SSGCL in favour of JJVL. The two important aspects of this letter which relate directly to clause 18 of the Implementation Agreement need to be spelled out. In para 7 of the LOI, it has been stipulated that *"the total cost of the Project shall not exceed US \$ 32 million (the 'Ceiling') and a term will be included in the Implementation Agreement to reflect the fact that notwithstanding the actual Project cost, for the purpose of Schedule 5 of the Implementation Agreement the maximum liability of SSGC will be restricted to the Ceiling"*. Clause 9 of the LOI requires JJVL to provide half yearly and annual audited accounts to SSGCL. It was also submitted therein that *"to the extent that the auditor determines that any expense of the Project Company is excessive or has not been incurred on the basis of an arms length transaction or is an expense which is unrelated to or not entirely related to the execution and implementation of the Project, the said expense will be deducted from any calculation of the Acquisition Cost payable by SSGC as set forth in Schedule 5 of the Implementation Agreement"*. Another important stipulation in the LOI is that *"in the event of any conflict between the Bid and the terms of the Tender Documents or the terms of [the] LOI, the terms of the Tender Document and the LOI will prevail. Any conflicting terms contained in the Bid are deemed to have been withdrawn and cancelled"*.

28. We, therefore, find it surprising and quite extraordinary that almost 8 months after the LOI, vide letter dated 24.2.2003, JJVL proposed (contrary to the LOI) that a new clause 18 be substituted for the one included in the original form of the Implementation Agreement. The suggested clause was a major deviation from the draft Implementation

Agreement as it sought deletion of clause 18 in its entirety. A wholly different clause 18 was proposed by JJVL as under:

A separate Agreement between the lenders, SSGC and the Company [JJVL] will be signed simultaneously with the signing of the Implementation Agreement to reach a correct understanding between the lenders, SSGC and the Company [JJVL] on all aspects related to the Implementation Agreement."

29. This major change in the Implementation Agreement was sought for the purpose of accommodating JJVL's lenders who, as noted above, had reservations about clause 18 *ibid*. After going through the correspondence placed on record by the parties including the letter dated 24.2.2003, it is not possible to accept the submissions made by learned counsel for JJVL that the deletion was sought by SSGCL. It is also clear from the record that as late as February 2003, JJVL had not been able to arrange financing for the Project and was desperately trying to secure favourable terms from SSGCL which would be acceptable to JJVL's lenders. Thus, on 24.2.2003, JJVL wrote to SSGCL that "*we have had the benefit of discussing the issues with the lenders ... [and] in view of the discussions held with them and their guidance, we would like to submit ... important issues for your urgent consideration and review.*" (emphasis added). That the financing for the Project had not been arranged by JJVL is also apparent from JJVL's aforesaid letter whereby a meeting was sought for agreeing on the text of a proposed tripartite agreement involving the lenders of JJVL. Importantly, however, from the same letter it is clear that there was no question of deleting clause 18 of the Implementation Agreement because the said clause and Schedule 5 were unquestionably and undisputedly part of the agreed terms.

30. The mysterious and baffling way in which Clause 18 and Schedule 5 suddenly disappeared from the Implementation Agreement is evident from the drafts of the Implementation Agreement that were exchanged between JJVL and SSGCL prior to its final signing. Clause 18 and Schedule 5 were present in the same language as the form of the Implementation Agreement in the first draft of the Implementation Agreement dated 06.11.2002 as well as the "corrected draft" dated 19.05.2003. It is particularly pertinent to note that in both these drafts, Schedule 5 contained the ceiling of US \$32 million for acquisition of the plant that was stipulated in the LOI. It must also be borne in mind that

there was a six-month gap between the first draft of 06.11.2002 and the “corrected draft” of 19.05.2003; a gap wherein Clause 18 and Schedule 5 remained unchanged. Inexplicably, after a gap of only 4 days, there appeared a “final Implementation Agreement” dated 23.05.2003 which has been placed on record by JJVL. This contains the meaningless and ineffective substitution to Clause 18 that JJVL had proposed, as detailed above. There is no indication at all of what transpired in these four days to suddenly make Clause 18 and Schedule 5 disappear into thin air. Despite opportunity given by the Court, no documentation has been placed on record by JJVL to throw light on this murky issue. In the circumstances, it is clear that Clause 18 and Schedule 5 have been invalidly removed from the Implementation Agreement to prevent SSGCL from acquiring the plant in the event of JJVL’s default at the option of SSGCL. From the foregoing discussion on royalty, it is already established that JJVL has defaulted in payment of the mandated and agreed basis for calculating royalty.

31. In addition to the changes in the draft Implementation Agreement, noted above, other substantial changes were also made to accommodate JJVL and its lenders. It is not necessary to advert to all such changes because the specific deviations from the draft Implementation Agreement and Instructions to Bidders, noted above, are sufficient for the purpose of demonstrating that the award of the LPG extraction Project to JJVL and the execution of the Implementation Agreement executed on 12.8.2003 were not lawful and were based on considerations meant to benefit JJVL at the expense of the State enterprise SSGCL. We also are left in no doubt *inter alia*, that:

- (a) JJVL’s bid was invalid having been submitted without the mandatory Bid Bond and, therefore, could not lawfully have been accepted and was in fact liable to rejection in terms of the Instructions to Bidders;
- (b) The royalty payments which were pegged to the higher of Saudi Aramco or domestic price of LPG and such basis had been expressly agreed between SSGCL and JJVL was unlawfully and without justification, altered to favour JJVL and as a result JJVL was granted an unearned and wrongful gain;

- (c) The terms of the draft Implementation Agreement which were the basis for making bids and for evaluating the same were materially and substantially modified after the bidding process to give undue and illegal favours to JJVL.

32. The foregoing discussion and the circumstances brought on record show gross criminal negligence on the part of functionaries of SSGCL, JJVL and possibly others, or the existence of corruption and/or corrupt practices in the bidding process, award of the LPG extraction project, overruns and delays in implementation of the Project etc.

33. Before parting with this section of our opinion, it may be noted that the Petitioner also made reference to the order of the Competition Commission of Pakistan (Respondent No. 6) dated 15.12.2009 wherein it was held *inter alia*, that JJVL had abused its dominant position in the market and thus violated section 10 of the Competition Act, 2010. We, however, refrain from dilating on this point as the said order has been challenged by JJVL and the matter is *sub-judice* before the Lahore High Court.

Maintainability.

34. Learned counsel on behalf of JJVL urged and supported his contentions against the maintainability of the Petition by referring to a number of precedents from this Court. He contended *inter alia*, that since Suit No. 151/2011 and CP No. 270/2007 are pending before the Sindh High Court and CCA No. 2/2010 is pending before the Lahore High Court, the Supreme Court should not entertain a petition under Article 184(3) of the Constitution. According to him, the matters arising in this Constitution Petition are the same as are being agitated in the said pending litigation. This submission is not correct because, firstly; suit No. 151/2011 has been filed by JJVL itself and no questions of public importance in respect of enforcement of fundamental rights arise therein. Moreover, the issues which have been raised by the petitioner and are discussed above are incapable of being made subject matter of the aforesaid civil suit. Secondly, CP 270/2007 has been filed by two shareholders of SSGCL who have an alleged grievance against SSGCL and its management. The present status of CP 270/2007 is that though it has been pending since 2007 no progress has been made therein. Furthermore, important questions which have been raised by the petitioner relating to the enforcement of the

fundamental rights of the People and issues involving the illegalities in the bidding process are not the subject matter of CP 270/2007, and, thirdly; the pending CCA 2/2010 impugns an Order of the Competition Commission of Pakistan imposing a fine on JJVL. It has no nexus with the issues arising before us in this case.

35. It was also urged on behalf of JJVL that the matter involves contractual rights that are not capable of adjudication without the formal recording of evidence; and evidence is generally not recorded in proceedings under Article 184(3). This submission is quite easily addressed by noting that the authenticity of the documents and record on which our opinion is based is not disputed; only the legal effect of the same has been examined by us. Thus no evidence is required to be recorded in these proceedings. Here we may also refer to the order dated 1.6.2009 passed in CP 270/2007 by a learned Division Bench of the Sindh High Court. It has been noted therein that the Supreme Court had asked the Sindh High Court to decide CP 270/2007 and connected cases preferably within a period of one month. Although more than four years have passed since the order of this Court, CP 270/2007 and connected matters, including suit No. 151 of 2011 have still not been decided. It would be quite pointless and a waste of time not to exercise jurisdiction under Article 184(3) which otherwise is clearly attracted. We have discussed below a number of recent judgments wherein the scope of the jurisdiction under Article 184(3) of the Constitution has been elaborately spelt out. The facts and circumstances of the present case clearly fall within such jurisdiction considering that the use and management of valuable natural resources by the State and its instrumentalities such as SSGCL, is involved.

36. Natural gas and LPG extracted therefrom are precious mineral resources vesting in the State and ultimately in the People. SSGCL is a State enterprise in which the majority shareholding is held by the Government. SSGCL is therefore, not free to deal with such assets whimsically or in utter disregard of the fiduciary duty owed to the nation. Nor, we may add, does SSGCL have unfettered discretion to deal with national assets in a manner that does not protect and advance the best interests of SSGCL as a fiduciary and repository of the interest of the people of Pakistan who are, through the Government, beneficial owners, not only of the mineral resources of the country but also

of a majority interest in SSGCL. It is also particularly important to note that LPG is being used in Pakistan by people who, for a variety of reasons either do not have access to, or are unable to obtain natural gas. In our recent judgment in Habibullah Energy v. WAPDA (Civil Appeals 149 and 150 of 2010), it has been explained that “*public sector enterprises... 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*”. We had also emphasised that “[r]ather than being owners of public sector enterprises, state agencies stand in a fiduciary relationship to the people” and also that 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*”. In another recent judgement in the case titled Khawaja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205) we held that “*it is a fundamental right of the citizens of Pakistan under Article 9 of the Constitution that the national wealth/resources must remain fully protected whether they are under the control of the banks or the autonomous or semi-autonomous bodies.*” We may also have recourse to the decision in Raja Mujahid Muzaffar v. Federation of Pakistan (2012 SCMR 1651); and the judgment reported as *Suo Motu Case No. 13 of 2009 (PLD 2011 Supreme Court 619)* wherein it was held that “*in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied... In such matters, judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in [the] larger public interest*”. These precedents leave us in no manner of doubt that in the present case we must exercise our jurisdiction under Article 184(3) of the Constitution.

37. Recently we have also dealt with cases and adjudicated issues of corruption, corrupt practices and non-transparency in the award of public contracts. In this regard reference may be made to Raja Muhajid Muzaffar vs. Federation of Pakistan (2012 SCMR 1651), Suo motu action regarding violation of Public Procurement Rules, 2004 in procurement of billions of rupees of exchequer case by National Insurance Co. Ltd. (S.M.C. No. 18 of 2010), Asif Fasihuddin Khan Vardag v. Government of Pakistan (C.P. 33 of 2013) and Habibullah Energy Ltd. Vs. WAPDA etc. (Civil Appeals Nos. 149 & 150 of 2010). The cardinal principle which has been kept in mind by this Court is that waste, plunder or wanton and

heedless use of public resources and funds must be prevented and public wealth wherever squandered must be recovered. The importance of fair, even handed and open competitive bidding has also been repeatedly emphasized by us while exercising our jurisdiction under Article 184(3) of the Constitution. In the matter of Suo Motu Case No.13 of 2009: Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad (PLD 2011 Supreme Court 619), we have emphasized that the Government and its instrumentalities are expected to act fairly, justly and in a transparent manner. Transparency lies at the heart of every transaction entered into by or on behalf of a public entity such as SSGCL. It was also observed by us that *“any transaction which is not transparent and goes against the interests of the general public constitutes violation of Article 9 of the Constitution”*. This Article guarantees the right to life as defined by this Court starting from the case of Ms. Shehla Zia vs. WAPDA (PLD 1994 SC 693). The jurisdiction under Article 184(3) *ibid* is meant precisely for the purpose of ensuring that the assets belonging to the People (such as mineral resources) are managed and exploited for the benefit of the People of Pakistan and also for ensuring that waste or abuse of such assets is not allowed to take place or to continue.

38. As noted above, people all over the country who cannot obtain natural gas rely on supply of LPG for many of their needs. The supply of LPG to a very large number of users, including those living in far-flung areas is a matter of public importance impacting their ‘life’ as defined by this Court. Such supply, therefore, needs to continue unabated. This much has been accepted by the parties before us. In fact it was the contention of counsel on behalf of JJVL that the Implementation Agreement should not be terminated because LPG is so important to the people of Pakistan; and that termination of the said agreement would result in a highly detrimental disruption in the supply of LPG to a large body of consumers. Six LPG marketing companies who receive LPG from JJVL were also heard. Their counsel also emphatically stressed the importance of the continued supply of LPG to such consumers. These marketing companies do not have any privity of contract with SSGCL nor can they lawfully insist on supply of LPG to them in the event the Implementation Agreement comes to an end, but their

submissions as to continued delivery of LPG to the end consumer have been taken into account by us.

39. It was also emphasized before us that if LPG extraction is discontinued, the components of LPG i.e. butane and propane will be wasted as these will have to be flared and will no longer remain available for supply to consumers. Although this does not explain the loss (through flaring) on account of the inordinate delays in implementing the Project in 2001-2003 by SSGCL and JJVL, avoidance of wastage through flaring is an important consideration for the purposes of passing an order to ensure that precious and scarce mineral resources of the nation are not frittered away and nor is the majority interest of the Government in SSGCL used for mismanaging and wasting national assets or for exploitatively bestowing undue favours on some at the expense of the People. In this respect, we are guided by the exhortation that *"the State shall ensure the elimination of all forms of exploitation ..."* (Article 3 of the Constitution) and Article 38 of the Constitution which commands that *"the State shall ... secure the well being of the people ... by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest ..."*.

40. We, therefore, for the reasons recorded above hold, declare and direct as under:-

- (1) The Implementation Agreement dated 12.08.2003 was awarded to JJVL in gross violation of the bidding process as advertised and as set out in the tender documents, including Instructions to Bidders.
- (2) The project was awarded by SSGCL in a highly non-transparent manner with the object of giving undue benefit to JJVL.
- (3) The changes made in the Implementation Agreement which have been noted in paras 16 to 32 above, were made with the object of giving unfair and unlawful benefit to JJVL at the cost of the State, State enterprise SSGCL and ultimately, the People of Pakistan.
- (4) The deletion of clause 18 of the Implementation Agreement and its substitution by a vague and meaningless clause was at the behest of JJVL and for the benefit of JJVL and its lenders at the expense of the general public interest.
- (5) The basis for calculating royalty payments which had specifically been agreed was unlawfully altered to provide benefit to JJVL and heavy loss to SSGCL, the State and ultimately to the People of Pakistan.

- (6) For the aforesaid reasons, the Implementation Agreement as executed between SSGCL and JJVL cannot be allowed to continue being based on illegalities from its very inception and is accordingly set-aside with all consequential liabilities as are provided in the "corrected draft" Implementation Agreement dated 19.5.2003. All losses caused to and incurred by the State, State enterprise SSGCL and the People arising out of and as a result of the bidding process and during the tenure of Implementation Agreement are to be made good and recovered from JJVL and all persons who had actively participated and had made substantial decisions in the bidding process and making of the Implementation Agreement.
- (7) A Committee comprising of (i) Mr. M. H. Asif, former Member, OGRA and, (ii) Mr. Shabbar Raza Zaidi, Partner of M/s A.F. Ferguson and Co., Chartered Accountants, is constituted for the following purposes:-
- (a) to calculate royalty payments (on the LPG extracted to date) on the basis of the Saudi Aramco reference price plus freight, for the full period during which the Implementation Agreement has been operational; this shall be done within 15 days from the date of this Order; an opportunity of hearing shall be afforded to SSGCL and JJVL while making the calculation;
 - (b) to determine an acquisition price for the LPG extraction Plant, as nearly as possible in accordance with the LOI dated 28.6.2002 and clause 18 read with Schedule 5 of the draft Implementation Agreement dated 19.5.2003 relating to a JJVL Event of Default; this shall be done within 15 days from the date of this Order;
 - (c) to suggest a management mechanism to the Court for appropriate orders including, if necessary, for the appointment of an independent manager/receiver; this may be done within 15 days of this Order and until then the Plant shall be managed by two senior persons, one each to be nominated by SSGCL and JJVL respectively; any deadlock between them shall be resolved by a decision of the Committee;
 - (d) to obtain from SSGCL and JJVL such information and data as may be necessary for the Committee to fulfil its responsibilities;
 - (e) to suggest ways in which the supply of LPG to end consumers continues unabated and without disruption;
 - (f) to seek such clarifications or further orders from the Court as may be considered necessary by the Committee.

- (8) The Office shall make available copies of the record to the Committee.
- (9) The fee of the Committee shall be determined on the basis of the extent and nature of the work.
- (10) The amount already deposited in Court by virtue of our order dated 23.05.2013 shall be paid to the party entitled, after determination of the amount of royalty payments on the basis indicated above.
- (11) The FIA shall inquire into the matters which have been noted and highlighted in this judgment and submit a report which shall identify all those who are responsible for the failings, including acts of criminal negligence, corruption, corrupt practices or other offences. FIA shall also inquire into and investigate such other matters which may come to light from examination of any documents and records during the course of inquiry/investigation. The report shall be submitted by FIA in Court within 30 days from today.

Chief Justice

Judge

Judge

Islamabad

A. Rehman

Announced on: 04.12.2013.

APPROVED FOR REPORTING.