IN THE SUPREME COURT OF PAKISTAN
[Appellate/Original Jurisdiction]

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE GULZAR AHMED
MR. JUSTICE SH. AZMAT SAEED

CIVIL PETITION NO.796 OF 2007 AND CMA NO.4560 & 4561 OF 2009 AND CMA NO.116 OF 2011 & CMA NO.403 & 406 OF 2012

(On appeal from the judgment of the High Court of Balochistan, Quetta dated 26.06.2007 passed in Constitution Petition No. 892/2006)

Maulana Abdul Haque Baloch and others ... ... PETITIONERS
Versus
Government of Balochistan through Secretary Industries and Mineral Development and others ... ... RESPONDENTS

CONSTITUTION PETITION No.68 OF 2010 & CMAs NO.3687 of 2010, 117, 151, 215, 324, 414 & 690 OF 2011

M. Tariq Asad, Advocate ... ... PETITIONER
Versus
Federal Government through its Federal Secretary, M/o Petroleum and Natural Resources, Islamabad and others ... ... RESPONDENTS

CONSTITUTION PETITION NO.69 OF 2010

Watan Party and another ... ... PETITIONERS
Versus
Federation of Pakistan and others ... ... RESPONDENTS

CRIMINAL ORIGINAL PETITIONS NO.1 OF 2011 AND 95 OF 2012 IN CONSTITUTION PETITION NO.69 OF 2010

Watan Party and another ... ... PETITIONERS
Versus
The Federation of Pakistan and others ... ... RESPONDENTS

CRIMINAL MISC. APPLICATION NO.8 OF 2011 IN CIVIL PETITION NO.796 OF 2007

Ehsan Ullah Waqas, MPA, Punjab ... ... PETITIONER
Versus
Tethyan Copper Company and others ... ... RESPONDENTS

CONSTITUTION PETITION NO.1 OF 2011

Qazi Siraj-ud-Din Sanjrani and another ... ... PETITIONERS
Versus
Federation of Pakistan & others ... ... RESPONDENTS

CONSTITUTION PETITION NO.4 OF 2011 & CMA NO.295 OF 2011

Senator Mohammad Azam Khan Swati, etc. ... ... PETITIONERS
Versus
Federal Government through its Federal Secretary,
M/o Petroleum and Natural Resources,
Islamabad, etc. ... ... RESPONDENTS

AND

HUMAN RIGHTS CASE NO.5377-P OF 2010

Application by Kh. Ahmed Tariq Rahim, Sr. ASC ... ... APPLICANT

For the petitioner (In CP No.796/2007)	:	Mr. Raza Kazim, Sr. ASC Mr. Mehmood A. Sheikh, AOR assisted by Mr. Usman Raza Jamil, Advocate
Petitioner (In Const. P NO.68/2010)	:	Mr. Tariq Asad, ASC in person
Petitioner (In Const. P No.69/2010 & Crl.O.Ps.1/11 & 95/12)	:	Barrister Zafarullah Khan, ASC in person
For the petitioners (In Const. P No.1/11)	:	Sahibzada Ahmed Raza Khan Qasuri, Sr. ASC
For the petitioners (In Const. P No.4/11)	:	Mr. Tariq Asad, ASC with Mr. Muhammad Azam Khan Sawati
For the applicant (In Crl. M. A No.8/2011)	:	Mr. Hasnain Ibrahim Kazmi, ASC
For the applicant (CMAs No.3687/10 & 151/11)	:	Malik Shakeel-ur-Rehman, ASC
For the applicant (CMA No.215/11)	:	Mr. M. Ikram Chaudhry ASC
For the applicant (CMAs No.324/11 & 718/12)	:	Raja Abdul Rehman, ASC
For the applicant (CMA-414/11)	:	Mr. Saleem Khan, ASC Ms. Afshan Ghazanfar, ASC
For the applicant (CMA-690/11)	:	Mir Aurangzeb, ASC/AOR

Applicant (In CMA. 2924/12)	:	Ms. Robina Shah, Social Worker In Person

<u>For the Respondents:</u>

For Government of Balochistan (Resp. Nos.1 in C.P.796/07) (Resp. No.2,3&5 in Const.P.68/10) (Resp. No.3&4 in Const.P.69/10) (Resp. No. 1 in Const.P.01/11) (Resp. No.2-4 in Const.P.04/11)	:	Mr. Amanullah Kanrani, AG Mr. Ahmar Bilal Soofi, ASC Mr. M. Aslam Ghuman, ASC Raja Abdul Ghafoor, AOR with Mr. Zarbat Khan, Director Mr. Azhar Ghaffar, Dy. Dir. (Mining) Assisted by M/S Noor Ahmed Zeb, Shehzad Haider & Osman Karim Khan, Advocates
For the Federation through M/o Petroleum, etc (Resp. No.3 in C.P. 796/07) (Resp. No.1&4 in Const.P.68/10) (Resp. No.1&2 in Const.P.69/10) (Resp. No.2,3&5 in Const.P.01/11) (Resp. No.1 & 8 in Const.P.04/11)	:	Raja Abdul Ghafoor, AOR Mr. Irshad Ali Khokhar, DG, Mineral Mr. M. Iqbal, Dir. (Mining)
For Tethyan Copper Co. Pakistan (Resp. No.4 in C.P.796/07) (Resp. No.6 in Const.P.69/10) (Resp. No. 4 in Const.P.01/11) (Resp. No. 6 in Const.P.04/11)	:	Mr. Khalid Anwar, Sr. ASC Mr. M. S. Khattak, AOR Mr. Mehr Khan Malik, AOR assisted by Barrister Zeeshan Adhi & Mr. Anas Makhdoom, Advocates
For Antofagasta Plc London & Barrick Gold Corp. Canada (Resp. No.5 & 7 in C.P. 796/07)	:	Mr. Mansoor Ahmed Sheikh, ASC Mr. Arshad Ali Chaudhry, AOR
For Muslim Lakhani (Resp No.6 in C.P.796/07)	:	Mr. Khalid Anwar, Sr. ASC Mr. Mehr Khan Malik, AOR
For BHP Minerals (Resp. No.8 in C.P. 796/07) (Resp. No.5 in Const.P.04/11)	:	Mr. Abdul Hafeez Pirzada, Sr. ASC Mr. Sikandar Bashir Mohmand, ASC Mr. Arshad Ali Ch. AOR Assisted by M/s Mustafa Aftab Sherpao and Hamid Ahmad, Advocates
For Balochistan Development Authority (Resp. No.2 in C.P.796/07)	:	Mr. Hadi Shakeel Ahmad, ASC
For State Bank of Pakistan (Resp. No.5 in Const.P.69/10)	:	Qazi Ahmed Naeem Qureshi, ASC
For Dr. Samar Mubarakmand (Respondent No.6 in Constitution Petitions No.68/10 & 01/2011)	:	Nemo

For M/s Shaheen Sehbai & Ahmad Norani (Resp. No.7 in Const.P.68/10)	:	Nemo
For Sardar Atif Ali Sanjarani (Resp.No.7 in Const. P No.1/11)	:	Raja Muqsit Nawaz Khan, ASC
For Benway Corporation (Resp. No. 7 in Const.P.04/11)	:	Mr. Shahid Kamal Khan, ASC Mr. Arshad Ali Chaudhry, AOR
On Court notice	:	Nemo for TCC
Dates of hearing:		13-16, 19-23, 26-29 November, 3-7, 10-11, 17-21 December, 2012

...

J U D G M E N T

IFTIKHAR MUHAMMAD CHAUHDRY, C.J. — Above matters were disposed of by this Court *vide* short order dated 07.01.2013 in the terms stated therein for reasons to be recorded later. This judgment provides reasons of the aforesaid short order.

2. Reko Diq (earlier known as 'Koh-e-Dalil') is a small town in a desert area in District Chagai, Balochistan, which is 70 kilometres (km) north-west of Naukundi close to Pakistan's border with Iran and Afghanistan. The area is located in Tethyan belt that stretches all the way from Turkey and Iran into Pakistan. Reko Diq, which means 'sandy peak' in Balochi language, is also the name of an ancient volcano. It is famous because of its vast gold and copper reserves and is believed to be the world's fifth largest goldmine. According to some sources, the deposits at Reko Diq include copper porphyry, with total mineral resources of 5.9 billion tons of ore with an average copper grade of 0.41% and gold grade of 0.22 grams per ton. The economically mineable portion of the deposits is calculated at 2.2 billion tons, with an average copper grade of 0.53% and gold grade of 0.30 grams per ton, with an annual production estimated at 200,000

tons of copper and 250,000 ounces of gold contained in 600,000 tons of concentrate.

3. On 29.07.1993, Balochistan Development Authority (BDA), a statutory corporation established under section 3(2) of the Balochistan Development Authority Act, 1974, hereinafter referred to as BDA Act, 1974, entered into a Joint Venture Agreement called "the Chagai Hills Exploration Joint Venture Agreement" (CHEJVA) with respondent BHP Minerals Intermediate Exploration Inc. (BHP), which is stated to be incorporated at the State of Delaware, USA and engaged in exploration of minerals, for exploring copper and gold in the *Reko Diq* area. The salient features of CHEJVA as per various Article of the agreement, i.e., description and relationship of parties, creation of joint venture, arbitration and certain other conditions of agreement are reproduced herein below: -

> "THIS AGREEMENT is made the 29th day of July, 1993 between the GOVERNOR OF BALOCHISTAN, through the CHAIRMAN BALOCHISTAN DEVELOPMENT AUTHORITY a statutory corporation of Balochistan Province (hereinafter called the "BDA") of the first part.
>
> AND BHP MINERALS INTERNATIONAL EXPLORATION INC. a corporation of the State of Delaware, U.S.A. (hereinafter called the "BHPM") of the other part.
>
> ARTICLE 2. CONDITIONAL AGREEMENT
>
> 2.1 This Agreement shall be conditional upon the Parties receiving from the Federal Government and/or the Provincial Government (as the case may be) within six (6) months of the date of this Agreement or such other period as the parties may agree:
>
> (i) all consents and approvals necessary under Pakistani law; And
> (ii) all assurances as to fiscal parameters for investment in any future Mining Venture which either of the Parties may have needed for.
>
> 2.2 The Parties shall co-operate in making application for any necessary consents, approvals and assurances required pursuant to Clause 2.1 and shall use all reasonable endeavours to obtain the aforesaid.
>
> 2.3 If pursuant to Clause 2.1 any necessary or required Governmental consent, approval or assurance is not obtained within six (6) months of the date of this Agreement, unless

otherwise agreed by the Parties, this Agreement shall absolutely cease and determine and neither Party shall have any rights or claims against the other as a result thereof.

ARTICLE 3 CREATION OF JOINT VENTURE

3.1 Subject both to Article 2 and to the satisfaction of Clause 5.2, the Parties hereby establish a contractual joint venture the objects of which are to explore for Mineral deposits in the Exploration Area and to conduct Feasibility Studies so as to evaluate the economic viability of the said Mineral deposits in the Exploration Area and all acts ancillary thereto which the Operating Committee shall resolve to be carried out.

3.2 BHPM shall be entitled to earn a seventy-five percent (75%) Percentage Interest in the Joint Venture by conducting within six (6) years of the Commencement date at its own expense (subject to Clause 7.2) Stage One Activities and Stage Two Activities and, if resolved that a Feasibility Study should be commissioned pursuant to Clause 11.2, then on completion of the Feasibility Study within the time allowed by the Parties for undertaking such.

3.3 Subject to satisfactory completion by BHPM of the Exploration Programme in accordance with Clause 3.2 and to the provisions of Article 13, as at the Commencing Date, BHPM shall be deemed to have received a fully vested legal and beneficial seventy-five percent (75%) Percentage Interest in the Joint Venture.

3.4 Subject as hereinbefore stated, as at the Commencement Date, the Parties' respective Percentage Interest shall be deemed to be as follows:

BDA	25%
BHPM	75%

ARTICLE 4 RELATIONSHIP OF PARTIES

4.1 The relationship of the Parties shall be one of unincorporated joint ventures and subject to this Article, nothing contained in this Agreement shall be construed or is intended to constitute any Party a partner, agent or representative of any other Party or to create any trust, mining or commercial partnership or new or separately taxable legal entity for any purpose whatsoever nor, save to the extent provided in this Agreement, shall anything contained herein be construed as constituting any Party an agent, representative or trustee of any other Party, it being expressly understood that each Party is entering into this Agreement solely for the purpose of protecting and developing its Percentage Interest.

4.3 Each Party shall hold a beneficial interest as tenant-in-common in the Joint Venture Property according to its Percentage Interest.

4.4. The rights and obligations of the Parties under this Agreement shall be several and not joint nor joint and several.

ARTICLE 5 EXPLORATION AREA & PROSPECTING LICENCES

5.2 Grant of Exploration Area

The Parties shall seek from the Provincial Government the following rights:

(a) for a period of three (3) years beyond the Commencement Date (a period hereinafter called the "Initial Period"), the exclusive and unfettered right to undertake Stage One Activities within the Exploration Area and, subject only to Clause 5.3, to apply for and be granted therein Prospecting Licences; and

5.3 Area Available for Prospecting Licences

5.3.1 The Parties shall seek from the Provincial Government the right to apply for Prospecting Licences may, in aggregate, at any time for the duration of this Agreement cover up to fifty square kilometers (50 sq. km) therein. For this purpose, the Joint Venture may secure its entitlement by means of up to ten (10) Prospecting Licences.

5.3.2 Where at any time the Joint Venture is active in ten (10) Prospecting Licences having, in aggregate, an area of fifty square kilometers (50 sq km), it shall not be permitted to apply for additional Prospecting Licences within the Exploration Area unless it first relinquishes from one or more of its existing Prospecting Licences an area equivalent to the size of the proposed Prospecting Licences. The Joint Venture shall not be precluded from relinquishing only a portion of an existing Prospecting Licences.

5.3.3 Where the Joint Venture relinquishes any Prospecting Licences (the "relinquished area") BDA shall be entitled to freely undertake such further exploration activities as it desires in the relinquished are. Further, BDA shall be entitled to utilize such Mining Information as exists with respect to the relinquished area, provided that in dealing with third parties with respect to the relinquished area, BDA will maintain strict confidentiality in accordance with the requirements of Article 18 as regards all other areas within the Exploration Area in respect of which the Joint Venture is then active or still interested.

5.4 Application for Prospecting Licences within the Exploration Area

5.4.1 The Parties may in accordance with Clause 5.2 apply for Prospecting Licences to explore for Minerals within the Exploration Area at any time within six (6) years of the Commencement Date. During the Initial Period the Parties right to grant of the said 'Prospecting Licences shall be automatic, subject only to Clause 5.8 but beyond the Initial Period the Parties right to grant of Prospecting Licences shall be subject to the normal administrative discretion of the Directorate of Mineral Development.

5.4.2 Each of the Prospecting Licences shall be issued to the Joint Venture for an initial term of two (2) years with the option to extend for up to three (3) years beyond the said initial term, provided that where the parties have commenced a Feasibility Study, the conclusion of which will not be possible until beyond effluxion of the five (5) year term possible for the relevant Prospecting Licence. The Directorate of Mineral Development

shall grant such further extension of time as may be reasonably required to permit conclusion of the said Study. The Parties shall also seek (pursuant to Clause 2.2) to have the said possibility of a further extension of time recognized by the Provincial Government.

5.5. Satisfaction of Conditions Attaching to Prospecting Licences

The Joint Venture shall hold each Prospecting Licence subject to compliance with all conditions attaching thereto, including:

(a) performance of all basic tenement maintenance works and expenditure requirements relating thereto; and

(b) the timely provision of reports to the Directorate of Mineral Development concerning specified aspects of Joint Venture Activities undertaken within the relevant reporting period.

5.6 Exclusive Right

The Parties shall seek (pursuant to Clause 2.2) additional assurances from Provincial Government, as are appropriate, namely, that the Parties shall for the duration of each Prospecting Licence be:

(a) entitled to have, insofar as the exploration for Minerals is concerned, exclusive possession of the area the subject of each Prospecting Licence for all the purposes of conducting the Joint Venture Activities; and

(b) take all reasonable steps to ensure that third parties do not impede the Joint Venture Activities or jeopardize the safety of any person engaged by the Parties for the purposes thereof.

5.7 Application Procedure for Prospecting Licences & Securing of Access Rights

5.7.1 Where so directed by the Manager, BDA shall be responsible on behalf of the Joint Venture for making all applications for those Prospecting Licences referred to in such-clause 5.4.1, for Mining Leases required pursuant to Clause 5.9, or pursuant to Clause 6.5, for Prospecting Licences with respect to Other Minerals.

5.9 Application for Mining Leases

The Parties shall pursuant to Clause 2.2 seek assurance from the Provincial Government, namely, that the Joint Venture shall have the right to apply for a Mining Lease at any time during the conduct of Stage Three or Stage Four Activities, if in the opinion of the Manager, a decision to undertake mining development is likely to be made pursuant to either of sub-clauses 8.2.10(d) or 11.3.2. the said Mining Lease shall be renewed at the commencement of any Mining Venture for the during of proposed mining operation thereunder.

7.2 ... ...

(a) appropriate administrative support as required for the obtaining of all leases, licences, claims, permits or other authorities of any kind whatsoever being necessary for the conduct of Joint Venture Activities;

10.3 Duties of Manager

In addition to the Manager's obligations specified elsewhere in this Agreement, the Manager shall undertake on behalf of the Parties the following actions:

(a) in consultation with BDA, make timely preparation and submission of programmes and budgets as provided by Clause 9.7;
(b) in accordance with those general directions, instructions and parameters for action issued from time to time by the Operating Committee, the ability to enter into contracts for the purposes of the Joint Venture Activities on behalf of the Parties;
(c) ….
(d) ….

(e) Make all Joint Venture Expenditure and commitments for the Joint Venture Activities on behalf of the Parties in accordance with programmes and budgets approved by the Committee and, subject to Clause 8, wherever possible avoid expenditures of commitments for Joint Venture Activities in excess of any approved budget;
(f) Furnish to the Committee reports on any matters of importance as soon as practicable after their occurrence and, in particular, advise the Committee of any factual information on the Prospecting Licences or other property held by the Venture (or by one Party on behalf of the other) which comes to his attention and which might reasonably be expected to result in material gains or losses to the Parties;

10.6 Authority over Joint Venture Property

For the purpose of managing the Joint Venture Activities, the Manager shall, under the supervision and control of the Operating Committee, be deemed to have possession and control of all the Joint Venture Property and shall have the authority to make decisions or enter into legally binding agreements concerning or relating thereto.

10.7 Contractors & Consultants

The Manager shall have the right to conduct any Joint Venture Activities through contractors and the right to employ or engage on sound competitive and commercial terms, consultants or advisers. Without limiting the generality of the foregoing, the Manager shall, subject to Clause 9.6, have the right to engage the services of specialist in-house research organizations and related Corporations.

ARTICLE DECISION AS TO MINE DEVELOPMENT

11.4.1 Mining development shall proceed either if the Parties so decide pursuant to sub-clause 8.2.10(d), and/or if pursuant to sub-clause 11.3.2 one or more Participating Parties give notice of an intention that development is to proceed.
11.4.2 Where BDA is a Non-participating Party, then subject both

to BHPM obtaining all routine Government approvals required and to compliance with Clause 11.6, BHPM shall be entitled to undertake sole risk investment (or form a consortium to undertake such investment) in a mining development within any of the relevant Prospecting Licences.

11.5 Should a mining development proceed pursuant to Clause 11.4, then within one hundred and twenty (120) days of the Election Date the Participating Party and the Non-participating Party shall in good faith negotiate and agree upon the fair value to be paid by the Participating Party to Non-participating Party's Percentage Interest in all the Joint Venture Property pertaining to proposed Mining Area (hereinafter called the "Non-participating Party's Transfer Interest".

ARTICLE 15 DISPUTE RESOLUTION

15.1 Consultation

The Parties shall meet periodically to discuss the conduct of the Joint Venture Activities and shall make every effort to settle amicably and in good faith disputes of any kind whatsoever arising out of or related to the performance of this Agreement.

15.4 Arbitration

15.4.1 Any dispute in respect of which:

(i) amicable settlement has not been reached within one hundred and twenty (120) days of written notice of the dispute;

(ii) neither Party requests resolution of the dispute by the Expert within the thirty (30) day period set forth in Clause 15.2 or a decision by the Expert pursuant to Clause 15.2 has not become final and binding pursuant to sub-clause 15.2.5, or

(iii) pursuant to sub-clause 15.2.2 the Parties fail to agree upon the appointment of an Expert,

shall be submitted to the International Centre for the Settlement of Industrial Disputes (the "Centre") established by the Convention for Settlement of industrial disputes between states and nationals of Other States in effect since October 14, 1966 (the "ICSID Convention")

15.4.2 To the extent required by the ISCID Convention each of the Parties agrees to submit to arbitration under the ICSID Convention, but should sub-clause 15.4.8 operate, then the Parties agree to submit to an arbitration conducted pursuant to the ICC Rules.

15.4.3 In all cases of arbitration pursuant to this Clause 15.4:

(a) arbitration shall take place in London, United Kingdom, unless the Parties decide otherwise;

(b) the language of the arbitration shall be English and all hearing materials, statements of claims or defence, and awards and the reasons supporting them shall be in English; and

(c) the costs of the arbitration shall be borne by the

losing Party.

15.4.4 In rendering their decision, the arbitrators shall consider the intention of the Parties at the time of entering into this Agreement insofar as it may be ascertained from the Agreement, Pakistani law, and as provided by Article 16, generally accepted standards and principles of international law applicable to the mining industry.

15.4.5 Any arbitrator(s) appointed pursuant to this Clause 15.4 shall have the full power to review and revise any decision, recommendation or opinion of the Expert related to the dispute. No Party shall be limited in the arbitral proceedings to evidence or arguments submitted to the Expert pursuant to Clause 15.2, and nothing shall prevent the Expert from being called as a witness to give evidence before the arbitrators.

15.4.6 The award of the arbitral tribunal shall be final and binding upon the Parties, and any Party may seek to enforce or execute the award in any court of competent jurisdiction. The Parties hereby waive any defence or sovereign immunity they may have or claim to have in relation to any action brought to enforce or execute any arbitral award.

15.4.7 For the purposes of arbitration pursuant to the ICSID Convention, the Parties agree that the transactions to which this Agreement relates constitute an investment within the meaning of Article 25(1) of the ICSID Convention.

15.4.8 In case, for whatever reason, the Centre should not accept jurisdiction or should reject the arbitration request, the dispute shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules") and the provisions of sub-clauses 15.4.3, 15.4.4, 15.4.5 and 15.4.6 shall apply. Arbitration shall be conducted by one sole arbitrator appointed by mutual agreement of the Parties. This arbitrator shall have extended experience in the mining field. In case the Parties cannot agree on the choice of the arbitrator, arbitration shall be of a nationality other than that of the Parties and shall have extended experience in the mining field. In case the Parties cannot agree on the choice of the arbitrator, arbitration shall be conducted by three arbitrators named in accordance with the ICC Rules.

ARTICLE 16 APPLICABLE LAW

The Law applicable to this agreement is the law of Pakistan which the Parties acknowledge and agree includes the principles of international law.

ARTICLE 17 CHANGE IN LEGISLATION

If, after the signing of this Agreement, there is any change in existing laws, regulations rules or policies (a "Change") or any new laws, regulations rules or policies are introduced (a "New

Provision") in Pakistan which is applicable to the Joint Venture or the activities of any Party in relation to matters dealt with herein and the effect of the Change or New Provision is either to provide for preferential treatment to or, conversely, to have an adverse effect on the Joint Venture or upon BHPM, in particular, then:

(a) if the Change or the New Provision is more favourable to the Joint Venture or one of the Parties than the relevant laws, acts rules or regulations in effect on the date this Agreement was signed (and the other Parties are not materially and adversely affected thereby), the Joint Venture and the Party concerned shall promptly apply to receive the benefits of such Change or New Provision. All the Parties shall use their best efforts to cause such application to be approved by the relevant Government authorities; and

(b) if, because of the Change or New Provision, the economic benefits to any Party or the Joint Venture existing or to arise under this Agreement are materially and adversely affected, directly or indirectly, then this Agreement shall continue to be implemented in accordance with its original terms. If, for any reason, the provision in the preceding sentence cannot be implemented, upon notice by the affected party to the other Parties, the Parties shall consult promptly and make all such amendments to this Agreement and any other related documentation as are required to maintain or preserve the economic benefits of the affected party or the Joint Venture hereunder, provided, however, that the Parties other than the affected Party are not materially and adversely thereby."

ARTICLE 19 LABOUR REQUIREMENTS OF THE VENUTE

19.3 Where pursuant to Clause 19.3 it is not possible to give preference to Pakistani personnel or contractors, the Manager may introduce to the Joint Venture such expatriate personnel as in his judgment are required to carry out the conduct of the Joint Venture Activities efficiently and successfully and the Federal Government shall assist in making arrangements for the obtaining of all necessary permits for such personnel (including visas, work permits and such other permits as may be required).

4. On 04.03.2000, Addendum No. 1 was executed between three parties, namely, Governor of Balochistan, for and on behalf of the Province of Balochistan, referred to as "GOB", and the Balochistan Development Authority, a statutory corporation created by and existing under the BDA Act, 1974, and BHP Minerals, inter alia, with a view to clarify the role of the BDA under CHEJVA; to have the GOB confirm and ratify all past actions, matters and things done by the BDA in connection therewith; and to amend certain terms of CHEJVA. It

provided definitions and interpretations of the terms used in CHEJVA, clarified the role of BDA's appointment as GOB's agent, empowered to fully bind GOB and to be deemed as GOB, and made amendments in clause 1.1, gave definitions of the terms 'affiliate', 'area of operational activity', 'available cashflow', 'commencement date', 'equity portion', 'mine development', 'mining operations', 'minerals', 'participating interest', 'participating party', 'parties', 'percentage interest', 'prospecting licence', 'transfer', reviewed article 2 to the effect that the conditions set out in sub-clauses 2.1(i) and (ii) of CHEJVA had been satisfied or waived; substituted clause 3.2, amended articles 5, 7, 8, 9, 11, 12, 14, 15 and 22.

5. On 28.04.2000, BHP entered into an Option Agreement with Mincor Resources, a company incorporated in Western Australia with its place of business situated at Perth. Article 2.1 of this agreement sets out the intent of the parties to establish an exploration alliance for the aforesaid purpose under which Mincor will have the right to explore, develop, exploit and acquire mineral resources on exploration licences held by BHP and its partner GOB, or on exploration licences to be acquired by either party in the region. Article 2.2.1 provides that in consideration of the payment of $ 100 by Mincor to BHP, BHP grants to Mincor the sole and exclusive right and option during the Option Period to enter into Alliance with BHP. Under Article 2.2.4, BHP acknowledges that Mincor intends to create a specialized company to be known as the Tethyan Copper Company (TCC) to finance and operate the Alliance Agreement. BHP agrees to exercising of Minor Option by either Mincor or TCC as its nominee, or Minor may assign its rights under the Agreement to TCC at any time. The terms of the Alliance Agreement are set out in Article 3 of the option

agreement. The Mincor Option gave the sole and exclusive right to Mincor or its nominee to enter into Alliance with BHP to explore copper and gold in the region. Article 3.3 deals with the acquisition and Clawback right. It states that the Clawback right applies to any significant mineralized occurrence discovered during the term of the Alliance Agreement by or on behalf of Mincor anywhere in the region or survey area.

6. On 24.10.2000, TCC, as nominee of Mincor, exercised the Mincor Option and executed an Alliance Agreement on 19.04.2002. On 03.09.2002, after the BMR 2002 were enforced, TCCP applied for an Exploration Licence (EL) for copper, gold and associated minerals in an area of 973.75 sq. km. in Chagai District and was granted EL-5 *vide* letter dated 09.09.2002. TCC also purchased the Clawback right of BHP for US$60 million. TCC is owned by Atacama, which in turn is owned 50% by Antofagasta and 50% by Barrick Gold of Canada. In 2006, Antofagasta, a Chilean company registered in the United Kingdom through its subsidiary Atacama Copper Pvt. Ltd., made an offer to buy shares of TCC, which offer was accepted by the Board of TCC. As such, Antofagasta through Atacama acquired the total shares of TCC for AUD 220 million.

7. On 01.04.2006, Novation Agreement was entered into between the Governor of Balochistan for and on behalf of the Province of Balochistan (“GOB”) acting through its agent, the Balochistan Development Authority, (“BDA”); and BHP (as aforesaid); and Tethyan Copper Company Limited (ABN 24 093 519 692) a company incorporated in Australia (“TCC”). The recitals in this Agreement carry forward the one sided process of indirectly binding GOB more and more through the medium of BDA, inasmuch these recitals reiterate

that GOB through Chairman BDA and BHP are parties to CHEJVA and provide, *inter alia*, that the parties have agreed to enter into this Agreement to novate CHEJVA so as to substitute TCC with BHP as a party to the said Agreement on the terms set out in the Novation Agreement. It further provides that TCC, in replacing BHP, shall enjoy all rights and benefits accorded to BHP under CHEJVA and the respective percentage interests of GOB and TCC shall be 25% 75%. Thus, the 75% interest of BHP in the agreement as well as in EL-5 was transferred to TCC. For facility of reference, detail of companies somehow concerned in the entire transaction is given below: -

Company	**Place of Incorpo-ration**	**Nature of Interest**	**Interest received through**	**Owned by**
BHP Minerals	Delaware, USA	Original party with 75% share	CHEJVA 29.07.1993	BHP Minerals Australia
Mincor NL	Western Australia	Assignable Mincor Option	Option Agreement 28.04.2000 for $100	Shareholders from Iscor Ltd. of South Africa
TCC	Western Australia	Nominee of Mincor for Option Agreement	Alliance Agreement 03.04.2002 for future investment of $2 to 3 million	Atacama
Atacama	UK	Purchased shareholding in TCC	Share Purchase for AUD220 million	Antofagasta and Barrick Gold
Barrick Gold	Canada	Shareholder of Atacama (50%)	Share Purchase Agreement	Itself Parent Company
Antofagasta	UK (FTSE-100)	Shareholder of Atacama (50%)	Original Holding Company of Atacama	Itself Parent Company
TCCP	Pakistan	Holder of EL-5	Amalgamated with TCC Branch Office	TCC

8. TCC started its operations in Pakistan through its Branch Office registered with the Board of Investment. It also incorporated a local subsidiary in Pakistan called TCCP. In December 2007, TCCP approached the Lahore High Court for amalgamation of TCC's Branch

Office in Pakistan and TCCP incorporated in Pakistan, which had been functioning simultaneously until that time. Subsequently, the Islamabad High Court, to whose file the case was transferred on its establishment, *vide* order dated 11.04.2008 approved the amalgamation of both the companies as per the scheme of arrangement. As such, licences and properties held by Pakistan Branch of TCC stood transferred to TCCP.

9. In the year 2006, Maulana Abdul Haq & others filed Constitution Petition No. 892 of 2006 in the High Court of Balochistan, challenging the legality of CHEJVA, validity of the act of relaxation of BMCR 1970 by GOB and the failure of BHP to complete the exploration at a reasonable pace. The petitioners in the said petition had sought the following reliefs: -

> "Under the circumstances, it is respectfully prayed that this honourable court may be pleased to declare that all transactions, starting from and based upon the CHJV of 1992-93, including each grant of a licence or other concession to any of the respondents and every transfer of interest in Reko Diq leading up to the latest acquisition (whether contemplated or completed) of respondent No.4, by respondent No.5 and of respondent No.4's interest in Reko Diq by Respondents No.5 and 7, are illegal, ultra vines, unconstitutional and mala fide and liable to be set aside. This honourable court may be pleased as a consequence, to order that interests in Reko Diq be disposed of strictly in accordance with the applicable law, rules and policy and after inviting bids.
>
> Any other relief including orders for appropriate inquiries and investigations and recovery of fortunes amassed by the respondents in the subject deals may also be kindly granted."

10. The learned High Court *vide* judgment dated 26.06.2007 dismissed the Constitution Petition and found CHEJVA, the relaxation of BMCR 1970 and other acts of GOB/BDA to be legal and valid. The said petitioners preferred Civil Petition for Leave to Appeal No. 796 of

2007 against the aforesaid judgment of the High Court. Subsequent thereto, other petitioners filed the titled Constitution Petitions directly before this Court under Article 184(3) of the Constitution, questioning the validity of the grant of licence(s) to BHP/TCC on the ground of absence of fairness, non-transparency, violation of laws/rules, and also alleged possible risks to the vital interests of the Province of Balochistan and Pakistan in the grant of mining lease to BHP/TCC. Various miscellaneous applications were also filed for being impleaded as parties. All the titled petitions and miscellaneous applications were heard together and disposed of by means of the short order referred to in the beginning of this judgment.

11. Mr. Raza Kazim, learned counsel for the petitioners averred that extraordinary and undue favour was extended to BHP under CHIEJVA in the grant of mineral rights in the Reko Diq area, inasmuch as after the execution of CHEJVA on 29.07.1993, BHP, knowing fully well that it was not eligible for the grant of mineral titles under the BMCR 1970 sought relaxations of the said rules from GOB vide letter dated 16.09.1993. And GOB in its turn, on 20.01.1994, issued an omnibus order for relaxation of rules, without specifying the specific rules to be relaxed in violation of section 5 of the Regulation of Mines and Oilfields and Mineral Development (Government Control) Act, 1948 [Act XXIV of 1948], which stipulates that relaxation would be specified for a particular mineral. The notification dated 20.01.1994, which purports to grant relaxations in 13 matters, is in contravention of rule 98 of BMCR 1970. Learned counsel for the petitioners argued that various clauses of CHEJVA are ultra vires the BMCR 1970. He referred to *Saleem-ur-Rehman v. Govt. of Punjab* (1986 SCMR 747) wherein it was held that where a relaxation is

sought in respect of a certain category, a restricted and not an extended meaning is given for understanding and applying a statutory provision. According to the learned counsel, clauses 5.2, 5.4.1, 5.4.2, 5.6, 5.9, 5.10, 5.11, 6.1, 6.4, 6.5, 14.1, 14.2 & 18.1 of CHEJVA are violative of different provisions of BMCR 1970. He averred that the Reko Diq area was also illegally declared as Export Promotion Zone just to benefit the respondents. He also referred to comments of the Federation as per letter dated 28.04.1992 wherein it was suggested that BDA should be given the right to enhance its percentage share up to at least 50% on the commercial production of the mineral, but the same was not done.

12. Mr. Tariq Asad ASC, petitioner in C.P. 68/2010, appeared in person and argued that the provisions of the Act of 1948 had overriding effect over BMCR 1970 or any other rules made subsequently under the said Act, inasmuch as, the Act is primary legislation authorizing the Government to make rules. Therefore, any provision in the rules inconsistent with the Act of 1948 would be *ultra vires* the rule-making powers granted under the said Act, hence *void*. He argued that the exemptions authorized to be made under the Act of 1948 were restricted to minerals or a class of minerals only and could not be granted to contracts or parties. The power to grant exemptions in the Rules is, therefore, violative of the class of exemptions authorized under the Act of 1948. He argued that the definitions of key terms as used in CHEJVA are inconsistent, and at variance, with the meaning given to them under the Rules. He also stated that Addendum No.1 was required to be validated within six months of its signing under Article 4 *ibid*, but that was not done. According to him, there was no provision in the Act of 1948 or the BMCR 1970 made

thereunder for a Joint Venture to apply for, or be issued a prospecting licence, especially since CHEJVA was unincorporated, whereas, the rules required parties to be issued PLs to be incorporated in Pakistan.

13. Mr. Abdul Hafeez Pirzada, Sr. ASC argued that the petitioners have significantly ignored and thereby rendered redundant rule 3 of BMCR 1970, which provides that except with the previous sanction of the Government, no license to prospect for any mineral and no lease of mines and minerals shall be granted otherwise than in accordance with these Rules. Thus, GOB's executive authority remains overriding in view of the above provision. Accordingly, GOB had in exercise of power under rule 98 of BMCR 1970 expressly relaxed the application of certain rules to CHEJVA. He alleged that the petitioners were seeking in bad faith for a relaxation granted after thorough review by GOB and an inter-ministerial committee, and acted upon almost one and a half decades earlier to be set aside on spurious grounds. The process of grant of relaxation was undertaken at a higher administrative level than the Mines Committee as GOB itself was represented. Majority of Mines Committee members were present. Therefore, the relaxation was entirely valid. He averred that notwithstanding the relaxation there had been substantial compliance with BMCR 1970, and the provisions of the Mineral Policy in particular were taken into consideration, which was admittedly approved and adopted by GOB. GOB in exercise of its powers under rule 98 of BMCR 1970 granted to BHP relaxation of provisions of BMCR 1970 relating to grant of exploration area, area available for prospecting license, satisfaction of conditions attached to prospecting licenses, exclusive rights, rights of pre-emption, etc. vide notification dated 20.01.1994. Doctrine of 'substantial compliance' and doctrine of 'indoor

management' as well as other equitable considerations apply to the transaction. The foreign investors had "de-risked" the project at substantial expense. The Feasibility Study had been submitted. Promissory estoppel and legitimate expectation were also relevant and applicable. The petitioners and now GOB want the mineral titles to be struck down posthumously. Therefore, declaring CHEJVA to be void ab initio would not be equitable besides being uncalled for and unjustified.

14. Mr. Pirzada further argued that CHEJVA was duly negotiated by GOB and was duly approved by the Chief Minister of Balochistan, Board of Directors of BDA, Law Department, Planning & Development Department and Finance Department, and was reaffirmed at the time of execution of the Addendum authorized by the then Governor, which execution/authorization was protected under clause (4) of Article 270AA of the Constitution. He argued that rule 98 is *intra vires* the Act of 1948. Also, it is relevant to take into consideration that rule 98 stood repealed over a decade ago on promulgation of BMR 2002. The petitioners were requesting the Court to examine the vires of a sub-statutory provision, which was repealed more than a decade ago. The relaxations granted had been acted upon already. The Prospecting Licenses granted had not only been relinquished by the area covered by them but are now understood to be the subject of other Exploration Licenses held by other parties. BMCR 1970 had not been framed under section 5 of the Act of 1948, but under section 2 thereof and were separate and distinct. If the power to make rules was conferred upon GOB, it obviously includes the power to relax the same, especially in view of rule 3 ibid. He pointed out that the rules relating to petroleum, minerals, etc., had been framed under the Act of 1948 some of which incorporated

relaxation provisions. In any event, even if BMCR 1970 were not relaxed, rules 3, 6 and 28 empowered GOB clearly to act otherwise. The words “except with previous sanction” did not relate to the period before BMCR 1970 as claimed by the petitioners in CP 68/10 and CP 4/11. 11. He further argued that the parties to CHEJVA could not be required to comply with the provisions of the BMCR 1970, which were in force at the time, as GOB itself waived and relaxed the same in favour of the foreign investors to facilitate them. They had never had the need to comply with the old rules, which should not apply to them after express relaxations were granted by GOB. Learned Sr. ASC argued that there was no provision in CHEJVA nor was there any other material on record (or even formally alleged) that the parties to CHEJVA intended to act in violation of BMCR 1970 or agreed to violate the applicable law. On the contrary, the entire object of making CHEJVA “conditional” (Article 2) was to ensure that all exploration activities were undertaken in compliance and consistent with requirements of applicable law. This is evident from the fact that in the event of relevant relaxations (referred to as notified orders in CHEJVA) were not received within a specified timeframe (Clause 2.3), the entire arrangement and proposed Joint Venture would come to an end. He clarified and emphasized that CHEJVA as a whole actually only became effective upon receipt of the relevant relaxations on 20.01.1994, therefore, BHP could not be held culpable for agreeing with GOB to seek approvals under BMCR 1970, including those under rule 98 *ibid*. He averred that there was complete misconception that question of relaxation of BMCR 1970 was raised after the agreement was signed. The very text of the conditional agreement was potentially at variance (without prejudice) with some of BMCR 1970, and therefore, it was

inherently incumbent to seek relaxation thereof subject-wise so as to harmonize the two instruments. In this context, the power of GOB to grant relaxation of the relevant rules was further buttressed and reinforced by rule 3 of BMCR 1970 read with its overarching executive authority under the Constitution, which independently gave an overriding power to it to override the entire set of rules. He argued that the foreign companies operating in Pakistan as parties or assignees under CHEJVA, such as BHP, Mincor, TCC, etc., were not required to be registered or incorporated in Pakistan for carrying out their operations. The learned counsel emphasized that as far as TCC is concerned, it is only bound by the Novation Agreement, which effectively extinguished all previous agreements under CHEJVA.

15. Mr. Ahmer Bilal Sufi, ASC appeared on behalf of GOB and averred that the record shows that CHEJVA on the date of its execution defeated a large number of provisions of BMCR 1970 as well as section 23 of the Contract Act, 1872 and Article 5 of the Constitution. He stated that the legal team representing TCC and BHP were unable to produce any precedent from any international or foreign jurisdiction where an agreement of this nature was entered into defeating and relaxing a host of provisions of the mining laws. He argued that the authority relaxing the rules did not apply its mind independently, inasmuch as neither details of any hardship were mentioned in the notification granting relaxations nor the same were stated to have been discussed in the meetings wherein the issue of relaxations was dilated upon. According to him, the process of grant of relaxation fails the test laid down by the Superior Courts regarding structuring of discretion in numerous judgments, including *Abid Hassan v. P.I.A.C.* (2005 SCMR 25), *Government of N.W.F.P. v.*

Mejee Flour and General Mills (Pvt.) Ltd. (1997 SCMR 1804) and *Aman Ullah Khan v. Federal Government of Pakistan* (PLD 1990 SC 1092).

16. Mr. Ahmer Bilal Sufi further argued that CHEJVA was not processed under the Foreign Private Investment Act of 1976 and the Governor's alleged executive orders to execute Addendum, if presumed valid for the sake of argument, could not have been issued in exercise of the executive authority under Article 130 or Article 173 of the Constitution as the field is already occupied by the Act of 1948 and BMCR 1970. Thus, the Governor or the Chief Minister had no legal space to exercise any executive powers in respect of mining rights that were liable to be regulated under the said rules. He placed reliance on the case of New National Mining Corporation v. Government of Baluchistan (PLD 1977 Quetta 15), wherein the Court observed that the Chief Minister is not empowered under BMCR 1970 to interfere in the affairs to be conducted under the rules.

17. It may be noted that Article 16 of CHEJVA provides that the law applicable to this agreement is the law of Pakistan which the parties acknowledge and agree includes the principles of international law. With a view to appreciating the above arguments of the learned counsel for the petitioners, and to see how far CHEJVA complied with the primary legislation governing the grant of prospecting/ exploration rights in the first instance, we have examined record pertaining to the relaxations sought by BHP after execution of CHEJVA and various clauses of CHEJVA in juxtaposition with different provisions of BMCR 1970. In this behalf, it is noteworthy that Mr. Martin Harris, BHP's lawyer from Australia, *vide* letter dated 16.09.1993, written on the letter head of BHP, asked BDA to approach the Mines Committee for the relaxation of certain rules. The contents

of the said letter are reproduced herein below: -

> "16th September, 1993 BHP Minerals
>
> Mr. Ata Mohammad Jafar,
> Chairman,
> Balochistan Development Authority,
> Civil Secretariat,
> Quetta, Balochistan
> Pakistan
>
> Dear Sir,
>
> Chagai Hills Joint Venture
>
> We have now reviewed the Balochistan Mining Concession Rules, 1970 (the "Rules") and have prepared a summary of our comments for discussion with the appropriate Government authorities (copy attached marked 'A').
>
> We must apologise for the time it has taken us to complete this task, which has been compounded to some extent by Mr. Robert Reid having left this office to take up a position in BHP Minerals' San Francisco Office. I have now assumed responsibility for Mr. Reid's work on this project.
>
> In reviewing the Rules we have sought to identify the consents, approvals and assurances which we must seek from the Government to progress the Joint Venture as referred to in Article 2 of the Joint Venture Agreement (the "Agreement"). We understand that this involves seeking Gazetted Notified Orders securing rights needed to implement the Agreement to the extent such rights are not available under or are inconsistent with the Rules.
>
> Rule 98 allows the Government to relax the Rules on terms and conditions. Primary responsibility for considering cases involving relaxation of the Rules appears to lie with the Mines Committee (Rule 2(f)). Subject to any current delegation of the Mines Committee's powers, we would suggest application be made to the Committee for Notified Orders as described in the attachment to this letter.
>
> We recommend that, for the time being, we limit the Notified Orders we are seeking to those needed to facilitate Stage One exploration activities, and therefore the attached comments do not address our concerns with the Rules for the mining phase of a project.
>
> We envisage that once Notified Orders relaxing the Rules have been made, these would be incorporated into a deed guaranteeing, inter alia, that the Notified Orders will not be revoked or overridden. The parties to the deed would be BHP Minerals, the Balochistan Development Authority, the Balochistan Government and the Central Government. The Central Government would have to be a party as, although

the Rules are promulgated by the Balochistan Government, they are created pursuant to the Regulation of Mines Oilfields and Mineral Development (Federal Control) Act, 1948 under which the Central Government retains overriding powers.

We would suggest that BHP Minerals' representatives visit Pakistan after forthcoming Federal and Provincial elections to discuss the above issues with yourself and Government representatives. In the interim we would appreciate any comments you may have on the approach we have proposed.

Regarding the Agreement, we have discovered a number of oversights in the version which was executed and will be in touch shortly to propose appropriate corrections.

Yours faithfully
Sd/-
Martin Harris
Senior Lawyer"

The contents of attachment 'A' are reproduced hereinbelow:-

1. Grant of Exploration Area

The minutes of the meeting held at BDA's officers in Quetta on 28th April, 1993 indicate that BDA has approached the Directorate of Mineral Development in relation to this matter. We should now pursue the Directorate's written confirmation of the Joint Venture's rights as per Clause 3.2 of the Agreement. One Important aspect of these rights is that the Government agrees not to grant any third parties any PLs or Mining Lease ("MLs") for Minerals over any part of the exclusive Exploration Area, except any areas confirmed by the Government as not available to the Joint Venture (see paragraph 2 below). Notified Orders addressing Rules 3, 17, 62(a), 63 and 98 will be necessary to secure these rights.

2. Area Available for Prospecting Licences

Under Clauses 5.3.1 and 5.3.2 the Parties will seek rights to apply for up to ten PLs covering an area of up to fifty square kilometers in the aggregate including right to subsequently relinquish and reapply for PLs over other areas. Notified Orders will be need which address Rules 10, 11,17, 18, 28, 62(a), 63 and Annexure IV of the rules, as amended by letter of 27 July, 1972 No. S.O.(IND)-5-5/71 (restricting the number of prospecting licences held by one party to two).

Furthermore, we must ask the Government to specify any areas within the Exploration Area which are not available for PLs or MLs, in accordance with Clause 5.8 and seek

appropriate Notified Orders relaxing rules 10, 17 and 82 in respect of the remainder of the Exploration Area.

3. Application Prospecting Licences

Rules requiring applicants for a PL to be incorporated in Pakistan need to be relaxed to the extent that BHP Minerals, as one of the joint applicants, is a foreign corporation. We should reserve our position for the time being insofar as the Rules requires applicants for a ML to be incorporated in Pakistan, as we anticipate forming a locally registered Jointly owned entity for the purpose of mining operations. It follows that Rules empowering the licensing authority to require an applicant to secure unquantified local investment should be waived in light of BDA's Joint Venture interest.

Rules 6 and 15 referring to the foreign investment regulations of the country in which the applicant is incorporated obviously present a problem to us. We believe that such Rules are inappropriate if foreign investment is to be encouraged given the multi-nationality of many international mining companies and the likely revision of Pakistan's own mining investment laws.
Other Rules relevant to this issue are; Rule 3, 6(if the word "person" includes companies); Rule 7 (under Notification of 24th August, 1981) to the extent the First Schedule application form (under Notification of 5th August, 1981) requires particulars of the company to be incorporated in Pakistan by the applicant; and Rules 8(5), 9(3), 14, 15, 70(a) and 85.

Clauses 5.3.2, 5.4.1 and 5.4.2 of the Agreement anticipate the Parties making applications, relinquishments and reapplications for PLs during the Initials Period of six years from the Commencement Date of the Agreement, each PL to be for a two year period with the option to extend to five years, or longer, as necessary to complete a Feasibility Study. Beyond the Initial Period the Parties' right to PLs would be subject to the normal administrative discretion of the licensing authority.

To accommodate these provisions, we will need Notified Orders addressing Rules 3,20,21,21,30,31,35 and 68 (to the extent a proposed PL covers a forest reserve), 62(a) and 63.

4. Satisfaction of Conditions Attaching to Prospecting Licences.

Under Clause 5.5 the Joint Venture must comply with conditions attaching to PLs, including expenditure and reporting requirements.

Rule 51 requires the holder of a PL to submit monthly

"production returns" to the licensing authority. We would suggest that this is unnecessarily frequent, and that, as with other reports required by the Rules, quarterly returns would suffice.

Rule 32 requires a licensee to submit a prospecting scheme for approval by the licensing authority, the authority may reject a proposed scheme and require it to be revised. The licensee must adhere to an approved scheme, and abide by the instructions of the authority from time to time in respect of the prospecting work.

These provisions reflect an outmoded philosophy of government control of exploration and mining activities. To be competitive with other mineral investment regimes, the Rules will need to allow the private investor to determine and manage its own exploration and development programme. The interests of the government can be adequately protected by imposing minimum exploration expenditure commitments to ensure that the licensee's work level justifies the grant of exclusive rights. The licensee should periodically report on work performed so that the authority can verify that the requisite expenditure is being incurred on valid exploration work. However, the licensee should be free to determine the best and most cost efficient way to spend its exploration funds. Any prospecting scheme provided to the licensing authority should be for information only, not for the authority's approval, and the licensee should be free to depart from or modify its scheme as and when its sees fit. Rules 70(f) and (h), 86 and 95 are also relevant to this matter to the extent they infer government control of the licensee's activities.

Finally, we would like to discuss some of the technical requirements under the rules regarding specifications for plans and signs under Rule 77 & Seventh Schedule so that current techniques.

5. Exclusive Rights

The Parties will need to seek Notified Orders to obtain the Government's assurance that it will take reasonable steps to protect the Joint Venture's activities from interferences, as noted in Clause 5.6. One measure would be to refrain from granting prospecting rights to others over a PL area, and implicit in this is a Notified order waiving Rule 69.

6. Other Minerals

Under Clause 6.1 the Joint Venture shall seek a right of first refusal over "Other Minerals" it discovers in the Exploration Area. Rule 53 gives a PL holder a preferential right in such circumstances, but subject to the broad discretion of the licensing authority. We would seek a

Notified Order whereby the Authority's discretion to deny such right is limited to cases where the Government does not elect to retain to itself rights over the Other Minerals discovered.

7. Government's Rights Pre-emption Acquisition, Merger and taking Control in National Emergency.

The Parties would need to ensure that the Government waived its rights under Rules 56, 57 and 70(g) before the Joint Venture commences work. Whilst it may be practically impossible for a mining company to prevent a forced pre-emption, acquisition or merger by or at the direction of the government of a foreign country, these actions should not result from the exercise of an express authority. We would view any such action as an expropriation for which full compensation would be payable, which if not agreed, would be determined by an international arbitral body.

We believe that compensation should also be paid where, under Rule 83, the Government takes control of a mine during a national emergency.

8. Assignment

Rule 12 would need to be relaxed to permit BHP Minerals to make an assignment of the kind anticipated in Clause 14.2 of the Agreement, and to permit any necessary assignment of rights should a sole "Participating Party" elect to develop a mine pursuant to Clause 11.

9. Application for Mining Lease

It is essential that the Joint Venture, or a sole "Participating Party" under Clause 11, is entitled to convert the relevant PL into a ML, if it wishes to develop a mine. Currently, the right of a holder of a PL to receive a ML is described in Rule 23 as a "preferential right" only. The subjective discretion of the licensing authority here and under Rules 31(2), 38, 62 and 63 must be waived in favour of an absolute right of the Joint Venture, or a sole "Participating Parry", to a ML, provided they comply with routine administrative requirement. Clause 11.8.2 of the Agreement anticipates this right of transition.

International mining companies will view this aspect of a country's mining regulations as one of the most important. The necessary right can be secured by appropriate Notified Orders.

The requirement under Rue 9(5) for an applicant for a ML to provide information about applications for licences and leases lodged in other countries would appear inappropriate in the case of a large foreign company such

as BHP Minerals, unless it is limited to a relatively small number of projects. The unqualified discretion of the licensing authority to void a ML application for failure to furnish evidence "to the satisfaction of the licensing authority" must be removed in favour of defined requirements.

The possibility, under Rule 19, that the right of an applicant to receive a ML may lapse due to delay in executing a lease deed should also be removed.

10. Royalty

The Parties must seek the Government's confirmation of the royalty rate of 2% of the value of the extracted minerals, equivalent to the "net smelter return" as agreed at our meeting on 28 April, 1993. Once settled, the rate would need to be fixed for the life of any mine by a Notified Order addressing Rule 65.

11. Penalties, Compensation and Cancellation

The Rule contains a number of approaches to failure of a holder of a PL to comply with its obligations under the Rules. These include for example: cancellation with or without notice (Rules 32(h), 51, 66, 70(h)); forfeiture of the right of renewal (Rule 32(d)): Penalty and cancellation (Rules 32(c), 55, 65, 81, 92, 96, 97). For unscientific working under a ML, the licensing authority may assess damage and an unspecified penalty (Rule 86). In some instances an opportunity is given to remedy a breach (Rule 95), and in others forfeiture of the security deposit is specifically referred to (Rule 70(c)).

Similarly, disputes with the licensing authority are approached in a number of ways. Decisions of the licensing authority may be appealed to the Government (Rule 71) but only a limited range of disputes may be taken to arbitration under the Arbitration Act (Rule 72). There appears to be an inconsistent approach in compensation for damage to lands resulting from activities pursuant to a PL or ML. Any such compensation is to be assessed by the appropriate "Lawful authority" under the " the law in force on the subject applying to the lands." However, only in the case of an ML may any dispute be referred to the licensing authority for arbitration (Rule 34 and 46).

There are also a number of criteria for assessing compensation, including: "reasonable compensation", "reasonable satisfaction and compensation", "fair market value", and "fair and proper compensation", (Rules 34, 46, 56 ad 57 and Clause 14 of Third Schedule).

We suggest that the Rules would be improved if they had a simpler and more consistent approach to breaches,

penalties and cancellation, and to compensation assessments. Where appropriate, the Rules should allow an opportunity for remedial action, and for an appeal to an independent forum.

We note that Pakistan has acceded to the ISCID Convention which is ideally suited to resource sector investment disputes.

12. Employment and Training

We are confident we can meet any reasonable requirements for employment, training and qualifications. We would need to discuss Rule 70(h), 74 and 76 with the licensing authority to determine and settle what these requirement would be for our exploration program.

13. Mining Lease

There are many other issues raised by the Rules which are relevant to the mining phase of a project. Some of the major problems include; exploitations scheme approvals, controls on mining operations, production targets, beneficiation and marketing controls (Rules 40, 47, 70(f), 70(h), 86, 94, 95).

It would perhaps be premature to address all of these issues now in the same details as those issues raised above. We therefore, suggest that discussion relating to ML matters await the outcome of Stage One exploration.

18. In pursuance of BHP's letter, BDA *vide* letter dated 23.10.1993, requested GOB to relax certain rules mentioned in the letter of BHP as under: -

"No.BDA/PLs/Mines/689-90
BALOCHISTAN DEVELOPMENT AUTHORITY
(Mines Division)

Dated the 23rd October, 1993

To

The Secretary,
Government of Balochistan,
Industries, Commerce and Mineral Resources
Department, Quetta.

Subject:- RELAXATION OF BALOCHISTAN MINING CONCESSION RULES FOR THE IMPLEMENTATION OF BDA-BHP JOINT VENTURE AGREEMENT FOR THE EXPLORATION OF GOLD AND ASSOCIATED MINERALS IN THE CHAGAI HILLS AREA, BALOCHISTAN.

Balochistan Development Authority has concluded an agreement on 29th July, 1993 with BHP Minerals of Australia for the discovery and development of Gold resources in the Chagai Hills area of Balochistan.

Since May, 1990, BDA, BHP Minerals, legal and financial experts were engaged to finalize the agreement. After a series of negotiations and the amendments of the terms and conditions, a final text of agreement was evolved on 27th of June, 1993. During this period, the Planning and Development Department, the Chief Secretary and the Chief Minister of Balochistan was apprised about the latest position from time to time.

The agreement has been approved by the Honourable Chief Minister Balochistan (copy of the approval enclosed at Flag F/A) as well as by BDA Board of Directors (copy enclosed at Flag F/B) and vetted by the Law Department Government of Balochistan (copy enclosed at Flag F/C).

Furthermore the Planning and Development Department and Finance Departments were requested for the required vetting, if any, of the draft agreement. A copy of the agreement was also forwarded to Industries Department for the information, study and comments *vide* our letter to BDA/HQs/MM/158/458-64, dated 29.6.1993.

Since the agreement is conditional and in accordance with the terms and conditions contained in Article 2 of the agreement, BDA has to get the consents and approvals from the provincial and/or Federal Government within six months of the signing of the agreement otherwise the agreement shall absolutely cease.

Now in this connection, we have received a letter from BHP Minerals (copy enclosed as F/D) stating that they have reviewed the Balochistan Mining Concession Rules 1970. In reviewing these Rules, BHP Minerals has sought to identify the consents, approvals and assurances which they must seek from the government to progress the Joint Venture. BHP team has mentioned that this involves seeking gazetted notified orders. Furthermore once notified orders relaxing these rules have been made, there would be incorporated into a deed guaranteeing that the notified orders will not be revoked or overridden.

It is also worth mentioning that Rule 98 of Balochistan Mining Concession Rules 1900 allows the Government to relax the Rules on terms and conditions.

It is accordingly requested that the required Mining Concession Rules contained in BHP letter (F/D) may please be relaxed for this particular case/project to avoid any complications at later stage.

Sd/-
CHAIRMAN
BALOCHISTAN DEVELOPMENT AUTHORITY”

19. Pursuant to the above, the matter was considered by the PDWP in its meeting held on 30.10.1993 wherein following decisions were taken: -

(1) The Industries Department will grant relaxation to the proposed clauses of Balochistan Mining Concessions Rules, 1970.

(2) The case would be referred to an impartial arbitration as per clause 15.4 of the agreement.

(3) The Industries Department will issue the modified orders pertaining to the relevant clauses within 15 days.

20. Thereafter, the Industries, Commerce & Mineral Resources Department of GOB, *vide* notification dated 30.01.1994, granted as many as thirteen relaxations to BHP purportedly with a view to enabling it to carry out the exploration work without any hindrance. The said notification reads as under: -

"GOVERNMET OF BALOCHISTAN
INDUSTRIES COMMERCE AND MINERAL RESOURCES, DEPARTMENT.

DATED QUETTA THE 20th JAN:1994

NOTIFICATION

No:S.O (MR)5-9/94.254.60. In exercise of the powers confirmed by Rule 98 of Mining Concession Rules 1970, the Government of Balochistan is pleased to grant the following relaxation as a special case in favour of BHP Company to carry out its exploration work without any complication:-

1. Grant of Exploration Areas
1. Area available for prospecting Licences.
2. Application for prospecting Licence.
3. Satisfaction of conditions attaching to prospecting Licences.
4. Exclusive right.
5. Other Minerals.
6. Government rights pre-emption acquisition merger, and taking control in National emergency.
7. Assignment.

8. Application for Mining Licence.
9. Royalty.
10. Penalties compensation and cancellation.
11. Employment and training.
12. Mining Lease.

Sd/-
By Order of Governor of
Balochistan"

21. The aforesaid letter of BHP's counsel Martin Harris, on the one hand, makes it clear that not only was BHP well aware of the restrictions imposed by statute, but they were also attempting to bind future governments to ratify the departures being made from the law. On the other hand, the writing of letter on behalf of BHP nullifies the assertion of learned counsel for TCC that the relaxations were granted by GOB at their own without asking of the respondents. These relaxations being in the nature of exemptions being granted from the application of the Rules to BHP and the entire CHEJVA project without a reference having been made to the provision of rule 3 of BMCR 1970 rendered nugatory BMCR 1970 in all substantial aspects. In this behalf, it is noteworthy that section 5 of the Act XXIV of 1948 empowers the Government to grant any exemptions of rules made under the Act. Any exemptions made under the BMCR 1970 must, therefore, conform to the provision the Act of 1948, which is the primary legislation on the subject. Section 5 of the Act of 1948 provides that the appropriate Government may, by notified order, declare that any mineral or mineral oil or any class or description thereof shall be exempt from all or any of the provisions of the rules made under this Act, or that such provisions shall apply thereto with such modification or subject to such conditions as may be specified in the order. Thus, the power to exempt a mineral or mineral oil or any class or description of minerals from all or any of the rules with or

without any modification lies only with the appropriate Government, i.e., Federal Government in relation to mines of nuclear substances, oilfields and gas fields and development of such substances, mineral oil and gas, and Provincial Government in relation to other mines and mineral development. In the case in hand, the power to grant exemptions in relation to a mineral or any class or description of minerals lay with the Government of Balochistan. Section 2 of the Act of 1948 provides that the appropriate Government shall have the power to make rules to provide for all or any of the matters stated therein. BMCR 1970 were framed in exercise of the power conferred by section 2 of the Act of 1948. Rule 3 of the said rules provides that except with the previous sanction of the Government, no licence to prospect for any mineral and no lease of mines and minerals shall be granted otherwise than in accordance with these rules. Admittedly, no such previous sanction as envisaged by rule 3 was sought by BDA-BHP. Instead, BDA-BHP entered into a conditional agreement (CHEJVA) subject to their seeking necessary consents, approvals and assurances in terms of article 2 thereof. Thereafter, relying on the said provision in CHEJVA, case for relaxation of above mentioned provisions of BMCR 1970 was processed purportedly in terms of rule 98 of BMCR 1970. Rules 98 provides that the Government shall have the power to relax any or all the provisions of these Rules in cases of individual hardship and under special circumstances to be recorded in writing and on terms and conditions to be fixed by it. A plain reading of the provision rule 98 makes it clear that it provides for relaxation of any of the provisions of BMCR 1970 in cases of individual hardship and under special circumstances to be recorded in writing, and that too, on certain terms and conditions to be fixed while granting the relaxation.

Before proceeding further, it is necessary to understand the term 'hardship' as defined and interpreted in different sources as under: -

> "The severity with which a proposed construction of the law would bear upon a particular case, founding, sometimes, an argument against such construction, which is otherwise termed the "argument ab inconvenient." [Black's law dictionary]
>
> Hardship
>
> 1. Extreme privation; suffering.
> 2. A cause of privation or suffering.
> [The American Heritage Dictionary of the English Language, Fourth Edition]
>
> 1. Conditions of life difficult to endure.
> 2. Something that causes suffering or privation.
> [Collins English Dictionary – Complete and Unabridged]
>
> The word 'hardship' is capable of being descriptive of adverse repercussions of every kind. It may be physical … … or mental … … ["Words and Phrases Legally Defined" edited by John B. Saunders, 2nd Edition (Vol. II, p. 347)].
>
> The term "hardship" includes any matter of appreciable detriment, whether financial, personal or otherwise. [Stroud's Judicial Dictionary (4th Edition, p. 1210) and Lexicon by Venkataramaiya (2nd Edition, p. 994)].

22. The term "hardship" has also received judicial interpretation in different jurisdictions. In *Government of Andhra Pradesh v. Sri D. Janardhana Rao* [(1976) 4 SCC 276], the Indian Supreme Court while considering the scope of the power of Government to relax the service rules under Rule 47 of General Rules held as under: -

> "It is not difficult to see that the occasion for acting under Rule 47 may well arise after the attention of the Govt. is drawn to a case where there has been a failure of justice. In such cases justice can be done only by exercising the power under Rule 47 with retrospective effect, otherwise the object and purpose of the rule will be largely frustrated."

Similarly, in *J.C. Yadav v. State of Haryana* (1990 AIR SC 857), the issue of relaxation of rules was dilated upon in the following terms: -

> "...relaxation of Rules to meet a particular event or situation, if the operation of the Rules causes hardship. The relaxation of the Rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a just and equitable manner. The scope of Rule is wide enough to confer power on the State Government to relax the requirement of Rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a times strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship... In such a situation the Government has power to relax requirement of Rules. The State Government may in exercise of powers issue a general order relaxing any particular Rule...
>
> ... In B.S. Bansal v. State of Punjab and Ors., [1978] 2 SLR 553 a Bench of the Punjab and Haryana High Court held that if the power of relaxation could be exercised in order to meet a general situation, then the whole purpose of the Rule would be frustrated and the Government would be armed with an arbitrary power which could cause great hardship to some officers. We have already referred to the relevant facts which show that in the instant case, power of relaxation was exercised by the State Government to meet a particular situation, it did not result into any injustice or cause hardship to any one. If power of 479 relaxation is exercised on extraneous consideration for oblique purposes or mala fide, the court has power to strike down the same but exercise of power of relaxation to meet a particular situation cannot be held to be arbitrary or illegal. In B.S. Jain v. State of Haryana, [1981] 1 SLR 233 the High Court set aside the promotions made in pursuance of the relaxation granted under Rule 22 placing reliance on the decision of the Division Bench in B.S. Bansal's case. On appeal, this Court in Ashok Gulati v. B.S. Jain, AIR 1987 SC 424 observed that the findings of the High Court that the State Government could not have relaxed the condition of passing the departmental professional examination by taking recourse to Rule 22 which conferred power of relaxation on the State Government could hardly be sustained ...
> ... Power to grant relaxation may be exercised in case of an individual to remove hardship being caused to him or to a number of individuals who all may be similarly placed. This power may also be exercised to meet a particular situation where on account of the operation of the Rules hardship is being caused..."

In *M. Venkateshwarlu v. Government of A.P.* [(1996) 5 SCC 167], the Indian Supreme Court held as under: -

> "8. Thus, it could be seen that the Governor is empowered to relax the rigour of the General Rules in such manner as may appear to him to be just and equitable in the interest of justice and equity. ... ..."

In *Sandeep Kumar Sharma vs. State of Punjab* [(1997) 10 SCC 298] it has been held as under: -

> "The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situation. Such rule must be construed liberally, according to the learned Judges. Of course arbitrary exercise of such poor must be guarded against. But a narrow construction is likely to deny benefit to the really deserving case. We too are of the view that the rule of relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the Government."

In *Ashok Kumar Uppal v. State of J&K* [(1998) 4 SCC 179], it has been held that: -

> "30. ... ... the Government can exercise the power to relax the Rules in all those cases in which hardship is caused in the implementation of those Rules to meet a particular situation or where injustice has been caused to either individual employee or a class of employees. Of course, this power cannot be exercised capriciously or arbitrarily to give undue advantage or favour to an individual employee."

Thus, while invoking the provision of relaxation, the party seeking it is required to make out a case of hardship and also show the special circumstances warranting exercise of such power, and in turn, the Authority granting such relaxation is required to record reasons for the exercise of such power. This is a common requirement found under the

statutes that provide for relaxation of the rules in special cases of hardship. See *Chief Secretary Punjab v. Abdul Raoof Dasti* (2006 SCMR 1876).

23. In the instant case, as noted above, BDA *vide* its letter dated 23.10.1993 presented the case for exemptions stating therein, *inter alia*, that since the agreement was conditional and as per terms and conditions contained in article 2 of the agreement, BDA was to get the consents and approvals from the Provincial and/or Federal Government within six months of the signing of the agreement otherwise the agreement shall absolutely cease; BHP after reviewing the Rules, was seeking to identify the consents, approvals and assurances from the Government to progress the Joint Venture by means of gazetted notified orders to be incorporated into a deed guaranteeing that the notified orders would not be revoked or overridden; rule 98 of BMCR, 1970 empower the Government to relax the rules on terms and conditions; and that the required rules may be relaxed for this particular case/project to avoid any complications at any later stage. A bare perusal of the contents of BDA's letter shows that neither BHP nor BDA in seeking relaxation of the rules fulfilled the requirements stated in rule 98, namely, showing hardship and special circumstances, but only contented by stating that "the required rules may be relaxed for this project to avoid any complications." As mentioned hereinabove, BDA's request was first considered by the PDWP's meeting wherein it was decided, *inter alia*, that the Industries Department would grant the relaxations and thereafter notification dated 20.01.1994 granting the said relaxations was issued, which recited that GOB, in exercise of the powers conferred by rule 98, was pleased to grant those relaxations as a special case, again making no

mention of hardship of whatever nature, or the existence of any special circumstance making out a case for invoking the provision of said rule. The competent authority also failed to determine the terms and conditions to be fixed in granting the relaxations sought for. In this view of the matter, in absence of the requirements of rule 98 being fulfilled in the instant case, all relaxations were granted in excess of authority and were entirely beyond the scope of the provisions of the law, and therefore *ultra vires* the powers granted under rule 98 of BMCR 1970 read with section 5 of the Act of 1948, and thus *void*. Shorn of the relaxations so granted, CHEJVA has no legal sanctity and consequently remains an agreement entered into against the provisions of law, hence not enforceable.

24. As all the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and *void ab initio*, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law.

25. A perusal of CHEJVA reveals that BHP and BDA exceeded their mandate by going beyond the scope of the actions envisaged in Article 2.1 (i) and (ii) of CHEJVA, namely, the parties seeking/receiving from the relevant competent authorities in the Federal and/or the Provincial Government within six months of the date of agreement ‘all consents and approvals necessary under Pakistani law’ and ‘all assurances as to fiscal parameters for investment in any future mining venture’. It appears that BHP/BDA’s representations, rather misrepresentations led the GOB authorities to issue the sought for

relaxations, inasmuch as the terms ‘consents’, ‘approvals’ or ‘assurances as to fiscal parameters’ used in the aforesaid sub-clauses of CHEJVA are not synonymous with the term ‘relaxation’. Any consent, approval or assurance is to be issued by the concerned authority in accordance with, and subject to the law of the land. This position is reassured by Article 16 of CHEJVA, according to which, the law applicable to the agreement is the law of Pakistan read with the principles of international law. It may be mentioned here that sub-clause 24.6.2 of CHEJVA provides that the parties shall be just and faithful to one another and will not do or omit to be done anything, which prejudices the interests of the Joint Venture. As mentioned above, under clause 2.2 of CHEJVA, BHP could have sought only ‘consents’, ‘approvals’ or ‘assurances’, and not the ‘relaxation’ of any rule. Unfortunately, in respect of every provision of CHEJVA, which ran contrary to the provision of any rule of BMCR 1970, relaxation in the name of ‘consent, approval and assurance’ was sought. BHP, therefore, could not be said to have been acting justly and faithfully from the very inception of their relationship with BDA as contemplated by the parties in sub-clause 24.6.2 of CHEJVA.

26. As mentioned hereinabove, the competent authority issued the relaxations in the form of a bulleted list without explaining what terms and conditions governed the extent of the relaxations as required under rule 98 ibid. The letter presents no explanation of any nature whatever, what was the hardship and what were the special circumstances warranting the grant of relaxations. It is equally silent on the terms and conditions being fixed on the grant of such relaxations. For example, the word “royalty” is included as one of the 13 relaxations while there was a special Article in CHEJVA governing

the payment of royalty. As already pointed out, the relaxations could be granted conditional on the parties showing hardship, special circumstances and the terms and conditions imposed in lie of relaxation. In the instant case, the relaxations granted by the Provincial Government to the Joint Venture against the letter and spirit of rule 98. Such illegal relaxations were then subsequently relied upon to countervail the requirements imposed by BMCR 1970. It has been held that where appropriate legislation is available, its provisions are to be followed by the concerned authorities in the matter of sale, mortgage or disposal of property vested in the Government. And where the relaxation of rules has led to ignoring provisions of the relevant law regulating such a lease, the same could not be approved by the courts of law. See *Abdul Haq and others vs. Province of Sindh and others* (PLD 2000 Karachi 224).

27. Clause 5.2(a) provides that the parties shall seek from the Provincial Government the exclusive and unfettered right to undertake stage one activities within the exploration area for an initial period of three years and to apply for and be granted therein prospecting licence subject to clause 5.3, whereas under clause 5.2(b) the parties have the non-exclusive right to conduct stage one activities and subject to clauses 5.3 and 5.4 to make application for further prospecting licences to explore for minerals within the exploration area. Under clause 5.4.1, the parties may, in accordance with clause 5.2 apply for prospecting licences to explore for minerals within the exploration area at any time within six years of the commencement date; during the initial period the parties' right to grant of the said prospecting licences shall be automatic subject only to clause 5.8, but beyond the initial period, the parties' right to grant of prospecting licences shall be

subject to the normal administrative discretion of the Directorate of Mineral Development. Under clause 5.4.2, each of the prospecting licencee shall be issued to the Joint Venture for an initial term of two years with the option to extend for up to three years beyond the said initial term provided that where the parties have commenced a feasibility study, the conclusion of which will not be possible until beyond expiry of five year term possible for the relevant prospecting licence, the Directorate of Mineral Development shall grant such further extension of time as may be reasonably required to permit conclusion of the said study. It further provides that the parties shall also seek pursuant to clause 2.2 to have the said possibility of a further extension of time recognized by the Provincial Government.

28. The aforesaid clauses 5.2, 5.3, 5.4 clearly violate rules 30, 31 & 32 of BMCR 1970. Under rule 30, no prospecting licence shall be granted in the first instance for a period of less than one and more than two years, whereas rule 31 provides that the licensing authority may in its discretion grant further renewals of prospecting licence for a period not exceeding twelve months at a time to enable the licensee to complete the prospecting work to the satisfaction of the licensing authority provided the licensee had applied to the licensing authority in writing one month before the expiry of the initial period of the prospecting licence and that total period of the prospecting licence shall not exceed three years. The renewal referred to in rule 31 is subject to the licensee having carried out his working obligations under rule 32, which provides that the licensee shall in respect of the areas covered by each licence prepare within three months of the grant of the licence a scheme of prospecting for the approval of the licensing authority, and shall not commence the operations unless the scheme

has been so approved. It further provides that the licensee shall in respect of the area covered by the licence carry out the prospecting work in accordance with the approved prospecting scheme. Unfortunately, none of the aforesaid clauses of CHEJVA complied with any of the relevant rules then in force.

29. It is argued on behalf of the petitioners that clause 5.6 of CHEJVA, which envisages exclusive right of the parties for the duration of the licence to have, insofar as the exploration for minerals is concerned, exclusive possession of the area, the subject of each licence for all the purposes of conducting the Joint Venture activities is not covered by any provision in BMCR 1970. We have considered the issue so raised in the light of provision of Rule 27 of BMCR 1970, which confers an exclusive right on the holder of the licence to mine, quarry, bore and search for, etc., for any specified mineral lying or being within, under or throughout the land specified in the licence. It is clear that the rule provides an exclusive right to mine for a specified mineral, but does not envisage exclusive possession of the area for which PL is granted for all purposes of conducting activities of a Joint Venture being given to the holder of the licence. In a nutshell, it is an exclusive right for exploration of the specified minerals, but not the right to exclusive possession of the area in question.

30. Rule 38 provides that on or before the determination of his licence, the licensee shall have a right to a mining lease in accordance with the terms contained in these rules for mining leases provided he has carried on prospecting operations to the satisfaction of the licensing authority in accordance with the working obligations, paid all Government dues regularly and paid compensation to the third parties as provided in these rules. On the other hand, clause 5.9 provides that

the parties shall pursuant to clause 2.2 seek assurance from the Provincial Government, namely, that the Joint Venture shall have the right to apply for a Mining Lease at any time during the conduct of Stage Three or Stage Four Activities if in the opinion of the Manager a decision to undertake mining development is likely to be made pursuant to either sub-clause 8.2.10(d) or sub-clause 11.3.2 and the said mining lease shall be renewed at the commencement of any mining venture for the duration of proposed mining operation thereunder. A perusal of rule 38 makes it clear that the right to grant of mining lease is not an absolute right, inasmuch as it is subject to the conditions laid down therein, namely, the terms contained in these rules for mining leases, carrying out the prospecting operations to the satisfaction of the licensing authority in accordance with the working obligations, paying all Government dues regularly and compensation to the third parties as provided in the rules, whereas under clause 5.9 the licensee is given the right to apply for a mining lease at any time during the conduct of Stage Three or Stage Four Activities on the sole discretion of the Manager and the renewal thereof without compliance with the terms and conditions prescribed in the rules in accordance with the provision of rule 38.

31. Mr. Ahmer Bilal Sufi, ASC contended that 10 prospecting licences covering an area of 1000 sq km were granted to BHP on 08.12.1996 in violation of rule 28 of BMCR 1970, which provides maximum limit of 10 square miles, i.e., 25.4 sq km per licence, as such the area granted was four times more than what was provided for under the said rule. On the other hand, learned counsel for BHP asserted that it was in the interest of GOB to grant as wide an area as

possible for prospecting to ensure discovery of minerals over a large part of the Province.

32. Clause 5.3.1 of CHEJVA provides that the parties shall seek from the Provincial Government within the exploration area which prospecting licence may, in aggregate, at any time for the duration of the agreement cover up to fifty square kilometers therein whereas as per clause 5.3.2, where at any time the Joint Venture is active in ten prospecting licences having in aggregate an area of fifty square kilometers, it shall not be permitted to apply for additional prospecting licences within the exploration area unless it first relinquishes from one or more of its existing prospecting licences an area equivalent to the size of the proposed prospecting licence. However, clause 5.10 of CHEJVA provides that the area shown in the map (Schedule B to CHEJVA) may be revised so as to accurately represent the current status from time to time of the exploration area including all prospecting licences or mining leases in existence from time to time including the revision or relinquishment of any prospecting licences or mining leases. This clearly nullifies clause 5.3.1 in the first instance, and then negatives the provision of rule 28, which provides that except as otherwise decided by the Government, a prospecting licence shall not be granted in respect of any area measuring more than 10 square miles and rule 42, which lays down that the lease shall not be granted in respect of any area of more than five square miles save in case where special exemption is granted by the Government. What was done in the instant case was that initially an area of 50 sq km was granted to the licensee for exploration, which was illegally extended to 1000 sq km pursuant to the request made by BHP-BDA. This part of

CHEJVA was also entered into against the letter and spirit of the law, which created another dent in the agreement.

33. Clause 5.11 provides that pursuant to clause 2.2 and in so far as the mining rules have particular application to this agreement, the parties shall seek from the Provincial Government notified orders in respect of the matters identified in clause 5.2, sub-clause 5.3.1, clauses 5.6, 5.9 and 6.1. It may be noted that under clause 5.2 the parties are entitled to seek from the Provincial Government exclusive and unfettered right to undertake stage one activities within the exploration area subject to clause 5.3, sub-clause 5.3.1 whereof specifies an area of 50 sq km in the aggregate. Clause 5.6 provides that the parties shall seek appropriate additional assurances from the Provincial Government for the exclusive possession of the area and that third parties do not impede the Joint Venture activities, etc. Under clause 6.1 the parties shall seek from the Provincial Government the grant of a first right of refusal to undertake further exploration for, or feasibility study in relation to or to develop and mine any ore body containing other minerals discovered by the Joint Venture within the exploration area. Under clause 6.4 where the Provincial Government decides to retain to itself rights with respect to other minerals within the relevant area, the Joint Venture shall nevertheless be entitled to undertake further Joint Venture activities within its existing prospecting licences for minerals, even though such Joint Venture activities may at times coincide with the Provincial Government activities in connection with other minerals provided that such Joint Venture activities are undertaken compatibly with Provincial Government objectives. Clause 6.5 provides that where in accordance with sub-clause 6.3.1 the Provincial Government elects not to pursue

in its own right and interest in other minerals, the Joint Venture may exercise its option within 90 days of the Provincial Government's notice pursuant to sub-clause 6.3.1 and, if so exercising the option, it shall accordingly apply for the right to specifically explore the other minerals within the exploration area. It further provides that where the Joint Venture exercises its option, the Provincial Government shall promptly issue further prospecting licences for other minerals and/or shall amend existing licences to also enable the conduct of Joint Venture activities in relation to other minerals. Rule 3 provides that except with the previous sanction of the Government no licence to prospect for any mineral and no lease of mines and minerals shall be granted otherwise than in accordance with rules. Rule 53 provides that the licensee or lessee shall without delay report to the licensing authority the discovery on or within any of the lands of mines demised by the licence or a lease of any mineral not specified in the licence or lease, but he shall not, unless a fresh licence or lease in respect of the minerals so discovered is granted to him under these rules, have any right to these minerals. The licensee or lessee will, however, enjoy preferential right to the grant of a prospecting licence or mining lease for such other mineral discovered and reported by him subject to the discretion of the licensing authority. Thus, above provisions of CHEJVA being contrary to the provisions of rules 3 and 53, BHP-BDA applied for relaxation of these along with a host of other rules, though under clause 2.2 of CHEJVA, they could have only sought 'consents', 'approvals' or 'assurances', and not the 'relaxation' of rules. No previous sanction of the Government was sought in terms of rule 3 for issuance of a prospecting licence otherwise than in accordance with

BMCR 1970. It was a mandatory requirement, non-fulfilment whereof rendered the whole exercise a nullity in the eyes of law.

34. Furthermore, these prospecting licences were renewed for a period of one year in 1998 and in 1999 and respondent No. 8 was extended the facility of prospecting licence in the Reko Diq area for a period of 5 years as against 3 years provided under rule 31, which provides that no further extension beyond 3 years will be granted. This provision was attempted to be circumvented by issuing a fresh prospecting licence (PL-14) on 21.02.2000 for the same area of 240,620.20 acres for 2 years wherein the licensee was given the option to retain the area beyond one year subject to their giving one month's notice in writing of their intention to do so. This was contrary to rule 30 of BMCR 1970, which stipulates grant of PL for a period not exceeding one year.

35. The BMR 2002 were promulgated vide Gazette notification dated 09.03.2002 and the licences and leases granted prior to the notification of BMR, 2002 and were continuing at that time were protected by means of rule 125 of the BMR 2002, which stipulates that any licence or lease granted, renewed or saved under any law for the time being in force and existing immediately before the coming into force of these Rules shall be deemed to have been granted, renewed or saved for the subsisting period in accordance with the provisions of these Rules as if these Rules were in force at the time such licence or lease was granted, renewed or saved and shall be treated accordingly. It is noteworthy that BHP did not have any mineral title at the time of notification of BMR 2002 as PL-14 had already expired on 21.02.2002 and was not further renewed. As such, their rights accrued under PL-14, having already ceased, were never protected. Since BHP did not

have any mineral title under the said rule, GOB was empowered under rule 67 of the BMR 2002 to invite bids to tender for award of exploration licences for the same area. However, GOB did not exercise its prerogative and instead granted exploration licence (EL-5) for the Reko Diq area, which was renewed for a further period of 6 years. Under CHEJVA, BHP/TCC enjoyed rights for exploration in the Reko Diq area between 1994 and 1996; held a prospecting licence for the same area for 5 years and an exploration licence for the same area for 9 years, meaning thereby that the exploration/prospecting facility was extended to BHP/TCC for a total period of 17 years, which is an extraordinary and undue favour in itself granted under CHEJVA.

36. As held hereinbefore, CHEJVA itself was a void agreement from its inception. This aspect had come to light during the correspondence by the two law firms, namely, M/S Kabraji & Talibuddin M/S Shakil Law Firm, engaged by the parties to vet the Addendum, which has already been discussed in detail hereinbefore. However, to cure the invalidity of CHEJVA, BHP in the name of Addendum unsuccessfully attempted to enter into a new agreement, where in place of the original two parties, three parties were attempted to be introduced. CHEJVA having been found and declared to be a void agreement in the earlier part of this judgment, there was no room left for BHP to build the superstructure on its basis, namely, Addendum No.1, Option Agreement', Mincor Option, Alliance Agreement, Novation Agreement, or the subsequent share-purchase agreements. Consequently, the transfers of interest from BHP to Mincor NL to TCC to Atacama to Barrick Gold to Antofagasta to TCCP all were illegal transactions entered into by the concerned parties at their sole risk and cost, and are so declared hereby.

37. Clause 18.1 of CHEJVA provides that the terms and conditions of the agreement and all mining information acquired by a party by reason of the operation of the agreement shall be confidential. This clause runs contrary to the provision of rule 39, which provides that if so required by the licensing authority, the licensee shall, before the return of the deposit made by him, disclose confidentially to the licensing authority all information acquired in the course of the operations carried or the geological formation of any area not taken up by him under a mining lease. It is noteworthy that BHP did not seek relaxation of rule 39 and the aforesaid clause 18.1 held the field as it is.

38. As per annexure marked 'A' to Martin Harris' letter dated 16.09.1993, BHP proposed that the Parties must seek Government's confirmation of the royalty @ 2% of the value of the extracted minerals, equivalent to the "net smelter return". Further, the rate of royalty once settled would need to be fixed for the life of any mine by a Notified Order addressing rule 65. It may be mentioned that rule 65 of BMCR 1970 requires the licensee or lessee to pay royalty at the rates to be notified by the Government from time to time of all minerals extracted by him. It further lays down that in case of non-payment of royalty within the prescribed time, the first two months shall be treated as grace period whereafter a penalty @ 6% of royalty dues shall be charged in case the payment is made after the expiry of the second month next after the due date. Furthermore, in case royalty along with penalty is not paid until expiry of the fourth month from the due date, the licensee or lessee shall be liable to pay a further penalty of upto Rs.50,000/- as determined by the licensing authority and in case it is not paid until the expiry of the six months

after the date it first became due, the licence or lease shall be cancelled forthwith. From a perusal of the relaxation sought and the provision of the rule in question, it is clear that the entire procedure to be followed in case of non-payment of royalty was done away with under CHEJVA. Such a relaxation too could not be sought and granted in the name of 'consent, approval or assurance'. It was an illegal exercise.

39. The undue favours being extended to BHP in the transaction further continued and the already inadequate consideration of CHEJVA (25 : 75 percentage interests) was being mitigated in many untold ways but the learned counsel for BHP still claimed at the rostrum that his client was to earn its part of the return and GOB was to get its percentage interest just without doing anything. Here, it may be mentioned that the Directorate of Mineral Department vide letter dated 19.07.1994 informed BDA that the Licensing Authority had accepted the request of BDA/BHP for reservation of gold area in relaxation of the limits of the area as fixed under Annexure-IV to BMCR 1970 and also approved the plan for a period of three years, and permitted it to start the prospecting/mining operation for gold mineral over an area of 33,47,226 (thirty-three lac forty-seven thousand two hundred twenty-six) acres situated in Chagai District on the following terms & conditions: -

> "(i) That within one month of the date of issue of this letter, you will deposit as Annual Fee a sum of Rs.33,47,226/- (in advance) on nominal rate of Rs.1/- instead of Rs.5/- per acre, as you have been exempted from the payment of Annual Fee at the rate of Rs.4/- per acre, in relaxation of Rule 33 of the Balochistan Mining Concession Rules, 1970.
>
> (ii) That within one month of the date of issue of this letter you will return one copy out of four (4) attached plans after affixing your signature and rubber stamp thereon in token.

(iii) That you will submit regularly quarterly progress reports.
(iv) That you will report without avoidable delay to the Licensing authority the discovery of any other mineral for which you do not hold a Prospecting Licence or such mineral bearing strata of archaeological discovery of treasures.
(v) That you will abide by all the terms and conditions of Balochistan Mining Concession Rules, 1970 as amended from time to time except as provided otherwise."

40. In the aforesaid letter, it was further mentioned that in case of acceptance of the above terms and conditions, if needful was not done strictly within the stipulated time, the reservation of the area would be treated to have lapsed without any notice and they would be required to apply afresh if they still desired to get the prospecting licence/mining lease, and such application would be considered *de novo* and decided in accordance with the relevant rules. Surprisingly, though BHP failed to comply with the above said terms and conditions, including the payment of annual fee within the stipulated period, but instead of treating the reservation to have lapsed, the Mineral Department *vide* letter dated 19.09.1994 pursuant to BDA's letter dated 11.08.1994 granted further period of 20 days to comply with the said terms and conditions with the condition that in case of failure to do the needful in the extended period, letter dated 19.07.1994 would stand withdrawn. It appears that the aforesaid terms and conditions were not complied with and the Industries, Commerce and Mineral Resources Department, instead of acting upon their letters dated 19.07.1994 and 19.09.1994, by their letter dated 16.11.1994 waived off the annual fee of Rs.3.347 million for gold exploration in an area of 33,47,226 acre for a period of three years. The said letter of the Industries Department is reproduced hereinbelow: -

"No. S.O (MR)5-9-94. 4829-30
GOVERNMET OF BALOCHISTAN
INDUSTRIES COMMERCE AND MINERAL
RESOURCES, DEPARTMENT

DATED QUETTA THE 16th NOV: 1994

To

The Director
Mineral Development
Quetta

Subject: RESERVATION OF AREA FOR GOLD EXPLORATION OVER 3,347,22(sic.) ACRES IN DISTRICT CHAGAI

The undersigned is directed to refer to the subject cited above and to convey approval of the competent authority to the waiving of an amount of Rs.3.347 million in favour of BDA on account of Annual fee etc for the area of 3,347,22(sic.) acres reserved for Gold Exploration in District Chagai for a period of three years.

You are requested to please take further steps immediately.

(MUHAMMAD IBRAHIM SUMLANI)
SECTION OFFICER
MINERAL RESOURCES

Quite strangely, as in the case of grant of large scale relaxation of the rules, the authority here too does not mention the circumstances in which it had become inevitable to relax the provision regarding allocation of exploration area. It also fails to mention why it was necessary to exempt BHP from paying the annual fee, or other dues. Though the Directorate of Mineral Department in the aforesaid letter dated 19.07.1994 mentioned that if applicants BHP-BDA on acceptance of the terms and conditions prescribed in the said letter, did not comply with the same within the stipulated time, the reservation of the area would be treated to have lapsed without any notice and they would be required to apply afresh if they still desired to get the prospecting licence/mining lease, and such application would be

considered de novo and decided in accordance with the relevant rules. It appears that neither did BHP-BDA pay the annual fee nor did it comply with other conditions so prescribed, and the Department suddenly by its aforesaid letter dated 16.11.1994 conveys the approval of the competent authority to the waiving of annual fee of Rs.3.347 million mentioning once again no justification for the said waiver, as was done in granting relaxation of bulk of the provisions of BMCR 1970.

41. The undue favours being extended to BHP are further established from the contents of the aforesaid letters. The Directorate of Mineral Department, in its letter dated 19.07.1994, states that BHP has been exempted from the payment of annual fee @ Rs.5/- per acre in relaxation of rule 33 of BMCR 1970, as a result whereof BHP will be required only to deposit a sum of Rs.33,47,226/- on that account at the nominal rate of Rs.1/- per acre instead of Rs.5 per acre. Then the Industries Department in its letter dated 16.11.1994 waives the already reduced amount from Rs.5/- per acre to Rs.1/- per acre. It was an extraordinary treatment meted out to BHP whereby a loss of Rs.1,67,36,130/- per annum was caused to the public exchequer without any justification whatsoever having been brought on the record. Thus, in the face of these facts and figures, it could not be said that for the BDA it was a free carried interest whereas in the case of BHP it was to be earned by making a huge investment.

42. Mr. Raza Kazim, Sr. ASC for the petitioners argued that BDA failed to exercise due diligence and properly consider the terms offered to it before entering into the agreement. It granted seventy five percent of mineral rights to BHP (the only party before it) on the latter's terms and conditions, which is apparent, *inter alia*, from Para 5

of the summary submitted to the Additional Chief Secretary (ACS) Balochistan. It allowed assignment of EL-5 in H-14 area by BHP to TCC, a newly established company, having no experience in the field of mining. Further, though BHP by virtue of CHEJVA was committed to spend an amount of US $ 130 Million for H-4 (Starter) Project (a part of deposits of copper and gold in Reko Diq), whereas it had only spent US $ 7.00 million. No substantial work had been carried out ever since the grant of PL/EL since 1993 and the respondent-companies were only sniffing around Reko Diq, without doing anything towards the project. He submitted that for the disposal of the largest single mineral resource asset in the Subcontinent, it was in the public interest that GOB, as a trustee of the people of Balochistan, had ensured that all proposals for the exploitation of the *Reko Diq* copper and gold mines were comprehensively scrutinized and verified by the concerned technical experts and professionals of the field of mining. However, pre-requisite for the *bona fide* exercise of the executive authority of GOB under Article 173 of the Constitution in entering into CHEJVA dated 29.07.1993, was its capability and competence, which was admittedly non-existent at the relevant time, inasmuch as, GOB did not have the experience of the concerned professionals, experts or engineers who could have verified the offer of BHP to explore, prospect and mine for copper and gold at Reko Diq.

43. It was argued on behalf of the petitioners that the executive authority of GOB acted in a non-transparent, arbitrary and unreasonable manner in the disposal of public property i.e. mineral resources in Reko Diq, thereby failing to obtain the best competitive price for the said mineral resources. No tenders were floated by publishing advertisements in the press and no competitive bids

invited/offered, therefore, the whole process of awarding CHEJVA to BHP was uncompetitive, non-transparent and illegal. It is further argued that CHEJVA is against public interest inasmuch as the same was executed without taking into consideration the protection and promotion of the welfare of the people of Balochistan, therefore, it is against public policy on the touchstone of section 23 and various other provisions of the Contract Act, 1872. According to the learned counsel, since the facts pertaining to these issues are substantially unfavourable to GOB, it renders CHEJVA together with all its offshoots null and void, on the touchstone of the constitutional constraints and requirements pertaining to this matter and also the relevant provincial laws, e.g., GOB Rules of Business, BMCR 1970, BDA Act 1974, etc.) and finally on the touchstone of the law laid down by the Supreme Court in the Steel Mills case reported as *Watan Party v. Federation of Pakistan* (PLD 2006 SC 697) concerning public policy, public interest, transparency and bona fides. In response, Mr. Abdul Hafeez Pirzada, Sr. ASC for BHP argued that it is apparent form clauses 3.1, 3.2, 3.3 and 3.5 of CHEJVA that both the object and consideration for the agreement are lawful, proper, just and not against any principle of public policy. In the context of public policy, he stated that it was also pertinent to underscore that since 1995 the Mineral Policy approved by the Federal and all Provincial Governments had been in force and the contents thereof were totally consistent and in accord with the provisions and scheme of CHEJVA. Therefore, the question of CHEJVA being opposed to public policy did not arise. He further argued that it was nobody's case that the National Mineral Policy was unlawful or opposed to public policy. The reliance by the petitioners on provisions of the Contract Act, 1872 was, therefore, not only misconceived, but

also wholly untenable. Mr. Ahmer Bilal Sufi, ASC for GOB argued concurrently with the petitioners that CHEJVA is void in terms of section 23 of the Contract Act, 1872. He has placed reliance on the cases reported as *Jalil Asgbar v. Atlas Industries & Trading Corporation* (1984 SCMR 1), *Inayat Ali Shah v. Anwar Hussain* (1995 CLC 1906), *Abdul Razzak v. Karachi Development Authority* (1991 CLC 1591) and *Cudgen Rutile (No. 2) Ltd v. Chalk* [1975 AC (Privy Council) 520].

44. We have scanned the record made available to the Court to find out whether at any stage prior to the award of CHEJVA, any tender was floated by the BDA, but unfortunately we have not come across any document showing any initiative taken by the BDA or any other department of GOB to publish advertisement in the press and invite tenders with a view to providing opportunity to other investors in the field of mining to come forward and compete with others. No doubt foreign investment in any modern economy is to be encouraged by all means, but all such activities are required to be carried out observing due process of law, which alone is a sure guarantee of the protection and promotion of the public interest. Reference may be made to the case pertaining to establishment of fast food restaurant in F-9 Park, Islamabad, reported as *Human Rights Case No. 4668 of 2006* (PLD 2010 SC 759) wherein it has been noted that a good number of foreign investors are doing trade/business in the country in accordance with the law on the subject. In the instant case, it appears that BDA entered into negotiations with BHP and took up the issue of grant of exploration rights with GOB in a most haphazard manner. In this regard, it is noteworthy that on 13.07.1993, the Chairman BDA forwarded a summary for approval of the draft agreement by the Chief

Minister whereupon the Additional Chief Secretary observed, *inter alia*, that the orders of the government required the draft agreement to be vetted by Finance Department, Law Department and Planning and Development Department. This was not done, nor was it possible to do so before the date fixed for signing of the agreement, i.e., 29.07.1993. The proposed agreement was "conditional" but that did not by itself provide adequate protection to GOB as conditions sought were specific and BDA ought to have provided adequate opportunities to concerned departments for proper examination of the case and it was in neither party's interest to enter into an agreement without considering its pros and cons just because the agreement provided an escape clause. Therefore, instead of agreement, better intent document should be signed. In response to the above observations of the Additional Chief Secretary, the Chairman BDA, *vide* note dated 22.07.1993, provided certain clarifications and when the matter again went to the Additional Chief Secretary remarked as under: -

(1) Chairman BDA was hand carrying the file to the C.S. Few people in the government really know what GOB is getting into in the agreement. Agreed that BHP is a good party, mineral exploration in the area is highly desirable but GOB has to be mindful of its interest specially the possible reaction of the people of the area to a large tract of land being reserved for BHP.

(2) The signing of the agreement has been fixed for 29.07.1993. Chairman BDA may be authorized to go ahead subject to the clause that the agreement will be of a provisional nature and any reasonable additions/alterations proposed by Planning & Development and Finance Departments in a period of one month from signing of the agreement shall be incorporated therein.

When the matter reached the Chief Secretary, he observed that the agreement was not moved well in time to the Planning & Development and Finance Departments for its vetting. He further remarked that the agreement to be signed on the 29.07.1993 should be termed as

"provisional" so that amendments/modifications, if any, could be made at a later stage. The said proposal was approved by the Chief Minister on 27.07.1993. CHEJVA was signed on 29.07.1993, but thereafter no amendments were made therein and it became effective on 20.01.1994. However, this fact was noticed at the time of entering into of Addendum on 04.03.2000, inasmuch as clause 3.0 recited that there was no further vetting/scrutiny of CHEJVA by the relevant departments of GOB. The processing of the matter by GOB in the above manner substantiates that public advertisements were not resorted to in the interest of transparency and to obtain the best competitive price for the disposal of public property, i.e., mineral resources in Reko Diq, and thereby denied participation to other investors of the field to the detriment of the general public, and especially the people of Balochistan. Such a handling of an issue of great public importance was against public policy as well because it certainly caused injury to the public good and, therefore, provides a basis for denying the legality of the transaction in question. It is noteworthy that section 23 of the Contract Act 1872 provides that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful, and every agreement of which the object or consideration is unlawful is void. In the instant case, CHEJVA was entered into in violation of a large number of provisions of BMCR 1970. It is, therefore, opposed to public policy, which calls for across the board enforcement and

application of the laws of the land. CHEJVA is hit by section 23 of the Contract Act, on this score.

45. Nothing has been brought on the record to show that the Finance Department, which is required under GOB Rules of Business, 1976 to scrutinize such a venture by respondent No. 1, had approved this project. In absence of non-approval of the JVA by the Finance Department, CHEJVA was executed between BDA and BHP. The respondents attempted to take undue advantage out of the political instability prevailing at that time, inasmuch as at that time, a Caretaker Government was in place. The foreign companies by means of CHEJVA, Addendum No.1 and other agreements preyed upon the huge gaps in understanding on the part of GOB of large scale mineral extraction and were in a distinct position to manipulate and dominate the will of GOB. Under article 3.2.7 of the UNIDROIT Principles of International Commercial Contracts under the title of gross disparity, a contract which has been conceived by a party seeking to take unfair advantage of the other party's dependence, economic distress or its improvidence, ignorance, inexperience and lack of bargaining skill cannot be enforced.

46. In Articles 5.2, 5.3, 5.7, 5.11, 7.2, *inter alia*, the parties shared the responsibility to 'seek' and apply for relevant government licences, leases and permissions etc. as necessary. However, Article 5.4.2 of CHEJVA provides that each of the Prospecting Licences shall be issued to the Joint Venture for an initial term of two (2) years with the option to extend for up to three (3) years beyond the said initial term, provided that where the parties have commenced a Feasibility

Study, the conclusion of which will not be possible until beyond efflux of the five (5) year term possible for the relevant Prospecting Licence. It further provides that the Directorate of Mineral Development shall grant such further extension of time as may be reasonably required to permit conclusion of the said Study. The Parties shall also seek pursuant to Clause 2.2 to have the said possibility of a further extension of time recognized by the Provincial Government. (Emphasis added)

47. Mr. Raza Kazim, Sr. ASC for the petitioners referred to the judgment of the Judicial Committee of the Privy Council in *Queensland Titanium Mines v. Chalk* (1975 A.C. 520). Briefly, the facts of the *Queensland Titanium Mines' case* were that the appellants were on June 27, 1966, holders of an authority to prospect, granted under section 23A of the Mining Act 1881 by the Minister of Mines, in respect of an area of approximately 18 square miles, which was renewable for a further period of one year from July 1, 1966. On their application for renewal the appellants were granted two authorities to prospect, one by the Governor-in-Council under section 46 (1) (b) of the Mining Act in respect of so much of the area as consisted of reserves, and the other by the Minister under section 23A (1) in respect of so much of the area as consisted of Crown land and private land. The two authorities were for terms of four years from July 1, 1966, and granted the appellants the right to prospect the land subject to the authority for all minerals other than coal, mineral oil and petroleum and the right to the grant of mining leases over any part of the subject lands. The appellants carried out extensive prospecting operations incurring considerable expense and discovered large mineral deposits. On February 2, 1970, they applied for three special mineral leases in

respect of the minerals so discovered in lands within the subject areas, but not including any private land. The applications were heard by the Mining Warden who recommended that the leases should be granted, but the Government refused to grant any. In consolidated actions in the Supreme Court of Queensland the appellants claimed specific performance of the contract which they alleged existed to grant them leases or, alternatively, damages for wasted expenses and loss of future profits. The respondent, representing the Government of Queensland, entered demurrers on the grounds, *inter alia*, that the appellants were not entitled to the grant of any special mineral leases and that, if on a true construction of the authorities to prospect, any provision purported to entitle the appellants to the grant of a special mineral lease or to oblige the Governor in Council to grant any such lease, the term was void for that neither the Mining Acts nor any other Act permitted the inclusion in an authority to prospect of a term which would oblige the Governor in Council to grant a special mineral lease. The Full Court allowed the demurrers. The Privy Council, while dismissing the appeals, held that the Crown in the Commonwealth of Australia could not contract for the disposal of any interest in Crown lands except in accordance with powers conferred by statute and, accordingly, where a statute prescribed a mode of exercise of the statutory power that had to be observed. It, therefore, followed that the freedom of the Minister responsible for implementing the statute could not be validly fettered by anticipatory action; that since the Minister before granting a mineral lease, whether in respect of reserves or Crown land, had to make statutory decisions and exercise statutory discretions, any attempt to bind himself in advance was beyond his statutory powers, and, as no purported agreement could

give rise to any contractual obligation enforceable in the courts, the statements of claim alleged no contract, which could be enforced and the demurrers were, therefore, well founded. Considering the similarity of the facts and points of law involved in the precedent case, the principles set therein have a persuasive value for the purposes of the case in hand. Various recitals in CHEJVA, Addendum, Novation Agreement, Mincor Option, Alliance Agreement, all have purported to bind the Government and its functionaries in the discharge of their statutory duties, which is not permissible. This aspect too is opposed to public policy in terms of section 23 of the Contract Act, 1872. Accordingly, all the said instruments are void and not enforceable in the courts of law.

48. Mr. Raza Kazim argued that BMCR 1970 were repealed and new rules known as BMR 2002 were framed by GOB under the influence of the respondent companies to make out a way for legalizing the illegal acts whereas according to Mr. Ahmer Bilal Sufi BMR 2002 were prepared and revised by the counsel engaged by TCC before the Balochistan High Court in Writ Petition No. 892/2006. In response, Mr. Khalid Anwar, Sr. ASC stated that above stance of the petitioners/GOB was based on the assertion that the law firm RIAA represented BHP in negotiations and later the same firm advised GOB on the draft and amendments made in the BMR 2002 as well. He stated that the firm had only offered its input in the consultation process for making improvements in the BMR 2002. In this behalf, he presented a list of clients of the firm downloaded from its website to show that its clients did not include BHP. When this fact was brought to the attention of the Court by the petitioners during the hearing of these proceedings in January 2011, the data of the year 2011 on the

website of the firm pertaining to the clients of the firm was got checked and it was found that TCC was included in the list of the firm's clients. The website also showed that the firm had provided assistance to GOB in the preparation of BMR 2002. However, information regarding the drafting and advising of the BMR 2002 by the said law firm was removed from the firm's website during the year 2012. Despite a conflict of interest, the role of the concerned law firm in the preparation of BMR 2002 is, therefore, established.

49. Learned counsel for GOB stated that the documents relating to CHEJVA, Addendum, Novation agreements, relaxations, etc., showed a clear pattern of irregularities. He pointed out that Mr. Ata Muhammad Jaffer, Chairman BDA, who also happened to be Additional Chief Secretary, was convicted by a Court functioning under National Accountability Ordinance, 1999 after being charged for an offence of having assets and living beyond his means. In response, learned counsel for TCC argued that the petitioners had made a bald assertion that elements of corruption and corrupt practices were involved in the award of contracts, and failed to produce any substantial evidence in support of such an assertion. Further, no nexus was established or shown to exist between the corrupt practices allegedly committed by Mr. Ata Muhammad Jaffer with CHEJVA.

50. A perusal of the record shows that the executant of CHEJVA, Mr. Ata Muhammad Jaffer held dual position of Chairman BDA and Additional Chief Secretary at the relevant time. The two positions are very distinct in the eyes of the law. The first is an office holder in a statutory incorporated body while the latter is an officer of GOB authorized to represent the Government. The same person holding both offices may have contributed to the impression created by BDA

that the Governmental authorities were under an obligation to issue the relevant relaxations and licences. In the former position, he forwarded the case to the Provincial Government whereupon in the latter position he chaired the meeting wherein decisions regarding CHEJVA were taken. It was a clear conflict of interest. The record also shows that he was hand carrying the file, which showed a visible haste on his part to execute the agreement. In fact, there was a greater burden on the officer not only to be fair in his adherence to the law, but also to have disassociated himself from the matter as far as his position as applicant was concerned. The record also shows that he disregarded caution sounded by several departments. As per the Balochistan Civil Servants (Efficiency and Discipline) Rules 1983, living beyond one's means is an act of corruption. The factum of his conviction has not been rebutted by the learned counsel for TCC or anyone else.

51. Mr. Ahmer Bilal Sufi, ASC for GOB argued that neither BHP was registered under the Companies Ordinance, 1984 nor did it have any place of business in Pakistan on the date of execution of CHEJVA as required by the said Ordinance, therefore, BHP was not competent to apply for and have a grant of mineral licenses in terms of rule 14 of BMCR 1970. BHP's act of applying for the said licence constituted misrepresentation which vitiated CHEJVA within the contemplation of the Contract Act, 1872. Mr. Abdul Hafeez Pirzada, Sr. ASC for BHP stated that BHP had obtained permission of the Board of Investment and had also filed returns with the Securities & Exchange Commission of Pakistan as a foreign company having a place of business in Pakistan as per the Companies Ordinance, 1984. He also pointed out that Australia, the country of incorporation of BHP Billiton, the parent

of BHP, allows Pakistani companies and Pakistani nationals to apply for and obtain mineral titles. Mr. Khalid Anwar, Sr. ASC for TCC argued that the foreign companies operating in Pakistan as parties or assignees under CHEJVA such as BHP, Mincor, TCCA, etc., were not required to be registered or incorporated in Pakistan at all for carrying out their operations. He argued that the parties to CHEJVA could not be required to comply with the provisions of the BMCR 1970, which were in force at the time, as GOB itself waived and relaxed the same in favour of the foreign investors to facilitate them. They had never had the need to comply with the old rules, which should not apply to them after express relaxations were granted by GOB. He argued that as far as TCC is concerned, it is only bound by the Novation Agreement, which effectively extinguished all previous agreements under CHEJVA. The learned counsel asserted that the Novation Agreement is entirely in conformity with the BMR 2002 and there is no question of violation of the said rules. He also took the stand that the respondents never asked GOB for a relaxation of the rules and it was BDA, an agent of GOB who had requested for the relaxations without their asking, which was subsequently accepted by GOB acting on their advice. Therefore, TCC was not under a responsibility to validate the legality of the relaxations granted. He argued that it is a presumption of the law of evidence/ *Qanoon-e-Shahadat* Order, 1984 that all official actions are deemed to be correct and legally valid.

52. It may be mentioned that rule 14 of the BMCR 1970 provides that a licence or lease shall only be granted or assigned to a company incorporated in Pakistan. Article 16 of CHEJVA provides that the law applicable to the agreement shall be the law of Pakistan, including the principles of international law as duly acknowledged and

agreed by the parties. In this connection, it is relevant to mention that every foreign company operating in Pakistan is required under the law to obtain a permission to establish a liaison office (LO) or branch office (BO). Companies that are issued such permission to establish an office registered with the Board are regulated by the Companies Ordinance, 1984. Sections 451 and 452 of Ordinance, 1984 lay down requirements for documents to be delivered to the Registrar of Companies by foreign companies and returns to be delivered where alterations as under: -

> 451. Documents to be delivered to registrar by foreign companies:-
> (1) Every foreign company which, after the commencement of this Ordinance, establishes a place of business in Pakistan shall, within thirty days of the establishment of the place of business, deliver to the registrar:-
> (a) a certified copy of the charter, statute or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and if the instrument is not written in the English or Urdu language, a certified translation thereof in the English or Urdu language;
> (b) the full address of the registered or principal office of the company;
> (c) a list of the directors, chief executive and secretaries (if any) of the company;
> (d) a return showing the full present and former names and surnames, father's name or, in the case of a married woman or widow, the name of her husband or deceased husband, present and former nationality, designation and full address in Pakistan of the principal officer of the company in Pakistan by whatever name called;
> (e) the full present and former names and surnames, father's name, or, in case of a married woman or widow, the name of her husband or deceased husband, present and former nationality, occupation and full addresses of some one or more persons resident in Pakistan authorised to accept on behalf of the company service of process and any notice or other document required to be served on the company together with his consent to do so; and
> (f) the full address of that office of the company in Pakistan which is to be deemed its principal place of business in Pakistan of the company.

(2) The list referred to in clause (c) of sub-section (1) shall contain the following particulars, that is to say:-

(a) with respect to each director: -

(i) in the case of an individual, his present and former name and surname in full, his usual residential address, his nationality, and if that nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, and other directorship which he holds;

(ii) in the case of a body corporate, its corporate name and registered or principal office; and the full name, address, nationality and nationality of origin, if different from that nationality, of each of its directors;

(b) with respect to the secretary, or where there are joint secretaries, with respect to each of them:-

(i) in the case of an individual, his present and former name and surname, and his usual residential address;

(ii) in the case of a body corporate, its corporate name and registered or principal office:

Provided that, where all the partners in a firm are joint secretaries of the company, the name and principal office of the firm may be stated instead of the particulars mentioned in clause (b).

(3) Every foreign company, other than a company mentioned in sub-section (1) shall, if it has not delivered to the registrar before the commencement of this Ordinance the documents and particulars specified in section 277 of the Companies Act, 1913 (VII of 1913), shall continue to be subject to the obligation to deliver those documents and particulars and be liable to penalties in accordance with the provisions of that Act.

452. Return to be delivered to registrar by foreign companies whose documents etc., altered:-

If any alteration is made or occurs in:-

(a) the charter, statute or memorandum and articles of a foreign company or any such instrument as is referred to in section 451;

(b) the address of the registered or principal office of the company;

(c) the directors, chief executive or secretaries or in the particulars contained in the list referred to in section 451;

(d) the principal officer referred to in section 451;

(e) the names of addresses or other particulars of the persons authorised to accept service of process, notices and other documents on behalf of the company as referred to in the preceding section 451; or

(f) the principal place of business of the company in Pakistan;

> the company shall, within thirty days of the alteration, deliver to the registrar for registration a return containing the prescribed particulars of the alteration and in the case of change in persons authorised to accept service of process, notice and other documents on behalf of the company, also his consent to do so.

53. The second party to CHEJVA is BHP, a company incorporated in the State of Delaware of the United States of America. For all practical and legal purposes, the second party is an American company to be treated as an American entity for all references to its nationality vis-à-vis rights and obligations accruing under the law. It is noteworthy that during hearing BHP despite repeatedly being required to produce before the Court such certificates of registration from the Board of Investment or the Registrar of Companies issued in favour of BHP failed to do so. Under section 456 of the said Ordinance, in the absence of such registration, a foreign company cannot institute legal proceedings without fulfilling requirements of sections 451 and 452 of the Companies Ordinance 1984. It loses its rights to bring a suit or legal action for any liability arising in its favour out of any contract it may have entered into in default of such registration. For facility of reference, section 456 of the Ordinance is reproduced hereunder: -

> 456. Company's failure to comply with this part not to affect its liability under contracts, etc.- Any failure by a foreign company to comply with any of the requirement or section 451 or section 452 shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until it has complied with the provisions of section 451 and section 452.

Section 456 was interpreted by this Court in *Hala Spinning Mills Ltd. v International Finance Corporation* (2002 SCMR 450) as under: -

> "12. ... ... As per requirement of this section any failure by a foreign company to comply with any of the requirements of section 451 or section 452 shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof but the company shall not be entitled to bring any suit, claim any set-off, make any counterclaim or institute any legal proceedings in respect of any such contract dealing or transaction until it has complied with the provisions of section 451 and section 452 of the Ordinance. As far as the first part of this provision is concerned, it needs no further elaboration. So far its latter portion is concerned on basis of it a foreign company cannot institute legal proceedings without fulfilling the requirements of sections 451 and 452 of the Ordinance."

54. Form the material produced before the Court it is evident that TCC started its operations in Pakistan through its Branch Office registered with the Board of Investment. It also incorporated a local subsidiary in Pakistan called TCCP. In December, 2007, TCCP approached the Lahore High Court for amalgamation of TCC's Branch Office in Pakistan and TCCP, incorporated in Pakistan, which had been functioning simultaneously until that time. Subsequently, the Islamabad High Court, where the case file was transferred on its establishment, *vide* order dated 11.04.2008 approved the amalgamation of both the companies as per the scheme of arrangement. As such, licences and properties held by Pakistan Branch of TCC stood transferred to TCCP.

55. Learned counsel for BHP and learned counsel for TCC took different positions on this issue. Learned counsel for BHP stated that BHP was registered in terms of the provisions of the Ordinance, but failed to substantiate his plea by producing any document. On the

other hand, learned counsel for TCC took the position that foreign companies were not required to comply with the said provisions as GOB itself had waived and relaxed the same in favour of the foreign investors to facilitate them. The grant of relaxation has since been held to be *ultra vires* and illegal, no reliance can be allowed to be placed upon a premise, which has been taken away from its inception.

56. As regards the reference made by learned counsel for BHP to the legal position obtaining in Australia allowing Pakistani companies or Pakistani nationals to apply for and obtain mineral titles, it has no bearing on the facts of the present case and cannot be made a basis for not complying with the requirements of law. At this stage, reference may be made to rule 15 of BMCR 1970, which provides that a licence or lease shall not be granted to any person who is or becomes controlled directly or indirectly by a national of or by a company incorporated in a country, the laws and customs of which do not permit subjects of Pakistan, or companies incorporated in Pakistan, inter alia, to operate mining concessions. Thus, though this rule imposes a restriction on foreign nationals/companies, but it in no way allows any foreign national/company who may not otherwise be hit by the prohibition contained in the said rule not to abide by the laws of the land.

57. Mr. Tariq Asad, ASC argued that CHEJVA also violated section 17 of the Registration Act, 1908. Mr. Ahmer Bilal Sufi, ASC contended that if TCC maintains that CHEJVA transfers interest, then it was liable to be registered under section 17 of the Registration Act, 1908. We have considered this aspect of the case. Section 17(1)(b) of the Act provides that an instrument, which purports or operates to create, declare, assign, limit or extinguish, whether in present or in

future any right or interest of the value of one hundred rupees and upwards to or in immovable property shall be registered. In the instant case, BHP-BDA failed to get CHEJVA registered under section 17 of the Registration Act. Similarly, subsequent assignment of rights under CHEJVA as purported to be done under the Alliance Agreement was also not registered in terms of said section 17. Here, too, the law of the land applicable to the agreement as per its own clause was not followed.

58. Learned counsel for BHP argued that Pakistan is a part of the comity of nations and has to consistently comply with and abide by its international obligations assumed through treaties, agreements covenants, and conventions or otherwise. It is settled law that domestic and municipal laws ought to be interpreted and applied harmoniously and consistently with international obligations. It is by these very laws (domestic and or municipal) that the state impinges upon its own sovereignty so as to fulfil its global and/or international obligations. The phenomena of globalisation poses a question begging an answer as to whether such municipal laws can be struck down by courts as impinge upon or compromise State Sovereignty, e.g. like the constitutional effects of laws enacted the European Union on the sovereignty of individual States. Pakistan has given effect to the New York Convention of 1958 through the Act XVII of 2011 and consequently formally incorporated the same into municipal laws. The *vires* of this statute have not even been impugned in the present proceedings. Pakistan has also given effect to the ICSID Convention through Act IX of 2011 and consequently formally incorporated the same as part of its municipal law. The vires of this statute are also not under challenge. However, any award rendered in the on-going

arbitration proceedings may be brought before the Courts of Pakistan for enforcement, thereby providing an opportunity for judicial review of the same on available legal grounds. Thus, for instance, under Act IX of 2011 an award by an ICSID Tribunal may be questioned or challenged on the same grounds for the purposes of execution as a Judgment of the High Court. Similarly, under the Act XVII of 2011 enforcement of an award can be refused on all of the grounds set out in Article V of 1958 New York Convention which includes grounds of public policy. In this behalf, a reference to sections 13 and 14 of the Code of Civil Procedure, 1908 may be useful. Learned counsel stated that judicial restraint is, therefore, called for given the specific facts and circumstances of the matter in line with the order dated 12.03.2012 wherein this Court did not restrain the on-going arbitration proceedings.

59. Learned counsel for BHP further submitted that without prejudice or otherwise affect the position adopted or advanced by any of the parties to the arbitration proceedings as BHP itself is not a party to the arbitration proceedings the ICC arbitration arises pursuant to the arbitration agreement contained in the CHEJVA, but under settled principles of law an arbitration agreement or even an arbitration clause as a part and parcel of a contractual agreement, is severable/ separable/autonomous from the main agreement (CHEJVA) and would under these principles survive even if the CHEJVA is struck down. The underlying cause of action in the ICC arbitration appears primarily to be premised on an alleged breach of contractual obligations. In this regard, arbitration clause is treated as an independent agreement, freely entered into by the parties, and thus enforceable for determination of a dispute under the agreement. This will include even

the validity of the main agreement. The ICSID arbitration arises from the Australia-Pakistan Investment Treaty (BIT). It is premised on alleged breach of treaty obligations by the State of Pakistan (which includes, under settled principles of international law, its constituent sub-divisions such as GoB) pursuant to Articles 3, 5 and 7 of the BIT. Under settled principles of international law: (i) every internationally wrongful act of a State entails the international responsibility of that State; (ii) there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State; (iii) the characterization of an act of a State as internationally wrongful is governed by international law such characterization is not affected by the characterization of the same act as lawful by internal law; (iv) the conduct of any State organ shall be considered an act of that State under international law whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central Government or of a territorial unit of the State and an organ includes any person or entity which has that status in accordance with the internal law of the State.

60. Learned counsel further argued that the above principles have been adopted and applied by domestic courts including English courts. One recent example is a decision of the Privy Council wherein the same principles were noted as being part of customary international law. An ICSID Tribunal has previously held that Article 25 of the ICSID Convention does not prohibit the treatment of a constituent sub-division of a Contracting State from being treated as part of that State even if that constituent sub-division has not been

notified thereunder to ICSID. Article 6(9) of the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) provides that unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. And, the arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void. And, Article 41 of the ICSID Convention (incorporated into domestic law by the Act IX of 2011), the ICSID arbitral tribunal shall be a judge of its own competence. Thus, judicial restraint is appropriate and just and the Court ought not to be called upon by a party to the arbitration proceedings to collaterally attempt to thwart the proceedings in which it has participated, submitted and appointed its own arbitrator. This is tantamount to abuse of the process of this Court. There is no fundamental right which entitles any person to seek such interference under Article 184(3) of the Constitution. There is no issue or allegation of public law involved or even raised in this matter. Consequently, even the principles laid down in the majority Judgment (note) of this Court in the case of *Hub Power Company Ltd. v. Pakistan WAPDA* (PLD 2000 SC 841) are not applicable at all. According to learned counsel, the phenomena of ceding sovereignty through globalization and international obligations is also to be taken into account in the larger context of the matter before this Court. In implementation of treaty/convention obligations the municipal law makes itself subservient to international law. Many sovereign and independent states, for the sake of political, economic and social stability and

national security voluntarily surrendered a part of their sovereignty to become members of the collectively secure and stable bodies, which process is going on.

61. In response, learned counsel for GOB argued that CHEJVA is a “surrender document” as it attempts to curtail the statutory independence and constitutional obligations of a licensing authority, inasmuch as the respondent/foreign companies were permitted by GOB to acquire rights in Reko Diq for exploration of copper and gold mines upon their own terms and conditions enabling them to maximize their profits inasmuch as once the mining began, the profit would be calculated on the end product of gold and copper extracted and produced. Mr. Tariq Asad, ASC argued that if GOB itself had become a party to CHEJVA, it would then be bound by all the decisions taken by the Operating Committee of the Joint Venture, where decisions would be taken on the basis of voting strength, determined by percentage interest in the Joint Venture. This meant that all powers relating to prospecting and mining operations would then be vesting in BHP and GOB, which is the Licensing Authority for Mines, would be performing its functions subject to direction by BHP. All this was tantamount to subordinating sovereign rights of the Province of Balochistan to a foreign company for the latter’s monetary interests, which position cannot be countenanced.

62. It may be mentioned that Part III of BMCR 1970 provides for the issuance of a mining lease and the statutory procedure for making applications for the same. In the absence of the application of BMCR 1970, CHEJVA attempted to exercise the statutory right of creating rules governing its operations, which is a right reserved for competent authority under section 2 of the Act of 1948. Article 11 of

CHEJVA provides for its own framework for the transfer of interests under the contract for mining development far away from the statutory framework provided in BMCR 1970. It utterly disregards all the rules provided therein and attempts to create an ad-hoc system of awarding the parties mining leases automatically. It declares that Prospecting Licences issued by the Provincial Government shall be 'converted into' Mining Licences. This goes much beyond the scope of an exemption and is tantamount to usurpation of executive and legislative prerogatives. No exemption or relaxation of rules can grant a foreign company the power to create *ad-hoc* rules to apply to a specific contract with regard to licences issued by a statutory body. Article 11.8.2 provides that where the Joint Venture or, pursuant to sub-clause 11.3.2, a Participating Party elects to develop a mine, then, subject only to compliance with routine Government requirements, it shall be entitled to convert the relevant Prospecting Licence(s) into Mining Licences so as to give a secure title over the required Mining Area. Article 11 not only renders the rules redundant, but also creates the possibility of continuing 'Mining Development' without Government approval and even to the exclusion of BDA under sub-clauses 11.3.3 and 11.4.1-2. This also disregards the terms and conditions of the Prospecting Licences issued to BHP by the Directorate of Mineral Development, Balochistan, which, *inter alia*, provided that the licence would not confer upon BHP any right to renewal of the prospecting licence or grant of a mining lease over the area or any part thereof unless the prospecting or work obligations as required under the licence have been carried out to the satisfaction of the Directorate of the Mineral Development. Besides, CHEJVA provides for the inclusion of other parties in the future as a mining consortium without recourse

to government licensing or authorization. Such permission to extend rights to parties not conceivable at the time of granting exemptions to the exclusion of both the present parties of the contract amounts to an attempt to disregard all relevant law for an undefined period of time. The same disregard for the laws of the host country and its law making institutions is expressed under Article 17, inasmuch as it provides that in case of change in legislation, which is applicable to the Joint Venture, then if the change or the new provision is more favourable to the Joint Venture or one of the Parties than the relevant laws, acts, rules or regulations in effect on the date this Agreement was signed, the Joint Venture and the Party concerned shall promptly apply to receive the benefits of such change or new provision. However, if, on account of the change or new provision, the economic benefits to any Party or the Joint Venture existing, or to arise under CHEJVA, are materially and adversely affected, directly or indirectly, then CHEJVA shall continue to be implemented in accordance with its original terms. Clearly, this clause of CHEJVA too, gives an overriding effect to CHEJVA over the legislative process and thereby attempts to make subservient the laws of a sovereign country, which cannot be approved.

63. Learned counsel for TCC argued that the Mining Lease against Exploration Licence 5 (EL-5) applied for by TCCP in 2011 was illegally refused by the Government's licensing authority in violation of rule 48 of BMR 2002, which made TCC eligible for such a lease as well as section 10 of the Protection of Economic Reforms Act 1976. He stated that TCC had completed the exploration work including drilling within the extended period wherein substantial discoveries of gold, copper, etc., were made and had also completed the Feasibility Study

and submitted it to GOB, containing a study to ascertain the commercial feasibility of the mining of the resource, treatment of ore obtained in mining operation, expected optimum return, life of the mine, mineable reserves and grade and the results of geological and geophysical investigations etc. After the above discovery by TCC, the present litigation attracted general focus and also publicity. TCC asserted its right under CHEJVA and BMR 2002 to be considered for and be granted the mining lease with or without the joint venture partner. He also averred that GOB, who had supported the legality of CHEJVA before the High Court, came up to take a different stand before this Court. In response, learned counsel for GOB has submitted that there is no question of retraction of pleadings on the part of GOB. However, law permits to modify position if there are developments subsequent to the filing of the case or new facts come to light. In this regard reliance is placed on *Mst. Ghulam Bibi v. Sarsa Khan* (PLD 1985 SC 345), *Mst. Mumtaz Begum v. Province of Sindh* (2004 CLC 697) and *Dilshad Ali v. Ahmed Khan* (2007 CLC 441). The developments in this regard included the approval of Dr. Samar Mubarakmand's project by ECNEC in December 2010 and accordingly CMA 252/2011 was filed apprizing the Court of this development and requesting a decision on merits. On 8th February, 2011 this Court directed the production of entire record relating to CHEJVA. The said record was retrieved and filed through several applications. It made shocking disclosures of extensive irregularities and corruption. The Government examined the same and decided not to defend the said acts and accordingly it decided to render full assistance to this Court from the record that was filed. Further, this Court has always encouraged that the Government officials must perform their functions in accordance with law and give

no weight/consideration to any unlawful order let alone protect the irregularities of their predecessors. See *Zahid Akhtar v. Government of Punjab* (PLD 1995 SC 530), *Iqbal Hussain v. Province of Sindh* (2008 SCMR 105), *Human Rights Cases Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010* (PLD 2010 SC 759).

64. Mr. Abdul Hafeez Pirzada, Sr. ASC for BHP argued that GOB through its agent BDA executed CHEJVA under its broader and overriding executive authority in terms of Article 142(c) read with Article 137 and Article 173 of the Constitution read with rule 3 of BMCR 1970, which was later reaffirmed by Addendum No. 1 and Novation Agreement dated 01.04.2006. Therefore, the process should be given full faith and credit throughout Pakistan as per the mandate of Article 150 of the Constitution. Learned counsel for TCC argued that the Addendum signed on 04.03.2000 between GOB, BDA and BHP was significant as GOB directly became a party to CHEJVA for the first time. He argued that the Addendum established and confirmed BDA as an agent of GOB and was created to clarify the positions of the parties especially the relationship between GOB and BDA.

65. Learned counsel further argued that the substance of the order dated 25.05.2011 passed in the instant case created a legitimate expectation that the CHEJVA was a legal and a valid instrument and TCC, at the very least, had the lawful right to apply for, and seek, the grant of mining lease because had this Court been, *prima facie*, of the view that the CHEJVA was *void ab initio*, it would not have vacated the injunction and asked GOB to consider and decide the request/application for grant of mining lease. He submitted that it was also pertinent to note that GOB too did not object to the vacation of the injunction and it was implicit in the vacation of the injunction that

a lawful right vested in TCC as a Joint Venture Partner of GOB under CHEJVA to apply for the mining lease in accordance with BMR 2002 and it was for GOB to decide the same, which it did. TCC acted in good faith and there is not an iota of evidence of any impropriety or illegality against it on record. BHP has to its detriment relied and acted upon the representations in CHEJVA, relaxation notification, prospecting license, exploration license and National Mineral Policy as well as several affirmations of CHEJVA and mineral titles issued from time to time by or on behalf of GOB.

66. Mr. Khalid Anwar, Sr. ASC argued that BDA was a party to CHEJVA and GOB was only added as a third party in its own right through the Addendum and that the Governor, as the Chief Executive of the Province at the time was well within his right to appoint BDA as his agent, which represented GOB for signing the Addendum. He clarified that an addendum only adds something by the parties by way of rights and obligations.

67. Mr. Ahmer Bilal Sufi, ASC for GOB argued that CHEJVA suffered from uncertainty as regards the identification of parties, inasmuch as the first page of CHEJVA mentions “Governor of Balochistan” whereas in clause 1.1 the “Parties” to CHEJVA are identified as BHP and BDA only. This confusion makes CHEJVA void under section 29 of the Contract Act, 1872, which is also recognized in legal opinion dated 3rd September 1999 by Kabraji. Mr. Sufi further argued that based on the record it can be stated that the Addendum is void under section 20 of the Contract Act as the second party executed it under a mistake of fact that BDA is an agent of GOB under CHEJVA. According to him, in absence of any agency document duly executed by GOB in favour of BDA, agency of BDA has been wrongly presumed.

The record shows that the summary for the then Governor was prepared, but he did not sign it. Later, photocopy of the same summary was presented to next Governor, which did not fulfil the requirement of rule 7 of the GOB Rules of Business, 1976. Learned counsel has further argued that the legal position is that the BDA Act, 1974 does not authorize the Chairman, BDA to act as an agent of GOB on his own accord. Rather BDA's Chairman has to perform all the acts in accordance with the provisions of law and cannot go out of the Statute. He has placed reliance on *Gadoon Textile Mills v. WAPDA* (1997 SCMR 641). He further submitted that it is essential for ratification that the Agent is not acting for himself whereas BDA was acting for itself. [see *Pehlwan v. Haji Muhammad Murad* (2005 SCMR 1405), *Imperial Bank of Canada v. Mary Victoria Begley* (AIR 1936 PC 193), *Prasanna Deb Raikat v. Darjeeling Himalayan* (AIR 1936 Cal. 37), *Government of India v. Jamunadhar Rungta* (AIR 1960 Pat. 19)]. He argued that the Lahore High Court while interpreting section 196 of the Contract Act in the case reported as *Muhammad Zakria v. Bashir Ahmad* (2001 CLC 595) has laid down that before ratifying an unauthorized act of an agent, the principal must be proved to have the knowledge of the action he is approving so that he can exercise the option of ratifying or disowning. He also argued that once the contract is void under sections 20, 23 or 29 of the Contract Act, no question of ratification arises because under section 196 of the Contract Act, only such acts can be ratified, which are done by one person on behalf of another. There being no previous relationship of agency between GOB and BDA, question of ratification did not arise.

68. Mr. Amanullah Kanrani, learned Advocate General Balochistan, stated that CHEJVA was neither placed before any

Government Department for vetting, nor was any opinion of the Law Department sought. He stated that BDA, which was a party to the joint venture, was not a Government entity and, in any case, did not represent GOB. He argued that contracts on behalf of the Federal or Provincial Governments are signed in the name of the President or Governor of the Province, as the case may be, in terms of Article 173(3) red with Article 139 of the Constitution. He argued that in the instant case, the contract purportedly signed on behalf of the Governor was not signed in accordance with GOB Rules of Business, 1976 by an officer duly authorized to do so thereunder. He pointed out that neither approval of the agreement was sought from the Provincial Cabinet nor was any advice sent to the Governor as required under rule 20 read with rule 40 *ibid*. In this behalf, he cited Schedule VIII containing matters to be sent to the Chief Minister for approval under rule 39 *ibid*.

69. It may be noted that under Article 173(3) of the Constitution, all contracts made on behalf of the Federation or of a Province shall be expressed to be made in the name of the President or, as the case may be, the Governor of the Province, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the President or Governor by such persons and in such manner as he may direct or authorize, whereas under Article 139(2), the Provincial Government shall, by rules, specify the manner in which orders and other instruments made and executed in the name of Governor shall be authenticated. Under rule 7(2) of the GOB Rules of Business, 1976 framed by GOB in pursuance of Article 139(2) ibid, all executive actions of Government shall be expressed in the name of the Governor; unless an officer has

been specifically empowered to sign an order or instrument, it shall be signed by the Secretary, the Additional Secretary, the Joint Secretary, the Deputy Secretary or the Section Officer to the Government in the department concerned and such signature shall be deemed to be the proper authentication of such order or instrument; and that instructions for the making of contracts on behalf of the Governor and the execution of such contracts and all assurances of property shall be issued by the Law Department. Now, it is to be seen whether CHEJVA was entered following the above parameters. The title page of CHEJVA recites that the Agreement for Chagai Hills Exploration Joint Venture is made between the Balochistan Development Authority and HBP Minerals International, Exploration Inc., whereas its opening page describes that the Agreement is between "the Governor of Balochistan through the Chairman, Balochistan Development Authority, a statutory corporation of Balochistan Province" and "BHP Minerals International Exploration Inc., a corporation of the State of Delaware, USA". The Agreement was signed on the one hand by the Chairman BDA and on the other by the representative of BHP. Relying on these recitals, the learned counsel for BHP took the position that GOB was a party to CHEJVA for all practical purposes, which it had executed through its agent BDA. In this behalf, it is noteworthy that as per the definition clause of CHEJVA, "Parties" means BHP and BDA. Clause 2.1 of CHEJVA provides, inter alia, that the Agreement shall be conditional upon the Parties receiving from the Federal Government and/or the Provincial Government within six months of the date of the Agreement, or such other period as the parties may agree, all consents and approvals necessary under Pakistani law. This amply makes it clear that both GOB and the Federal Government were entities outside the

ambit of “Parties” from where the “Parties” to CHEJVA were to seek the necessary consents and approvals. However, by execution of the Addendum, which was signed on 04.03.2000, some 7 years after the signing of CHEJVA, whereby CHEJVA was sought to be amended, a completely new turn was taken in many respects. The opening page of the Addendum recites that the Addendum is made between the Governor of Balochistan, for and on behalf of the Province of Balochistan, referred to as “GOB”, and the Balochistan Development Authority, a statutory corporation created by and existing under the BDA Act, 1974, and BHP Minerals. Thus, in the Addendum, as against the original bipartite agreement, a tripartite agreement was executed, and GOB is purported to be made a party. Such an assumption constituted a mistake of fact as rightly asserted by the learned counsel for GOB. Further, the last page of the Addendum shows that it was signed by the Chairman BDA on two counts, firstly on behalf of the Governor of Balochistan, and secondly on behalf of BDA, and then by the representative of BHP. In this behalf, it must be mentioned here that merely because Governor of Balochistan was mentioned in the title of CHEJVA would not mean that GOB had become a party to the agreement. It is clear that CHEJVA was made between BDA and BHP alone for all practical purposes, and not between GOB through BDA and BHP. Therefore, recitals in the Addendum, by way of preamble, that GOB through Chairman BDA and BHP intended to enter into a Joint Venture Agreement and it was desirable to clarify the roles of GOB and BDA thereunder; that GOB intended to appoint BDA as its agent in connection with CHEJVA, or GOB affirmed that BDA had been exercising rights and discharging obligations under the Agreement as if it were a joint venturer rather than the agent of GOB, or GOB clarified

the role of BDA under CHEJVA as agent of GOB and the scope of its authority to act on behalf of GOB in connection with CHEJVA, or GOB ratified all past actions, matters and things done by BDA in connection with CHEJVA all were devices to indirectly bring GOB into the pale of CHEJVA, which object could only be achieved by following the course provided under the law. All these clarifications and ratifications were based on a mistake of fact within the contemplation of section 20 of the Contract Act, 1872, i.e., GOB was a party to CHEJVA and BDA was agent of GOB. Such a mistake of fact on the part of BHP made the contract void and unenforceable.

70. The question as to whether GOB was a party to CHEJVA remained under consideration of the parties to CHEJVA for quite some time, and was examined in detail by the legal experts engaged by each side to advise them on the Addendum. M/S Kabraji & Talibuddin, in advising BHP on the preparation of the final draft of the Addendum pursuant to the issues raised by the Law Department of GOB, in their letter dated 03.09.1999 stated, inter alia, that there was confusion as to who were the “Parties” to the JVA, which had arisen due to the fact that the GOB was stated at the head of the Agreement to be a party to the JVA “through the BDA”, but JVA was, at the foot of the document, expressed to be executed on behalf of BDA (not GOB through BDA), but without any indication that the Agreement was being signed in a representative capacity as an agent “on behalf of the Governor of Balochistan”. It was further stated that the question as to who were the parties to the JVA became even more unclear by virtue of the fact that the term “Parties” in the JVA is defined as “BHP and BDA” and it was abundantly clear on reading the agreement that it was in fact the BDA, and not the GOB who was the other party to it and entitled to the

rights and subject to the obligations respectively conferred on or assumed by BDA under the agreement. The opinion termed it as a fundamental uncertainty as to the parties to the contract, which could render it void and advised that the agreement be novated to the BDA, i.e. by a contract between GOB, BDA and BHP. The opinion recognized that the fact of Chairman BDA signing the JVA on behalf of GOB would not by itself confer an agency on the BDA in relation to the contractual obligations and rights of the principal under the contract, i.e. GOB. As regards clause 2.4 of the Addendum aimed at ratifying and adopting by GOB the acts performed by BDA pursuant to assumption of obligations under the JVA, it was opined that it would not operate or purport to operate as a "protection clause" for all BHP's "wrong actions" and that there was nothing about absolving BHP for any supposed liability for any wrongdoing. The opinion, in the final conclusion, advised that GOB must be expressly made and remain a party to the Addendum because if that was not done, then all terms and conditions therein would be unenforceable by or against GOB. Similarly, M/S Shakil Law Firm, in its opinion regarding the draft Addendum tendered by it to BDA vide its letter dated 10.11.1999 stated, inter alia, as under: -

> "In our opinion, any addendum to the JVA can only be executed amongst the Parties, who are signatory to the JVA. As far as GOB is concerned, the same is not party to JVA, therefore, they cannot be included in addendum.
>
> Observations of the Law Department that all contracts on behalf of the Provincial Government under article 173 of the Constitution are to be executed in the name of the Governor of the Province, may be relevant in respect of the contracts which are intended to be executed by the Government, whereas the JVA has been expressly executed between BDA and BHP."

This opinion, however, was disregarded and the Addendum dated 04.03.2000 was signed in the name of "the Governor, on behalf of the province", BDA and BHP. While we agree with Mr. Khalid Anwar that BDA was a party to CHEJVA, but would not uphold his proposition that by means of Addendum GOB could be added as a third party in its own right. Inclusion of GOB as a new party to the contract required an affirming signature under the hand of a duly authorized representative or agent of GOB in terms of Rule 7 of GOB Rules of Business, 1976. This not having been done, the signature of Chairman BDA on the Addendum in the circumstances of the case, did not fulfil the requirement of rule 7 ibid. Hence, the argument of learned counsel for TCC that the Governor was well within his right to appoint BDA as his agent fails and is, therefore, repelled.

71. It may be noted that in the above context, an undated authorization letter on a plain paper was got signed from the then Governor of Balochistan [Justice (Retired) Amir-ul-Mulk Mengal], purporting to authorize Chairman BDA to sign the Addendum on behalf of the Governor. For facility of reference, said letter is reproduced hereinbelow: -

AUTHORIZATION LETTER

> I, Justice (Retd) Amir-ul-Mulk Mengal, Governor Balochistan hereby authorize Chairman, Balochistan Development Authority to sign Addendum No.1 to the Joint Venture Agreement dated July 29, 1993 between Government of Balochistan through Chairman, Balochistan Development Authority and BHP Minerals International Exploration Inc. for the Exploration of Copper, Gold and Associated Minerals in Chagai (Balochistan) on behalf of the Government of Balochistan.
>
> Sd/-
> (Justice Retd. Amir-ul-Mulk Mengal)
> Governor Balochistan

Although prior to this authorization, former Governor Syed Fazal Agha had not signed the document placed before him for the purpose of executing authorization, *prima facie*, for the reason that before 12.10.1999, GOB through the Chief Minister had decided to constitute a two-member committee to examine the said document. There are serious question marks on the manner in which the then Governor of Balochistan granted authorization by executing an undated document. However, from certain documents it could be presumed that the same was executed on 24.12.1999 Thus, by means of the Addendum, in the name of ratification in terms of section 196 of the Contract Act, 1872, instead of making amendments in CHEJVA, its entire complexion was changed. This authorization by the Governor to sign the agreement as an agent in favour of BDA was through a note by the Governor titled 'Authorization Letter' which is not printed on the Governor's letterhead, carries no date, notification number, nor is it addressed to any office or authority or even stamped. Neither is there any supporting documentation, nor does the letter provide a reference to a decision of the Cabinet on the matter. The issue of approval of the Option Agreement and Alliance Agreement was brought to Cabinet three times but it did not approve it. In the circumstances, the approval obtained from the Governor on an undated plain paper was improper and untenable in the eyes of law.

72. Learned counsel for GOB argued that CHEJVA also suffered from uncertainty about the area, which is to be viewed as subject matter of CHEJVA. In response, Mr. Khalid Anwar, Sr. ASC for TCC stated that it was in the interest of GOB to grant as wide an area as possible for prospecting to ensure discovery of minerals over a large part of the Province. It may be noted that according to clause 5.3.1 of

CHEJVA, the aggregate prospecting area shall not be more than 50 sq km. However, by virtue of clause 5.10, the map covering an area of 13000 sq km, annexed with CHEJVA as "Schedule B", may be revised so as to accurately represent the current status of the area from time to time. It clearly establishes that the area is not final and constitutes uncertainty within the ambit of section 29 of the Contract Act. See *Sheikh Shahabuddin v. Vilayat Ali* (AIR 1926 Nagpur 435 at 439) wherein the Court declared a contract pertaining to a mining area to be void as it did not identify the deposit clearly as constituting a mistake of fact in terms of section 20 of the Contract Act. Also see *Abdul Khaliq v. Sabir Ahmed* (PLD 1961 BJ 79), *Rauf Ahmed Ghori v. Managing Director, Cholistan Development Authority, Bahawalpur* (1998 CLC 1464) and *Ahmed Ali Khan v. City District Government, Karachi* (2009 MLD 704).

73. The Option Agreement and Alliance Agreement are also premised on a mistake of fact that BDA was an agent of GOB under CHEJVA, therefore, the same are too void under section 20 of the Contract Act. At no stage of the proceedings, was any document creating relationship of principal and agent between GOB and BDA was produced or referred to by the private respondents nor did we come across any such document while scanning the record of the case during hearing or in the course of writing of judgment. Moreover, admittedly, BDA and GOB were not parties to the Option Agreement and Alliance Agreement, therefore, the learned counsel for GOB was right in arguing that the same were not binding upon BDA and GOB. The legal position is that the BDA Act, 1974 does not authorize BDA to act as an agent of GOB, rather the Act requires BDA to seek approval

of the GOB in certain matters while performing its functions enumerated in the Act.

74. It is pertinent at this stage to discuss BDA's capacity to enter into an agreement of the nature of CHEJVA in light of the provisions of BDA Act, 1974 under which it is incorporated. Section 3(2) of BDA Act, 1974 provides that the Authority shall be a body corporate having perpetual succession and common seal. It is empowered to acquire and hold property, both movable and immovable, subject to the provisions of BDA Act, 1974. It can sue or be sued by the said name. Under section 17(6), the Authority may participate in joint ventures with the private sector in regard to matters specified in clauses (a) and (b) of sub-section (1) of section 16 whereas aforesaid clauses (a) and (b) of section 16(1) enumerate the functions of the Authority, namely, preparation and execution of comprehensive development programmes including projects and schemes relating to land and water development, power, agriculture, industry and activities ancillary thereto, for the economic uplift of relatively under-developed areas to be notified by Government, and planning, promoting, organizing and implementing projects for mineral exploitation and development including establishment of mineral-based industries, etc. BDA's separate legal entity is reinforced by BHP's learned counsel's own argument, though made without prejudice, that BDA itself retained statutory functions and powers to enter into joint ventures for development of mineral based industries with the private sector in terms of section 17(6) read with section 16(1)(b)(i) of the BDA Act, 1974.

75. A perusal of the above provision shows that BDA possesses its own legal personality, distinct and separate from GOB. BDA is not

even listed as an attached department under any of the Departments of GOB in the GOB Rules of Business, 1976. However, BDA in entering into the Addendum remained in a state of confusion as to whether CHEJVA was, or any subsequent agreement on the subject had, to be entered into by it independently of any other department of GOB. All that BDA through its Board of Directors was required to do was to seek approval of GOB for the project of mineral exploration in terms of section 4 of BDA Act, 1974 and enter into a Joint Venture Agreement in terms of section 17 read with section 16 of the Act. All subsequent agreements/instruments in connection with CHEJVA would have followed the same position. This confusion on the part of BDA as well as GOB hierarchy unfortunately led to a fundamental uncertainty and ambiguity in CHEJVA, which rendered the contract void ab initio on this score as well. In this view of the matter, the very premise of the Addendum as well as the Novation Agreement that BDA was an agent of GOB constitutes a "mistake of fact" within the ambit of section 20 of the Contract Act.

76. The learned counsel for the petitioners argued that GOB, whilst determining as to whether the terms and conditions of CHEJVA constituted the best possible deals in the public interest, had failed to address the following issues, in the disposal of the copper and gold wealth of Reko Diq: -

(i) Whether any steps were taken by GOB to fully inform itself of the nature of gold and copper mining business in Reko Diq and the global business norms prevailing in the 21st century for large scale gold and copper mining and the terms of agreement between National Governments and foreign corporations?

(ii) Whether competitive offers from major/successful mining companies operating in other countries were obtained for comparison and negotiation and whether any tenders floated internationally for the extraction of gold from the

Reko Diq mines, which were proven by the year 2000 when Respondent No. 4 bought the share of Respondent No. 8 under CHEJVA for US$60 million?

(iii) Whether GOB made the decision on the basis of consideration of the relevant facts brought on record having regard to rationality and competence, technical and financial considerations?

77. In response, M/S Abdul Hafeez Pirzada, Sr. ASC for BHP and Khalid Anwar, Sr. ASC for TCC stated that CHEJVA provided additional benefits to GOB beyond those that were available under BMCR 1970, inasmuch as GOB was given 25% “free carried interest” up to discovery and related licenses also vested in GOB. Further, GOB would not bear the cost of exploration - the highest risk stage of the project – 100% of the cost of exploration being borne by the foreign investors BHP/TCC. Subsequently, GOB would also be entitled to get 25% share in mining lease. According to the learned counsel, GOB would not bear the cost of exploration, which is the highest risk stage of the project and that 100% of the cost of exploration would be borne by the foreign investors BHP/TCC. As a consequence of the agreement, 52% of the free cash flow of the project would be received by the Federal Government and GOB and only 48% by the private party. Learned counsel claimed that there were approximately 20 Exploration Licenses in Chagai District other than EL-5 none of which conferred such rights in favour of GOB. According to the learned counsel, under all those ELs, 100% interest was in favour of the holder and the same would be the case if and when a mining lease is granted. EL-5 is only 0.8% of all Exploration Licenses in the District and 0.2% of the District. Mr. Pirzada further argued that CHEJVA was approved by the entire chain of GOB authorities, i.e., Chief Minister, Governor and the concerned Departments. He also argued that under BMCR 1970, a PL

was to be issued on “first come first serve basis” and the holder would have 100% interest therein. CHEJVA provided for Stage One Activities (Exploration); Stage Two Activities (Pre-feasibility); Stage Three Activities (Feasibility); and Stage Four Activities (Feasibility). Under Clause 3.2 of CHEJVA, BHP had to “earn” its 75% share. Under Clause 8.1 of CHEJVA GOB was not to contribute for exploration, pre-feasibility and feasibility stage. Under Clause 12.4.1 even when Mining Venture started financing for GOB to be obtained by BHP. All of these provisions showed that an advantage and benefit well beyond that even envisaged by BMCR 1970 was achieved by GOB under CHEJVA. Learned counsel asserted that it was a beneficial agreement and after the discovery made in pursuance of CHEJVA, District Chagai had been put on the world mining map. As regards petitioners’ claim that the existence of copper and gold deposits in Balochistan was evidenced long ago in maps published by the Geological Survey of Pakistan (GSP), Mr. Pirzada stated that such a mention in the GSP map only signifies probability of mineral presence due to its location on the Tethiyan copper belt that extends from Turkey into Iran and Afghanistan all the way to Balochistan, and does not in itself equate to the identification of specific reserves, which can only be ascertained through the process of prospecting for mineable resources, which is an expensive process requiring investment in millions of dollars. On this point, Mr. Khalid Anwar, Sr. ASC stated that though it has been known since Mughal times that the Province of Balochistan is rich in natural resources including great deposits of precious metals such as copper, but it was because of CHEJVA that these precious natural resources of Balochistan worth billions of dollars in the form of mineral wealth were finally discovered. According to him, without the assistance of

companies like BHP and TCC, with international mining experience, this would have been impossible and the whereabouts and extent of the metal reserves of Balochistan would have remained unknown. He further argued that GOB was awarded 25% share in CHEJVA without having to spend a penny which was a very rare arrangement in the mining industry. The word 'void' in the context of the Contract Act merely means 'unenforceable'. He asserted that no one has challenged the validity or binding nature of CHEJVA in any manner whatsoever. He averred that TCCP was created to obtain EL-5 under BMR 2002 and that none of the terms of the mining lease was violated. If any such terms were violated, GOB ought to have sought a 'show cause' first.

78. Mr. Ahmer Bilal Sufi, ASC for GOB stated that *vide* application dated 24.04.1994, BDA requested that an area of 3,347,226 acres as per the attached plan may be reserved for exploration of gold and associated minerals in Chagai District for the joint venture. Vide letter dated 19.07.1994, the Directorate of Mineral Development, Government of Balochistan, in pursuance of decision of Mines Committee (not on record) and GOB's notification dated 20.01.1994, accepted the aforesaid application for reservation of gold area in relaxation of the limits of the area as fixed under Annexure IV of BMCR 1970 (Annexure IV is not on record) for a period of three years with effect from date of issue of the said letter and permitted the applicant to start "prospecting/mining operation" for gold minerals over the aforesaid area of 3,347,226 acres. This permission letter also mentions that the applicant will deposit an annual fee in the sum of Rs. 3,347,226 at nominal rate of Rs. 1 per acre instead of Rs. 5 per acre as the applicant was exempted from payment of the prescribed annual fee in relaxation of rule 33 of BMCR 1970. This reservation of

3,347,226 acres for exploration is the most serious violation of BMCR 1970. There is no provision in BMCR 1970 for reservation of an area for exploration purposes. The terms “exploration” or “exploration area” and “reservation of area for exploration” do not exist in BMCR 1970. The said reservation of a huge tract of land does not fall under relaxation of rules but amounts to amendment of the BMCR 1970, which amendment was never made. The mention of grant of exploration area does not fall within the ambit of relaxation, as provided under rule 98 of the BMCR 1970. The grant of reservation area was, therefore, illegal and created a complete monopoly of the Joint Venture over the gold reserves in the gold belt located in Balochistan.

79. Learned counsel also submitted that there is no provision for grant of mineral title to a Joint Venture in BMR 2002. Rule 9 stipulates that GOB, at the request of a person proposing to carry on mineral operations, may enter into a mineral agreement in case of substantial foreign investment. For this purpose, rule 9(3) provides that a mineral agreement may make provision for the formation of joint ventures under sub-clause (3)(c). However, CHEJVA is neither a mineral agreement nor has any mineral agreement under rule 9 been executed between GOB and TCC. It appears that a request to this effect was made by TCC in the year 2007 to respondent No. 3 Government of Pakistan (GOP) for a mineral agreement to be executed amongst GOB, GOP and TCC, but the same was not granted. At any rate, there was no mineral agreement in the field whereunder a mineral title would be granted to a joint venture. Hence, the exploration licence granted to the Joint Venture and extended up to

2011 was violative of BMR 2002. The Joint Venture was also not entitled to claim a mining lease under the BMR 2002.

80. We have considered the argument of the learned counsel for the petitioners that consideration of CHEJVA was inadequate, therefore, the same was liable to be declared void ab initio on that score as well. In this regard, it may be noted that Article 3.1 of CHEJVA provides that the object of the contractual Joint Venture to explore for mineral deposits in the exploration area and to conduct feasibility studies so as to evaluate the economic viability of the mineral deposits therein whereas the consideration of CHEJVA is stated in Article 3.2, which provides that BHP shall be entitled to 75% percentage interest on completion of stages one and two activities and commissioning of feasibility study. The 75% percentage interest in the Joint Venture to be received by BHP is restated and reinforced in Article 3.3 and further reiterated in Article 3.4. Much emphasis was laid by the learned counsel for BHP that BHP or subsequently its assignee had to “earn” its share by undertaking and completing the aforesaid activities/processes whereas GOB would be receiving 25% “free carried interest up to discovery” and thus this consideration of CHEJVA was lawful, proper, just and not against any principle of public policy. BHP/TCC in a presentation to the Court highlighted that a prospecting licence enables the holder to prospect on some lands which are subject to the mineral resources. The learned counsel explained that mineral exploration is the process of finding ore (commercially viable concentrations of minerals) to mine, which is a much more intensive, organized and professional form of mineral prospecting and, though it frequently uses the services of prospecting, the process of mineral exploration on the whole is much more

involved. Mineral exploration methods vary at different stages of the process depending on size of the area being explored, as well as the density and type of information sought. Then, area selection is a crucial step in professional mineral exploration. Selection of the best, most prospective, area in a mineral field, geological region or terrain will assist in making it not only possible to find ore deposits, but to find them easily, cheaply and quickly. Area selection is based on applying the theories behind ore genesis, the knowledge of known ore occurrences and the method of their formation, to known geological regions via the study of geological maps, to determine potential areas where the particular class of ore deposit being sought may exist. Oftentimes new styles of deposits may be found which reveal opportunities to find 'look-alike' deposit styles in rocks and terrains previously thought barren, which may result in a process of pegging of leases in similar geological settings based on this new model or methodology. This process applies the disciplines of basin modeling, structural geology, geochronology, petrology and a host of geophysical and geochemical disciplines to make predictions and draw parallels between the known ore deposits and their physical form and the unknown potential of finding a 'look alike' within the area selected. Area selection is also influenced by the commodity being sought; exploring for gold occurs in a different manner and within different rocks and areas to exploration for oil or natural gas or iron ore. Areas which are prospective for gold may not be prospective for other metals and commodities. Similarly, companies of different sizes (in terms of market capitalization and financial strength) may look for different sized deposits, or deposits of a minimum size, depending on their will and ability to finance construction. He stated that often the major

mining houses will not look for deposits of less than a certain size class because small deposits will not meet their criteria for an internal rate of return. This practice may result in larger mining companies relinquishing control of smaller ore bodies they find, or may preclude them from entering a terrain which is characterized by deposits of a particular type or style. Often a company or consortium wishing to enter mineral exploration may conduct market research to determine, if a resource in a particular commodity is found, whether or not the resource will be worth mining based on projected commodity prices and demand growth. The learned counsel stated that this process may also inform upon the area selection process as noted above, where areas with small-sized deposit styles will be ruled out based on likely economic returns should a deposit be found. This occurs because often smaller deposits are more expensive to run, and hence, carry greater risks of closure if commodity prices fall significantly. The ultimate result of an area selection process is the pegging or notification of exploration licenses, known as tenements. Similarly, companies of different sizes (in terms of market capitalization and financial strength) may look for different sized deposits, or deposits of a minimum size, depending on their will and ability to finance construction.

81. Now if one were to argue, as has been done by the learned counsel for BHP, that since a prospecting/exploration licencee has to undertake all the above noted processes of prospecting/exploration at its own expense, the licencee must get the lion's share in the undertaking and the lessor, for not having to spend much in the process, even though it is the owner of the mineral wealth, must be placed at a disadvantageous position as regards its percentage interest. Admittedly, in the entire afore-noted process, both the lessor

and lessee do not get any return until the activity reaches the final stage, i.e., extraction of the mineral in question, its smelting and thereafter its marketing. Therefore, to say that BDA will be getting 25% interest from the inception of the agreement does not reflect the correct position. The percentage interest of BDA will remain the same 25% and BDA will get it only after the project reaches the above stages. As per the usual business practices, especially in a joint venture, the share percentage of the parties in the ultimate interest (free cash flow) are determined on the basis of the investments made by the respective parties. If one party has assets worth Rs.100/- and the other party invests Rs.100/- for making it marketable, both parties get 50:50 share in the net return. In another situation, if one party has assets worth Rs.300/- and the other invests Rs.100/- for making it marketable, then both parties get 75:25 share in the return. In yet another scenario, where one has assets worth Rs.1000/- and the other party invests Rs.100/- to make it marketable, the share percentage of the two will be 10:1. In all these situations, the percentage interest of each party is proportionate to the input percentage by the respective party.

82. To substantiate his contention, the learned counsel for the petitioners placed reliance upon letter dated 28.04.1992 of the National Centre for Technology Transfer, Ministry of Science and Technology, Government of Pakistan addressed to the Chairman BDA with reference to his request for the views and comments of the Federal Government on CHEJVA. Having examined the document, the National Centre opined that the term “equity share” in a joint venture company is improperly used and since it was a contractual joint venture where the parties will share profits and liabilities according to

their percentage interest in the venture, therefore, those terms be avoided. The Centre further stated that if BHP was insisting to recoup the expenditures incurred during exploration and feasibility study phase, then BDA ought to be given the right to enhance its percentage interest up to at least 50% on the commercial production of the mineral.

83. In this behalf, learned counsel for the petitioners also drew our attention to a project of the Qara-Zaghan Gold Mines, an Afghan Company, backed by investors from USA, Britain and Turkey through JP Morgan Investment Bank, which had obtained mining rights in open bidding for the said project on the following terms and conditions: -

(i) 26% royalty from the gross production of the gold extracted to be sold in the London market;

(ii) No infrastructure would be provided by the Afghanistan Govt; and that all immovable property would become the property of the Govt;

(iii) The company would pay surface rents for the use of the land;

(iv) The Contract is based upon EITI (Extractive Industry Transparency Initiative) where the contract does not contain a confidentiality clause.

On the contrary, even though learned counsel for BHP time and again described GOB's 25% as "free carried interest up to discovery", but the fact of the matter is that consideration of CHEJVA cannot be termed 25%. In so doing, the learned counsel overlooks clause 12.4 of CHEJVA, which provides that the costs of activities and operations within a mining area shall be paid for by the participating parties in proportion to their respective percentage interests provided always that the BDA shall be entitled to elect not to contribute to the cost of such development with effect from the conclusion of the then current

programme and budget and require that BHP contribute such costs on behalf of BDA until such time as minerals are produced from the mining area. It further provides that upon minerals or other minerals being produced from the mining area, BHP shall be entitled to recover from BDA (i) all of those costs (principal sums) which BHP contributed on behalf of BDA to the mining development and (ii) compounding interest accruing on the principal sums at LIBOR plus 2%. Further, under clause 12.5 of CHEJVA, BDA covenanted and agreed with BHP to repay the debt by means of fully allocated fifty percent of BDA's entitlement to gross revenues derived from the mining venture. Clause 12.6 places a floating charge against BDA's property and interest in the mining venture.

84. Furthermore, Article 3.2 of CHEJVA provides that BHP shall be entitled to 75% percentage interest in the Joint Venture subject to clause 7.2. Under paragraph (a), BDA is required to provide support/services to BHP in terms of appropriate administrative support as required for the obtaining of all leases, licences, claims, permits or other authorities of any kind whatsoever being necessary for the conduct of Joint Venture activities. Under paragraph (b), BDA is responsible for providing interpretation and liaison services as may be reasonably required by the Manager. Under paragraph (c), BDA has to provide services of the kind referred to in sub-clause 5.7.2. Under paragraph (d), BDA is responsible for providing all mining information and any other relevant information in its possession prior to the commencement date pertaining to the exploration area. Under paragraph (d), BDA is to provide accommodation of a reasonable standard for persons involved in the conduct of the Joint Venture activities in such places within or near the exploration area where

accommodation is readily available. Under paragraph (e), BDA is responsible to provide suitable security arrangements for persons engaged upon Joint Venture activities within the exploration area or whilst such persons are in the course of travelling to or from the exploration area and Quetta as may be arising out of discussions between the Manager, BDA and the Provincial Government, from time to time. The liability of BDA to bear the aforesaid expenses is further clarified in clause 7.3, which states that in the event that the Operating Committee decides to undertake a feasibility study, BHP shall fund such study provided always that the BDA shall continue to provide at its own expense the services referred to in clause 7.2. In terms of sub-clause 5.7.2 as referred to clause 7.2, BDA is also liable for negotiating all necessary land access agreements in connection with such further prospecting licences. Further, the BDA shall be responsible for liaising with relevant provincial Government and local government authorities and with affected local landholders to ensure that good relations are maintained between the Joint Venture and other persons during the conduct of Joint Venture activities. The extent of liability of BDA to bear expenses goes on. Clause 9.3 titled “contribution by the BDA” is yet another interest example in this respect. On the one hand, it provides that with the exception of those costs to be borne by the BDA in conjunction with its obligations under clause 7.2, the BDA shall not be obliged to contribute to any Joint Venture expenditure required in association with the exploration programme, and on the other, it provides that upon completion by BHP of the exploration programme, the BDA shall become obliged to contribute to all further Joint Venture expenditure in proportion to its percentage interest. Clause 10.8.2 provides that the expenditure

incurred in the case of accident or any other emergency relating to the Joint Venture activities shall be outlaid on behalf of the parties in proportion to their respective percentage interests. Clause 10.10.4 provides that any party may, at its own expense conduct or have conducted for it a confirmatory audit of the Joint Venture's financial books, reports and records. Clause 12.4 on the one hand provides that the costs of activities and operations within a mining area shall be paid for by the participating parties in proportion to their respective percentage interests in the mining venture provided always that the BDA shall be entitled to elect not to contribute to the cost of such development with effect from the conclusion of the then current programme and budget and require that BHP contribute such costs on behalf of the BDA until such time as minerals are produced from the mining area, and on the other, provides that upon minerals or other minerals being produced from the mining area, BHP shall be entitled to recover from the BDA (i) all of those costs (principal sums) which BHP contributed on behalf of the BDA to the mining development and (ii) compounding interest accruing on the principal sums at LIBOR plus two percent (2%) such principal sums and interest thereon hereinafter called the 'debt'. Under clause 12.5, BDA has to repay the debt by means of fully allocating fifty percent of the BDA's entitlement to gross revenues derived from the mining venture. From the above provisions of CHEJVA, it is clear that BDA is liable to bear a host of expenditures in connection with the Joint Venture activities, and it cannot be said that GOB is entitled to 25% "free carried interest up to discovery" as asserted by the learned counsel for BHP. The learned counsel for BHP, in asserting that BDA's 25% percentage interest was free carried interest, never set off the above contributions/expenditures to be

made by BDA. It is thus established that CHEJVA was entered into for an inadequate consideration as regards the percentage interest of BDA.

85. As noted hereinabove, the Addendum purported to clarify the role of GOB in the original CHEJVA and to confirm BDA's agency for GOB, something which did not exist in CHEJVA. It also purported to make alterations in CHEJVA with retrospective effect, that too, in the name of interpreting terms, which were not present in the original contract. The very first component of a principal granting ratification is the confirmation that the purported agent was in fact acting in excess of authority and was never an agent of the principal. This is a contradiction in terms because an attempt was being made to clarify certain things, and in the light of such clarification, to ratify what was done by BDA in its separate capacity, as having been done by it as agent of GOB. It is already established that relationship of principal and agent never existed between the two, therefore, the question of ratification would not arise and the ratification sought to be made in the Addendum was an exercise in futility. One of the established essentials of ratification in law is that the purported agent must have been acting in the name of the purported principal, always having been representing himself as a lawful agent of the same (Sanaullah v. Muhammad Rafiq 2003 CLC 138). In the instant case, BDA never purported to act as agent of GOB, rather it was doing certain acts and processing matters concerning CHEJVA as a Joint Venture partner, e.g., in the matter of seeking relaxation, BDA never posed itself as agent of GOB, rather it dealt with the matter in its separate capacity and pursued it with the concerned departments of GOB as a Joint Venture partner. It is well settled that acts done by a person in his

own name and in his separate legal capacity are not capable of subsequent ratification by another person. See (*Muhammad Zakaria v. Basher Ahmad* 2001 CLC 595) and *Imperial Bank of Canada v. Mary Victoria Begley* (AIR 1936 PC 193). Moreover, GOB in the instant case was at all times aware of the actions of BDA as being performed by the latter in its own name and authority. The principle of ratification as envisaged in section 196 of the Contract Act is not applicable. As such, the ratification purported to be made in the Addendum is of no consequence.

86. Learned counsel for TCC argued that the allegations made about CHEJVA and the relaxations of BMCR 1970 were directed against BHP and not against TCC, which was not even in existence when the relaxations of the rules took place on 20.01.1994. And, in any case, the invalidity of CHEJVA under the law should have no effect on the validity of the Novation Agreement dated 01.04.2006 as it was made under the BMR 2002 and not subject to the validity of CHEJVA. He asserted that TCC's legal entitlement flows from the Novation Agreement under which BHP completely left the scene with no further legal rights or obligations. He stated that even if CHEJVA was invalid, the Novation Agreement was validly signed and the parties to it are only bound by its terms and not those of CHEJVA or any other instruments signed before it. The Novation Agreement actually stood acted upon by GOB after assignment of EL-5 in pursuance thereof, wherein discovery has been made by TCC. The parties having already entered into Novation Agreement in supersession of the original agreement (CHEJVA), the Court has now to consider the effect of an agreement which is subsequently altered, so as to change the parties to the agreement or to change its terms and conditions, or both, and

decide as to whether the original agreement is still legally valid or relevant or has it been extinguished in the eyes of law? According to him, agreement would not cease to exist even if it is *void*, but would simply be unenforceable and BHP would be entitled to sue BDA under it. He clarified that the effect of novation of contract is not to transfer a right or liability under the original contract, but to extinguish the contract altogether. He quoted from 'Chitty on Contracts' and relied upon various judgments of the Superior Courts to argue that the effect of a novation agreement is to extinguish the previous contract and to replace it with the terms of the new agreement in its entirety through the mutual consent of the parties. Further, GOB having independently confirmed its legal duty and obligation to TCC, the latter would have all the legal rights and entitlements set out in the Novation Agreement. He argued that the commercial relationship between GOB and TCC was created after the Novation Agreement, therefore, this Court should not rule upon the legality of CHEJVA, which is subject matter of the proceedings before international forums. He stated that in the light of the Court order dated 25.05.2011 passed in the instant case, theoretically there were two possible options, viz., GOB could have granted the mining lease, or they could have rejected it.

87. Section 62 of the Contract Act 1872, which deals with novation, rescission and alteration of contract, provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. EL-5 and other rights under the Alliance Agreement were all rights that depended on the existence of CHEJVA for their existence. A necessary element for the execution of a valid novation of contract is the validity of the original agreement that is to be substituted. Where an

agreement is void, all subsequent alterations, variations or novations based upon such agreement will also be invalid. When a contract is unlawful or illegal as being prohibited by a specific provision of the statute, it could not be enforced, although the parties might have entered into a novation of the contract on the basis of such unlawful or illegal consideration. See *Haji Habib v. Bhikamchand Jankilal Shop* (AIR 1954 Nag 306). Further, a collateral illegal contract or an earlier illegal contract, in spite of a novation would, still remain illegal and a court of law would decline to grant any relief to any one of the parties even in respect of such a collateral contract, or an earlier illegal contract, which is the basis of the suit contract and on which a cause of action may be founded. See *Hussain Kasam Dada v. V. C. Association* (AIR 1954 Mad 528) and *Peddi Virayya v. Deppalapudi Subba Rao* (AIR 1959 Andh Pra 647). Furthermore, in *Ratanlal son of Pannalalji v. Firm Mangilal Mathuralal* (AIR 1963 MP 323) it has been held that a court of law should decline to enforce even a perfectly innocent and legal contract where it arises out of a collateral illegal contract or an immoral contract or any legal contract which has for its basis an earlier illegal or immoral contract, in spite of the fact that the parties may have entered into a novation. And, if there is a direct connection between a fresh contract after novation and the earlier illegal contract or the earlier collateral contract, the novated contract would still continue to be illegal or immoral and the court would refuse to enforce the same in view of the provisions of section 23 of the Contract Act. It was further held that in the case of an illegal contract, both parties being in the position of guilty persons, the court should refuse assistance to any one of them on the basis of an illegal contract or on the basis of a novated legal contract, which has for its basis an

earlier or a collateral illegal contract. CHEJVA having been held to be void for reasons stated above, the entire superstructure built upon it also falls to the ground. In this regard, reference may be made to the cases of *Yousaf Ali v. Muhammad Aslam Zia* (PLD 1958 SC 104), *Ashrafi (Pvt.) Ltd. v. Abdul Majeed Bawam* (1991 MLD 1101), *Nazir Ahmad v. Muhammad Saleem* (2002 YLR 1531), *Talib Hussain v. Member, Board of Revenue* (2003 SCMR 549) and *Moulana Atta-ur-Rehman v. Al-Hajj Sardar Umar Farooq* (PLD 2008 SC 663).

88. As noted hereinabove, if GOB had decided to enter into an agreement, the agreement would be executed through its concerned department and the same would be signed by the Secretary, Additional Secretary, etc., of the concerned department as per the mandate of rule 7 of the GOB Rules of Business, and not through BDA, which is a statutory corporation with a separate and distinct entity under the relevant statute from a department of the Provincial Government. Accordingly, GOB could not have validly appointed BDA or its Chairman to act as GOB's agent either at the time of execution of CHEJVA or at any time thereafter. It was, therefore, not permissible to rely on the so-called affirmation or ratification made in Addendum as was sought to be done by the learned counsel for BHP. Having examined this aspect of the matter in some detail, we find that GOB was not a party to CHEJVA, therefore, GOB could not be said to have entered into an agreement with any company or a prospective licensee of the nature referred to in CHEJVA or the Addendum. Accordingly, it is held that CHEJVA suffered from uncertainty as to parties to the agreement and was *void ab initio*, as rightly contended by the learned counsel for GOB.

89. Mr. Khalid Anwar, Sr. ASC stated that release of 8 out of 10 Prospecting Licences (PLs) reflects the waning interest of BHP, which no longer wished to pursue mining activities in the area and wanted to pull out and recover as much of its investment as possible. According to him, for that reason BHP signed the 'Option Agreement' with Mincor for a nominal fee of US$ 100.

90. It may be mentioned that rule 12(1) of the BMCR 1970 provides that a licence shall not be assigned, alienated or sublet in any form by the licensee. Under sub-rule (2), a lease shall not be assigned or alienated in any form without the previous consent in writing of the licensing authority. Under sub-rule (3), a mining lease shall not be sublet by the lessee to any party in any way whereas under sub-rule (4), the licensee or lessee may, under intimation to the licensing authority, assign, sublet or charge the lease or licence to or in favour of Industrial Development Bank of Pakistan or its assignee or bank or a financial institution approved by the licensing authority. It may be mentioned that clause 14.1 of CHEJVA provides that no party shall be entitled to assign the whole or any part of its percentage interest to a third party without the prior consent of the non-assigning party, which consent shall not be unreasonably withheld. The mild restriction placed on the transferring party in the said clause is done away with in the case of BHP in clause 14.2 ibid, which provides that notwithstanding clause 14.1, BHP shall be entitled to assign its interest or any part thereof to a related corporation without the consent of the non-assigning party. Thus, above Article of CHEJVA being contrary to the provisions of rule 12 referred to above, BHP and BDA applied for relaxation of this rule too. BHP then by means of Addendum, got inserted four more clauses, namely, clauses 14.3, 14.4, 14.5 and 14.6

in clause 14 of CHEJVA. Clause 14.3.1 provides that if a party desires to transfer all or any part of its percentage interest, the other parties shall have a pre-emptive right to acquire such interest. Under clause 14.3.2, a party intending to transfer its interest shall notify the other parties of its intention and the other parties within 90 days from such notice shall notify the transferring party whether it elects to acquire the offered interest, thus the applicability of clause 14.1 was excluded. By clause 14.3.3, the transferring party, after expiration of the aforesaid period of 90 days, is empowered to consummate the transfer of the whole of the offered interest to a third party within a period of 180 days. Whatever little limitations were placed on the transferring party in clause 14.3 were then done away with by clause 14.4, which states that clause 14.3 shall not apply to a transfer to an affiliate, incorporation of a party, corporate merger, consolidation, amalgamation or reorganization of a party, grant of a security interest, any percentage interest by mortgage, deed of trust or distribution of any proceeds of sale of minerals from a mining venture pursuant to article 12. It is thus clear that the little scope of consent originally reserved for BDA in clause 14.1 of CHEJVA was done away with firstly in clause 14.2 itself, and subsequently by the clauses inserted by means of Addendum No.1. All these provisions in CHEJVA and further reinforced by means of Addendum advanced and safeguarded the interests of just one party, namely, BHP and/or its assignee because obviously no question of assignment/transfer of BDA's interest in favour of any third party would ever arise. Be that as it may, in the instant case, CHEJVA itself has been declared to be void in terms of various provisions of the Contract Act, 1872, including sections 20, 23, etc., and consequently unenforceable. No transfer or assignment of an

interest under a void agreement can be made by any of the parties to such agreement under any principle of law. This appears to be violative of the principle contained in section 7 of the Transfer of Property Act, 1882, which provides that only such person is competent to transfer property who is competent to contract and entitled to transferable property or authorized to dispose of transferable property.

91. It may be noted that this Court on 03.02.2011 passed a restraint order in the following terms: -

> "In view of importance of the case, ... we consider it appropriate at this stage to know the reaction of the respondents through their learned Advocates as to whether it would not be appropriate that the Government of Balochistan through its competent authority may postpone its decision of granting mining lease or otherwise to the Companies/claimants of holders of EL-5 to wait for the result/outcome of these proceedings.
>
> 2. Mr. Khalid Anwar, Senior Advocate Supreme Court has stated that as far as the parties interested in obtaining the mining lease are concerned, they have only to submit an application to the Government of Balochistan before 19.02.2011 and then it is for the Government of Balochistan through its competent authority to take the decision to consider the request or whatever position may be, therefore, he and other learned Advocates associated with him, Messrs Abdul Hafeez Pirzada, Fakhruddin G. Ibrahim and Barrister Sajid Zahid have no objection if order is passed to the effect that the Government of Balochistan may postpone decision on the application(s) submitted for mining lease till the decision/outcome of the instant proceedings without prejudice to their legal rights. Dr. Salahuddin Mengal, learned Advocate-General, Balochistan has stated that the Government of Balochistan has instructed him to make the statement that so far it has not received any application for grant of mining lease from any of the companies. However, it would not dispose of the application, if submitted until the decision of this Court subject to all just exceptions. Similar stand has been taken by Ch. Mazhar Ali, learned Deputy Attorney General, who is representing the Government of Pakistan.
>
> 3. ..... in view of the statement so made by the learned counsel for the parties, it is declared that no decision shall be taken by the Government of Balochistan in respect of the grant of the mining lease on the application submitted by any of the parties without prejudice to their legal rights till the decision of the instant proceedings".

92. TCC, *vide* lease application form "F" dated 08.02.2011, formally applied to GOB under Rules 10 and 47 of the BMR 2002 for the grant of the mining lease, making a claim over 99 sq km comprising 14 copper and gold reserves, but no order was passed by the authorities/GOB on the said application because of the pendency of the present petitions and the restraining order dated 03.02.2011. TCC asserted before the Court that it was entitled to obtain a decision from GOB on its application for the grant of mining lease. GOB while persisting with its privilege to the detailed scrutiny of Feasibility Study, reiterated its competence under BMR 2002 to decide upon TCC's application. The petitioners, however, contested the claim. By means of C.M.A. No. 112 of 2011, GOB through Secretary Mines and Minerals Development Department made the following prayer: -

> "Since the feasibility study report has been submitted by respondent No.4 for consideration, the review of which is under process by the respondent No.1, and since the mineral agreement is yet to be signed between respondent Nos.1 and 4 wherein, details and modalities will be decided strictly in accordance with the spirit of BMR 2002 and incorporated in the mineral agreement to be executed, therefore, the instant petition for leave to appeal filed by the petitioners may kindly be disposed of."

93. After considering the matter in detail, and in the light of the arguments raised by the learned counsel, this Court *vide* order dated 25.05.2011, recalled the restraining order dated 03.02.2011 and directed the competent authority in the Government of Balochistan to decide TCC's application for the grant of mining lease transparently and fairly in accordance with the law and the rules. Relevant paras from the said order are reproduced as under: -

> "13. We are in agreement with the learned counsel for the parties and are of the opinion that at this stage it will not be proper for us to inquire into the Feasibility Study Report or to rule upon the entitlement of TCC to the mining lease.

> The reason is that under the governing law and 2002 Rules, this matter falls exclusively within the domain of the Government of Balochistan and the Government is also seized of the Feasibility Report as well as the application of TCC. All the parties have expressly admitted that the Government of Balochistan being the competent authority in this matter, should in due discharge of its obligation, make a decision on TCC's application impartially, objectively and in accordance with law and thus accept its legal responsibility thereof. In this view of the matter, it will not be proper for us to pre-empt the decision of the Government of Balochistan by entering into the merits of the case at this juncture.
>
> 14. As such accepting the consensus of all the learned counsel and for the reasons above recorded, the restraining order dated 03.02.2011 is recalled. The competent authority in the Government of Balochistan shall proceed to expeditiously decide TCC's application for the grant of mining lease transparently and fairly in accordance with the law and the rules. In so doing the Government of Balochistan shall not be influenced in any manner whatsoever by the pendency of these proceedings or by the orders therein passed by this Court. Upon decision of the matter by the Government of Balochistan, the learned Advocate General of the Province shall inform the Registrar of this Court forthwith. The petitions shall remain pending on the file of this Court until the decision of the application by the competent authority."

94. After the passing of the above order, GOB considered the application of the TCC in the light of the Feasibility Report and the relevant laws/rules and required TCC to file reply within a period of 30 days on the following observations: -

(1) That from the record, it appears that the Balochistan Development Authority had signed a Chagai Hills Exploration Joint Venture Agreement with BHP, thereafter M/S Tethyan Copper Company Pakistan (Pvt.) Ltd for exploration, evaluation of Gold, Copper and associated minerals during the period of licences existing for exploration and prospecting of the area. The record reflects that neither any company was registered and incorporated under the Companies Act 1984 with the registrar of Firms nor in any other law;

(2) That the company did not make proper feasibility or exploration of the discovered deposits and achieve the targets required under the rules.

(3) That the second renewal application submitted by the applicant had given declaration that the applicant will submit the complete feasibility of the entire lease/exploration area. The applicant has utterly failed to

submit the said feasibility report meaning thereby that they have failed to conduct and complete exploration in the exploration licence/granted area.

(4) That on account of non-exploration and failure to explore the area during the last 17 years, the Government of Balochistan and the local inhabitants of the area have been deprived of the fruitful results.

(5) That the present application has been filed on behalf of TCC and not on behalf of co-sharer, who was alleged to be co-associate in the working project under rule 48 of BMR 2002. Since the applicant alone was not allottee of exploration licence, thus legally applicant is not competent to make application for the grant of mining lease.

(6) That the Mines Committee has noted the fact that the application was received on 18.02.2011 and the licence had expired on 19.02.2011, Later on, request was made to the Secretary, Mines & Mineral Department, Government of Balochistan on 03.03.2011 for participating in the mining lease. This fact was not made part of it. In such circumstances, the application is incomplete and is in violation of rule 48 of BMR 2002.

(7) The relevant portion of the feasibility study submitted by the expert committee was also examined by the Mines Committee, which made the following observation: -

  (i) That the Company has failed to comment or dilate upon rest of discovery of deposits except H-14 and H-15;

  (ii) The proposed development, operation and scheme of the mines in programme of the mining operation for the 11 other potential resources is missing/omitted to be considered in feasibility report;

  (iii) That considering the information given by the company in all respects in the light of BMR 2002 the Company has further failed to identify all the resources and achievements of all the targets within stipulated time.

  (iv) Misrepresentation for obtaining exploration licences EL-6, EL-8, EL-26 and EL-27 wherein there is no share of partner. Despite being a world class Exploration/Mining Company so called partner has failed to submit the technical, financial, economical viability report of the entire resources of EL-5 enjoying with special relaxations in all respects allegedly granted by GOB for the last 17 years.

  (v) There is a default and violation committed under rule 29(2)(c)(iii) of BMR 2002 as well as failure to provide the required information as contemplated under rule 47 of the BMR 2002.

(8) That the submission of the application relating to H-4, H-8, H-13, H-35 and H-79, etc., is in violation of rule 48 of BMR 2002.

(9) That feasibility report is silent about the processing, smelting and refining of the metals/minerals to be extracted from the mining area.

(10) That in view of aforementioned reasons, the Committee

found that the application submitted by the applicant is not satisfactory. It is also not in the interest of Government and people of Balochistan to grant the lease on a document which is incomplete and sketchy."

95. On 19.10.2011, TCCP submitted interim response to the above observations and sought further time for arrangement of meeting. The relevant portions from TCCP's reply are reproduced hereinbelow: -

Response to para-1 of the Notice:

TCCP was registered and incorporated under the Companies Ordinance, 1984 on 30.11.2000, with registration number K-08158 of 2000-2001. Evidence of its registration and incorporation is included at appendix 6. Details of such incorporation were also provided in TCCP's Mining Lease Application and have long been known to GOB.

The reference to BHP is irrelevant because TCCP, not BHP, submitted the Mining Lease Application. Furthermore, pursuant to clause 2(a) of the 2006 Novation Agreement, GOB agreed that TCC shall replace BHP as a party to CHEJVA and all references to BHP in CHEJVA must be read and construed as if they were references to TCC.

Response to para-2 of the Notice

This objection is vague because it does not explain what was "improper" in TCC's feasibility or exploration work or how TCC failed to achieve "targets required under the rules." The extensive exploration work which was carried out was conducted professionally and to international standards, and the Feasibility study and other technical reports submitted in support of the application satisfied or acceded to all requirements in CHEJVA and the BMR 2002. ... ...

A perusal of the conditions imposed by the Licensing Authority at the time of grant and subsequent renewals of EL-5 as well as its assignment to TCC in 2006 shows that the only requirement therein regarding the conduct of exploration operations was that TCC shall carry out the explorations in accordance with "good exploration practices." ... ...

Nothing in the BMR 2002 or CHEJVA requires TCC to undertake a feasibility study of every mineral occurrence in the Exploration Area. This is consistent with industry practice. Ore is often found in clustered deposits, meaning that distributions of ore may be found in and around a

particular mining site. The economic viability of the dispersed ore clusters will vary over time depending on market conditions. It may be more or less profitable to mine different clusters. It is, therefore, normal industry practice to create a "base case" for mining operation by conducting a feasibility study in respect of a particular site that is profitable according to prevailing economic conditions at the relevant time. Such a feasibility study then supports an application for a mining lease for the area in and around the immediately viable ore site. Mining leases are granted on this basis because, among other things:

... ...

Response to Para-3 of the Notice

This objection has no factual basis. The second EL-5 renewal application did not state that TCC would submit a feasibility study of the entire lease area. Neither CHEJVA nor the BMR 2002 imposes any such requirement, and TCC had never undertaken to do so. Indeed, the 2007 EL-5 Quarterly Report appended to the second EL-5 renewal application (at appendix 4) made it clear that the focus of exploration activities was and would continue to be H-14 and H-15 that is the main prize of the Western Porphyries and that such activity had utilized all TCC resources available in the Reko Diq area. Given that this focus in TCC's exploration work has made explicit five years ago, and formed part of the basis for the EL-5 renewal, it is wrong for the Licensing Authority to suggest that TCC agreed to submit a feasibility study in respect of the entire lease area. ... ...

Furthermore, any suggestion that the feasibility study should have assessed in detail each potential mineral occurrence in the proposed mining lease area is contrary to the BMR 2002 and normal industry practice. ... ...

Response to para-4 of the Notice

This objection is misconceived for the following reasons: -

(a) The above mentioned objection is misconceived because it is not based on any provision of BMR 2002. It is not a "routine" requirement under CHEJVA and it is unclear on what basis the Licensing Authority is bale to raise this objection.
... ...

(d) In 2008, EL-5 was extended for the second time. At the time of extension the Licensing Authority did not raise any concern about the length of time it has taken to explore the relevant area. Indeed, the grant of the extension was provided in accordance with the BMR 2002 and evidences the fact that the proposed

exploration timetable was satisfactory to the Licensing Authority.

... ...

Response to para-5 of the Notice

The BMR 2002 do not require that both parties to a joint venture should make a Mining Lease Application. The only requirement, to the extent it is relevant, is Rule 47(1), which provides that "an application for the grant of a mining lease may be made only by a body corporate formed by or under a law for the time being in force in Pakistan". As mentioned above, TCCP fulfils this requirement. There is nothing in the BM Rules which requires it to make a joint application with GOB under CHEJVA. In the circumstances, this objection is wholly misconceived.

In addition to the above matters. GOB's absence from the Mining Lease Application was the result of its own election and TCC cannot be held responsible for such absence nor can the Government's own choice not to participate and jointly file the Mining Lease application would serve as a ground for denying the Mining Lease to which TCC is entitled. ... ...

It will be appreciated from the above matters that GOB had the opportunity to submit a joint Mining Lease application, but it refused to do so. In the circumstances, it would be wrong, unreasonable and unfair for the Licensing Authority now to rely on that refusal to deprive TCC of a mining lease.

Response to para-6 of the Notice

In addition to the matters set out in response to paragraph 5 of the notice, we comment as follows:

(a) The Mining Lease Application was not received by the Licensing Authority on 18.02.2011. The Mining Lease Application was received by the office of the Licensing Authority on 15.02.2011 at 11:45 (evidence of delivery is enclosed at appendix 1.3).

(b) More significantly, it is incorrect to suggest that TCC was requesting GOB's participation in the Mining Lease Application only after the filing of the Mining Lese Application. TCC consistently urged GOB to file the Mining Lease Application jointly with TCCP (see, for example, TCC's letter to GOB dated 8 February 2011 at appendix 1.2 and the meeting between GOB and TCC on 12-14.02.2011 cited above). It was only when GOB refused to engage that TCCP filed the Mining Lease Application on its own.

Response to para-7 of the Notice

The objections at 7(i)-(iii) above relate to the same issue,

namely the focus of the feasibility study on H-14 & H-15 and the alleged failure to consider the other mining opportunities within the exploration area. As noted above in Para 3.18, neither CHEJVA nor the BMR 2002 require the feasibility study to consider the entire lease exploration area and each and every mineral occurrence contained therein. There is therefore, no basis for, and it is outside of, the Licensing Authority's powers, to insist that the feasibility of the entire exploration area be assessed.

As regards the objection at 7(iv) above, EL-6, EL-26 and EL-27 are wholly irrelevant for the determination of the Mining Lease Application, which is limited to the area covered by EL-5. For the avoidance of doubt, however, TCC denies completely making any misrepresentations with regard to those licences.

The objections at Paragraph 7(v) of the Notice are groundless. TCC has fully complied with the requirements set forth in Rule 47 of BMR 2002 regarding the contents of the Mining Lease Application and the supporting documents, including the feasibility study (see also Para 3.25), nor has TCC violated Rule 29(2)(c)(iii) of BMR 2002. The second renewal of EL 5 demonstrates that the Licensing Authority was indeed satisfied that an extension of the term of that exploration licence was necessary for the completion of the feasibility study.

Response to para-8 of the Notice

In the absence of clarification concerning which BMR 2002 have been breached (and the alleged manner of such breach) TCC is unable to understand this objection.

In this regard Rule 45 of BMR 2002 grants the holder of a mining lease a right to "carry on in the mining area, in conjunction with mining operations… exploration operations in relation to any such minerals or group of minerals". Similarly, Rule 56 of BMR 2002 obliges the holder of a mining lease to submit to the Licensing Authority periodic summaries of exploration operations carried out in the mining area. Clearly, the BMR 2002 provide that the order of a mining lease can undertake further expansion work in the mining lease area. An interpretation that feasibility study is required on each mineral occurrence in the mining lease area for the grant of a mining lease would make the provisions of Rules 45 and 56 totally redundant, which cannot be the case.

Response to para-9 of the Notice

This objection is misconceived. The Mining Lease Application is an application for a mining lease, not a smelting or refining licence. As such, the BMR 2002 do not require that TCC include such proposals in its Mining Lease

Application. We note the failure of the Notice to cite a relevant BM Rule in this regard.

TCC is entitled to a mining lease under CHEJVA subject to compliance with routine requirements. The requirement to include proposals in respect of smelting or refining is not, however, a routine requirement and it is improper to require such proposals from TCC. This is especially so given the recognition of CHEJVA by the BMR 2002.

The requirement in respect of smelting is also contrary to the original agreement between the parties, which envisaged that TCC would export its minerals. For example, Schedule C to CHEJVA expressly recognizes that any contract for mining venture (i.e. a Project Agreement) should address the obtaining of all export licences which (TCC) may require for exporting its entitlement to concentrates derived by the Mining Venture. Given this provision, it is clear that CHEJVA (and the parties at the relevant time) anticipated that TCC would export its mined minerals. It would, therefore, be contrary to CHEJVA to prevent such exports, and instead, require TCC to establish smelting and refining.

Response to Para 10 of the Notice

This objection misrepresents the requirement of the BMR 2002, which direct the Licensing Authority to determine only whether granting the lease is in the interest of the development of the mineral resources of Balochistan. The objection also ignores the Government's view expressed years ago by including CHEJVA and forcefully reasserted before the High Court – that the project significantly advances mineral development in the province. Having already foreseen these considerable benefits, the Government cannot now change its view as to the project's positive impact.

Moreover, the project is also decidedly in the interests of the people of the region. It will generate jobs for multiple generations of local workers, promote the development of the local infrastructure, and spur the continued development of the mining sector in Balochistan. Under the joint venture arrangements, and taking into account taxes and royalty conditions, 52% of the cash flows of the project will go to the Governments of Pakistan and Balochistan and a total of US$ 450 million will be spent during the life of the project directly on development prospects for the local and provincial communities.

Other substantial contributions by TCC in the areas of health, education and community support were presented for the Government's consideration in numerous operating Committee meetings including at the presentation of 25.08.2010.

96. The Mines Committee, in its special meeting held on 14.11.2011, observed that seeking of further time by TCC for arrangement of meeting was contrary to rules and not permissible, as such, it independently considered the matter in pursuance of its reasons stated in the notice and the interim response thereto and declined to grant the mining lease to TCC. Relevant portions from the decision/minutes of minutes are reproduced hereinbelow: -

> The Mines Committed observed that TCCP has stated that the "Government in its capacity as Licensing Authority cannot exercise any form of administrative discretion" which is not correct. Administrative discretion of Director General Mines & Minerals has been defined in Rule 2 (J & Z) and Rule 11 of BMR 2002, whereby the Authority has been delegated to the DG, the power of Licensing Authority in taking administrative assistance from Mines Committee constituted under Rule 3 of BMR 2002. TCCP has already accepted the terms and conditions of this office assignment letter dated 08.04.2006 through an undertaking whereby it was clearly mentioned that:-
>
> > "The Exploration Licence assigned to M/S Tethyan Copper Company Limited shall be terminated if they violate any of the terms and conditions as laid down above and in BM Rules, 2002".
>
> Record reveals that initially CHEJVA was signed between BDA and BHP on 29.07.1993. BHP and BDA were not registered firms, neither under the Companies Ordinance nor under the Registration Act. The Joint Venture Agreement dated 29.07.1993 has also not been incorporated under the Company Ordinance or under any other law required under rule 14 of BMCR 1970.
>
> TCCP applied for mining lease area containing thirteen main mineralization clusters i.e. H-4, H-8, H-13, H-15, H-79, etc. The present feasibility study submitted by TCCP covers only H-14 & H-15 deposits.
>
> The feasibility study discussed the business case, technical and finical information, technical economic viability, funding arrangement, capital and operating estimate and executing schedule of H-14 & H-15 covering 4.5 sq.kms. although the application for mining lease area cover 99.47 sq.kms. having other economic deposits, which are not included in the mines development for the reasons that these deposits have not been fully explored during last three terms of exploration licence.

The subject feasibility study of H14, H15 means to prepare a report which can justify securing mining lease from Competent Authority. TCCP has failed to provide the feasibility study of H4 starter project, although TCCP was approached through this office letters No.DC(MM)/EL(5)4728, dated 18-07-2007 & No. EL(5)6122-23, dated 12.09.2006 for development supply of H4 feasibility report. The stated exploration work was also the component of exploration licence.

The matter came to conclusion from the above quoted rule and justification that TCCP utterly failed to achieve the exploration targets and to submit the full feasibility report of the discovered deposits i.e. H-4, H-8, H-13, H-35, H-79, etc.

The members discussed the Rule 48 of BMR 2002 and decided that the applicant singly is not legally competent under the said rule as per record of DC(MM), which reveals that the said exploration licence was granted in favour of Balochistan Development Authority and TCCP.

The members observed that the submitted feasibility study confined only to two deposits i.e. H-14 & H-15. Other ore bodies in the vicinity like H-4, H-8, H-13, H-35, H-79, etc., are yet to be explored. These deposits were already discovered prior to grant of 2nd renewal.

Members took the view that non-submission of full feasibility study of EL-5 entire area (discovered deposits i.e. H-4, H-8, H-13, H-35 & H-79, etc.) make the TCCP defaulter under Rule 29(2)(c)(iii) of BMR 2002.

The members rejected the stance of TCCP for not establishing the smelting and refining unit within the Province and decided that establishment of smelting and refining units within Balochistan Province will be encouraged and preferred.

The members were of the view that mining lease application of TCCP has already been processed/disposed of on merit under Rules 11, 29(2)(c)(iii), 47, 48, 52, etc. of BMR 2002 and their progress. BM Rules, 2002 which have been enforced w.e.f. 08.03.2002, attract the interest of the invertors on such matters as transparency, criteria for dealing with application and the grant of licences and leases, expeditious decision making process, independent resolution mechanism, etc.

Keeping in view the above facts consulting the official records/BMR 2002, notice dated 21.09.2011 and interim reply dated 19.10.2011 received from TCCP, the members came to the conclusion that the Mining Lease application dated 15.02.2011 along with supporting documents

> (including Feasibility Study Report) submitted by TCCP does not fulfil the requirements of Rules 47, 48 of BMR 2002. It was unanimously decided by the Mines Committee to reject the application dated 15.02.2011 and refuse the grant of Mining Lease in favour of TCCP.

97. Thus, the application for grant of Mining Lease was dismissed by the Mines Committee constituted under BMR 2002 in its special meeting held on 14.11.2011 and the decision communicated to TCC *vide* letter dated 15.11.2011. TCC challenged the said decision by filing an administrative appeal before the Secretary, Department of Mines & Minerals, Government of Balochistan, as provided under the BMR 2002, which too was dismissed. However, both these orders were not challenged by TCC, before the High Court of Balochistan under Article 199 of the Constitution. As such, the same attained finality.

98. Mr. Ahmer Bilal Sufi, ASC for GOB stated that thereafter TCC filed claim both before ICC & ICSID and the Government of Pakistan was defending the same while objecting to jurisdiction, which were still pending. The jurisdiction of ICC was invoked in pursuance of CHEJVA as an international private contract, whereby the claimant primarily sought specific performance of CHEJVA and asked for grant of mining lease in the Reko Diq area of 99 km (as mentioned in the lease application) comprising 14 deposits. In the alternative, damages of an unspecified amount were claimed, to be established on merits. The said arbitration proceeding was filed against GOB. The nominee of ICC Committee in Pakistan, namely, Mr. Aziz A. Munshi and the nominee of GOB (Mr. Shahid Hamid) were objected to. GOB also raised objection on the nominee of the claimants, namely, William Rowley QC, which was upheld. The Arbitration Tribunal of ICC was constituted comprising the following members: -

(a) Rt. Hon. Lord Collins, (Chairman);

(b) Dr. Michael Moser; and
(c) Prof. David A.R Williams.

In order to meet the deadline from ICC, GOB filed the respondent's answer and counter claim to the claimant's request for arbitration.

99. Before the ICSID, the TCC made the claim under Bilateral Investment Treaty between Pakistan and Australia. As opposed to ICC contract based claim, it was a treaty based claim. The claim was again for specific performance of CHEJVA and the grant of mining lease of an area of 99 sq km. The claimant also moved an application for provisional measures for a status quo order. In the said application, it was requested to freeze the work of GOB in 99 sq km including H-4. The prayer made therein reads as under: -

> "166. For the foregoing reasons, TCCA respectfully requests the Tribunal to issue an Interim Award ordering provisional measures. The Specific measures TCCA seeks are that, during the pendency of this dispute, Pakistan be ordered:
>
> a. to refrain from, and take all steps necessary to ensure that Balochistan refrain from, taking further steps to develop the Reko Diq Mining Area, or any part thereof, by itself or with third parties;
>
> b. to refrain from, and take all steps necessary to ensure that Balochistan refrain from, selling, leasing transferring, authorizing or otherwise disposing of the Reko Diq Mining Area, or its interest in the Joint Venture, or any part thereof to any third party;
>
> c. to refrain from, and take all steps necessary to ensure that Balochistan refrain from, breaching the confidentiality provisions of TCC's Feasibility Study by sharing or disclosing any portion of its contents with any unauthorized person or entities;
>
> d. to refrain from, and take all steps necessary to ensure that Balochistan refrain from, taking any steps that infringe TCC's exclusive surface rights under the Surface Rights Lease;
>
> e. to issue, and take all steps necessary to ensure that Balochistan issue any authorization required to allow

TCC's expatriate staff to work in Pakistan and to travel to and access the Reko Diq site, including work visas, security clearances and No-Objection Certificates; and

f. to refrain from, and take all steps necessary to ensure that Balochistan refrain from, taking any steps that would unsettle the *status quo,* aggravate the dispute or render ineffective any ultimate relief granted by this Tribunal."

GOB contested the said application for provisional measures by filing objections on jurisdiction of ICC. The date of hearing for provisional measures was 04.12.2012 in London. The Government of Pakistan contested the said claim by filing detailed reply. In its reply, the Government stated that the team headed by Dr. Samar Mubarakmand was working on H-4 area, which was 12 km away from H-14 and H-15 for which the TCCA had filed feasibility. Objections on jurisdiction were also taken in the said reply.

100. This Court *vide* order dated 07.12.2012 directed GOP as well as GOB to request the ICC and ICSID Tribunals not to take further steps. The Ministry of Petroleum and Natural Resources, Government of Pakistan, *vide* letter dated 23.12.2012, apprised the Secretary General of ICSID that this Court *vide* order dated 07.12.2012 had directed to request the ICC and ICSID not to take any further step and prayed that the period for nomination of Arbitrator may be extended, so that the matter may be disposed of by this Court. However, the ICSID Tribunal, *vide* letter dated 24.12.2012, informed that it was unable to stop the proceedings and established the Tribunal comprising the following: -

(a) Dr. Klaus M. Sachs, (Chairman);
(b) Dr. Stanimir Alexandrov; and
(c) Rt. Hon. Lord Hoffmann.

101. Prior to that Pakistan's objections against TCC's nominee

Mr. John Beechey succeeded and he stepped down. On 06.11.2012, the hearing took place in London, when Dr. Samar Mubarakmand also entered appearance as a witness and stated that GOB was planning to work in H-4 Area. The details and its activity timelines were also provided by him in his testimony before the ICSID and ICC Tribunals. After hearing the submissions of both the parties, the Tribunal reserved its judgment.

102. The Government of Pakistan also took up the matter with Australian Government under Article 2 of the Bilateral Investment Treaty (BIT) to have consultations to deny TCCA the benefits of the BIT. In this regard, correspondence was done with the Australian Government. However, the Australian Government in exercise of its sovereign rights has not agreed with the proposal of GOP.

103. The case of GOB before international forums was that although it was not working on H-14 and H-15 areas for the time being, Dr. Samar's project at H-4 could not be stopped through provisional measures and it must be allowed to progress since it was the need of GOB to bring economic prosperity and contribute towards improving the law and order situation in the Province.

104. The ICSID Tribunal rendered draft Procedural Order No. 1 dated 13.11.2012, which allowed Pakistan to file its detailed Memo on jurisdiction by 18.01.2013 and also gave other timelines for various filings by the parties throughout the year 2013. Further, the ICSID Tribunal *vide* unanimous decision dated 14.12.2012 dismissed the request of TCCA for provisional measures and allowed GOB and Dr. Samar Mubarakmand to carry out mining and smelting of H-4 area. The plea of TCCA regarding urgency and irreparable loss was also declined. However, GOB was asked to keep on informing the Tribunal

about every development at the mining site. Relevant portion of the decision of the Tribunal is reproduced hereinbelow: -

> "151. In conclusion, the Tribunal finds that, at present, there is insufficient evidence on record to show that provisional measures are necessary to avoid irreparable harm. However, the Tribunal notes that the H4 Work Plan is fairly general and does not provide any details about the work specifically envisaged by Respondent with respect to deposit H4. The Tribunal therefore requests Respondent to inform the Tribunal and Claimant, on a regular basis, about its specific plans and activities with respect to deposit H4.
>
> 152. In the remaining parts (c) to (f) of the Request, Claimant further requests the Tribunal to order Respondent or Balochistan to refrain from breaching the confidentiality provisions of TCC's Feasibility Study, infringing TCC's exclusive surface rights under the Surface Rights Lease, and unsettling the status quo, aggravating the dispute or rendering ineffective any ultimate relief granted by the Tribunal. Finally, Claimant requests the Tribunal to order that Respondent or Balochistan issue any authorizations necessary for TCC's expatriate staff to work in Pakistan and travel to and access the Reko Diq site.
>
> 153. In its pleadings, Claimant has based these requests on the same arguments of urgency and necessity without however developing them further during the Hearing. The Tribunal is of the view that in regard to these requests Claimant failed to meet its burden of showing urgency and necessity. This leads the Tribunal to dismiss these parts of the Request.
>
> IV. Decision
>
> 154. The Tribunal therefore decides as follows:
>
> (1) Respondent shall immediately inform the Tribunal and Claimant of any change of its present intention (i) to implement the H4 Work Plan, (ii) not to expand its mining activities to H14 and/or H15 or to any other deposit within Licence EL-5 and (iii) not to give any rights in this regard to any third party.
> (2) Respondent shall further inform the Tribunal and Claimant, on a regular basis, about its specific plans and activities with respect to deposit H4.
> (3) The Tribunal remains seized of the matter and shall consider future applications by Claimant if the situation materially changes, in particular in case Respondent (i) materially deviates from the H4 Work Plan, (ii) expands its mining activities to deposits H14 and/or H15 or to any other deposit within

Licence EL-5 or (iii) gives any rights in this regard to any third party.

(4) Otherwise, the Request is dismissed.

(5) The Tribunal will decide on the costs related to the Request at a later stage of the arbitral proceedings."

105. Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 provides that a party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter, which is covered by the arbitration agreement, may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter. And, on an application so moved, the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. However, TCC in the instant case first obtained interim orders, but then rushed to ICC and ICSID without first exhausting the legal remedies available to them under the law of Pakistan, which is the applicable law of the agreement. TCC did not file any application expressing reservation or review of the order passed by the appellate authority. TCC appeared to be fully satisfied with it, but in Paras 73, 74 and 75 of their interim relief application before ICC they pretended as if sufficient time was not given to them. In such circumstances, GOB, *vide* Respondent's Objections dated 27.01.2012 questioned before the International Forum the *locus standi* of TCC to invoke international arbitration.

106. The law of Pakistan being the law applicable to the agreement, the Courts of Pakistan are the appropriate forum to decide the legality of CHEJVA. Learned counsel for GOB stated that in this regard, GOB and the Government of Pakistan have respectively put

both the ICC and ICSID on notice *vide* respondent's Answer to the Claimant's Request for Arbitration and Counterclaim dated 16.11.2012 that matter of CHEJVA is pending before the Supreme Court of Pakistan in the following words: -

> "2. Matters relating to the enforceability, validity and *vires* of CHEJVA, the addendum of 2000 and the novation of 2006 ("the joint venture contract") are pending before the Supreme Court of Pakistan in CPLA 796/2007, CP 68/2010, CP 69/2010, CP 1/2011 and CP 4/2011. The Claimant, its Pakistani subsidiary and its parent companies are before the Supreme Court of Pakistan and before were present before the Balochistan High Court. In excess of 50 applications have been filed and are pending before the Supreme Court. It is plain that only the Supreme Court of Pakistan has the jurisdiction to decide on the validity of the joint venture contract and no tribunal has the authority or power to usurp such jurisdiction. Therefore, this Tribunal should suspend any further proceedings in this arbitration until such time the Supreme Court of Pakistan determines the validity, legality and vires of CHEJVA.
>
> 3. During the Course of the Supreme Court proceedings allegations of corruption have been raised. It is the Supreme Court of Pakistan which is the appropriate forum for determining whether corruption is a factor in the matter before it and then take appropriate decisions. In this regard, Article 34 of the UN Convention on Corruption allows the Supreme Court, in part being the sub-set of the State to continue with pending legal proceedings."

Even otherwise in addition to section 4 of the New York Convention Act referred to above, article 2(3) of the New York Convention, which is incorporated in Pakistan's domestic law as an act of Parliament in 2011, states that the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Moreover, Article 34 of the UN Convention Against Corruption 2003 provides that with due regard to the right of third

parties, acquired in good faith, each state party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. And, in this context, states parties may consider corruption relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action. This indeed furnishes additional basis under international law to this Court to decide upon CHEJVA and related documents.

107. Learned counsel for GOB has submitted that regarding BIT, it is submitted that the same was entered into by the Federal Government without consultations from Balochistan or any other Province. This should not have been the case as all investments effectively are made or parked in one of the territories of provinces. The Provincial Government has no idea of the assurances given by the Federal Government through BITs. The provinces are kept in the dark. This is unfair situation particularly now when after 18th amendment, BITs should not be entered into unless all provinces are consulted. In fact, the dominant view of international lawyers is against execution of BITs by the developing states like Pakistan. An open letter of 50 lawyers against BITs is placed on record at page 1 in CM 4920/ 2012 in CPLA 796/2007. The BITs provide for compensation in cases of direct expropriation and indirect expropriation and the meaning of indirect expropriation is constantly expanding to include even delay in decision of the court, change in legislation and adverse decision of domestic court. Thus, in this sense BITs are contrary to independence of Judiciary. These aspects are not being examined by the Federal Government while ratifying the BIT. The consequence is what we are witnessing; identical claim is made before ICSID along with the one in

ICC. This issue is required to be considered by the Federal Government before signing any further BITs in haste and carefully evaluate the national interests and consequences and provinces must be consulted first as well.

108. Article 3(1) of the BIT provides that each party shall encourage and promote investments in its territory by investors of the other party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments. It is thus clear that the present BIT requires that investment be made in accordance with law of Pakistan. If an investment is made contrary to law of Pakistan, it will be an illegal investment that cannot be protected under the BIT. Land of any state is its most precious commodity. It cannot be parted with arbitrarily and without due process or proper authorization. Minerals in land are nature's endowment for the people of Pakistan. They are in nature of public trust. Title in minerals can be given away only in accordance with law and not through any other means. The mineral rules act as guardians of the said public trust. Adherence to them ensures that minerals are exploited and given away in national interest. It is the position of GOB that foreign investment is welcome, but investor must comply with laws of Pakistan as required under article 5 of the Constitution.

109. Learned counsel submitted that Pakistan is liable before the International Centre for Settlement of Investment Disputes (ICSID) because of the Provisions of the Agreement between Australia and Pakistan on the Promotion and Protection of Investments, dated 07.02.1998 (Australia-Pakistan Treaty). Pakistan is not liable before ICSID in the capacity of a party to the contract but rather because it has agreed to place itself before ICSID in any arbitration proceedings

against an Australian Investor through its treaty commitments. He argued that this constitutes 'consent' as defined under Article 25 of the ICSID Convention. He presented two Acts of Parliament of 2011 before the court that enable the execution of awards in Pakistan made by ICSID and the ICC Court of Arbitration. These are the Arbitration (International Investment Disputes) Act, 2011 and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011. He quoted sections 3 & 4 from the former and sections 6 from the later, which provide for enforcement of the awards through the High Courts.

110. Pakistan is governed by a written Constitution. Under Article 1 of the Constitution of Islamic Republic of Pakistan, 1973 [hereinafter referred to as "the Constitution"], Pakistan is a Federal Republic known as the Islamic Republic of Pakistan and comprises four federating units, namely, the Provinces of Balochistan, Khyber Pakhtunkhwa, the Punjab and Sindh, the Islamabad Capital Territory, the Federally Administered Tribal Areas and such States and territories as are or may be included in Pakistan, whether by accession or otherwise. As per Article 7 of the Constitution, "the State" means the Federal Government, *Majlis-e-Shoora* (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess. Pakistan is a sovereign State. The concept of sovereignty means supreme authority in a political community. A sovereign State is often described as one that is free and independent. In its internal affairs it has undivided jurisdiction over all persons and property within its territory. It claims the right to regulate its economic life without regard for its neighbors and to increase armaments without limit. No other

nation may rightfully interfere in its domestic affairs. In its external relations, it claims the right to enforce its own conception of rights and to declare war. In political theory, the ultimate authority of the State in the decision-making process and in the maintenance of order is called the sovereignty. Its supreme and independent power is exercised in the domestic and foreign policy. As per dictionary meaning, sovereignty is supreme and unrestricted power, as of a State; the position, dominion, or authority of a sovereign; and an independent State. Sovereignty is manifested above all in the way a State functions, but it is most apparent in the system of State rights, including sovereign rights. It is precisely the State's powers that ensure the State's authority and thus its sovereignty. Only State power can authoritatively influence and, when necessary, exercise coercion on all aspects of life in human society. State power is in effect universal and sovereign in nature. A State's domestic sovereignty is closely linked with its independence from foreign powers. Thus, it is a settled principle of international law that where a contract is entered into with a foreign national or a foreign company, it is governed by the municipal laws of the country where the contract is executed subject to any special provision to the contrary incorporated in the contract. In the instant case, as per CHEJVA itself, the law of Pakistan is the law applicable to the agreement. The validity of CHEJVA was challenged by the private citizens on various grounds, including the illegalities committed in granting large scale relaxations to BHP. The proceedings were started before the High Court of Balochistan in the year 2006 and were continued in petition for leave to appeal before this Court, which were subsequently joined by direct petitions filed under Article 184(3) of the Constitution of Pakistan. More importantly, the proceedings

before the High Court, and subsequently before this Court were not initiated by any of the parties to CHEJVA, but by private citizens. Until the recent development of decision of the Mining Committee refusing the application submitted by TCC for grant of mining lease, there was no dispute between the parties and for the same reason, none of the parties had ever invoked the jurisdiction of ICSID or any other international forum. Initially, this Court had passed a restraint order requiring GOB not to decide the application for grant of mining lease, which was subsequently vacated. However, if the restraint order was not withdrawn, GOB would not have been in a position to give any decision on the application for grant of mining lease, and consequently TCC or any other affected person would not be in a position to approach ICSID or any other international forum. In this view of the matter, there is no force in the assertion of the learned counsel for the private respondents that GOB had any grudge against BHP or TCC and that they were unable to make out a case of bias or grudge against GOB.

111. Learned counsel for GOB stated that the conduct of TCC is hardly respectful towards this Court because the Court provided three specific interim reliefs to TCC by allowing their application to be filed, by ordering the decision on the application and again by ordering decision of the appellate authority; yet they disregarded the benevolence of this Court and did not bother to approach this Court and instead approached international forums. According to the learned counsel, by invoking the jurisdiction of ICC and ICSID while this Court was fully seized of matters relating to CHEJVA and other matters, TCC attempted to prejudice the determination of legality of CHEJVA and other agreements by openly arguing that these proceedings have

become infructuous. In this regard reference has been made to *Javid Dastgir Mirza v. State* (1977 SCMR 267), *Naveed Nawazish Malik v. Ghulam Rasool Bhatti* (1997 SCMR 193), *In Re: Suo Motu Criminal Original No. 1 of 2001* (PLD 2002 SC 399) and *Johra Saeed v. University of Health Sciences* (2007 MLD 447).

112. We find force in the submission of learned counsel for GOB that the respondent company has been changing positions and has not been forthcoming before this Court. For example, it was described as TCCA before the Balochistan High Court (as described in the impugned judgment at page 27 of CPSLA No. 796/2007, Part I). Thus, in the appeal, it is TCCA that would continue to be present before this Court. However, later it was stated that it is not TCCA, but TCCP that is before this Court without making any application for the change of parties. This Court accordingly issued notices to TCCA. Whereas before the ICC and ICSID, in common para 2 of the respective claims, it referred to itself jointly as "TCC" as including TCCA and TCCP wherever the context so permits. Such an evasive style of TCC could hardly mislead the Court or the International Tribunals. Learned counsel for TCC has not been able to substantiate his plea that GOB had any grudge against BHP or TCC and that they were unable to make out a case of bias or grudge against GOB.

113. Mr. Abdul Hafeez Pirzada, Sr. ASC for BHP has submitted that in view, and as a consequence, of the order dated 25.05.2011 passed by this Court in the instant case and the fact that the application for a Mining Lease has been rejected in the administrative appeal, the CPLA has become infructuous. He argued that the substance of the order dated 25.05.2011 in the CPLA created a legitimate expectation that the CHEJVA was legal and valid and that

TCC, at the very least, had the lawful right to apply for and seek grant of a Mining Lease. If this Court had been of the view that, *prima facie,* the CHEJVA was *void ab initio*, it would not have vacated the injunction, which was not objected to by GOB. It was, therefore, implicit in the vacation of the injunction that a lawful right vested in TCC qua the Joint Venture Partner of GOB under CHEJVA to apply for the Mining Lease pursuant to BMR 2002 and for GOB to decide the same, which it had. He further argued that the language of the order dated 25.05.2012 wherein it has been held that "the petitions shall remain pending on the file of this Court until the decision of the application by the competent authority" read with the prayer in CMA 112/11 of GOB reproduced in the said order clearly indicated that the CPLA stood disposed of and the judgment of the Balochistan High Court impugned in the CPLA had become final and also immune from any other or further proceedings including those under Articles 184(3) and 185 of the Constitution automatically, upon issuance of the order dated 14.11.2011 of the licensing authority under BMR 2002 in terms of which the application for the Mining Lease was rejected. According to him, the CPLA ceased to exist having abated as a *lis* before this Court on 14.11.2011. He also argued that the petitioners and now GOB, contrary to all known principles of propriety and the law of pleadings, principles of equitable *estoppel in pais* as well as issue (collateral) estoppel, and the equitable maxim of approbation and reprobation were seeking to revive the CPLA and setting aside of the CHEJVA. This was being done with an ulterior motive by the petitioners and GOB and was tantamount to abuse of the process of this Court.

114. He argued that the only remedy available against the judgment of the Balochistan High Court lay under Article 185 of the

Constitution by way of petition for leave to appeal and the jurisdiction of this Court under Article 184(3) of the Constitution to interfere directly, indirectly or collaterally with a judgment of a Court of record, established by and invested with jurisdiction under the Constitution was barred and the judgment of the Balochistan High Court could not be set aside or varied by a declaratory or any other order under Article 184(3) of the Constitution. He also submitted that it was evident from a reading of the prayer clause of each of the Constitution Petitions that these too had become infructuous as the dominant thrust of these Constitution Petitions was that the Mining Lease ought not to be granted to TCC. This object already stood achieved in view of the order dated 14.11.2011 passed by the licensing authority and upheld on 03.03.2012 in the Administrative Appeal. Thus, there was *no* fundamental right entitling any citizen (or outsider with no privity of contract with parties to a contract) to directly or indirectly seek disruption of or interference with on-going international arbitration proceedings *which is the true motive of the petitioners and GOB given that* the avowed and overt object of the Constitution Petitions stood achieved already.

115. Mr. Khalid Anwar, Sr. ASC argued that if TCC were granted the mining lease, the instant petition would still be maintainable because this Court could then declare that everything including relaxation was illegal and strike it down, for which this Court had jurisdiction. However, if they had refused to grant it, there would be no complaint against them to be agitated before this Court unless this Court had given the findings that the international arbitration clause of CHEJVA was illegal and unconstitutional; ICSID and ICC Arbitration should not have taken place; and the verdict, if any, given by the

Arbitrators would be null and *void*. He requested the Court not to give such a finding and suggested that proper course for the Court would be to stay its hands off and wait for the outcome of those proceedings being carried out under the laws of Pakistan, namely, the Arbitration (International Investment Disputes) Act, 2011, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, and the Fourth Schedule to the Constitution of Pakistan under which the International Arbitration Treaties are binding upon the Government of Pakistan. According to the learned counsel, that would be the best, clearest, fairest and most transparent approach, which would restore the confidence of foreign investors in Pakistan as a safe environment for their investments and there would be no conceivable allegations that the agreement was struck down after the discovery had been made. He urged that Pakistan should stand up for its commitments under the bilateral treaty read with ICSID clause, which the State of Pakistan has accepted voluntarily and freely, and that this Court should not put its prestige on the line.

116. We have given anxious consideration to the arguments of the learned counsel. The Constitution Petitions were filed by the petitioners in the instant case and entertained by this Court by way of public interest litigation considering the peculiar facts and circumstances of the instant case where despite the fact that grave illegalities and irregularities were committed in the execution of CHEJVA and other instruments, but GOB failed to defend the petition filed before the Balochistan High Court under Article 199 of the Constitution and protect the interests of the people of Balochistan. The petitioners genuinely apprehended that the CPLA filed against the judgment of the Balochistan High Court before this Court might also

not meet the same fate. The petitions under Article 184(3) of the Constitution have raised questions of public importance with reference to enforcement of Fundamental Rights. Learned counsel for GOB rightly argued that there is no question of retraction of pleadings on the part of GOB inasmuch as the law permits parties to modify position if there are developments subsequent to the filing of the case or new facts come to light. The developments in this regard included the approval of Dr. Samar Mubarakmand's project by ECNEC in December 2010 and accordingly CMA 252/2011 was filed apprizing the Court of this development and requesting a decision on merits. The objection raised by the learned counsel for TCC is, therefore, not tenable. On 08.02.2011, this Court directed the production of entire record relating to CHEJVA. The said record was retrieved and filed through several applications. It made shocking disclosures of extensive irregularities and corruption. The Government examined the same and decided not to defend the said acts and accordingly it decided to render full assistance to this Court from the record that was filed. Further, this Court has always emphasized that the government functionaries must perform their functions in accordance with law. In this regard, reference may be made to the cases reported as *Ghulam Bib v. Sarsa Khan* (PLD 1985 SC 345), *Zahid Akhtar v. Government of Punjab* (PLD 1995 SC 530), *Iqbal Hussain v. Province of Sindh* (2008 SCMR 105), *Human Rights Cases Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010* (PLD 2010 SC 759), *Mst. Mumtaz Begum v. Province of Sindh* (2004 CLC 697) and *Dilshad Ali v. Ahmed Khan* (2007 CLC 441). It is may be mentioned that this Court has wide powers in terms of Article 184(3) of the Constitution to oversee the acts/actions of the other organs of the State, namely, Executive and Legislature. It is also well

settled that under the principle of trichotomy of powers, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens *inter se*. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights, which calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society. The discharge of constitutional duty by the State functionaries in deviation to the spirit of the Constitution can be anvil to the Constitution and is challengeable on diverse grounds including mala fide and colourable exercise of the power in bad faith for ulterior motive. It is difficult to confer validity and immunity to the mala fide act or action from judicial scrutiny in exercise of power of judicial review which is inherent in the superior courts. Reference in this behalf can be made to the cases of *Miss Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), *Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473), *Wasey Zafar v. Government of Pakistan* (PLD 1994 SC 621), *Sabir Shah v. Federation of Pakistan* (PLD 1994 SC 738), *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324), *Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161), *Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* (PLD 1998 SC 1263), *Farooq Ahmad Khan Leghari v. Federation of Pakistan* (PLD 1999 SC 57), *Liaqat Hussain v. Federation of Pakistan* (PLD 1999 SC 504), *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607), *In the matter of Reference No.2 of 2005 By the President of Pakistan* (PLD 2005 SC 873), *Javed Jabbar v. Federation of Pakistan* (PLD 2003 SC 955), *Iqbal Haider v.*

Capital Development Authority (PLD 2006 SC 394), *Muhammad Mubeen-us-Salam v. Federation of Pakistan* (PLD 2006 SC 602), *Wattan Party v. Federation of Pakistan* (PLD 2006 SC 697), *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642), *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61), *Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265), *Bank of Punjab v. Haris Steel Industries (Pvt) Ltd.* (PLD 2010 SC 1109), *Shahid Orakzai v. Pakistan* (PLD 2011 SC 365), *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407), *Federation of Pakistan v. Munir Hussain Bhatti* (PLD 2011 SC 752), *Wattan Party v. Federation of Pakistan* (PLD 2011 SC 997).

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, reference may usefully be made to the case of *Bhanu Constructions Company v. A.P. State Electricity Board* [1997 (6) ALT 328] wherein it has been held that: -

> "9. Law: Public Field:
>
> When it comes to public field, the fundamental rights granted by Part IV of the Constitution of India makes an obvious distinction. In the words of the Supreme Court in *Shrilekha Vidyarthi v. State of U.P.*, (1993) 1 SCC 212
>
> > "The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those

> of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

In the case of *Food Corporation of India v. Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 77, the Supreme Court observed as follows:-

> "There is no unfettered powers in public law; a public authority possesses powers only to use them for public good. This imposes duty to act fairly. The Court held that despite the term in the tender notice enabling the rejection of any tender without assigning any reason, such rejection must be for valid reason because every public body is under duty to act fairly."

10. Law: International Contracts of the Government:
The case of the petitioner is that because of his right not to be rejected arbitrarily and his legitimate expectation to be treated fairly, Section 3.2 of the Loan Agreement giving unfettered discretion to the Fund to withhold concurrence for any tender is unconstitutional. The agreement is governed by the general terms and conditions which provide that it shall be governed by the laws and regulations of the Japan. "One of the clearest rejections of any renvoi doctrine is to be found in the field of contract, it being thought that no sane businessman or his lawyers would choose the application of renvoi. Lord Diplock rejected the application of the doctrine in contract thus:

> "One final comment upon what under English conflict rules is meant by the 'proper law' of a contract may be appropriate. It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the Courts of that country might themselves apply if the matter were litigated before them. For example, if a contract made in England were expressed to be governed by French law, the English Court would apply French substantive law to it notwithstanding that a French Court applying its own conflict rules might accept a renvoi to English law as the lex loci contractus if the matter were litigated before it. Conversely, assuming that under English conflict rules English law is the proper law of the contract the fact that the Courts of a country which under English conflict rules would be regarded as having jurisdiction over a dispute arising

> under the contract (in casu Kuwait) would under its own conflict rules have recourse to English law as determinative of the rights and obligations of the parties, would not make the proper law of the contract any the less English law because it was the law that a Kuwaiti Court also would apply."(See Cheshire & North's Private International Law 1984 AC 50)

Therefore, it is a moot question whether the validity of the said provision in the agreement can be tested with reference to the Constitution of India. Inasmuch as the project is executed in India by a public body, we may still examine this question.

11. Basically, the curb on arbitrary power by reason of legitimate expectation of a citizen is not an absolute and substantive right. The Supreme Court has held in *Union of India v. Hindustan Development Corporation*, that such a legitimate expectation cannot be equated to such a substantive right. Even if it were so, there can be a reasonable restriction of such a right in public interest. As we have seen above, the same provision in the agreement if it were in a private contract will be quite valid and it is attacked as unconstitutional only because it interferes with the right of the petitioner to have his tender considered.

12. In *Tata Cellular v. Union of India*, (1994) 6 SCC 651, the Supreme Court spelt out the parameters of judicial review in the following words:

> "The duty of the Court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers,
> 2. Committed an error of law,
> 3. Committed a breach of the rules of natural justice,
> 4. Reached a decision which no reasonable tribunal would have reached or,
> 5. Abused its powers.
>
> Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case.
>
> Shortly, put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(ii) Irrationality, namely, Wednesbury unreasonableness,
(iii) Procedural impropriety.
The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

In the case of Asia Foundation & Construction Ltd., the Court applied these principles and came to the conclusion that such judicial review is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

In that case, it was noted as follows:-

"It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and Respondent 1 together with the consultant's opinion after the so- called corrections made the conclusion of the Bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring Court's interference in the matter of an award of contract."

Thus, it is clear that this Court has the jurisdiction to adjudge the validity of CHEJVA on the above grounds, including non-transparency, violation of law/rules, curtailment of the fundamental rights of the general public, etc.

118. In this regard, it is pertinent to mention that a number of tribunals have held that, where an investment is made in violation of the general principles of law, which include violations of certain host country laws, such as where an investment results from the commission of crimes, e.g., fraud or bribery, the tribunal possesses both the ability and the obligation to prevent the investor from

benefiting from the rights under the relevant bilateral investment treaty. The ICSID Tribunal in *World Duty Free v. Kenya* [(ICSID Case No ARB/00/7), Award, 25 September 2006] rejected the claimant's attempts to characterize the payment made to the then president of Kenya as something other than a bribe to secure a contract, and also laid out the legal consequences of that bribe – that the tribunal could not uphold claims based on contracts of corruption because to do so would be a violation of international public policy. In that case, the claimant did not dispute Kenya's assertion that a payment had been made to the then president nor did claimant dispute the manner in which Kenya described the payment as having been made. The tribunal rejected the claimant's argument that the payments made on behalf of the claimant to the then president of Kenya were "a personal donation for public purposes" that were "sanctioned by customary practices and ... regarded a matter of protocol by the Kenyan people". The tribunal held that the payments were a bribe because they "were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment." In the course of its reasoning, the tribunal explained that where a payment is received corruptly by a state official – i.e. where it is a covert bribe – receipt of the payment is not legally imputable to the state itself and that, "if it were otherwise, the payment would not be a bribe." After satisfying itself as to the objective existence of a transnational public policy rule against bribery conducted by identifying the rule "through international conventions, comparative law and arbitral awards," the tribunal looked away from norms of international law to the law applicable to the dispute – English and

Kenyan – and found nothing that would justify bribe taking but instead plenty to proscribe it. The tribunal also asserted that, even in contexts where "corruption is widespread either within the purchasing country or in the particular sector of activity... all arbitral tribunals [have] concluded that such facts do not alter in any way the legal consequences dictated by the prohibition of corruption... [regardless of the fact that] in some countries or sectors of activities, corruption is a common practice without which the award of a contract is difficult -- or even impossible"... and that the tribunal "agree[d] with such a conclusion." Interestingly, and of particular relevance for our case, is the fact that the claimant was the successor in title to the contract and was not even in existence as a juridical person when the payment was made and "ha[d] no knowledge, actual or constructive, of any payment which could be characterized as improper and unlawful." Nevertheless, as noted above, the tribunal refused to uphold the claims based on the corrupt contract.

119. In *Tokios Tokelės v. Ukraine* [(ICSID Case No ARB/02/18), Decision on Jurisdiction and Dissent, 29 April 2004] it was observed that the requirement "that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern [bilateral investment treaties]," while noting that "the purpose of such provisions … is 'to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal'."

120. In *Inceysa v. El Salvador* [(ICSID Case No ARB/03/26), Award, 2 August 2006] it was held that a contract made in violation of host country law does not benefit from the protections of the relevant bilateral investment treaties or the rights granted by them, including

the right to arbitration. In that case, the illegal act was fraud committed by the investor in obtaining a contract with the host state. The tribunal found that such an outcome was mandated by the principle of good faith, as well as by the fact that granting treaty rights or protections in such cases would violate both the principle of nemo auditur propiam turpitudinem allegans and international public policy. The tribunal also found that the claimant's failure to act in good faith – by making fraudulent misrepresentations in obtaining its contract with El Salvador – meant that "... it did not make it in accordance with Salvadoran law" and that this rendered the tribunal "... incompetence to hear [the investor's] complaint, since its investment cannot benefit from the protection of the [treaty]." With respect to emo auditur propiam turpitudinem allegans, the Inceysa tribunal held that: "... [a] foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud." It was found further that investments made in violation of host state law were contrary to international public policy, which it defined as "... consist[ing] of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it. That bilateral investment treaties commonly contained a provision requiring investments to be made "in accordance with law" was a "clear manifestation" of the signatories' commitment to this international public policy and of their intent to exclude from the treaty's protection investments made in

violation of the internal laws of each of signatory. The tribunal further found that the language "in accordance with law" in bilateral investment treaties "...follow[ed] international public policies designed to sanction illegal acts and their resulting effects" and that "it is uncontroversial that respect for the law is a matter of public policy … in any civilized country … and that a meta-positive provision [exists] prohibit[ing] attributing effects to an act done illegally," a provision that prevented the tribunal from hearing the dispute. The tribunal concluded its discussion of international public policy by holding that "it is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which ... is a principle of international public policy."

121. While dismissing the case on other jurisdictional grounds, the tribunal in *TSA Spectrum de Argentina SA v. Argentina* [(ICSID Case No ARB/05/5), Award, 19 December 2008] noted that, had these other grounds not been available, it would have reserved the issue of corruption in the granting to the claimant of a concession (contract for the privatization of the management and control of the Argentine radio spectrum) for the merits of the case and would not have decided them at the jurisdictional stage. Such reservation followed from the fact that investigations into bribery and misuse of public office in connection with the granting of the concession were, at the time of the decision, ongoing in Argentina, with the alleged bribery still being investigated and two indictments, but no judgments, having issued from the misuse of public office investigations.

122. Above are the reasons in support of the short order passed by this Court, by which the titled CPLA was converted into appeal, and the appeal as well as the Constitution Petitions under

Article 184(3) of the Constitution were allowed with costs throughout whereas the Miscellaneous Applications were disposed of. In consequence, the Chagai Hills Exploration Joint Venture Agreement dated 23.07.1993 was held to have been executed contrary to the provisions of the Mineral Development Act, 1948, the Mining Concession Rules, 1970 framed thereunder, the Contract Act, 1872, the Transfer of Property Act, 1882, etc., which was even otherwise not valid, therefore, the same was declared to be illegal, *void* and *non est*. In pursuance of the above declaration, Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006, which were based upon, and emanated from, CHEJVA were also held to be illegal and *void*. It was further held that all those instruments did not confer any right on BHP, MINCOR, TCC, TCCP, Antofagasta or Barrick Gold in respect of the matters covered therein. It was lastly held that EL-5 was tantamount to exploration contrary to rules and regulations as the claim of TCCP was based on CHEJVA, which document itself had been held to be *non est*. Therefore, before exploration it was incumbent upon it to have sought rectification of its legal status.

IFTIKHAR MUHAMMAD CHAUDHRY, CJ

GULZAR AHMED, J

SH. AZMAT SAEED, J

Islamabad, 7 January, 2013
APPROVED FOR REPORTING

سپریم کورٹ آف پاکستان

پریس ریلیز

مورخہ 10.05.2013

سپریم کورٹ نے ریکو ڈیک کیس کا تفصلی فیصلہ جاری کر دیا ۔ آج سپریم کورٹ آف پاکستان نے ریکو ڈیک کیس کا تفصیلی فیصلہ جاری کیا ہے یہ کیس چیف جسٹس آف پاکستان جناب جسٹس افتخار محمد چوہدری کی سربراہی میں تین رکنی بینچ جس میں جسٹس گلزار احمد اور جسٹس شیخ عظمت سعید بھی شامل تھے، نے سنا تھا۔اس کیس کا مختصر فیصلہ 7.1.2013 کو سنایا گیا تھا۔ایک سوانچاس صفحات پر مشتمل فیصلہ جس میں تفصیلی اسباب دیے گئے ہیں جناب چیف جسٹس افتخار محمد چوہدری نے تحریر کیا ہے۔ پورا فیصلہ سپریم کورٹ کی ویب سائٹ www.supremecourt.gov.pk پر بھی موجود ہے۔

حکم نامے کے کچھ اہم مندرجات درج ذیل ہیں:۔

فیصلہ

افتخار محمد چوہدری، CJ اوپر بیان کیے گئے معاملات کو اس عدالت نے مختصر فیصلہ دیتے ہوئے مورخہ 07.01.2013 کو حقائق کی روشنی میں جس کی وجوہات بعد میں بیان کی جائیں گی۔ نپٹا دیا تھا۔ یہ فیصلہ پہلے ذکر کیے گئے مختصر فیصلہ کے متعلق وجوہات بیان کرتی ہے۔

3. مورخہ 29.07.1993 کو بلوچستان ڈویلپمنٹ اتھارٹی، (BDA) ایک قانونی کارپوریشن کے طور پر بلوچستان ڈویلپمنٹ اتھارٹی ایکٹ، 1974 کی دفعہ 3(2) کے تحت قائم ہوئی جسکا یہاں بعد میں BDA Act,1974 کے طور پر حوالہ دیا گیا۔ جو کہ مشترکہ کام / مقصد کے معاہدہ میں جس کو "the Chagai Hills Exploration Joint Ventrure Agreement" (CHEJVA) کہا جاتا ہے میں مدعا علیہ ,BHP Minerals Intermediate Exploration Inc. (BHP) کے ساتھ شامل ہوئی۔ جو کہ کہا جاتا ہے کہ USA کی ریاست Delaware میں رجسٹرڈ شدہ ہے اور معدنیات کی دریافت کا کام کرتی ہے جیسا کہ ریکوڈک کے علاقے میں کاپر اور سونے کو دریافت کر رہی ہے۔

4. مورخہ 04.03.2000 کو تین پارٹیوں کے درمیان AddendumNo.I کے تحت معاہدہ ہوا۔ جن میں گورنر بلوچستان،

صوبہ بلوچستان کی جانب سے، جیسا کہ "GOB" کا حوالہ دیا گیا۔اور بلوچستان ڈویلپمنٹ اتھارٹی جوایک قانونی کارپوریشن BDA Act,1974 کے تحت قائم اورز یراثر وجود رکھتی ہے۔اور BHP Minerals جیسا کہ بیان کیا گیا کہ اس تناظر میں ,CHEJVA، کے تحت BDA کے کردار کی اور معاملات اور اقدامات جو BDA نے اس سلسلے میں کیے ہیں کی وضاحت کی جائے۔اور CHEJVA کی کئی شقوں کو تبدیل کیا جائے، یہ CHEJVA میں بیان کی گئی شقوں کی تعریفیں اور تشریحات بیان کرتی ہے اور BDA's کی بطور GOB's ایجنٹ کے طور پر تقرری کے کردار کی وضاحت کی جائے، جو کہ GOB پر مکمل طور پر ذمہ داری عائد کرتا ہے اور اس کے GOB سمجھا جائے گا۔اور کلاز 1.1 میں جو کہ الحاق کے لفظ کی تعریف کرتا ہے کام کے علاقے کی موجود فنڈ کی ترسیل ابتدائی تاریخ، برابر حصہ, معدنی ترقی، معدنی تلاش، معدنیات، شراکتی نفع, شراکتی فریق، فریقین، فیصدی نفع، مشتعر لائسنس، منتقلی، آرٹیکل 2 کی اس حد تک نظر ثانی کی جائے کہ جو شرائط ذیلی شقوں 2.1(i) اور CHEJVA(ii) میں بنائی گئی ہیں قابل اطمینان ہیں یا ختم کر دی گئی ہیں ۔متبادل شقیں 3.2 نے آرٹیکل 5,7,8,9,11,12,14,15 اور 22 میں ترمیم کر دی ہے۔

5. مورخہ 28.04.2000 کو BHP نے Mincor Resources کے ساتھ ایک لازمی معاہدہ کیا جو کہ مغربی آسٹریلیا کی تجارتی کمپنی ہے اور جس کا تجارتی علاقہ پرتھ میں واقع ہے۔معاہدہ کے آرٹیکل 2.1 فریقین کے لیے ایک راہ متعین کرتی ہے کہ وہ اس مقصد کے لیے دریافتی اتحاد کرے۔جس کے تحت Mincor کو اختیار حاصل تھے کہ وہ معدنیات کو تلاش کرے۔ترقی دے Exploit کرے اور حاصل کرے اور قبضہ میں رکھے۔اس لائسنس کے تحت جو اسے BHP اور اس کے شریک GOB کی طرف سے دیا گیا ہے یا وہ دریافتی لائسنس پر جو کہ کسی بھی ایک پارٹی کو علاقہ میں حاصل ہے آرٹیکل 2.2.1 مہیا کرتا ہے کہ 100 ڈالر معاوضہ کے عوض Mincor کی جانب سے BHP کو۔Minor,BHP کو مکمل اور قلعی اختیار اور نیلامی دے اور عرصہ نیلامی دوران BHP کے ساتھ اتحاد رکھے آرٹیکل BHP 2.24 کو پابند کرتا ہے کہ Micor ایک Specialized کمپنی تشکیل دے جو کہ Tethyan Copper company (TCC) کے نام سے جانی جاتی ہے کی مالی معاونت کرے اور مشترکہ معاہدہ پر عمل کرے۔ BHP کو اختیار ہے کہ وہ کوئی بھی فیصلہ کرے Mincor کے ساتھ یا TCC کے ساتھ جانشین بنانے کے لیے اتحادی معاہدہ کی شرائط Option Agrement کے آرٹیکل 3 میں بیان ک ءگئی ہیں Mincoroption مکمل اور کلی اختیار دیتا ہے Mincor کو یا اس کے جانشین کو کہ وہ علاقہ میں کاپر اور سونے کی دریافت کے متعلق BHP کے ساتھ اتحاد کرے۔آرٹیکل 3.3 حصول اور Clawback حقوق کے متعلق ہے یہ بیان کرتا ہے کہ Clawback کے حقوق دریافت کے دوران کسی بھی اہم معدنیات کا وقوع پزیر ہونا اس اتحادی معاہدہ کی شرائط کی روشنی مین لاگو ہوتے ہیں یا Mincor کی جانب سے سروے ایریا کے کسی حصہ میں بھی تبدیلی لائی جائے

6. 24.10.2000، کو TCC نے Mincor کے نمائیندہ کے طور پر، Mincoroption کو استعمال کرتے ہوئے، اور مورخہ

19.04.2002 کومشترکہ معاہدہ کیا۔03.09.2002 کو،2002 BMR کے نفاذ کے بعد، TCCP نے کاپر، سونا اور منسلک شدہ معدنیات ضلع چاغی کے 973.75. km کے علاقے پر دریافت کرنے کے لیے Explorution Licence (EL) کے لیے اپلائی کیا اور مورخہ 09.09.2002 کو بذریعہ لیٹر EL-5 جاری کیا گیا۔ TCC نے BHP کے US$60million کے Clowback کے حقوق بھی خریدے۔ Atacama نے TCC کو خریدا، 50% کے حساب سے Antofagasta نے اور 50% کے حساب سے بارک گولڈ کنینڈا نے خریدا2006 میں Antofagasta ایک چیلین کمپنی، بذریعہ زیر اثر Atacoma complxr Pvt, Ltd, یونائیٹڈ کنگڈم میں رجسٹرڈ ہوئی نے TCC کے شیرز خریدنے کے لیے آفر دی اور اس آفر کو TCC کے بورڈ نے قبول کر لیا اسی طرح Antofagasta نے بذریعہ Atacoma AUD 220 million کے عوض TCC کے تمام شیرز حاصل کر لیے۔

7۔ مورخہ 1-4-2009 کو صوبہ بلوچستان کی طرف سے گورنر بلوچستان، بلوچستان ترقیاتی ادارے اور BHP اور آسٹریلیا کی کمپنی TCC کے درمیان معائدہ طے پایا۔ معائدے کی تحریر سے پتا چلتا ہے کہ حکومت بلوچستان کو بلا واسطہ طور پر BDA کے ذریعے یک طرفہ طور پر پابند کیا گیا ہے۔ کیونکہ یہ زور دیتی ہیں کہ حکومت بلوچستان بذریعہ چیئرمین BDA اور BHP، CHEJVA کی فریق ہیں اور بتاتی ہیں کہ معائدے کے فریقین نے CHEJVA کو موثر بنانے کے لیے معائدے کرنے میں آمادگی ظاہر کی تا کہ TCC کو BHP سے اس متبادل معائدے میں موجود شرائط کے تحط تبدیل کیا جائے۔ یہ مزید بتاتا ہے کہ TCC، BHP کی جگہ لیتے ہوئے، BHP کے CHEJVA کے تحت تمام حقوق اور فوائد سے بھی مستفید ہوگی۔ اور حکومت بلوچستان اور TCC 25% اور 75% کے حساب سے مستفید ہونگے۔ لہذا BHP کا 75% معاہدے تحت اور EL-5, TCC کو ٹرانسفر کر دیئے گئے۔

8۔ TCC نے پاکستان میں اپنے آپریشن، اپنی برانچ آفس جو کہ بورڈ آف انوسٹمنٹ کے ساتھ رجسٹرڈ ہے کے ذریعے شروع کئے۔ اس نے پاکستان میں ایک مقامی ذیلی برانچ TCCP کے نام سے کھولی۔ دسمبر 2007 میں TCCP پاکستان کے الحاق کے لیے لاہور ہائی کورٹ سے رجوع کیا۔ جو کہ اس وقت تک اکھٹا کام کر رہے تھے۔ نتیجتاً 11.04.2008 کو اسلام آباد ہائی کورٹ نے، جہاں کیس ٹرانسفر کیا گی، نے دونوں کمپنیوں کو معائدے کے تحت الحاق کی اجازت دے دی۔

9۔ سال 2006 میں مولانا عبدالحق وغیرہ نے بلوچستان ہائی کورٹ میں آئینی درخواست نمبر 892/06 دائر کی جس میں حکومت بلوچستان نے CHEJVA، validity of Act of Relaxation کی قانونی حیثیت اور BHP کی مقرر وقت میں تلاش میں ناکامی کو چیلنج کیا۔ سائل نے اس کیس میں مندرجہ ذیل دادرسی کی استدعا کی:۔

'ان حالات میں مودبانہ طور پر یہ استدعا کی جاتی ہے کہ معزز عدالت یہ قرار دے کہ تمام معاہدات جو CHJV کے 93-1992 کی بنیاد پر شروع ہوئے بشمول تمام لائسنس اور رعائتیں جو کسی بھی مدعا علیہ کو دی ہیں۔ اور ریکوڈیک کے جو کہ اب تک (آیا مکمل یا نامکمل) ہیں جو کہ مدعا علیہ نمبر 4 کو 5 کی طرف سے اور 4 کا مفاد ریکوڈیک میں مدعا علیہ نمبر 5 اور 7 کی طرف سے ہے وہ غیر قانونی، آئین سے متصادم ہے اسے کالعدم قرار دیا جائے۔ یہ معزز عدالت اس کے مطابق یہ حکم صادر کرے کہ ریکوڈیک کیس کو آئین کے عین مطابق حل کیا جائے اور اس کے لئے قانون اور پالیسی کے مطابق بولیاں لی جائیں۔ مزید کوئی اس کیس کے مطابق دادرسی دی جائے اور مناسب تفتیش وتحقیق کے بعد مدعا علیان سے غیر قانونی طور پر حاصل ہونے والے منافع کو واپس دلایا جائے۔

10۔ معزز عدالت نے مورخہ 26.6.2007 کے حکم کے تحت آئینی درخواست خارج کر دی اور CHEJVA کو BMCR1970 کی نرمی اور حکومت بلوچستان اور BDA کی تمام کاروائیوں کو قانونی اور جائز قرار دیا۔ ان سائلین نے ہائی کورٹ کے اس حکم کے خلاف سپریم کورٹ میں CP.796/2007 دائر کی۔ اس کے بعد دوسرے سائلین نے آئین کے ارٹیکل 184(3) کے تحت براہ راست سپریم کورٹ میں آئینی درخواستیں دائر کیں۔ جن میں BHP/TCC کو لائسنسوں کے اجراء پر اس بنیاد پر سوال اٹھایا گیا کہ ان میں شفافیت کی کمی ہے اور قانون اور قوائد کی خلاف ورزی کی گئی ہے اور ان لائسنسون کے اجراء میں بلوچستان اور حکومت پاکستان کے اہم مفادات کو داوء پر لگایا گیا ہے۔ مختلف پارٹی بننے کی متفرق درخواستیں بھی دائر کی گیں۔ تمام پٹیشنز اور متفرق درخواستیں اکھٹی سنی گئی اور ایک مختصر حکم کے تحت جس کا حوالہ شروع میں دیا گیا ہے کے تحت نمٹادی گئیں۔

17۔ یہ بھی بیان کیا جاتا ہے کہ CHEJVA کے آرٹیکل 16 بتاتا ہے کہ اس معائدے پر لاگو ہونے والا قانون پاکستان کا قانون ہے جس پر فریقین آمادہ ہیں جو کہ بین الاقوامی قانون کے مطابق ہے مندرجہ بالا دلائل جو کہ سائلین کے معزز وکلاء نے دئے وہ قابل تعریف ہیں اور پہلے یہ دیکھتے ہوئے کہ CHEVJA نے بنیادی آئین سازی جو کہ کان کنی کے حقوق کے متعلق ہے سے کتنا انحراف کیا ہے۔ ہم نے ریکارڈ کا جائزہ لیا ہے جو کہ ان رعایات سے متعلق ہے جو کہ BHP اور CHEVJA اور اس کی مختلف دفعات کے تحت حاصل کیں۔ اس حوالے سے یہ بات اہم ہے کہ جناب مارٹن ہیرس جو کہ BHP کیا آسٹریلیا سے وکیل ہیں انھوں نے مورخہ 16.9.1993 کو BHP کے ہیڈ لیٹر پر BDA کو کہا کہ وہ مائنز کمیٹی سے کچھ قوانیں کو نرم کرنے کے لئے رجوع کرے۔

18۔ BHP کے خط کی تعمیل میں، BDA نے خط مورخہ 20.10.1993 حکومتِ بلوچستان سے درخواست کی کہ وہ BHP کہ خط میں مذکور قوانین میں نرمی کرے... ...

19۔ مندرجہ بالا کی تعمیل میں PDWP نے اپنے اجلاس منعقدہ 30.10.1993 میں معاملے کو زیرِ غور کیا... ...

20۔ اس کے بعد محکمہ صنعت، تجارت اور معدنی وسائل، حکومتِ بلوچستان نے بذریعہ نوٹیفیکیشن مورخہ 30.01.1994 BHP کو 13 رعایتیں دیں تاکہ یہ معدنی وسائل کی تلاش کا کام بغیر کسی رکاوٹ کے کر سکیں مذکورہ نوٹیفیکیشن مندرجہ ذیل ہے:-

" گورنمنٹ آف بلوچستان
انڈسٹریز، کامرس اور منرل ریسورسیز ڈیپارٹمنٹ
بتاریخ کوئٹہ 20 جنوری 1994

نوٹیفیکیشن

No:S.O (MR)5-9/94.254.60. Minning Consession Rules 1970 کے Rule 98 کے توثیق کردہ اختیارات کو استعمال کرتے ہوئے حکومتِ بلوچستان BHP کمپنی کو قوانین میں مندرجہ ذیل چھوٹ بحیثیت خاص معاملہ دے رہی ہے تاکہ بغیر کسی پیچیدگی کے تلاش کا کام کر سکے:

1. Garnt of Exploration Areas
1. Area available for prospecting Licence.
2. Application for prospecting Licence.
3. Satisfaction of Conditions attaching to prospecting Licences.
4. Exclusive right.
5. Other Minerals.
6. Government rights pre-emption acquisition merger, and taking control in national emergency.
7. Assignment.
8. Application for Mining Licence.
9. Royalty.
10 Penalties compensation and cancellation.

11. Employment and training.

12. Mining Lease.

21. BHP کے وکیل مارٹن حارث کا مذکورہ بالا خط ایک طرف یہ ظاہر کرتا ہے کہ BHP نہ صرف قانون کی نافذ کردہ پابندیوں سے اچھی طرح واقف تھی لیکن وہ مستقبل میں آنے والی حکومتوں کو بھی اس بات کا پابند کررہے تھے کہ وہ قانون کی خلاف ورزی کی توثیق کرے جب کہ دوسری طرف BHP کی طرف سے لکھے جانے والا خط TCC کی جانب سے پیش ہونے والے فاضل وکیل کی اس دلیل کی نفی کرتا ہے کہ حکومتِ بلوچستان نے مدعا علیہان کہ کہے بغیر اپنی مرضی سے رعایات دیں یہ رعایات جو کہ مستثنیٰ نوعیت کی تھیں۔قوانین کے اطلاق سے BHP اور پورے CHEJVA منصوبے کو دی گئیں جو کہ BMCR 1970 کے Rule 3 کے اطلاق کے بغیر دی گئیں جس میں BMCR 1970 کے تمام ٹھوس پہلوؤں کو بے اثر کردیا۔اس ضمن میں یہ چیز قابل ذکر ہے کہ Act XXIV of 1948 کی شق 5 حکومت کو یہ اختیار دیتی ہے کہ وہ قوانین میں اس ایکٹ کے تحت استثنیٰ دے اس لیے BMCR 1970 کے تحت کوئی بھی دیا گیا استثنیٰ Act 1948 کی شقوں کے مطابق ہونا چاہیے جو کہ اس موضوع پر ایک بنیادی قانون ہے Act 1948 کی شق 5 کے مطابق کوئی حکومت مشتہر کردہ حکم کے ذریعے یہ اعلان کرسکتی ہے کہ کوئی معدنیات یا معدنی تیل یا اس کی کوئی قسم،اس ایکٹ کے تحت بنائے گئے قوانین کی شقوں سے کلی یا جزوی طور پر مستثنیٰ ہوگی یا یہ کہ ایسے قوانین ایسی ترامیم یا ایسی شرائط کے تحت لاگو ہونگے جو کہ اس حکم میں بیان کردہ ہوگا۔اس لیے،معدنیات یا معدنی تیل یا اس کی کسی قسم کو تمام یا کسی قوانین سے ترمیم یا بغیر ترمیم کے صرف کسی حکومت کو مستثنیٰ کرنے کا اختیار ہوتا ہے۔جیسا کہ وفاقی حکومت کو ایٹمی مادہ کی کانوں،تیل اور گیس کے ذخائر اور معدنی تیل اور گیس کی ترقی کے سلسلہ میں اور صوبائی حکومت کو دوسری کانوں اور معدنیات کی ترقی کے سلسلہ میں۔ موجودہ مقدمہ میں حکومتِ بلوچستان معدنیات یا کسی بھی کسی بھی قسم کی معدنیات کے سلسلہ میں استثنیٰ کا اختیار رکھتی ہے Act 1948 کی شق 2 کے تحت کوئی بھی حکومت تمام یا کسی بھی معاملہ جیسا کہ وہاں بیان ہوا،کے لیے قانون سازی کا اختیار رکھتی ہے Act 1948 کی شق 2 کے تحت دیئے گئے اختیار کو استعمال کرتے ہوئے BMCR 1970 وضع کیا گیا۔مذکورہ قوانین کے Rule 3 کے مطابق حکومت کی سابقہ منظوری کے بغیر معدنیات کی تلاش کے لیے کوئی لائسنس اور کانوں یا معدنیات کا ٹھیکہ،سوائے قانون کے مطابق نہ دیا جائے گا۔بلاشبہ BDA-BHP نے کوئی ایسی منظوری،جیسا Rule 3 میں بیان ہے نہیں لی۔بجائے اس کہ BDA-BHP نے ایک مشروط معاہدہ کیا بشرطیہ وہ آرٹیکل 2 کے تحت ضروری منظوری اور رضامندی لیں گے۔اس کے بعد CHEJVA میں مذکورہ قانون پر انحصار کرتے ہوئے BMCR 1970 کی مذکورہ شقوں میں رعایت کیلئے معاملہ BMCR کے Rule 98 کے تحت بھیجا گیا۔98 کی شقوں کے مطابق حکومت کو یہ اختیار حاصل ہے کہ وہ کوئی ایک یا ان قوانین کی ساری شقوں میں انفرادی دشواری اور تحریر شدہ خصوصی حالات اور اپنی طرف سے مقرر کردہ قواعد وضوابط کے تحت رعایت دے۔Rule 98 کے مطالعہ سے یہ واضح ہوتا ہے کہ یہ BMCR 1970 کی کسی بھی شق کو انفرادی دشواری اور تحریر شدہ خصوصی حالات میں رعایت دیتا ہے اور یہ رعایت بھی کچھ قواعد وضوابط مقرر کرنے کے بعد دی جائے گی۔پس قانونی نرمی کے دیکھتے ہوئے جسکا

فریق مطالبہ کرتی ہے یہ ضروری ہے کہ (hardship) کا مقدمہ بنایا جائے اور مخصوص حالات ظاہر کریں۔ جو اس قسم کے اختیارات کے استعمال کرنے کی ضمانت دیں اور مجاز اتھارٹی ان اختیارات کے استعمال کرنے کے لئے وجوہات کو بھی ریکارڈ پر لے آئیں یہ قانوں کے تحت عام ضرورت ہے کہ محصوص مشکل حالات میں قانون میں نرمی کی جاتی ہے۔ چیف سیکرٹری پنجاب Vs عبدالروف دستی 2006 SCMR 1876 ملاحظہ کریں۔

23۔ موجودہ کیس میں جیسا کہ اوپر زکر کیا گیا۔ DBA کے خط مورخہ 23.10.1993 کے مطابق جو معافی کے لئے کیس پیش کیا وہ یہ کہ معاہدے کے شق نمبر 2 کے شرائط وضوابط کے تحت معاہدہ مشروط تھا۔ BDA کو معاہدہ سختظ کرنے کے چھ ماہ کے اندر صوبائی یا وفاقی حکومت سے رضامندی/منظوری لینی تھی ورنہ معاہدے بلکل ختم ہو جاتا۔ BHP کو قوائد کا جائزہ اور نظر ثانی کرنے سے پہلے حکومت می رضامندی اور منظوری کی تصدیق کی کوشش کی گئی تھی۔ مشترکہ کاروبار کو جاری رکھے۔ ایک خریدہ اعلامیہ کے زریعہ اس ضمانت کے ساتھ کہ Notified Order کو منسوخ یا متروک نہیں کیا جائیگا۔ 1970 BMSR کا قائدہ 98 حکومت کو اختیار دیتا ہے کہ ضوابط وشرائط کے مطابق قانون کو نرم کیا جائے اور متعلقہ قاعدوں میں محصوص حالات کے لئے لچک پیدا کیا جائے۔ BDA کے خط کے مواد کو سرسری دیکھنے سے نظر آتا ہے کہ نہ BHR نے اور نہ BDA نے قانون میں نرمی حاصل کرنے کے لئے قاعدہ نمبر 98 کے تقاضوں کو پورا کیا ہے جس سے hardship یا مخصوص حالات کا کیس ظاہر ہوتے ہوں بلکہ صرف یہ کہا گیا ہے۔ کہ اس کی پیچیدگیوں سے بچنے کے لئے اس پراجیکٹ کے لئے مطلوبہ قانوں کو نرم کیا جائے جیسا کہ زکر کیا گیا BDA کی درخواست پر پہلے PDWP کی میٹنگ میں غور کیا گیا اور یہ فیصلہ ہوا کے محکمہ صنعت relacation دے گا اور بعد میں notification مورخہ 20.01.1994 جاری ہو گیا جو پڑھنے سے معلوم ہوتا ہے کے GOB نے قاعدہ 98 کے تحت اختیارات استعمال کرنے ہوئے مطلوبہ قوانیں میں نرمی کر دی لیکن دوبارہ hardship کا زکر نہیں کیا گیا۔ اور نہ محصوص وجوہات کی موجودگی کا زکر کیا ہے۔ مجاز اتھارٹی ان قوائد وضوابط کا تعین کا زکر کرنے میں بھی ناکام ہوئی ہے۔ جن کی وجہ سے مطوبہ قوانیں میں لچک مانگی گئی تھی۔ اس کیس میں قاعدہ 98 کے تقاضوں کو پورا کیے بغیر تمام نرمیاں / لچک دینے میں اختیارات کے ناجائز استعمال کیا گیا ہے جو قانوں کے وسعت سے ماررہی ہے اسلئے 1970 BMCR کے قاعدہ 98 اور 1948 Act کے دفعہ 5 کو پڑھتے ہوئے مذکورہ اختیارت سے تجاوز ہے۔ اور غیر قانونی ہے۔ جو نرمی دی گئی ہے CHEJVA کے پاس اس کی کوئی قانونی حیثیت نہیں ہے اور نتیجتا ایسا معاہدہ کر بیٹھے جو قانوں کے خلاف ہے پس ناقابلے عمل ہے۔

24۔ CHEJVA کی تمام اہم دفعات اس بھروسے پر بنائی گئیں تھیں جو آسانیوں کے تحت تھیں جو کہ شروع سے آخر تک غیر قانونی تھیں، اس معاہدے کا ناجائز ہونا اسکی بنیاد سے ہی ظاہر ہوتا ہے۔ اس طرح کے معاہدے کا کوئی حصہ آزادنہ طور پر لاگو ہونے اور علیحدہ کرنے کے اصول کو اس کے کسی حصہ کو بچانے کے لئے استعمال نہیں کیا جا سکتا۔ یہ معاہدہ اس وجہ سے قانون کے تحت قلی طور پر باطل اور غیر نافذ العمل ہے۔

25۔ CHEJVA کا معائنہ / مطالعہ کرنے سے پتہ چلتا ہے کہ BHP اور BDA نے اپنے منشور سے تجاوز کیا اور موجودہ گنجائش سے زیادہ استعمال کیا یعنی پاکستانی قانون کے تحت تمام ضروری رضامندی اور منظوری اور مستقبل میں کان کنی کے منصوبے میں سرمایہ کاری کے لئے مالی مقدار کے طور پر سب کو یقین دہانی فریقین کے حصول / وصول کرنے بذریعہ مجاز حکام جو کہ وفاقی یا صوبائی حکومت کے چھ ماہ کے اندر معاہدہ کرنا تھا یہ ظاہر ہوتا ہے کہ BHR/BDA's کی گزارشات کے برعکس غلط بیانیوں نے گورنمنٹ آف بلوچستان کے حکام کو آسانیاں دینے پر مجبور کیا چونکہ رضامندی، منظوری کی اسطلاح یا یقین دہانیاں مالی مقدار میں استعمال کی گئیں CHEJVA کی مندرجہ بالا زیلی شقوں میں کوئی مترادف نہیں ہیں اصطلاح "آسانی" کے کوئی رضامندی، منظوری یا یقین دہانی متعلقہ حکام کی رضامندی سے ملک کے قانوں کے تحت کیا جائے گا۔ اس نقطہ نظر کی CHEJVA کے آرٹیکل 16 نے ضمانت دی ہے جس کے مطابق جو قانون اس معاہدے پر لاگو ہے وہ پاکستانی قانون ہے جس کو عالمی قانون کے ساتھ پڑھا جائے گا۔ یہاں ذکر کیا جاسکتا ہے کہ CHEJVA زیلی شق 24.6.2 فراہم کرتی ہے کہ تمام فریقین ایک دوسرے کے ساتھ منصفانہ اور وفادار ہونگے اور ایسا عمل نہیں کریں گے اور نہ ہونے دینگے جو کہ مشترکہ مفادات کے خلاف ہو۔ جیسا کہ اوپر بیان ہے CHEJVA شق 2.2 کے تحت، BHP صرف رضامندی منظوری یا یقین دہانیوں کو حاصل کرسکتی تھی مگر کسی قانون میں نرمی حاصل نہ کرسکتی تھی بدقسمتی سے CHEJVA ہر شق کی نسبت میں BMCR 1970 کے سارے دفعات کے خلاف چل رہا ہے قوانیں میں اجازت منظوری اور یقین دہانی کے نام پر لچک مانگی گئی ان کے BDA سے معاہدے کے شروع سے ہی BHP کے بارے میں اس لیے نہیں کہا جاسکتا کہ یہ منصفانہ اور وفاداری سے کام کرتے ہیں جیسا کہ ظاہر دونوں فریق کے CHEJVA کی زیلی شق 24.6.2 سے ظاہر ہوتا ہے

26۔ جیسا کہ اوپر بیان کیا گیا ہے، مجاز اتھارٹی نے بلٹ لسٹ کی شکل میں رعایات دی لیکن اس بات کو واضح نہیں کیا کہ یہ کن شرائط پر دی گئیں اور Rule 8 کو اپلائی کیا گیا یا نہیں۔ اس بات کو واضح نہیں کیا جاسکا کہ ایسے کون سے خاص عوامل تھے جن کی وجہ سے یہ تمام رعایات دی گئیں۔ یہ بات بھی واضح نہیں کہ رعایات کن شرائط وضوابط کے تحت دی گئیں۔ مثال کے طور پر لفظ "حق ملکیت "13 رعایات میں سے ایک ہے جبکہ CHEJVA میں ایک مخصوص آرٹیکل ہے جس میں حق ملکیت کی ادائیگی کا ذکر ہے۔ جیسا کہ پہلے بھی ذکر کیا گیا ہے، رعایات صرف مشروط طور پر دی جاسکتی ہیں جن میں فریقین کسی شکل کا ذکر کریں۔ موجودہ کیس میں صوبائی حکومت نے Rule 8 کے مخالف رعایات دی ہیں ایسی غیر قانونی رعایات کو بعد میں BMCR 1970 کے تحت قانونی تقاضوں کو توڑنے کے لیے استعمال کای گیا۔ یہ بیا کیا گیا ہے کہ جہاں کہی بھی مناسب قانونی طریقہ موجود ہو تو حکومت کی زمین کو بیچتے ہوئے یا کسی اور تصرف میں لاتے ہوئے اس کی شرائط کو پورا کیا جانا چاہیے۔ لیکن جہاں قوانین میں رعایت اس قانون کے خلاف دی جائیں تو پھر عدالتیں اس کی توثیق نہیں کرسکتیں۔ جیسا کہ کیس Abdul Haq and others Vs. Province of Sindh and others

(PLD 2000 Karachi 224).

28۔ مندرجہ بالا دفعات 5.4 ,5.3 ,5.2 واضح طور پر BMCR 1970 کے Rules No.30, 31 اور 32 کی خلاف ورزی کرتی ہیں۔ Rule 30 کے تحت پہلی دفعہ Prospecting Licence ایک سال سے کم یا دو سال سے زیادہ عرصے کیلئے نہیں دیا جا سکتا، جبکہ Rule 31 کہتا ہے کہ لائسنس جاری کرنے والی اتھارٹی اپنی صوابدید پر Prospecting Licence میں توسیع کر سکتی ہے جو کہ ایک سال سے زیادہ نہ ہوتا کہ لائسنس ہولڈر کو یہ موقع فراہم ہو کہ وہ اپنا کام مکمل کر سکے لیکن اس کے لیے ضروری ہے کہ لائسنس ہولڈر مجاز اتھارٹی کو ایک ماہ پہلے تحریری طور پر آگاہ کرے لیکن اس Prospecting Licnece کا عرصہ تین سال سے زیادہ کا نہیں ہو سکتا۔ Rule 31 کے تحت توسیع کیلئے ضروری ہے کہ لائسنس ہولڈر اپنا کام Rule 32 کے ضابطوں کے مطابق سر انجام دے جو یہ کہتا ہے کہ لائسنس ہولڈر ہر لائسنس کے تحت آنے والے علاقوں میں کام کے بارے میں تین ماہ کے اندر اپنا پروگرام مجاز اتھارٹی کے سامنے پیش کرے اور اپنا کام تب شروع کرے جب یہ اسکیم منظور کر لی جائے۔ یہ مزید بیان کرتا ہے کہ لائسنس ہولڈر لائسنس کے مطابق علاقے میں Prospecting Scheme کے منظور شدہ پلان کے تحت کام کروائے گا۔ بدقسمتی سے مندرجہ بالا CHEJVA کی دفعات کو ملحوظِ خاطر نہیں رکھا گیا۔

29۔ سائلین کی طرف سے یہ کہا گیا کہ CHEJVA کی دفعہ 5.6 جو کہ فریقین کو یہ حق دیتی ہے کہ وہ لائسنس کی مدت کا خود تعین کریں اور جہاں تک منرلز کی دریافت کا تعلق ہے یا علاقے کے قبضے کی بات ہے، ہر لائسنس کا مقصد ہے کہ مشترکہ کاوشیں کی جائیں گی یہ BMCR 1970 کی دفعہ کے تحت نہیں آتا۔ ہم نے اس مسئلے کو BMCR 1970 کے Rule 27 کے تحت دیکھا ہے جو کہ لائسنس ہولڈر کو یہ پورا حق دیتی ہے کہ وہ Mine, Querry, Bore اور تلاش وغیرہ کا کام کرے جو لائسنس کے مطابق اس کے دائرہِ اختیار میں آتا ہو۔ یہ واضح ہے کہ قانون میں کان کنی کسی خاص دھات کے لیے ہوتی ہے نہ کہ وہ پورے علاقے کے قبضے کے لیے ہوتی ہے جس کے لیے PL دی جاتی ہے جو کہ لائسنس دار کو مشترکہ کاوشیں کرنے کے مقصد کیلئے ہوتی ہے۔ مختصر طور پر یہ کسی خاص دھات کی تلاش کے حق کیلئے ہے نہ کہ پورے علاقے کے قبضے کے لیے۔

30۔ Rule 38 کو دیکھنے سے یہ واضح ہوتا ہے کہ Minning Lease کا حق غیر مشروط نہیں ہے بلکہ اس پر چند پابندیاں عائد ہیں جن میں Minning Lease کیلئے Rules کی پابندی، مجاز اتھارٹی کی مرضی کے تحت، کام کی ادائیگی، گورنمنٹ کے تمام واجب الادا بقایا جات کی بروقت ادائیگی اور تیسرے فریق کو معاوضے کی ادائیگی شامل ہے۔ جبکہ دفعہ 5.9 کے تحت لائسنس ہولڈر کو یہ حق دیا گیا ہے کہ وہ Minning Lease کے دوران صرف مینجر کی مرضی سے Stage three یا Stage four کی سرگرمیاں سر انجام دے سکتا ہے اور اس کی توثیق Rule 38 کی دفعات کے بغیر حاصل کر سکتا ہے۔

32۔ CHEVJA کی شق 5.3.1 بتاتی ہے کہ فریقین صوبائی حکومت سے دریافت کے علاقے میں تلاش کا 50 مربع کلومیٹر کا مجموعی طور پر احاطہ کرنے والا لائسنس کسی بھی وقت معائدے کی مدت کے لئے حاصل کریں گے جبکہ شق 5.3.2 کے مطابق جہاں مشترکہ منصوبہ 10 تلاش کے لائسنسوں میں مجموعی طور پر 50 مربع کلومیٹر کے رقبہ پر کام کر رہا ہو تو وہ اسے مزید دریافت کے لائسنس حاصل کرنے کے لئے درخواست دینے اجازت نہ ہوگئی تاوقتیکہ یہ پہلے سے موجود لائسنسوں میں موجود امعائدہ اتنا رقبہ جو کہ نئے حاصل کرنے والے لائسنس میں موجود ہو کو مکمل یا ختم نہ کرلے۔ تاہم CHEJVA کی شق 5.10 بتاتی ہے کہ نقشے میں دیا گیا رقبہ (CHEVJVA کا شیڈول-B) دہرایا جانا چاہیے تاکہ یہ صحیح طرح وقت کے ساتھ ساتھ وقوع پزیر اور بشمول ان لائسنسوں یا کان کنی کے پٹوں کی نظر ثانی اور تکمیل کے بارے میں موجودہ صورتحال بتائے۔ یہ واضح طور پر شق 5.3.1 کو کالعدم کرتی ہے جو کہ بتائی ہے کہ ماسوائے اس کے جس کا حکومت نے فیصلہ کر دیا کھوج لگانے کا اجازت نامہ کسی ایسی جگہ کے لئے نہیں دیا جائے گا جو 10 مربع میل سے زیادہ ہو اور رول 42 جو کہ یہ بتاتا ہے کہ پٹہ کسی ایسی جگہ کے لئے نہیں دیا جائے گا جو کہ 5 مربع میل سے زیادا ہو سوئے اس کیس میں جہاں حکومت کی طرف سے خاص استثنا دیا گیا ہے موجودہ کیس میں یہ ہوا کہ ابتدائی طور پر 50 مربع کلومیٹر کا رقبہ اجازت گرینڈہ کو تلاش کے لئے دیا گیا جو کہ غیر قانونی طور پر BHP-BDA کی طرف سے کئے گئے مطالبے پر 1000 مربع کلومیٹر تک بڑھا دیا گیا۔ CHEJVA کا یہ حصہ غیر قانونی طور پر شامل کیا گیا جس نے معاہدہ میں ایک اور شگاف پیدا کیا۔

33۔ شق نمبر 5.11 مہیا کرتا ہے کہ شق نمبر 2.2 کی روشنی میں اور کان کنی کے قوانین کے اس معاہدے پر اطلاق کو دیکھتے ہوئے، فریقین کو صوبائی حکومت کے مصدقہ احکامات' ان معاملات کے لئے جو کہ جو کہ شق نمبر 5.2، ذیلی شق 5.3.1 شق نمبر 5.6، 5.9 اور 6.1 میں آتے ہیں میں دیکھے۔ یہ بھی نوٹ کیا جائے کہ شق نمبر 5.2 کے تحت فریقین کو اجازت ہے کہ وہ صوبائی حکومت سے شق نمبر 5.3 ذیلی شق نمبر کے تحت جو کہ کل 50 مربع کلومیٹر رقبے کا تعین کرتی ہے۔ اس پر پہلی سٹیج کی سرگرمیاں شروع کرنے کے متعلق پوچھے۔ شق نمبر 5.6 کہتی ہے کہ فریقین کو صوبائی حکومت سے رقبے کی خصوصی ملکیت کے بارے میں اضافی یقین دہانی لینی چاہئے اور یہ کہ تیسرے فریق کو مشترقہ منصوبے سے روکنا ہے۔ شق نمبر 6.1 کے تحت فریقین کو صوبائی حکومت سے مزید کھدائی سے انکار کے پہلے حق، یا مشترکہ منصوبے کے تحت کھودیے گئے رقبے سے حاصل ہونے والی دوسری معدنیات پر تحقیق کے بارے میں پوچھا ہوگا۔ شق نمبر 6.4 کے تحت جہاں صوبائی حکومت کو مخصوص رقبے سے حاصل ہونے والی دوسری معدنیات کے متعلق اپنے اختیارات کے مطابق فیصلہ کرنا ہے۔ مشترکہ منصوبے کے باوجود اپنے موجودہ معدنیات کے لائسنس کے تحت مزید مشترکہ منصوبہ کی سرگومیوں کا حق رکھتا ہے۔ حتی کہ ایسی مشترکہ منصوبے کی سرگرمیاں بعض اوقات اس مشترکہ منصوبے کی سرگرمیوں سے مطابقت رکھتی ہیں جو کہ صوبائی حکومت دوسری معدنیات کے حوالے سے کرے۔ شق نمبر 6.5 کہتی ہے کہ جہاں شق نمبر 6.3.1 کے مطابق صوبائی حکومت دوسری معدنیات میں دلچسپی کے اختیار کو منتخب نہیں کرتی تو مشترکہ منصوبہ صوبائی حکومت کے نوٹس سے 90 دنوں کے اندر اپنے اختیار کو ذیلی شق نمبر

6.3.1 کی پیروی کرتے ہوے استعمال کرسکتا ہےاورایسا اختیاراستعمال کرتے ہوئے یہ خاص طور پر دوسری معدنیات کی تلاش کے علاقے میں تلاش کے حق کے لئے درخواست دے سکتا ہے۔ یہ مزید بتاتا ہے کہ منصوبہ اپنے اختیار کو اسستعمال کرتا ہے۔صوبائی حکومت فوری طور پر دوسری معدنیات کے لیے مزید تلاش کے اجازت نامے جاری کرے گی یا دوسری معدنیات کے سلسلے میں موجود لائسنس /اجازت نامہ میں تبدیلی کر کے اسے مشترکہ منصوبے کی سرگرمیوں کے انعقاد کے قابل کرے گی۔رول 3 بتاتا ہے کہ سوائے حکومت کی گزشتہ اجازت کا کوئی لائسنس کسی معدنیات کے لیے اور کوئی پٹہ کسی کان اور معدنیات کے لیے نہیں دیا جائے گا اسکے برعکس جو کورلز میں موجود ہے رول 53 بتاتا ہے کہ اجازت گرہندہ اور پٹہ گرہندہ بغیر دیر کئے لائسنسنگ اتھارتی کو دریافت سے متعلق اطلاع دیں گے یا کانوں کی زمین کے اندر جو کہ لائسنس کے تحت دی گئی ہو یا کسی معدنی نوعیت کا پٹہ جو کہ لائسنس میں واضح نہ ہو لیکن اسکا ان معدنیات پر کوئی حق نہ ہوگا تاوقیکہ ایک نیا لائسنس یا پٹہ ان افراوز معدنیات کے سلسے میں ان قوانین کے مطابق دیا گیا ہو۔اجازت گرہندہ اور پتہ گرہندہ تاہم لائسنسگ اتھارٹی کی صوابدید پر ایسی دوسری رپورٹ کردہ افروز معدنیات کی تلاش کے لائسنس یا معدنی نوعیت کا پتہ حاصل کرنے کے لیے ترجیحی حق سے لطفا اندوز ہونگے۔پس CHEJVA ایسی اوپر دی گئی دفعات رول 3 اور 53 کی دفعات کے برعکس ہونے کے باعث BHP-DBA نے دوسرے قوانین کے ساتھ قواعد میں نرمی کی درخواست دی اگرچہ CHEJVA کی شق 2.2 کے تحت وہ صرف رضا مندی، منظوری یا یقین دہانی کی کوشش کر سکتے ہیں نہ کہ قوانین میں نرمی کی۔کسی تلاش کے لائسنس کے اجراء کے لیے پہلے کوئی اجازت رول 3 کے لحاظ سے حکومت سے حاصل نہیں کی گئی جو کہ اس کے برعکس BMCR-1970 کے مطابق ہو۔یہ ایک لازمی ضرورت تھی جس کی غیر تکمیل نے تمام کام کو قانون کی نظر میں معدوم کر دیا۔

34۔ مزید اسی قسم کی قانون پر مبنی لائسنس کی تجدید ہوئی تھی ایک سال کے لئے 1998 اور 1999 میں، اور مدعا علیہ نمبر 8 کو بھی ریکوڈک کے علاقہ میں قانون پر مبنی لائسنس کی سہولت فراہم کر دی تھی۔بجائے 3 سال کے 5 سال کے مدت فراہم دی گئی تھی رول (31) کے تحت تین سال سے زیادہ کی مدت کس طرح سے بھی فراہم نہیں کرنے دیں گے۔یہ شق نئے لائسنس (PL-14) کے اجرا کو روکنے کے لئے قانون پر مبنی بتاریخ 21.02.2000 کو اس علاقے کے لئے جو کہ تقریبا (240620.20) ایکڑ پر محیط تھے۔عرصہ 2 سال کے لئے اس شرط پر دے دیا گیا تھا کہ اس ایک سال کے عرصہ کو بغیر کسی قانونی نوٹس کے بڑھائیں گے اور اگر بڑھانا ہو تو ایک مہینہ پہلے نوٹس دینا ہوگا۔یہ شق نمبر (30) BMCR 1970 کے قانون کے خلاف تھا۔جو کہ بیان کرتے ہیں کہ (PL) کا عرصہ ایک سال سے زیادہ نہیں بڑھایا جائے گا۔

35۔ BMR 2002 مورخہ 09.03.2002 سرکاری نوٹفیکشن کے لاگو ہونے اور وہ لائسنس اور ایگریمنٹ جو کہ BMR, 2002 کے نوٹیفکیشن سے پلہے جاری ہونے تھے اور وہ سارے معاملات جو اُس وقت جاری تھے۔شق نمبر 125 (BMR 2002) کی وجہ سے محفوظ رہے تھے اسی طرح کوئی بھی لائسنس لیز ایگریمنٹ یا تجدید جو وجود میں آئے تھے فوری طور پر موجودہ قانون کے تحت

جاری کئے جاتے اور اسی طرح سب کو اس قانون کے مطابق تجدید کئے جائے۔ یہ بات اہمیت کے حامل نہیں ہے کہ (BHP) کے پاس اُس وقت کوئی منرل ٹائٹل نہیں تھا BMR-2002 نوٹیفکیشن کے وقت جس طرح کہ PL-14 پہلے سے لینی (21.02.2002) کو ختم ہو چکی تھی اور مزید ان کی تجدید لینی کی گئی تھی۔ جیسا کہ (PL-14) کے مطابق اُن کو حق حاصل نہیں تھا۔ متعلقہ رولز کے تحت ان کے پاس معدنیاتی حق ملکیت نہیں تھا، جی۔او۔پی رولز 67 کے BMR-2002 کے تحت حق حاصل تھا کہ نیلامی کے ذریعے لوگوں کو مدعو کر کے اُس علاقے میں لائسنس کو تلاش کریں۔ بہرحال (GOB) نے اپنے استحقاق نہیں کیا اور بجائے (EL-5) لائسنس دینے کے ریکوڈک کے علاقے میں جو کہ مزید وہ چھ سال کے لئے تجدید ہو چکی تھی۔ TCC/BHP,CHEJVA کے تحت ریکوڈک کے علاقے میں تلاش سے مستفید ہونے تھے 1994 اور 1996 میں جو کہ اس کو پراسپیٹنگ لائسنس اُسی علاقے کے لئے تقریباً عرصہ 5 سال کے اور تلاش لائسنس عرصہ 9 سال کے لئے اس کا مطلب یہ ہوا کہ پراسپیکٹنگ/تلاش سہولت دیا گیا تھا (TCC/BHP) کو تقریبا عرصہ 17 سال کے لئے جو یہ سہولت ایک غیر معمولی اور ناجائز حمایت تھی (CHEJVA) کے مطابق۔

36۔ جیسا کہ اوپر بیان کیا گیا ہے، (CHEJVA) اور یہ پہلو دو قانونی کمپنیوں جن کے نام Talibuddin M/s Shakil Law Firm جو کہ فریقین کے طرف سے Addendum کی تصدیق مطالعہ کے لئے مشغول کی گئی تھی کے بیچ میں خط و کتابت کے دوران سامنے آیا۔ اور اس پہلو پر پہلے یہاں تفصیلاً بحث ہو چکی ہے۔ (CHEJVA) کی غیر قانونی حیثیت کو قانونی حیثیت دینے کے لئے (BHP) آڈینڈم کے نام پر ایک نیا معاہدے کرنے کی ناکام کوشش کی۔ جہاں دو اصل فریقین کی جگہ پر تین نئے فریقین کو متعارف کرانے کی کوشش کی گئی۔ معاہدہ (CHEJVA) غیر قانونی پائے جانے کے صورت میں فیصلے کے شروع والے حصے میں کالعدم قرار دے دیا گیا۔ اور آب (BHP) کے لئے اس معاہدے کے بنیاد پر جس کا نام آڈینڈم نمبر 1، خود اختیاری معاہدہ، منکور آپشن، الائنس ایگریمنٹ، نویشن ایگریمنٹ یا ثانوی معاہدات کے ذریعے سے اپنا ڈھانچہ تعمیر کرنے کا کوئی جواز یا راستہ موجود نہیں ہے۔ نتیجا تن (BHP) کے طرف سے منکور، اینل سے TCC سے ایٹا کاما سے بیرک گولڈ سے انٹوفا گسٹا سے TCCP کو تمام متعلقہ مفادات کا انتقال غیر قانونی لین دین پر مبنی ہے۔ جو کہ متعلقہ فریقین نے اپنی رسک پر سرانجام دیئے۔ یہ سب معاہدات باطل قرار دے دیئے۔

37۔ (CHEJVA) کی ذیلی شق 18.1 میں یہ بیان کیا گیا ہے کہ معادنیاتی معاہدہ کے متعلق اور اس معاہدہ پر عمل پیرا ہونے کی بنا پر حاصل شدہ معلومات کو صیغہ راز میں رکھا جائے گا۔ یہ ذیلی دفعہ قاعدہ نمبر 39 کی خلاف ورزی کرتی ہے جس میں یہ درج ہے کہ اگر لائسنس دہندہ حکام کی موقعہ پر لائسنس رکھنے والے فریق سے جب وہ ذخیرے سے حاصل شدہ میٹریل بحوالہ حکام کرے گا تو جیالوجی کارگزاری کے دوران اس علاقے سے متعلقہ حاصل شدہ معلومات کو یا کسی ایسے علاقے سے متعلق معلومات جس علاقے کو معدنیاتی لائسنس نہ تھا وہ ساری معلومات لائسنس اتھارٹی کے ساتھ رازدانہ طریقے سے ظاہر کرے گا۔ یہ بات غور کئے جانے کے قابل ہے کہ (BHP) نے رول قاعدہ نمبر 39 کے متعلق کو رعایت کی استدعا نہ کی تھی۔ اور ذیلی دفعہ 18.1 اسی طرح پر تاثر اور قابل اطلاق/ نافذ تھی۔ Annex (A)

کے مطابق مارٹن ہیری کے نام 16.09.93 کی چھٹی ہے۔(BHP) نے یہ تجویز دی تھی کہ فریقین کو حاصل شدہ معدنیات کی مالیت کی دو فیصد کنفرم کی رائلٹی سے متعلق حکومت کی یقین دھانی حاصل کرنی چاہیے۔اور یہ رائلٹی نیٹ سملٹر ریٹرن کے برابر ہوگی۔مزید براہ ایک دفعہ جو رائلٹی طے کر لی جائے گی وہ قاعدہ نمبر 65 کے تحت اس مائنز کے عمر کے لئے ہی نوٹیفائی کر ہوگی۔ یہاں یہ بات قابل ذکر ہے کہ BMCR 1970 کے رول نمبر 65 کا یہ تقاضا ہے کہ لائسنس دہندہ یا لائسنس رکھنے والا حکومت کے وقتاً فوقتاً جاری کردہ نوٹیفکیشن میں درج شرح ریٹ کے مطابق اس کے طرف سے تمام نکالی گئی معدنیات پر شرح رائلٹی ادا کرے گا۔ یہ رول اس بات کا تقاضا کرتے ہیں۔ کہ اگر مقررہ وقت کے اندر اندر رائلٹی ادا نہیں کی جاتی۔تو دہ ماہ کا عرصہ بطور گریس پریڈ دیا جائے گا۔اور اگر رائلٹی دوسرے ماہ کے بعد اگلے مہینے میں ادا کی جاتی ہے۔تو اس پر چھ فیصد کے حساب سے جرمانہ ادا کرنا پڑے گا۔مزید براہ اگر رائلٹی بمعہ جرمانہ چوتھے مہینے کے اختتام تک ادا نہیں کی جاتی تو لائسنس دہندہ یا لائسنس رکھنے والے کو مزید جرمانہ ادا کرنا ہوگا۔جس کا تعین لائسنس دہندہ حکام کریں گے اور اس کی حد پچاس ہزار تک ہوسکتی ہے۔اور اگر پھر بھی یہ رقم ابتدائی واجب الادا سے لے کر چھٹی ماہ کے اختتام تک ادا نہیں کی جاتی تو لائسنس یا ٹھیکہ منسوخ تصور ہوگا۔استدعا کی گئی رعایت اور زیر بحث متعلقہ رول کی ذیلی دفعہ کے مطالعہ سے یہ بات ظاہر ہوتی ہے۔کہ وہ سارا نظام جس کے تحت رائلٹی ادا نہ کئے جانے کی صورت میں اقدامات اٹھائے جانے تھے۔وہ (CHEJVA) کے حق میں نظر انداز کر دیئے گئے۔اس طرح کی رعایت رضامندی، مرضی، اجازت یا پھر یقین دہانی کے نام پر نہ ہی طلب کی جاسکتی ہے۔اور نہ ہی عطا کی جاسکتی ہے۔ یہ ساری شق ہی غیر قانونی تھی۔

37۔ (CHEJVA) کی ذیلی شق 18.1 میں یہ بیان کیا گیا ہے کہ معادنیاتی معاہدہ کے متعلق اور اس معاہدہ پر عمل پیرا ہونے کی بنا پر حاصل شدہ معلومات کو صیغہ راز میں رکھا جائے گا۔ یہ ذیلی دفعہ قاعدہ نمبر 39 کی خلاف ورزی کرتی ہے جس میں یہ درج ہے کہ اگر لائسنس دہندہ حکام کی موقعہ پر لائسنس رکھنے والے فریق سے جب وہ ذخیرے سے حاصل شدہ میٹریل بحوالہ حکام کرے گا تو جیالوجی کارگزاری کے دوران اس علاقے سے متعلقہ حاصل شدہ معلومات کو یا کسی ایسے علاقے سے متعلق معلومات جس علاقے کو معدنیاتی لائسنس نہ تھا وہ ساری معلومات لائسنس اتھارٹی کے ساتھ رازدانہ طریقے سے ظاہر کرے گا۔ یہ بات غور کئے جانے کے قابل ہے کہ (BHP) نے رول قاعدہ نمبر 39 کے متعلق کو رعایت کی استدعا نہ کی تھی۔اور ذیلی دفعہ 18.1 اسی طرح پر تاثر اور قابل اطلاق/ نافذ تھی۔

38۔ Annex (A) کے مطابق مارٹن ہیری کے نام 16.09.93 کی چھٹی ہے۔(BHP) نے یہ تجویز دی تھی کہ فریقین کو حاصل شدہ معدنیات کی مالیت کی دو فیصد کنفرم کی رائلٹی سے متعلق حکومت کی یقین دھانی حاصل کرنی چاہیے۔اور یہ رائلٹی نیٹ سملٹر ریٹرن کے برابر ہوگی۔مزید براہ ایک دفعہ جو رائلٹی طے کر لی جائے گی وہ قاعدہ نمبر 65 کے تحت اس مائنز کے عمر کے لئے ہی نوٹیفائی کر ہوگی۔ یہاں یہ بات قابل ذکر ہے کہ BMCR 1970 کے رول نمبر 65 کا یہ تقاضا ہے کہ لائسنس دہندہ یا لائسنس رکھنے والا حکومت کے وقتاً فوقتاً

جاری کردہ نوٹیفکیشن میں درج شرح ریٹ کے مطابق اس کے طرف سے تمام نکالی گئی معدنیات پر شرح رائلٹی ادا کرے گا۔ یہ رول اس بات کا تقاضا کرتے ہیں۔ کہ اگر مقررہ وقت کے اندر اندر رائلٹی ادانہیں کی جاتی۔تو دہ ماہ کا عرصہ بطور گریس پریڈ دیا جائے گا۔اور اگر رائلٹی دوسرے ماہ کے بعد اگلے مہینے میں ادا کی جاتی ہے۔تو اس پر چھ فیصد کے حساب سے جرمانہ ادا کرنا پڑے گا۔مزید براہ اگر رائلٹی بمعہ جرمانہ چوتھے مہینے کے اختتام تک ادانہیں کی جاتی تو لائسنس دہندہ یا لائسنس رکھنے والے کو مزید جرمانہ ادا کرنا ہوگا۔جس کا تعین لائسنس دہندہ حکام کریں گے اور اس کی حد پچاس ہزار تک ہوسکتی ہے۔اور اگر پھر بھی یہ رقم ابتدائی واجب الادا سے لے کر چھٹی ماہ کے اختتام تک ادانہیں کی جاتی تو لائسنس یا ٹھیکہ منسوخ تصور ہوگا۔استدعا کی گئی رعایت اور زیر بحث متعلقہ رول کی ذیلی دفعہ کے مطالعہ سے یہ بات ظاہر ہوتی ہے۔کہ وہ سارا نظام جس کے تحت رائلٹی ادا نہ کئے جانے کی صورت میں اقدامات اٹھائے جانے تھے۔وہ (CHEJVA) کے حق میں نظر انداز کر دیئے گئے۔اس طرح کی رعایت رضامندی، مرضی، اجازت یا پھر یقین دہانی کے نام پر نہ ہی طلب کی جاسکتی ہے۔اور نہ ہی عطا کی جاسکتی ہے۔یہ ساری شق ہی غیر قانونی تھی۔

39۔ لین دین کے دوران BHP کو دی گئیں غیر واجبی حمایات مذید جاری رکھی گئیں۔اور پہلے ہی سے CHEJVA کا غیر مناسب ذر (75 :25 فیصد سود) کئی بن بتائے طریقوں سے کم کیا جارہا تھا۔لیکن BHP کے فاضل وکیل نے روسٹم پر ابھی بھی کلیم کرتا ہے کہ اُس کے موکل نے بدل میں اپنا حصہ لینا تھا اور GOB نے بغیر کچھ کیے اپنی فی صدی شرح سود حاصل کرنا تھی یہاں یہ اظہار بھی ممکن ہے کہ منرل ڈیپارٹمنٹ کے ڈائیریکٹوریٹ نے بحوالہ خط مورخہ DBA19-07-1994 کو مطلع کیا کہ لائیسنسنگ اتھارٹی نے BDA/BHP کی التجا برائے ریزرویشن آف گولڈ ایریا قبول کی تھی۔علاقے کی حدود میں رعائت کرتے ہوئے جیسا کہ BMCR 1970 کے منسلکہ 4 میں متعین تھی۔اور نقشہ بھی برائے تین سال منظور کیا۔اور اسے آئندہ مائینگ آپریشن شروع کرنے کے لئے 3347226 ایکڑ کے ایک علاقہ ضلع چاغی میں درج ذیل شرائط پر اجازت دی۔

(i) یہ کہ خط ہذا کے اجراء کے ایک ماہ کے اندر آپ مبلغ -/3347226 روپے بطور سالانہ فیس (پیشگی) بحساب 5 روپے کی بجائے بشرح معمولی 1 روپیہ فی ایکڑ جمع کرواؤ گے اس طرح آپکو سالانہ فیس بشرح 4 روپے فی ایکڑ بہ رعایت رول 33 بلوچستان مائینگ کنسیشن رول 1970 سے مستثنیٰ کیا گیا ہے۔

40. مذکورہ بالا خط میں یہ مذید ذکر کیا گیا تھا کہ مندرجہ بالا شرائط کی قبولیت کی صورت میں اگر مطلوبہ عمل درآمد وقت معینہ کے اندر نہ کیا گیا تو علاقہ کی ریزویشن بلا کسی نوٹس ختم تصور ہوگی۔اور اگر وہ ابھی بھی آئندہ لائیسنسنگ مائینگ لیز کی خواہش رکھتے ہیں تو انہیں از سر نو درخواست دینے کی ضرورت ہوگی اور اس طرز کی درخواست پر دوبارہ غور کیا جائے گا اور متعلقہ رولز کے مطابق فیصلہ کیا جائے گا۔حیرانگی کی بات ہے کہ اگر چہ **BHP** مذکورہ بالا شرائط بشمول ادائیگی سالانہ فیس اندر میعاد معینہ پر عملدرامد میں ناکام ہوئی ہے۔ بلکہ بجائے ر یزویشن ختم تصور کرنے کے منرل ڈیپارٹمنٹ نے BDA کے خط مورخہ 1994-08-11 کی پیروی میں بحوالہ خط مورخہ

19-04-1994 مزید 20 ایام کا وقت مذکورہ شرائط پر عمل درآمد کے لئے اس شرط پر دیا کہ مطلوبہ عمل پر توسیع شدہ وقت میں ناکامی کی صورت میں خط مورخہ 19-07-1994 دست بردار تصور کیا جائے گا۔ یوں لگتا ہے کہ مذکورہ بالا شرائط کی تعمیل نہ کی گئی ہے اور انڈسٹری کامرس اور منرلر ریسوسز ڈیپارٹمنٹ نے بجائے اپنے خطوط مورخہ 19-07-1994 اور 19-09-1994 پر عمل کرنے کے بذریعہ اپنے خط مورخہ 16-11-1994 مبلغ 3.347 ملین روپے کی سالانہ فیس برائے تلاش گولڈ 3347226 ایکڑ کے علاقہ کی سالانہ فیس مبلغ 3.347 ملین روپے ختم کردی۔

بالکل عجب طور پر جیسا کہ رولز کی وسیع سطح پر رعائت کی صورت میں اتھارٹی نے ذکر تک نہیں کیا کہ کن حالات میں نمایاں علاقہ کی تفویض کے لئے رولز کی رعائت ناگزیر ہو چکی تھی۔ یہ اس بات کا اظہار کرنے میں بھی ناکام ہوئی کہ کیوں BHP کو سالانہ فیس اور دیگر واجبات کی ادائیگی سے مستثنیٰ کرنا لازمی تھا۔ اگرچہ ڈائرکٹوریٹ آف منرل ڈیپارٹمنٹ نے مذکورہ خط 19-07-1994 میں ذکر کیا کہ اگر درخواست دہندہ BHP-BDA مذکورہ خط میں بیان کردہ شرائط کی قبولیت کی صورت معینہ وقت کے دوران عمل درآمد نہیں کرتا تو ریزرویشن بلانوٹس ختم تصور ہوگی۔ اور اگر وہ آیندہ لائسنس/مائنگ لیز چاہتے ہیں تو انہیں ازسرِنو درخواست دینا ہوگی۔ یہ ظاہر ہوتا ہے کہ نا B H P - B D A نے سالانہ فیس ادا کی اور نا ہی دیگر مجوزہ شرائط پر عمل کیا، اور محکمہ نے اچانک اپنے مذکورہ خط مورخہ 16-11-1994 کے ذریعے مبلغ 3.347 ملین روپے سالانہ فیس کی معافی کی مجاز اتھارٹی کی قبولیت بھی فراہم کردی اور ایک بار پھر بلا اظہار جواز برائے مذکورہ معافی دی جیسا کہ BMCR 1970 کی جملہ شقوں کی رعائت دیتے ہوئے کیا تھا۔

41. مذکورہ بالا خطوط کے متن سے BHP کو فراہم کردہ غیر واجبی ہمدردیاں مزید ثابت ہوتی ہیں۔ ڈائرکٹوریٹ منرل ڈیپارٹمنٹ اپنے خط مورخہ 19-07-1994 میں بیان کرتا ہے کہ BMCR 1970 کے رول 33 میں رعائت کرتے ہوئے BHP کو سالانہ فیس بشرح 5 روپے فی ایکڑ کی ادائیگی سے مستثنیٰ ہوگئی ہے۔ نتیجتاً BHP کو بحساب 5 روپے فی ایکڑ کی بجائے معمولی شرح بحساب 1 روپیہ فی ایکڑ مبلغ ۔/3347226 روپے جمع کروانا ہوں گے۔ انڈسٹری ڈیپارٹمنٹ نے اپنے خط مورخہ 16-11-1994 کے ذریعہ پہلے سے کم کردہ رقم 5 روپے سے 1 روپیہ ختم کردی۔ BHP کو یہ ایک غیر معمولی سلوک فراہم کیا گیا جس سے مبلغ -/16736130 روپے سالانہ کا بغیر ریکارڈ پر لائے بلا کسی جواز کے سرکاری خزانہ کو خسارہ ہوا۔ پس ان حالات و واقعات کو مدنظر رکھتے ہوئے یہ نہیں کہا جاسکتا کہ BDA کے لئے بلا مفاد تھا جبکہ BHP کے کیس میں ایک بڑی سرمایہ کاری کے ذریعہ کمانا تھا۔

44۔ عدالت میں پیش کردہ ریکارڈ کا مطالعہ کرتے ہوئے ہم نے اخذ کیا کہ آیا کہ CHEJVA ایوارڈ سے پہلے BDA کی جانب سے کوئی ٹینڈر مشتہر کیا گیا لیکن بدقسمتی سے ہمارے علم میں کوئی ایسی بات نہ آسکی جس سے ثابت ہوتا ہو کہ BDA یا گورنمنٹ آف بلوچستان کے کسی دوسرے ادارے نے اخبارات کے ذریعے مشترکہ دوسرے انوسٹرز سے بھی ٹینڈر طلب کیے ہوں۔ بلاشبہ غیر ملکی سرمایہ

کاری کے کسی بھی جدید معیشت کیلئے حوصلہ افزائی کی جانی چاہیے لیکن یہ تمام اقدامات قانون کے مطابق کیے جانے چاہیے جو کہ مفاد عامہ کے حقوق کے تحفظ کی ضمانت دیتا ہے اس کا حوالہ F-9 پارک اسلام آباد میں قائم کردہ ریسٹورنٹ کے مقدمہ ہیومن رائٹس کیس نمبر 4668/2006 (پی ایل ڈی 2010 ایس سی 759) دیا جاسکتا ہے۔ جس میں مشاہدہ کیا گیا کہ موجودہ موضوع سے متعلقہ غیر ملکی سرمایہ کاروں کی خطیر تعداد ملک میں قانون کے مطابق کاروبار کر رہی ہے۔ موجود مقدمہ میں ایسا لگتا ہے کہ BDA نے BHP کے ساتھ مذاکرات کیے اور گورنمنٹ آف بلوچستان کے ساتھ ایکسپلوریشن رائٹس کا معاملہ نہایت جلد بازطریقے سے کیا اس سلسلہ میں یہ قابل ذکر ہے کہ مورخہ 13 جولائی 1993ء کو چیئرمین BAA نے وزیراعلیٰ کی منظوری کیلئے ایک سمری ارسال کی جس پر ایڈیشنل چیف سیکرٹری نے لکھا کہ گورنمنٹ کے حکم کے مطابق یہ ڈرافٹ ایگریمنٹ وزارتِ خزانہ وزارت قانون اور پلاننگ اور ڈویلپمنٹ ڈیپارٹمنٹ سے تصدیق کے بعد ارسال کیا جائے۔ یہ نہ کیا گیا اور نہ ہی یہ فقرہ تاریخ 29-07-1997-1997 جو کہ معاہدہ پر دستخط کرنے کیلئے مقرر تھی سے پہلے کیا جانا ممکن تھا۔ موجوزہ معاہدہ مشروط تھا جس کی رو سے گورنمنٹ آف بلوچستان کو بذات خود بھی کوئی تحفظ حاصل نہ تھا کیونکہ مجوزہ شرائط مخصوص تھیں اور BDA کو چاہیے تھا کہ متعلقہ ڈیپارٹمنٹس کو خاطر خواہ موقع فراہم کرتی تا کہ وہ اس کا معائنہ کر سکے اور یہ پارٹیوں کے اپنے مفاد میں بھی نہ تھا کہ بغیر معائنہ کیے یہ معاہدہ کیا جائے کیونکہ معاہدہ میں ایک غیر یقینی شرائد بھی تھی لہٰذا معاہدہ کی بجائے صاف نیتی کا غذ دستخط ہونا چاہیے تھا۔ ایڈیشنل چیف سیکرٹری کی مذکورہ بالا مشاہدات کے جواب میں چیئرمین BDA نے 22-07-1993-1993 کے نوٹ میں کچھ وضاحتیں لکھیں اور جب معاملہ دوبارہ ایڈشنل چیف سیکرٹری کے پاس گیا تو اسے درج ذیل لکھا۔

(1) چیئرمین BDA اپنے ہاتھوں میں فائل سے چیف سیکٹری کے پاس گئے حکومت میں بہت کم لوگ یہ جانتے ہیں کہ حکومت بلوچستان کسی قسم کے معاہدے مین پھنسنے جارہی ہے۔ مان لیا BHP ایک اچھی پارٹی ہے اور معدنیات کی تلاش علاقے میں بہت زیادہ پسندیدہ ہے لیکن حکومت بلوچستان کو اپنے مفاد کا خیال رکھنا چاہیے، خاص طور پر اُس وقت جب BHP کے لیے بہت بڑا زمینی قطعہ مختص کیا جارہا ہو تو اُس علاقے کے عوام کا کیا ردِعمل ہوگا۔

(2) معاہدے پر دستخط کے لیے 29.07.1993 کا دن مقرر کیا گیا۔ ذیلی شق کہ یہ معاہدہ عارضی نوعیت کا ہوگا کے تحت چیئرمین BDA کو اختیار حاصل ہے کہ وہ اُس میں پیش رفت کریں اور اس معاہدے کے دستخط ہونے کے ایک ماہ کے اندر اندر منصوبہ بندی و ترقیاتی اور معاشی امور کے محکمہ جات اگر اس معاہدے کے اندر کوئی معقول اضافہ یا ترمیم تجویز کریں تو اُسکو معاہدے کا حصہ سمجھا جائیگا۔
جب معاملہ چیف سیکٹری تک پہنچا تو اُنھوں نے محسوس کیا کہ معاہدہ منصوبہ بندی وترقی اور اقتصادی امور کے شعبہ جات کو برائے ثانوی مشاہدہ بلکے بروقت نہیں بھیجا گیا تھا۔ انھوں نے مزید کہا کہ معائدے پر 29.07.1993 کو دستخط ہونا تھا اور اِسکو "عارضی معاہدہ " سے تعبیر کیا جانا چاہیے تھا تا کہ اگر ترامیم یا تبدیلیاں کوئی ہوں تو مابعد اُنہیں شامل کیا جاسکے اور وزیراعلیٰ نے 27.07.1993 کو اِس تجویز کی منظوری دی تھی ۔ CHEJVA پر 29.07.1993 کو دستخط کر دیئے لیکن اس کے بعد کوئی ترامیم نہ کی گئیں اور اسطرح

20.01.1994 کو یہ معاہدہ فعال ہو گیا۔ تاہم اس چیز کا نوٹس اُس وقت لیا گیا جب 04.03.2000 کو Addendum کی طرف پیش رفت کی گئی۔ جیسا کہ ذیلی شق نمبر 3.0 سے یہ بات واضح ہے کہ حکومت بلوچستان کے متعلقہ شعبہ جات میں کوئی ثانوی مشاہدہ یا سکروٹنی برائے متعلقہ شجوانہ کی تھی۔

حکومت بلوچستان کا اس طرح سے مسلئے کو Process کرنا اس بات کو واضع کرتا ہے کہ عوامی اشتیارات سے رجوع نہیں کیا گیا جس کے تحت شفافیت اور عوامی جائیداد کے لیے بہترین متقابل قیمتیں حاصل کی جاسکیں۔ جیسا کہ ریکوڈک میں معدنی وسائل اواس طرح عوام الناس اور بلوچستان کے عوام بالخصوص کے حقوق کے برعکس دوسرے سرمایہ کاروں کے اس معاہدے میں حصہ لینے سے دور رکھا گیا۔ عوام الناس کے مفاد والے مسئلہ کو اس طرح نمٹانا عوامی حکمت عملی کے برخلاف ہے کیونکہ یقیناً یہ مفاد عامہ کے لیے نقصان دہ ہے اور اس لیے اس معاہدہ کی قانونی حثیت کو رد کرنے کے لیے جواز فراہم کرتی ہیں۔ یہ بات قابل غور ہے کہ کنٹریکٹ ایکٹ 1872 کے سیکشن 23 کے مطابق کسی بھی معاہدے کا بدل اور مقصد قانونی ہے اگر اس کو کسی قانون نے منع نہ کیا ہو۔ یا اس نوعیت کا ہو کہ اگر اُسکی اجازت دی جائے تو وہ کسی قانون سے متصادم ہوگی۔ یا جس میں دھوکہ دہی کا شُبعہ ہو۔ یا جس سے کسی کی جان و مال کو نقصان پہنچنے کا اندیشہ ہو یا عدالت اس کو غیر اخلاقی سمجھتی ہو یا وہ عوامی حکمت عملی کے متضاد ہو۔ اس تمام کیسس میں معاہدے بدل اور مقصد کو غیر قانونی سمجھا جاتا ہے اور ہر وہ معاہدہ جسکا بدل اور مقصد غیر قانونی ہے وہ معاہدہ باطل ہے۔ موجودہ کیس میں CHEJVA نے بی سی ایم آر 1970 کی بہت سے شقوں کی خلاف ورزی کی گئی تھی لہذا یہ پبلک پالیسی کے برعکس ہے جس کے تحت قانون کا بلا متیاز مکمل نفاذ ہونا چاہیئے۔ اس سلسلے میں CHEJVA کنٹریکٹ ایکٹ کی دفعہ 23 کی زد میں آتا ہے۔

45۔ ریکارڈ پر ایسی کوئی چیز فراہم نہیں کی گئی جس سے یہ پتہ چلے کہ فینانس ڈیپارٹمنٹ گورنمنٹ آف بلوچستان رولز آف بزنس 1976 کے تحت پابند ہے کہ وہ یہ مدعا علیہ نمبر 1 سے ایسے معاہدے کی چھان بین کرائیں۔ JVA کی فینانس ڈیپارٹمنٹ کی منظوری کے بغیر ہی BDA اور BDA نے CHEJVA پر عمل درآمد کیا۔ مدعا علیان نے اُس وقت کے سیاسی عدم استحکام سے مفاد حاصل کرنے کی کوشش کی ہے جیسا کہ اُس وقت قائم مقام حکومت تھی۔ بین القوامی کمپنیوں نے CHEJVA ایڈنڈم نمبر 1 اور دوسرے معاہدوں کے ذریعے حکومت بلوچستان پر غالب ہونے کی کوشش کی ہے اور معدنیات کے نکالنے کے حوالے سے جائز فائدہ اُٹھانے کی کوشش کی ہے UNIDROI.T کے ذیر دفعہ 3.2.7 اور بین القوامی اقتصادی معاہدوں کے اصولوں کے عنوان "سنگین تضاد" کے تحت، وہ معاہدہ جس میں کسی ایک فریق نے دوسرے فریق کے انحصار اقتصادی بدحالی، جہالت، ناتجربا کاری، وغیرہ سے غیر ضروری فائدہ اُٹھانے کے کوشش کی ہو وہ معاہدہ قابلِ عمل نہ ہے۔

50۔ ریکارڈ کا معائنہ کرنے سے ظاہر ہوتا ہے کہ CHEJVA کو نافذ کرنے والے، محترم عطا محمد جعفر کے پاس ایک ہی مخصوص وقت

یہ بطور چیرمین بی ڈی اے اور ایڈیشنل چیف سیکرٹری دو عہدے تھے۔ یہ دونوں عہدے قانون کی نظر میں بہت مختلف تھے۔ پہلے میں وہ ایک آفس ہولڈر تھا قانونی انکار پوریٹ باڈی میں جبکہ آخری میں وہ ایک آفیسر تھا گورنمنٹ آف بلوچستان کا جو گورنمنٹ کی نمائندگی کرنے کا مجاز تھا۔ وہی شخص جو دونوں آفس رکھ رہا تھا اس تاثر کو تقویت دیتا ہے جو بی ڈی اے نے لیا کہ گونمنٹ اتھارٹیز کی ذمہ داری ہے کہ وہ لائسنز اور متعلقہ رعایت جاری کرے۔ پہلی صورت حال میں اس نے کیس صوبائی گورنمنٹ کو بھیجا اور بعدازاں دوسری حیثیت میں اس میٹنگ کی صدارت کی جس نے CHEJVA کے متعلق فیصلے کئے۔ یہ ایک واضح مفادات کا تضاد تھا۔ ریکارڈ یہ بھی ظاہر کرتا ہے کہ وہ ہاتھ میں فائل لے جاتا، جو ظاہر کرتا ہے اس کی طرف سے نمایاں جلد بازی تھی معاہدے کو نافذ کرنے میں۔ اصل میں وہاں آفیسر پر بہت بوجھ تھا کہ وہ نہ صرف قانون کے عمل میں غیر جانبدار رہے، بلکہ وہ اس معاملے سے خود کو علیحدہ کر لیتا، جہاں تک درخواست گزار کا تعلق تھا۔ ریکارڈ اس بات کو بھی ظاہر کرتا ہے کہ اس نے مختلف محکموں کی جانب سے خبردار کیا جانے کے باوجود اپنے آپ کو علیحدہ نہیں کیا۔ بلوچستان سول سرونٹ (کارکردگی اور نظم وضبط) رولز 1983 کے مطابق اپنی حیثیت سے زیادہ ہونا بدعنوانی کے ذمرے میں آتا ہے۔ اس سزا کی حقیقت کو نہ ٹی سی سی کے فاضل وکیل اور نہ کسی اور نے نفی کی۔

52۔ یہاں پہ اس بات کا ذکر کرنا ضروری ہے کہ رول BMCR14 1970 مہیا کرتا ہے کہ لائسنس یا لیز صرف اُس کمپنی کو دی جائے گی جو پاکستان میں موجود ہو۔ CHEJVA کا آرٹیکل 16 کہتا ہے کہ جو قانون معاہدوں پر نافذ ہوگا وہ پاکستان کا قانون ہوگا، بشمول بین الاقوامی اصول جن کو فریقن نے اپنی باہمی رضامندی سے قبول کیا۔ اس سلسلے میں یہاں پر ذکر کرنا ضروری ہے کہ ہر غیر ملکی کمپنی جو پاکستان میں کام کر رہی ہے وہ قانون کے تحت اجازت حاصل کرے ایک رابطہ دفتر (LO) اور دفتر کی شاخ (BO) قائم کرنے کے لئے۔ کمپنیز جن کو دفتر قائم کرنے کی اجازت دی جاتی ہے وہ رجسٹرڈ ہوتی ہیں بورڈ کے ساتھ کمپنی آرڈیننس 1984 کے تحت۔ سیکشن 451 اور 452 آرڈیننس 1984 وہ لوازمات مہیا کرتا ہے جن کے تحت باہر کی کمپنیز کو دستاویزات پیش کرنے ہوتے ہیں رجسٹرار کمپنیز کو اور ریٹرنز پیش کرنے ہوتے ہیں۔

53۔ CHEJVA سے دوسری فریق بی ایچ پی ہے جو کہ ریاست ہائے متحدہ امریکہ کی ریاست Delaware میں شامل ہے۔ تمام عملی اور قانونی مقاصد کیلئے، دوسری فریق ایک امریکن کمپنی ہے جس کو اس کی قومیت کے تمام تر حوالہ جات اور ساتھ ہی ساتھ قانون کے تحت تمام تر حقوق اور ذمہ داریاں حاصل ہیں۔ یہاں پہ یہ بات قابل ذکر ہے کہ سماعت کے دوران بی ایچ پی متعدد بار ضرورت پڑنے کے باوجود بی ایچ پی کے حق میں رجسٹرار آف کمپنیز یا بورڈ آف انویسٹمنٹ کے جاری کردہ سرٹیفکٹس آف رجسٹریشن عدالت کے سامنے پیش کرنے میں ناکام رہا۔ آرڈیننس کے سیکشن 456 کے تحت، اس طرح کی رجسٹریشن کی غیر موجودگی میں ایک غیر ملکی کمپنی، کمپنیز آرڈیننس 1984 کے دفعات 451 اور 452 کی شرائط کو پورا کیا بغیر کوئی قانونی کاروائی شروع نہیں کر سکتی۔ یہ فریق کوئی مقدمہ کرنے یا قانونی کاروائی کے لئے اپنے حقوق کھو دیتی ہے اور اپنے حق میں موجود کو جوابدہی حاصل کرنے کے اگر یہ کسی معاہدے میں داخل ہوتے ہیں اس رجسٹریشن کی کوتاہی کی صورت میں

55۔ بی ایچ پی اور ٹی سی سی کے فاضل وکلاء نے اس معاملے پر مختلف آراء دیں۔ بی ایچ پی کے فاضل وکیل نے کہا کہ بی ایچ پی آرڈیننس کی دفعات کی شرائط میں رجسٹر کیا گیا تھا لیکن کسی بھی دستاویز کی عدم دستیابی کی باعث درخواست کی تصدیق کرنے میں ناکام رہا۔ دوسری طرف، ٹی سی سی کے فاضل وکیل نے کہا کہ غیر ملکی کمپنیز کو آرڈیننس کی شرائط کی پاسداری کرنا ضروری نہیں تھا۔ کیونکہ گورنمنٹ آف بلوچستان نے غیر ملکی سرمایہ کاروں کو آسانی دینے کے لئے خود ہی ان شرائط کو ختم یا آسان کر دیا تھا۔ اس نرمی کی پیش کش کو اس وقت سے غیر قانونی اور غیر نافذ العمل تصور کیا جاتا ہے، اور اس کو بطور مقدمہ پیش کرنے کے آغاز سے ہی اس پر بھروسہ نہیں کیا جا سکتا۔

57۔ جناب طارق اسد ASC نے دلائل دیئے ہیں کہ شجوا نے Registrar Act 1908 کی دفعہ 17 کی بھی خلاف ورزی کی ھے۔ جناب حمر بلال صوفی ASC نے دلائل دیے کہ اگر TCC اس شجوا کو برقرار رکھتی ہے۔ ہم نے مقدمے کے اس پہلو پر بھی غور کیا ہے۔ اس ACT کی دفعہ 17(1)(b) بیان کرتی ہے کہ وہ آلہ جو رویہ عمل ہوتا ہے، عمل کرنے کا جواز فراہم کرتا ہے، مقصد پیدا کرتا ہے، بیان کرتا ہے، ذمہ داری تفویض کرتا ہے مقصد کو محدود کرتا ہے یا ختم کرتا ہے۔ آیا کہ حال میں، مستقبل میں ایک سو ہزار روپے یا زاہد کی قدر یا طاقت کے تناظر میں یا پھر منقولہ جائیداد کی شکل میں رجسٹرڈ کیا جائے گا۔ اس مقدمے میں، BHP-BDA رجسٹریشن اکیٹ کی دفعہ 17 کے تحت شجوا کو رجسٹرڈ کرنے میں ناکام رہے ہیں اسی طرح مابعد شجوا کے تحت پیدا ہونے والے حقوق جن امور کو Alliance Agrement کے تحت سرانجام دینا ضروری ہوتا ہے کو بھی متعلقہ دفعہ 17 کے تحت رجسٹرڈ نہ کیا گیا تھا۔ یہاں پر ریاست کے اطلاقی قانون بمتعلقہ معاہدہ اور اس معاہدہ کی اپنی دفعہ کی منشا پر بھی عمل نہ ھوا۔

62. یہاں پر اس بات کا ذکر کرنا ضروری ہے کہ BMCR1970 کے حصہ سوم لیز کے لائسنس کے اجراء کا اور اس مقصد کے لیے درخواستیں قانونی طریقہ کار درج ھے۔ BMCR 1970 کے اطلاق کے بغیر شجوا نے اپنے فعال کو مربوط کرنے کے لیے قواہد بنانے کے لیے اپنے قانونی حق کا استعمال کیا، یہ وہ حق ہے جو 1948 کے ایکٹ کی دفعہ 2 کے تحت مجاز حکام کا اختیار ہے شجوا کے آرٹیکل 11 میں کان کنی کے متعلق معاہداتی مفادات BMCR1970 میں دیے گہے ڈھانچہ سے ماورا، تبدیل کرنے کا طریقہ کار بھی موجود ھے۔ یہ ایسے تمام قواعد کو بالائے طاق رکھتے ھوے کان کنی کے لائسنس کے خودکار اجرا سے متعلق ایک عارضی نظام فراہم کرتا ہے۔ اس میں اس بات کا اعادہ ہے کہ صوبائی حکومت کی طرف سے جاری کردہ لائسنسز کو کان کنی کے لائسنسز میں تبدیل کر دیا جائے گا۔ یہ امر استثنا کی حد سے بہت دور نکل جاتا ہے۔ اور اسکا مطلب انتظامی اور قانون ساز ادارے کے استحقاق غاصبانہ قبضہ کے علاوہ کچھ نہ ہے۔ کوئی استثنا یا رعائیت کسی غیر ملکی کمپنی کو لائسنسز جن کو مجاز حکام نے جاری کیا ہوا ہو کے متعلق مجاز عارضی بنیادوں قواعد وضوابط جو کے کسی خاص معاہدہ سے متعلقہ ہو بنانے یا اطلاق نے کی اجازت نہ دی جا سکتی ھے۔ آرٹیکل 11.8.2 میں درج ہے کہ جہاں کسی مشترکہ کوشش کے تحت یا زیلی دفعہ 11.03.2 کی پیروری میں ایک شریک کار فریق، ایک کان میں آپریشن کرنے کا انتخاب کرتی ہے تو وہ ایسا کام حکومت کی معمول کے

تقاضہ جات کے تحت ہی کرسکتی ہے تو اس پر استحقاق حاصل ہوگا کہ وہ امکانی لائسنسز کو کان کنی کے لائسنسز میں بدل لیں تا کہ مطلوبہ کان کنی کہ متعلقہ رقبہ میں وہ محفوظ استحقاق حاصل کر سکے آرٹیکل 11 نہ صرف ایسے قواعد کو بے ثمر قرار دیتا ہے۔ بلکہ حکومتی منظوری کے بغیر کان کنی کے عمل کے جاری رہنے کے امکان بھی پیدا کرتا ہے اور یہاں تک کے یہ عمل زیلی دفعات 11.3.3 اور BDA 11-04-1-2 کے تحت کو بھی غیر فعال کر دیتا ہے۔ یہ امر ڈائریکٹوریٹ برائے ترقی کان کنی بلوچستان کی طرف سے BHP کو جاری کردہ امکانی لائسنسز کی شرائط وضوابط کی بھی نفی کرتا ہے جو کے منجملہ اس امر کا اعادہ کرتا ہے کہ لائسنس BHP کو یہ اجازت نہ دیتا ہے کہ وہ اس وقت تک کسی امکانی لائسنسز کی تجدید کرے یا کسی رقبہ یا کسی قطعہ سے متعلق کان کنی کا کوئی لائسنس جاری کرے جب تک وہ ڈائریکوریٹ برائے کان کنی بلوچستان کے اطمنان کے مطابق لائسنس کے تحت کام کے متعلق فرائض سے عہدہ براۂ نہ ھو جائے۔ شجوہ اس بات کی اجازت دیتا ہے کہ مستقبل میں، متعلقہ حکومت یا مجاز حکام سے رجوع کیئے بغیر دوسرے فریقیں کو کان کنی کے ساتھ کے طور پر شریک عمل کیا جاسکتا تھا۔
معاہدہ میں شامل موجودہ دونوں فریقین کو یہ اجازت دینا کہ وہ اپنے حقوق کو دوسری پارٹیوں تک وسعت دے لیں۔ ایسی استثنیات دیتے وقت یہ امر قابل غور نہ تھا اور اس کا مطلب صرف اور صرف یہی تھا کہ اس وقت کے متعلقہ قوانین وقوائد وضوابط کہ بالائے طاق رکھتے ھوئے اس وقت لامحدود کے لیئے ان کی کوئی پرواہ ہی نہ کرنے کی کوشش کے مترادف ہے۔ آرٹیکل 17 میں صراحت دی گئی ہے کہ میزبان ملک کے قوانین کے ساتھ اس کے قانون ساز ادارے کی بے توقیری کا جواز پیدا کیا گیا اور یہ کہ اگر قانون سازی کے ذریعے تبدیلی کی جاسکتی ہے جس کا اطلاق مشترکہ کارعمل پر ہونا ہے تو پھر ایسی تبدیلی مشترکہ کارعمل کے لیے زیادہ مفید ہوگی یا پھر کسی ایک فریق کے حق میں ہوگی بانسبت ان قواعد وضوابط اور اصولوں کے جو اس معائدہ کے دستخط کیئے جانے پر رائج تھے۔ مشترکہ کاوش کار اور متعلقہ فریقین اسی صورت میں فائدے کے حصول کے لیئے جو اس نئی قانونی شق کے تحت امکانی طور پر حاصل ہوسکتا ہو۔ درخواستیں دائر کریں گے تاہم اس نئی قانونی شق یا نئی تبدیلی کے تحت شجوا یا کسی فریق کے مالی مفادات پر براہ راست یا بالواسطہ کوئی قدغن لگتی ہو تو شجوا پہلے والے شرائط اضوابط کے ساتھ ہی اپنے کام میں تسلسل رکھیں گے اور یہ شق شجوا کے حق کو ہی بہرحال قانون سازی کے عمل پر برتر رکھتی ہے اور اسطرح سے وہ ایک آزاد اور خودمختار ملک کے قوانین کو زیر بار کرنے کی کوشش کرتی ہے۔ جس کی اجازت نہ دی جاسکتی ہے۔

69۔ یہ بات قابل ذکر ہے کہ آئین کے آرٹیکل (3)173 کے تحت وفاق یا صوبے کی طرف سے تمام معاہدہ جات واضح طور پر صدر یا جیسی بھی صورت ہو صوبے کے گورنر کی طرف سے کئے جاتے ہیں۔ اور ایسے تمام معاہدہ جات اور جائیداد سے متعلق ضمانت نامے ایسا شخص اس اختیار کو استعمال کرتے ہوئے صدر یا گورنر کر طرف سے اس انداز میں استعمال کریگا جیسا کہ ہدایات دی گئی ہیں یا اختیار دیا گیا ہے۔ جبکہ آرٹیکل (2)139 کے تحت صوبائی حکومت قواعد کے ذریعے اس طریقہ کار کی وضاحت کریگی جس میں ایسے احکامات اور معاہدہ جات جو گورنر کی طرف سے کئے گئے۔ اور یہ معاہدہ جات مستند ہوں گے۔ قاعدہ 7(2) گورنمنٹ آف بلوچستان رولز آف بزنس 1976 جن کو گورنمنٹ آف بلوچستان نے آرٹیکل (2)139 بالا کے تحت مرتب کیا کے مطابق گورنمنٹ کے تمام انتظامی اقدامات واضح طور پر گورنر

کے نام سے ہونگے تاوقتیکہ کسی آفیسر کو خاص طور پر کوئی حکم یا معاہدے پر دستخط کے لئے اختیار نہ دیا جائے۔تو اس پر متعلقہ محکمہ کا سیکرٹری ،ایڈیشنل سیکرٹری، جوائنٹ سیکرٹری، ڈپٹی سیکرٹری یا سیکشن آفیسر دستخط کرے گا۔اور ایسے حکم اور معاہدے پر اس کے دستخط کو مستند سمجھا جائے گا۔گورنر کی طرف سے کئے گئے معاہدہ جات ان پر عملدرآمد اور جائیداد سے متعلق ضمانت نامہ کے بارے میں ہدایات محکمہ قانون جاری کرے گا۔اب یہاں یہ دیکھنا ہے کہ CHEJVA طے کرتے وقت درج بالا حدود و قیود کی پیروی کی گئی۔CHEJVA کا ابتدائی صفحہ بتا تا ہے کہ چاغی ہلز ایکسپلوریشن، جوائنٹ وینچر کا معاہدہ بلوچستان ڈویلپمنٹ اتھارٹی اور بی ایچ پی مائنرلز انٹرنیشنل ایکسپلوریشن کے درمیان طے پایا جبکہ اس کا پہلا صفحہ بتا تا ہے کہ یہ معاہدہ گورنر آف بلوچستان بذریعہ چیرمین بلوچستان ڈویلپمنٹ اتھارٹی جو کہ ایک قانونی ادارہ ہے اور بی ایچ پی مائنرلز انٹرنیشنل ایکسپلوریشن جو کہ امریکہ کی ریاست DELAWARE کا ادارہ ہے کے درمیان طے پایا اس معاہدہ پر ایک طرف سے چیرمین بلوچستان ڈویلپمنٹ اتھارٹی اور دوسری طرف سے بی ایچ پی کے نمائندے نے دستخط کئے۔ان حقائق پر انحصار کرتے ہوئے بی ایچ پی کے فاضل وکیل نے یہ دلیل دی کہ گورنمنٹ آف بلوچستان تمام عملی مقاصد کے لئے CHEJVA میں فریق تھی جو کہ اس نے اپنے نمائندے بلوچستان ڈویلپمنٹ اتھارٹی کے ذریعہ طے کیا۔اس سلسلہ میں یہ قابل ذکر ہے کہ CHEJVA کی تعریفی شق کے مطابق فریقین کا مطلب بی ایچ پی اور بلوچستان ڈویلپمنٹ اتھارٹی ہے۔CHEJVA کی شق 2.1 بیان کرتی ہے کہ معاہدہ کی تاریخ سے چھ ماہ کے اندر وفاقی حکومت یا صوبائی حکومت سے وصولی فریقین کے لئے مشروط ہوگی یا کوئی بھی دورانیہ جس پر فریقین رضامند ہو اور یہ رضامندی اور منظوری پاکستانی قانونی کے تحت لازم ہے۔یہ معائنہ واضح کرتا ہے کہ حکومت بلوچستان اور وفاقی حکومت فریقین کی فہرست سے باہر تھیں جہاں سے CHEJVA کے فریقین نے ضروری رضامندی اور منظوری لینی تھی۔تاہم ضمیمہ کے اجراء سے جس پر مورخہ 4.3.2000 کو دستخط ہوئے CHEJVA پر دستخط ہونے کے سات سال بعد اور جس کے ذریعہ CHEJVA میں ترمیم چاہی گئی اور بہت سے معاملات میں نیا رخ اختیار کیا گیا۔ضمیمہ کا پہلا صفحہ بتا تا ہے کہ یہ ضمیمہ صوبہ بلوچستان کر طرف سے گورنر بلوچستان، جس کو GOB تحریر کیا جائے گا اور بلوچستان ڈویلپمنٹ اتھارٹی، ایک قانونی ادارہ جو کہ بلوچستان ڈویلپمنٹ اتھارٹی ایکٹ 1974 کے تحت وجود میں آیا اور بی ایچ پی مائنرلز کے درمیان طے پایا اس طرح اس ضمیمہ کے ذریعہ اصل دو فریقی معاہدہ کے برعکس اس کو سہ فریقی معاہدہ بنایا گیا اور یہ بظاہر گورنمنٹ آف بلوچستان کو فریق بنانے کے لئے کیا گیا۔اس طرح کا مفروضہ حقائق کو غلط بنا دیتا ہے۔جیسا کہ فاضل کونسل حکومت بلوچستان نے درست طور پر بیان کیا مزید ضمیمہ کا آخری صفحہ ظاہر کرتا ہے کہ اس پر چیرمین بلوچستان ڈویلپمنٹ اتھارٹی نے دو مرتبہ دستخط کئے پہلے گورنر بلوچستان کی طرف سے اور دوسری مرتبہ بلوچستان ڈویلپمنٹ اتھارٹی کی طرف سے اور بعد ازاں بی ایچ پی کے نمائندے نے دستخط کیے۔اس سلسلہ میں یہاں پر یہ ذکر کرنا ضروری ہے کہ CHEJVA کے ٹائٹل میں محض گورنر بلوچستان کا ذکر کرنے کا مطلب یہ نہیں کہ گورنمنٹ آف بلوچستان معاہدہ میں فریق بن چکی ہے۔یہ واضح ہے کہ CHEJVA صرف اور صرف بلوچستان ڈویلپمنٹ اتھارٹی اور بی ایچ پی کے درمیان تمام عملی مقاصد کے لئے طے پایا نہ کہ حکومت بلوچستان بذریعہ بلوچستان ڈویلپمنٹ اتھارٹی اور بی ایچ پی کے درمیان طے پایا۔اس لئے ضمیمہ تحریر کرتے ہوئے ابتدائیہ کے ذریعے جوائنٹ وینچر معاہدہ

میں حکومتِ بلوچستان بذریعہ بلوچستان ڈویلپمنٹ اتھارٹی اور بی ایچ پی کو شامل کرنے کا مقصد تھا۔ اور اس کے تحت حکومت بلوچستان اور بلوچستان ڈویلپمنٹ اتھارٹی کے کردار کی وضاحت کرنے کی خواہش تھی اور گورنمنٹ آف بلوچستان کی طرف سے CHEJVA کے معاملات میں بلوچستان ڈویلپمنٹ اتھارٹی کو اپنا نمائندہ مقرر کرنے کی خواہش تھی یا گورنمنٹ آف بلوچستان نے تصدیق کی کہ بلوچستان ڈویلپمنٹ اتھارٹی معاہدہ کے تحت اپنی ذمہ داریوں سے عہدہ براء ہوئی جیسا کہ جوائنٹ وینچر میں تھا یا کہ بطور نمائندہ گورنمنٹ آف بلوچستان یا گورنمنٹ آف بلوچستان نے CHEJVA کے تحت بلوچستان ڈویلپمنٹ اتھارٹی کے کردار کی بطور نمائندہ گورنمنٹ آف بلوچستان کی تصیح کی اور گورنمنٹ آف بلوچستان کی طرف سے CHEJVA کے تحت کام کرتے ہوئے اس کے اختیارات کی تصیح کی یا گورنمنٹ آف بلوچستان نے بلوچستان ڈویلپمنٹ اتھارٹی کی طرف سے CHEJVA کے بارے میں تمام معاملات اور اقدامات کی تصیح تھی۔ اور یہ تمام اقدامات طریقے گورنمنٹ آف بلوچستان کو CHEJVA کے تحت بلواسطہ لانے کے لئے تھے اور یہ مقصد صرف قانون کے تحت بیان کردہ طریقہ کار پر عمل کرتے ہوئے حاصل کیا جاسکتا ہے۔ یہ تمام درستگیاں اور وضاحتیں قانون معاہدہ 1872 کی دفعہ 20 کے تحت حقائق کی غلطی کی بنیاد پر کی گئی تھیں۔ یعنی کہ گورنمنٹ آف بلوچستان CHEJVA میں فریق تھا اور بلوچستان ڈویلپمنٹ اتھارٹی اس کا نمائندہ۔ بی ایچ پی کی طرف سے اس طرح کی حقائق کی غلطی اس معاہدہ کو باطل اور نا قابل عمل درآمد بنا دیا۔

70۔ یہ سوال کہ آیا CHEJVA, GOB میں فریق تھی کافی عرصے تک زیرغور رہا اور دونوں فریقین کے قانونی ماہرین کے زیر نگرانی تفتیش ہوتا رہا تا کہ ضمیمہ کہ بارے مشورہ حاصل ہو سکے۔ M/S کبر جی اور طالب الدین نے BHP کو GOB کے محکمہ قانون کی طرف سے بھیجے گئے خط مورخہ 3.9.1999 میں اٹھائے گئے مسائل کے مطابق ضمیمہ کی حتمی مسودہ کی تیاری پر مشورہ دیا کہ 'وہاں پر الجھن تھی کہ JVA میں فریق کون تھے جو درحقیقت اس لیے پیدا ہوا کہ GOB نے معاہدہ کے متن میں جو کہ JVA میں BDA کے ذریعی فریق بننے کے لیے تھا مگر دستاویز میں GVA تھا جو کہ BDA کی طرف سے عمل درآمد کیا گیا۔ (not GOB through BDA) مگر کسی بھی اشارے کے بغیر معاہدہ نہ گورنر بلوچستان کی طرف سے representative کی capacity میں دستخط ہوا۔ مزید یہ کہ کہا گیا کہ JVA میں کون فریق تھے یہ سوال ابھی غیر واضع ہے اس حقیقت کو مدنظر رکھتے ہوئے کہ JVA میں، اصطلاح پارٹیز کو BDA اور BHP واضع کیا گیا ہے اور اس معاہدہ کو کثرت سے پڑھنے سے ثابت ہوا ہے کہ درحقیقت یہ BDA تھا نہ کہ GOB جو کہ دوسرا فریق تھا اور بالترتیب معاہدہ کے تحت BDA کے طرف سے معاہدہ میں دیئے گئے فرائض اور ذمہ داریوں کا حقدار۔ اس طرح M/S شکیل لاء فرم نے BDA کے خط مورخہ 10-11-1999 میں اپنی رائے دی جو ذیل درج ہے۔

"ہماری رائے میں JVA کے لئے کوئی بھی ضمیمہ ان فریقین کے بیچ عمل درآمد ہوگا جنہوں ہے JVA پر دستخط کئے ہوں۔ جہاں تک GOB کا تعلق ہے وہ JVA میں فریق نہیں ہے اس لئے وہ ضمیمہ میں شامل نہیں کیا جاسکتا۔

محکمہ قانون کے مشاہدہ کے مطابق صوبائی حکومت کی جانب سے سارے معاہدے آئین کے آرٹیکل 173 کے تحت اُس صوبائی گورنر کے نام سے کئے جائیں گے، یہ اُن معاہدوں کے متعلق ہوسکتا ہے جو ابھی گورنمنٹ کی طرف سے ہونگے لہذا J V A واضع طور پر B D A اور B H P کے درمیان طے پایا ہے۔ "

تاہم یہ رائے نظر انداز کی گئی اور ضمیمہ مورخہ 04-03-2000 BDA اور BHP اور صوبے کی طرف سے گورنر کے نام سے دستخط کیا گیا۔ جبکہ ہم مسٹر خالد انور سے متفق ہیں کہ BDA، CHEJVA میں فریق تھا مگر اپنے دعوٰی کو برقرار نہ رکھ سکا کہ ضمیمہ کی صورت میں GOB کو اپنے حقوق کے لئے تیسرا فریق بنایا جاسکتا ہے۔ GOB کو معاہدہ میں نیا فریق بنانے کے لئے GOB Rules of Business, 1976 کی دفعہ 7 کے تحت کسی بااختیار کارندہ یا نمائندہ کے دستخط ضروری تھے مگر یہ نہیں کیا گیا۔ موجودہ حالات کے تناظر میں ضمیمہ چیئرمین BDA کے دستخط اوپر دیئے گئے شق نمبر 7 کی ضروریات کو پورا نہیں کرتے اس لئے TCC کی جانب سے فاضل وکیل کی طرف سے دیئے گئے دلائل کہ گورنر BDA کو اپنا نمائندہ مقرر کرنے میں بااختیار تھا کو ثابت نہ کر سکے لہذا اسکو منسوخ کیا جاتا ہے۔

71۔ مندرجہ بالا تناظر میں یہ نوٹ کیا جائے کہ ایک سادہ کاغذ پر لکھے گئے بغیر تاریخ کے Authorization Letter اُس وقت کے گورنر بلوچستان [جسٹس (ریٹائرڈ) امیر الملک مینگل]، کے دستخط لئے گئے جس میں چیئرمین BDA کو بااختیا بنایا گیا کہ وہ گورنر کے نام سے ضمیمہ پر دستخط کرے، اس کے باوجود کہ اس سے پہلے یہ Authorization سابقہ گورنر سید فضل آغا نے دستخط نہیں کیا تھا جب یہ اُس کے سامنے پیش کیا گیا اس پر عمل درآمد کروانے کے لئے، بادی النظر میں اس وجہ سے کہ مورخہ 12-10-1999 کو GOB وزیر اعلیٰ کے ذریعہ یہ فیصلہ کیا کہ ایک دورکنی کمیٹی تشکیل کی جائے جو کہ اس دستاویز کا جائزہ لے، تاہم کچھ مخصوص دستاویزات سے یہ قیاس کیا جاسکتا ہے کہ یہ مورخہ 24-12-1999 کو عمل میں آیا، اس طرح ضمیمہ کے اسباب کی طرف سے اصلاح کے نام سے سیکشن 196 آف دی کنٹریکٹ ایکٹ 1872، اس کے باوجود کہ CHEJVA میں اصلاح کی جائے مگر اس کی ساری شکل کو تبدیل کیا جائے۔ گورنر کی جانب سے DBA کو ایک Authorization Letter کے ذریعے اپنے نمائندے کے حیثیت سے بااختیا بنایا گیا جو کہ نہ تو گورنر کے لیٹر پیڈ پہ پرنٹ تھا نہ اُس پر کوئی تاریخ تھی اور نہ کوئی نوٹیفیکیشن نمبر اور نہ ہی کسی آفس یا اتھارٹی کو مخاطب کیا گیا تھا اور نہ ہی اُس پر کوئی مہر ہے۔ نہ ہی وہاں پر کوئی مددگار دستاویزات موجود ہیں۔ اور نہ ہی اس خط میں کیبینٹ کے اس معاملے پہ کسی فیصلہ کے بارے میں حوالہ دیا گیا ہے معاہدے اور اتحاد کے معاہدے کی منظوری کے معاملے پر کابینہ میں تین مرتبہ معاملہ لایا گیا مگر یہ منظور نہ ہوا۔ اس تناظر میں یہ منظوری جو کہ گورنر سے حاصل کی گئی ایک سادہ کاغذ پر یہ کانون کی نظر میں نامناسب اور دفاع تھا۔

72۔ حکومت بلوچستان گورنمنٹ کے وکیل نے بحث کی کہ CHEJVA کو علاقے کے متعلق بے یقینی کا شکار بھی ہونا پڑا جو کہ CHEJVA کا موضوع بھی ہے۔اس کے جواب میں PCC کی طرف سے جناب خالد انور سینئر اے۔ایس۔سی نے بیان کیا کہ یہ حکومت بلوچستان کی دلچسپی تھی کہ وہ صوبے کا زیادہ سے زیادہ علاقہ معدنیات کی دریافت کو یقینی بنانے کے لیے وقف کرے۔ CHEJVA کی شق 5.3.1 کے مطابق جو مکمل علاقہ تھا وہ پچاس مربع کلومیٹر سے زیادہ نہیں ہوگا۔تاہم شق 5.10 کے مطابق علاقے کا نقشہ 13000 مربع کلومیٹر کے علاقے پر محیط ہے جو CHEJVA کے شیڈول B کے ساتھ جڑا ہوا ہے اس کو تبدیل کیا جانا چاہیے تاکہ علاقے کی حیثیت کو وقت کے ساتھ ساتھ صحیح طریقے سے پیش کیا جا سکے۔یہ تو بالکل ظاہر ہے کہ علاقے کا تعین ابھی حتمی طور پر نہیں ہو سکا جس کی وجہ سے قانون معاہدہ کی شق 29 کے بارے میں بے یقینی ہے۔دیکھیں شیخ شہاب الدین بنام ولائیت علی (AIR 1926 Nagpur 435 at 439) جہاں پر عدالت نے معدنیاتی علاقے سے متعلق ایک معاہدے کو بے بنیاد قرار دیا کیونکہ اس میں ذخائر کی صحیح تشخیص نہیں ہو سکی تھی جیسا کہ قانون معاہدہ کی شق 20 میں موجود ہے جو کہ ایک غلطی تھی۔مزید دیکھیں عبدالخالق بنام صابر احمد (PLD 1961 BJ 79) ، رؤف احمد غوری بنام مینیجنگ ڈائریکٹر چولستان ڈویلپمنٹ اتھارٹی بہاولپور (1998 CLC 1464) اور احمد علی خان بنام شہری ضلعی حکومت کراچی (2009 MLD 704)۔

73۔ آپشن معاہدہ اور الائنس معاہدہ کی بنیاد بھی ایک حقیقی غلطی پر ہے کہ بلوچستان ڈیویلپمنٹ اتھارٹی جو کہ CHEJVA کے تحت بلوچستان گورنمنٹ کی agent تھی لہٰذا قانون معاہدہ کی دفعہ 20 کے تحت یہ بھی بے بنیاد ہیں۔کاروائی کے دوران کسی بھی موقع پر ایسی کوئی دستاویز پیش نہیں کی گئی جس کے مطابق پرنسپل اور ایجنٹ حکومت بلوچستان اور بلوچستان ڈیویلپمنٹ اتھارٹی کے درمیان تعلق پیدا ہو یا جس کے بارے میں پرائیویٹ مدعا علیہان نے نشاندہی کی ہو نہ ہی کیس کے ریکارڈ کی جان پڑتال کے دوران، سماعت کے دوران یا فیصلہ لکھنے کے دوران ہمارا سامنا ایسی کسی دستاویز سے ہوا ہے۔مزید یہ بات بھی طے ہے کہ بلوچستان ڈیویلپمنٹ اتھارٹی اور حکومت بلوچستان آپشن معاہدہ اور الائنس معاہدہ میں شامل نہیں تھیں لہٰذا حکومت بلوچستان کا معزز وکیل اپنی بحث کرنے میں ٹھیک تھا کہ بلوچستان ڈیویلپمنٹ اتھارٹی اور حکومت بلوچستان ان معاہدات کی پابند نہیں ہے۔قانونی حیثیت یہ ہے کہ بلوچستان ڈیویلپمنٹ قانون 1974 بلوچستان ڈیویلپمنٹ اتھارٹی کو یہ اختیار نہیں دیتا کہ وہ گورنمنٹ آف بلوچستان کے ایجنٹ کے طور پر کام کرے بلکہ قانون کے مطابق بلوچستان ڈیویلپمنٹ اتھارٹی کو قانون کے تحت اپنے معاملات کی ادائیگی کے لیے مختلف معاملات میں گورنمنٹ آف بلوچستان کی منظوری لینی پڑتی ہے۔

75۔ بلوچستان ڈیویلپمنٹ اتھارٹی کی حکومت بلوچستان سے اپنی نمایاں اور آزاد قانونی حیثیت ہے۔بلوچستان ڈیویلپمنٹ اتھارٹی حکومت بلوچستان کے رولز آف بزنس میں شامل محکموں کی فہرست میں شامل محکمے کے طور پر بیان نہیں کی گئی ہے، تاہم بلوچستان ڈیویلپمنٹ

اتھارٹی ضمیمے میں داخل ہونے سے پہلے بے یقینی کا شکار رہی کہ آیا کہ CHEJVA یا اُس کے نتیجے میں کیے جانے والے کسی معاہدے میں حکومت بلوچستان سے آزاد حیثیت سے شامل ہوسکتی ہے۔ بلوچستان ڈیویلپمنٹ اتھارٹی کو صرف اس بات کی ضرورت ہوتی ہے کہ وہ اپنے بورڈ آف ڈائریکٹرز کے ذریعے حکومت بلوچستان سے بلوچستان ڈیویلپمنٹ قانون 1974 کی دفعہ 4 کے تحت کسی معدنیاتی تلاش کے منصوبے کے لیے ضروری منظوری حاصل کرے اور قانون کی دفعہ 16 اور 17 کے تحت ایک مشترکہ منصوبے کے معاہدے میں شامل ہو جائے۔ CHEJVA کے حوالے سے بعد میں ہونے والے تمام معاہدات / دستاویز میں بھی یہی حیثیت برقرار ہے۔ بلوچستان ڈیویلپمنٹ اتھارٹی اور حکومت بلوچستان کے تنظیمی ڈھانچے میں اس بے یقینی کی وجہ سے CHEJVA میں ایک بنیادی بے یقینی اور مشکل آ گئی جو کہ صرف اس وجہ سے ہی اس معاہدے کو آغاز سے بے بنیاد بنا دیتا ہے۔ معاملے کی اس طرح سے جانچ پڑتال کے مطابق ضمیمہ اور نو ویشن معاہدہ کی بنیاد کہ بلوچستان ڈیویلپمنٹ اتھارٹی حکومت بلوچستان کی ایجنٹ تھی قانون معاہدہ کی دفعہ 20 کے تحت ایک "حقیقی غلطی" بنتی ہے۔

80۔ ہم نے مدعی کے معزز وکیل کی بحث پر بھی توجہ دی کہ CHEJVA کی شرائط غیر موزوں تھی لہٰذا صرف اسی بنیاد پر ہی اس معاہدے کو آغاز سے بے بنیاد قرار دیا جائے۔ اس لحاظ سے اس بات پر غور کرنی چاہیے کہ CHEJVA کے آرٹیکل 3.1 میں یہ بات کہی گئی ہے کہ مشترکہ منصوبے کا معاہداتی مقصد تلاش والے علاقے میں معدنیاتی ذخائر کو تلاش کرنا ہے اور موزوں تحقیقات کا انتظام کرنا ہے تا کہ وہاں موجود معدنیاتی ذخائر کے معاشی فوائد کا اندازہ لگایا جا سکے۔ جبکہ CHEJVA کی شرائط آرٹیکل 3.2 میں بیان کیا گیا ہے جس کے تحت BHP پہلی اور دوسری سرگرمیوں کے مرحلوں کی تکمیل کے بعد 75% منافع اور موزوں تحقیقات کے کمیشن کی حقدار ہوگی ۔مشترکہ منصوبے میں 75% منافع جو کہ BHP کو موصول ہونا تھا اس کو آرٹیکل 3.3 میں دوبارہ بیان اور لاگو کیا گیا ہے اور آرٹیکل 3.4 میں اس کا دوبارہ اعادہ کیا گیا ہے۔ BHP کے معزز وکیل نے اس بات پر بہت زور دیا ہے کہ BHP یا اس کے قائم مقام کو مذکورہ بالا سرگرمیاں اور عمل کی ذمہ داری اور اُن کی تکمیل کے بعد اپنا حصہ "وصول" کرنا تھا جبکہ حکومت بلوچستان کو 25% حصہ ملنا تھا "دریافت تک کا آزاد منافع" اور پھر CHEJVA کی یہ شرائط قانونی طور پر صحیح اور انصاف کے مطابق تھیں اور پبلک پالیسی کے اصول کے مخالف نہیں ہونی تھی۔ BHP/TCC نے عدالت میں بیان دیتے ہوئے اس بات پر روشنی ڈالی کہ ایک قابل منافع لائسنس /اجازت نامہ اس کے مالک کو اس قابل بناتا ہے کہ وہ کچھ زمینوں پر اپنی توجہ مرکوز کرے جہاں معدنیاتی ذخائر موجود ہوں۔ معزز وکیل نے وضاحت کی کہ معدنیاتی ذخائر کی تلاش ایک ایسا عمل ہوتا ہے جس میں پہاڑی کان میں چٹانوں (جس میں تجارتی حوالے سے معدنیات موجود ہوں) کو تلاش کیا جاتا ہے جو معدنیاتی ترقی کے لیے بہت محنت طلب، منظّم اور پیشہ وارانہ حالت کے حامل ہوتا ہے اور اگرچہ اس میں ترقی کا امکان بہت زیادہ ہوتا ہے لیکن معدنیاتی ذخائر کی تلاش کی سرگرمی میں اس کا بہت عمل دخل ہے۔

81۔ اب اگر ایک دلائل دے رہا ہوتا، جیسا کہ کونسل برائے BHP نے دیے کہ جب متلاشی ٹھیکیدار، تلاش کرنے کے عمل کے تمام

اخراجات کا ذمہ لیتا ہے تو ٹھیکیدار لازمی طور پر بڑے حصہ کی ذمہ داری لیتا ہے اور کان کا مالک، کچھ نہ خرچ کر کے بھی کان کی دولت کا مالک ہوتا ہے اور نفع تناسب کی نقصان دہ پوزشن پر ہوتا ہے۔ بغیر شک وشبہ کے، تمام درج بالا عمل میں مالک اور پٹہ دار منافع نہیں لیتے جب تک سرگرمیاں آخری سٹیج پر پہنچ جائیں یعنی معدنیات کا انتخاب، اسکی صفائی اور بعد میں اس کی مارکیٹنگ۔ لہذا یہ کہنا کہ BDA معاہدے کا آغاز سے ہی 25% سے فاہدہ لے رہا ہے یہ درست سمت میں ظاہر نہیں ہوتا۔ BDA کا تناسب فائدہ 25% ہی رہیگا اور BDA صرف اسے منصوبے کی درج بالا سٹیج پر پہنچانے کے بعد اسے لے گا۔ کاروبار کے روزمرہ معمولات کے مطابق، خاص طور پر مجموعی کاروبار میں، فریقن کے حصہ تناسب منافع فریقن کے علیحدہ علیحدہ حصہ سرمایا جو فریقین نے دیا ہوتا، پر تعین کیا جاتا ہے۔ اس کے برعکس، اگرچہ کونسل برائے BHP متعدد بار بیان کیا GoB کا 25% فائدہ/سود معدنی دریافت تک بیان کیا ہے لیکن معاملہ کی حقیقت یہ ہے کہ CHEJVA کا لین دین 25% میں قرار نہیں دیا جاسکتا۔ ایسا کرتے ہوئے فاضل کونسل نے CHEJVA کی شق 12.4 کو نظر انداز کیا ہے جو بتاتی ہے کہ معدنی علاقے میں سرگرمیاں اور اپریشن کی لاگت ہمیشہ شامل ہونے والی فریقین فائدہ تناسب سے ادا کریں گی اور بی ڈی اے کو حق ہوگا کہ وہ ایسی ترقیاتی لاگت اور موجودہ پروگرام اور بجٹ میں حصہ نہ ڈالے گی اور بی ایچ پی ، بی ڈی اے کی جانب سے ایسی لاگت میں حصہ ڈالے جب تک معدنیات معدنی علاقے سے پیدا نہیں ہوتیں۔

میزید براں، معدنیات پر اور دیگر معدنی چیزوں پر جو کان کنی علاقے میں پیدا ہوں گی، بی ایچ کو حق ہوگا کہ وہ وصول کرے (i) وہ تمام اخراجات جو بی ایچ اے نے نی بی ڈی اے کی جانب سے کیے (ii) کمپاونڈ سود پر نسپل رقم پر بمعہ 2% سود۔ مزید CHEKA کی شق 12.5 کے تحت بی ڈی اے نے بی ایچ اے کے ساتھ معاہدہ اور عہد کیا ہے کہ وہ بی ڈی اے قرضہ کو حاصل شدہ 50% آمدنی جو معدنی کاروبار، سے واپس کرگی۔ شق 6-12 بی ڈی اے کی جائیداد پر معدنی کاروبار پر بوجھ ڈالتی ہے۔

84۔ مزید براں CHEJVA آرٹیکل 3.2 بناتا کہ بی ایچ پ کہ وہ مشترکہ کاروبار منافع میں شق 7.2 کے تحت حق دار ہے۔ پیراگراف الف کے تحت 75 فیصد کا حق دار ہے۔ پیرگراف الف کے تحت بی ڈی اے کو مطوب کیا جاتا ہے کہ وہ بی ایچ پی کو خدمات اور مددے، جیسا کہ مناسب انتظامی مدد، پٹہ جات، لائسنس کلیم، اجازت نامہ اور دوسرے بڑے اختیارات جو لازمی ہوں مشترکہ کاروبار کی سرگرمیوں کے لئے۔ شق 12.5 کے تحت حاصل شدہ آمدنی مشترکہ کاروبار میں سے 50 فیصد کو مخصوص کرتے ہوئے بی ڈی اے کو قرضہ واپس کرنا پڑے گا۔ CHEJVA کی مندرجہ بالا شقوں سے یہ ظاہر ہوتا ہے کہ بی ڈی اے میزبان کے طور پر مشترکہ کاروبار کی سرگرمیاں کے اخراجات برداشت کرے گا اور یہ نہیں کہا جاسکتا کہ GOB، 25 فیصد نفع کا حق دار دریافت تک جبکہ فاضل کونسل برائے بی ایچ پی نے کہا۔ کونسل برائے بی ایچ پی نے یہ کہا کہ بی ڈی اے کا 25 فیصد کا سعود، سعود سے پاک ہے۔ بالا اخراجات اور امداد کو کبھی نمایاں نہیں کیا۔ یہ ثابت ہوگیا کہ CHEJVA نے ناکافی لین دین میں داخل ہوا جسے بی ڈی اے کے تناسب نفع۔

85۔ جیسا اوپر بیان کیا کہ ضمیمہ GOB کا اصل کردار CHEJVA میں مطلب ظاہر کرتا ہے اور بی ڈی اے کو GOB کی ایجنسی

تصدیق کرتا ہے ایسی چیز جو CHEJVA میں نہیں ہے۔اس کی منشاء ظاہر کرتا ہے کہ CHEJVA سے ماضی سے تبدیلیاں وہ بھی شرائط کی تشریح کی نام پر جو کہ اصل معاہدہ میں نہ تھیں۔ درستگی دینے کا پہلا بڑا عنصر یہ تصدیق دینا ہے کہ ایجنٹ کو حقیقت میں اختیار سے زیادہ کام کر رہا تھا اور مالک کا ایجنٹ نہ تھا۔شرائط میں ایک تضاد تھا کیونکہ یہ بہت چیزوں کو واضح کرنے کی کوشش کی گئی تھی۔اس وضاحت کی روشنی میں یہ تصدیق کرنا تھا۔جو بی ڈی اے نے اپنی جدا حیثیت میں کام کیئے اور جو ہو رہا تھا GOB کے ایجنٹ کے طور پر۔ یہ پہلے ہی ثابت ہو چکا ہے مالک اور ایجنٹ کے درمیان کو ئی تعلق نہیں تو تصدیق و درستگی کا سوال نہیں اٹھے گا اور درستگی جو ضمیمہ میں دی گئی ہے وہ ایک بے کار مشق تھی قانون میں منظوری کا ثابت عنصر یہ ہے کہ منظور شدہ ایجنٹ اپنے منظور شدہ مالک کے نام پر کام کرتے رہے گا۔ ہمیشہ خود کو ایک قانون اطاعت والا ایجنٹ پیش کرتا رہے۔ (ثناءاللہ بنام محمد رفیق (2003 CLC 138) موجودہ کیس میں بی ڈی اے نے کبھی GOB کا بطور ایجنٹ کام نہیں کیا۔ بلکہ وہ یقیناً کام اور معاملات CHEJVA کے متعلق بطور مشترکہ کاروبار حصہ دار کرتا تھا۔مثال کے طور پر رعایت لینے کا معاملہ۔بی ڈی اے نے کبھی خود کو GOB کا ایجنٹ پیش نہیں کیا۔ بلکہ اس نے معاملات کو جدا حیثیت میں ادا کیا اور GOB محکموں میں پیروی کی بطور مشترکہ کاروبار حصہ دار۔ یہ طے شدہ ہے کہ وہ اعمال جو ایک شخص اپنے نام اور جدا قانونی حیثیت میں کرتا ہے ان کی بعد میں دوسرے شخص سے منظوری نہیں ہوتی۔ دیکھو (محمد زکریا بنام بشیر احمد (2001 CLC 595) اور (امپیریئل بنک آف کنیڈا بنام میری ویکٹوریہ بیگلے 193) AIR 1936 PC 1936 PC مزید یہ کہ موجودہ کیس میں تمام اوقات میں بی ڈی اے کے تمام اعمال سے GOB آگاہ تھا۔جو بی ڈی اے نے اپنے اختیار سے کئے۔منظوری کا اصول جو کنٹریکٹ ایکٹ کی دفعہ 196 میں درج ہے لاگو نہیں ہوتا۔لہذا درستگی کی منظوری جو ضمیمہ میں کی گئی ہے اس کا کوئی حیثیت (نتیجہ) نہیں ہے۔

86۔ TCC کے فاضل وکیل نے بتایا کہ CHEJVA اور BMCR 1970 میں نرمی کے خلاف لگائے گئے الزامات BHP کے برخلاف تھے نہ کہ TCC کے جو کہ اس وقت موجود ہی نہیں تھی جس وقت رولز میں نرمی مورخہ 20-1-94 کو لائی گئی۔اور کسی بھی صورت میں CHEJVA کا غیر قانونی ہونا نئے معاہدے مورخہ 1-4-2006 پر اثر انداز نہیں ہونا چاہیئے کیوں کہ ہے MBR کے تحت قائم ہوا اور اس کا CHEJVA کے قانونی ہونے سے کوئی تعلق نہ ہے۔اس نے مزید بتایا کہ TCC کے قانونی حقوق نئے معاہدے سے نکلتے ہیں جسکے تحت BHP بغیر کسی حق اور فرض کے منظر سے مکمل طور پر غائب ہو جاتی ہے۔اس نے کہا CHEJVA غیر قانونی بھی تھا نیا معاہدہ ٹھیک طور پر دستخط کیا گیا اور فریقین صرف اس کے شرائط کے پابند ہیں نہ کہ CHEJVA یا کسی دوسرے معاہدے کے جو کہ اس سے قبل دستخط ہوئے۔نئے معاہدے پر EL-5 کے حوالگی کے بعد دراصل GOB نے عمل درآمد گیا جس کے نتیجے میں TCC نے دریافت کر لی۔فریقین جو کہ پہلے معاہدے CHEJVA کے برخلاف نیا معاہداہ کر چکی ہے جو کہ بعد میں تبدیل کیا گیا ہے تا کہ اس کے فریقین با شرائط یا دونوں میں تبدیلی لائی جائے اور فیصلہ کرے کہ آیا پہلے کا اصل معاہدہ قانونی طور پر درست اور متعلقہ ہے یا کہ یہ قانونی طور پر ختم ہو چکا ہے۔انکے مطابق معاہدے کے باطل ہونے سے اسکا وجود ختم نہیں ہوتا لیکن ایسی صورت میں یہ قابل عمل نہیں ہوتی اور BHP اس کے تحت BDA نے خلاف دعویداری کر سکتی ہے۔اس نے

وضاحت کی کہ معاہدے کی تجدید سے حق یا فرض کی منتقلی نہیں ہوتی بلکہ اصل معاہدے کی بلکل تنسیخ ہو جاتی ہے۔

87۔ کنٹرکٹ ایکٹ 1872 کا دفعہ 62 معاہدہ کے تجدید، تنسیخ اور تبدیلی سے متعلق ہے، جس میں کہا گیا ہے کہ اگر معاہدے فریقین کسی معاہدے کو نئے معاہدے سے بدلتے یا اسکی تنسیخ یا تبدیلی پر آمادہ ہو جائیں اس صورت میں اصل معاہدے پر عمل درآمد کرنا ضروری نہیں ہوتا۔

اتحادی معاہدے کے تحت EL-5 اور دیگر تمام وہ حقوق تھے جن کی بقاء کا انحصار CHEJVA کے موجودگی پر تھا۔ صحیح تجدیدی معاہدے کے قیام کے لئے اصل معاہدہ کا درست ہونا لازمی شرط ہے۔ جب کوئی معاہدہ باطل ہو تو بعد کی تمام تبدیلیاں اور تجدید جو کہ اسی معاہدے پر مبنی ہوں وہ بھی غیر قانونی ہوتی ہیں۔ جب ایک معاہدہ قانون کے ایک مخصوص دفعہ میں ممانعت کی وجہ سے غیر قانونی ہو ایسا معاہدہ نافذ العمل نہیں ہوسکتا اگر چہ اس کے فریقین بعد میں ایسے غیر قانونی غوض پر تجدیدی معاہدہ بھی کر لیں۔ دیکھیں حاجی حبیب بنام بھکمچند جتکیلال شاپ (AIR 1954 Nag) مزید براں بات کا غیر قانونی معاہدہ یا پہلے والا غیر قانونی معاہدہ یا وجود تجدید غیر قانونی ہی رہیں گے اور ایک عدالت اس طرح کے غیر قانونی معاہدوں کی بنیاد پر قائم دعویداروں میں کسی بھی فریق کو کوئی شنوائی نہیں دیں گے۔

دیکھیں حسین کاسم دادا بنام وی سی ایسوسی ایشن (AIR 1954 Mad 528) اور پیڈی ویرایا بنام دیپالوڈی سباراؤ (AIR 1959 Andh Pra 647) مزید براں رتن لال ولد پنالالجی بنام فرم منجی لال ماتھورالال (AIR 1963 MP 323) میں قرار دیا گیا ہے کہ ایک مکمل طور پر صاف اور قانونی معاہدہ جو کہ ایک بعد کے غیر قانون یا غیر اخلاقی معاہدے سے نکل رہی ہو یا کوئی قانونی معاہدہ جسکی بنیاد پہلے سے غیر قانونی یا غیر اخلاقی معاہدہ پر مبنی ہو قطع نظر اس کے، کہ فریقین نے اسکی تجدید بھی کی ہو عدالت کو ایسا معاہدہ پر عمل درآمد نہیں کروانا چاہئے۔

اور اگر بعد از تجدید نیا معاہدہ پہلے کے غیر قانونی معاہدہ یا پہلے والا کولٹرل معاہدہ میں براہ راست تعلق ہو تو تجدید معاہدے کی حیثیت اسی طرح غیر قانونی یا غیر اخلاقی جاری رہی گی اور عدالت کنٹرکٹ ایکٹ کے دفعہ 23 کے تحت اسکو قابل عمل بنانے سے انکاری رہی گی۔ مزید قرار دیا گیا کہ غیر قانونی معاہدہ جس میں دونوں فریق کے شامل جرم ہونے کی وجہ سے عدالت کسی بھی فریق کی غیر قانونی معاہدہ یا تجدید شدہ قانونی معاہدہ جس کی بنیاد پہلے سے غیر قانونی معاہدہ پر ہو کسی بھی فریق کی معاونت سے انکار کریگی۔ CHEJVA کے مندرجہ بالا وجوہات کی بناء پر باطل ہونے کے سبب اس پر کھڑی تمام عمارت زمین بوس ہو جاتی ہے۔ اس ضمن میں ان کیسیز کا حوالہ دیا جا سکتا ہے۔ یوسف علی بنام محمد اسلم ضیاء (PLD 1958 SC 104) اشرفی پرائیویٹ لمیٹڈ بنام

عبدالمجید بوام، (1991 MLD1101) نذیر احمد بنام محمد سلیم، (2002 YLR 1531) طالب حسین بنام ممبر بورڈ آف ریونیو، (2003 SCMR 549) اور مولانا عطاء الرحمٰن بنام الحاج سردار عمر فاروق (PLD 2008SC 663)۔

88۔ جیسا کہ یہاں بتایا گیا، اگر گورنمنٹ آف بلوچستان ایک معاہدے میں داخل ہونے کا فیصلہ کیا تھا، اس معاہدے کی تعمیل اس سے متعلقہ محکمے کے ذریعے کی جائے گی اور گورنمنٹ آف بلوچستان قانونی کاروبار کی شق 7 کے مطابق متعلقہ محکمے کی سیکرٹری، ایڈیشنل سیکرٹری وغیرہ کی طرف سے دستخط کیا جائے گا اور نہیں بذریعہ DBA، جو الگ وجود کے ساتھ ایک قانونی کارپوریشن ہے اور صوبائی حکومت کے متعلقہ محکمے کے قانون سے ظاہرً الگ ہے لہذا CHEJVA کے عمل کے وقت یا اس کے بعد کسی بھی وقت اور گورنمنٹ آف بلوچستان صحیح طور پر BDA تقرر نہیں کرسکتی ہے یا اس کا چیئرمین گورنمنٹ آف بلوچستان کے ایجنٹ کے طور پر کام کرسکتا ہے۔ اس لئے BHP کے لئے فاضل وکیل کی طرف سے ضمیمہ میں کی جانے والے نام نہاد اثبات یا توثیق پر اعتماد کرنا جائز نہیں تھا۔ اس مسئلے کی کچھ تفصیل کے ساتھ جانچ پڑتال کرتے ہوئے ہمیں معلوم ہوا کہ گورنمنٹ آف بلوچستان CHEJAV میں ایک پارٹی نہیں تھی، اس وجہ سے گورنمنٹ آف بلوچستان کسی بھی کمپنی کے ساتھ معاہدے میں داخل یا CHEJAV میں آئندہ کے لئے اس نوعیت کے لائسنس یا ضمیمہ کے کئے نہیں کہہ سکتا تھا۔ لہذا یہ طے ہوا کہ CHEJVA غیر یقینی صورت حال سے دوچار ہے تا کہ ابتداء میں معاہدہ پارٹیز کے طور پر گورنمنٹ آف بلوچستان کے لئے اپنے فاضل وکیل کی طرف سے آئیں۔

92۔ کان کنی کے لائسنس کی اجراء سے متعلق BMR 2002 کے رولز نمبر 10 اور 47 کے تحت بذریعہ لیز درخواست فارم "F" مورخہ 08-02-2011 کو حکومت بلوچستان کے سامنے TCC باضابطہ طور پر دائر کیا گیا، جس میں 99 سکوائر کلومیٹر بشمول 14 تانبے اور سونے کے ذخائر پر دعویٰ داخل کیا گیا ہے لیکن اس دعویٰ پر حکام / گورنمنٹ آف بلوچستان کی طرف سے کوئی آرڈر جاری نہیں کیا گیا کیونکہ موجودہ پیٹیشنس عدالت میں زیر التوا تھیں اور 03-02-2011 کا حکم امتناعی موجود تھا۔ TCC نے کورٹ کے سامنے اس بات پر زور دیا کہ اپنی درخواست برائے اجراء کان کنی لائیسنس دیئے جانے کے بعد اس کو یہ استحکاق حاصل تھا کہ وہ گورنمنٹ آف بلوچستان سے فیصلہ لے جبکہ گورنمنٹ آف بلوچستان اس بات پر اسرار کررہی تھی کہ فزیبلٹی سٹڈی کی تفصیلی سیکروٹنی گورنمنٹ آف بلوچستان کا استحکاق تھا اور وہ بھی BMR2002 کے تحت TCC's کے درخواست پر فیصلہ کرنے کی مجاز تھی۔

94۔ مذکورہ بالا آڈر جاری کئے جانے کے بعد گورنمنٹ آف بلوچستان نے فزیبلٹی رپورٹ اور متعلقہ قوانین اور ضوابط کی روشنی میں TCC کی درخواست پر غور کیا۔

97۔ BMR2002 کے تحت کان کنی کی کمیٹی نے اپنے اجلاس مورخہ 14-11-2011 کو کان کنی کے لائیسنس کے اجراء کی

درخواست کو مسترد کر دیا اور چھٹی مورخہ 15-11-2011 کے ذریعے اس فیصلے سے TCC کو مطلاع کر دیا گیا۔ TCC نے سیکرٹری محکمہ مائینز اینڈ منرلز گورنمنٹ آف بلوچستان کے سامنے اس فیصلہ کو ایک انتظامی اپیل کے ذریعے چیلنج کر دیا جس کی اجازت BMR2002 میں موجود ہے اور یہ اپیل بھی مسترد کر دی گئی۔ تاہم TCC نے یہ دونوں حکم نامے عدالت عالیہ بلوچستان کے سامنے آئین کے آرٹیکل 199 کے تحت چیلنج نہ کیا جس کی بنا پر پہلے والے فیصلے حتمی حیثیت اختیار کر گئے تھے۔

116۔ ہم نے معزز کونسل کے دلائل کو توجہ سے سُنا ہے۔ Constitution Petitions موجودہ مقدمے کے درخواست کنندگان نے جمع کرائی تھیں اور اس عدالت نے وسیع عوامی مفاد کو مدنظر رکھ کر داخل کیں، موجودہ مقدمے کے مخصوص حقائق اور حالات کو مدنظر رکھتے ہوئے جہاں اس حقیقت کے باوجود کہ CHEJVA کی تعمیل و تکمیل میں سنگین غیر قانونی بے قاعدگیاں ہوئیں ہیں مگر بلوچستان کی حکومت بلوچستان ہائی کورٹ میں دستور کے آرٹیکل 199 کے تحت Petitions کا دفاع نہیں کر سکی اور نہ ہی بلوچستان کی عوام کے مفاد کا دفاع کر سکی۔ درخواست کنندگان بجا طور پر پریشان تھے کہ اس عدالت میں داخل کی گئی Petition جو بلوچستان ہائی کورٹ کے فیصلے کے خلاف ہے اسکا بھی وہی حال نہ ہو دستور کے آرٹیکل 184(3) کے تحت یہ Petition عوامی اہمیت کے حوالے سے سوالات اُٹھاتی ہیں جو بنیادی حقوق سے متعلق ہیں۔ گورنمنٹ آف بلوچستان کے نمائندگان نے بجا طور پر دلائل دیئے کہ گورنمنٹ آف بلوچستان کا اپنے عوے سے پیچھے ہٹنے کا سوال ہی پیدا نہیں ہوتا۔ کیونکہ قانون پارٹیز کو اپنی پوزیشن میں تبدیلی کی اجازت دیتا ہے اگر مقدمے کے اندراج میں مذید پیش رفت ہو یا نئے حقائق سامنے آئیں۔ اس حوالے سے جو پیش رفت ہیں اُن میں ڈاکٹر ثمر مبارک مند کے دسمبر 2010 میں ECNEC کے تحت پروجیکٹ کی منظوری شامل ہے۔ نتیجہ تن CMA 252/2011 داخل کی گئی جس میں اس عدالت کو اس نئی پیش رفت کی متعلق آگاہ کیا گیا اور فیصلے کو معیار کے مطابق کرنے کی استدعا کی گئی۔ چنانچہ TCC کے نمائندہ وکلاء کی جانب سے اُٹھائے گئے اعتراض میں کوئی وقعت نہیں۔ 08.02.2011 کو اس عدالت کی طرف سے CHEJVA کا تمام ریکارڈ پیش کرنے کا حکم ہوا۔ متعلقہ ریکارڈ حاصل کیا گیا اور کئی درخواستوں کے ذریعے داخل کیا گیا۔ جس سے کرپشن اور بے قاعدیئا گیوں کا حیران کن انکشاف ہوا۔ حکومت نے ان کا جائزہ لیا اور ان اُمور کا دفاع نہ کرنے کا فیصلہ کیا اور اس عدالت میں داخل ریکارڈ کے سلسلے میں بھرپور معاونت کا فیصلہ کیا۔ مزید اس عدالت نے ہمیشہ قانونی اداروں کو قانون کے تحت کام کرنے پر زور دیا ہے۔ اس سلسلے میں Reported کیسز کا ر یفرنس درج ہے۔

(PLD 1985 SC 345) Gulam Bibi Vs Sarsa Khan،

(PLD 1995 SC 530) Zahid Akhtar Vs Government of Punjab"،

"(2008 SCMR 105) Iqbal Hussain Vs Province of Sindh"

"(PLD 2010 SC 759) Human Rights Cases No. 4668/2006, 111/2007,15283-4/2010

(2007 CLC 441), Dilshad Ali Vs Ahmed Khan

یہاں یہ بات قابلِ ذکر ہے کہ دستور کے آرٹیکل (3)184 کے تحت اس عدالت کو وسیع اختیارات ہیں کہ وہ ریاست کے باقی ادارے جیسے مقنّنہ اور انتظامی اداروں کے معاملات کی نگرانی کرے۔trichotomy آف پاورز کے اُصول کے مطابق بھی یہ بات طے شدہ ہے کہ عدلیہ قانون کی تشریح اور نفاذ میں اہم کردار ادا کرتی ہے، نیز حکومت کے مابین جھگڑوں کو نبٹانے میں بھی اہم کردار ادا کرتی ہے یا پھر جو ریاست اور اس کے شہریوں یا شہریوں اور ریاست کے مابین ہوں۔ عدلیہ کو بنیادی حقوق کے نفاذ کی ذمہ داری سونپی گئی ہے جس کے لئے ایک آزاد اور موثر عدالتی انتظامیہ کی ضرورت ہوتی ہے۔ تاکہ اُن تمام اقدامات کا تدارک کیا جاسکے جو بنیادی حقوق میں خلل ڈالتے ہوں اور معاشرے میں قانون کی حکمرانی ہو۔ ریاستی اداروں دستور کے قائم کردہ اُصولوں سے انحراف دستور کے اوپر بھاری اوزار ہے اور یہ مختلف حیثیتوں میں قابلِ اعتراض ہے جس میں بدنیتی اور کسی مخصوص مقصد یا بُرے مقاصد کے لئے اختیارات سے تجاوز میں شامل ہے

117. جہاں تک میونسپل عدالتوں کا حکومت کے کسی اقدام کو غلط قرار دینے کی طاقت اور اختیار کا تعلق ہے جس جگہ یہ ثابت ہو جائے کہ فیصلہ کن اتھارٹی نے اپنے اختیارات سے تجاوز کیا ہے، قانونی سقم کی وجہ سے غلطی کی ہے یا فطری انصاف کے اصولوں کو پامال کیا ہے اور ایسے فیصلے پر پہنچے ہیں جس پر کوئی مناسب فورم نہ پہنچ سکے یا اپنے اختیارات کا ناجائز استعمال کیا ہے، عام طور پر Bhanu Constructions Company v. A.P State Electricity Board [1997(6) ALT 328]... ... کے مقدمے کا حوالہ دیا جاتا ہے اس طرح یہ واضح ہے کہ اس عدالت کا دائرہ اختیار ہے کہ CHEJVA کی درستگی بشمول عدم شفافیت، قانون/ قوائد کی خلاف ورزی، عوام الناس وغیرہ کے بنیادی حقوق کی تخفیف کے بارے میں مندرجہ بالا وجوہات کی بناء پر فیصلہ کرے۔

122. اس عدالت کے جاری کردہ مختصر حکم کی معاونت کے لیے مندرجہ بالا وجوہات ہیں جس کے تحت عنوان بالا CPLA کو اپیل میں تبدیل کیا گیا تھا اور اپیل کے ساتھ آئین کے آرٹیکل (3)184 کے تحت آئینی درخواستوں کو لاگت کے ساتھ منظور کیا گیا تھا اور متفرق درخواستوں کو بھی نمٹا دیا گیا تھا۔ اس کے نتیجے میں چاغی ہلز ایکسپلوریشن جائنٹ وینچر معاہدہ مورخہ 23.07.1993 کے بارے میں قرار دیا گیا کہ یہ Mineral Development Act 1948, the Mining Concession Rules, 1970 جو کہ Contract Act, 1872 اور Transfer of Property Act, 1882 کے تحت بنے ان کی شقوں کی خلاف ورزی سے تحریر کیا گیا تھا۔ جو کہ بصورت دیگر جائز نہ تھا۔ اس لیے اُسے غیر قانونی، کالعدم اور جاری نہ رکھنے کے قابل قرار دیا گیا۔ مندرجہ بالا وضاحت کی روشنی میں Addendum No.1 مورخہ 04.03.2000, Option Agreement مورخہ 28.04.2000، اور Alliance Agreement مورخہ 03.04.2002 اور Novation Agreement مورخہ 01.04.2006 جو کہ CHEJVA کی بناء پر جاری ہوئے غیر قانونی اور کالعدم قرار دیئے گئے تھے۔ یہ مزید قرار دیا گیا کہ اُن

دستاویزات کی بناء پر BHP، MINCOR، TCC، TCCP، Antofagastaیا Barrick Gold میں درج شدہ معاملات کے بارے میں کوئی حق حاصل نہیں ہوگا۔آخر میں یہ قرار دیا گیا تھا کہ EL-5 کو تلاش کے مساوی قوانین اور ضوابط کی خلاف ورزی قرار دیا گیا کیونکہ TCCP کا دعویٰ CHEJVA کی بنیاد پر تھا جن دستاویز کو بذاتِ خود نا قابلِ عمل قرار دیا جا چکا ہے۔اس لیے تلاش سے پہلے اس پر یہ لازم ہے کہ اس کی قانونی حیثیت کی تصحیح کروائی جاتی۔
