IN THE SUPREME COURT OF PAKISTAN
(Original/Appellate Jurisdiction)

PRESENT

Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Rana Bhagwandas
Mr. Justice Javed Iqbal
Mr. Justice Abdul Hameed Dogar
Mr. Justice Muhammad Nawaz Abbasi
Mr. Justice Tassaduq Hussain Jillani
Mr. Justice Saiyed Saeed Ashhad
Mr. Justice Hamid Ali Mirza
Mr. Justice Karamat Nazir Bhandari

CONSTITUTION PETITION NO. 9 OF 2006 &
CIVIL PETITION NOs. 345 & 394 OF 2006

(On appeal from the judgment/order of High Court of Sindh at Karachi dated 30.03.2006 passed in Constitution Petition No.D-240 of 2006)

Const. P.9/2006
Wattan Party through its President … … Petitioner.

Versus

Federation of Pakistan,
through Cabinet Committee of Privatization,
Prime Minister Secretariat, Islamabad and others … Respondents.

CP.345/2006
Pakistan Steel Peoples Workers Union,
CBA through its Chairman … … Petitioner.

Versus

Federation of Pakistan,
through the Cabinet Secretary and others … … Respondents.

CP.394/2006
Federation of Pakistan,
through the Cabinet Secretary and others … … Petitioners

Versus

Pakistan Steel Peoples Workers Union,
through its Chairman & others … … Respondents

For the petitioner (in Const. P.9/2006) : Barrister Zafarullah Khan, Sr. ASC.
Raja Muhammad Akram, Sr. ASC
Assisted by Ms. Sadia Abbasi, Advocate.
Muhammad Habib-ur-Rehman, Adv.

For the petitioner (in CP.345/2006 and for Respt. No.1 in CP. No.394/2006)	:	Mr. Abdul Mujeeb Pirzada, ASC. Mr. M.S. Khattak, AOR.
On Court Notice (in Const. P.9/06 & for petitioner in CP.No.394/06)	:	Mr. Makhdoom Ali Khan, Attorney General for Pakistan. Assisted by Mr. Khuram M. Hashmi, Adv.
For respondent No.1 (in Const.P. No.9/06 & for Respt. No.2 in CP.No.345/06)	:	Mr. Abdul Hafeez Pirzada, Sr. ASC Raja Abdul Ghafoor, AOR Mr. Mehr Khan Malik, AOR Assisted by Mr. Hamid Ahmed, Adv. Mr. Sikandar Bashir Mohmand, Adv.
For respondent No.2&4 (in Const. P.9/2006)	:	Syed Sharifuddin Pirzada, Sr. ASC. Mr. Sulman Aslam Butt, ASC Mr. Mehr Khan Malik, AOR. Assisted by Ms. Danish Zubari, Adv. Mr. Waqar Rana, Adv.
For respondent No.3 (in Const. P.9 /2006 & For Respondent No.5 (in CP.345 /2006	:	Mr. Wasim Sajjad, Sr. ASC. Mr. Arshad Ali Ch. , AOR. Assisted by Mr. Idrees Ashraf, Adv. Mr. Ali Hassan Sajjad, Adv.
For respondent No.7 (in Const. P.9/2006)	:	Mr. Khalid Anwar, Sr. ASC. Mr. Kazim Hassan, ASC Mr. M.A. Zaidi, AOR. Assisted by Mr. Raashid Anwar, Adv.
For Respondent No. 4 (in CP.345/2006)	:	Mr. Anwar Mansoor Khan, AG (Sindh) Dr. Qazi Khalid Ali, Addl. AG (Sindh) Raja Abdul Ghafoor, AOR. Mrs. Afshan Ghazanfar, AAG
For the applicant (in CMA.1190/2006)	:	Mr. Ahmer Bilal Sufi, ASC. Mr. G.N. Gohar, AOR
Respondent No. 5 & 6 (in Const.P.9/06)	:	Nemo.
Respondent No. 2-3&5 (in C.P.345/06)	:	Nemo.
Respondent No.2-5 (in Const.P.394/06)	:	Nemo.
Dates of hearing	:	30th & 31st May, 1st , 5th to 8th, 12th to 15th 19th to 23rd June 2006.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – In the listed petitions, one petition has been filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan (hereinafter referred to as “the Constitution”), whereas two petitions are under Article 185(3) of the Constitution, which have arisen out of the judgment of the High Court of Sindh, Karachi dated 30th March 2006. As common question relating to the process of privatization of Pakistan Steel Mills Corporation (PSMC) is involved, therefore, we intend to dispose them of by means of instant short order.

2. Government of Pakistan (GOP) has 100% shares in PSMC which was established between the period from 1968 to 1984 with the collaboration of Russian Government. PSMC came into production in the year 1984-85 but statedly it could not prove to be a commercially viable project for many reasons including overstaffing, mismanagement, etc. On 29th May 1997, on the basis of summary, moved by Cabinet Division through Joint Secretary to the Cabinet, Council of Common Interest (CCI) approved its privatization. Statedly, idea of privatization was dropped in 1998 as per the statement filed on behalf of Chairman, PSMC. Relevant para there-from reads as under:--

> "The matter regarding privatization of PS has been under discussion for quite some time. Initially it had been taken up in 1998 but had been dropped and instead of privatization it was decided to undertake restructuring of the corporation. The matter regarding inclusion of initial public offering of PS (IPO) in privatization programme was taken up in the last quarter of 2004. It was proposed that an IPO be carried out with the assistance of Lead Manager, selected from PS's existing penal following a competitive process. Relevant modalities for the transaction, including the offer size, would be finalized in consultation with Ministry of Industries and production, Pakistan Steel Management and the Lead Manager and brought to the PC Board for its approval. The offer price, to be proposed by the Lead Manager, would also be submitted to the PC Board for making recommendation for consideration of the Cabinet Committee on Privatization (CCOP)."

The statement, so filed, also indicates that the above decision was followed by a decision for its restructuring in the year 2000.

3. It is an admitted fact that in order to achieve the object, Memorandums of Understanding were also singed by the Government of Pakistan with the Government of Russia on 6th February 2003 as well as with China. It seems that GOP arranged hefty loans for restructuring of PSMC, as a result whereof its profitability enhanced during the years 2002-2003, 2003-2004, and 2004-2005. Again the Cabinet Committee on Privatization (CCOP) vide its decision dated 11th April 2005 decided for its privatization. In pursuance of this decision, notices for Expression of Interest (EOI) were published in different news papers. One of them indicates the profitability of the PSMC, which is reproduced herein below :--

> "In the fiscal year 2004-05 PSMC has recorded annual sales of over Rs.30 billion and net profit of Rs.6 billion"

In pursuance of above EOI, 19 parties applied for pre-qualification out of which, following nine were qualified :--

1. Aljomaih Holding Company (Saudi Arabia)
2. Al-Tuwairqi Group (Saudi Arabia) and Arif Habib Group (Pakistan)
3. Azovstal Steel/System Capital Management (Ukraine)

4. Government of Raz Al Khaimah (UAE)

5. International Industries Ltd. (Pakistan) and Industirla Union of Donbass (Ukraine)

6. Magnitogorsk Iron & Steel Works Open JSC (Russia)

7. Nishat Mills Ltd. And D.G. Khan Cement Co. Ltd (Pakistan)

8. Noor Financial Investment Co. (Kuwait)

9. Shanghai Baosteel Group Corporation (China)

In the meantime, M/s Citi Group was appointed as Financial Advisor (FA) for the purpose of evaluation of the assets of the PSMC. In the terms of reference, following guidelines were provided to the FA:--

> "The objective is to apply various internationally accepted valuation techniques to obtain a valuation range for PSMC as a going concern. The valuation model will take into account the capital expenditure and earning projects, costs and other business considerations. The model will be used to undertake a sensitivity analysis in order to highlight the impact of changes in different variables, such as gross product margins, rate of custom duty on import of iron. A valuation based on comparative pricing analysis will also be prepared. Inputs of the valuation model and valuation methodology will be reviewed with the PSMC management."

4. It is important to note that the Board of Privatization Commission (BOPC) had observed in its meeting dated 30th March 2006 that the land underneath the PSMC should also be included while evaluating the assets, etc. of the PSMC. On completion of the process of the evaluation, the BOPC recommended sale of the shares @ **Rs.17.43** per share. FA submitted final report on 30th March 2006, which was considered statedly by the BOPC and it recommended that the share of the PSMC be sold @ **Rs.17.43** per share. Relevant contents of the report are reproduced herein below :---

> "The Board of Privatization Commission considered the valuation carried out by the FA as well as the replacement cost of the plant and recommended total value of PSMC at US$ 500 Million. Based on this, the Reference price for 75% strategic stake would be US$ 375 Million i.e. Rs.17.43 per share calculated at the rat of Rs.60 per US$ (total shares being divested are 1,290,487,275)"

On the very next day, CCOP determined the reference price of the share @ Rs.16.18 less than the value suggested by Privatization Commission @ Rs.17.43 per share, whereas final bid was accepted @ Rs.16.80 per share.

5. It may also be noted that as against the above price, the GOP as well as Privatization Commission has extended following benefits to the purchaser:-

i) The stock in trade in the Unit worth about **<u>Rs.10 billion,</u>** to be handed over to the purchaser.

ii) The cash worth about Rs.8.559 billion lying in its account, out of which post dated cheques of about **Rs.7.67 billion** have already been issued to clear the liability of loans, which were due from the year 2013 to 2019.

ii) The Tax of Rs.3 billion has already been paid, out of which **Rs.1 billion** will be refunded to the purchaser on taking the possession of the Unit.

iv) Total loss to Government in this way works out to **Rs.18 billion (net) [7.67+10.00+1.00].**

v) Above all, the Government has accepted the liability to pay compensation of about **Rs.15 billion** to the worker as Golden Hand Shake Scheme, which will be another loss to the State.

6. It is to be noted that in the meantime, out of pre-qualified parties M/s Arif Habib Group of Companies and M/s Al-Tuwairqi Group of Companies entered into a consortium before the bidding process, whereas third party M/s Magnitogorsk Iron and Steel Works, Russia joined hands with the consortium on the day of bidding. The bid offered by this consortium was found to be higher than the bid of other competitors, as such the same was accepted and Letter of Acceptance (LOA) was issued on the same day i.e. 31^{st} March 2006, followed by the agreement dated 24^{th} April 2006.

7. On 15^{th} May 2006, when the Constitution Petition No.9/2006 under Article 184(3) of the Constitution was filed, notices were ordered to be issued to the respondents. Attorney General for Pakistan was also requested to assist the Court.

8. It may also be noted that Letter of Acceptance was challenged by Pakistan Steel Peoples Workers Union CBA, by invoking the jurisdiction of the High Court under Article 199 of the Constitution. The same was disposed of by means of short order dated 30^{th} March 2006, which is reproduced herein below:--

> "For reasons to be recorded later, we are of the view that he Provisions of Article 154 are mandatory and the functions of the Cabinet under the Privatization Ordinance 2000 ought to be performed by the Council of Common Interests. Nevertheless in view of the fact that the Provincial Govt: has consented to the Privatization of the Respondents No.5 and other facts and circumstances. We are not persuaded to exercise discretionary jurisdiction under Article 199 for the purpose of issuing any direction in respect of the respondent No.5. The petition stands disposed of."

It may be noted that although petition was disposed of but the relief was not granted.

9 We have heard learned counsel for the parties at great length, in view of the importance of the matter. After due deliberations and taking into consideration the issues involved therein in depth, by means of instant short order, which will be followed by detailed reasons later, it is held and directed as follows:---

1. Conscious of the mandate of Article 153 and 154 of the Constitution, we hold that the establishment and working of the Council of Common Interest (CCI) is a cornerstone of the Federal structure providing for protection of the rights of the Federating units. Mindful that this important institution is not functioning presently and taking note of the statement made by the counsel for the Federal Government Mr. Abdul Hafeez Pirzada that the process for making it functional is underway, we direct the Federal Government to do the needful expeditiously as far as possible but not later than six weeks.

2. The approval for the privatization of Pakistan Steel Mills Corporation by the Council of Common Interests on 29th May 1997 continues to hold the field. But in view of the developments having taken place during the intervening period and the divergent stand taken by the counsel for the Federal Government to the effect that the afore-referred order was never recalled and the stand taken by the counsel for the P.S.M.C. that the matter of its privatization was dropped subsequently, by way of propriety, it would be in order if the matter is referred to the Council of Common Interest (C.C.I.) for consideration.

3. The Privatization Commission Ordinance No. LII of 2000 is not ultra vires of the Constitution.

4. While exercising the power of judicial review, it is not the function of this Court, ordinarily, to interfere in the policy making domain of the Executive which in the instant case is relatable to the privatization of State owned projects as it has its own merits reflected in the economic indicators. However, the process of privatization of Pakistan Steel Mills Corporation stands vitiated by acts of omissions and commissions on the part of certain State functionaries reflecting violation of mandatory provisions of law and the rules framed there-under which adversely affected the decisions qua prequalification of a member of the successful consortium (Mr. Arif Habib), valuation of the project and the final terms offered to the successful consortium which were not in accord with the initial public offering given through advertisement.

10. For the foregoing reasons, the Letter of Acceptance (LOA) dated 31st March, 2006 and Share Purchase Agreement dated 24 April, 2006 are declared as void and of no legal effect.

The petitions are accordingly disposed of with no order as to costs.

Islamabad,

23.06.2006.

Irshad /*

APPROVED FOR REPORTING