IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE EJAZ AFZAL KHAN

Const. Petitions No. 5 & 15 of 2004, C.M.A. No. 4251/2011 & H.R.C. No. 14144-S of 2009

Dr. Akhtar Hassan Khan	Petitioner (in Const. P. 5/2004)
Watan Party through its President	Petitioner (in Const. P. 15/2004)
Application by Amjad Ali	Petitioner (in H.R.C. 14144-S/2009)

Versus

Federation of Pakistan and others	Respondents (in Const. Petitions)

For the petitioner: [in Const. P. 5/04)	Mr. M. Ikram Ch., Sr. ASC
For the Petitioner: (in Const.P.15/04)	Barrister Zafarullah Khan, Sr. ASC
For Respondent 2: (in Const.P.5/04) & For Respondent 3 (in Const. P.15/2004)	Ch. Aitzaz Ahsan, Sr. ASC Assisted by Mr. Faisal Qausain Naqvi, Adv. Barrister Gohar Ali Khan, Adv. Mr. Arshad Ali Chaudhry, AOR
For respondent No.3 (in Const.P.5/04) & For respondent No.5 (in Const.P. 15/04)	Mr. Makhdoom Ali Khan, Sr. ASC Mr. M.S. Khattak, AOR assisted by Saad Hashmi, Adv.
For Respondent No.4 (in Const.P.5/04) & For Respondent No.6 (in Const. P. 15/04)	Mr. S. M. Zafar, Sr. ASC Syed Ali Zafar, ASC Raja Abdul Ghafoor, AOR assisted by Talib Hussain, Adv.
For respondents 7-23: (in Const.P.5/04)	Syed Iftikhar Hussain Gillani, Sr. ASC

For respondent No.1: (in Const. P. 5/04 & Const. P.15/04)	Maulvi Anwar ul Haq, Attorney General for Pakistan.
Date of hearing:	27.10.2011, 21, 22, 23, 24, 28, 29 November, 2011

JUDGMENT

Tassaduq Hussain Jillani, J.- Privatization of Habib Bank Limited [hereinafter referred to as the "HBL"] effected through open bidding held on 29.12.2003 has been challenged through these two petitions filed under Section 184(3) of the Constitution of Islamic Republic of Pakistan. Having heard learned counsel for the parties at length, the issues which crop up for consideration broadly are as follows: -

i) Whether the privatization of HBL was carried out in utter haste and on the desire of the International Monitory Fund?

ii) Whether the procedure adopted to privatize HBL was tainted with *mala fides* and violative of the provisions of Privatization Commission Ordinance and the Rules framed there under?

iii) Whether the approval of the highest bidder AKFED by the Cabinet Committee on Privatization in its meeting held on 1.1.2004, was an improper exercise of discretion and amenable to interference in accord with the well

recognized principles of judicial review of administrative action;

iv) Whether injecting an amount of Rs. 17.7 billion in HBL and thereafter offering it for privatization was an act of financial mismanagement of a financial institution causing loss to the public ex-chequer and against the best practices? and

v) Whether the petitioners have locus standi to challenge the privatization of HBL?

2. Facts giving rise to these petitions briefly stated are that the decision to privatize HBL though taken in 1995, but a decisive step culminating in its sale was taken in the year 2000, when the Privatization Commission Ordinance was promulgated and the Privatization Commission [hereinafter to be called the 'P.C.'] appointed an accountancy firm of Pakistan AF Ferguson as the Financial Advisor for valuation of the HBL. It invited Expressions of Interest [hereinafter referred to as the "EOIs'] from prospective bidders in June 2002 but on account of sluggish response, the process was called off. In the following year (April 2003), the PC again called for EOIs and this time 19 parties submitted EOIs followed by submission of Statements of Qualification [hereinafter referred to as the 'SOQs']. The SOQs of the bidders were examined by a Pre-qualification Committee and

these bidders were also granted access to the Data Room prepared by the Bank and the PC. It was opened on September 8, 2003 and closed on 21st of November, 2003. However, only three parties entered the Data Room to conduct due diligence.

3. In November 2003, with a view to provide further incentive to the prospective bidders, the PC decided that while bidders would be required to bid for 51% of the issued and paid up capital of the Bank, they would also have the option of either purchasing the entire 51% stake at once or first to acquire a 26% or more stake with management control and then pay for the remaining stake within a period of not exceeding two years. The reference price recommended by the Financial Advisor (AF Ferguson & Co.) was Rs. 20.609 billion for the value of government stake of 51% in the Bank which was being invested. However, this reference price was revised by the PC itself and fixed at Rs.22.143 billion in its meeting held on 26th of December 2003. This price was later approved by the Cabinet Committee on Privatization [hereinafter to be referred to as the 'CCOP'].

4. The Pre-qualification Committee formed by the PC in its meeting dated 20th of December, 2003 permitted three potential bidders to participate in the bidding process. Agha Khan Foundation for Economic Development [hereinafter referred to as the "AKFED"] was declared the highest bidder in the bidding for

sale of 51% shares of HBL held on 29.12.2003 and it was higher than the reference price of Rs.22.143 billion.

5. The State Bank of Pakistan also provided their clearance for declaring AKFED as successful bidder vide letter dated 31st December 2003. The CCOP accepted the recommendation of the PC in its meeting held on Ist of January 2004. AKFED then paid the initial sale price and entered into an agreement on 26th of February 2004 with the PC and the State Bank of Pakistan for the purchase of 51% share of the government stake in Habib Bank Limited and for taking over the management of the HBL.

6. Petitioner Dr. Akhter Hassan Khan (in Const. P. No. 5 of 2004) is a former Federal Secretary Planning, Government of Pakistan. According to him, the process of bidding was not transparent; that prior to bidding (dated 29th of December 2003) on 23.12.2003, the Economic Coordination Committee of the Cabinet [hereinafter referred to as the "ECC"] decided to make Habib Bank attractive for privatization. The ECC approved issuance of bonds amounting to Rs.9.84 billion against income tax funds due to the HBL. The Ministry of Finance also advised transfer of Rs. 9.00 billion of HBL's bad debts to the Corporate and Industrial Restructuring Corporation [hereinafter referred to as the "CIRC"] and in this way a benefit of Rs.18.84 billion were given to the Habib Bank after short listing of three bidders.

According to him if these benefits had been announced before the Expression of Interest, the response would have been much greater and multinational banks would have expressed interest. His learned counsel Mr. Muhammad Ikram Chaudhry, ASC contended as follows:-

(i) that the net assets of the HBL valued more than the highest bid at which it has been sold;

(ii) that in the year 2003 it had 1425 branches in Pakistan and 48 branches in 26 countries of the world including USA, UK, France, Germany, Saudi Arabia and UAE and had a staff of 17000 employees. The good will of the bank can be gauged from the fact that at the time of privatization, it had 20% of the overall business in the banking sector with subsidiary companies;

(iii) that good will of the bank, the value of movable and immovable properties as also assets were not correctly valued by the Financial Advisor and the decision was taken in posthaste by the Privatization Commission and the CCOP in violation of the Privatization Commission Ordinance, the Rules and other relevant laws;

(iv) that it is on record that respondent No. 5 (Central Insurance Co. Ltd) could not manage

the earnest money of U.S Dollars 20 Million and respondent No. 6 (State of Qatar) were not found up to the mark having proposed a bid of Rs.21.09 billion in comparison to the successful bidder's bid of Rs.22.4 billion. If this was the state of affairs, the Privatization Commission should have restarted the process of inviting parties for fresh bidding process as contemplated in the Privatization Commission Ordinance 2000, Privatization Commission Valuation of Property Rules, 2001 and Privatization Modes Procedure Rules 2001;

(v) that the appointment of AF Fergusan and others etc was flawed because the procedure adopted for appointment of Financial Advisor and other consultants was violative of the Privatization Commission Ordinance, 2000 and the Rules/Regulations framed thereunder;

(vi) that the method of valuation adopted by AF Fergusan and Co. as DDM was not suitable as it caused huge financial loss to public at large and Pakistan. The decision taken to sell 5% shares by public offering in the case of National Bank of Pakistan, OGDC, SSGC having multiple response

could have been replicated in HBL. The sale of its shares could have brought a huge money of Pakistanis residing abroad (which in the present case would not be) and it would have also given fresh impetus and a better and positive idea to correctly evaluate the assets of HBL including goodwill and a base for determining better Reference Price;

(vii) that the decision of Privatization Commission and CCOP seems to be made in posthaste as most of the proceedings are relatable to specific dates i.e. in a short span of time bidders entering the data room, on or before 21.12.2003, final reference price approved by December 26, 2003 bidding on 31.12.2003, approval of the final bid of AKFED on 1.1.2004. It is humanly impossible to go through all the details/documents, in merely 8 days or so to arrive at a decision of approval by CCOP on December 17, 2003 and the steps taken thereafter for appointment of advisors, consultants and valuation of the assets etc of HBL were also done in a hurried manner. The enhancement of sale of shares from 26% to 51% was also not publicized in the manner

required by law and till 23rd December, 2003, Rs. 9.84 billion investment made by issuance of bonds and also transfer of bad debts of Rs.9 billion of HBL to CIRC as referred in the preceding paras were also not earlier, or thereafter advertized to the public which could have brought more money. It is evident from the record as well that IMF and World Bank pressure was also cause of hasty and under valued sale of HBL of course violated the law as well;

(viii) Dilating on the financial worth of the HBL, learned counsel placed on record the following table of the yearly profit of the bank (after privatization) indicating that respondent AFKED had recovered the entire sale price of Rs.22.4 billion in a period of five years. The table is given below:-

Year	**Profit before tax**	**Profit after tax**	**AKFED Share of**
2004	7,163	5,679	2,896
2005	13,834	9646	4,919
2006	18840	12700	6477
2007	13127	8041	4100
2008	15855	10000	5100/23492
2009	21000	13400	6834

(ix) that the real worth of HBL is evident from the fact that the Government in October 2007

decided to sell 7.5% shares of the HBL in the market and they fetched Rs.12.61 billion. Calculated at this price, the value of 51% share, according to him, comes to Rs.82.7 billion instead of 22.4 billion for which it was sold. He referred to the World Bank Paper No. 403 by Mr. Dick Welch Oliver Fremond titled as "The Case-by-Case Approach to Privatization Techniques and Examples" to contend that the Privatization Commission should have conducted the privatization process in accord with the recommendations of such competent academics who have expertise in the field and in the afore-referred paper, he has proposed various steps for a credible process of privatization.

7. Learned counsel for the petitioner, Barrister Zafarullah, ASC in Constitution Petition No. 15 of 2004 in addition to the contentions which in substance were similar to the ones canvassed by petitioner's learned counsel in Constitution Petition No. 5 of 2010 argued as follows:-

(i) that the process of privatization has not been transparent inasmuch as although Section 23 of the Privatization Ordinance, 2000 specifically

mandates that advertisements for Privatization will be placed in newspapers with an "international circulation", the respondent-PC placed the advertisements in Statesman of India, Express, Nawa-i-Waqt, Dawn, Frontier Post, the News, Jang in Pakistan; Arab News of Jeddah and Khaleej Times of UAE. The advertisements in Pakistani newspapers were large and in some detail whereas advertisements in foreign newspapers were short and cryptic;

(ii) that AKFED had offered the highest bid of Rs. 22.409 billion or Dollars 350 million for 51% shares and QSCEAI offered Rs. 21.99375 billion which indicates very marginal difference between the two bids and it could be termed as collusive i.e. based on previous arrangements between the parties since QSCEAI joined the sale proceedings later on. The bid was confirmed by CCOP within forty eight hours which was unholy haste;

(iii) that the two bidders, neither had any experience of owning or managing an operation as expansive as the HBL, in such a situation, a prudent course would have been to postpone the

sale so as to analyze and ascertain the reasons behind this lack of interest and to take corrective measures so as to make the Bank and Pakistan's investment climate more attractive. Instead by processing this complex transaction within 48 hours on the strength of only two bids, it has created the impression of not only distressed sale but also not completely above board;

(iv) that with the control of HBL in selected geographical areas, the AKFED will be in possession of a combination of financial power and mind controlling influence like East India Company; that after privatization a new branch of HBL was immediately opened in Afghanistan i.e. the hub of terrorism which is unfortunate and the possibility cannot be ruled out that other interested actors in Afghanistan can infiltrate and misuse the organization for non-commercial objectives;

(v) that this is not surprising that AKFED's core competence is that for profit development urgency creating economic capacity and opportunity and is region specific in the

developing world. Apart from this there is reason for concern on two other counts:-

(i) The new Board (Privatization Commission Board) was unable to successfully resist political pressure or stay aloof of crony capitalism. Already there are ethical problems with AKFED nominees on board, one being closely connected with security brokerage i.e. a Financial Advisor to the PC and other being Legal Advisor to several corporate borrowers of HBL.

(ii) In Pakistan the AKFED is known too deeply involved in executing the educational reforms with an agenda in the wake of post 9/11 developments.

(vi) that in any case the net result of restructuring by the Privatization Ministry's Financial Advisor leaves the people of Pakistan out of pocket by Rs.14 billion when it is realized that Rs.17.7 billion of public money was injected by the State Bank of Pakistan to "fill a hole" in HBL's balance sheet and further in December 2003, just week before the bidding, the Finance Ministry first authorized transfer of Rs. 9.00 billion of HBL bad debts to the CIRC (Corporate Industrial Restructuring Corporation) and then issued another 9.00 billion rupees worth of bonds to cover a tax liability to CBR now FBR this all

amounts to Rs.27 billion to get Rs.22.4 billion only for sale of HBL.

8. Learned counsel for the applicant, Mr. Iftikhar Gillani in CMA No. 742 of 2011 who wanted to be impleaded as party as he represents ex-employees of HBL who were laid off during the process of downsizing by various modes including the golden handshake scheme also questioned the transparency of the entire exercise of privatization and in addition to the submissions which were similar to the one's made by learned counsel for the petitioners in the connected petitions, contended as follows:-

(i) that the privatization of the Bank was undertaken on the dictation of IMF. The Memorandum of Economic and Financial Policies for January-June 2003 states in Para 23 that potential investors in HBL have been pre-qualified and have started due diligence and bidding will take place in December. The bidding did take place on 29th December, 2003 in compliance with the undertaking given to the IMF;

(ii) that on 23rd December, 2003 a few days before the bidding the government decided to issue bonds worth 9.84 billion against the taxation

liability of the Bank to get it ready for privatization and in the same month the Finance Minister authorized transfer of Rs.9.00 billion of the bank's bad debts to the CIRC (Corporation Industrial Restructuring Corporation), besides Rs. 17.7 billion were injected by the State Bank of Pakistan to "fill a hole" in the Bank's balance sheet. Thus Rs. 36.84 billion; and the AKFED has recovered the entire sale price of Rs.22.4 billion in five years. This is a very short period in the life of a bank or any other service industry because in such institutions there is very little depreciation and the normal pay out period is about 15 years or even more.

9. Learned counsel for the PC, Mr. Aitzaz Ahsan, ASC defended the privatization of HBL and submitted as follows:-

(i) that these petitions have been filed under Article 184(3) of the Constitution which are not maintainable as neither any question of public importance with reference to enforcement of fundamental rights is involved nor the judicial review is tenable in policy making domain of the executive authority;

(ii) that the policy decision to privatize the strategic assets taken by the competent authority in the Federal Government cannot be assailed as the courts in exercise of power of judicial review have refrained from interfering in this domain;

(iii) that the petitions have raised multiple disputed questions of fact entailing factual enquiry which exercise cannot be undertaken in a Constitution petition;

(iv) that the argument that HBL should not have been privatized once it had become a profit-earning enterprise is inherently flawed. If accepted, the logic of the argument would mean that an institution can never be privatized because if it is making losses, very few will be interested in buying it. More seriously, the fundamental argument behind privatization is that the private sector can be more reliably depended upon as a source of profits than the public sector. Thus, the decision in relation to the privatization of an asset is really a decision as to which mode of operation or control is likely to provide results in the long run. And, from that

perspective, it is submitted that the results are clear:

1) It is not in dispute that the nationalization of the banks in Pakistan caused financial havoc and the destruction of a once-proud industry.

2) HBL was indeed rescued from collapse through a massive effort by the Government of Pakistan but the effort and the cash injections required were not a sustainable commitment from the Federal Government's perspective.

3) By comparison, HBL, since privatization, has only gone from strength to strength as can be seen from its annual reports. The privatization of HBL has thus caused no loss to the nation but has instead greatly benefited it.

4) More specifically:

   (a) The net assets of HBL in the year 2008 were worth Rs.66.3 billion and the net profit (before taxation) was Rs.16.9 billion (USD 200.9 million (in contrast to USD 52 million in June 2003).

(b) Similarly, the net assets of HBL in the year 2009 were worth Rs.84.3 billion and the net profit (before taxation) was Rs.21.3 billion (USD 253.8 million).

(v) The privatization of HBL has been a huge financial success from the perspective of the Federal Government:

(1) As of 31.12.2003, the accumulated losses of HBL were Rs.13 billion.

(2) From 2004 till date, the Federal Government has made a profit of Rs.60.5 billion from HBL (inclusive of tax receipts, dividends and income from sale of shares).

(vi) that the allegations leveled by the Watan Party against the Ismaili community are despicable, based on communal hatred and deserve to be censured. They are also entirely unsustainable. Other international banks operating in Afghanistan include the National Bank of Pakistan and Standard Chartered Bank, neither of which has ever been accused of patronizing terrorism by virtue of a branch in Kabul;

(vii) that the process of privatization of HBL does not reflect an undue haste as it commenced in the

year 1995 and decisive decision was taken in 2003;

(viii) that the privatization of the Bank was part of an overall policy decision taken by the Federal Government to dispose of State owned enterprises and the first step in this regard was the establishment of Privatization Commission in the year 1991 for supervision and oversee of the disposal of State owned enterprises;

(ix) that nationalized banks were privatized because they were no longer profit bearing enterprises; that balance sheet reflected losses on account of overstaffing, over-branching, huge portfolios of non-performing loans, poor customer services, under-capitalization, poor management and undue interference in lending and recovery of loans; that the banks and financial institutions privatized during the period in question are as follows:

(i) In April 1991, 26% of the shares of Muslim Commercial Bank Limited in April 1991 were sold to the National Group.

(ii) In September 1991, 26% of the shares of Allied Bank of Pakistan Limited were sold to the Allied management Group.

(iii) Bankers Equity Limited was privatized in 1996.

(iv) Habib Credit & Exchange Bank Limited (presently Bank Alfalah Limited) was privatized in June 1997.

(v) United Bank Limited was privatized in October 2002.

(x) that the privatization of HBL was a careful bipartisan exercise which commenced in 1995 and completed in 2004. During this period, where steps were taken by successive Governments (detailed breakup is given in concise statement) culminating ultimately in the approval by the CCOP of the highest bid on 15th of January 2004 reflect that the process was bipartisan and in accordance with the Privatization Ordinance and the Rules framed thereunder.

(xi) In support of the submissions made, learned counsel relied on:

(1) Suo Moto Case No. 10 of 2007 (PLD 2008 SC 673 & 689)

(2) Gatron (Industries) Limited v. Government of Pakistan (1999 SCMR 1072).

(3) All Pakistan Newspapers Society v. Federation of Pakistan (PLD 2004 SC 600).

(4) Syed Zulfiqar Mehdi v. Pakistan International Airlines Corporation (1998 SCMR 793 at 801).

10. Mr. Makhdoom Ali Khan, learned counsel for HBL also filed a detailed concise statement narrating the history of the institution; its corporate profile; how it was ranked as one of the largest Banks in Asia prior to privatization; how the nationalization of the institution in 1974 reduced its market share from 15 to 18%; why it was deemed appropriate by the Federal Government to privatize it; how the process initiated in 1995 got delayed; why various attempts to privatize it remained abortive; and the various steps taken from 2002 to approval of the final bid and signing of the share-purchase agreement in February 2004 reflect due diligence, transparency and a continued object to ensure that the ownership of this important national strategic asset does not go in the hands of buyer who does not have credible credentials. Explaining the rationale of the establishment of Corporate and Industrial Restructuring Corporation [hereinafter referred to as the "CIRC"] he argued that this corporation was established to plug the holes in various

banks/financial institutions. The portfolio of non-performing loans in HBL had become huge and unless the State had intervened, it would have collapsed and thereby would have led to the economic meltdown in the country. Under this scheme, the HBL in 2001 transferred 22 non-performing loans worth Rs.309.815 million to CIRC followed by transfer of 69 loans worth 894.587 million in 2003. These loans were transferred back and various other amounts were also adjusted by mutual consent and an amount of Rs.994.076 million was paid to HBL by CIRC on 18.9.2006 through letter bearing No. CIRC/MF-MA3665. Defending the issuance of bonds by the Federal Government against the latter's admitted liability of refunding the tax which were collected in excess of what was due from HBL, learned counsel submitted that this liability was a matter of record and no exception could be taken to it. This was a sensible decision taken by the Federal Government to maximize the privatization value of HBL; all the bidders had been informed about the transfer of non-performing assets to CIRC and they had accordingly factored this development into their bid values.

11. Repelling the argument of petitioners that the Government had sunk Rs.17.7 billion into HBL and then sold it for Rs. 22.409 billion at a loss of Rs.4.4. billion, learned counsel contended that if the Federal Government had not contributed Rs. 17.7 billion to recapitalize the HBL, it would have been close

to bankruptcy. This financial bail out, he argued was not unique in Pakistan but the governments world over in the 1980s injected billions of dollars to save their financial and banking institutions and thereby stalled the process of further deterioration of economies. In this regard, he referred to the two recent books titled, *'Beyond the Crash'* authored by former Prime Minister of UK Mr. Gordon Brown and the book titled, '*On the Brink'* authored by Mr. Henry M. Paulson, Jr., former US Treasury Secretary, whereby the authors explain various steps taken by these countries to assist the banks and economy. A special law was enacted to save these financial institutions called the Troubled Assets Relief Program and a sum of US Dollars 150 billion were given to five banks alone to keep them afloat. Defending the mode of valuation of the bank by the Financial Advisor, learned counsel submitted that Discounted Dividend Model (DDM) takes into account, *inter alia*, the potential development of the entity/financial institution and its capacity to generate income in the future. The DDM took into account the revised business plan till the year 2009 developed by the FA for HBL. Even in valuating UBL prior to its privatization, DDM method was adopted. While conducting valuation, the FA took into account the decision of the Federal Government to issue bonds to HBL aggregating (i) Rs. 9.804 billion in respect of tax refunds; (ii) Rs. 2.247 billion in respect of public sector debts; (iii) transfer

of non-performing loans having a book value of Rs.1.283 billion to CIRC; and (iv) the impact of additional provisioning in the sum of Rs.6.2 billion. If these factors had duly been taken into consideration in valuating HBL then it cannot be dubbed as flawed or tainted. The determination of reserved price as recommended by the FA, by the PC and its Board and its approval by the CCOP, therefore, cannot be regarded as arbitrary or collusive.

12. Mr. S.M. Zafar, learned counsel for the AKFED submitted that a careful study of the various steps taken by the Federal Government and the PC to privatize HBL would indicate that the entire process was carried out strictly within the parameters of law i.e. the Privatization Commission Ordinance, 2000 and the Rules/Regulations framed thereunder. He submitted that respondent AKFED was the highest bidder in open bidding; that it had the most credible corporate profile and a history of service in the developing countries including Pakistan in the realm of social and economic sectors. It is an international development agency dedicated to promoting private initiative and building economically sound enterprises, primarily in the developing countries. He recounted services of Sir Sultan Mohamed Shah, Agha Khan III towards the establishment of Pakistan and how the family after the creation of this country worked for the wellbeing of the nation, his services in the area of

health and education and how His Highness Agha Khan has upheld the laudable traditions of his grandfather. He in particular made reference to the creation of the pioneering institutions such as Agha Khan University in Karachi and the Agha Khan Rural Support Program (AKRSP). The latter program, he contended, has transformed rural lives in the poor and remote areas of Northern Pakistan. Under the aegis of Agha Khan Development Network, about 185 schools and centers of learning impart education to almost 40,000 students in the country and around 200 health units and hospitals operate across Pakistan, serving its population in the rural as well as urban areas. He added that after the nuclear explosion in 1998 and the tragedy of 9/11, Pakistan was confronted with serious political economic, and law and order crisis which had a damaging effect on foreign investment. The global investors were reluctant to invest in Pakistan. In the wake of such a crisis, it was a conscious decision on the part of AKFED to participate in the privatization process so as to send a positive signal to the rest of the world that such a premier institution was ready to invest and was willing to take the challenge of contributing its bit towards country's development. It was on account of purchase of the HBL by AKFED that former's financial ranking has registered a steep rise and now it has become a thriving profit making venture and is among the best run banking institutions world wide. No wonder

the HBL received the Best Bank Award by Global Finance (2008), Best Bank Emerging Markets by Global Finance (2008), Best Bank of the Year by the Banker (2009), Best Bank-Pakistan by Global Finance (2009), Global Finance Award for the World's Best Emerging Market Bank in Asia (2010), Global Finance Award for Best Bank in Pakistan (2010), Global Finance Award for World's Best Trade Finance Bank 2011, among other such awards.

13. He also alluded to the Financial Statements of the year ending 2010 of HBL which indicate that it is being run in a professional manner; that its profits have tripled since privatization; that it has paid Rs.46.760 billion in taxes since privatization (this being higher than the total for 20 years of tax payments before privatization) and has paid Rs.6.332 billion in dividends to the government since privatization. Oblivious of the afore-referred facts and the remarkable performance of HBL, the petitioners, he lastly contended, have attempted to invoke Article 184(3) of the Constitution to destroy a valid legal transaction which has not only resurrected a crumbling banking institution but also has added strength to country's economy.

14. We have given anxious consideration to the submissions made by learned counsel for the parties, have gone through the precedent case law cited at the bar as also the concise statements submitted by the parties and proceed to dilate on the broad questions framed in terms as follows:

Question No. 1: Whether the privatization of HBL was carried out in utter haste and on the desire of the International Monitory Fund?

15. This issue of necessity would entail a reference, though briefly to the history of HBL, its nationalization and the genesis of its privatization. The HBL was established in 1941 in Bombay and after the creation of Pakistan, it shifted its head office to Karachi and in a short span of time became one of the largest and successful banking institutions in the country. However, in 1974, it along with several other Banks was nationalized through promulgation of the Banks (Nationalization) Act, 1974. After nationalization, there was a financial crunch in the banking sector on account of various factors which is manifest from the fact that the portfolio of non-performing loans in this sector grew from 25 billion to 198 billion in the period from 1989 to 1998. After the military takeover in 1977, the Nationalization Policy was reviewed which is reflected in the Transfer of Managed Establishments Order, 1978. In 1991, the Federal Government brought certain amendments in the Banks (Nationalization) Act, 1974 with a view to sell its share in the capital of nationalized banks. In 1995, for the first time the Federal Government seriously examined the issue of privatization of the Bank, a summary was initiated, report was requisitioned from the Bank which among other things included taking ways

and means to improve the performance of the Bank so as to make it a profit earning enterprise rather than a loss making entity for sale. The process was however delayed and it was in December 1998 that the Privatization Commission invited the Expressions of Interest in relation to sale of 26% shares of the Bank and eight parties submitted the EOIs. The PC called for Statement of Qualification [hereinafter referred to as the "SOQ"] from potential bidders. However, this process had to be abandoned in view of the military takeover in October 1999. In the year 2000, the Privatization Commission Ordinance was promulgated to provide a legal regime to the privatization process and the PC appointed an accountancy firm of Pakistan AF Ferguson as the Financial Advisor for this exercise. The PC once again invited EOIs from prospective bidders in June 2002 and received 10 EOIs which was followed by soliciting SOQs from the bidders by 15th of August, 2002 but only four parties submitted their SOQs. Not satisfied with the response, the PC once again called for EOIs in April 2003 and this time 19 parties submitted EOIs followed by submission of SOQs. The SOQs of the bidders were examined by a Pre-qualification Committee and these bidders were also granted access to the Data Room prepared by the Bank and the PC. The Data Room was a physical space, had a sizeable location as well in which all the relevant information regarding the Bank and its assets were made available so that

the bidders could carry out due diligence at their end. It was open on September 8, 2003 and closed on 21st of November, 2003. However, only three parties entered the Data Room to conduct due diligence.

16. In November 2003, the PC decided that while bidders would be required to bid for 51% of the issued and paid up capital of the Bank, they would also have the option of either purchasing the entire 51% stake at once or first to acquire a 26% or more stake with management control and then pay for the remaining stake within a period of not exceeding two years. The Pre-qualification Committee formed by the PC in its meeting dated 20th of December, 2003 permitted three potential bidders to participate in the bidding process and those are:-

(i) Agha Khan Foundation for Economic Development [hereinafter referred to as the "AKFED"];

(ii) Consortium of Central Insurance Company Limited [hereinafter referred to as the "CCIC"]; and

(iii) Government of Qatar through the Supreme Council for Economic Affairs and Investment [hereinafter referred to as the "QSCEAI"].

17. The reference price recommended by the Financial Advisor (AF Ferguson & Co.) was Rs. 20.609 billion for the value of government stake of 51% in the Bank which was being invested. However, this reference price was revised by the PC itself and fixed at Rs.22.143 billion in its meeting held on 26th of December 2003. This price was later approved by the CCOP.

18. Bidding for the sale of 51% shares was held on 29.12.2003 but only two parties i.e. AKFED and QSCEAI submitted the bidding documents and the earnest money. The highest bid was received from AKFED and was accepted by the PC in its meeting on 30th of December, 2003 as it found it to be higher than the reference price of Rs. 22.143 billion. The State Bank of Pakistan also provided their clearance for declaring AKFED as successful bidder vide letter dated 31st December 2003. The CCOP accepted the recommendation of the PC in its meeting held on Ist of January 2004. AKFED then paid the initial sale price and entered into an agreement on 26th of February 2004 with the PC and the State Bank of Pakistan for the purchase of 51% share of the government stake in Habib Bank Limited and for taking over the management of the HBL.

19. It is not disputed that the privatization of HBL was part of the overall policy of privatization whereby several financial institutions were disinvested to shore up their financial

viability. Some of these institutions whose privatization preceded that of HBL are as under: -

i) In April 1991, 26% of the shares of Muslim Commercial Bank Limited were sold to the National Group.

ii) In September 1991, 26% of the shares of Allied Bank of Pakistan Limited were sold to the Allied Management Group.

iii) Bankers Equity Limited was privatized in 1996.

iv) Habib Credit & Exchange Bank Limited (presently Bank Alfalah Limited) was privatized in June 1997.

v) United Bank Limited was privatized in October 2002.

20. The afore-referred narration of the process of privatization in general and of HBL in particular would show that the impugned privatization was neither done in utter haste nor it was institution specific.

21. The decline in financial worth of the bank can be gathered from a comparison of its 50% share of the local commercial banking market prior to its nationalization with the volume of its non-performing loans after nationalization which grew from Rs. 25.00 billion to Rs. 198.00 billion in the period between 1989 to 1998. It appears that the PC and CCOP were conscious of the checkered history of HBL privatization, the dire state of its finances and how the earlier attempts made since

1995 could not fructify. This baggage must have made them wiser to take every step with care and without unnecessary delay as also to search for a credible buyer.

22. The painful contrast between HBL's glorious past, its corporate profile and financial strength prior to nationalization with its steep fall in the post nationalization period must have been one of the compelling factors which obliged successive governments in the country to review Nationalization Policy and to privatize public sector institutions particularly the banks. According to learned counsel for PC, Mr. Aitzaz Ahsan and which has not been contradicted by anyone, the accumulative loses of HBL as on 31.12.2003 were Rs. 13.00 billion. It is a matter of common observation that the nationalized banks were privatized because they were no longer profit bearing enterprises. Their poor performance and dismal balance sheets was attributable to a host of factors. Some of those factors were overstaffing, over-branching, political interference for grant and recovery of loans leading to huge portfolios of non-performing loans, under capitalization, poor customer services and lack of professional management. These growing losses and their obvious adverse effect on national economy were some of the compelling reasons which weighed with all the governments preceding the one which finally privatized it to remain committed to this objective. The allegation that the impugned exercise was undertaken merely at

the behest of the International Monetary Fund (IMF) or done in undue haste underpins a total lack of appreciation of the banking crisis which led to privatization. Such wild allegations shorn of any concrete proof and entailing factual inquiry cannot be valid basis for interference in constitutional jurisdiction of this Court. A mere advice or suggestion may not amount to a pressure of the kind to have deprived the competent authority under the law to have taken independent decision. Even otherwise, we are living in a globalized world of interdependence; a world where countries and international financial institutions assist and aid the developing countries in their march towards economic progress. International Monitory Fund is one of those institutions which has played its role in several countries. Though its policies some times may be open to criticism but that is for the concerned economists in the government or academics to examine and opine but once the Competent Authority in the government has taken a decision backed by law, it would not be in consonance with the well established norms of judicial review to interfere in policy making domain of the executive authority. In Asia Foundation & Construction Ltd Vs. Trafalgar House Construction (I) Ltd ((1997) 1 Supreme Court Cases 738), the Indian Supreme Court annulled the judgment of the High Court whereby the said Court had quashed the award of contract to a Company on the ground that the contract was awarded at the behest of

Asian Development Bank who had partly funded the project. The Court observed 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 World Bank or the Asian Development Banks grant loan or subsidy, as the case may be. When such financial institutions grant such huge loan 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 valuation bids of the appellant and respondent no. 1 together with the consultant's opinion after the socalled 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. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouratism in the grant of contract in favour of the appellant.*

23. In Tata Cellular v. Union of India (36(1994) 6 SCC 651), the Court while dilating on the parameters of judicial review in matters of awarding of contract by the Government candidly laid down as follows:-

> *"77. 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 of particular decision taken in the fulfillment 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."*

24. In R v. Deptt. Of Constitutional Affairs [2006 All ER (D) 201] even some deviation from the best practice was found

to be no justification for judicial review. The Court held that, "*It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review."* In Reliance Airport Developers (P) Ltd v. Airports Authority of Indian and others [(2006) 10 SCC], the ratio of the afore-referred judgment was reiterated and it was observed that the power of judicial review would be available *'only if public law element is apparent which would arise only in a case of "bribery, corruption, implementation of unlawful policy and the like."* In the cases of commercial contracts, the Courts' lack of expertise was taken note of in Paras 50 and 51, in terms as follows:-

> *"It does not have the material or expertise in this context to 'second guess' the judgment of the panel. Furthermore, this process is even more clearly in the realm of commercial judgment for the defendant, which judgment cannot properly be the subject of public law challenge on the grounds advanced in the evidence before me."*

To argue that better performance and rising profits of HBL after privatization be considered as proof that privatization was flawed or was done in utter haste under some external pressure amounts to a twisted logic. These positive results have on the contrary vindicated the impugned process of sale and made it a credible exercise.

Question Nos. ii & iii: **ii)** Whether the procedure adopted to privatize HBL was tainted with *mala fides* and violative of the

provisions of Privatization Commission Ordinance and the Rules framed there under?

iii) Whether the approval of the highest bidder AKFED by the Cabinet Committee on Privatization in its meeting held on 1.1.2004, was an improper exercise of discretion and amenable to interference in accord with the well recognized principles of judicial review of administrative action;

(Question Nos. ii & iii have close nexus and are dilated upon together)

25. Question No. 2 has two dimensions i.e. (i) mala fides or collusion and (ii) violation of mandatory provisions of law and the rules framed thereunder. The allegations of mala fides and of the impugned exercise being collusive are questions of fact requiring factual inquiry. It is by now a well established principle of judicial review of administrative action that in absence of some un-rebuttable material on record qua mala fides, the Court would not annul the order of Executive Authority which otherwise does not reflect any illegality or jurisdictional defect. In Federation of Pakistan Vs. Saeed Ahmed Khan (PLD 1974 SC 151), this Court was called upon to dilate upon the mala fides as a ground for exercise of power of judicial review of administrative action and the Court observed as follows: -

> "Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to

> establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of male fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides mutt be pleaded with particularity, and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of male fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging male fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.
>
> "Male fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself."

26. There is no allegation that any member of the CCOP or PC or the Financial Advisor had made some personal gain, or that any one of them wanted to help the highest bidder for mala fide reasons. The general allegations of being influenced by IMF or '*crony capitalism'* are hardly sufficient to establish that the impugned privatization was tainted with mala fides warranting interference in judicial review.

27. Coming to the second tier of the question i.e. the alleged violation of law, it would be pertinent to refer to some provisions of the Privatization Commission Ordinance, 2000,

which may have bearing in the instant case. Those provisions are as follows: -

Rules 3,4,5 & 6 of the Privatization (Modes and Procedures) Rules, 2001.

> *3.* ***Manner and procedure for privatization****.--(I) The manner for carrying out the privatization programme under section 22 of the Ordinance and the procedure for modes of privatisation under section 25 thereof shall, if, and to the extent, the Commission deems necessary, include -*
>
> *(a) legal, technical and financial due diligence of the property being privatised in order to, inter alia.*
>
> *(i) identify any obstacles to privatisation and suggest, where possible, ways to remove them;*
>
> *(ii) allow a fair and independent valuation of the property being privatised ; and*
>
> *(iii) prepare a suitable information memorandum together with other marketing instruments;*
>
> *(b) pre-qualification of prospective bidders to evaluate, where a privatization requires it, .that the prospective bidders are technically and financially in a position to own, manage and operate the assets being privatised;*
>
> *(c) preparation of bid documents which. shall include instructions to bidders and proforma sale instruments and the bid documents shall include appropriate disclaimers to protect the Federal Government, Commission and their respective officers, employees, consultants and advisers in respect of the information provided to the bidders;*
>
> *(d) holding of pre-bid conferences to discuss concerns of prospective bidders;*

(e) creation of an enabling environment; and

(f) carrying out of a bidding process.

2. Subject to the terms of appointment of an adviser, where an adviser has been appointed for the privatisation, it shall carry out or advise on any or all of the steps specified in clauses (a) to (f) of sub-rule (1).

4. ***Approval or rejection of highest ranked bidder****.--(1) Save in the case of negotiated sale process, the Commission shall carry out a bidding process which is suited to the needs of the privatization with the objective of selecting the highest ranked bidder amongst the bidders that he.--*

(a) has satisfied the pre-qualification criteria determined by the Commission, if required; and

(b) complied with instructions for bidding provided by the Commission to bidders.

(2) Upon selection of a highest ranked bidder as specified in sub-rule (1) the Board shall refer the matter for approval, or rejection of such highest ranked bidder with full justification, to the Cabinet.

5. ***Additional modes of privatization****. --- In terms of clause (f) of section 25 of the Ordinance, there shall be the following additional modes of privatisation, namely:-*

(a) public offering of shares other than through a stock. exchange; and

(b) sale of shares, assets, business and property to a person that has a pre-emptive right to acquire the same (or any part thereof) subject to fulfillment of conditions attached to such rights.

6. ***Negotiated sale****.---(1) The Commission may adopt he negotiated sale process for any of the modes of*

privatization specified in section 25 of the Ordinance and rule 5 of these rules, if---

(a) in the opinion of the Board, sufficient interest for a privatization has not been received.

(b) the Board has recommended to the Cabinet and the Cabinet has authorized the Commission to initiate the negotiated sale process;

(c) the Board has approved the party or parties interested in purchasing the property being privatize;

(d) a team for carrying out the negotiated sale process has been constituted by the Board which shall include a representative from the Ministry under whose jurisdiction the entity being privatized falls; and

(e) the Board has delegated full power to the negotiation team for carrying out the negotiated sale process and defined the parameters for negotiation.

(2) On conclusion of the negotiated sale process, the terms and conditions of the transfer of the property to be privatized to the interested party shall be submitted to the Cabinet for consideration and approval."

Regulation Nos. 3 of the Privatization Commission (Hiring of Valuers) Regulations, 2001

*"3. **Manner and procedure for hiring of valuers by the Commission**(1) If, and to the extent, the Commission deems necessary to allow a fair and independent valuation of the property being privatised in terms of sub-clause (ii) of clause (a) of sub-rule (1) of rule 3 of the Privatisation (Modes and Procedures) Rules, 2001, by hiring a valuer, the terms of reference of valuation shall include inter-alia, a brief history of the entity, the financial position, a*

description of the product line/ service of entity, if any, a description of land, buildings, plant & machinery, the current assets and liabilities, and the current state of the industry.

(2) The Commission shall maintain a panel of valuers with the approval of the Board of the Commission.

(3) Terms of reference formulated vide sub regulation (1) shall be sent to at least three valuers on the panel of valuers.

(4) The valuer quoting lowest rate shall be selected for carrying-out valuation as per terms of reference;

Provided that the valuer other than the valuer giving lowest quotation may be selected after recording reasons in writing.

Rules 4, 5 & 6 of the Privatization Commission (Valuation of Property) Rules, 2001.

"4. ***Manner and procedure for valuation of property by the valuer hired by the Commission****. (1) The valuer appointed in terms of Privatization Commission (Hiring of Valuers) Regulations, 2001, shall associate a legal firm, a firm of chartered accountants, chartered surveyors, surveyor and other experts as may be applicable and include their reports with the valuation report.*

(2) The valuer shall submit a valuation report containing an executive summary, terms of reference provided by the Commission, summary of valuation, the different bases used for carrying out valuation alongwith a recommendation on the recommended basis of valuation and a value of the entity for the purpose of determining a reference price.

> *5.* ***Manner and procedure for valuation of property by the adviser hired by the Commission****.--- The adviser hired by the Privatization Commission as per procedure shall carry out the valuation in terms of Financial Advisory Services Agreement.*
>
> *6.* ***Processing of valuation report****.- (1) Upon receipt of the valuation report from the valuer or the adviser, a valuation note shall be prepared in the Commission and submitted to the Board of the Commission for recommending a reference price.*
> *(2) The reference price recommended by the Board of the Commission shall be submitted to the Cabinet for approval."*

28. We have already noted that the decision to privatize HBL was taken as far back as 1995. However, on account of political instability, discouraging market forces and lack of positive response from the potential investors / financial institutions, the privatization remained abortive. The first step taken in the latest round culminating in the impugned privatization was in the year 2000. In the concise statement filed by the Privatization Commission which has not been controverted by the petitioners' learned counsel, it has explained in graphic detail various steps taken from the enactment of law and commencement of the privatization process to the culmination of approval of the highest bid to bring home the point that there was substantial compliance with law, the Rules and Regulations

framed thereunder. After putting in place the legal regime, some of the important steps were appointment of AF Ferguson as Financial Advisor because international response for the search remained sluggish (Regulation No. 3 of the Privatization Commission (Hiring of Valuers) Regulations, 2001), calling for Expressions of Interest through advertisement (2.6.2002), requisition of Statements of Qualification (SOQs) from bidders, constitution of a Pre-qualification Committee (in terms of the Privatization Commission (Modes & Procedures) Rules, 2001), the screening of three parties by the said Committee, the recommendations of three parties by the Pre-qualification Committee for undertaking due diligence. These parties were invited to review the documentation relating to HBL, however only AKFED submitted a Confidentiality Agreement in December 2002. If the PC intended to help AKFED, it could have had declared it the highest bidder there and then, instead in April 2003, the PC again called for Expressions of Interest (EOIs) through advertisements in newspapers, from parties interested in purchasing a minimum of 26% share of HBL along with transfer of management. Only 19 parties submitted Expressions of Interest. They were requested to tender SOQs; only seven of them submitted those. The Pre-qualification Committee recommended AKFED and two others (CCIC and SCEAI). The Board of PC approved the report of the Pre-qualification

Committee on 26.12.2003. Data Room of HBL remained opened from September 18, 2003 to November 25, 2003. Foregoing was the process of pre-qualification. The PC simultaneously was finalizing the mode of privatization. Various steps taken were as follows (Rules 3,4,5 of the Privatization Commission (Modes & Procedures) Rules, 2001):-

> "a. In its meeting dated 17 November 2003, CCOP decided that potential investors would be required to bid for 51% of the shareholding of HBL, but would be given the option to acquire 51% equity in one go or to acquire 26% equity initially along with transfer of management control.
>
> b. In the case of the second option, it was determined that shares representing the remaining 25% equity of BL would be transferred in the name of the successful investor only upon the full and punctual payment for the same in two installments over a maximum period of two years.
>
> c. It was also determined that payment for the balance stake would include, in the case of payment in US $, an interest rate of LIBOR plus 250 basis points while in the case of Pak Rs., mark up of PIB plus 250 basis points.
>
> d. Finally, it was decided that in case of default in payment of the balance stake, the transaction would be unwound and the shares earlier transferred would be bought back at a minimum 25% discount and that the US$ 10

million Stand By Letter of Credit provided by the successful bidder would be encashed.

e. Thus, the financial consequences of the two options were made equal while protection was also provided in the form of heavy penalties against a defaulting bidder."

29. Ultimately, only two parties (namely AKFED and SCEAI) participated in the bidding on 29 December 2003 and the bid of AKFED as noted earlier was not only the highest but also was higher than the "reference price" approved by the CCOP on 26 December 2003. (Rule 6(2) of the Privatization Commission (Valuation of Property) Rules, 2001)

30. A careful perusal of the steps taken in the process for privatization of HBL referred to in the preceding paragraph would indicate that there was substantial compliance with the relevant provisions of the Privatization Commission Ordinance, 2000 and the Rules / Regulations framed thereunder. A minor deviation of Rules or Regulation, if any, in absence of any credible allegation of mala fides or corruption would not furnish a valid ground for interference in judicial review.

31. The transfer of non-performing loans having a book value of Rs.1.283 billion to CIRC (Corporate Industrial Restructuring Corporation) and issuance of recovery bonds to the tune of Rs.9.804 billion in respect of tax refunds as also injection of Rs.17.00 billion in HBL prior to privatization were cited as

some of the instances of mala fide acts designed to extend undue favour to the prospective highest bidder at the cost of public exchequer. There is force in the submissions of Mr. Makhdoom Ali Khan, learned Sr. ASC that the transfer of non-performing loans to CIRC (Corporate Industrial Restructuring Corporation) was carried out in an entirely transparent manner and all the bidders were informed in advance. He explained that a total of 22 non-performing loans worth Rs. 309.815 million were first transferred to CIRC by HBL in 2001 followed by a further 69 loans worth Rs.894.587 million in 2003. Some loans were then transferred back and various other amounts were also adjusted by mutual consent after which an amount of Rs.994.076 million was paid to HBL by CIRC on 18.9.2006 vide CIRC's letter bearing Ref. No. CIRC/MF-MA3665. More generally, the transfer of bad loans to CIRC was a well thought out and fully planned strategy which had the effect of enhancing the value of HBL. Contact was established between HBL and officials from the Ministry of Finance on a regular basis in order to execute the transfer efficiently. The transfer to CIRC was accomplished after the completion of CIRC due diligence and resolution of HBL's non-performing loans with the SBP Resolution Committee.

32. Similarly the issuance of bonds by the Federal Government against the admitted tax liability cannot be taken exception to because the taxation authorities had collected taxes

from HBL in excess of the actual liability. Both the transfer of non-performing loans to CIRC as also issuance of bonds were duly considered by the valuer in assessing the value of HBL. So far as the valuation of HBL is concerned, we could not find any material on record which could persuade us to hold that either the valuer was appointed collusively or the valuation carried out by it was against the Rules or best practices being followed. In the concise statement filed by the PC, the valuation and determination of fair price was defended by submitting that:

> *"The reserve price of HBL was determined by the best experts available on the basis of the most well-recognized and internationally accepted accountancy methodologies. More importantly, that reserve price was based upon an 18-month long study of massive quantities of data, which data was also made available to the bidders through a data room.----------The reserve price of HBL was fixed on the basis of a methodology known as "discounted Dividend Method" (or "DDM") which is different from the "Discounted Cash Flow" (or "DCF") methodology generally used to determine reserve prices in the case of privatizations of industrial units. More specifically:*
>
> *a. DDM is used in the case of banks (rather than DCF) because one of the major components of bank value is the ability to obtain deposits which is an asset value not captured through cash flow. Hence the future flow of dividends is estimated (as opposed to future cash streams) in order to determine potential investor value.*
>
> *b. Methodologies such as DDM and DCF are intended to produce valuations inclusive of the value of all assets, albeit on the assumption that those assets will continue to be used for the purposes for which they were earlier being used. The valuation of HBL was thus inclusive of the value of HBL's other assets, such as licenses to operate branches in various countries as well as numerous pieces of real property."*
>
> *i. This valuation concluded that the value of HBL's assets if broken up and sold*

separately (the net asset value) was Rs.22 billion as of 30 June 2003 and Rs. 23.7 billion as of 31 December 2003.

ii. However, the valuation of HBL by the winning bidder (for 100% of the shares) was approximately Rs. 43.94 billion, which is almost twice that of the net asset value of 30 June 2003.

iii. This massive differential makes it clear that the value at which HBL was privatized was inclusive of goodwill as well as all other intangible factors, such as the fact that the winning bidder would be acquiring control over HBL."

33. No counter affidavit was filed by either of the petitioners to controvert the afore-referred stance of the PC. Moreover, it has not been disputed that the valuation was carried out in terms of the Financial Advisory Services Agreements; that the mode of valuation adopted by the valuer was permissible under the Privatization Commission (Valuation of Property) Rules 2001 and that the valuation report was processed by the Board of the PC in accord with the afore-referred Rules. For afore-referred reasons, the approval of the highest bid of AKFED by the CCOP being higher than the reference price was neither improper nor violative of the law governing the process of privatization to call for judicial review.

34. The Courts while dealing with cases relatable to financial management by the government or awarding of contract by it must appreciate that these are either policy issues or commercial transactions requiring knowledge in the specialized

fields. The Courts lack the expertise to express any opinion on the soundness or otherwise of such acts / transactions. The question whether a contractual transaction or decision taken in the exercise of executive authority by the Government can be subjected to judicial review has engaged the attention of constitutional courts in several countries and the judicial consensus generally has been that the Courts should ordinarily refrain from interfering in policy making domain of executive authority or in the award of contracts unless those acts smack of arbitrariness, favoritism and a total disregard of the mandate of law. In Watan Party Vs. Federation of Pakistan (PLD 2006 SC 697), the Court annulled the privatization of Karachi Steel Mill not merely because of violation of a single rule or regulation but there were several factors that weighed with the Court which included the abdication of the authority by the Cabinet Committee on Privatization to the Privatization Commission to issue letter of acceptance to whoever may be the highest bidder, the net assets of the Steel Mill which was privatized had not been included in the valuation report, the decision that the Government of Pakistan shall bear a huge financial liability of the VSS Scheme for the employees of the Steels Mill which was not part of the initial public offering to the bidders through the advertisement, the credentials of the highest bidder seriously impinged on its integrity as also the fact that the major share

holding in the highest bid was that of a company which had off shore offices. At page 763 of the Watan Party supra case, this Court commented in detail on the corporate credentials of a member of the consortium that had purchased it which reflected that the Privatization Commission had not kept in view the mandatory requirements of the process of pre-qualifying a bidder. There were 9 instances of financial irregularities in the corporate profile of the said member of the consortium, which were specifically noted in the para 87 of the said judgment.

35. As against this, in the instant case, the highest bidder, the AKFED is part of the Agha Khan Development Network, which has placed its company profile before this Court. Mr. S. M. Zafar, ASC submitted a detailed concise statement on its behalf wherein it has been averred that: -

> *"AKDN is a group of private, International, non denominational agencies working to improve living conditions and economic opportunities for people in various regions of the developing world. The Network's organizations have individual mandates that range from the fields of health and education to architecture, rural development and promotion of private sector enterprise. Together they collaborate in working towards a common goal to build institutions and programs that can respond to challenges of social, economic and cultural change on an ongoing basis.*
>
> .....
>
> .....
>
> *In the context of Pakistan in particular, it is submitted that the AKDN, including by virtue of its economic development arm AKFED, has a very special and dear relationship with Pakistan and its people. Under the vision and leadership of His Highness the Aga Khan, the AKDN has a long-standing history in the nation's development. His Highness'*

grandfather, Sir Sultan Mohamed Shah, Aga Khan III, is regarded as an important contributor to the founding of Pakistan. After the partition in 1947, Sir Sultan Mohamed Shah, Aga Khan III, worked for the wellbeing of the nation; his contributions in the area of health and education are widely known to all in the country. His Highness the Aga Khan has upheld the traditions of his grandfather Sir Sultan Mohamed Shah, Aga Khan III, which have led to the creation of pioneering institutions such as the Aga Khan University (AKU), which is today recognized as a premier provider of health and medical services in the country and which has also gained international recognition, and the Aga Khan Rural Support Program (AKRSP), which has essentially transformed rural lives in the poor and remote areas of Northern Pakistan. Under the aegis of the Aga Khan Development Network around 185 schools and centers of learning impart education to almost 40,000 students in the country, and around 200 health units and hospitals operate across Pakistan, serving its populations in the rural as well as urban areas.

It may be mentioned to the Honorable Court that when the Government of Pakistan decided to sell its controlling interest in HBL in the last round of efforts which commenced in 2000, Pakistan was going through political, economic and law and order crisis: the era of post 9/11 may be described as somewhat challenging for this country. The Honorable Court may agree that foreign investment in any country requires confidence in the country's economic and political stability, its consistency in policies, availability of resources, labor and other business related factors, a general condition of law and order, and on a sound legal system. Owing to negative impact of the adverse publicity and harsh on-the-ground realities at that time, the conditions for investment in Pakistan were not encouraging. Global investors as such were reluctant and this was further exacerbated by their awareness that the Government of Pakistan had been trying to move forward with its privatization plans, including the privatization of HBL, for quite some time but all efforts to that effect, were proving unfruitful. Under these circumstances, AKFED took the view that its participation in the privatization process would send a very positive signal to the rest of the world by showing that a premier institution such as AKFED was ready to invest and was willing to take on the challenge of contributing towards the country's development in times of difficulty.

……

……

> *As the details submitted in the paragraph below will show, following its participation in an open and transparent bidding process and being declared as successful and highest bidder, and having acquired controlling shares in HBL, AKFED has achieved the above-described objectives and aims. HBL is now a thriving profit-making venture and is among the best-run banking institutions worldwide. This is recognized by the fact that HBL received the Best Bank Award by Global Finance (2008), Best Bank Emerging Markets by Global Finance (2008), Best Bank of the Year by the Banker (2009), Best Bank - Pakistan by Global Finance (2009), Global Finance Award for the World's Best Emerging Market Bank in Asia (2010), Global Finance Award for Best Bank in Pakistan (2010), Global Finance Award for World's Best Trade Finance Bank 2011, among other such awards"* (Emphasis is supplied).

36. The AKFED has an impressive profile both in the corporate and social sectors. The HBL's performance after privatization recapitulated in the preceding paragraphs (which has not been controverted through a counter affidavit) have vindicated the process of privatization under challenge. The post privatization performance may be a hindsight reasoning as we have been called upon to decide it after a period of almost 6/7 years of the sale of HBL but the Court can take note of that in the peculiar facts of this case. This Court has generally exercised judicial restraint in interfering with the policy making domain of the executive authority while exercising the power of judicial review of administrative actions. In the case of Watan Party *supra* (Pakistan Steel Mills Case), the well established principles governing the power of judicial review were reiterated by holding that:

> "*in exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter.*"

The Court quoted with approval the law laid down in Messrs Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) & BALCO Employees Union (Regd.) v. Union of India (AIR 2002 SC 350). In the latter judgment, the Indian Supreme Court held as follows: -

> "Process of disinvestments is a policy decision involving) complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority."

37. Similarly in Tata Cellular Vs. Union of India ((1994) 6 Supreme Court Cases 651), the Court laid down that the power of judicial review would be available qua the contractual powers of the government bodies to prevent arbitrariness or favourtism. However, the Government being guardian of finances is expected to protect the financial interest of the State. The Court nevertheless enunciated the principle of judicial restraint by holding that it does not sit as a court of appeal but merely to review the manner in which the decision was taken. This is so

because the Court does not have the expertise in the domain of administrative decision making.

38. In Sterling Computers Ltd Vs. M & N Publications Ltd ((1993) 1 Supreme Court Cases 445), the Court outlined parameters of judicial review in terms as follows:-

> *"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process'….. By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable rational, not arbitrary and violative of Article 14 of the Constitution."*

39. In Air India Ltd Vs. Cochin International airport Ltd ((2000) 2 Supreme Court Cases 617), the Court held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation. Nevertheless it was observed, the State, its corporations, instrumentalities and agencies have the public duty to be fair in their transactions. In the event of some irregularity in the decision making process, it was further observed, the Court must exercise its discretionary powers of judicial review with circumspection and only in furtherance of public interest and not merely making out of a legal point. It should always keep the larger public interest in mind to interfere or not to interfere. Only

when the public interest overwhelms any other consideration, the Court should interfere. In Master Marine Services (P) Ltd Vs. Metcalfe & Hodgkinson (P) Ltd ((2005) 6 Supreme Court Cases 138), the Indian Supreme Court set aside the judgment of the High Court whereby the contract awarded to a party was quashed.

Question No. IV: Whether injecting an amount of Rs. 17.7 billion in HBL and thereafter offering it for privatization was an act of financial mismanagement of a financial institution causing loss to the public ex-chequer and against the best practices?

40. It has not been disputed before us by the respondents that the government had contributed a sum of Rs.17.7 billion to recapitalize HBL but the reason being pressed into service is that if it had not been done, the institution would have been close to bankruptcy. In examining this issue, we have kept in view the financial crisis of 1980s, the banking bailouts in other countries and the condition of HBL at the time when this capital was injected as also the best practices being followed in similar situations. There is force in the submissions of Mr. Makhdoom Ali Khan, learned Sr. ASC that injecting money into financial institutions and particularly banks has been a worldwide phenomenon during the period of financial crunch which commenced in the last decade and still continues to an extent.

41. George W. Bush has been the President of United States in country's worst economic crisis after the great depression of 1930's. There were many factors which led to this economic meltdown but one of the major factors was the huge advances made by the banks to the housing sector. In his autobiography "Decision Points", he devotes a full chapter on "Financial Crisis" and describes how he faced that challenge and how some of those banks were saved from bankruptcy through various measures including injecting huge capital. One of those banks was Bear Stearns which then was one of the largest American banks and if it had failed, it could have a domino effect. To prevent that situation, the Government not only injected billion of dollars into it but also negotiated its purchase by J.P. Morgan Chase. He says that:

> *"Hank shared my strong inclination against government intervention. But he explained that a collapse of Bear Stearns would have widespread repercussions for a world financial system that had been under great stress since the housing crisis began in 2007. Bear had financial relationships with hundreds of other banks, investors, and governments. I the firm suddenly failed, confidence in other financial institutions would diminish. Bear could be the first domino in a series of failing firms. While I was concerned about creating moral hazard, I worried more about a financial collapse.*
>
> *"Is there a buyer for Bear?" I asked Hank.*
>
> *Early the next morning, we received our answer. Executives at JPMorgan Chase were interested in acquiring Bear Stearns, but were concerned about inheriting Bear's portfolio of risky mortgage-backed securities. With Ben's approval, Hank and Tim Geithner, the President of the New York Fed, devised*

> *a plan to address JPMorgan's concerns. The Fed would lend $30 billion against Bear's undesirable mortgage holdings, which cleared the way for JPMorgan to purchase Bear Stearns for two dollars per share."*

42. In his book *'On the Brink'* Mr. Henry M. Paulson, Jr. (former CEO of Goldman Sachs and George Bush's Treasury Secretary during his second term) explains how a bipartisan approach was adopted by the Congress to meet the financial crisis; how the latter empowered the Treasury Secretary to advance a sum of US Dollars 350 billion to troubled banks; how it unanimously passed the Troubled Assets Relief Program (TARP); and how a sum of US Dollars 250 billion[1] in equity were transmitted to the banking system. The breakup of the amount injected into various financial institutions is as follows:-

> *"Tim subsequently announced the capital amounts that regulators had settled upon just hours before: $25 billion for Citigroup, Wells Fargo, and JPMorgan; $15 billion for Bank of America; $10 billion for Merrill Lynch, Goldman Sachs, and Morgan Stanley; $3 billion for Bank of New York Mellon; $2 billion for State Street Corporation."*

43. Recounting the lessons learnt during the period he was at the helm of affairs, he lamented that the crisis was allowed to fester; that corrective measures were not taken in time to save the financial/banking institutions and described it as a '*troubling political dysfunctioning'.* It would be in order to refer to the following quote from his book. He says:

[1] Page 358.

> *'In my time in Washington, I learned that, unfortunately, it takes a crisis to get difficult and important things done. Many had warned for years of impending calamity at Fannie Mae and Freddie Mac, but only when those institutions faced outright collapse did lawmakers enact reforms. Only after Lehman Brothers failed did we get the authorities from Congress to inject capital into financial institutions. Even then, despite the horrific conditions in the markets, TARP was rejected the first time it came up for a vote in the U.S. House of Representatives. And, amazingly enough, as I write this in late 2009, more than one year after Lehman's fall, U.S. government regulators still lack the power to wind down a nonbank financial institution outside of bankruptcy.*
> *I am not sure what the solution is for this ever more troubling political dysfunction, but it is certain that we must find a way to improve the collective decision-making process in Washington. The stakes are simply too high not to. Indeed, we are fortunate that in 2008 Congress did act before the financial system collapsed. This took strong leadership in both the House and the Senate, because all who voted for Tarp or to give us the emergency authorities to deal with Fannie and Freddie knew they were casting an unpopular vote[2]."*

44. Similarly Gordon Brown, former Prime Minister of UK, in his book "Beyond the Crisis" provides a telling account of how billions of Pounds were injected into collapsing Banks in Europe to prevent the crisis from going worse and to save the economies:

> "On Monday morning, October 13, as markets opened, we announced a £37 billion recapitalization of RBS, Lloyds, and HBOS. We would take a 57 percent stake in RBS and a 58 percent stake in HBOS, with a 32 percent stake in Lloyds subject to their mergers. The detailed terms of our £250 billion credit-guarantee scheme was also announced, along with new arrangements for dividends and remuneration and a commitment to keep credit flowing.

[2] Page 439.

> I had long felt that we were dealing not only with a technical failure, but a moral failure too. So for me, a crucial part of the announcement was that some degree of justice was secured: remuneration was cut back, dividends were cancelled, and the chief executive and the chair of RBS both tendered their resignations. And the CEO of HBOS would not be working for the merged entity any more.
>
> On the same day Germany announced €400 billion in guarantees and €100 billion in capitalization; France €320 billion in guarantees of medium-term debt and €40 for capitalization; Italy €40 billion in capitalization and 'as much as necessary in guarantees. Holland added €200 billion in guarantees, and Spain and Austria €100 billion each.
>
> That day saw a 10 percent rise in the European stock exchange, the biggest rise ever.
>
> At no point in history have governments ever injected so much money into buying up assets in the banking system, with capital and guarantees running into trillions. When officials gave me a list of all the countries that had followed Britain's lead----- Germany, France, Spain, Denmark, Portugal, the Netherlands, Austria, Switzerland, and America-----I knew that we had come through this in one piece. The patient was out of the emergency room and into intensive care."

In a seminal paper titled as '*White Paper on All the Options for Managing a Systemic Bank Crisis*' co-authored by three academicians[3] of repute, precisely this issue has been addressed. According to them:

> *"The short answer as to why banks are being saved is fear that the 1930 Depression nightmare would again become a reality. Since banks enjoy the monopoly of creating money through providing loans, bankrupt banks means reduced credit, which in turn results in a lack of money for the rest of the economy. Without access to capital, business and the means of production contract, which, in turn, causes mass unemployment and a host of collateral social problems. Thus, when banks are in trouble,*

[3] Bernard Lietaer from University of California, Dr. Robert Ulanowicz from University of Maryland and Dr. Sally Goerner from Integral Science Institute Chapel Hill, NC.

they can trigger what is know as a Second Wavecrisis, through a ferocious circle making a victim of the real economy: Bad banking balance sheets => credit restrictions => recession => worse bank balance sheets => further credit restrictions and so the spiral downward goes.

To avoid such a tailspin - governments feel the need to prop up the banks' balance sheets. This exercise is already under way. For instance, several major banks were able to refinance themselves earlier in 2008, mainly by tapping sovereign funds. But, as the depth of the – insolvency has become more obvious, this has become harder to do. Central banks will step in to help by providing an interest yield - that makes it easy for financial institutions to earn a lot of money, at no risk.

The next logical step is also formulaic. Whenever a bank that is too big to fail is in real trouble, the recipe has been the same since the 1930s: the taxpayers end up footing the bill to bail out the banks, so that they can start all over again. Of the 96 major banking crises around the world that the World Bank has counted over a recent 25 year period, taxpayer bailouts have been the answer in every instance. For example, the United States government that had funded Reconstruction Finance Corporation during 1932-53 period, repeated the exercise with the Resolution Trust Corporation for the Savings and Loan crisis in the 1989-95 period, and now again with the Troubled Assets Relief Program (TARP) of 2008. Other recent examples include the Swedish Bank Support Authority (1992-96) and the Japanese Resolution and Collection Corporation which started in 1996 and is still ongoing. In the current international crisis, among the first institutions that were saved in this way include Bear Stearns in the US, and the nationalization of Northern Rock in the UK. In mid-October 2008, European governments pledged an unprecedented 1.873 trillion Euros, combining credit guarantees and capital injections into banks, based on the strategy pioneered by the United Kingdom.

These bailouts end up being expensive for the taxpayers and the economy at-large. One exception has been in Sweden, which ended up costing only 3.6% of the GNP because important parts of the portfolio could be unwound over time at better conditions than those when the assets we originally

> *acquired. But such outcomes are rare -. Some examples of the staggering cost of bailing out banks as a percent of the corresponding countries' annual GNP, as estimated by the World Bank.*
>
> - Sweden 1992-96 3.6%
> - USA 1988 3.7%
> - Spain 1977-85: 16.8%
> - Venezuela 1994-5 18%
> - Mexico 1994 19.3%
> - Japan 1997 24%
> - Chile 1981-83 41.2%
> - Thailand 1997-2000 45%
> - Malaysia 1997-2000 45%
> - Argentina 1980-82: 55.3%
> - South Korea 1997-2000 60%
>
> *If we add in the Citibank bailout announced in November 2008 to all the previous packages already approved, the total pledges by the American taxpayer of the bailout exceeds now $4.616 trillion dollars! In February 2009, the US Treasury Secretary Timothy Geithner has unveiled an additional bank bail-out plan worth at least another $1.5 trillion9 The Bloomberg estimate is even higher: 7.7 trillion, which amounts to $ 24,000 for every man, woman and child in the country. The only event in American history that comes even close to the pledges made so far is World War II: Original Cost: $288 billion, Inflation Adjusted Cost: $3.6 trillion. It is hard to believe, but true, that the US bailout could cost more than the inflation adjusted cost of the Louisiana Purchase, the New Deal and the Marshall Plan, the Korean and Vietnam War, the S&L debacle, NASA and the Race to the Moon combined!"*

45. It is nobody's case that when the HBL was recapitalized or offered for privatization, it had an impressive balance sheet. Admittedly when the amount in question was injected into HBL, the volume of its non-performing loans was huge and the Federal Government and its financial experts deemed it proper to finance HBL. Petitioners have not alluded to any opinion of some reputed economist holding this bailout to be

in-appropriate or unwise or against best practices being followed. If we keep the afore-referred opinions of those who were at the helm of affairs during one of the worst economic and banking crisis in history as also of the academics in the field in juxtaposition with the steps taken in Pakistan to forestall economic meltdown (including impugned privatization), we find that the decision makers by and large were motivated by the same bonafide considerations, though at a smaller scale. Rather the steps taken in Pakistan perhaps were more timely and that is why unlike the West, the banking and financial crisis in Pakistan comparatively has not been that serious. Some of the inferences that can be drawn in this regard are: first, that banks and particularly those who have major share of loans or investment in the economy are linked with other financial institutions and Government, if such banks fail, it has a domino effect on economy; second, that injecting money [(as done by the Federal Government in the case of HBL or by US by buying the toxic acids of the banks through TARP (Troubled Assets Relief Program) or through CIRC (Corporate and Industrial Restructuring Corporation) by Government of Pakistan)] are some of the known methods to prop up the banks; third, that these bailouts are not intended to merely help the Banks, rather these are designed for yet another salutary purpose i.e. to keep the economy afloat, so that the Banks continue to advance loans

for further investment which in turn means more jobs and great productivity; Fourth that through a credible mode, a financial institution could be sold even through negotiation, if it is deemed proper with a view to save the said institution from bankruptcy with the resultant meltdown effect on the economy. George W. Bush and its financial advisors took recourse to such a mode when after injecting a US 30 billion dollars loan by the US Federal Reserve Bank into Bear Stearns it was sold to JP Morgan. Even under the Privatization Commission (Modes and Procedures) Rules, 2001, Rule 3 spells out the manner and procedure for privatization. Rule 5 provides for additional modes of privatization and Rule 6 even authorizes PC to negotiate sale by adopting any of the modes of privatization specified in Section 25 of the Ordinance and Rule 5 of these Rules in certain situations enumerated therein and fifth that the Privatization Ordinance and the Rules as also the Regulations framed there under vest a certain amount of discretion with the PC and the Board during the sale process in line with the best practices in vogue in other countries. This discretion is sought to be regulated by the afore-referred law and Rules and any bona fide decision made in the exercise of the said discretion can only be interfered with in accord with the well recognized principles of judicial review of executive authority discussed while dilating upon question Nos. 2 & 3.

46. In view of the above, the various measures taken by the Federal Government to recapitalize HBL or to reduce the volume of its non-performing loans to make it more attractive for sale is neither against the law or the best practices being followed, nor does it reflect mala fides to furnish a ground for interference in these proceedings.

Question No. V: Whether the petitioners have locus standi to challenge the privatization of HBL?

47. The petitioners in these two petition have admittedly no personal interest as petitioner in Constitution Petition No. 5 of 2011 is a former Federal Secretary, Government of Pakistan and the averments made in the petition reflect that he is a public spirited person motivated with a desire that the national strategic assets if privatized should reflect transparency which allegedly is lacking in the instant case. Similarly petitioner in Constitution Petition No. 15 of 2004 represents a party which may not claim a large constituency but is motivated by a similar spirit. These petitions are in the nature of public interest litigation and the Courts in exercise of its constitutional jurisdiction qua matters of public importance relating to enforcement of Fundamental Rights have been liberal particularly if the issue raised is relatable to a public injury arising from breach of public duty. In S.P. Gupta

and others v. President of India and others (AIR 1982 SC 149), the Court observed as follows:-

> *"Where a legal wrong or a legal injury is caused to a person or to a determinate class of person by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in the Supreme Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."*

48. Similarly this Court in Miss Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416) held that:

> *"After all the law is not a closed shop and even in the adversary procedure, it is permissible for the next friend to move the Court on behalf of a minor or a person under disability, or a person under detention or in restraint. Why not then a person, if he were to act bona fide activise a Court for the enforcement of the Fundamental Rights of a group or a class of persons who are unable to seek relief from the Court for several reasons. This is what the public interest litigation /class action, seeks to achieve as it goes further to relax the rule on locus stands so as to include a person who bona fide makes an application for the violation of any constitutional right of a determined class of persons whose grievances go unnoticed and unredressed. The initiation of the proceedings in this manner will be in aid of the meaningful protection of the rule of law given to the citizens by Article 4 of the Constitution, that is, "(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan"*
>
> *This Article does not say as to what proceedings should be followed, then whatever be its nature must he judged in the light of the purpose, that is, the enforcement of any of the Fundamental Rights. It is, therefore, permissible when the lis is between an aggrieved person*

> *and the Government or an authority to follow the adversary procedure and in other cases where there are violation of Fundamental Rights of a class or a group of persons who belong to the category as afore-stated and are unable to seek redress from the Court, then the traditional rule of locus standi can be dispensed with, and the procedure available in public interest litigation can he made use of, if it is brought to the notice of the Court by the person acting bona fide. On the language of Article 184(3), it ::. needless to insist on a rigid formula of proceedings for the enforcement of the Fundamental Rights. If the framers of the Constitution had intended the proceedings for the enforcement of the Fundamental Rights to be in a strait-jacket, then they would have said so, but not having done that, one would not read any constraint in it. Article 184(3) therefore, provides abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction. It would be for the Supreme Court to lay down the contours generally in order to regulate the proceedings of group or class actions from case to case."*

49. In Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), the Court took a similar view and in Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (PLD 1998 SC 1263), the Court came to a similar conclusion. In such cases, even the existence of an alternate remedy has not prevented the Court from exercising its power of judicial review if the said alternate remedy is neither efficacious nor expeditious. In Watan Party through President v. Federation of Pakistan (PLD 2006 SC 697), the Court repelled this argument by holding that:-

> *"But at the same time, we have also to keep in mind another very important principle of law enunciated by this Court in the case of Syed Ali Abbas v. Vishan Singh (PLD 1967 SC 294) i.e. petitioner cannot be refused relief and penalized for not throwing himself again (by way of revision or review) on mercy of authorities who are responsible for such excesses. This principle has to be read along with the principle laid down in the case of Anjuman-e-Ahmadiya, Sargodha ibid wherein it has been held that if an adequate remedy provided by law is less convenient, beneficial and effective in case of a legal right*

> *to performance of a legal duty, the jurisdiction of the High Court can be invoked. Similarly this principle has been reiterated in the Murree Brewery's case ibid wherein it has been held that if a statutory functionary acts mala fide or in a partial, unjust and oppressive manner the High Court in exercise of its writ jurisdiction has power to grant relief to the aggrieved party.*
>
> *Thus we are of the opinion that under the circumstances of the case, it would not be in the interest of justice to push the petitioners back to the authority who had already exercised the jurisdiction and is insisting that the action so taken by it is not only in accordance with law as it suffers from no legal discrepancy or infirmity but is also transparent. Therefore under the circumstances, referring the case of the petitioner to the Federal Government or this Court directing investigation under section 27 of the Ordinance would be inappropriate and an exercise in futility and it would also not serve the interests of justice."*

50. While holding that these petitions are maintainable, we would like to strike a note of caution. The Court has to guard against frivolous petitions as it is a matter of common observation that in the garb of public interest litigation, matters are brought before the Court which are neither of public importance nor relatable to enforcement of a fundamental right or public duty. In Ashok Kumar Pandey v. State of West Bengal (AIR 2004 SC 280), the Court was seized of such a petition when it observed as follows:-

> *"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It*

> *is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."*

51. Foregoing are the detailed reasons for the short order dated 29.11.2011 reproduced below in terms of which these petitions were dismissed:-

> *"This judgment shall dispose of Constitution Petitions No. 5 and 15/2004, Civil Miscellaneous Application No.4251/2011 and Human Rights Case No.14144-S/2009 as they have nexus.*
>
> *2. We have heard learned counsel for the parties at some length and have gone through the documents annexed as also the precedent case law cited at the bar.*
>
> *3. For reasons to be recorded later in the detailed judgment, we hold and declare as under:-*

a) *that the approval of the privatization of Habib Bank Limited by the Cabinet Committee on Privatization was within the purview of Privatization Commission;*
b) *that it does not reflect violation of any statutory provisions;*
c) *that neither the process was tainted with lack of transparency or malafides nor the successful bidder lacked qualifications prescribed in law; and*
d) *that it is in accord with the best practices around the world and the law declared by this Court.*

The petitions are dismissed in afore-referred terms.

JUDGE

JUDGE

JUDGE

Islamabad,
29.11.2011
Khurram Anees
Approved for Reporting