IN THE SUPREME COURT OF PAKISTAN

(Original/Appellate Jurisdiction)

PRESENT

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

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

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

Const. P.9/2006

Wattan Party through its President … … Petitioner.

Versus

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

CP.345/2006

Pakistan Steel Peoples Workers Union,
CBA through its Chairman … … Petitioner.

Versus

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

CP.394/2006

Federation of Pakistan,
through the Cabinet Secretary and others … … Petitioners

Versus

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

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

For the petitioner (in CP.345/2006 and for Respt. No.1 in CP. No.394/2006) : Mr. Abdul Mujeeb Pirzada, ASC.
Mr. M.S. Khattak, AOR.

For the petitioner (in CP. No.394/2006) : Syed Zafar Abbas Naqvi, AOR.

On Court Notice (in Const. P.9/06 & for petitioner in CP.No.394/06) : Mr. Makhdoom Ali Khan,
Attorney General for Pakistan.
Assisted by Mr. Khuram M. Hashmi, Adv.

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

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – These petitions were disposed of vide short order dated 23rd June, 2006, concluding para therefrom is reproduced hereinbelow:-

> "*we have heard learned counsel for the parties at great length, in view of the importance of the matter. After due deliberations and taking into consideration the issues involved therein in depth, by means of instant short order, which will be followed by detailed reasons later, it is held and directed as follows:--*
>
> *1. Conscious of the mandate of Article 153 and 154 of the Constitution, we hold that the establishment and working of the Council of Common Interests (CCI) is a cornerstone of the Federal structure*

> *providing for protection of the rights of the Federating units. Mindful that this important institution is not functioning presently and taking note of the statement made by the counsel for the Federal Government Mr. Abdul Hafeez Pirzada that the process for making it functional is underway, we direct the Federal Government to do the needful expeditiously as far as possible but not later than six weeks.*
>
> *2. The approval for the privatization of Pakistan Steel Mills Corporation by the Council of Common Interests on 29th May 1997 continues to hold the field. But in view of the developments having taken place during the intervening period and the divergent stand taken by the counsel for the Federal Government to the effect that the afore-referred order was never recalled and the stand taken by the counsel for the P.S.M.C. that the matter of its privatization was dropped subsequently, by way of propriety, it would be in order if the matter is referred to the Council of Common Interests (C.C.I.) for consideration.*
>
> *3. The Privatization Commission Ordinance No. LII of 2000 is not ultra vires of the Constitution.*
>
> *4. While exercising the power of judicial review, it is not the function of this Court, ordinarily, to interfere in the policy making domain of the Executive which in the instant case is relatable to the privatization of State owned projects as it has its own merits reflected in the economic indicators. However, the process of privatization of Pakistan Steel Mills Corporation stands vitiated by acts of omission and commission on the part of certain State functionaries reflecting violation of mandatory provisions of law and the rules framed thereunder which adversely affected the decisions qua prequalification of a member of the successful consortium (Mr. Arif Habib), valuation of the project and the final terms offered to the successful consortium which were not in accord with the initial public offering given through advertisement.*
>
> *For the foregoing reasons, the Letter of Acceptance (LoA) dated 31st March, 2006 and Share Purchase Agreement dated 24th April, 2006 are declared as void and of no legal effect."*

2. Brief facts are that Pakistan Steel Mills Corporation (P.S.M.C.) is a private limited company and its 100% equity is owned by Government of

Pakistan. It was incorporated in 1968 at a total cost of Rs. 24.7 billion. It commenced production in 1981 to 1984. The Mill is the biggest producer of steel in Pakistan and the only major manufacturer of flat and long bars and billet. It being situated near Port Qasim (Karachi) has got its jetty, water, natural gas and power. The plant was installed with the collaboration of Russian Government by the Ministry of Industries, Production and Special Initiatives. Mills net assets include land measuring about 19000 acres out of which the plant and the machinery is located on 4457 acres of land (core land) besides the land of downstream industrial estates.

3. The annual designed capacity of P.S.M.C. is 1.1 million tons. As explained in the written reply submitted by the management of the Mill, during initial years of its establishment, its profitability was not too remarkable on account of overstaffing, financial liabilities, poor work discipline, low capacity utilization, low sales, mismanagement and lack of a culture of accountability, etc. It was added that no appreciable investment was made in maintenance and mandatory repairs resulting in deterioration of machinery/equipment. However, in the year 1997, the Government of Pakistan (G.O.P.) decided to privatize it and got approval for the same from the Council of Common Interests (C.C.I.). But somehow process of privatization could not be completed and in the meanwhile on 20th May, 2000, its restructuring was approved by the Chief Executive of Pakistan. The process also included rightsizing of its manpower, repair and maintenance of plants, etc. It is the case of the Chairman P.S.M.C. that these measures were aimed at making P.S.M.C. a financially viable entity. To achieve the object following measures were adopted:-

(a) Financial Restructuring.
(b) Manpower Restructuring.
(c) Repair & Maintenance.
(d) Offer of Equity to Private Sector.
(e) No New Investment in Direct Expansion.

The idea of restructuring of the plant was conceived perhaps due to dropping the idea of privatization in 1998. The plan of restructuring so put forward proved successful as in the following years i.e. 2002-03, 2003-04, 2004-05, the audited accounts depicted its financial position as follows:-

Rs. In Million

Years	Capacity Utilization (%)	Net Profit before Tax	Net Profit after Tax	Accumulated Profit/Loss	Duties & Taxes paid	End Year Liquidity	Earning per share (Rupees)
2002-03	92	1239	1024	(7648)	5505	412	0.60
2003-04	94	7094	4852	(2796)	5395	7751	2.82
2004-05	89	10191	6734	3938	8901	11096	3.91
Total		**18,524**	**12610**		**19,801**	**9280***	

*as on 19.05.2006

4. Despite the above improved financial position of P.S.M.C. Government of Pakistan Ministry of Privatization and Investment, Privatization Commission on 4th March 2005 moved a summary to the Board of Privatization Commission suggesting therein that P.S.M.C. may be included in the privatization programme and recommendation to that effect may be made to the Cabinet Committee on Privatization (C.C.O.P.). It seems that in pursuance to it the Board of Privatization Commission gave approval to the proposal for the privatization of P.S.M.C. Later on, on having obtained approval from the Privatization Commission Board, Privatization Commission commenced the proceedings and in this behalf publications were made inviting Expression of Interest (EOI) from strategic investors to participate in the privatization of Pakistan Steel Mills Corporation (Pvt) Limited. The vibrant financial position of the company was also made public. It is important to note that besides publishing financial summary, the following statement showing the **Profile** of the company was notified:-

> "*PSMC is the country's largest and only integrated steel manufacturing plant with an annual designed production capacity of 1.1 million tons. It was*

> *incorporated as a private limited company in 1968 and commenced full scale commercial operations in 1984. PSMC complex includes coke oven batteries, billet mill, hot and cold rolling mills, galvanizing unit and 165 MW of own power generation units, supported by various other ancillary units. It is located 30km south east of the coastal city of Karachi, in close proximity to Port Bin Qasim, with access to a dedicated jetty, which facilitates import of raw materials. PSMC manufactures a wide mix of products, which includes both flat and long products. PSMC effectively enjoys a captive domestic market due to the prevalent demand-supply imbalance in the country's steel industry, where demand has historically exceeded local supply. PSMC also strives to maintain high quality and environmental standards and in this regard has received ISO 9001, ISO 1400-1 and SA 8000 certifications, along with the Environmental Excellence Award 2005. As a result of sustained improvement in Pakistan's macroeconomic environment, the demand for steel in the country is expected to grow substantially. PSMC is uniquely positioned to take advantage of the expected demand growth as adequate infrastructure is already in place to cater to capacity expansion."*

5. Before inviting E.O.I the Valuers were appointed to carry out a valuation. As per record, M/s City Group were appointed. The Group was assisted by Advisors namely M/s CORUS to provide technical "due diligence", including plant mechanical integrity assessment and technical inputs to the valuation model and environmental "due diligence" and M/s A.F. Ferguson & Co. (an affiliate firm of Price Waterhouse Coopers) for the purpose of Accounting, Tax, HR and IT "due diligence" along with M/s ORR, Dignam & Co. Advocates for legal "due diligence". It is relevant to point out that Financial Advisors/Valuers prepared the Valuation Report on the basis of the report submitted by A.F. Ferguson, CORUS and ORR, Dignam & Co. without undertaking independent exercise in respect of accounting, tax, etc and other aspects of the matter. A.F. Ferguson had also relied upon the Statement of Accounts furnished by P.S.M.C. In fact the Statement of Accounts and the balance sheet were copied in verbatim by the A.F. Ferguson. As far as these reports are concerned, admittedly, they are prepared on historical value of

assets of a concern i.e. according to the book value which is always based on depreciated price of the unit.

6. The Financial Advisor completed exercise for preparation of Valuation Report on following guidelines provided by Privatization Commission (P.C.):---

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

7. In pursuance to the publication of E.O.I. 19 parties had shown their interest. As such, Privatization Commission issued them Request for Statement of Qualifications (RSOQ) out of which the names of following nine prospective bidders were approved:-

(i) Aljomaih Holding Company (Saudi Arabia).
(ii) Al-Tuwairqi Group (Saudi Arabia) and Arif Habib Group (Pakistan).
(iii) Azovstal Steel/System Capital Management (Ukraine).
(iv) Government of Ras-Al-Khaimah (UAE).
(v) International Industries Ltd (Pakistan) and Industrial Union of Donbass (Ukraine).
(vi) Magnitogorsk Iron & Steel Works Open JSC (Russia).
(vii) Nishat Mills Ltd. and D.G. Khan Cement Co. Ltd (Pakistan).
(viii) Noor Financial Investment Co. (Kuwait).
(ix) Shanghai Baosteel Group Corporation (China).

It is stated that in the meanwhile on 28th October 2005, the Financial Advisor (F.A.) City Group submitted the interim report of Valuation of Shares followed by the final report on 30.03.2006.

8. It may not be out of place to mention here that at the time of the issuance of the E.O.I., the Privatization Commission intended to sell 51 to 74% out of 100% equity stake in P.S.M.C. but at the time of bidding total 75% shares were put on sale. A perusal of the profile of P.S.M.C. published in the newspapers indicates that nothing was mentioned therein in respect of the incentives which were provided later on to the successful bidder by the Privatization Commission including the exclusion of the price of land on which unit/project is situated i.e. 4457 acres and goodwill of the P.S.M.C. The incentives/concessions not advertised but extended to successful bidder included:--

(i) The stock in trade contained in the Unit worth about Rs. 10.00 billion.

(ii) The commitment of the Government of Pakistan to clear the loan liability of PSMC which was due for the year 2013 to 2019, amounting to about Rs.7.67 billion from the cash of Rs.8.559 billion lying with the Mills as per the Statement of Account.

(iii) Refund of Rs.1.00 billion paid in advance as tax to Government of Pakistan

(iv) Responsibility accepted by Government of Pakistan to satisfy the claim of the workers opting for Voluntary Separation Scheme (V.S.S.) up to Rs. 15.00 billion.

9. Admittedly, according to the report of Valuer (City Group) the value of the land has not been added in calculating the share price. In the final Evaluation Report/Summary dated 30th March, 2006 submitted by the F.A. to the BOPC, it was observed by the latter as follows:---

> "*The Board of Privatization Commission considered the valuation carried out by the FA as well as the replacement cost of plant and recommended total value of PSMC at US $ 500 Million. Based on this, the Reference price for 75% strategic stake would be US$*

> *375 Million i.e. Rs. 17.43 per share calculated at the rate of Rs.60 per US $ (total shares being divested are 1,290,487,275).”*

The summary also indicates that the Privatization Commission Board (BOPC) having considered the valuation recommended by the Financial Advisor proposed that, “ the current market value of total assets of P.S.M.C. may also be taken into account.” The Board of Privatization Commission however while considering F.A. report as well as the replacement cost of the plant recommended that the total value of P.S.M.C. would be U.S. $ 500 Million and based on this the reference price for 75% strategic stake would come to US $ 375 million i.e. Rs. 17.43 per share calculated at the rate of Rs. 60 per U.S. $.

10. On the next day i.e. 31st March, 2006, the matter was placed before the Cabinet Committee on Privatization (CCOP). The CCOP however did not accede to the proposal of the Privatization Board with regard to the inclusion of the value of total assets as also the per share price worked out by it on the basis of F.A. Valuation and the replacement cost (Rs. 17.43 per share) and instead decided as under:--

> “*The Cabinet Committee on Privatization (CCOP) considered the summary dated 30th March 2006, submitted by the Privatization & Investment Division on “Privatization of Pakistan Steel Mills Corporation” and approved the valuation of US$ 464 million based on DCF valuation for privatization of the Pakistan Steel Mills Corporation Limited (PSMC) for its 100% equity stake. On the basis of above, 75% equity stake (1,290,487,275 shares) works out to US$ 348 million i.e. Rs. 16.18 per share.*
>
> *II. The CCOP also approved the proposal contained in Para 8 of the summary to issue Letter of Acceptance (LoA) to the Successful Bidder if their per share price is equal or higher than the Reference Price mentioned in sub para I above.*
>
> *III. The CCOP directed the Privatization Division to follow the approved policy for Privatization, strictly in letter and spirit. Any deviation from the approved policy, if deemed necessary, should be brought up to the CCOP well in advance for consideration and approval of waiver, if any.*

IV. The CCOP directed the Privatization Division to impress upon the potential buyer to make the entire payment of the transaction to the GoP within the period stipulated in the bid documents.

V. The CCOP directed the Privatization Division to invariably add their viewpoint(s) recommendations explicitly in their summaries, in future."

11. In view of the above decision of C.C.O.P. the consortium comprising M/s Arif Habib Group of Companies, M/s Al-Tuwairqi Group of Companies and M/s Magnitogorsk Iron and Steel Works, Russia was declared successful bidder at the rate of Rs.16.80 per share. Thereafter the matter was not again placed before the CCOP and the Letter of Acceptance (LoA) was issued on the same date.

12. In the meanwhile on 27th February, 2006, the ongoing process of privatization of P.S.M.C. was challenged by Pakistan Steel Mills Workers Union (CBA) and three others before the High Court of Sindh at Karachi in a Constitutional petition (bearing No. 240 of 2006) claiming therein the following reliefs:-

"*a) Direct the respondent No.1 to constitute Council of Common Interests (CCI) under Articles 153 and 154 of the Constitution.*

b) Declare that the provisions of Sections 3,5,6,7,9,14,16,22 of the Privatization Ordinance LII of 2000 are ultra vires of Articles 153 and 154 of the Constitution and therefore, void and of no legal effect.

c) Declare that the process of Privatization is violative of Articles 2-A, 3, 4, 5, 9, 25, 38 of the Constitution.

d) Declare that the process of Privatization adopted by respondents No.1 and 3 in respect of sale of shares and management control in the PSM is illegal, arbitrary, irrational and without any lawful authority.'

e) Restrain the respondents No. 1 and 3 from carrying through with the Privatization of P.S.M. without the directions and supervision of CCI and the Province of Sindh.

> *f) Direct the respondents to maintain status quo during the pendency of this petition.*
>
> *g) Any other relief (s) fit and necessary in the circumstances of this case may also be granted."*

13. Incidentally the above petition came up for hearing on 30th March, 2006 before acceptance/finalization of the bid and it was dismissed in limine vide short order reproduced hereinbelow:-

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

Later on detailed reasons for the above order were issued on 31.05.2006.

14. Wattan Party through Barrister Zafarullah Khan filed a petition under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan challenging the process of privatization and acceptance of bid of respondent No.7 before this Court. Aggrieved by the order/decision of High Court, C.P. No. 345 of 2006 was filed by the Workers Union C.B.A. and C.P. No. 394 of 2006 has been filed by the Federation of Pakistan against the same judgment.

15. It is to be observed that Federation of Pakistan and others challenged the judgment of the Sindh High Court at Karachi inter alia on the ground that Articles 153 and 154 of the Constitution of Islamic Republic of Pakistan are not attracted in the case of privatization of a company wholly owned by the Federal Government and further that in exercise of its Constitutional jurisdiction, the High Court can not decide academic question like vires of a statute when such decision was not warranted, upon the facts of the case. The learned Sindh High Court in the detailed reasons concluded that for privatization of the Federal Government owned industries approval of CCI is mandatory but

relief was declined because the Chief Minister Sindh being one of the members of the C.C.I. had consented to the privatization of P.S.M.C. and in the facts and circumstances of the case, this consent of Chief Minister was sufficient to deny the petitioner, the discretionary relief under Article 199 of the Constitution.

16. Before dilating upon the merits of the case it is to be noted that both the learned counsel for Federation of Pakistan and Privatization Commission admitted that approval of CCI for privatization of Federal Government owned industrial units is necessary. Learned counsel for the Privatization Commission during his arguments placed on record a decision of CCI dated 29th May 1997 to substantiate that approval of CCI had already been obtained. Similarly learned counsel for the Government of Pakistan relied on the same decision and also brought on record complete summary placed before the CCI seeking approval for privatization of Federal Government owned industries including PSMC. He contended that the assertion (in Statement of Affairs filed by PSMC through its Chairman) that in 1998 the decision of privatization of PSMC was dropped is incorrect. He added that he has been instructed to make statement that the decision of C.C.I. dated 29th May 1997 still holds the field. On enquiry by the Court on the point as to whether C.C.I. has been appointed/activated so far or not, learned counsel after explaining the importance of C.C.I., answered that the process of making C.C.I. functional was "underway".

17. Learned counsel for the petitioner (C.P. No. 9 of 2006) Barrister Zafarullah contended that P.S.M.C. is the only huge integrated iron mill having finishing plants, blast furnaces, steel converters, Hot and Cold Roll Galvanizing Unit, grinding units, 65 mega watts power generation plant, 4 steel plants in Thatha, water supply plant, thermal power plant, 40 locomotives of 100 HP each, more than 100 railway wagons, 110 kilometers metalled road, 10 k.m. railway track, water treatment plant, jetties and 98 coke ovens, 80 brand new vehicles,

cash in hand, etc. But the Privatization Commission had sold its 75% shares against Rs.16.80 per share which comes to U.S. $ 348 million i.e. Rs. 21.68 billion along with the land measuring 4457 acres which has been unbundled from total land of 19086 acres on which Gulshan-i-Hadeed Town, schools etc are located. He further stated that out of the downstream industrial estates located on P.S.M.C. 220 acres land has been allotted to M/s Al-Tuwairqi Group of Companies by the Government of Pakistan (GoP) for the purpose of establishing a steel mill. Earth breaking ceremony of the said mill was carried out on 30th March, 2006, therefore, according to him for the best reasons known to the Privatization Commission its shares were sold to the same group along with the consortium of M/s Arif Habib Group of Companies, M/s Al-Tuwairqi Group of Companies and M/s Magnitogorsk Iron and Steel Works, Russia. He added that the petitioner being a registered political party having direct interest in national assets including the Steel Mill has invoked the jurisdiction of this Court under Article 184 (3) of the Constitution in its own right. He contended that 'Access to Justice' is a fundamental right of everyone, therefore, petition is maintainable. Reliance in this behalf has been placed by him on **S.P.Gupta v. M. Tarkunde and others** (A.I.R. 1982 SC 149), **Miss Benazir Bhutto v. Federation of Pakistan and another** (PLD 1988 SC 416), **Al-Jehad Trust v. Federation of Pakistan** (PLD 1996 SC 324), **Malik Asad Ali v. Federation of Pakistan** (PLD 1998 SC 161) and **Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan** (PLD 2000 SC 869).

18. Mr. Abdul Mujeeb Pirzada, learned ASC contended that he is appearing on behalf of the members of the Union and it being a public interest litigation locus standi of the petitioners to invoke the jurisdiction either of the High Court or this Court should not be questioned for the purpose of denying relief to the petitioners. He stated that before the completion of the process of privatization, the Privatization Commission itself took into confidence the workers

as it is evident from the letter dated December 20th, 2005 because the members of the Union have a right to form the workers and management group for the purpose of giving a bid to purchase the shares of the Mill and in fact in pursuance of such offer the workers were ready to participate in the bid but as at the eleventh hour they were called upon to deposit U.S. $ 30 Million as earnest money which they could not arrange hurriedly although the funds belonging to the workers amounting to about Rs. 18.00 billion were lying with the management. Therefore, the objection to the maintainability of the petitions is without any substance. Reliance was placed on **Multiline Associates v. Ardeshir Cowasjee** (PLD 1995 SC 423) and **Ardeshir Cowasjee v. Karachi Building Control Authority (KMC) Karachi** (1999 SCMR 2883). Learned counsel contended that the petitions have also been filed under Article 185(3) of the Constitution against the judgment of the Sindh High Court at Karachi passed in writ petition on 30th of March, 2006, detailed reasons thereof were issued subsequently on 31st May 2006. Against this very judgment, the Federation of Pakistan had also filed a petition under Article 185(3) of the Constitution with the prayer that the same may be set aside. The issues involved being similar, the question of locus standi would be merely an academic and insignificant question.

19. Syed Sharif-ud-Din Pirzada learned counsel for the Privatization Commission contended that to invoke jurisdiction of this Court under Article 184(3) of the Constitution, two conditions are required to be fulfilled namely infringement of the fundamental rights and absence of alternate remedy. In the case in hand no fundamental right has been infringed and under the scheme of Privatization Commission Ordinance No.LII, 2000 (hereinafter referred to as "Ordinance"), two alternate remedies are available in terms of section 27 and section 28 of the Ordinance. According to learned counsel the judgment relied upon by the petitioner in **S.P. Gupta's case** ibid, in the circumstances of the

instant case is not applicable because thereafter the Indian Supreme Court in the case of **BALCO Employees Union (Regd) v. Union of India** (AIR 2002 SC 350) has explained the scope of the public interest litigation.

20. Learned Attorney General, however, at the outset contended that after hearing the case at length by this Larger Bench for a long period, it will not be fair on his part to say that, "no point of public importance is involved in this case", therefore, he will not be questioning locus standi of the petitioners particularly in view of the judgments in the cases of **Multiline Associates** and **Ardeshir Cowasjee** ibid.

21. This Court in the referred cases and the Indian Supreme Court in the case of **S.P. Gupta** ibid have laid down a rule namely that any member of the public having sufficient interest can maintain an action for judicial redress of public injury arising from breach of the public duty or from violation of some provision of the Constitution or the law and for enforcement of such public duty and observance of such Constitutional provision.

In the case of **Benazir Bhutto** ibid, it was held that only when the element of public importance is involved , the Supreme Court can exercise its power to issue the writ while sub Article 1(c) of Article 199 of the Constitution has a wider scope as there is no such limitation therein.

In **Al-Jehad Trust ibid**, it has been held that, "question of locus standi is relevant in a High Court but not in the Supreme Court when the jurisdiction is invoked under Article 184(3) of the Constitution."

In **Malik Asad Ali** ibid it was observed that under Article 184(3) of the Constitution, this Court is entitled to take cognizance of any matter which involves a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I Part II of the Constitution even suo moto, without having any formal petition.

In **Multiline Associates** ibid this Court held that requirement of the locus standi in the case of pro bono publico (public interest litigation is not so rigid) has extended scope. This principle has been reiterated in **Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan** (PLD 1998 SC 1263)

As far as the judgment in **All Pakistan Newspaper Society v. Federation of Pakistan** (PLD 2004 SC 600) cited by the learned Sr. ASC Syed Sharif-ud-Din Pirzada is concerned, it is distinguishable because in that case we have held that it pertains to a financial dispute between two groups of newspaper industry i.e. employer and employees and no question of public importance was involved as the parties (employer and employees) were litigating with each other in respect of the validity or otherwise of Wage Board Award published by the Government of Pakistan on 25th October, 2001. Likewise, **Balco's case** ibid need not be discussed in view of the judgments referred hereinabove and keeping in view that the learned Attorney General has himself conceded that this case involves questions of public importance, therefore cannot be thrown away summarily. Besides we are conscious of the fact that it is not only the petition under Article 184 (3) of the Constitution which is pending consideration before us but at the same time there are two other petitions which have been filed under Article 185(3) of the Constitution (one by the Workers Union and second by the Federation of Pakistan), involving similar questions therefore, keeping in view the importance of the case and the alleged violation of Article 4 and Article 9 of the Constitution, we hold that the petition under Article 184(3) of the Constitution filed by the Wattan Party is maintainable.

22. Now we turn to the question relating to availability of alternate remedy to petitioner in terms of section 27 and 28 of the Privatization Commission Ordinance, 2000. For facility of reference both these sections are reproduced hereinbelow:-

> *"27. **Investigations.-** (1) The Federal Government or any of its agencies authorized by it, may of its own or on a complaint oversee, scrutinize or investigate any privatization transaction within one year of the completion of the privatization.*
> *(2) After the expiry of the period referred to in sub-section (1), the Federal Government or any of its agencies shall not be empowered to carry out any such scrutiny or investigation.*
> *28. **Jurisdiction of High Courts.-** Notwithstanding anything contained in any other law for the time being in force, the High Court shall exercise exclusive civil and criminal jurisdiction-*
> *(a) to adjudicate and settle all matters related to, arising from or under or in connection with this Ordinance;*
> *(b) to adjudicate and settle all matters transferred pursuant to section 31; and*
> *(c) to try offences punishable under this Ordinance."*

23. Learned counsel Mr. Abdul Mujeeb Pirzada contended that the Federal Government itself is petitioner in one of the petitions (C.P. No. 394 of 2006), in the memo of the petition it is supporting the process of privatization as prayer has been made for the dismissal of petition filed on behalf of the Workers Union before the High Court bearing C.P. No. D-240/2006. Besides from day one when the proceedings started the matter was discussed at considerable length wherein number of omissions and commissions in the privatization of the project under consideration have been pointed out which according to him were sufficient to annul the Letter of Acceptance (LoA) dated 31st March, 2006 and the subsequent Share Purchase Agreement between the parties dated 24th April, 2006. But no concern was shown at all on its behalf, therefore, under these circumstances availing an opportunity to lodge complaint before the Federal Government in terms of section 27 of the Ordinance would be nothing but a futile exercise. In this behalf he has placed reliance on **Anjuman-e-Ahmadiya, Sargodha v. The Dy Commissioner Sargodha** (PLD 1966 SC 639) and **The Murree Brewery Co. Ltd v. Pakistan thr. The Secretary to Government of Pakistan, Works Division** (PLD 1972 SC 279). He also submitted that because he

is challenging the very vires of the Ordinance, he cannot be compelled to avail the so-called remedies.

24. Syed Sharif ud Din Pirzada, learned ASC for the Privatization Commission opposed the arguments put forward by Mr. Abdul Mujeeb Pirzada learned ASC and stated that in presence of a statutory remedy the petition under Article 199 or Article 184(3) of the Constitution is not maintainable.

25. Learned Attorney General contended by relying on the principles laid down in **The Chairman East Pak Railway Board Chittagong etc v. Abdul Majid Sardar, Ticket Collector Pak Eastern Railway Laksam** (PLD 1966 SC 725) and **Lahore Improvement Trust, Lahore thr. Its Chairman v. The Custodian Evacuee Property West Pak Lahore** (PLD 1971 SC 811) that "the Court to explore possibility of every possible explanation for the validity of an order passed by public authority," suggested resort to section 27 of the Ordinance by making reference to the Federal Government for the purpose of further probe into the case to examine the legality and validity of transaction.

26. It is important to note that as far as the principle of law discussed in the cases of **Anjuman-e-Ahmadiya, Sargodha** and **Lahore Improvement Trust** ibid is concerned, there is no cavil with the same and we with utmost respect approve the same. 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 **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.

27. 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.

28. Now turning towards the implication of section 28 of the Ordinance a perusal whereof indicates that civil and criminal jurisdiction has been conferred on the High Court to adjudicate and settle all matters related, arising from or under or in connection with the Ordinance as also all matters transferred pursuant to section 31 and to try offences punishable under the Ordinance. In our opinion the matters shall be arising in respect of the rights and obligations of the parties who are the subject of the Ordinance. As far as pro bono publico cases are concerned, those shall not be covered under this provision of law because in such cases Court has been called upon to exercise Constitutional jurisdiction on the basis of the information laid before it that the matter involves question of public importance relating to their fundamental rights individually or collectively. A perusal of section 28 clause a, b, c, indicates that for such like litigants this section provides no remedy for redressal of their grievances.

29. Besides above reasons there is an important aspect of the case namely these remedies are available within the Ordinance and Mr. Abdul Mujeeb Pirzada learned ASC has challenged its vires on the touchstone of Article 153 & 154 of the Constitution. Therefore the law vires, of which have been challenged, it

would not be fair to compel the petitioner to avail the remedy under the same law. The High Court within its limited jurisdiction under section 28 can not strike down any of the provisions of the Ordinance. Furthermore, petitioner's learned counsel has raised issues of great public importance falling within the Constitutional domain of this Court which could not have been adequately addressed to by the Court in terms of section 28 of the Ordinance.

30. Mr. Abdul Mujeeb Pirzada learned ASC argued that without the approval of C.C.I. privatization of P.S.M.C. is unconstitutional in view of the mandate of Article 154 of the Constitution. The Mill is owned by the people of Pakistan and its tax payers, there is representation of employees of all the Provinces and its sale proceeds are to be spent for alleviation of poverty of the people and discharge of debts, therefore, bypassing the CCI by the Federal Government is not only illegal but is also against the Command of the Constitution. He further contended that despite restoration of the Constitution w.e.f. 31st December, 2002, the C.C.I. has not been constituted and made functional so far. Therefore, the whole process of privatization has become illegal for this reason. He also stated that the learned High Court accepted the arguments of the petitioner in this behalf but declined to grant relief by not exercising discretionary jurisdiction under Article 199 of the Constitution for reasons which are not tenable in law. Therefore, he prayed that on this sole ground the process of privatization of P.S.M.C. deserves to be declared unconstitutional. According to him, even the Ordinance is bad law having not been approved by the CCI.

31. Syed Sharif-ud-Din Pirzada, learned Sr. ASC contended that as far back as 29th May, 1997, approval for the privatization of P.S.M.C. had been obtained. To substantiate his plea, he has placed on record decision of the CCI dated 29th of May 1997 along with the Schedule containing approval for privatization of Pakistan Steel Mills Corporation and its units and contended that

after having taken approval there was no necessity for placing again the matter before the CCI.

32. Mr. Abdul Hafeez Pirzada learned Sr. A.S.C. contended that Article 173 of the Constitution has directly conferred authority upon the Federation and Provinces to dispose of their property. In this case as well, in exercise of the same authority, the CCI has not been bypassed as the Federal Government had received its categorical, explicit and unambiguous endorsement of the entire privatization programme on a summary submitted to it in accordance with the rules on 25th May 1997 approval of which was granted on 29th May, 1997. He explained the object of establishing the institution of CCI during the process of making of Constitution of 1973. According to him, in the Federal System of Government, it is necessary to take along the Federating Units in the affairs of the Federation and once CCI had taken a decision this Court in judicial proceedings has no jurisdiction to revise the same because under the principles of trichotomy of Powers the three Organs of the State have got their respective areas for the purpose of exercising jurisdiction. Therefore, interference made in the approval of the CCI dated 29th May 1997 would give rise to an anomalous position. Learned counsel placed on record a paper book containing documents of "Constitution Making in Pakistan" ever since the inception of this country. It is to be noted that management of P.S.M.C. had stated in unambiguous terms that the decision of its privatization was dropped in 1998 and in the year of 2000 a decision was taken by the then Chief Executive to revamp the Pakistan Steel Mills and to achieve the object loans were to be arranged from the banks. Two Memoranda of Understanding (MOUs) were also signed with Russian and Chinese Governments for the purpose of providing technical support to the Government of Pakistan to revamp Pakistan Steel Mills. In view of such stand taken by P.S.M.C., Mr. Wasim Sajjad learned counsel appearing on its behalf was asked to explain the position by filing another statement. In compliance of the order, he submitted an explanation wherein he

took the stand that, "by implication the privatization process was dropped. The restructuring was approved by the then Chief Executive on 20.05.2000."

33. Mr. Abdul Hafeez Pirzada, learned counsel for the Federal Government and learned Attorney General were on the same wavelength when they contended that the decision of C.C.I. can only be annulled by the Parliament in a joint sitting in accordance with the provisions of Article 154 (5) or could be rescinded by the CCI itself and such decision cannot be undone by any other functionary. This is in line with this Court's earlier view given in **Messrs Gadoon Textile Mills v. WAPDA** (1997 SCMR 641) wherein at Page 769 it was observed as under:--

> "*It is significant to note that the Federal Government has not been authorized to give any direction to the CCI. Clause 5 of Article 154 provides a procedure in a case where the Federal Government or the Provincial Government is dissatisfied with the decision of the Council. Any of the aggrieved governments may refer the matter to Majlis-i-Shura (Parliament) in joint sitting whose decision in that behalf shall be final.*"

34. Learned Attorney General contended that in view of the facts of the case in hand the reference in respect of the approval for privatization of P.S.M.C. by the C.C.I. is no more a live issue in view of its decision dated 29th May 1997, the question relating to taking approval of C.C.I. before privatization of an industry owned by the Federation presently seems to be academic one, therefore, it may be left open for decision in some other case where there is a live controversy when there is actually no approval of C.C.I. and then this Court may interpret Article 153, 154 and 173 of the Constitution and law. To substantiate his plea he has relied upon **Qazi Hussain Ahmad v. Gen. Pervaiz Musharaf** (PLD 2002 SC 853), **Shah Sawar v. the State** (2000 SCMR 1331), **Commissioner Income Tax v. M/S. Hasan Associates (Pvt) Limited** (1994 SCMR 1321), **A.K. Roy v. Union of India** (A.I.R. 1982 SC 710), **Naresh v. State of Maharashtra** (AIR 1967 SC 1) and **Mst. Kaneez Fatima v. Wali Muhammad** (PLD 1993 SC 901 at page

915). In the last mentioned case it has been decided that it is an accepted principle that if a case can be decided on other issue properly it is not necessary to enter into Constitutional issues. The importance of CCI has been examined by this Court in **Mian Muhammad Nawaz Sharif v. President of Pakistan** (PLD 1993 SC 473). Relevant para therefrom is reproduced hereinbelow:-

> "*The Council of Common Interests is an important Constitutional institution which irons out differences, problems and irritants between the Provinces inter se and the Provinces and the Federation in respect of matters specified in Article 154. The Council is responsible to Majlis-e-Shoora, which in joint sitting may from time to time by resolution issue directions through the Federal Government generally or in particular matters to take action as the Parliament may deem just and proper and such directions shall be binding on the Council. Ground C(i) of the dissolution order specifies that the Council of Common Interests has not discharged its Constitutional functions to exercise its powers particularly in the context of privatization of industries in relation to the subject matter mentioned in Article 154.*"

35. After perusal of judgment in **Muhammad Nawaz Sharif's case** as well as an earlier judgment reported in **Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan** (PLD 1992 SC 646), one can well conceive the importance of CCI and by making it functional the Federal Government can resolve number of issues/differences including the process of privatization of industries owned by the Federal Government as per mandate of the Constitution and procedure laid down therein. In the instant case, the decision/approval was taken to privatize good number of industries mentioned in the schedule attached to the decision dated 29th May 1997 including P.S.M.C. Therefore the view taken by this Court in the case of **Messrs Gadoon** ibid is respectfully approved with reference to functioning of C.C.I. under Articles 153 & 154 of the Constitution. As a consequence whereof the view taken by the Sindh High Court in the impugned judgment is upheld.

36. Thus in view of the statement so made on behalf of the Federation of Pakistan as well as learned counsel appearing for Privatization Commission that approval from CCI had already been taken on 29th May 1997, no further discussion is called for except to consider the effect of the stand which has been taken in the written statement by the counsel of PSMC namely that in 1998 the decision was dropped and its restructuring was planned by the then Chief Executive on 20.05.2000. Learned counsel for Federation of Pakistan stated that once the approval has been obtained from the CCI, the same decision cannot be set aside except in accord with the procedure laid down in Article 154(5). On having gone through the relevant Constitutional provision we agree with his contention but at the same time we are mindful of the fact that in the process of restructuring which started after about 3 years of the decision of CCI dated 29.05.1997, the project was restructured by investing huge money. The MoUs were also signed with the governments of China and Russia for the purpose of providing technical support to increase its capacity up to 1.5 metric tons per year and thereafter the Mill had started making profit as is evident from the Statements of Accounts/balance sheets pertaining to the years 2002-03, 2003-2004 and 2004-05. It is significant to note that during these years the project made remarkable profits and according to the stand taken on behalf of PSMC it wiped off all its losses and carried forward accumulated profit of Rs.3.938 billion as on 30th June, 2005, therefore, we observe that in view of these healthy developments having taken place during the intervening period and the divergent stand taken by the counsel for the Federal Government to the effect that order dated 29th May 1997 was never recalled and the stand taken by the counsel for the PSMC that the matter of its privatization was dropped subsequently, by way of propriety if not as a matter of legal obligation, it would be in order if the matter is referred to the Council of Common Interests (C.C.I) for fresh consideration. There is another reason to keep intact the decision dated 29th May 1997 because its validity or otherwise has not

been challenged before us nor it was ever challenged before the Parliament in terms of Article 154 (5) of the Constitution.

37. During the course of arguments, learned counsel for the Federation was called upon to apprise the Court as to whether C.C.I. is functioning or not? He, after obtaining instructions, stated at the Bar on the following day that process for making C.C.I. functional was **underway**.

Thus in view of the importance of C.C.I. as a body envisaged by the Constitution, we direct the Federal Government to do the needful expeditiously as far as possible but not later than **six weeks**.

38. The next most important question raised before us is with regard to the vires of the Privatization Commission Ordinance LII 2000. Mr. Abdul Mujeeb Pirzada learned ASC argued that Ordinance 2000 is ultra vires of the Constitution. He explained that it was promulgated during the period when the Constitution was in abeyance therefore the requirements of Article 154 of the Constitution were not fulfilled. However, on revival of the Constitution it was necessary to amend the same in order to bring it in line with the said Article. According to him, the C.C.I. is an important Constitutional body but perusal of the contents of Ordinance 2000 indicates that it has no role to play for the purpose of getting its policies implemented. As far as the executives are concerned, they are not supposed to take decisions for the purpose of privatization of the industries belonging to the Federal Government or to deal in other fields wherein CCI has got jurisdiction as per its Constitutional mandate. He emphasized that the vires of Ordinance 2000 were challenged before the Sindh High Court but it has failed to dilate upon this aspect of the case as the Constitutional petition has been dismissed in limine. It was also argued by the learned counsel that Constitutional protection available to the Ordinance in pursuance to 17th Amendment in the Constitution does not prohibit the Legislature to repeal or amend different sections of the Ordinance through the process of legislation. Substance of his arguments was that when there is a conflict between

Constitutional provision and the sub constitutional provision then the sub Constitutional provision has to yield to the Constitutional provision and different provisions of the Ordinance including sections 2,3,5,6,7,9,14,16,22 are not in consonance with Articles 153 and 154 of the Constitution, therefore, the same are liable to be struck down. Reliance was placed by him on **Mehram Ali v. Federation of Pakistan** (PLD 1998 SC 1445) and **Syed Zafar Ali Shah** ibid to explain judicial powers of the Court to examine the constitutionality of a law on the subject. He also contended that where a law encroaches upon fundamental rights or it comes in conflict with another provision of the Constitution, the same shall be deemed to be violative of the Constitutional provisions. The workers of P.S.M.C. are earning their livelihood and are responsible for its effective running but they were not permitted to form a group for the purpose of participating in the bid, therefore, section 25 of the Ordinance needs to be amended incorporating a further clause in the modes of privatization and in absence of such provision of law they have been deprived of their fundamental right to life. He further submitted that the Constitution is a social contract and it regulates rights and obligations of its subjects, therefore, any violation of the same by a subordinate legislation calls for striking off the same being contrary to Constitutional commitments between the parties.

39. Mr. Abdul Hafeez Pirzada learned ASC for the Federation contended that Ordinance 2000 does not suffer from procedural or substantive ultra vires. He argued that perhaps an impression has been gathered that CCI has to be approached for each and every item of privatization which is neither required nor possible. Reliance was placed on **Gadoon Textile Mills** ibid wherein it has been held that CCI superimposes its will on the Cabinet and the Cabinet is bound under the provisions of Article 154 of the Constitution to follow the decisions and directions of the CCI. According to him it would not be proper to say that in the entire process of privatization CCI is involved. He submitted that Ordinance 2000

was promulgated by the Chief Executive competently under the powers available to him at the relevant time and the same was protected/ratified under Article 270-AA of the Constitution. According to him the intent of the Parliament cannot be overridden by this Court in exercise of the power of judicial review unless it is shown that it is in conflict with any provision of the Constitution. He further explained that this Court can strike down a law on the following touchstones:-

(i) If it is tainted with malice which must be proved as a fact.

(ii) If it lacks procedural propriety which is extension of the principle of natural justice.

(iii) If it is ex facie illegal.

(iv) If there is failure to conform to the principle of proportionality (proportionality has not been defined even in England). In this regard he referred to the principle of reasonableness laid down in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1947] 2 All ER 680**.

He also submitted that if this Court at all comes to the conclusion that there is conflict between Article 154 and 270-AA which has provided protection to the Ordinance then the two Articles of the Constitution are to be reconciled as this Court is not empowered to strike down any provision of Constitution.

He further contended that according to his information Rules and Procedure of the Council of Common Interests were promulgated (in exercise of the powers conferred by sub Article 3 of Article 154 of the Constitution) by the C.C.I. in the year 1991 and since then CCI is implementing its policies through the executives who are exercising the jurisdiction as per the provisions of Rules of Business of the Government of Pakistan.

40. Learned Attorney General for Pakistan (on Court notice) contended that there are two kinds of ultra vires, procedural and substantive. Procedural ultra vires is that law has been made in a manner different from which it should have

been made as required by the Constitution and Substantive ultra vires means that it is in conflict with the provisions of the Constitution. Procedural ultra vires is sought to be cured by curative legislation in the form of validation of laws. Article 270-AA cured that procedural ultra vires because it has been protected by this Constitutional provision, therefore, this question is no longer open to this Court. As far as substantive ultra vires is concerned, the Ordinance will be protected throughout the extra Constitutional period and after the restoration of Constitution the Ordinance has been protected by 17th Amendment, therefore, it would be deemed to be a protected law and cannot be called ultra vires. Reliance was placed by him on **Miss Benazir Bhutto** ibid, **Mrs. Benazir Bhutto v. Federation of Pakistan** (PLD 1989 SC 66). He further contended that legislation should not be randomly struck down. The Court must endeavour to find every reason for its validity as held in **The Province of East Pakistan v. Sirajul Haq Patwari** (PLD 1966 SC 854), **Mehreen Zaibun Nisa v. Land Commissioner** (PLD 1975 SC 397), **Inamur Rahman v. Federation of Pakistan** (1992 SCMR 563), **Multiline Associates** ibid, **Messrs Elahi Cotton Mills Ltd. v. Federation of Pakistan** (PLD 1997 SC 582), **Pakistan Burma Shell Ltd. v. Federation of Pakistan** (1998 PTD 1804), **Dr. Tariq Nawaz v. Govt of Pakistan** (2001 PLC (CS) 57), **Mian Asif Islam v. Mian Mohammad Asif** (PLD 2001 SC 499), **Pakistan Muslim League (Q) v. Chief Executive of Pakistan** (PLD 2002 SC 994) and **Pakistan Lawyers Forum v. Federation of Pakistan** (PLD 2005 SC 719).

41. Before examining respective arguments advanced by the learned counsel for the parties it would be appropriate to observe that the concept of Council of Common Interests/Inter Provincial Council was conceived during the making of 1973 Constitution in pursuance of an Accord between the Parliamentarians:--

> "*To conform to the spirit of federalism, a new arrangement has been worked out to ensure effective participation of the Provincial Governments in*

sensitive and important spheres of national life. In respect of the subjects in Part II of the Federal Legislative List and the item of electricity in the Concurrent Leglislative List, special provision has been made for the creation of a Council of Common Interest to be appointed by the President as envisaged in the Constitutional Accord. The Council shall consist of the Chief Ministers of the Provinces and an equal number of members from the Federal Government. The Council shall formulate and regulate policies in relation to the specified matters and exercise supervision and control over related institutions."

42. In line with the above accord, Council of Common Interests was to be constituted with following objects and purposes:-

"24. **COUNCIL OF COMMON INTERESTS/INTER PROVINCIAL COUNCIL.**
There shall be a Council of Common Interests under the Constitution which shall consist of four provincial Chief Ministers and four members of the Federal Cabinet to be nominated by the Prime Minister.

25. In respect of the items No.17 , 27 and 29 of the Federal List above and item of electricity on the Concurrent List in so far as it relates to the Federation, the Council shall exercise supervision and control on policy. The institutions relating to these items shall function under the control and supervision of this Council.

26. The decisions of the Council shall be implemented by the concerned Ministries of the Federal Government.

27. The Council shall, through the Prime Minister, be responsible to the Parliament."

43. Subsequent thereto, the Constitution makers transformed the above provisions in Article 153 and 154 of the Constitution. Article 153 provides for the composition of the Council of Common Interests whereas Article 154 deals in respect of the functions and rules of procedure. For convenience these Articles are reproduced hereinbelow:-

***"153.** (1) There shall be a Council of Common Interests, in this Chapter referred to as the Council, to be appointed by the President.*
(2) The members of the Council shall be------
(a) the Chief Ministers of the Provinces, and
(b) (an equal number of members from the Federal Government to be nominated by the Prime Minister from time to time.
(3) The Prime Minister, if he is a member of the Council, shall be the Chairman of the Council but, if at any time he is

> *not a member, the President may nominate a Federal Minister who is a member of the Council to be its Chairman.*
> *(4) The Council shall be responsible to [Majlis-e-Shoora] (Parliament)].*
> *"**154**. (1) The Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and, in so far as it is in relation to the affairs of the Federation, the matter in entry 34 (electricity) in the Concurrent Legislative List, and shall exercise supervision and control over related institutions.*
> *(2) The decisions of the Council shall be expressed in terms of the opinion of majority.*
> *(3) Until [Majlis-e-Shoora] (Parliament) makes provision by law in this behalf, the Council may make its rules of procedure.*
> *(4) [Majlis-e-Shoora (Parliament)] in joint sitting may from time to time by resolution issue directions through the Federal Government to the Council generally or in a particular matter to take action as [Majlis-e-Shoora (Parliament)] may deem just and proper and such directions shall be binding on the Council.*
> *(5) If the Federal Government or a Provincial Government is dissatisfied with a decision of the Council, it may refer the matter to [Majlis-e-Shoora (Parliament)] in a joint sitting whose decision in this behalf shall be final."*

A perusal of Article 154 indicates that the Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and in so far as it is in relation to the affairs of the Federation, the matter in entry 34 (electricity) in the concurrent legislative list and shall exercise supervision and control over related institutions. There is no need to furnish the details of the matters enunciated in Part II of the Federal Legislative List because presently we are only concerned in respect of privatization of Federally owned industries. It is nobody's case that in the matter of disinvestment or privatization of PSMC the CCI has no jurisdiction.

44. On the basis of the law laid down by this Court in the case of **Mian Muhammad Nawaz Sharif** ibid, the Privatization Commission moved a summary dated 25th of May, 1997 to the CCI for the purpose of its approval to privatize the government owned industries details whereof were mentioned in the Schedule attached therewith. Relevant para therefrom is reproduced hereinbelow:-

"Based on the functions and powers of CCI, its concurrence is necessary for the privatization of utilities (electricity, oil, natural gas and miners resources) and state-owned entities (industrial units and other undertakings). The honourable Supreme Court of Pakistan in Muhammad Nawaz Sharif v. the Federation of Pakistan (PLD 1993 Supreme Court Page 473) had observed that the Government ought not to have transferred any units included in Part II of the Federal Legislative List to the private sector in the absence of a policy or policies framed by the CCI."

45. In pursuance to above summary, the following decisions were recorded by the CCI:-

"The Council of Common Interests (CCI) considered the summary dated 25th May, 1997 submitted by the Privatization Commission on "Privatization of Utilities and other State Owned Entities" and decided to grant ex post facto approval to the disinvestments completed by the Privatization Commission so far subject to the reservations that non transparent and irregular transactions during the previous government's tenure of office as in the case of Kot Addu Power Station, PTC, National Press Trust Newspapers and any other transactions should be thoroughly investigated and necessary action taken to proceed against those involved.

II. The CCI decided to approve the recommendations as outlined in the Summary submitted by the Privatization Commission for early implementation.

III. The CCI decided that the Privatization Commission should include at least one representative from each Province.

IV. The CCI decided that the net sale proceeds accruing from privatization process should be utilized primarily for debt retirement and should not be used for budgetary support.

V. The CCI approved the sale of surplus railway land for improving the financial position of the railways, providing better railway facilities and retirement of debt. The sale of surplus land available with federal and provincial governments/agencies should be expedited to retire the debt of federal and provincial governments.

VI. The CCI decided that the share of hydel profits or royalties/gas development surcharge from Oil and Gas sources should remain at levels at which it would have remained, had there been no privatization.

VII. The CCI endorsed the need for establishment of Regulatory Authorities i.e. for power, gas, telecommunications, railways and wherever required. The Regulatory Authorities, apart from other functions, should keep in view the CCI decision at (VI) above concerning their respective fields."

46. It is to be noted that prior to the promulgation of Ordinance 2000 the privatization was being done by a Commission established under the executive fiat of the Federal Government. Later on, apparently to implement the decisions of the CCI, Ordinance 2000 was promulgated also with a view to structure the discretionary authority of the Privatization Commission and to ensure greater transparency.

47. Article 8 of the Constitution grants the power of judicial review of legislation according to which this Court is empowered to declare a law void if it is inconsistent with or in derogation to the fundamental rights. However, at the same time this Court is empowered to declare any legislation contrary to the provisions of Constitution under some of the identical provisions of the Constitution as under Article 143 of the Constitution on having noticed inconsistencies between the Federal and Provincial laws the Court is empowered to declare that which out of the two laws is in accordance with the Constitution. Besides it is an accepted principle of the Constitutional jurisprudence that a Constitution being a basic document is always treated to be higher than other statutes and whenever a document in the shape of law given by the Parliament or other competent authority is in conflict with the Constitution or is inconsistent then to that extent the same is liable to be declared un-Constitutional. This is not for the first time that a law like Ordinance 2000 has come for examination before the Court as in the past a number of laws were examined and when found against the Constitution the same were declared void and of no legal effect. Reference may be made to the case of **Syed Zafar Ali Shah v. Gen. Pervez Musharaf, Chief Executive of Pakistan** (PLD 2000 SC 869) wherein it was held that judicial power means that the superior courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its relation to jurisdiction are all allied concepts and the same cannot be taken away. It is inherent in the nature of judicial power that the Constitution is regarded as a supreme law and any law

contrary to it or its provisions is to be struck down by the Court, as the duty and the function of the Court is to enforce the Constitution. Prior to the case of Zafar Ali Shah, this Court had examined different laws and declared that provisions of some of them were contrary to the provisions of the Constitution. Reference to the cases of **Mehram Ali** ibid, **Sh. Liaqat Hussain v. Federation of Pakistan** (PLD 1999 SC 504), **Khan Asfand Yar Wali v. Federation of Pakistan** (PLD 2001 SC 607), etc is pertinent. Keeping in view the principles defining the powers of judicial review of this Court to examine a law at the touchstone of the Constitution, we have considered the arguments put forward by learned counsel for the petitioner and have also minutely gone through the provisions/sections of the Ordinance 2000 referred to by the learned counsel in his arguments to ascertain as to whether any of them negates the provisions of the Constitution.

48. It may be noted that the main concern of Mr. Mujeeb Pirzada was that as under Article 154 of the Constitution, it is the domain of the C.C.I. to lay down policies, therefore, with reference to the process of privatization the legislature must have given some role to the C.C.I. instead of conferring the jurisdiction upon the Privatization Commission. According to him, even in the definition clause C.C.I. has not been mentioned. It may be noted that a perusal of the Preamble of Ordinance 2000 shows that it has been drafted substantially and in consonance with the spirit of the summary which was put up before the C.C.I. on 25th May 1997. The Federal Government had made some commitments therein that the proceeds of privatization will be utilized for the retirement of the Federal Government debt and for poverty alleviation. To achieve the object a Privatization Commission has been established under section 3 for carrying out the purpose of the Ordinance. It is most important to note that earlier to the promulgation of the Ordinance, the Privatization Commission was responsible for disinvestment of the government entities in the industrial sector and it was functioning under the Notification bearing No. F(5)(1) Admn-1/1991 dated 22nd

January, 1991. But after the promulgation of the Ordinance the said notification was rescinded in terms of section 3(ii) of the Ordinance.

The provisions of section 5 of the Ordinance deal with the functions and powers of the Commission. One of the functions enumerated therein is to recommend privatization policy guidelines to the Cabinet etc. It is to be noted that in the year 2000 when the Ordinance was promulgated at that time the Constitution was in abeyance. Therefore, the Commission was authorized to provide guidelines to the Cabinet but no sooner the Constitution has been revived the policy guidelines of privatization prepared by the Commission shall be subservient to the policy guidelines of the CCI which it has to provide under Article 154 of the Constitution. Under the scheme of the Constitution the Commission independently cannot provide such guidelines and it has to follow whatever guidelines are provided by the CCI.

Section 6 deals with the composition of Board of the Commission, general management and decision of the affairs of the Commission. This provision has been promulgated for the purpose of smooth working of the Commission for the purpose of implementing the Constitutional mandate given to the CCI in terms of Article 154 of the Constitution.

Section 7 of the Ordinance deals with the appointment of the Chairman, Secretary and the members by the Federal Government. Obviously for the purpose of carrying out the object and the purposes of the Privatization Commission, appointments have to be made by the Federal Government and such appointment when made cannot be said to be un-Constitutional.

As far as section 9 relating to the delegation of powers by the Board its examination does not identify violation of any of the provisions of law for the purpose of holding it contrary to the Constitution.

Likewise sections 14, 16 and 22 deal with the privatization fund and their distribution for the purpose of the smooth running of the affairs of the

Commission. Sections 14 and 16, deal with the establishment of fund, preparation of budget of the Commission which will be utilized while performing its functions and exercising its powers under the Ordinance.

As far as section 16 is concerned, it is one of the important sections in the Ordinance therefore the same is reproduced hereinbelow:-

> *"**Privatization Fund.---(1)** The Commission shall establish and maintain a distinct and separate Privatization Fund in which all Privatization proceeds shall be deposited. The Commission shall, out of the moneys so deposited, withdraw and contribute to the Commission's Account such amount or amounts as may be needed by it from time to time but only to supplement the other resources therein if and to the extent necessary. The remaining Privatization proceeds shall be kept in trust for and distributed to the Federal Government or the enterprise owned or controlled by the Federal Government entitled to such proceeds."*

The above provision seems to have been enacted to carry out the object for which CCI has given the approval on the summary dated 25th May 1997 viz that the sale proceeds of the project shall be used for the purpose of retirement of Federal Government debts.

49. It is to be observed that Section 16 of the Ordinance was amended by means of Ordinance CXVI of 2002 dated 8th of November 2002 by virtue of which two provisos were added:-

> ***2.---Amendment of Section 16, Ordinance LII of 2000**.---In the Privatization Commission Ordinance, 2002 (LII of 2000) in section 16, in subsection (1) for the full stop at the end, a colon shall be substituted and thereafter the following provisos shall be inserted, namely:-*
> *"Provided that the Commission may, if so required by the Federal Government, withhold a specified amount out of the Privatization proceeds, of the Government of Pakistan's shares in the oil and gas fields specified in the Schedule to this Ordinance.*
> *Provided further that the amount withheld under the foregoing proviso shall be paid to the Federal Government and shall not exceed the sum equivalent to such proceeds as may be necessary to compensate the Federal Government for the investments made by it in such oil and gas fields."*

Perusal of the above provisos indicates that the sale proceeds can be used by the Federal Government for the purpose other than that which has been approved by the CCI therefore the Federal Government has to examine its implication and to ensure that it takes ex post facto approval from the CCI.

Thus it is concluded that subject to above observation, section 16 is also not contrary to any of the provisions of the Constitution.

50. Section 22 of the Ordinance reads as under"-

> *"22.---**Privatization Programme**.—Subject to the provisions hereinafter provided, the Commission shall, after approval by the Cabinet, carry out the Privatization programme in the prescribed manner."*

51. Learned counsel emphasized that in terms of Article 154 of the Constitution, it is the CCI which has to give the programme and as this section gives power of approval to Cabinet, it is in conflict with Article 154. At this juncture Mr. Abdul Hafeez Pirzada, Learned Sr. ASC appearing for the Federal Government stated that all the policies of the CCI have to be implemented by some agency therefore section 22 has provided a vehicle for the implementation of such policy. A perusal of this section indicates that it does not speak in respect of the policy which essentially has to be framed by the CCI under Article 154(1) of the Constitution. Admittedly CCI has no implementing agencies, therefore, the Constitution makers had only assigned the job of giving the policies to it and as far as their implementation is concerned for that purpose Privatization Commission has been established. As stated hereinabove initially the Commission was acting under a notification but then it has been institutionalized by way of promulgating Ordinance 2000. It is Cabinet which is bound by the policy of the CCI and has to see that privatization programme is in accord with the same.

52. Before discussing the manner in which CCI policies are implemented by the Federal Government it would be appropriate to note that framing the policy and issuing the programme for the purpose of carrying out

privatization are distinct and different from each other. The word "Policy" has been defined in Black's Law Dictionary 7th Edition Page 1178 as follows:

> "the general policies by which a Government is guided in its management of public affairs."

Whereas the word "Programme" has been defined in 20th Century Dictionary Page 1107:

> "the schedule of proceedings for and list of participants in a theatre performance, entertainment, ceremony, etc; an agenda, plan or schedule, a series of the planned projects to be undertaken".

On having seen the meanings of both the expressions one can conveniently conclude that the programme which is to be provided by the Commission is merely a schedule for the purpose of the privatization in a manner prescribed in law.

53. Article 154 of the Constitution has itself provided mechanism for the purpose of functioning of the CCI. Its sub Article (3) lays down that until "Majlis-e-Shoora (Parliament) makes provisions by law in this behalf, the Council may make its rules of procedure". In pursuance of such interim arrangement the Council has framed its rules as far back as 12th January, 1991 which have inter alia provided a procedure for implementing the decisions. Rule 4 of the Procedure stipulates the kind of cases which are to be submitted to the Council for formulation and regulation of the policies on which the CCI has jurisdiction of supervision and control. The list provided under the sub rule (c) includes all undertaking projects and schemes of such institutions, establishments, bodies and corporations; industries, projects and undertaking owned wholly or partially by the Federal Government or by a Corporation set up by the Federation. Essentially it also includes the supervision and control over PSMC.

Rule 5 is again important as it deals with the meetings of the Council. The Chairman from time to time has been authorized to summon a

meeting of the Council to meet at such time and place as he thinks fit. According to this rule there shall be at least one meeting of the Council in a year.

As far as Rule 14 is concerned, according to it the minutes of the meeting should be circulated by the Cabinet Division to all the members who shall return the same after perusal. Discrepancies, if any, shall be reported by the members within seven days of the receipt of the minutes. Sub rule (2) says that the Cabinet Division shall also pass on the decision of the Council to all concerned for necessary action but the primary responsibility for the proper implementation of the decision would be that of the sponsoring secretary or the chief secretary of the Province concerned who would ensure that the decision has been duly passed on to all the agencies concerned. As per sub rule (4) it is the responsibility of the Cabinet Secretary to watch the implementation of the decision and the Secretary of the Division concerned or the Chief Secretary of the Provincial Government concerned shall supply to the Cabinet Secretary such documents as the latter should by general or special request require to enable him to complete his record of the case and to satisfy himself that the decision has been fully implemented.

It is important to note that a perusal of both these rules abundantly makes it clear that the policy decisions of the CCI are required to be implemented by the Cabinet Secretary as well as the Secretary of the concerned Ministry. Therefore, it is not correct to assert that the powers of the C.C.I. have been transferred/delegated to the Commission for the purpose of making its policies independent of C.C.I. while discharging the functions in terms of section 5 as well as section 22 of the Ordinance 2000. It would not be out of place to mention that as far as the procedural rules are concerned they have got Constitutional support/backing, therefore, whatever decision will be pronounced by the CCI the Executive Government in discharge of its functions in terms of Article 97 of the

Constitution is bound to implement the same unless it is varied by the Parliament. It may be recorded that validity of these Rules has not been challenged before us.

54. Besides the above decision to further elaborate the role of the executive for the implementation of the decisions of the CCI reference may be made to Sub Article (4) of Article 154 of the Constitution which provides that Majlis-e-Shoora (Parliament) in joint sitting may from time to time by resolution issue directions through the Federal Government to the Council generally or in a particular matter to take action as [Majlis-e-Shoora] (Parliament) may deem just and proper and such directions shall be binding on the Council. A perusal of this Article indicates that the Constitution makers have even not allowed the Parliament to speak to the CCI directly but for communication of its directions it has also taken the help of the Federal Government. Since both the institutions are constitutional bodies there was no impediment for the Parliament even to address directly to the CCI in respect of the resolution passed by it. Making available the agency of the Federal Government clearly goes to show that it is just within the scheme of the Constitution because such decisions/resolutions even if passed by the Parliament have to be carried out or implemented through the Federal Government in terms of Article 97 of the Constitution which is repository of the Federal executive powers. In the instant case as well the various provisions of the Ordinance 2000 indicate that the object was nothing but to implement the decision of the CCI through a Privatization Commission which has been constituted under a statutory provision and the functions etc of the Privatization Commission clearly demonstrate that it was just for the purpose of providing a vehicle to the CCI for the implementation of its programme on the same analogy as the Majlis-e-Shoora (Parliament) takes the assistance of the Federal Government for purpose of getting implemented its resolution in terms of Article 154 (4) of the Constitution.

We may point out here that the procedural rules are not ordinary rules framed under an Act of Parliament but are the rules which have been framed

under the Constitutional provision, therefore, their status would not be less than that of an Act of the Parliament in any manner and so long Majlis-e-Shoora has not made the rules they shall hold the field. There is identical rule making provision in the Constitution i.e. Article 191 which confers power upon the Supreme Court and Article 202 which confers power upon the High Courts to frame their rules. Similarly Articles 90 and 99 confer powers upon the Federal Government to frame their Rules of Business.

55. Thus it is held that the procedural rules framed by the CCI are required to be adhered to strictly for the purpose of implementation/carrying out its policies.

56. All the above provisions have been tested by us at the touchstone of Article 8 of the Constitution in the light of the arguments put forward by the parties' counsel. But we fail to find any provision in the Ordinance 2000 to be contrary to any of the fundamental rights. Besides it has got constitutional protection under Article 270-AA and adhering to the principles laid down in **Mehmood Khan Achakzai v. Federation of Pakistan** (PLD 1997 SC 426) it was promulgated competently by the Chief Executive and it has not been shown to us that either it has been framed by an incompetent authority, or that it suffers from mala fides and lack of jurisdiction. In as much in the post revival period of the Constitution when the Court's powers were restored for judicial review to examine the legislation at the touchstone of the Constitution nothing has been identified or pointed out lacking or against the mandate of the Constitution as has been discussed hereinabove. Therefore, it is held that the Privatization Commission Ordinance, (LII) of 2000 is not ultra vires of the Constitution.

57. The next question is in respect of the judicial review of the policies of the Government. It is well settled that normally in exercise of the powers of judicial review this Court will not scrutinize the policy decisions or to substitute its own opinion in such matters as held in **Messrs Elahi Cotton Mills** ibid.

Likewise in the case of **Balco Employees** ibid, the Supreme Court of India observed 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."*

This view is in line with this Court's view as given in **Elahi Cotton ibid**. Similar view was taken by the Indian Supreme Court in **Delhi Science Forum v. Union of India** (AIR 1996 SC 1356).

58. The parameters of judicial review were graphically commented upon in **Associated Provincial Picture Houses Ltd**. Ibid which has been relied upon by counsel for both sides where in the concluding paragraph the Court came to the conclusion in the words of Lord Somervell as under:-

> *"I do not wish to repeat what I have said, but it might be useful to summarize once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it."*

This view was further reiterated and the principle laid down therein was followed in **Nottinghamshire County Council v. Secretary of State for the Environment and another appeal** (1986) 1 All ER 199) wherein the Court observed as follows:

> *"The law has developed beyond the limits understood to apply to judicial review as practiced by the courts in 1947. The ground on which the courts will review the exercise of an administrative discretion by a public officer is abuse of power. Power can be abused in a number of ways: by mistake of law in misconstruing the limits imposed by statute (or by common law in the case of a common law power) on the scope of the power; by procedural irregularity; by unreasonableness in the Wednesbury sense; or by bad faith or an improper motive in its exercise. A valuable, and already 'classical'; but certainly not exhaustive analysis of the grounds on which courts will embark on the judicial review of an administrative power exercised by a public officer is now to be found in Lord Diplock's speech in Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374."*

There is no cavil to the proposition being espoused by learned Attorney General with reference to **Peter Can's "An Introduction to Administrative Law"** 2nd Edition that the Court while exercising power of judicial review may not express opinions on polycentric issues requiring technical expertise and specialized knowledge. In the instant case, however, we are seized not with a polycentric issue as such but with the **legality**, **reasonableness** and **transparency** of the process of privatization of the project under consideration i.e. PSMC. These are well established basis for exercise of judicial review. Thus it is held 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. However, action taken can always be examined on the well established principles of judicial review.

59. Barrister Zafar Ullah Khan learned ASC contended that process of privatization of PSMC lacks transparency for number of reasons which he has explained in his petition duly supported with evidence available to him, therefore irrespective of the fact as to who is the successful bidder the transaction deserves to be declared contrary to the provisions of the Ordinance 2000 as well as rules framed thereunder. Mr. Abdul Mujeeb Pirzada learned ASC as well as Ahmar Bilal Sufi Advocate who appeared on behalf of Intervener (Iftikhar Shafi) supported his contention. Learned counsel for the Federation, for Privatization Commission, for P.S.M.C. and the bidders contended that the transaction of privatization of PSMS has been completed in the most transparent manner, therefore, calls for no interference by this Court. Learned Attorney General, however, contended that in the facts and circumstances of the case, the Court may not enter into controversial facts and can find out middle way to resolve the controversy, the suggested way was to direct investigation provided under section 27 of the Ordinance 2000.

60. We consider it appropriate at this stage to first of all ascertain the status of the material which is available on record in order to decide as to whether the Court has to confine to the material which has been placed on record only by the petitioners or in view of the importance of the case the documents which are not disputed between the parties can be taken into consideration. Learned senior ASC for the Privatization Commission stated that as far as the newspaper clippings are concerned those cannot be considered valid piece of evidence for judicial review. Reference in this behalf has been placed by him on the case of **Raja Muhammad Afzal v. Ch. Muhammad Altaf Hussain and others** (1986 SCMR 1736). He further emphasized that if the practice of equating the news clippings with evidence is allowed then every public interest litigation will be based on the press clipping. It will be highly dangerous. Similarly learned Attorney General contended that it is not the first case in which the reliance has

been placed on the news clippings but there are may other cases like **Islamic Republic of Pakistan v. Abdul Wali Khan** (PLD 1976 SC 57), **Khawaja Ahmad Tariq Rahim** ibid, **Miss Benazir Bhutto** ibid and **Mian Muhammad Nawaz Sharif** ibid but the distinction which is required to be noted by this Court is that in the cases which he has referred to the decision had already been taken by the President of Pakistan for the purpose of forming his view not only on the basis of media reports but information received by him from different sources and this Court had to examine the validity of the decision of the President in dissolving the Assembly or taking action for banning a political party whereas in the instant case the Court is being called upon to accept the news clippings and based on the same give a verdict that the transaction of privatization lacks transparency which according to him is not possible unless the allegations are proved in accordance with law. He contended that all these judgments were reconciled by the Lahore High Court in the judgment reported in **Pakistan Lawyers Forum v. Federation of Pakistan** (PLD 2004 Lahore 130) authored by one of the learned Member of this Bench Mr. Justice Tassaduq Hussain Jillani. In this context he also relied upon the judgments in the case of **Benazir Bhutto v. President of Pakistan** (PLD 2000 SC 77) and **Muhammad Shahbaz Sharif v. Federation of Pakistan** (PLD 2004 SC 583). In the case of **Pakistan Lawyers Forum** ibid, the learned author Judge laid down following parameters for the purpose of taking judicial notice of a newspaper report and articles:-

> *(i)* *Where direct evidence is not available.*
> *(ii)* *Where it is sought to be proved that a person has notice of the contents of the newspaper report.*
> *(iii)* *Where it is sought to be shown that a person is an author or otherwise responsible for the statement or article published in a newspaper which is to be used against him.*
> *(iv)* *In cases of defamation.*
> (v) *If the issue/occurrence is rather old and eye-witnesses are either wanting or less reliable.*

From the above parameters laid down by the learned Lahore High Court it is manifest that newspaper reports and articles can only be used in above exceptional

circumstances meaning thereby that if on record admissible evidence is available which is not disputed between the parties particularly in the cases where the defendant/respondent himself had brought on record certain documents in proof of his plea then the Court is not debarred to look into the same for the purpose of arriving at a just conclusion particularly in the exercise of jurisdiction under Article 199 and Article 184(3) of the Constitution, where the Court had no occasion to record the evidence itself and had to base on the pleadings of the parties who are supported with the documents like the instant case although the petitioners in Const. Petition No.9 of 2006 had relied upon the press clippings and articles but the respondents either on their own or under directions of the Court had brought on record material to satisfy the Court that the transaction under challenge is in accordance with law. Therefore, while accepting such request and declining to give relief, it would be incumbent upon the Court to rely upon the documents which are not disputed between the parties and such documents can be considered/treated as evidence on record. It may be noted that in the judgment passed by this Court in Constitutional Petition No. 59 of 1996 **Mohtarma Benazir Bhutto v. President of Pakistan** (PLD 1998 SC 388), a review was filed under Article 188 of the Constitution on the premise that in the judgment under review findings had been recorded in a summary manner and such findings may be detrimental during the trial of the petitioner on different charges. Keeping in view this aspect, this Court observed in the case of **Benazir Bhutto** ibid that in order to remove any doubt, it was clarified that the observations made in the order under review were restricted in their application to the proceedings under Article 184 of the Constitution for the purpose of Article 58 (2-b) alone and were not to be treated as a proof of charges for any other purpose. In **Mian Muhammad Shahbaz Sharif** ibid, this Court observed as under:-

> *"23. As far as evidentiary value of press reports is concerned, it is noted that one line of precedents in the jurisprudence of the country is that no evidentiary value is attached to the press reports and no reliance can be placed on a press report where a person claims a legal right on its basis. The Courts do not decide cases on press reports. In the other line of authorities, such as Wali Khan's case, Ms. Benazir Bhutto's case and Mian Muhammad Nawaz Sharif's case, the press reports are relied upon, but these cases are distinguishable. This Court in exercise of its jurisdiction under Article 184(3) does not act as a Court of appeal, but as a Court of review.*
> *24. Basically to believe or disbelieve the press reports is a question of fact and before reaching a positive conclusion such facts need to be examined, keeping in view their intrinsic value. Many such statements are given only for political purposes, but the same cannot straight away be taken as proved nor at their own they create a legal right nor any evidentiary value can be attached to press reports, unless irrefutable evidence is brought on record for establishing their correctness."*

We have no reason to disagree with the above proposition of the law. However, in the present case controversy is not only to be settled on the basis of the press clippings which were filed for the first time when the petition was submitted by the petitioner under Article 184(3). The other petition filed by Mr. Abdul Mujeeb Pirzada bearing (C.P.No. 345 of 2006) also has no documents to decide the factual controversy perhaps for the reason that when originally petitioner invoked the jurisdiction of the High Court under Article 199 of the Constitution the petition was dismissed in limine and against the short order followed by detailed reasons, petition for leave to appeal was filed. At the same time the Federation of Pakistan has also filed petition for leave to appeal (No. 394 of 2006) against the same judgment of the Sindh High Court. Thus, we will be evaluating the documents which have been placed on record by the respondents themselves. Amongst those, the important documents which were filed on behalf of the PSMC in pursuance of order dated 18th May 2006 passed by this Court are as follows:-

(i) Comprehensive report about the existing affairs of the Mill along with its assets and the balance sheets duly audited for the last three years.

(ii) The Privatization Commission also produced before the Court complete proceedings including the summary it submitted and the deliberations/proceedings by the Cabinet Committee for Privatization, its decisions and the reasons/grounds which persuaded the Commission and the Government of Pakistan to privatize Pakistan Steel Mills.

Some other documents including Memorandum and Article of Association of PSMC were also placed on record. Likewise financial statements for the period ended June 30th 2003, June 30th 2004 and June 30th 2005 were filed without expressing any reservation to their admissibility. Similarly on behalf of the Privatization Commission all the necessary documents were filed including a secret report of CCI approving the privatization of the PSMC along with other projects. It is important to note that this document otherwise was not part of the pleadings but was placed on record during the course of hearing.

It is most interesting to note that as far as the Government of Pakistan/Federation of Pakistan is concerned, it also filed a thick paper book of about 650 pages containing documents and other record of proceedings/deliberations taking place during the process of the privatization. The petitioners have not denied these documents in any manner whereas the respondents are bound by the same. Therefore, for our findings/decision, we will be relying upon/referring to these documents rather than press clippings or media reports, unless reference to latter is found absolutely necessary and we are convinced of its correctness and authenticity.

61. Now the stage has arrived where we have to examine and adjudicate the contentions raised by the learned counsel for the parties and to see whether on account of omissions and commissions committed by the relevant functionaries, the transaction is valid and transparent. To determine validity/transparency or otherwise following questions are to be addressed:-

(i) Whether the terms of reference framed for the valuer were in accord with the Privatization Commission Valuation Rules, 2001?

(ii) Whether the method adopted in valuing the property satisfied the mandate of law contained in Privatization Ordinance 2000 and the rules framed thereunder and whether it is in accord with the internationally recognized principles in this regard?

(iii) Whether the process of pre-qualification of potential bidders satisfied the requirement of Privatization Commission Regulations?

(iv) Whether the decision dated 31.03.2006 taken by the Cabinet Committee (CCOP) to sell the Mill if the bid was above Rs.16.18 per share satisfied the requirements of law?

(v) Whether the final terms/concession offered to the highest bidder/consortium on 31.03.2006 were in accord with the terms and conditions of initial public offering given to the potential bidders through advertisement dated 19.10.2005 and if not whether these can be justified on the touchstone of law and "reasonableness"?

62. In view of the above points it may also be borne in mind that CCI vide its approval dated 29th May 1997 had given the approval for the privatization of the Federal Government owned projects or entities for the purpose of retiring the debts and this object has been duly transformed in the Preamble of the Ordinance 2000, therefore, keeping in view the object for privatization it should have been the endeavour on the part of the Privatization Commission to adopt such ways and means which may fetch highest price of its assets. Admittedly, in this context the report of the statement of affairs submitted on behalf of the Chairman of PSMC becomes more relevant coupled with the Statements of Accounts. The owners generally make their efforts to show less book value of the assets for purpose of lessening the tax burden on the concern. Admittedly such balance sheets and the statements of accounts were never prepared for the

purposes of disposing of the assets, shares etc in the market. It is not disputed that before the appointment of Financial Advisor (F.A.), the P.C. was required to determine and decide the most important issue i.e. valuation of property according to section 24 of the Ordinance 2000 and its mode. The valuation of property is to be done in the prescribed manner i.e. the Privatization Commission (Valuation of Property) Rules, 2001 by independent valuers who are to be hired in accordance with Privatization Commission (Hiring of Valuers) Regulations, 2001. It may be noted that as per section 2 (l) of the Ordinance, property "includes any right, title or interest in property, moveable or immovable in whole or in part or any means and instruments of production owned or controlled directly or indirectly by the Federal Government or any enterprise owned or controlled by the Federal Government whether in or outside Pakistan". The cumulative effect of the relevant law/rules/regulations is that the valuation of the property is part of the process of privatization of an ongoing concern. This conclusion about legislative intent is further reiterated by the Privatization Commission (Hiring of Valuers) Regulation 2001. Regulation 3 of which provides that for a fair and independent valuation of the property the Privatization Commission shall frame terms of reference for the valuer which shall, "include inter alia, a brief history of the entity, the financial position, a description of the produce line/service of the entity if any, a description of land, building, plant and machinery, the current assets and liabilities and the current state of industry."

63. In the instant case during the hearing of the case, the land of PSMC had been one of the focal points for consideration, both for the Court as well as for the learned counsel appearing on behalf of the parties. Perhaps this issue has arisen in view of the report which has been submitted by the PSMC in respect of its affairs which says that the value of the non-core property situated in the downstream industrial estate is considerably high, therefore, the valuation of the land has attained more importance under the circumstances of the case. As already

stated in Para (supra) the terms of reference given by the Privatization Commission to the **valuer did not make any reference to determine the value of land**. A perusal of the report of the statement of affairs of the PSMC reveals that PSMC has total of 19086 acres of land out of which little less than 9000 acres is meant for labour colony and little more than 1000 is earmarked for plants, storage of raw material and waste products. The Government of Pakistan has offered plant and machinery located on 4457 acres of the land for bidding purposes but unfortunately in the reference sent to the Financial Advisor nothing was stated for the valuation of the land and if the same was added in the assets then what would be the price of a share which the government was going to privatize. It was all the more essential as strategic equity share of 75% and management control was being handed over to the successful bidder. With this percentage of share holding, the owner under the Companies Ordinance has very wide powers. It was precisely for these reasons that, "the Disinvestment Commission of India" while laying down policy guidelines stressed the need that if strategic sale of equity holding of more than 50% has been offered for sale then the valuation of land becomes necessary. The report lays down as under:-

> "*Strategic sale implies sale of a substantial block of government holdings to a single party which would not only acquire a substantial equity holdings of up to 50% but also bring in the necessary technology for making the PSU viable and comparative in the global market. It should be noted that the valuation of the share would depend on the extent of disinvestment and the nature of share holder interest in the management of the company. Where the Government continues to hold 51% or more of the share holding the valuation will relate mainly to the shares of the company and not to the assets of the company. On the other hand where shares are sold through strategic sale and management is transferred to the strategic partner, the valuation of the enterprise would be different as the strategic partner will have control of the management. In such cases the valuation of land and other physical assets should also be computed at current market values in order to fix the reserve price for the strategic sale.*"

The afore-referred recommendation of the Disinvestment Commission of India is in accord with the spirit which underlies section 24 of the Privatization Ordinance, 2000 and rule 3 of the Privatization Commission (Hiring of Valuers) Regulations, referred to above. When the case was being heard and reports were being examined the learned counsel appearing for the respondents candidly admitted that the Financial Advisor (City Group) had not valued the land on which the PSMC is located which is described as core land. This fact is also evident from the report of the City Group. Contrary to it the agreement of sale and purchase as per clause 4.2 of the Share and Purchase Agreement dated 24.04.2006 entered with purchasers, lays down condition precedent to completion that notwithstanding any other provision of this agreement completion shall not occur until and unless the unmutated land has been mutated in the name of the company in the relevant record of rights. When we inquired from the learned counsel for P.C. that without adding the value in the property (assets) of PSMC in terms of section 24 read with valuation rule 3 how can the property/land be mutated, he got recorded following statement as an officer of the Court but not as a counsel for P.C.:-

> *"Admittedly the land has not been evaluated. What is the nature of the land subject to the document which has been produced by the learned Advocate General of Sindh, my submission is that since the land has not been valued and it appears that land was partly acquired under Acquisition Act for the purpose of the PSM by the Sindh Government and secondly it was given by the Sindh Government at a special rate again for the purpose of Steel Mill, so my personal opinion, I am not speaking as a counsel for the Privatization, my personal opinion as officer of the Hon'ble Court, that so long as the unit of the Steel Mills they can leave/use it, but if they are not going to leave/use it as Steel Mill then they are not entitled to the land, it will revert to the Federal Government, subject to the document which will come."*

Whereas contrary to the above statement Mr. Khalid Anwar who appeared on behalf of the successful bidders contradicted the above statement and stated as follows:-

> *"The land always belong to a company and name of the Company is PSM Co. Before the sale to me the land belongs to the company. The shape of the agreement the foundation says I am buying shares in the company. A separate question what does the company owns, the answer is the company owns land, plant, current assets. Land as such is not being sold. Not a single square inch of the land as such is being sold. Why not? The land always belong to the company; the land will always continue belong to the company. It will never ever be mutated in the name of the buyer. All that is happened is that out of that 19000 acres of land, which is already in the name of the company, the company will surrender only 13500 acres, and small amount of few hundred acres will be transferred in the name of the company not in the name of the buyer. I state in all integrity and seriousness before your lordship that my client is not buying a single square inch. Not one."*

The above facts are sufficient to draw the inference that in the valuation process of the property the land underneath the unit was not added. Similarly A.F. Ferguson & Co. one of the Advisors to assist the City Group (F.A) engaged to conduct the accounting, tax, HR and I.T. due diligence had stated in unequivocal terms that they had conducted their due diligence review based on the draft **UNAUDITED** financial statements of the Corporation for the year ended June 30, 2005 which were provided to them by the management on September 16, 2005. The data provided to the F.A. was all the more insignificant as it had been informed by the management that significant adjustments had been incorporated in the financial statements of the Corporation in the year ended June 30, 2005 subsequent to the date on which the un-audited financial statements were provided to them for the purpose of their report. It was admitted at the Bar by the learned counsel appearing on behalf of the official respondents that these unaudited financial statements were prepared on book value (historical value and not on the basis of market value of its assets, stock in trade raw material etc). It is important to note that the market value of the assets is reckoned all over

the world, reference in this behalf may be made to the report prepared by the experts in the exercise carried out under the auspices of United Nations. While commenting on the mode of valuation the report concludes as under:-

> *"Unfortunately, the lesson of valuation as an inexact science has not been easy to learn. Political expediency (e.g. government officials often believe that the more financially rigorous the valuation is, the more politically defensible the sale will be) and the investment banking culture brought by most Western financial advisors, has led to the construction of sophisticated valuation models in perhaps too many privatization exercises.*
> *This is not to suggest that conventional valuation techniques are useless or should not be applied. Rather, their results should be viewed with an understanding of this uncertain and evolving context. There is never" one right answer." The quality of the results of the valuation exercise is a function of the accuracy of the inputs used and the validity of assumptions made. The adage "garbage in-garbage out" rings true in this setting. <u>Ultimately, we believe that resources are better spent developing and strengthening market-based mechanisms for price discovery, rather than relying on armies of investment bankers to conduct a valuation.</u>"* ***(Emphasis is supplied).***

64. We are conscious of the fact that the courts are not supposed to settle the controversy as to which method should have been followed by the valuer for the purpose of determining the value of shares. As per Mr. Abdul Hafeez Pirzada this is not a science but an art. Same view was endorsed by the learned Attorney General although he has cited a number of judgments i.e. <u>**Commissioner of Wealth Tax v. Mahadeo Jalan**</u> [1972] 86 ITR 621 and <u>**Commissioner of Gift Tax v. Kusumben D. Mahadevia**</u> [1980] 2 SCC 238. However, we can look into the models of valuation internationally recognized to ascertain as to which out of them suits the seller and buyer respectively. In this behalf Mr. Abdul Hafeez Pirzada, learned ASC placed on record a report prepared by the World Bank titled as, "**The Case-by-Case Approach to Privatization Techniques & Examples"** wherein the principle for assessing the market value of assets for an ongoing concern has been stressed in the following words:--

> "………*The government, on the other hand, has a fiduciary responsibility to its citizens when it privatizes an asset. It is entrusted to sell privatizable assets at or above their fair market value, and must take every precaution to ensure that this happens. Agreeing to sell state assets below their market value is tantamount to favouring a buyer, and it deprives the state of needed financial resources. While this may sometimes be politically desirable---for example, in the case of employees of privatized companies---transparency is crucial. Thus the size of the discount offered should be determined and publicly disclosed.*"
> ***(Emphasis is supplied).***

65. The above quotation from the World Bank Report goes to show that the Government must make efforts to adopt such a procedure on the basis of which fair market value of its assets can be achieved. As far as the judgments cited by the learned Attorney General are concerned, which are referred to hereinabove, those are not helpful in the context of the instant case, in as much as they are relatable to fixation of share for the purposes of Wealth Tax and Income Tax Act. These do not seem to be relevant for determining the share value for the purposes of privatization under the Ordinance.

66. Mr. Khalid Anwar, learned Sr. ASC appearing for the bidder stated that the bidders before the bid got prepared valuation report for their consumption from an independent valuer and the reference price fixed by the said valuers was mostly similar, therefore, the report of the City Group does not suffer from any material irregularity.

67. Suffice to observe in this behalf that the method of valuation favoured by buyers is known as "Discounted Cash Flow" (D.C.F.) and the method liked by the seller for calculating market value of share are different and distinct from each other. Incidentally the bidders got assessment of the share on the basis of historical evaluation of the assets handed over to it by PSMC, rightly so because their interest was to purchase the share at a lesser value whereas as has been noted above, generally this formula is not preferred by the seller. Be that as it may, even in the report which has been relied upon by the bidders, the assets

including the land have not been evaluated and the valuation has been based on the discounted cash flow method. Both the reports prepared by the City Group and Taseer Hadi from whom the bidders got prepared the report had calculated the discounted cash flow from 2006 onward without having regard to the fact that after restructuring in the year 2002-03 the PSMC did increase its profitability and the P.C. while publishing the notices for Expression of Interest in the newspapers had shown the statement of positive financial condition. The crux whereof is that in the fiscal year 2004-2005, PSMC had recorded annual sales of over Rs.30.00 billion and net profit of Rs.6.00 billion. It is equally important to note that after restructuring, the liquidity of the Corporation improved and it paid off principal amount of debt of Rs. 11.35 billion on 30th June 2003. Therefore under these circumstances it was incumbent upon the Privatization Commission to have taken care about these facts and these must have been mentioned categorically in the Terms of Reference framed for the Financial Advisor that the Mill is ongoing profitable concern and it has marketable assets and the liabilities are much less than the assets, therefore, keeping in view these facts any internationally acceptable methodology for calculating its shares may be adopted. At this juncture it is important to note that according to the report of PSMC 10% equity offer will be made to the private sector meaning thereby enlisting its shares on the Stock Exchange for the purpose of ascertaining correct value in order to achieve the object for which in terms of the Ordinance the privatization was to take place.

68. It is equally important to note at this stage that this procedure could have been more appropriate, accurate and acceptable to the seller i.e. the Government of Pakistan in view of its experience in respect of privatization of 23.2 percent government owned shares of the National Bank of Pakistan and to follow this procedure there was no difficulty to take steps for the purpose of offering 10% shares for public through Stock Exchange. In this behalf, the

Privatization Commission had a precedent in respect of the case of **National Bank of Pakistan** which is reported as **PLJ 2004 Central Statutes 259**, the following paragraphs are relevant to discussion:-

> *"NBP was the first SOE whose shares were offered by means of an Offer for Sale to the general public. The Cabinet Committee on Privatization (CCOP) decided to offer 5% (18,652,000) shares of NBP with a green shoe option of an additional 5% shares in case of over-subscription Shares of NBP were listed on the Karachi, Lahore and Islamabad Stock Exchanges and subscription for the shares was held during 19-22 November 2001. Since it was an initial offering, shares were offered at par value (Rs. 10/- per share) to attract small investors. The offering was heavily over-subscribed and applications for an amount of Rs.1.04 billion were received against the required amount of Rs.186.5 million (for 5% shares). Thus Government exercised the green shoe option and divested 37,304,000 shares for gross proceeds of Rs.373 million.*
>
> *In October 2002, it was decided to divest an additional 5% (18,652,000) shares of NBP through a secondary public offering at the Stock Exchanges with a green shoe option of additional 5% shares. Taking the market price of NBP share as a benchmark, the CCOP fixed the offer price as Rs.21/- per share. Subscription for the shares was held during 07-09 October, 2002. This offer was also heavily oversubscribed and applications were received for an amount of Rs.1.63 billion against the target amount of Rs.391.7 million (for 5% shares). The Government chose to exercise the green shoe option and realized proceeds of Rs.783.3 million.*
>
> *To take advantage of the bullish market and excess liquidity available with investors, it was decided in June 2003 to offer additional shares through a third public offering. However, on this occasion the offer size was restricted to 3.2% (13.131 million) of the outstanding shares in order to keep the Government's shareholding above 75%. Again using the market price as a benchmark, shares were offered at the price Rs.46/- per share and subscription as held during 13-15 October 2003. The offer was oversubscribed and funds received amounted to Rs.1.22 billion against the required amount of Rs.604 million.*
>
> *Through the above process, The Government has divested 23.2% (87.7 million) shares of NBP for total proceeds of Rs.1.76 billion.*
>
> *As the divested shares were owned by the Government through State Bank of Pakistan ('SBP'), the Privatization Commission remitted the proceeds for the first two offerings to SBP in early 2002 and early 2003. Sale proceeds for the 3rd offering have also been*

> *remitted to SBP on January 14, 2004. The transaction stands successfully completed on January 14, 2004."*

It is in our knowledge that the shares of the National Bank of Pakistan were already listed on the Stock Exchange but there was no harm in even taking steps and adopting measures for the purpose of enhancing the value of the shares of the PSMC by adopting the same procedure and bringing its limited shares on the Stock Exchange as the Government had already decided to sell its 10% equity to the public. And if for this purpose, some legal formalities were required to be taken, the same ought to have been resorted to.

69. The contract for valuation of project was awarded in terms of a written agreement/terms of reference, para 3.2.6 of which required that the final report of valuation shall be submitted by the Financial Advisor six weeks prior to the bidding date. The said paragraph reads as under:-

> ***"3.2.6. Final Valuation Model***
>
> *The final valuation model will be used to determine the Reserve Price for the bidding process. The FA is expected to present the valuation model to explain and discuss the underlying assumptions and workings at various forums within the Government to obtain approval of the Reserve Price. The final valuation report shall be submitted at least six weeks prior to the bidding date."*

For reasons best known to the F.A. and which have not been explained either in the written statement filed by the counsel for the P.C. or by the counsel for the Federal Government the final report was submitted to the P.C. on 30th March 2006, the date P.C. sent a summary to the C.C.O.P. regarding approval of the reference price. The requirement of six weeks was mandatory as after submission of the valuation report the P.C. is required to examine it at its own level so as to fix a fair reference price for approval by the C.C.O.P. This belated submission just 24 hours before the bidding date on the one hand deprived the PC to assess the report independently and the CCOP of a well considered and independent comment on the said report on the other hand.

70. The argument of Mr. Abdul Hafeez Pirzada, learned Sr. ASC that the interim report submitted on 28th October 2005 meets the requirement of Regulation is not tenable because requirement under Para 3.2.6. is that of "FINAL REPORT" and not the interim report and secondly the lapse of "half a year" may have changed the objective conditions and thirdly it is not the case of PC that the interim report was considered at the time of fixing the reference price.

71. This brings us to the question as to whether decision taken by the Cabinet Committee (CCOP) on 31.03.2006 for sale in favour of anybody offering more than the reference price of the share i.e. Rs. 16.18 is valid.

72. Unmindful of the codal violation (violation of para 3.2.6. of the Terms of Reference sent to the valuer) and of the qualitative infirmity, the PC carried out the exercise of preparing a summary for approval of the reference price by the CCOP the same day. According to the written statement filed by Mr. Zahid Hameed Consultant P.C., during course of hearing, on **30.03.2006** the Board of Privatization Commission convened and deliberated on the privatization of PSMC for 4-5 hours. During this meeting the Managing Director of the F.A. Mr. Joz Garza who had already flown in from U.K. came and presented salient features of the valuation report to the members of the Board. The meeting according to him was held in the afternoon of the afore-referred date. The summary prepared by P.C. and submitted to the CCOP on 31.03.2006 reads as under:-

> *"The Financial Advisors, Citigroup Global Markets Limited (FA) has conducted the valuation of Pakistan Steel mills Corporation (PSMC) using three standard valuation methodologies used in global M&A transactions. These include:*
>
> *(a) Discounted Free Cash Flow Analysis (DCF)*
> *(b) Public Multiple Analysis (comparable companies).*
> *(c) Precedent Transaction Analysis.*
>
> *2. On the basis of DCF approach, the valuation ranges between US$ 407-464 Million. The weighted average cost of capital assumed for discounting the free cash flows to the firm is 12%.*
>
> *3. Using Public multiple Analysis, the valuation ranges between US$307-406 Million.*
>
> *4. On the basis of Precedents Transaction Analysis, the valuation ranges between US$ 389-501 Million.*

5. The FA has recommended a value of US$ 375 Million (on 100% equity basis). This recommendation is on the basis of average of above three valuation methodologies with a 10% discount as bidders are not expected to pay full fair value.

6. The PC Board considerd the valuation as recommended by the FA and proposed that the current market value of total assets of PSMC may also be taken into account. Valuation recommended by the FA reflects the core operations of PSMC (i.e., excluding surplus land and assets) and therefore, is based on PSMC as a going concern. The non-core land and assets being unbundled from PSMC includes Steel Town and Gulshan-e-Hadeed land which have been evaluated at US$ 500 Million by Nanjee & Co Karachi. The replacement value of the plant is estimated at around US$500 Million. These estimates do not include the current market value of Downstream Industries land and land reserved for NIP (this segment includes approximately 5,000 acres). Adding up these elements the value of PSMC comes in excess of US$ 1.0 Billion.

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

8. It is proposed that the Privatization Commission may be authorized to issue Letter of Acceptance (LoA) to the Successful Bidder if their per share price is equal or higher than the Reference Price approved by the CCOP.

9. The Cabinet Committee on Privatization (CCOP) is requested to approve the proposals made in para 7 and 8 above.

10. The Minister of the Privatization and Investment has seen and authorized the submission of this summary to CCOP."

73. The C.C.O.P. on examining the above summary recorded its minutes and the decision on **31.03.2006** as follows:-

*"**MINUTES**---Privatization Division informed the CCOP that the Financial Advisor (FA) of Pakistan Steel Mills Corporation (PSMC) has recommended a valuation of US$ 375 million for privatization of PSMC on 100% equity basis. The FA of PSMC is Citigroup Global Markets Limited.*

2. CCOP was informed that FA's valuation of US$ 375 million for 100% equity stake is based on the average of the following three valuation methodologies with a 10% discount:

(i) Discounted Free Cash Flow Analysis (DCF) valuation ranges between US$ 407-464 million with weighted average cost of capital assumed for discounting at the rate of 12%.

(ii) Public Multiple Analysis (comparable companies) valuation ranges between US$ 307-406 million.

(iii) Precedents Transaction Analysis valuation ranges between US$ 389-501 million.

3. CCOP was informed that the Board of Privatization Commission has recommended a total value of US$ 500 million for 100% equity stake of PSMC. According to this, the Reference

Price for 75% equity stake (1,290,487,275 shares) works out to US$ 375 million i.e. Rs. 17.43 per share (calculated at the rate of Rs. 60 per US$).

4. Privatization Division briefed the CCOP that the Board of Privatization Commission considered the valuation as recommended by the FA and proposed that the current market value of total assets of PSMC may also be taken into account. PC Board observed that the valuation recommended by the FA reflects the core operations of PSMC (i.e. excluding surplus land and assets) and therefore, is based on PSMC as a going concern. The non-core land and assets being unbundled from PSMC includes Steel Town and Gulshan-e-Hadeed land which have been evaluated at US$ 500 million by the evaluators. The replacement value of the plant is estimated at around US$ 500 million. These estimate do not include the current market value of Downstream Industries and land reserved for NIP (this segment includes approx 5,000 acres). Adding up these elements the value of PSMC comes in excess of US$ 1.0 billion.

5. It was acknowledged that DCF is the most acceptable methodology for valuation of on-going units.

6. Privatization Division briefed the CCOP on the profiles of the prospective bidders, also.

7. CCOP observed that Privatization Division has not amplified their viewpoint in the summary in detail. Privatization Division clarified that the viewpoints of FA, Board of Privatization, as well as, the Privatization Division have been covered in its overall context in the summary.

8. On the question of payment of VSS to the employees of PSMC, the CCOP was informed that the entire liability on this account would be borne by the GoP.

DECISION

The Cabinet Committee on Privatization (CCOP) considered the summary dated 30th March, 2006, submitted by the Privatization & Investment Division on "Privatization of Pakistan Steel Mills Corporation" and approved the valuation of US$ 464 million based on DCF valuation for privatization of the Pakistan Steel Mills Corporation Limited (PSMC) for its 100% equity stake. On the basis of above, 75% equity stake (1,290,487,275 shares) works out to US$ 348 million i.e. Rs. 16.18 per share.

II. The CCOP also approved the proposal contained in para 8 of the summary to issue Letter of Acceptance (LoA) to the Successful Bidder if their per share price is equal or higher than the Reference Price mentioned in sub-para I above.

III. The CCOP directed the Privatization Division to follow the approved policy for Privatization, strictly in letter and spirit. Any deviation from the approved Policy, if deemed necessary, should be brought up to the CCOP well in advance for consideration and approval of waiver, if any.

IV. The CCOP directed the Privatization Division to impress upon the potential buyer to make the entire payment of the transaction to the GoP within the period stipulated in the bid documents.

> *V. The CCOP directed the Privatization Division to invariably add their viewpoint(s) recommendations explicitly in their summaries, in future."*

74. The above decision of the CCOP not only reflects disregard of the mandatory rules but also all material which was essential for arriving at a fair reference price. Because firstly determining the reference price for approval of the CCOP is a separate exercise to be carried out in terms of rule 6 of the Privatization Commission (Valuation of Property) Rules 2001 whereas the approval of the highest bidder is a separate exercise undertaken under the Privatization (Modes & Procedure) Rules, 2001. Rule 4(2) of these rules mandates that, "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". While approving the summary the Cabinet Committee totally ignored rule 4 of the Privatization (Modes & Procedure) Rules, 2001, referred to above and instead abdicated its authority to the Privatization Commission to issue Letter of Acceptance to whoever is the highest bidder. Secondly the Cabinet Committee totally ignored the proposal of the Board of Privatization Commission that the net assets should also be included while valuing the project. Thirdly the decision that the Government of Pakistan shall bear the liability of the entire VSS of the employees of the PSMC was neither part of the summary submitted by the Privatization Commission nor was it included in the initial public offering given to the bidders through advertisement. Fourthly notwithstanding the proposal of the Board of Privatization Commission to value the share of PSMC at the rate of Rs.17.43 it reduced it to Rs. 16.18 without assigning any good reason whatsoever. This is violative of section 24-A of the General Clauses Act of 1997 as interpreted by this Court in **M/s Airport Support Services v. Area Manager Quaid-i-Azam International Airport Karachi** (1998 SCMR 2268). There is no cavil to the proposition that when the law entrusts a power to an authority it has to be

exercised by the said authority and this Court may not substitute its opinion with that of the said authority. But if the decision of the authority betrays total disregard of the rules and the relevant material, then the said decision fails the test of reasonableness laid down by the Constitutional Courts for the exercise of the power of judicial review. Faced with such a situation a Constitutional Court would be failing in its Constitutional duty if it does not interfere to rectify the wrong more so when valuable assets of the nation are at stake.

75. The last question framed pertains to the question of divergence in the initial public offering to the successful bidders and the final terms/conditions offered to the highest bidder (on 31.03.2006) and whether these were in accord with the terms and conditions of public offering given through advertisement dated 16.09.2005.

76. For a better appreciation of the issue under consideration it would be in order if the terms offered in the advertisement are kept in view. The advertisement dated 16.09.2005 reads as under:-

"The Transaction:

The Privatization Commission ("PC") intends to sell as 51-74% equity stake in Pakistan Steel Mills Corporation (Pvt) Ltd. (PSMC or the Company), together with management control; to a qualified strategic investor on an "as is, where is" basis. A consortium led by Citigroup Global Markets Limited is advising the PC on the sale.

Expression of Interest

Investors interested in joining the process are requested to submit an Expression of Interest (EOI), at the earliest. EOIs should clearly provide the following information:

- *Name of company/group and its background information*
- *Audited financial statements for the preceding three years.*
- *Details of ownership/group structure.*

Upon receiving the EOIs and processing fee, Request for Statement of Qualification (RSOQ) will be dispatched to the interested investors immediately. EOIs should be submitted (in duplicate) together with a non-refundable processing fee of US$ 5,000/- or Pkr 300,000/- payable in the form of a bank draft favouring 'Privatisation Commission, Government of Pakistan'. EOIs and the bank drafts should reach the Director General (I&T), PC at the given address by 8th October, 2005.

The Company

PSMC is the country's largest and only integrated steel manufacturing plant with an annual designed production capacity of 1.1 million tons. It was incorporated as a private limited company in 1968 and commenced full scale commercial operations in 1984. PSMC complex includes coke oven batteries, billet mill, hot and cold rolling mills, galvanizing unit and 165 MW of own power generation units, supported by various other ancillary units. It is located 30km south east of the coastal city of Karachi, in close proximity to Port Bin Qasim, with access to a dedicated jetty, which facilitates import of raw materials. PSMC manufactures a wide mix of products, which includes both flat and

long products. PSMC effectively enjoys a captive domestic market due to the prevalent demand-supply imbalance in the country's steel industry, where demand has historically exceeded local supply. PSMC also strives to maintain high quality and environmental standards and in this regard has received ISO 9001, ISO 1400-1 and SA 8000 certifications, along with the Environmental Excellence Award 2005.

PSMC's brief financial summary is as follows:				
Financial Summary				
(Pkr million)	***FY02***	***FY03***	***FY04***	***FY05***
Net Sales	*14,286*	*22,084*	*24,778*	*30,452*
Operating Profit	*4*	*2.275*	*6.666*	*9.761*
Net Income	*102*	*1,024*	*4,852*	*6,008*
Total Assets	*30,151*	*23,669*	*30,935*	*36.687*
Equity	*8,544*	*9,568*	*14,420*	*20,419*
(1) Provisional				

As a result of sustained improvement in Pakistan's macroeconomic environment, the demand for steel in the country is expected to grow substantially. PSMC is uniquely positioned to take advantage of the expected demand growth as adequate infrastructure is already in place to cater to capacity expansion.
Preliminary information on PSMC is available on the following websites:
www.paksteel.com and www.privatization.gov.pk. "

A bare reading of the afore-referred advertisement would show that the Privatization Commission had invited Expression of Interest from strategic investors for the privatization of PSMC and the salient features of the public offering were mainly two:-

(i) Sale of 51 to 74% equity stake (it was increased to 75% by way of corrigendum) of PSMC.

(ii) The sale carried with it the transfer of management control to strategic investors on and **"as is" "where is"** basis.

There was no break up of the land which was to be sold to the strategic investors along with PSMC. There was no undertaking that the liability of VSS (up to Rs.15.00 billion) would be borne by the seller. There was no commitment that loans (about Rs. 7.67 billion) would be cleared before the Sale Purchase Agreement is signed. These concessions which had been offered after the acceptance of the bid were rather huge. The liability of VSS it was admitted before this Court by the counsel for Federation and counsel for the Steel Mills would amount to Rs.15.00 billion. The loan liability which was to be cleared by the Government of Pakistan amounted to Rs.7.67 billion and this was payable immediately even though the due date was June 2013, onwards.

77. Similarly valuable core land part of which had not been transferred to the PSMC had to be transferred to it without which it was stipulated in the agreement that the agreement shall not be complete (Clause 4.2 of the agreement). The value of inventories it was admitted before the Court was not less than 12.00 billion. Similarly the refund of Rs. 1.00 billion excess tax which shall now be received by the bidder if he is allowed to operate after issuing the letter of acceptance in this manner minus the price of land the bidder shall be having benefit of Rs. 12.451 billion (Inventories of raw material etc as per Statement of Net Assets dated 31st March 2006) + Rs. 8.517 billion (cash in hand as per Statement of Net Assets dated 31st March 2006) + Rs. 1.00 billion (refund of Rs. 1.00 billion tax as per report 2006) **= Rs. 21.968 Billion**. When Mr. Wasim Sajjad counsel was confronted with the afore-referred figures and asked what is the net benefit of the sale he replied that the cost of the land which is being unbundled amounts to Rs.70.00 billion and this according to him would be the ultimate gain. This argument ignores the reality that land always belonged to Government of Pakistan and could be unbundled, even without privatization. Similarly Mr. Abdul Hafeez Pirzada, learned Sr. ASC said that as the Government of Pakistan is disbursing the loans which were due in 2013 therefore the amount of mark up (existing) which would come to about Rs. 6.00 billion shall be saved in this manner. We asked him as to whether the amount of the interest would have not been paid if the mill remains in operation and has shown profit as it has started making the improvement in its performance from the year 2000 to 2003, he could not answer satisfactorily. It may also be noted that besides the above profit the bidder will also be entitled to get another profit if the employees opt for VSS then the liability of Rs.15.00 billion shall be paid by the Government of Pakistan. On our enquiry during the hearing, it was informed by the Director Operations that up till now more than 2000 employees have applied for VSS Scheme.

78. This transaction is outcome of a process reflecting serious violation of law and gross irregularities with regard to sale of the first and the biggest steel mill that this country has. From the facts admitted before us, even the procedural irregularities are not disputed. It has been argued by Mr. Abdul Hafeez Pirzada that rule 4(2) of the Privatization Commission (Modes & Procedure) Rules 2001 has been satisfactorily applied even though it was conceded that the name of the highest bidder was neither before the CCOP nor approved. The fact is that even the bidding took place after CCOP decision dated 31.03.2006. He obliquely suggested that in any case the CCOP knew the names of the bidders. If this be correct, how could the CCOP import its behind the scene knowledge into decision making and that also without noting it. Learned Attorney General argued somewhat on the similar lines even though he admitted that PC and CCOP have adopted somewhat **"convoluted"** procedure.

79. In our judgment rule 4 is couched in absolute language which requires full compliance. The rule has a wisdom behind it when it says that the CCOP will approve the name of the **highest ranked bidder and not the highest bid**. To us the wisdom in requiring approval of the highest bidder rather than the highest bid is that the Cabinet/CCOP will also have to keep in view the considerations not purely economic in approving or not approving the names of the highest bidder. As mandatory and absolute requirement of Rule 4 has not been met, in our considered view this alone is sufficient to invalidate the Letter of Acceptance and the Share Purchase Agreement based on it.

80. Learned Attorney General stated that the Courts are not supposed to substitute their own opinion with that of the authority under the law unless it is shown that the action is not sustainable being unreasonable. He relied upon **Associated Provincial Picture Houses** ibid and **Nottinghamshire County Council** ibid.

81. We have considered learned Attorney General's contention and have gone through the precedent case law. The case law would have been relevant if the public functionaries had not committed violation of the rules, noted above. Question of reasonableness would be relevant if the transaction/action was otherwise in accordance with law/rules.

82. Besides it has been noted by us with concern that the whole exercise reflected indecent haste by P.C. as well as C.C.O.P. in that on 30th of March 2006 the final report of the F.A is received, the officials of the PC process the same on the same day, the meeting of the Board of Privatization Commission also takes place the same day and the summary is prepared the same day. The very next day i.e. 31st of March 2006, the CCOP meets, considers the summary, fixes a reference price and authorizes the P.C. to approve the highest bid. Even the Managing Director of the FA had already flown a day earlier to make presentation. During lengthy hearing spread over almost three weeks, no counsel much less Mr. Abdul Hafeez Pirzada learned Sr. ASC for Federation could offer any explanation for the haste in finalizing the process of the privatization. Apart from the illegality noted above viz complete violation of Rule 4, this unexplained haste casts reasonable doubt on the transparency of the whole exercise.

83. It has been argued by the learned Attorney General that as no consequences of non-compliance of rule 4 have been provided in the Rules, the same be held as directory and not mandatory. For this purpose he relied on **Maulana Noor ul Haq v. Ibrahim Khalil** (PLJ 2001 SC 380). Non provision of consequence is one of the tests to determine the "directory" or "mandatory" nature of a statutory provision. The whole purpose of legislation is also to be kept in view to determine whether the duty cast is of absolute nature or of directory nature. We have already explained that the rule creates a distinction between the bid and the bidder and obliges the CCOP to approve **the highest ranked bidder and not the bid**. The language employed is mandatory in nature. Therefore, we repel the

argument that the rule is "directory" in nature and having been substantially complied with the Court should condone the twisted or as he put it "convoluted" procedure. Reference made by him on **Messrs Nishtar Mills Limited v. Superintendent of Central Excise Circle II** (PLD 1989 SC 222) is not apt under the circumstances.

84. As far as the argument of the learned Attorney General that as making fresh reference to the CCOP for reconsideration may result in reiteration of the earlier decision, therefore, the Court should not strike down the decision on this ground is concerned, it is clear that we are not striking down the action on this ground alone as the contents of this judgment reveal. The argument, therefore, has no merit. In any case reaffirmation of the decision after compliance with law, would demonstrate the supremacy of law.

85. The process of pre-qualification of potential bidders is an important limb of privatization process as it is the declared motto of the Privatization Commission (as manifested on the first page of the **Annual Report 2004)** that "**Privatization in an open, fair and transparent manner, for the benefit of the people of Pakistan, in the right way, to the right people, at the right price"**. To ensure that only "sound bidders with adequate experience and sound track record of corporate governance participate in the bidding process" the PC issued elaborate set of conditions in October 2005 containing conditions of eligibility and disqualification for pre-qualification with nomenclature titled as, "**Request for Statement of Qualification. Pakistan Steel Mills Corporation Limited October 2005"**. The definition clause defines, inter alia, consortium, due date and lead bidder. The due date for submission of seeking pre-qualification was 29th October 2005. Condition 2.1 lays down the eligibility requirements sub paras of which are relevant for the instant case:

> *(a) the Potential Bidder, and if the Potential Bidder is a Consortium the Lead Bidder, must be a company or a*

body corporate, whether incorporated in Pakistan or abroad (refer to Section 3.5).

(b) ……………

(c) if the Potential Bidder is a Consortium there must be a Lead Bidder (refer to Section 3.5(b) who is duly authorized (to the satisfaction of the Commission) by all other Consortium members to act on their behalf. After the submission of the SOQ, the Consortium members shall not be changed (both in respect of the percentage of the Equity Stake specified in Section 3.5 (b) below and any addition or deletion in the composition of the Consortium), unless the Commission consents to the same, in its sole discretion, not later than thirty (30) days prior to the proposed date of bidding.

(d) …………..

(e) the Potential Bidder, and in the event the Potential Bidder is a Consortium each Consortium member, must demonstrate a track record of sound corporate performance and governance.

(f) …………….

(g) *the acquisition of the Equity Stake by the Potential Bidder (or where the Potential Bidder is a Consortium, any part of the Equity Stake by any member of the Consortium) should not be in violation of the laws of Pakistan."*

Condition 2.2 spells out the basis for disqualification some paras of which would be relevant, those are as follows:-

"*(a) …………*

(b) …………

(c) …………

(d) …………

(e) has a track record of corporate behaviour evidencing any willful defaults on any of its obligations to any bank or financial institution in or outside Pakistan or is currently in default of its payment obligations to any bank or financial institution;

(f) ………….

(g) ………….

(h) ……………

(i) ……………..

(j) is involved in any litigtion, arbitration or any other dispute or event which may have a material adverse effect on its ability to acquire the Equity Stake or to manage PSMC after completion of the acquisition of the Equity Stake.

(k) …………

(l) …………..

(m) *…………..*

(n) *…………..*"

86. 19 parties filed Request for Statement of Qualification (ROSQ) out of which following nine were found eligible:-

i. Aljomaih Holding Company (Saudi Arabia).
ii. Al-Tuwairqi Group (Saudi Arabia) and Arif Habib Group (Pakistan).
iii. Azovstal Steel/System Capital Management (Ukraine).
iv. Government of Ras Al Khaimah (UAE).
v. International Industries Ltd (Pakistan) and Industrial Union of Donbass (Ukraine).
vi. Magnitogorsk Iron & Steel Works Open JSC (Russia).
vii. Nishat Mills Ltd. and D.G. Khan Cement Co. Ltd (Pakistan).
viii. Noor Financial Investment Co. (Kuwait).
ix. Shanghai Baosteel Group Corporation (China).

At Sr. No.2 of the above eligible parties, Arif Habib and Al-Tuwairqi Group formed a consortium from the very beginning. The due date for constitution of consortium as given in the Request for Statement of Qualification was 29th October 2005. The Consortium which ultimately participated in the bidding process on 31.03.2006 consisted of the following:--

(i) M/s Arif Habib Group of Companies.

(ii) M/s Al-Tuwairqi Group of Companies.

(iii) M/s Magnitogorsk Iron and Steel Works, Russia

Admittedly this Consortium had not applied within the afore-referred due date and their qualification as Consortium had not undergone the test of scrutiny. This aspect has assumed importance for two reasons: firstly because during the course of hearing of C.M.A. No. 1190 of 2006 filed by Iftikhar Shafi levelling serious allegations which remained uncontroverted and this factual position has also been admitted by counsel for Mr. Arif Habib during the hearing at the Bar, with regard to his qualification to participate in the bidding process falling within the mischief of Condition (i) and (ii) of the Basis of Disqualification (reproduced ibid). The conditions for qualification required that change can be brought about in the consortium **"not later than 30 days"** prior to the proposed date of bidding (Para 2.1 of the Request for Statement of Qualification). In the instant case even if there was a valid sanction order for the creation of the Consortium on 22.03.2006 this

change in the composition of the bidding party was hit by the afore-referred condition.

87. A comment on the corporate credentials of a member of the consortium would be pertinent in view of the mandatory requirements of the "Request for Statement of Qualification" (RSOQ) referred to above. It has not been denied by the respondent Mr. Arif Habib that he is involved in following criminal and civil cases:

(i) FIR No. 55/2003 dated 26.05.2003 under sections 342, 386/ 409 and 506 of Pakistan Penal Code at PS Lahore.

(ii) Suit No. 481/2003 for the recovery of Rs.5600611760 in Sindh High Court filed by Iftikhar Shafi against Arif Habib/Ms Arif Habib Securities Ltd.

(iii) Suit No.639/2003 for the recovery of Rs.1701035843 in Sindh High Court filed by M/s Shafi Chemicals against Arif Habib and M/s Arif Habib Securities Ltd.

(iv) Suit No.480/2003 for the recovery of Rs.10989948199 in the Sindh High Court Karachi, filed by M/s Diamond Industries Ltd against Arif Habib and M/s Arif Habib Securities Ltd.

(v) Representation dated 5 April 2002 filed before SECP and pending against Arif Habib.

(vi) Representation to the President of Pakistan against Arif Habib.

(vii) Representation to the Prime Minister of Pakistan against Arif Habib.

(viii) Arbitration proceedings notified by the Chief Minister Punjab and still pending.

(ix) Proceedings of the inquiry Committee reports on the affairs of Karachi Stock Exchange and Lahore Stock Exchange dated 31st August 2000 and 14th June 2002."

Copies of the afore-referred F.I.R and the civil suits were appended with C.M.A. No. 1190 of 2006 which indicate that in the F.I.R., he was the principal accused

and the allegations were that through his manipulation the stock exchange crashed leading to enormous losses to the small investors running into billions. In the civil suits the allegations are that the respondent Arif Habib and others manipulated the stock market and thereby caused losses. Learned counsel placed on record a copy of the report of four member Task Force headed by Mr. Justice Saleem Akhtar (a retired Judge of the Supreme Court of Pakistan) against certain individuals. In the report on different occasions the Commission had made observations about the corporate behaviour of Mr. Arif Habib. It may be noted that at the time of the crash of the Karachi Stock Exchange (K.S.E.) Mr. Arif Habib was President of the KSE as well as one of its major brokers. One of the following paras from the Task Force report would reflect about the corporate behaviour of Mr. Arif Habib:-

> "*In these circumstances, the role of Badla financing in whetting investor appetite needs to be understood. Badla financing which grew markedly during this period, provided financing to investors who lacked liquidity to purchase in the ready market, albeit at high interest rate. Investors were willing to borrow at exorbitant Badla rates (which were capped at 18% in KSE but rose in the uncapped LSE to over 100%) because the accelerated rise in stock prices made such expensive borrowing feasible. The growing availability of Badla financing from lenders, who were largely brokers and institutions added to the buying frenzy in the ready market, raising stock prices on a daily basis and further amplifying expectations in the futures market. It may be noted that some of the major Badla providers were the same people who were selling the future market, and thus benefiting from the heightened expectations of price rises in the future. In other words, there was a strong nexus between lenders and brokers/investors who could influence market sentiment to their own advantage.*
>
> *The major brokers representing financiers of Badla on February 28, 2005 and some of the largest net sellers in the March Futures were:-*

Badla Providers 28th February 2005	***Amount (Rs. Million)***
Arif Habib Securities	*4,622*
Aqeel Akarim Dedhi	*4,233*

It is equally significant to note here that in reply to C.M.A. filed on behalf of Iftikhar Shafi it was admitted on behalf of Arif Habib that, "*it may be mentioned that the existence of these suits has been expressly stated in the annual accounts of*

Arif Habib Securities Limited, which is a public document and it was also filed with the Privatization Commission." This statement in the pleadings on behalf of Arif Habib goes to substantiate without any doubt that his involvement in litigation was in the knowledge of the Privatization Commission. Thus, it had a duty to have applied mind before declaring him qualified to be one of the members of the consortium because we are of the opinion that a person who is involved in litigation in respect of the matter which pertains to a corporate body like K.S.E., etc, and against whom a report publicly has also been issued by the Task Force could not be considered a person who could, prima facie, handle the affairs of the Pakistan Steel Mills transparently. Thus, his involvement in the litigation as well as the corporate behaviour as is evident from the Task Force Report could have disqualified him under Para 2.2(j) of the RSOQ. Apparently this aspect seems to have been ignored by the Privatization Commission. We are conscious of the fact that the observations being made herein are not conclusive and can only be used for the purposes of the present litigation in view of the principle laid down by this Court in the case of **Mohtarma Benazir Bhutto** ibid (PLD 2000 SC 77).

88. This Court would not like to comment on the veracity of the allegations levelled either in the application, in the F.I.R., the civil suits filed or the report of the Enquiry Commission lest it may prejudice the case of either side before appropriate forums/courts. However, for the purposes of qualification as a potential bidder, the disqualification condition stipulates that a potential bidder would be disqualified to participate in the bidding process if, "he is involved in litigation, arbitration or any other dispute or event which may have material adverse effect on its ability to acquire the Equity Stake or to manage PSMC after completion of the acquisition of the Equity Stake." It is surprising that although the afore-referred allegations are a matter of record and have not been controverted either by respondent Mr. Arif Habib or by the Privatization Commission yet he was cleared of the qualification process and was allowed to participate.

89. After bidding the consortium consisting of (i) M/s Magnitogorsk Iron & Steel Works (ii) M/s Al-Tuwairqi Group of Companies and (iii) M/s Arif Habib Group of Companies was declared successful and Letter of Acceptance dated 31.03.2006 issued. But surprisingly agreement dated 24.04.2006 was executed between the:--

(i) President of Islamic Republic of Pakistan through the Ministry of Privatization and Investment (the "Seller") and

(ii) the Privatization Commission, established under the Privatization Commission Ordinance, 2000 (Ordinance LII of 2000), having its principal office located at 5-A Constitution Avenue, Islamabad, hereinafter referred to as the "Commission". and

(iii) PSMC SPV (Mauritius) Limited a company incorporated and existing under the laws of Mauritius as joint venture company having its registered office at Suite 450, 4th Floor, Barkly Wharf East, Le Caudan Waterfront, Port Louis, Mauritius and the existing and paid up capital of which is owned entirely by ATG Holdings and MMK Holdings in equal shares ("PSMC Mauritius") and

(iv) Arif Habib Securities Limited a company incorporated and existing under the laws of Pakistan and having its registered office at 60-63 Karachi Stock Exchange Building, Stock Exchange Road, Karachi Pakistan ("AHSL") and

(v) Arif Habib son of Habib Haji Shakoor, resident of 86/11 10th Street, Khayaban-e- Sehr Phase VI, DHA Phase NIC No.42301-1015651-1 ("AH") (AHSL and AH forming "AHG" as defined below.

Following parties stood as guarantors for the purchasers named above:-

(i) ATG Holdings Mauritius Limited, a company incorporated and existing under the laws of Mauritius a wholly owned subsidiary of ISPC whose registered office is at Suite 450, 4th Floor, Barkly Wharf East, Le Caudan Waterfront, Port Louis, Mauritius ("ATG Holdings").

(ii) Al-Ittefaq Steel Products Company, a company incorporated and existing under the laws of the Kingdom of Saudi Arabia whose registered office is at P.O. Box 2705 Dammam-31461, Kingdom of Saudi Arabia ("ISPC").

(iii) MMK Holdings (Asia) Limited, a company incorporated and existing under the laws of Mauritius whose registered office is at Suite 450, 4th Floor, Barkly Wharf East, Le Caudan Waterfront, Port Louis, Mauritius a wholly owned subsidiary of MMK ("MMK Holdings").

(iv) Magnitogorsk Iron and Steel Works Open Stock Company, a company incorporated and existing under the laws of the Russian Federation whose registered office is at 93 Kirova Street, Magnitogorsk, Chelyabinsk Region, Russia ("MMK").

90. It is an admitted fact that the PSMC SPV (Mauritius) Limited got certificate of incorporation from Republic of Mauritius on 19th Day of April, 2006. Learned counsel appearing for bidders namely Mr. Kazim Hussain also filed a statement mentioning therein that except Mr. Arif Habib remaining members of the Consortium had no office in Pakistan. Relevant para therefrom is reproduced herein below:-

> "*The guarantors ATG Holdings Mauritius Limited, Al-Ittefaq Steel Products Company, MMK Holdings (Asia) Limited and Magnitogorsk Iron and Steel Works Open Stock Company do not have any place of business or office in Pakistan at the present time.*
> *2. PSMC SVP (Mauritius) Limited also does not have any place of business or offices in Pakistan at the present time.*
> *3. Arif Habib Securities Limited however is a public limited company duly incorporated in Pakistan having its registered office at Karachi."*

It is clear that bidders are different than the purchasers. The names of the purchasers shown in the Agreement dated 24.04.2006 have not been approved by the C.C.O.P. When asked to explain the anomaly, learned counsel for successful bidder explained that the afore-referred arrangement was devised with a view to provide a corporate vehicle through which the successful bidder could exercise corporate control on P.S.M.C. He further attempted to explain that this devise was adopted to save the double taxation. We fail to understand that the Privatization Commission readily accepted the arrangement which was to the benefit of the bidders for the purpose of entering into the Sale Purchase Agreement knowing well that under the law of our country no such permission can be granted because the contract is to be entered between the seller and the purchaser as approved by

the Privatization Commission Board and the CCOP in terms of Rule 4(2) of the Privatization Commission (Modes and Procedure) Rules, 2001. Further under section 10 of the Contract Act the parties have to make contract for a lawful consideration and with a lawful object which are not thereby expressly declared to be void. In view of this principle of law it is to be borne in mind that the expediencies of the bidder with regard to save their skin from double taxation could not form a valid basis for the Privatization Commission to accept such a plea for the purpose of allowing them to enter into contract through an offshore company which has been incorporated out of the country. Even otherwise, we cannot encourage such practice because if at all the bidders wanted to have any benefit of taxation they should have resorted to the municipal law of Pakistan and in this behalf if at all there was necessity they could have obtained incorporation of any other company within the territory of Pakistan having its own permanent office or business. Although we are mindful of the fact that after starting the business in Pakistan a company can open its office and can get the registration for the same purpose in terms of section 450 of the Companies Act. But if a corporate body i.e. PSMC SVP (Mauritius) Limited had got incorporation few days before entering into an agreement i.e. on 19th April 2006 in a different country coupled with the fact that this company is not a bidder, the PC should have not entered into contract in the present shape.

91. Now turning towards the contents of the contract it may be noted that the same has been signed after vetting but there is not a single clause incorporated therein to the effect as to whether the bidders had furnished any guarantee for the purpose of making investment in the PSMC with a view to raise its production capacity. On this when we enquired from the learned Attorney

General as well as learned counsel appearing for the bidders, they filed following statement on 8th June, 2006:-

> "*We refer to your request for clarification regarding the utilization of PSMC land and future enhancement in the production capacity of PSMC.*
> *We hereby confirm that PSMC land will only be used for purposes of the steel industry and related industrial activities and we shall not carve it out for sale or disposal for commercial or residential purposes.*
> *We hereby confirm that immediately after the Completion Date we shall commence work on the repair and revamping of the existing facilities of PSMC in an effort to ensure sustained utilization of its designed production capacity of 1.1 MTA and thereafter shall seek an economic enhancement of its production capacity up to 1.5 MTA. It is estimated that immediately an investment of US$ 250 mm will be required for PSMC to be become economically viable. Thereafter furthr investments will be made to raise the capacity of up to 3.0 MTA.*"

92. It may be noted that at the initial stage of the hearing when the learned counsel appearing for the P.C. Syed Sharif-ud-Din Pirzada made a statement in his personal capacity that the land underneath the Mill cannot be used for any other purpose except for the purpose of running the business of the Mill, the learned counsel for the bidder did not agree but when the proceedings went on and the Court expressed its apprehension in respect of the valuation of shares without including the value of the land as has been discussed, then for the first time the above statement was filed. It is equally important to note that no assurance/guarantee was obtained earlier. The incorporation of the above letter to the effect as to how much investment would be made when for the first time this

fact was also highlighted in the above letter but without making any commitment that the amount shall be invested because the language employed therein indicates that in the revamping of the existing facilities of PSMC in an effort to ensure sustained utilization of its design production capacity of 1.1MTA and thereafter shall seek enhancement of its production capacity to 1.5 MTA it is estimated that immediately an investment of U.S. $ 250 mm will be required for PSMC to become economically viable. Thereafter further investment will be made to raise the capacity to3.0 MTA. The letter in terms does not clearly suggest that this much amount shall be invested. However, the learned Attorney General as well as the counsel for the bidder stated that this letter may be read as one of the conditions of the warranty of the agreement and this may be read and treated as part of the agreement. The submission made on their behalf is not acceptable for a number of reasons: firstly the document is not the part of the original transaction; secondly during the Court proceedings such documents cannot be read as part of the agreement unless it is agreed to by the PC and when essentially this document does not bear the signatures on behalf of the PC; thirdly it is not signed by the parties who are signatories to the Share Purchase Agreement. Fourthly, it has been issued and placed on record not as a reflection of genuine transaction between the contracting parties but to allay the concerns of the Court reflected in observations made during hearing.

93. At this juncture it is noted that the amount which purchaser intends to spend, if the statement is considered as commitment for the sake of argument, then the same has to be examined along with the fact that equal to this amount the Government of Pakistan itself is paying to its employees i.e. Rs. 15.00 billion if they all accept VSS besides other financial benefits break-up of which has already

been given in above paras. Thus, examined from this angle as well, there was no necessity to privatize the PSMC at a lesser price instead of selling it at a fair market price for achieving the objects set out for privatization.

94. It may be pertinent to point out here that the learned counsel appearing for the bidder was not holding the brief on behalf of the PSMC SVP (Mauritius) because power of attorney had been filed only on behalf of guarantors and Arif Habib. We may explain as to why it was enquired with regard to the investment of the amount because during the hearing impression was being created that the object of privatization is not to close the PSMC but to increase its production capacity. Therefore, the violation was also done by following the internationally acceptable principle of DCF which only deals with in respect to the future prospects of an on-going concern. It was pointed out to the learned counsel for the respondents that if the object was so, then where is the condition in the contract of Sale Purchase Agreement dated 24.04.2006 to the effect that how much money will be invested by the purchaser for enhancing its capacity. There was no answer to it and at the end of the day the above statement was filed. It is equally important to note here that there is no doubt that the Government can independently form a policy for the purpose of privatization but here in Pakistan the policies have to be framed in pursuance to the decisions of the C.C.I. The decision of C.C.I. dated 29th May 1997 explicitly provides that the object of privatization would be to retire the debts and this policy has been incorporated in the Ordinance 2000, as well. Therefore, if the P.C. wanted to sell the shares of PSMC for any other purpose i.e. to build its capacity for the purpose of catering the requirements of steel in the country then in that case they should have again approached the CCI for the purpose of modification of its policy. Thus the result

could be that after framing a policy through C.C.I., privatization can take place, however, the only object should be the debt retirement and for this purpose the government may apply any such formula internationally recognized which may ensure to bring more money in the country.

95. In the above context the next important question is with regard to the period of holding. Admittedly, in the agreement the holding period has been fixed only three years meaning thereby that after three years there is no guarantee whether the actual purchaser would not sell the shares of this on-going concern which is an industry of a very important nature known as mother industry. But no guarantee in this behalf has been obtained. Learned counsel appearing for the PC stated that there is a clause that the shares shall not be transferred against the security of Pakistan. We quite agree with him but at the same time it has not been defined anywhere that for the purpose of ensuring the security of Pakistan what measures shall be followed if the purchaser ultimately decides to dispose of/sell the shares against the interests of Pakistan. Therefore, in this behalf a clause should have been incorporated into the agreement. As we have observed hereinabove that even the agreement dated 24th of April 2006 has not been conditionalized to safeguard the interest and it seems that it is an ordinary standard type of agreement which has been signed without looking into the pros and the cons.

96. In the circumstances and for above reasons, Constitution Petition No. 9 of 2006 and C.P. No. 345 of 2006 (after conversion into appeal) are allowed and C.P. No. 394 of 2006 is dismissed, all in the above terms. Parties are left to bear their own costs.