

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE JAMAL KHAN MANDOKHAIL

**CIVIL MISC. APPLICATION NO.7139 OF 2019 IN
CONSTITUTION PETITION NO.2 OF 2011**

(Matter regarding implementation of the order of this Court dated 28.06.2019).

AND

**CIVIL REVIEW PETITION NO.494 OF 2019 IN
CONSTITUTION PETITION NO.2 OF 2011**

(Mainland Husnain Pakistan Limited. v. Ishaq Khan Khakwani and others).

AND

**CIVIL MISC. APPLICATION NO.7894 OF 2019 CIVIL
REVIEW PETITION NO.NIL OF 2019 IN CONSTITUTION
PETITION NO.2 OF 2011**

(Hassan Naseem. v. Ishaq Khan Khakwani and others).

AND

**CIVIL MISC. APPLICATION NO.7897 OF 2019 CIVIL
REVIEW PETITION NO.NIL OF 2019 IN CONSTITUTION
PETITION NO.2 OF 2011**

(Lt. General (R) Saeed-uz-Zafar and others. v. Ishaq Khan Khakwani and others).

AND

**CIVIL MISC. APPLICATION NO.8322 OF 2019 CIVIL MISC.
APPLICATION 7897 OF 2019**

(Lt. General (R) Saeed-uz-Zafar and others. v. Ishaq Khan Khakwani and others).

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AND

**CIVIL MISC. APPLICATION NO.8251 OF 2019 CIVIL
REVIEW PETITION NO.NIL OF 2019 IN CONSTITUTION
PETITION NO.2 OF 2011**

(Waqar Yazdani Butt and others. v. Ishaq Khan Khakwani and others).

AND

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**CIVIL MISC. APPLICATION NO.11484 OF 2021 IN CMA
NO. 7139 OF 2019 IN CONSTITUTION PETITION NO.2 OF
2011**

(Letter of A. F. Ferguson & Co.)

AND

**CIVIL MISC. APPLICATION NO.13353 OF 2021 IN CMA
NO.7139 OF 2019 IN CONSTITUTION PETITION NO.2 OF
2011**

(Matter regarding implementation of the order of this Court
dated 28.06.2019)

In attendance:

Mr. Khalid Javed Khan,
Attorney General for Pakistan.
Mr. Sohail Mehmood,
Additional Attorney General for
Pakistan.
Mr. Habib-ur-Rehman Gillani,
Secretary Railways.
Mr. Ramzan Sheikh (MHPL)
Mr. Khurram Akbar Khan, Partner A.F.
Ferguson.
Mr. Imtiaz Aslam Malik, Partner A.F.
Ferguson.
Kh. Azhar Rasheed, ASC.
(M/o Railways)
Mr. Naeem Hassan, Secy., Lit. FBR.
Mr. Hassan Akbar, Addl. P.G. NAB.
Mr. Waqas Khoso, S.O. (Planning)
Mr. Amjad Mumtaz, Audit Officer.
Mr. Munawar Mumtaz, A.A.O.
Ch. Faisal Fareed, ASC.

Date of Hearing: 17.01.2022.

ORDER

CMA No.9022 of 2021. This is an application
seeking permission to place on record a letter dated
28.08.2021. Through the said letter, M/s AF Ferguson & Co
had expressed their willingness to work with Pakistan
Railways, pursuant to a request made to this Court on behalf
of Pakistan Railways that M/s AF Ferguson & Co may be
associated to oversee the process of floating international

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Railways, pursuant to a request made to this Court on behalf
of Pakistan Railways that M/s AF Ferguson & Co may be
associated to oversee the process of floating international

tenders relating to leasing of Royal Palm Golf & Country Club, Lahore ("**The Club**"). The Secretary, Pakistan Railways is present in Court. He submits that pursuant to the said letter, representatives of Pakistan Railways and M/s AF Ferguson & Co have finalized the terms of reference (TOR)/scope of work which will be performed by M/s AF Ferguson & Co. A representative of M/s AF Ferguson & Co namely Khurram Akbar Khan, partner is present in Court. He confirms the statement made by the Secretary, Pakistan Railways. Consequently, this application is allowed and letter dated 28.08.2021 is taken on record.

2. Mr. Khurram Akbar Khan has informed us that the requisite documentation for completion of audit of management accounts have been provided to his Firm. He maintains that the said audit for the year 2017 will be completed within a maximum period of three weeks. We have asked Mr. Khurram Akbar Khan when the audit of management accounts for the year 2017-18 will be completed. He maintains that the said exercise would take about six weeks after the accounts upto 2017 have been completed. Mr. Ramzan Sheikh of MHPL, present in Court

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submits that the entire record for completion of audit for the ~~year~~ 2018 is available with him. As soon as the audit for the year 2017 is completed, the entire record will be handed over within a period of one week thereafter.

3. The learned Attorney General for Pakistan as well as the Secretary, Pakistan Railways have pointed out that

RFP documents and determination of evaluation and eligibility criteria is complete and the international tenders can be published in local newspapers within one week and in international newspapers one week thereafter. At this stage, Mr. Imtiaz Aslam Malik, partner of M/s AF Ferguson & Co has pointed out that although NESPAK had earlier been appointed by Pakistan Railways as their consultant for preparation of the entire set of documentation to float international tenders and the same had been vetted by the financial team of M/s AF Ferguson & Co, it was advisable that in view of the fact that the Club is a mixed use facility which includes hospitality, food and beverage as well as a Golf course it may be appropriate to hire a consultant who would be able to advise on issues relating to the Golf course. We note that Pakistan Railways and its consultant, namely NESPAK have been informed about such recommendation by M/s AF Ferguson & Co. In case a need is felt to retain separate consultant to advise on issues relating to the Golf course, there is no bar on Pakistan Railways seeking such consultancy services if considered necessary by NESPAK and Pakistan Railways. Even otherwise, the Secretary Pakistan Railways submits that in case a corporate entity bids for the entire facility, they would have the option to retain a consultant for the upkeep and up-gradation of the Golf Club keeping in view the fact that one of the attractions is its Golf course and it may be in the interest of the commercial entity which wins the bid to hire consultants to maintain and improve the Golf course to meet international standards. He

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therefore submits that it may be premature at this stage for Pakistan Railways to hire food and beverage, hospitality and Golf Course consultants. We do not wish to comment on this issue at this stage. The matter is left to be decided with mutual consultation between Pakistan Railways and its consultants/advisors.

4. **CMA No.12242 of 2021.** This is an application on behalf of Pakistan Railways seeking permission to float tenders through international competitive bidding ("**ICB**"). The Secretary, Pakistan Railways who is present in Court submits that M/s AF Ferguson & Co were appointed as Supervisor consultants for the bidding process and after a number of meetings between Pakistan Railways and M/s AF Ferguson & Co tender documents have been finalized. He maintains that Pakistan Railways with the support of M/s AF Ferguson & Co will ensure that the tendering process is transparent and attracts well reputed national and international bidders/investors. He has informed us that advertisements will be published in National (*Urdu and English*) newspapers of wide circulation and the Ministry of Foreign Affairs will also be requested to direct Pakistan Embassies/Missions abroad to share the advertisement with potential foreign investors. He states that the bidding documents have already been shared with the Public Private Partnership Authority, Privatization Commission, NESPAK and Board of Investment as well as M/s AF Ferguson & Co and all bidding documents have been finalized in consultation

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with and to the satisfaction of all concerned. In view of the above, Pakistan Railways is granted permission to float the tenders through the ICB process. The application is accordingly allowed.

5. Mr. Khurram Akbar, partner of M/s AF Ferguson & Co has pointed out that vide our order dated 29.04.2020 we had directed that the bills for professional services rendered by M/s AF Ferguson & Co may be submitted in this Court for appropriate orders for payment by MHPL. He solicits an order in this regard. We therefore direct Mr. Ramzan Sheikh of MHPL to pay 50% of the aggregate amount of invoices submitted by M/s AF Ferguson & Co within 15 days from today. Appropriate orders for payment of the balance amount will be passed after the audit of management accounts has been completed in all respects.

6. CMA No.13353 of 2021. This is an application submitted on behalf of Mr. Shahrukh Khan with the prayer that his name may be removed from the Exit Control List. The learned Attorney General for Pakistan has pointed out that in compliance of the order of this Court dated 12.08.2021 the Auditor General of Pakistan has submitted his report which is already on the record. The Audit Committee of Pakistan Railways has communicated its comments/response to the said report which have been received by Auditor General's Office. The final report after considering the comments of the Audit Committee is awaited. He maintains that once the final report of the Auditor General's Office is available before this

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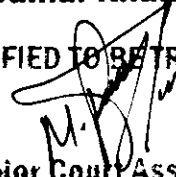
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Court, it would facilitate this Court in determining the final liability of Mr. Shahrukh Khan incurred during the period for which he held the position as *pro bono* Advisor of the Club. We therefore direct the Auditor General of Pakistan to ensure that the final report is submitted before this Court within three weeks. The application moved on behalf of Shahrukh Khan shall be taken up after the final report of the office of Auditor General of Pakistan has been placed on record and examined by us.

7. Let the matter be re-listed after six weeks. ^ ^

Sd/- Umar Ata Bandial, J
Sd/-Ijaz Ul Ahsan, J
Sd/-Jamal Khan Mandokhail, J

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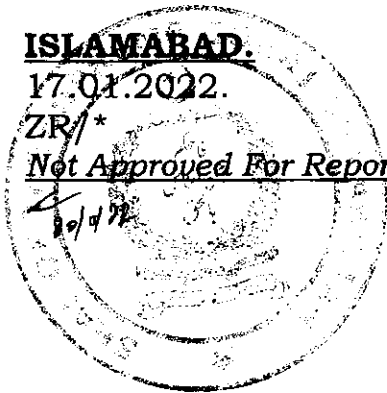
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17.01.2022.

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Not Approved For Reporting

20/1/22



(respondent No.4 to 6)

Mr. M. S. Khattak, AOR
(respondent No.9 and 13)

Mr. Salman Akram Raja, ASC
Assisted by Abuzar Salman Khan Niazi,
Advocate, Malik Ahsan Mehmood,
Advocate, Asad Lodha, Advocate and
Malik Ghulam Sabir, Advocate
(respondent No.1)

Mr. Wasim Sajjad, Sr. ASC
Mr. M. S. Khattak, AOR
(respondent No.8)

Mr. Shahzada Mazhar, ASC
Ch. Akhtar Ali, AOR
(respondent No.14)

Nemo
(respondent No.15)

Ch. Aitzaz Ahsan, Sr. ASC
Syed Faisal Hussain Naqvi, ASC
(respondent No.16 and the applicants in C.M.A.
No.2960/2019)

Mr. Ali Zafar, ASC
Mr. Zahid Nawaz Cheema, ASC
(respondent No.17 and in CrI.R.P. No.18/2019)

For Pakistan Railways: Sh. Rasheed Ahmed, Federal Minister
Mr. Iftikhar Ahmed, Audit Officer
Mr. Shakeel-ur-Rehman Khan, ASC
(in W.P. No.22816/2016)

For A.F. Ferguson: Mr. Mansoor Usman Awan, ASC
(in CMA.1864/2019)

For the Federation: Mr. Sajid Ilyas Bhatti, Addl. A.G. Pak.

For NAB: Mr. Nayyar Rizvi, Addl. P.G.
Mr. Naeem Tariq Sanghera, Special
Prosecutor

Date of Hearing: 11.04.2019

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JUDGMENT

IJAZ UL AHSAN, J.- The brief facts necessary for decision of the instant matters are that the Provincial Government granted a lease in perpetuity of a prime property located on Canal Bank Road, Lahore to the Railways Department during pre-partition times. The Railways Golf Club ("Club") was set up on such property in 1911. Its objective was to provide recreational

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facilities to the employees of the Railways Department. The Club comprised of an 18-hole golf course, a swimming pool, club house and housing accommodation for the lower staff of the Railways Department. In 2000, a decision was made to offer the Club on commercial lines to interested parties to finance, redesign, develop and manage its operations. To this end, advertisements were issued in various newspapers, i.e. advertisement in an English newspaper dated 16.03.2000 ("**First Advertisement**"), advertisements in English and Urdu newspapers dated 23.08.2000 ("**Second Advertisement**"), and advertisement in an English newspaper dated 10.09.2000 ("**Third Advertisement**"). Pursuant thereto, six parties submitted their expressions of interest and applications for pre-qualification, i.e. Husnain Construction Company-Unicon Consulting Joint Venture, Pakistan Services Limited, Meinhardt Singapore Private Limited, Bradenton International Enterprises, Fidelity Investment Bank Limited and Gharibwal Cement Limited. A three-member committee carried out an initial evaluation and pre-qualified four parties, namely, Husnain Construction Company-Unicon Consulting Joint Venture, Pakistan Services Limited, Meinhardt Singapore Private Limited and Gharibwal Cement Limited, which were issued the bid documents. *Vide* letter dated 01.04.2001, an Evaluation Committee comprising of Director Marketing, Director Property and Land and Divisional Superintendent was recommended to evaluate the proposals received for the project. Out of the pre-qualified parties, Husnain Construction Company-Unicon Consulting Joint Venture, Pakistan Services Limited and Meinhardt Singapore Private Limited submitted their bids. The Evaluation Committee completed the evaluation of the bids and *vide* evaluation report dated 20.04.2001 ("**Bids Evaluation Report**") recommended to the Evaluation Committee of the Railway Board to award the contract to Husnain Construction Company-Unicon Consulting-Maxcorp Joint Venture having scored 89 marks, while Pakistan Services Limited was awarded 36 marks and the bid of Bradenton International Enterprises was declared to be non-responsive. Finally, pursuant to an approval dated 20.04.2001 of the Executive Committee of Pakistan Railways, the Pakistan Railways Golf Club Lahore Leasing Agreement dated 26.07.2001 ("**Agreement**") was

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executed in favour of a consortium comprising of respondents No.14, 15 and 16, namely Maxcorp Development Sdn Bhd (**"Maxcorp"**), M/s Husnain Construction Company (Private) Limited (**"Husnain Construction Company"**) and Unicon Consulting Services (Private) Limited (**"Unicon Consulting"**), respectively (**"Maxcorp consortium"**). According to the Agreement, Maxcorp-Husnain (Private) Limited was to be the lessee, which subsequently became respondent No.17, i.e. Mainland Husnain Pakistan Limited (**"MHPL"**).¹ Be that as it may, construction work was undertaken and various facilities including restaurants/dining areas, swimming pools, etc. were constructed. The golf course was also redesigned. Simultaneously new membership was opened with a new name "Royal Palm Golf and Country Club". The membership fee was increased manifold and membership of old members of the Railways Golf Club was cancelled. In consequence of misgivings expressed about the mode manner and transparency of the process the matter was taken up by the National Assembly of Pakistan which constituted a Committee (**"NA Committee"**) to examine this issue. The NA Committee summoned the parties, recorded statements and prepared a report (**"NA Report"**). In its report, the NA Committee came to the conclusion that the lease had been awarded under questionable circumstances. However despite the NA Report, neither Pakistan Railways nor the Government of Pakistan took any action against those alleged to be involved in this matter.

2. It is alleged in the instant matters that the lessee(s) defaulted in its payment obligations and various payments which were due were paid after considerable delay; that on account of various acts, omissions and commissions on the part of the respondents, huge losses to Pakistan Railways and the national exchequer had been occasioned; the process of award of the contract was tarnished, tainted and non-transparent; and amounts in excess of rupees one billion were collected by way of membership fee which was utilized by the management in a non-transparent and questionable manner. The petitioners claim to

¹ The terms "Maxcorp consortium", "MHPL" and "lessee" shall be used interchangeably throughout this opinion, as deemed appropriate.

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have moved various applications with the then Chief Executive of the country, the then Federal Minister for Railways and Communications and the General Manager Pakistan Railways, Lahore in addition to a large number of State functionaries. However, their efforts proved to be an exercise of futility. Having exhausted all other avenues and considering the colossal nature of potential loss to the State exchequer, the petitioners, who are public spirited citizens, approached this Court by filing a constitution petition under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**"). Petitioner No.1 is a former minister, former member of the National Assembly of Pakistan and member of the erstwhile Club, while petitioner No.2 is a former minister and former member of the National Assembly.

3. The matter was initially taken up by this Court on 13.01.2011 when the following order was passed:-

This petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 along with listed Human Rights Case has been instituted on behalf of Ishaq Khan Khakwani and Dr. Mubashir Hassan, wherein alleged scam in awarding on lease equal to 141 acres of land lying in the heart of the city of Lahore to respondent No. 15 Husnain Construction Company (Pvt) Ltd. has been highlighted.

2. According to the facts narrated by Mian Allah Nawaz, learned Sr. ASC for the petitioners, the land belonging to the Railways Department has been leased out in a highly non-transparent manner without following settled procedure in vogue in the country for such purpose. In this behalf, in the notice published in the newspaper under the caption "Expression of Interest", no specification of the land with its measurement etc was mentioned, however, subsequently, this very notice was converted into an "Invitation" and on the basis of recommendations of a Committee this prime land was leased out as aforesaid. Initially, the area which was to be given to the lessee was equal to 103 acres but, subsequently the same was increased to 141 acres. Probably according to learned counsel, in pursuance of some negotiations when the final agreement was executed the area was raised to 141 acres and the period of lease of 33 years, too, was converted into 49 years. He explains that a lot of hue and cry was raised against this deal from different quarters including persons well-connected with it and the citizens of the country, but no appropriate and timely action was taken. The Special Committee comprising parliamentarians was, later constituted which gave its recommendations, copy of which has been placed on record, despite that no action seemed to have been taken so far. He further states that after filing instant petition, rather; he was astonished to know through newspaper 'The Express Tribune' dated 9th January, 2011, that recommendations of the Special committee were dropped. It is to be noted that the relevant news item was published under

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caption "Political Expediency, Report of Railway Land Fraud Dropped", contents of which are reproduced as under:-

3. With a view to confirm the above news item, on being asked, Mr. Rauf Klasra, its originator attached with the said newspaper, has appeared and stated that according to his knowledge after receipt of recommendations from the Special Committee in the month of October, 2010, no action has been taken upon it, the reasons of which he has mentioned in the story published in the newspapers (details of which have been reproduced herein above). As per his interpretation, a case of big scam in which initially Rs.25 billions of this nation now increased to Rs.50 billion involved, has been spelt out. He further states that he has strong reasons to substantiate his plea in view of the background of this case which he explained precisely and added that initially Mr. H.U. Baig was the Chairman of Public Accounts Committee (PAC) who had taken up this matter but without making final conclusions about this scam despite availability of an authentic audit report of the Auditor General confirming the allegations of land scam in the Railway Department. According to his belief, he states, after the general elections Mr. Allah Yar, MNA was made Chairman of PAC who also did not venture to finalize report of his predecessor Chairman PAC or the report of Committee and in this manner a period of about more than 8 to 10 years passed away without any progress, therefore, his apprehension as expressed by him in the news item noted hereinabove is substantial and is liable to be sustained. Similarly Mr. Munawar Abbas, Additional Secretary, National Assembly, confirms that Special Committee had completed its report in the month of August, 2010 and so far it has not been placed before the House.

4. Mian Allah Nawaz, learned Sr.ASC with his petition has also placed on record report of the Special Committee on Railways' land scam contents whereof have been confirmed with the news item published in newspapers, the Daily 'The News' Daily 'Dawn', etc. clipping of which are also available on record.

5. Thus, on having gone through the material available on record placed by the petitioner for perusal of this Court, we are prima-facie of the opinion that in terms of sub Article (3) of Article 184 of the Constitution a number of questions of public importance with reference to fundamental rights of public, the owners of the public property, as its income ultimately is likely to be spent upon the welfare of the public in the national interest, are involved falling within the four corners of Article 9 of the Constitution, therefore, this petition is admitted to regular hearing and notices are directed to be issued to the respondents as under:

i. The Railway Board through its Chairman/Secretary Railways, Government of Pakistan, with directions:

a. to produce complete file of the transaction which had taken place between the Railways and the Lessee and the record along with details/particulars of the officers involved in the transactions and also serve upon them notices to appear in the Court notwithstanding the fact whether he was Minister, or the Chairman or whatever his capacity may have been/may be. The latter on receipt of notices from the Chairman, shall appear before the Court on the next date of hearing to file reply to defend the instant petition and submit their point of view.

b. The Chairman/Secretary, Pakistan Railways, to put up on record the audit report prepared by the audit in respect of instant transaction. He

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shall also submit the details of the criminal cases, if any, got registered in connection with the affairs of the instant case and with fate of the same and if the matter is pending before the Court, report shall also be obtained from the Court concerned and if no action has been taken so far, explain as to why the matter has not been taken up seriously so far, if the allegation of the scam alleged is correct.

ii. Respondent No.2 to produce on record the notifications/appointment letters of the officers/officials with their details who were posted as the Chairman, the Secretary or officers in any other capacity at the time when the deal was executed.

iii. Senior Member Board of Revenue, Punjab, to put up the revenue plans of the property indicating the ownership of the land in question.

iv. The Executive Committee of Railway Board to place complete record of the deliberations undertaken before finalizing the deed and any other document which it considers necessary. Also, to file its reply and furnish the names of the Golf Club with their antecedents.

v. General Manager, Manufacturing & Services P.R, Railway Carriage Factory, Islamabad, Respondent No.5 and Member Finance, Ministry of Railways, Respondent No.6, to submit the reply of this petition and any other valuable information available with them.

vi. Director General (Audit) Railways with direction to place on record the authentic copy of the audit report prepared in this behalf and also submit whether the same was submitted before the Chairman PAC Mr. H.U. Baig and subsequently before the Chairman PAC Mr. Allah Yar and what was the fate of the same.

vii. Lt. Gen. (R) Javed Ashraf Qazi, respondent No.8 and respondents Nos.9, 10, 12, 13, 14, 15 and 16 to file comments/reply of the petition along with supportive documents and explain with regard to the above noted documents which according to the petitioners were prepared and placed before the PAC but no action has so far been taken. So far as respondent No.15 M/s. Husnain Construction Company, is concerned they have to disclose the names of the persons/partners who are the lease holders and sponsors, Directors, etc. responsible for the functioning of the Royal Palm golf Club.

viii. Notice be also issued to Lt. Gen. (R) Saeed-uz-Zafar, Ex-Chairman/Secretary, Pakistan Railways, Khurshid Alam Khan, Ex-chairman/Secretary, Pakistan Railways and Major General (R) Hamid Hassan Butt, Ex-General Manager through respondent No.1 enabling them to file the reply/comments as they are also allegedly involved in the scam, to be present during hearing of the case so they may have full opportunity to defend themselves. If they fail to appear, it would be deemed that they have nothing to rebut the allegations which have been leveled against them.

6. The replies by the concerned should be submitted within 10 days. The case is ordered to be fixed on 31st January, 2011.

Thereafter, the matter was taken up on various dates of hearing and arguments were heard at length several times. While the matter was pending before this Court, various matters were initiated by the parties before various fora including the Lahore

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High Court which passed various orders from time to time. One such order constituted a management committee to run the Club. We were however informed that the said committee was ineffective, under the influence of the existing management and the funds of the Club were being syphoned off and all relevant records were being clandestinely removed. Thus on 27.12.2018, the following order was passed:-

...Therefore the aforementioned orders are modified in that the committee constituted by the learned High Court is dissolved. A. F. Ferguson & Co. is appointed as the receiver of the Club. It is directed to immediately take over the Club and take into custody the entire record. The existing management is restrained from entering the Club, or removing any document/record therefrom or in any manner directly or indirectly interfering in the affairs and working of the Club till further orders. However, the normal activities of the Club and its operations shall not be impeded in any manner whatsoever including but not limited to its dining areas, gymnasium, sports activities, swimming pools, cinema halls and wedding functions that have already been booked and are to be held therein, which should be allowed to be held strictly as per the booking orders etc.

3. Writ Petition No.22818/2016 is withdrawn from the learned High Court and shall be heard along with Constitution Petition No.2/2011...

A. F. Ferguson & Co. filed its preliminary report *vide* C.M.A. No.41/2019 and concise statements *vide* various civil miscellaneous applications. Pursuant to this Court's order dated 04.04.2019, NAB has also filed its compliance reports *vide* C.M.A. No.3254/2019 containing a copy of Reference No.9/2018 filed in the Accountability Courts, Islamabad against various persons including the respondent(s) in Const.P. No.2/2011.

4. Learned counsel for the petitioners submitted that during Gen. (R) Pervaiz Musharraf's era, various army personnel were inducted into Pakistan Railways on key posts without any competitive process. Several senior officers were removed from service through promulgation of an Ordinance. Then by way of another Ordinance, the Secretary, Ministry of Railways was to be the Chairman of the Board and there was to be an Executive Committee consisting of the Secretary, Ministry of Railways who was to be its Chairman for taking day to day decisions to be approved later on by the Railway Board. According to the learned counsel, this was done to accommodate Lt. Gen. (R) Ashraf Javed

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Qazi who was first appointed as Secretary/Chairman, Pakistan Railways and subsequently as Federal Minister for Railways and Communications. He in turn appointed several persons of his choice without any competitive process as is required for such appointment and these positions were doled out to personal favourites without any consideration of competence or merit. Learned counsel pointed out that few months later, manipulated advertisements were issued inviting expressions of interest to finance, redesign, develop and manage the operations of the Pakistan Railways golf course. The Club was suddenly closed and memberships cancelled after which the buildings were bulldozed. It is the petitioners' case that the advertisements calling for submissions of expression of interest neither provided the details of the property to be commercialized nor asked the interested parties to submit their bids. According to the learned counsel, the expression of interest documents were taken to be offers against the canons of contract law. Thereafter, an Evaluation Committee was constituted which prepared a report dated 20.04.2001 and gave its recommendations. The Executive Committee of the Railway Board on the same date recommended Maxcorp for undertaking the project. Learned counsel questioned as to how the report of the Evaluation Committee was prepared in Lahore and sent to Islamabad on the same day for the signatures of the members of the Executive Committee of the Railway Board. Thereafter, unauthorized negotiations were carried out resulting in conversion of the expression of interest into a financial bid. He submitted that the foregoing indicates that everything was pre-planned in order to favour Husnain Construction Company. Learned counsel argued that the terms of the Agreement were different from the decision dated 20.04.2001 in that the period of the lease was increased from 33 to 49 years in a one-sided and arbitrary manner, which was extendable, the area was mysteriously increased from 103 to 141 acres, Phase II was added, the usage charges of land amounting to Rs.21.6 million were omitted and Rs.4/- per square yard were kept with 15% increase every three years. All these steps were taken and changes in basic terms and conditions made behind the backs of other potentially interested parties to grant undue favours. It is submitted that different categories of

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membership were offered for which the fee ranged from Rs.5 to 15 lakh. Learned counsel fully supported the findings of the NA Report according to which the Railways Department had suffered colossal losses. In support of his arguments, he relied upon the judgments of this Court reported as *Habibullah Energy Limited and another v WAPDA through Chairman, etc.* (PLD 2014 SC 47).

5. Learned counsel for respondent No.1, the Railways Board, submitted that the area of the land handed over (141 as opposed to 103 acres as advertised), the tenure of the so-called lease (an unregistered document purporting to be a renewable lease for 49 rather than 33 years) and the terms pertaining to the use and revenue sharing (exclusion of all revenue from the sale of food and beverage) reflect a most substantial departure from the terms that were advertised and on the basis of which bids were invited. According to the learned counsel, the documentary evidence substantiates the fact that the foregoing terms were altered for the benefit of respondents No.14, 15 and 16 after the last date for the submission of bids without a fresh advertisement being issued indicating the change in the said terms. Furthermore, the terms granted to the said respondents through the Agreement were substantially different, to their benefit, from the terms that were approved by the Railway Board's Executive Committee on 20.04.2001. He argued that the foregoing constitutes a gross violation of due process and transparency in the execution of the Agreement and in light of the law laid down in *Habibullah's* case (supra), the Agreement and all related transactions are liable to be declared void. Furthermore, he pointed out that Pakistan Railways has terminated the Agreement *vide* letter dated 26.05.2016 which has not been challenged in any Court of law by the private respondents. Learned counsel submitted that contracts that deal with public assets or carry an element of public interest or grant access to public assets may be set aside in judicial review by the superior Courts under Articles 199 and 184(3) of the Constitution when such contracts are found to be tainted on account of a failure to follow due process, including departure from the terms/conditions advertised to the public at large. Learned counsel also submitted that it is within this Court's jurisdiction under

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Article 184(3) *supra* to issue a declaration to the effect that the dubious and non-transparent Agreement executed in favour of respondents No.14, 15 and 16 is *non est* and void *ab initio* and refer the matter to NAB to determine criminal liability related to the transaction in question. Furthermore, according to him the instant civil proceedings and the criminal proceedings before NAB can proceed simultaneously and independently without being affected by each other. He referred to various judgments of the superior Courts of the country in support of his contentions.

6. Learned counsel for respondent No.4, the Executive Committee of the Railway Board, stated that the then members of such Committee were Mr. Khurshid Ahmed Khan (Former Member Finance and Secretary/Chairman Railways), Lt. Gen. Retd. Saeed Uz Zafar (former Secretary/Chairman Railway Board), Maj. Gen. Retd. Hamid Hasan Butt (former General Manager Manufacturing and Services Railway) and Mr. Iqbal Samad Khan (former General Manager Manufacturing and Services Railway). He submitted that during the period that the afore-named persons were part of the Executive Committee, the performance of the Railways Department remained outstanding with an increase in revenues. Learned counsel argued that the assertions raised by the petitioners are fake, baseless and against the true facts; that no Railway administration raised any objection against the Agreement since its signing till 2016; and previously NAB had recommended closure of this case. According to him, the said persons have filed their respective versions *vide* C.M.As. No.393 to 395 and 535/2011 which may be considered as part and parcel of his arguments. Learned counsel prayed that the instant petition be disposed of without any observations against the afore-named persons who are currently facing trial before the Accountability Courts lest it may prejudice them and their cases.

7. Learned counsel for respondent No.8 submitted that his client was appointed Secretary Railways on 27.10.1999 and held that office till 04.09.2000 after which he was appointed as the Minister for Railways on 05.09.2000 and held such office till November, 2002. While he was Secretary Railways, he was directed

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to generate his own funds as the Government was not in a position to do so. Although the Cabinet authorized him to sell land, if necessary, he did not do so. Previously, the golf course of the Club was generating only Rs.12 per year as lease money. Respondent No.8 decided to cancel the lease and commercialize the land to generate more revenue for Pakistan Railways. During his tenure as Secretary Railways, two advertisements were issued in the national press on 23.08.2000 and 10.09.2000 inviting expressions of interest for the golf course pursuant where to there was no proper response and on 04.09.2000, respondent No.8 relinquished his charge and was thereafter neither involved in any negotiation nor the process of the award of contract. His role was only limited to that of a Minister under the Rules of Business, 1973. According to the learned counsel, NAB has involved respondent No.8 with *mala fide* intentions on the ground that he presided over a staff conference dated 02.07.2001 at Islamabad where it is alleged certain decisions were taken. However, the learned counsel submitted that this staff conference was not a secret meeting and was attended by all the senior officers of Pakistan Railways. It is submitted that the minutes of such staff conference regarding the revision of terms of contract with Maxcorp and the question of construction of the hotel are being misused against respondent No.8 to alleged that the entire contract was being revised as a result of this meeting. The other matters discussed in the conference were a briefing on terms already agreed to by the Executive Committee which was the competent authority and respondent No.8 had no role whatsoever who is being framed.

8. It is the case of respondent No.14, Maxcorp, that it came to know about the project somewhere in January, 2001 when a common friend introduced them to Gen. (R) Pervaiz Muhsarraaf at a lunch meeting in Kuala Lumpur, Malaysia. Thereafter, on being encouraged by Gen. (R) Pervaiz Muhsarraaf, the representatives of Maxcorp visited Pakistan for inspection of the land and agreed that the project could be taken up through a joint venture company. However, Maxcorp did not participate in any of the events/applications including the pre-qualification application filed before January, 2001. Maxcorp believes that Husnain

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Construction Company and Unicon Consulting used Maxcorp's name, experience and track record to obtain the award of the project in the name of the joint venture company as the latter two companies did not have any prior experience in construction, development or financing of a golf club which was necessary for pre-qualification. After completion of the golf course, Husnain Construction Company and Unicon Consulting bought out the shares of Maxcorp in the joint venture company and refused to settle the outstanding dues for construction of the golf course for which Maxcorp is pursuing a suit for recovery in the Civil Court, Lahore. Maxcorp prayed that it be relieved of any liability towards Pakistan Railways in the aforementioned circumstances.

9. It is the case of respondent No.16, Unicon Consulting, that it is a reputed company, the Agreement was not awarded illegally and there was no "alliance" that led to its award and signing. The expressions of interest were not converted into bids, rather after the submission of documents for pre-qualification, pre-qualified parties were issued tender documents and asked to file bids pursuant to which the Agreement was signed with the winning bidder. The initial mention of the 33 year lease was only because it was a common lease term; the land usage charges remained Rs.4 per square yard with the total land usage charges being mistakenly written as Rs.21.6 million instead of Rs.2.16 million; there was no increase in the land area bid by the consortium which was always based on approximately 140 acres and permission to bid for additional area had been expressly given by Pakistan Railways; and the construction and operation of a hotel was done pursuant to a specific directive from the then Railways Minister. Unicon Consulting denied the legality of the NA Report as the NA Committee did not associate the said respondent in the proceedings or provide them an opportunity of hearing. Maxcorp's decision to leave the consortium was as per its own wishes on the basis of the agreement between the parties. Finally, the consortium had always offered the share of royalties after excluding food and beverage. The hotel has not been built because Pakistan Railways has not yet handed over possession free of encumbrances of the land where the hotel is supposed to be built.

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The claim that the Agreement has been achieved through fraud and deceit has not been substantiated with any evidence and the petitioners have approached this Court with unclean hands and *malafide* intentions.

10. Learned counsel for respondents No.17, MHPL, made certain preliminary submissions:-

- i. Since Reference No.8/2018 dated 24.03.2018 has been filed by NAB in the Accountability Court *inter alia* against the parties in the instant petition, therefore any finding on any of the issues, whether in favour or against any party, will cause prejudice to the criminal trial in the Accountability Court, therefore, in the interest of justice and fairness, the instant petition ought to be disposed of till the final outcome of the trial in the Accountability Court;
- ii. The factual controversies involved in this case need to be addressed through evidence and cannot be decided in proceedings under Article 184(3) of the Constitution;
- iii. This Court lacks jurisdiction under Article 184(3) *ibid* as the matter is not of public importance and does not involve the enforcement of fundamental rights rather pertains to the legality or otherwise of a contract;
- iv. Pakistan Railways cannot file any legal proceedings to have the Agreement declare void due to its own mistakes;
- v. As per Clause 23 of the Agreement, the proper forum for adjudication of any disputes between Pakistan Railways and MHPL, is to be decided through arbitration;
- vi. There is no intelligible differentia between the Agreement and any other contract between the Government and a private party warranting the validity of such Agreement to be adjudicated upon directly in this Court under Article 184(3) of the Constitution which would be violative of Article 25 of the Constitution;

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- vii. No established or written law has been alleged to have been violated by Pakistan Railways or MHPL at the time of execution of the Agreement; and in 2001 there was no statutory law relating to public procurement. Besides, Pakistan Railways followed the proper procedure throughout the process;
- viii. Petitioner No.1 has not come with clean hands. He is an interested party as he was one of the members running the golf course prior to its privatization and is aggrieved because this right to run the affairs of the golf course was taken away from him. Furthermore, he never chose to take any action himself while in Government and he filed the instant petition after 10 to 11 years after the execution of the Agreement. Moreover, he has concealed the fact that Writ Petition No.7072/2001 was dismissed on 14.05.2001 which was never appealed against. Neither did the current Railway Minister, Mr. Sheikh Rasheed Ahmed, raise any objection pertaining to the award of the contract.

11. On merits, learned counsel for MHPL made the following arguments:-

- i. All the terms and conditions of the Agreement were complied with and fulfilled by MHPL which spent more than Rs.1.5 billion to build the project which is a fully functional golf and country club of international standards creating employment and generating income for Pakistan;
- ii. The reference of 103 acres in the advertisements was to the area of the golf course and not the site in general. There was no restriction in the advertisements that the proposed design/plan for the entire project had to be within the minimum of 103 acres of the golf course itself or that the site was limited to 103 acres. The advertisements left it to the interested parties to give their best design/plan keeping in view the site as a whole and made it clear that the proposed design/plan for the Club, the existing golf course and other areas may be redesigned. Furthermore, the use of the word

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“currently” in one of the advertisements meant that the area of the golf course could be varied subsequently;

- iii. The tender documents stated very clearly that the Club could be extended, redesigned, reconfigured or developed by the proposers for the commercialization of the Club and facilities adjacent to it;
- iv. The reality of the matter is that a golf course of international standards requires a minimum of 120 acres of land and it is not possible to encompass it in 103 acres let alone incorporate a golf club, tennis courts, swimming pools, squash courts as well;
- v. The bid documents clearly specified that the parties could in the proposed design suggest any other additional facilities that they would like to incorporate in the project over and above those that were specified by Pakistan Railways;
- vi. Under the bid documents, the designated person to issue clarifications in respect of the project was the Deputy Director Marketing of Pakistan Railways therefore the letter dated 28.02.2001 confirming that the design proposal could be in respect of the entire area of the site was in conformity with the bidding documents and advertisements; furthermore, this letter was sent to all the bidders;
- vii. The design of MHPL for the project on 135 acres was examined and approved without any objection as follows: the Evaluation Committee evaluated the technical proposal of the consortium based on a golf and country club of 135 acres as per the Evaluation Report; the letter dated 20.04.2001 which was sent to the sponsors of MHPL confirming that their bid has been accepted also showed that the total area for which the design proposal had been accepted was 135 acres; the draft of the Agreement which was approved by the Ministry of Law and Justice on 23.05.2001 also contained the area of 135 acres; the Executive Committee of Pakistan Railways discussed the

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entire proposal of MHPL containing the design for 135 acres for the project and approved the same on 26.06.2001; the area was again approved in the Minister's Staff Conference on 02.07.2001; and the final Agreement also specified that the land for the project was 135 acres and the land of the hotel was 5 acres and this Agreement was approved by the Executive Committee on 21.07.2001.

- viii. If anyone had any objection or doubt that the area for the proposal could not be more than 103 acres as per the bidding documents or the advertisements for expressions of interest, these respective bodies would not have given their approvals;
- ix. There is no loss to Pakistan Railways or any unlawful gain to MHPL by finalizing the design of the project on 135 acres;
- x. Courts ought to lean in favour of an interpretation which upholds the validity of contracts and transactions, especially if the project has been built and third party rights have been created in the form of memberships and the project has been implemented for the past 18 years;
- xi. While the bidding documents mentioned 33 years as the lease period, MHPL submitted a bid for 66 years because the return on such huge investments is not possible in a short span of 33 years; therefore after evaluation, Pakistan Railways ultimately agreed to approve the lease period of 49 years *vide* letter dated 21.07.2001; besides if the lease period is to be reduced to 33 years, it can be so done under Clause 28.1 of the Agreement;
- xii. The figure of 21.6 million per annum appearing in the internal letter dated 20.04.2001 can be explained by mathematical calculation of converting 135 acres to square yards and multiplying the same with Rs.4 per square yard which turns out to be 2.16, with the figure of "21.6" being a result of a typographical error as explained by the Director Marketing of Pakistan Railways in his concise statement;

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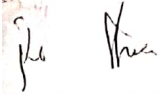
- xiii. There was no revenue sharing item from food and beverages. The only revenue sharing item in respect of restaurants was the revenue from the hotel and since the sponsors of MHPL did not bid for the hotel, the sharing of revenue from the hotel was not part of the bid. In the bid of MHPL, an offer was made to share 10% of the revenue from club membership, from sports and recreational facilities and sale of consumer items which were approved at all stages; and
- xiv. MHPL did not give a design proposal for developing a hotel however on 02.07.2001 in the Minister's Staff Conference it was decided that MHPL should also make a bid for a 5 star hotel and in compliance therewith, MHPL made an offer to build a hotel as a project distinct from the golf and country club in Phase II on additional land of 5 acres which was accepted by the Executive Committee of Pakistan Railways on 21.07.2001 and it was accordingly incorporated in the Agreement.

12. We have heard the learned counsel for the parties and those who made submissions in person and have examined the voluminous record. Before proceeding further, we deem it appropriate to first consider the preliminary objection raised by the learned counsel for MHPL that contracts such as the Agreement cannot be taken cognizance of by this Court under Article 184(3) of the Constitution. In this regard it is pertinent to note that this Court has consistently upheld the power of judicial review by the superior Courts of Pakistan. Albeit in the context of the constitutional jurisdiction of the High Court under Article 199 of the Constitution, in the judgment reported as *Messrs Airport Support Services v The Airport Manager, Quaid-e-Azam International Airport, Karachi, etc.* (1998 SCMR 2268) a three member bench of this Court held as under:-

It has consistently been held that while routine contractual disputes between private parties and public functionaries are not open to scrutiny under the Constitutional jurisdiction, breaches of such contracts, which do not entail inquiry into or examination of minute or controversial questions of fact, if committed by Government, semi-Government or Local Authorities or like controversies if involving dereliction of obligations, flowing from a statute, rules or instructions can adequately be addressed for



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relief under that jurisdiction. Further a contract, carrying elements of public interest, concluded by functionaries of the State, has to be just, fair, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises that public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation. Deviations, if of substance, can be corrected through appropriate orders under Article 199 of the Constitution. In such behalf even where a contract, pure and simple, is involved, provided always that public element presents itself and the dispute does not entail evidentiary facts of a disputed nature, redress may be provided.

Furthermore, in *Habibullah's* case (supra) it was opined as follows:-

...as has been repeatedly held the jurisdiction of the Superior Courts of Judicial Review for the enforcement of Fundamental Rights is not a "closed shop" particularly, in the context of Public Interest Litigation (PIL)...

26. The nature, scope and extent of the power of judicial review by the superior Courts of administrative actions and the grounds on the basis whereof such actions can be set aside has evolved with the passage of time and its contours stand clearly defined especially in the context of the award of the contracts by the State or its instrumentalities.

The Court went onto rely upon the afore-reproduced extract from the *Airport Support Services* case (supra) after which it observed:-

28. An overview of the judgments reproduced or referred to herein above leaves little room for doubt that it is now a well-settled principle of law that all public functionaries must exercise public authority, especially while dealing with the public property, public funds or assets in a fair, just, transparent and reasonable manner, untainted by mala fide without discrimination and in accordance with law, keeping in view the Constitutional Rights of the Citizens. This would hold true even in the absence of any specific statutory provisions setting forth the process in this behalf. Therefore, it is not really relevant whether the transaction in question was governed by the Ordinance, 2000 or the-Rules, 2004 or neither. It is an equally well settled principle of law that such actions of public functionaries are always subject to Judicial Review. No doubt, while exercising its jurisdiction, the Superior Courts neither sit in appeal over the administrative actions nor interfere on account of inconsequential deviations, as has been observed in *Dr. Akhtar Hassan Khan's* case (supra). However, where the administrative authority acts in a discriminatory manner and action fails the test of reasonableness, transparency and/or is otherwise unjust and unfair or suffer from mala fide, the Courts not only are vested with the jurisdiction to set aside such action but any failure in such an eventuality to exercise the power of Judicial Review, when invoked, would make the Court a party to such unreasonable, unfair, mala fide and illegal action.

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While hearing a constitution petition under Article 184(3) of the Constitution in the case of *Wattan Party through President v Federation of Pakistan through Cabinet Committee of Privatization, Islamabad, etc.* (PLD 2006 SC 697) pertaining to the privatization of Pakistan Steel Mills Corporation, a nine member bench of this Court made the following observations with respect to its jurisdiction under the noted provision:-

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.

It was observed by this Court in *Suo Motu Case No.13 of 2009* (PLD 2011 SC 619) pertaining to the Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for the development of land in Sector E-11 Islamabad, that:-

24. It is well-settled that in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However, in such matters, judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process. It is also a well-settled principle of law that since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides...

...The Governmental bodies are invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner. Transparency lies at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids is a prerequisite. The reservations or

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restrictions, if any, in that behalf should not be arbitrary and must be justifiable on the basis of some policy or valid principles, which by themselves are reasonable and not discriminatory.

While relying on the afore-reproduced extracts, this Court in the case of *Raja Mujahid Muzaffar, etc. v Federation of Pakistan, etc.* (2012 SCMR 1651) observed as follows:-

31. Public funds, public property, licenses, jobs or any other government largesse is to be dealt with by public functionaries on behalf of and for the benefit of the people. Public authority must necessarily be examined in accordance with law keeping in view the Constitutional Rights of the citizens. Thus, this Court has not hesitated in the exercise of its jurisdiction of judicial review conferred by Article 184(3) of the Constitution to scrutinize matters where public money is being expended through procurement or public property is being sold, so as to ensure that transactions are undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality.

33. This jurisdiction has been exercised consistently and repeatedly by this Court to scrutinize transactions undertaken by the Government so as to ensure that public money and public property is not squandered or stolen.

While hearing certain human rights cases, this Court *In the matter of: Alleged Corruption in Rental Power Plants etc.* (2012 SCMR 773) opined as under:-

In the light of the above dictum, there could be no cavil with the proposition that as far as transparency in the implementation of the policy, if available, the process of awarding contract is concerned, it squarely falls within the jurisdiction of this Court available to it under the Constitution and the power of judicial review.

17. It is important to note that all the executive authorities are bound to enter into contracts for supplies at the least expense to the public exchequer. Most significant consideration for every department of the Government must be the best economical mode of meeting the public needs. Agreements for pecuniary considerations are against public policy, as such, are void...Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds...it is sufficient to observe generally that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper

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means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country. Every action taken by the Government must be in public interest and its action would be liable to be invalidated on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

In the case of *Dr. Akhtar Hassan Khan, etc. v Federation of Pakistan, etc.* (2012 SCMR 455) while hearing constitution petitions in which the privatization of Habib Bank Limited effected through open bidding was challenged, this Court was of the view that:-

34. The Courts while dealing with cases relatable to financial management by the government or awarding of contract by it must appreciate that these are either policy issues or commercial transactions requiring knowledge in the specialized fields. The Courts lack the expertise to express any opinion on the soundness or otherwise of such acts/transactions. The question whether a contractual transaction or decision taken in the exercise of executive authority by the Government can be subjected to judicial review has engaged the attention of constitutional courts in several countries and the judicial consensus generally has been that the Courts should ordinarily refrain from interfering in policy making domain of executive authority or in the award of contracts unless those acts smack of arbitrariness, favoritism and a total disregard of the mandate of law.

47. ...These petitions are in the nature of public interest litigation and the Courts in exercise of its constitutional jurisdiction qua matters of public importance relating to enforcement of Fundamental Rights have been liberal particularly if the issue raised is relatable to a public injury arising from breach of public duty...

Another important judgment is that of *Khawaja Muhammad Asif v Federation of Pakistan, etc.* (PLD 2014 SC 206) in which this Court held that it had the jurisdiction to hear a constitution petition and a human rights case pertaining to the award of a project by Sui Southern Gas Company Limited (SSGCL), a State enterprise, to Jamshoro Joint Venture Limited (JJVL) for extraction of Liquefied Petroleum Gas (LPG) as it involved issues of public importance relating to such natural resources with reference to the enforcement of the fundamental rights guaranteed by the Constitution, as people all over the country who cannot obtain natural gas rely on supply of LPG for many of their needs and therefore impacted their 'life' as defined by this Court. The Court opined as follows:-

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

In *Jamshoro Joint Venture Ltd., etc. v Khawaja Muhammad Asif, etc.* (2014 SCMR 1858), which was the review filed in the aforementioned case, a five member bench of this Court upheld the order under review and held that:-

The fact change in Article 2 is not disputed one and only the circumstances under which this change was brought about in the IA was the relevant question which has been effectively considered in our judgment and there is hardly any basis or justification supplied to change the view from the one expressed in the said judgment. The change in Article 2 was not merely of a curative nature but was a drastic departure from the original Article 2 of the IA which restricted the term of IA only upto 3-2-2011 and by changing it, the term of IA was extended beyond 3-2-2011 upto the currency of GSA. This has put JJVL in total advantageous position and left SSGCL with no opportunity to look for better and more favourable deal from the one offered by JJVL.

In the judgment reported as *Asaf Fasihuddin Khan Vardag v Government of Pakistan, etc.* (2014 SCMR 676), while faced with a constitution petition under Article 184(3) of the Constitution challenging the appointment of the Director General, Civil Aviation Authority and the delay in the completion of New Benazir Bhutto International Airport Project, Islamabad (NBBIAP), a three member bench of this Court held as under:-

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46. It is well settled by now that this Court has wide powers in terms of Article 184(3) of the Constitution to ensure that acts/actions of the other organs of the State, namely, Executive and Legislature do not breach the fundamental rights guaranteed by the Constitution. Under the principle of trichotomy of powers, the Judiciary is entrusted with the responsibility of enforcement of Fundamental Rights, which calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society. The discharge of constitutional duty by the State functionaries in deviation to the spirit of the Constitution is anathema to the Constitution and is challengeable on diverse grounds including mala fide and colourable exercise of power for ulterior motive. It is not possible for judiciary to confer validity and immunity to the acts or actions which suffers from mala fide in exercise of power of judicial review...In matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However, in such matters, judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides.

48. There is no cavil with the proposition that as far as transparency in the implementation of the policy, if available, the process of awarding contract is concerned, it squarely falls within the jurisdiction of this Court available to it under the Constitution and the power of judicial review.

13. According to the aforementioned judgments, the scope of the power of judicial review under Article 184(3) of the Constitution can be summed up as follows:-

- i. Acts or omissions on the part of State functionaries reflecting violation of mandatory provisions of law or the rules framed thereunder;
- ii. Breaches of contracts which do not entail examination of minute/disputed questions of fact committed by public functionaries involving dereliction of obligations flowing from a statute, rules or instructions;
- iii. Public functionaries must exercise public authority, especially while dealing with public property, public funds or assets, in a fair, just, transparent and reasonable manner, untainted by *mala fides* or colourable exercise of power for ulterior motives, without discrimination and in accordance with law, keeping in view the constitutional rights of the

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citizens, even in the absence of any specific statutory provisions setting forth the process in this behalf;

iv. Interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by *malafides*;

v. Governmental bodies powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner;

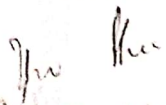
vi. Public funds, public property, licenses, jobs or any other government largesse is to be dealt with by public functionaries on behalf of and for the benefit of the people;

vii. Scrutinize matters where public money is being expended through procurement or public property is being sold, so as to ensure that transactions by the Government are undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality and public money and public property is not squandered or stolen;

viii. The presence of elements such as personal solicitation and personal influence in the procurement of contracts directly leading to inefficiency in the public service and to unnecessary expenditures of the public funds;

ix. All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution;

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- x. If material changes are brought about in agreements subsequent to the bidding to benefit a particular party, this will in fact negate the notion of a fair and open competitive bidding process; and
- xi. Courts should ordinarily refrain from interfering in the policy making domain of the Executive or in the award of contracts and should not substitute its decision for that of the latter unless the acts or omissions smack of arbitrariness, favoritism and a total disregard of the mandate of law.

14. In light of the aforementioned principles, it is worthy to point out briefly the glaring facts from admitted documents which do not require a detailed inquiry or examination, and thus make the instant matter a fit case for judicial review:-

- i. The terms of the Agreement pertaining to the area of the property to be leased out, the term of the lease and the revenue sharing formula, were changed to benefit one bidder;
- ii. The terms and conditions of the Agreement were substantially and materially different from what was advertised;
- iii. Whole of the information was not available to all the potential bidders hence there was no level playing field; and
- iv. The project involved public money.

In light of the foregoing, the objection raised by the learned counsel for the MHPL regarding the maintainability of the instant petition is misguided and thus overruled.

15. In order to determine the legality of the process that culminated into the Agreement, certain admitted documents need to be examined in chronological order in light of the principles of judicial review highlighted above. The process for awarding the contract pertaining to the Club appears to have begun with the advertisements. The First Advertisement is very vague and apart

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from stating that the Club is being offered on commercial lines for recreational purposes on lease/rental basis and that the site includes approximately 103 acres of the Golf Course, there are no other details about the project. Then the Second Advertisement was issued approximately five months later which contained more details. It was an invitation for expressions of interest from national and international parties having specific qualifications and experience in developing and managing golf courses with fully developed recreational, sports facilities and/or allied services for the development and management of the Club on a lease/rental or joint venture basis. It also provided that the property is currently an 18 hole, par-72 status golf course spread over approximately 103 acres which has a club house and a fully functional swimming pool. The Third Advertisement was issued approximately three weeks later which was almost a replica of the second, except one major, albeit camouflaged, change, i.e. details of prior experience in financing, development and management of five star hotels was required in addition to that of golf courses. It is clear from the foregoing that all three advertisements explicitly state that the lease or joint venture offer is for a site of 103 acres of land which was the entire 18 hole golf course along with a club house and a fully functional swimming pool. None of the advertisements mention that any area in excess of 103 acres was being offered. Thus the contention of the respondents that the property offered for lease was more than 103 acres is incorrect. Furthermore, the Third advertisement seems to have been issued to accommodate the afterthought of the construction of a five star hotel within the project premises.

16. Adverting to the bid documents dated 02.01.2001, in Appendix A to the form of the bid, the term of the Agreement is stated to be "33 years, further extendable with mutual consent of the parties". In the technical proposal under the heading of 'Explanation of Scope of Work' it is also mentioned that the Club shall be available "for an initial period of thirty three (33) years (extendable with mutual consent of the parties)". Furthermore, the bid evaluation form does not mention any evaluation criteria and corresponding weightage for the hotel and is restricted to the golf

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course, the club house and sports facilities. Be that as it may, on 28.01.2001, a computer generated response was sent by fax by Mr. Waseem Aslam, Deputy Director Marketing addressed specifically to Mr. Pervez Qureshi of Unicon Consulting which stated that additional land adjacent to the Golf Club can be made available subject to you're (sic) requirements so as to facilitate the establishment of a hotel/resort." Learned counsel for the respondents have sought to rely on the aforementioned fax to argue that the area of the land on offer was not restricted to 103 acres and that in fact they could have bid for any area of land considered desirable by them. It is an admitted fact that no fresh public advertisement was issued in this regard. As held in the case of *Habibullah's* case (supra), "an advertisement is universally accepted as a condition precedent for ensuring a free, fair, open, competitive and transparent process for transfer of public assets or rights therein." We are of the view that a change in one of the essential terms of the project specifically mentioned in the advertisements could not have been made without a fresh advertisement enabling all potential bidders to participate in the process. No compelling arguments have been put forward by the respondents for non-issuance of such advertisement, rather the learned counsel for MHPL tried to justify this omission by stating that a similar letter was issued to at least one other pre-qualified bidder. Be that as it may, that does not divest Pakistan Railways from following the proper procedure of having this change in one of the essential terms of the project advertised because had an advertisement to this effect been issued, it would have had an impact on the number of parties which submitted their expressions of interest. Besides, it is a computer generated letter which was not signed by any individual. Therefore, it is clear that the fax dated 28.02.2001 was a private communication which falls foul of the principles of due process and transparency that is attached to bidding pertaining to state land. Further, none of the respondents has been able to explain, under what authority of law did Mr. Waseem Aslam, Deputy Director Marketing, change a fundamental and vital term of what was advertised, and also incorporated in the bid documents. We therefore find that the said act of the Deputy Director Marketing was patently illegal, without

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lawful authority and clearly meant to favour one bidder to the complete exclusion of other interested and potential bidders.

17. The bid dated 06.04.2001 submitted by the Maxcorp consortium transgressed the terms of the advertisements in that it was for an area of 141 acres (as opposed to 103 acres in the advertisements) and was also for a period of 66 years as opposed to 33 years mentioned in the bid documents, although it was extendable with the mutual consent of the parties. Furthermore, the financial proposal for royalties provided for 10% of the total amount of Club membership fees (membership entrance fees and monthly subscription fees), revenue from sports and recreational facilities and revenue from the sale of consumer and other items to be paid to Pakistan Railways per annum with a minimum guaranteed amount of Rs.700,000, Rs.500,000 and Rs.600,000, respectively. There was no exclusion of revenue generated from any class of items falling under the head of 'consumer and other items', particularly from the sale of food and beverage. It was intended to cover all sales to consumers at the premises of the Club by the lessee and was not to be restricted to the sharing of "revenue from sale of merchandise products at the Golf Club" as eventually mentioned in the Agreement. This exclusion constituted a material departure from the financial proposal and would have led to a substantial reduction of amounts payable to Pakistan Railways and a corresponding increase in the income of Maxcorp consortium. This was clearly *malafide* and designed to cause wrongful loss to Pakistan Railways and wrongful gain for Maxcorp consortium. By consciously and deliberately agreeing to such departure, the concerned officials acted illegally and in violation of their mandate and caused huge financial losses to Pakistan Railways.

18. According to the Bids Evaluation Report dated 20.04.2001, out of six applicants who were pre-qualified, only three submitted their bids. The documents of Bradenton International Enterprises were returned for not being a "responsive" bid. The remaining bidders, i.e. Maxcorp and Pakistan Services Ltd., were awarded the following scores:-

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Applicant	Financial (30%)	Technical (70%)	Total Marks
Pakistan Services Ltd.	19.5	16.5	36
Maxcorp	25.5	63.5	89

It was further stated with regard to Pakistan Services Ltd. that they "have not complied with the Project concept that was advertised nor have they submitted a conceptual layout of the project they have proposed. In addition their proposal does not appear to be able [to] support the financial submission they have offered. Their submission does not sufficient (sic), logical and analytical basis for earning strong and stable base line with intermental (sic) potential, a percentage of which has to be given to PR." Be that as it may, in the Golf Club/TOR Evaluation (Summary) and the Golf Club/TOR Evaluation attached thereto, it is specifically stated that the contract period for Maxcorp was to be 33 years. The Golf Club/TOR Evaluation also mentions a rate of 10% revenue sharing for the sale of consumer goods. Furthermore, while the Golf Club/TOR Evaluation makes reference to a hotel, there are no details regarding the same and only "Phase II" is mentioned with respect to both Maxcorp and Pakistan Services Limited. Finally, the document remains silent with regard to the area to be leased out.

19. On the same day that the Bids Evaluation Report was compiled, i.e. 20.04.2001, a letter was submitted by Mr. Khalid Naqi, Director Marketing, Lahore to the Executive Committee of the Railway Board, Islamabad for its approval, specifying the terms on which a contract may be awarded to the Maxcorp consortium ("**First Letter of Contract Awarding**"). It describes the Club spread over an area of approximately 103 acres with no mention of 140 acres. The terms prescribed therein were a land usage charge of Rs.21.6 million per annum (with 15% increase every three years) and royalty of 10% of the gross revenue (or a minimum guaranteed amount of Rs.1.8 million per annum) without any exclusions. It also mentions the lease period as 33 years, extendable.

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20. Again on the same day, i.e. 20.04.2001, a letter of intent ("**Letter of Intent**") was issued to the Maxcorp consortium informing them of being the successful bidder for the project. It also mentions that the draft agreement shall be forwarded to them in due course of time. It is worthy to note how the Bids Evaluation Report, its assessment by the Evaluation Committee, the First Letter of Contract Awarding, its approval by the Executive Committee of the Railway Board, and the Letter of Intent are all dated 20.04.2001. What is more peculiar is the fact that the First Letter of Contract Awarding issued by Mr. Khalid Naqi, Director Marketing who was stationed at the Directorate of Marketing of the Ministry of Railways at Lahore was transmitted to and signed by all four members of the Executive Committee of the Railway Board at Islamabad. The undue and unholy haste with which the foregoing documents were issued raises serious questions regarding their compliance with the rules and regulations as well as legality. Such activity was a *mala fide* attempt to give an appearance and false façade of a legal cover to the whole process which was clearly a sham.

21. In the meanwhile, on 23.04.2001, the President/General Manager of the Club gave instructions to close the golf course from 01.05.2001 for a period of 18 to 24 months and to cancel all memberships of the Club which would be re-opened when the new golf course of international standards is complete on the terms and conditions then specified, and that a notice to this effect be issued on the notice board which was done on the same date.

22. Then a letter dated 21.07.2001 was issued by Mr. Khalid Naqi, Director Marketing, Lahore to the Executive Committee of the Railway Board, Islamabad for its approval, modifying some of the terms on which the contract may be awarded to the Maxcorp consortium ("**Second Letter of Contract Awarding**"). The term of the lease was mentioned as 49 years, extendable, instead of 33 in the First Letter of Contract Awarding, and a Phase II was incorporated mentioning the licensing fee and the fixed guaranteed revenue share. There was still no mention

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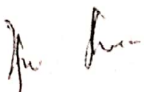
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that the area of the land that was to be leased out was to be 140 acres.

23. Finally, the Agreement was executed on 26.07.2001, pursuant whereto a private limited company under the name and style of "Maxcorp-Husnain (Private) Limited" was incorporated. According to the said company's memorandum of association, the shareholding was as follows: five nominee directors of Maxcorp (Asia) Overseas Ltd. (a subsidiary of Maxcorp) held a total of 51 shares therein; three nominee directors of Husnain Construction Company held a total of 40 shares therein; and one nominee director of Unicon Unicon Global Services (Pvt.) Ltd. held nine shares therein. Possession of the property in question was handed over to the Maxcorp consortium. In order to cater for the increased area from 103 acres to 140 acres, several houses of the employees of Pakistan Railways (various houses and a number of quarters of low paid employees) were demolished. The finding of the NA Report was that this factum was established on the record. Besides, the said assertion has not been denied or contradicted during the course of the hearing. Under what authority of law was the additional land taken over and who ordered demolition of houses worth millions of rupees remains shrouded in mystery. It is pertinent to note the dates of the signatures of the members of the Executive Committee of the Railway Board on the Second Letter of Contract Awarding. While the signature of the Secretary/Chairman Railways is undated, that of the G.M. (M&S) Carriage Factory, ISD, Member Finance M/O Railways and G.M. (Ops) PR Headquarters are dated 24.07.2001, 25.07.2001 and 26.07.2001, respectively. Then on the same day that the G.M. (Ops) PR Headquarters signed the Second Letter of Contract Awarding, the Agreement was signed which indicates that the former was a mere eyewash. Furthermore, no initial draft of the Agreement was ever made a part of the bid documents or shown to any of the pre-qualified parties apart from the Maxcorp consortium after the issuance of the Letter of Intent wherein it was stated that the draft agreement shall be forwarded to them in due course of time.

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Court Associate
Islamabad, Pakistan

24. Be that as it may, the terms eventually included in the Agreement were drastically and materially different from the terms originally conceived in the documents examined above. The first issue is regarding the area of the property in question. Recital A of the Agreement provides that "The Lessor is the owner of all those pieces of freehold land measuring approximately one hundred and forty (140) acres held under the name and more particularly described and marked in Exhibit A hereto". Under Clause 1.1 of 'Interpretations and Definitions', "Property" is defined as "all those pieces of freehold land measuring approximately 140 acres, subject to Clause 2.6(i)(a) held under and more particularly described and marked in Exhibit A hereto". This area of 140 acres was contrary to the acreage originally conceived for the project, i.e. 103 acres. The second issue is that of Phase II of the project, i.e. construction of a hotel. Under Clause 1.1 of 'Interpretations and Definitions', "Lessee's Work, Phase II" is defined as "the financing, erection, procurement, construction, renovation, reconfiguration, redesigning, completion, operation, maintenance, management and possession of the Hotel" and Phase II of the "Project" is defined as "The erecting, procuring, constructing, developing, financing, managing, operating, running, possessing, maintaining, and controlling including lease or sub-let of the Hotel and earning of all the money from carrying out the above for the Lease Term and doing all acts and things necessary to achieve the above purposes." Although the construction of a hotel was mentioned in the Third Advertisement, there are no details mentioned regarding Phase II of the project in any of the documents preceding the Agreement. The third issue is that of Phase III of the project as contemplated by the Agreement. Under Clause 1.1 of 'Interpretations and Definitions', "Lessee's Work, Phase III" is defined as "the financing, erection, procurement, construction, renovation, reconfiguration, redesigning, completion, operation, maintenance, management and possession of any additional facility or facilities which may be mutually agreed by both Parties which may include but not necessarily [be] restricted to condominiums/apartments/office blocks" and Phase III of the "Project" is defined as "The erecting, procuring, constructing, developing, financing, managing, operating, running, possessing, maintaining, and controlling

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including lease or sub-let of any additional facilities that may be mutually agreed by both Parties including but not restricted to condominiums/apartments/offices blocks and earning of all the money from carrying out the above (the technical, financial details along with revenue share of Lessor shall be mutually agreed) for the Lease Term and doing all acts and things necessary to achieve the above purposes." These provisions in the Agreement relating to Phase III of the project were nowhere mentioned in any of the documents prior to the Agreement, including the advertisements. It is unclear as to how this term could be subsequently incorporated into the Agreement at this final stage. The fourth issue pertains to revenue share which is defined under Clause 1.1 of 'Interpretations and Definitions' as "the percentage of the Gross Receipts payable by the Lessee to the Lessor as Revenue Share with respect to the activities as specified in Clause 6.1(i)." The noted clause provided for 10% per annum of the total amount of Club membership fees (membership entrance fees and monthly subscription fees) and revenue from sports and recreational facilities as mentioned in the financial proposal. However, the 10% per annum revenue from the "sale of consumer and other items" as envisaged in the financial proposal was changed to "sale of merchandise products at the Golf Club" in the Agreement. This is a stark contrast with the original revenue sharing formula and essentially excludes every item falling under the head of consumer and other items besides merchandise products. As regards the allegation regarding the change in usage charges of land from Rs.21.6 million in the First Letter of Contract Awarding to Rs.4/- per square yard in the Agreement, we find that as explained by the Director Marketing of Pakistan Railways, the figure of "21.6" million appears to be a result of a typographical error where the usage charges of land of 135 acres (540,000 square yards) multiplied by Rs.4 per square yard turns out to be "2.16" million. Be that as it may, it is manifest from the above that the Agreement that was finally executed between Pakistan Railways and the Maxcorp consortium was significantly and substantially different from the terms originally conceived in the various documents mentioned in the course of this opinion in order to benefit the Maxcorp consortium at the cost of causing losses to Pakistan Railways and consequentially the national

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exchequer. Further, all changes were made non-transparently, without following the processes and procedures and in utter and total disregard of the interest of Pakistan Railways, the very organization that these officials were employed to serve and protect.

25. Furthermore, it is an undisputed fact that Maxcorp left the consortium through a shareholder buyout by Husnain Construction Company on 15.01.2003 after building the first nine holes of the golf course although subsequently it was given a sub-contract by the latter to build the remaining nine holds. Thereafter *vide* Certificate of Incorporation on Change of Name dated 20.07.2004 issued by the Securities and Exchange Commission of Pakistan, the name of "Maxcorp Husnain Pakistan Limited" was changed to "Mainland Husnain Pakistan Limited", i.e. respondent No.17. A public notice regarding the shareholder buyout and the change of name was issued in "The News" on 06.08.2004. We have been apprised that certain outstanding dues of Maxcorp remain unsettled in which regard litigation is pending in Pakistan. Such a convenient exit should not have been allowed under the Agreement in view of the fact that the name, antecedents, experience, financial resources and know-how of Maxcorp consortium in setting up and operation golf and country clubs was used as a major qualification to win the project. Be that as it may, this makes it apparent having fraudulently used the name of Maxcorp for the sole purpose of winning the project, Husnain Construction Company and Unicon Consulting maliciously elbowed it out to run the project on their own despite the fact that they did not have any prior experience in construction, development or financing of a golf club which was necessary for pre-qualification, for winning the project in the first place.

26. Finally, *vide* letter dated 26.05.2016 issued by the Secretary/Chairperson, Ministry of Railways, the Agreement was terminated on the grounds of failure to make timely payments, failure to send audited statements, failure to construct a five-star hotel and unauthorized construction and use of marquees and cinemas for public consumption. We have been apprised that the

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said termination letter has not been challenged in any Court of law by the private respondents. The learned counsel for the respondents have not disputed the said fact. That being the case, even otherwise the Agreement between the parties stands terminated. We see no lawful reason or basis for insistence of MHPL that they be put back into possession of the leased property and assets existing on the leased land and/or management of the Club.

27. We are of the opinion that considering the admitted documents on the record, the foregoing discussion evidences the various illegalities, procedural improprieties and violations of the well-established principles of due process and transparency involved in bidding which ought to be a fair and competitive process. The procedure adopted was tainted with *mala fide* and nepotism in order to award the project to a pre-determined party to the exclusion of others and was therefore devoid of transparency, fairness and openness. This rendered the whole process from the issuance of the advertisements to the execution of the Agreement unlawful. The transaction has been disowned by Pakistan Railways itself which has taken the categorical stand that the aforementioned process was plagued with lapses and irregularities by the then office bearers in collusion with MHPL in order to benefit the latter. This has necessarily resulted in huge losses to Pakistan Railways and the national exchequer on account of non-payment and/or withholding of dues which were already reduced by inclusion of unlawful terms in the Agreement excluding certain revenue. Litigation regarding various issues, including outstanding dues, violation of terms and conditions of the Agreement and membership fees, has seriously affected the functioning of the Club and further development of phases came to a halt. Bad blood and mistrust has developed between the parties and the pending litigation has prospects of lingering on for years on end without the possibility of any resolution. Withholding of potential income from leasing the property of Pakistan Railways is resulting in further losses.

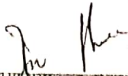
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Supreme Court of Pakistan

28. We are in no manner of doubt that the entire process was tainted with mala fide and nepotism and no feasible resolution of the disputes between the parties is possible in the foreseeable future. In order to prevent future loss, this Court passed an order dated 27.12.2018 (reproduced earlier in this opinion) as a stop gap arrangement which is continuing but needs to be replaced by a more permanent arrangement.

29. The Federal Minister for Pakistan Railways has entered appearance on his own accord and requested to be heard in person in such capacity. In the interest of justice, we have permitted him to do so. The Honourable Minister has systematically taken us through the record and vehemently emphasized that valuable and expensive State property including Pakistan Railways Club which is situated in the heart of Lahore were given as largesse for political and personal considerations without due process following the principles of openness and transparency and at the whims of few individuals holding high offices without considering the fact that a State institution would suffer substantial loss and injury on account of their acts of misguided generosity at State expense. He submits that Pakistan Railways which has consistently suffered losses worth Billions of Rupees on account of incompetence, political free loading and gross mismanagement and irresponsible and criminal political favour giving was used as a proverbial sacrificial lamb to meet personal ends. Properties including Pakistan Railways Club which could have fetched considerable and substantial sums of money and hence contributed towards reducing the huge losses being continuously suffered were jettisoned from the pool of valuable assets on terms clearly and patently unfavorable, unreasonable and unconscionable to the detriment of the said State institution.

The Honourable Minister has made an impassioned appeal that this Court should interfere in the matter to undo the callous and ruthless wrong done to a State institution through self serving, irresponsible and motivated actions on the part of the State functionaries. He maintains that unless this Court interferes in the matter, the illegality and wrong shall continue indefinitely without

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any possibility whatsoever of a just and fair solution owing to the fact that the parties are well connected and are utilizing all conceivable tactics to frustrate resolution of the dispute and undoing the injustice caused to Pakistan Railways. In the above context, on a Court query, the Minister for Railways has apprised us that various international parties from Dubai, Qatar and Malaysia, etc. have expressed interest in taking leasehold rights of the Club which would result in substantial income for Pakistan Railways. We are conscious of the fact that investment in the Club has taken place and assets have been created by the respondents for which financing has been taken or the Club's own funds, including income and security deposits of members have been utilized, therefore in order to put the parties in substantially the same position as they would have been in if there was no Agreement, we consider it just and equitable that a detailed forensic audit be conducted in which, after taking into consideration all factors, the respective financial liabilities of the parties towards each other would be determined. In doing so, the financial benefits derived by the Respondents shall be identified and quantified and shall be factored in while determining the respective rights and liabilities of the parties. The audit shall also determine the amount of financing availed for the project from different financial institutions, whether such funds were utilized entirely for the purposes of the project, the securities given and the legal and contractual obligations of the party required to repay the amount of financing availed. Once this exercise is complete, this Court would determine the manner and time frame in which the party which owes money would pay the other such amount.

30. Before parting we deem it appropriate to mention that in view of the cases of *Raja Mujahid Muzaffar* (supra), *Khawaja Muhammad Asif* (supra) and *In the matter of: Alleged Corruption in Rental Power Plants etc.* (supra), there is no bar against this Court that precludes it from exercising its jurisdiction under Article 184(3) of the Constitution and passing a declaration to the effect that an agreement/contract is void *ab initio* while simultaneously referring the matter to NAB to determine criminal liability related to the transaction in question. Therefore, the argument of the

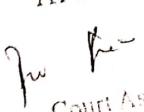
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learned counsel for the respondents that the findings in this opinion would cause prejudice to some of the parties in the criminal proceedings is misconceived.

31. For the reasons recorded above, the following declarations and directions are issued:-

- i. The Agreement with the Maxcorp consortium/MHPL is *non est*, null and void *ab initio* and of no legal effect;
- ii. Possession of the land given to the lessee under the Agreement is to be handed over to Pakistan Railways ("PR") forthwith along with all the assets and infrastructure thereupon. A.F. Ferguson shall complete handing over of all records and transfer management of the Club within 7 days hereof. Henceforth PR shall be responsible for running the Club. PR shall nominate its officer(s) or a team of independent professionals, if it deems appropriate to take over and run the Club:
- iii. A. F. Ferguson & Co., was appointed as the receiver of the Club *vide* order of this Court dated 27.12.2018. A. F. Ferguson having been appointed by this Court with a specific mandate shall stand indemnified and held harmless against any claim, law suit or any other proceedings before any Court, authority, Tribunal or functionary that may be contemplated or initiated by any of the parties for any act or omission on its part in the course of performance of its functions. Notwithstanding anything stated hereinabove, any dispute, claim or complaint by any of the parties against the receiver shall only be filed before this Court. In that event, the matter shall be decided in accordance with law.
- iv. We direct the Auditor General of Pakistan to:-
 - a. Conduct a detailed forensic audit of the Club;
 - b. Determine the scope and extent of the work done under the Agreement;
 - c. Determine the amount owed by Pakistan Railways to the Maxcorp consortium/MHPL and/or vice versa (if any);

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- d. In doing so, the Auditor General shall identify and quantify the financial benefits derived by the Respondents from the Club which shall be duly factored in while calculating and determining the liabilities of the Respondents. Such liabilities alongwith other amounts found payable by the Respondents will be set off against its verified claims against the Petitioner and the differential/balance amount shall be paid or recovered; and
- e. Any other matter ancillary or incidental thereto.

A.F. Ferguson shall assist and facilitate the Auditor General's office in conducting the forensic audit. Such exercise shall be undertaken within one month, at the end of which the Auditor General of Pakistan shall submit its report to the Implementation Bench constituted below. Once this exercise is complete, the said Bench would determine the manner and time frame in which the party which owes money would pay the other such amount.

The logistic support and recurring expenses of the Auditor General shall be borne by both parties equally. The fee of A. F. Ferguson & Co. for services performed shall be paid out of the funds of the Club against proper receipt. The rate of such fee shall be determined by the Implementation Bench;

- v. As represented by the Federal Minister for Railways, we direct that the Ministry of Railways/Pakistan Railways shall float an international tender in accordance with the laws pertaining to public procurement for a fresh lease of the Club. Such process including the final award of the new contract/lease shall be completed within three months or such further time as may be allowed by this Court pursuant to an appropriate application being moved. The Ministry of Railways/Pakistan Railways is required to submit weekly progress reports in this regard before the Implementation Bench constituted below;
- vi. In the meantime, the normal activities of the Club and its operations shall not be impeded in any manner whatsoever

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including but not limited to its dining areas, golf course, gymnasium, sports activities, swimming pools, cinema halls and wedding functions that have already been booked and are to be held therein, which shall be allowed to be held strictly as per the booking orders etc. All assets including receivables, all systems including software/security, etc of MHPL having any nexus with the Club/MHPL shall be taken over and vest in PR. All employees of the Club/MHPL shall continue to work for the Club subject to any orders that may be passed by PR. All Bank accounts in the name of the Club/MHPL shall be taken over, vest in and be operated by the nominees of PR. MHPL shall henceforth have no right over such accounts/receivables, etc. All statutory registrations of the Club shall also stand transferred to PR/Club. PR shall provide all requisite financial support to the Club in the interregnum;

- vii. The proceedings before the Accountability Court in Reference No.9/2018 shall continue in accordance with law. Monthly progress reports shall be submitted by NAB for the perusal of the members of the Implementation Bench in Chambers. It is however made clear that the Accountability Court shall decide the matter(s) before it independently, transparently and strictly in accordance with law on the basis of the evidence before it; and
- viii. For the purpose of implementation of this judgment and its continuous compliance, subject to approval of the HCJ we hereby constitute an Implementation Bench which shall comprise of Faisal Arab, J and Ijaz ul Ahsan, J which shall meet as and when the need arises. In case at any point in time it is not possible for both members to be present at the Principal Seat of this Court at Islamabad, the Hon'ble Chief Justice of Pakistan may, on a case to case basis, nominate another Bench provided that at least one original member of the Implementation Bench who is present and available in Islamabad shall constitute part of the said Bench;
- ix. Let the matter be re-listed before the Implementation Bench after one month.

29. The constitution petition and human rights cases are allowed in the aforementioned terms. As the main petition stands decided, the criminal review petitions, criminal original petitions

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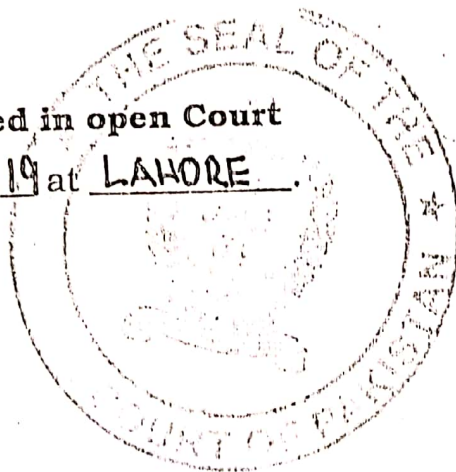
and civil miscellaneous applications are disposed of as having been rendered infructuous. After due consideration, we deem it appropriate to send Writ Petition No.22818 of 2016 titled 'Mainland Husnain Pakistan Limited v Pakistan Railways, etc.' back to the learned Lahore High Court for further appropriate orders on the basis of the findings recorded in this judgment. The office is directed to send all the files and records of the noted case to the learned Lahore High Court forthwith.

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Certified to be True Copy

[Signature]
Supreme Court of Pakistan
Islamabad

Announced in open Court
on 28.06.19 at LAHORE.



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01/7/19

APPROVED FOR REPORTING

[Signature]