

## IN THE HIGH COURT OF SINDH KARACHI

**Present:**

Mr. Justice Syed Hasan Azhar Rizvi

Mr. Justice Adnan Iqbal Chaudhry.

C.P. No. D-8125 of 2018      Pakistan Mineral Development Corporation Ltd. versus Province of Sindh and others.

C.P. No. D-8126 of 2018      Pakistan Mineral Development Corporation Ltd. versus Province of Sindh and others.

For the Petitioners      M/s. Barrister Zamir Ghumro and Malik Naeem Iqbal, Advocates.

Respondents 1 & 2      Province of Sindh through Secretary Energy Department and D.G. Directorate General of Coal Mines Development, Government of Sindh, through Mr. Jawad Dero, Additional Advocate General Sindh alongwith Mr. Khadim Hussain Channa, D.G. Coal Mines and Mr. Shahzad Muzafar, Assistant Director, Coal Mines, Karachi.

Respondent No.3      Sindh Lakhra Coal Mining Company (Pvt.) Ltd. through Mr. Jaffar Raza, Advocate alongwith Mr. Toufique Ahmed, C.E.O. of the Company.

Dates of hearing      13-12-2018, 18-12-2018 & 20-12-2018.

Date of decision      22-05-2019.

### JUDGMENT

Adnan Iqbal Chaudhry J. - The Petitioner in both petitions is aggrieved of the refusal to renew its mining leases and the grant of mining permits to the Respondent No.3. Both petitions involve the same set of facts and raise common questions of law, therefore, we decide these petitions by a common judgment.

2. The petitioner, Pakistan Mineral Development Corporation (Pvt.) Ltd., is a company under the laws of Pakistan with its registered office at Islamabad. Per the petition, the Petitioner is under the administrative control of the Ministry of Petroleum and Natural Resources, Government of Pakistan.

The Respondent No.3, Sindh Lakhra Coal Mining Company (Pvt.) Ltd. (hereinafter 'SLCMC'), is also a company under the laws of Pakistan, incorporated on 12-02-2016, the entire shares of which are said to be owned by the Government of Sindh.

3. C.P. No.D-8125/2018 is in respect of an area of 3818.81 acres at Lakhra, District Jamshoro, for which a mining-lease was granted to the Petitioner for mining coal w.e.f. 16-04-1985 for a period of thirty [30] years (expired on 15-04-2015). C.P. No.D-8126/2018 is in respect of another area of 1278.31 acres at Lakhra for which a mining-lease was granted to the Petitioner for mining coal w.e.f. 18-04-1985 for a period of thirty [30] years (expired on 17-04-2015). The said mining-leases had been granted to the Petitioner under the erstwhile Pakistan Mining Concession Rules, 1960 which were succeeded in the Province of Sindh by the Sindh Mining Concession Rules, 2002 (hereinafter 'the SMC Rules'). The SMC Rules were framed by the Provincial Government under section 2 read with section 6 of the Regulation of Mines and Oilfields and Mineral Development (Government Control) Act, 1948 (a Central Act). Under the SMC Rules, the Licensing Authority is the Director General, Mines and Mineral Development, Government of Sindh (Respondent No.2).

4. On or about 12-11-2014, i.e. around 5 months prior to the expiry of its mining-leases, the Petitioner applied to the Respondent No.2 for renewal of its mining-leases. These renewal applications remained pending with the Respondent No.2, and though in the meantime both the mining-leases of the Petitioner expired in April 2015, the date of such expiry stood extended by virtue of Rule 48(2) of the SMC Rules which reads as under:

**“48. Duration of Mining Lease – (1) .....**

(2) Notwithstanding the provisions of sub-rule (1), but subject to these rules, where an application is made for the renewal of a mining lease, the lease shall not expire until the application is refused, withdrawn, granted or lapses, whichever first occurs.

(3) .....

5. The applications of the Petitioner for the renewal of its mining-leases were eventually rejected by the Respondent No.2 vide the impugned Notifications dated 20-09-2017, and thus both the mining-leases of the Petitioner stood expired on the said date.

6. Against the refusal of the Respondent No.2 to renew the mining-leases, the Petitioner filed appeals (one for each lease) before the Secretary, Energy Department, Government of Sindh (the Appellate Authority), under Rule 71 of the SMC Rules.

7. While the Petitioner’s appeals under Rule 71 of the SMC Rules were pending, the Respondent No.2 granted to SLCMC ‘mining-permits’ for coal vide the impugned Notifications dated 09-07-2018, valid for a period of ten [10] years each, for the same area of 3818 acres and 1265 acres<sup>1</sup> at Lakhra, which was previously the mining area of the Petitioner’s mining-leases. Per the said Notifications dated 09-07-2018, the mining-permits granted to SLCMC were converted from exploration permits that had been granted earlier.

8. Being aggrieved of the fact that the Respondent No.2 had granted mining-permits to SLCMC without waiting for a decision on the Petitioner’s appeals pending under Rule 71 of the SMC Rules, the Petitioner filed C.P. No.D-2484/2018 and C.P. No.D-2485/2018 before the Circuit Court at Hyderabad on 26-07-2018 (hereinafter ‘the Hyderabad Petitions’) to challenge the impugned Notifications dated 09-07-2018.

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<sup>1</sup> The Notification dated 09-07-2018 issued to SLCMC for a mining permit for 1265 acres at Lakhra was placed on the record by the AAG Sindh as the same had been left out inadvertently by the Petitioner’s counsel.

9. On 31-10-2018, one *Sagar Ujan* also filed C.P. No. D-7643/2018 before this Court at Karachi to challenge in the public interest the same impugned Notifications dated 09-07-2018 for mining permits issued by the Respondent No.2 in favor of SLCMC. The order dated 08-11-2018 passed in C.P. No. D-7643/2018 records SLCMC's acknowledgment that it had yet to take possession of the coal field and its undertaking that in any case it will not commence extraction of coal till the next date. It appears that C.P. No. D-7643/2018 is still pending before this Court and the said undertaking of SLCMC still continues in that petition.

10. The appeals of the Petitioner under Rule 71 of the SMC Rules pending before the Appellate Authority were eventually dismissed vide a common order, hereinafter referred to as the impugned decision dated 08-11-2018.

11. Vide order dated 15-11-2018 passed in the Hyderabad Petitions, the Petitioner was given time to move for a transfer of the Hyderabad Petitions to the principal seat at Karachi so as to be heard along with C.P. No. D-7643/2018 (*Sagar Ujan v. Province of Sindh*). However, the Petitioner chose instead to file these fresh petitions at the principal seat on 20-11-2018.

12. Despite notices by the Respondents to vacate the subject coal field, the Petitioner managed to remain in possession. On 20-11-2018 a status quo order was passed in these petitions. By order dated 20-12-2018 it was clarified that the status quo order did not allow the Petitioner to excavate coal. The SLCMC did not come in possession of the said coal field and it has yet to commence operations under the mining-permits granted to it. Such fact is also acknowledged by SLCMC in its reply to this petition.

13. The prayer made in the subject petitions is as follows:

*"1. Declare that the refusal of Respondent No.1 and 2 to renew the mining lease of petitioner is illegal, unlawful, unconstitutional, mala fide,*

*arbitrary, discriminatory, unreasonable, unfair and unjust and in violation of principles of natural justice, equity and fairness and set aside the same forthwith;*

2. *To set aside the Notification dated 20.09.2017 and order dated 08.11.2018 passed by the Respondent No.1 and direct the Respondent No.1 and 2 to renew the mining lease of the Petitioner;*

3. *To set aside the Notification dated 09.07.2018 and order dated 08.11.2018 and permanently restrain the Respondents, its attorneys, representatives, assignees, successors or anybody acting on their behalf from making procurement in violation of Sindh Public Procurement Rules, 2010 as well as Sindh Mining Concession Rules 2002 and all other applicable laws;*

4. *Restrain the Respondents No.1 and 2, their attorneys, agents, officers or anybody acting on their behalf from interfering in possession of leased area of Petitioner, till final adjudication of the captioned petition;*

5. *Grant costs of the Petition;*

6. *Grant any other relief .....*"

14. Heard the learned counsel and perused the record.

Mr. Jawad Dero, the learned AAG Sindh, and Mr. Jaffar Raza, learned counsel for SLCMC had objected to the maintainability of these fresh petitions on the ground that the Hyderabad Petitions for the same relief were still pending. On the other hand, Barrister Zamir Ghumro, learned counsel for the Petitioners submitted that these fresh petitions had been filed also to challenge the impugned decision dated 08-11-2018 passed by the Appellate Authority, a fresh cause of action, and that in any case, under sub-Rule 3(a) of Rule 71 of the SMC Rules, a person aggrieved of a decision of the Appellate Authority "may apply to the court for a judicial review of that decision."<sup>2</sup> Since the subject petitions also impugn the decision of

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<sup>2</sup> **71. Appeal** – (1) Any person aggrieved by a decision of the licensing authority in respect of any matter or dispute regarding the mineral title may, within thirty days of the date of that decision, appeal against that decision to the Secretary, Mines & Mineral Development for a review of that decision, but the bringing of the appeal will not affect the operation of the decision, pending disposition of the appeal.

(2) The Secretary, Mines & Mineral Development shall review the decision referred to in sub-rule (1) and –

(a) shall consult with the mines committee on the matter;

the Appellate Authority dated 08-11-2018 which came subsequent to the Hyderabad Petitions, and in view of Rule 3(a) of Rule 71 of the SMC Rules, we agree with Barrister Zameer Ghumro that these petitions cannot be held to be not-maintainable merely on the ground that the Hyderabad Petitions are also pending.

15. To give context to the other submissions made by learned counsel, it would be expedient to first highlight certain provisions of the SMC Rules. Rule 4 provides for a 'Mines Committee' to advise the Licensing Authority in relation to matters concerning the administration of the SMC Rules *inter alia* on the grant of mining concessions, its renewal, cancellation, amendment in its terms and conditions etc. The SMC Rules provide for different types of mining concessions, two of them being a 'Mining Lease' and a 'Mining Permit'. A Mining Lease along with certain other mining concessions is classified as a 'Mineral Title' [Rule 2(gg)], while a Mining Permit along with certain other mining concessions is classified as a 'Mineral Permit' [Rule 2(ff)]. The duration of a Mining Lease does not exceed 30 years (Rule 48), while the duration of a Mining Permit does not exceed 10 years (Rule 86). Rule 85 suggests that a Mining Permit is granted for small-scale mining. Learned counsel for both sides too submitted that a Mining Permit is granted for small-scale mining while a Mining Lease is granted for large-scale mining.

Rule 50 of the SMC Rules lists instances where a Mining Lease is to be granted and where it is to be refused. Rule 52 deals with the renewal of a mining lease as follows:

**"52. Application for Renewal of Mining Lease -** (1) Subject to sub-rule (2), the provisions of rules 49 and 50 shall apply with necessary

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(b) may rescind or affirm the decision appealed from or may make a new decision in substitution therefor; and

(c) shall give a decision within thirty days after the date on which the appeal is brought.

(3) Any person who is aggrieved by a decision of the Secretary, Mines & Mineral Development under sub-rule (2)(b) may -

(a) apply to the court for a judicial review of that decision; or

(b) refer the matter to arbitration, as may be provided in that person's mineral title or mineral agreement.

modifications in relation to an application for the renewal of a mining lease under this rule.

(2) An application for the renewal of a mining lease shall be made not later than [six months] [twelve months] before the date of expiration of the lease or such later date, but not later than such date of expiration, as the licensing authority may allow, on good cause shown.

(3) Subject to sub-rule (4), on application duly made, the lease may be renewed in accordance with rule 48(1)(b) with or without a variation of the conditions of the lease and upon payment of the fee specified in the First Schedule.

(4) The licensing authority shall not grant a renewal of a mining lease if minerals in workable quantities do not remain to be mined and cannot be mined on a profitable basis.”

16. Barrister Zamir Ghumro, learned counsel for the Petitioners first submitted that the coal mined by the Petitioner is supplied by it to the WAPDA on subsidized rates, which assists the Federal Government in producing less-expensive electricity, and hence a renewal of the Petitioner’s mining-leases was in the public interest. He submitted that given such public interest, the words “lease may be renewed” appearing in Rule 52(3) of the SMC Rules were to be read as “lease shall be renewed”. He relied on *Muhammad Tajammal Hussain v. Shaukat Mahmood* (PLD 2007 SC 277) and *Abdul Karim v. The Returning Officer* (PLD 1999 Quetta 78) to submit that where the use of the word “may” concerns public interest, it is to be construed to mean “must”.

17. Barrister Ghumro’s second line of argument was that the impugned Notifications dated 20-09-2017 by the Respondent No.2 and the impugned decision dated 08-11-2018 by the Appellate Authority whereby the renewal of the Petitioner’s mining-leases was declined, and the impugned Notifications dated 09-07-2018 whereby the SLCMC was granted mining-permits instead, were all *malafide* acts. He submitted that the impugned decision of the Appellate Authority manifests that the refusal to renew the Petitioner’s mining-leases was only for the reason that the Petitioner was a

Federal Government entity and the Government of Sindh had already made up its mind to award a mining concession in the same area to the SLCMC, a company wholly owned by the Government of Sindh. He drew our attention to the mention of a previous exploration permit in the impugned Notifications dated 09-07-2018 and submitted that no exploration was or could have been carried out by SLCMC; that under Rule 78(2)(c) of the SMC Rules, there was no point to give an exploration permit for an area that had already been the subject of a mining lease; and that mining-permits in favour of SLCMC were apparently issued only to oust the Petitioner. He submitted that by reason of Rule 68(a)(iii) of the SMC Rules, a mining-permit could not have been granted to SLCMC when the Petitioner's appeal under Rule 71 of the SMC Rules was pending. He submitted that in any case, under Rule 68 of SMC Rules and the Sindh Public Procurement Act, 2009 it was incumbent on the Respondent No.2 to invite competitive bids before granting mining-permits to SLCMC. He submitted that the impugned Notifications dated 09-07-2018 granting mining-permits to SLCMC were issued by the caretaker Provincial Government which was contrary to its mandate under section 230 of the Elections Act, 2017.

18. Mr. Jawad Dero, learned A.A.G. Sindh arguing for the Respondents 1 and 2 submitted that the Petitioner did not have any vested right in the renewal of a mining lease; that under Rule 52 of the SMC Rules the Respondent No.2 was competent to refuse renewal of a mining lease; that under Rule 50 the Respondent No.2 was competent to give preference to an entity registered in Sindh such as the SLCMC. He submitted that notwithstanding their respective control with the Government, both the Petitioner and SLCMC were private limited companies and therefore it was wrong of the Petitioner to portray the matter as a dispute between the Federal Government and the Government of Sindh. He submitted that the grant of mining concessions is not a 'Public Procurement' with the meaning of section 2(m) of the Sindh Public Procurement



Act, 2009 and therefore the said Act is not applicable to the case; and that the calling of competitive bids under Rule 68 of the SMC Rules is attracted only for the grant of an Exploration License and a Mining Lease and not for the grant of a Mining Permit. He pointed out that Rule 71 of the SMC Rules categorically states that “..... but the bringing of the appeal will not affect the operation of the decision, pending dispensation of the appeal”, and thus there was no embargo on the grant of mining permits to SLCMC pending the Petitioner’s appeal under Section 71 of the SMC Rules. He acknowledged that the impugned Notifications dated 09-07-2018 granting SLCMC the mining-permit were issued during the tenure of the caretaker Government, but he submitted that the decision to issue such permits had been taken by the Coal Mines Committee in its meeting held on 23-05-2018 during the tenure of the preceding elected Government. The learned AAG submitted that the Petitioner was in unlawful occupation of the coal field.

19. Mr. Jaffer Raza, learned counsel for the SLCMC while adopting the arguments of the learned AAG drew our attention to the fact that the impugned Notifications dated 09-07-2018 granting SLCMC the mining permits were issued after nine (09) months of the impugned Notification dated 20-09-2017 whereby the Petitioner was denied a renewal of its mining leases. Thus, he submitted, that the allegation of *malafides* was absurd.

20. It was contended on behalf of the Petitioner that since a renewal of the Petitioner’s mining-leases was in the public interest on account of it supplying coal to WAPDA, the words “lease may be renewed” appearing in Rule 52(3) of the SMC Rules were to be read as “lease shall be renewed”. But in our view that amounts to arguing that Rule 52(3) is to be interpreted subjectively from the Petitioner’s point of view, i.e., when a renewal is perceived in the public interest, the Rule is to be read as stating that the mining lease ‘shall’ be renewed; and when it cannot be perceived in the public interest then the Rule is to be read as stating that a mining lease

'may' be renewed. Such an argument is clearly misconceived. True, that the word 'may' in a statute can be read as 'shall', but that is always dependent on the context in which the word is used in the statute and on the intent of the legislature behind the use of such word, which intent is gathered from the scheme of the relevant statute.

21. In *Tajammal Hussain* (PLD 2007 SC 277), the case relied upon by Barrister Ghumro, the provision under consideration was section 12(1) of the Representation of the People Act, 1976 which provided that "Any elector of a constituency may propose or second the name of any duly qualified person to be a member for that constituency". The election of the returned candidate had been challenged on the ground that his proposer and seconder were not electors from the constituency. In his defense the returned candidate submitted that the word 'may' in section 12(1) meant that it was not mandatory for the proposer and seconder to be electors from the same constituency. Such argument was rejected by the Supreme Court by observing that the word 'may' as used in section 12(1) could not be construed to mean a person who is not elector of the constituency, and that "looking in this scenario one can safely conclude that the word 'may' used in section 12(1), to achieve the object of the law, is to be used as 'shall' or 'must". The *ratio decidendi* of *Tajammal Hussain's* case is found in the following paragraph:

"8. It is well-settled that the word 'may' used in the statute, in the circumstances of the particular case, can also be used as 'shall'. Reference in this behalf may be made to *Muhammad Saleh v. The Chief Settlement Commissioner, Lahore* PLD 1972 SC 326, *Fida Jan v. State* 2001 SCMR 36 and *Nasiruddin and others v. Sita Rain Agarwal* AIR 2003 SC 1543. In the case of *Muhammad Saleh (ibid)* it has been observed that "it is now well-settled that the word 'may' and 'shall' in the legal phraseology are interchangeable, depending on the context in which they are used, and are not to be interpreted with the rigidity which is attributed to them in ordinary parlance." Similarly in *Nasiruddin's case (ibid)* it is observed that "it is well-settled that the real intention of the Legislature must be gathered from the language used. It may be true that use of expression 'shall or may' is not decisive for arriving at a finding as to whether a

statute is directory or mandatory, but the intention of the Legislature must be found out from the scheme of the Act."

The other case relied upon by Mr. Ghumro, that of *Abdul Karim* (PLD 1999 Quetta 78), was also an election matter where Rule 17(1) of the Balochistan Local Government Election Rules, 1983 provided that the proposers of a candidate "may" attend the scrutiny of nomination papers. The Returning Officer and the Appellate Authority both rejected the nomination paper of the petitioner on the ground that the seconder of the petitioner was not present at the time of scrutiny, essentially treating the word "may" in Rule 17(1) to mean "shall". The learned Division Bench discussed the case law where the word "may" was read as "shall" but held that the word "may" appearing in Rule 17(1) of the Balochistan Local Government Election Rules, 1983 could not be read as "shall". It was held that :

"An analysis of the rulings cited above would show that the word 'may' has in the following circumstances been treated as a binding obligation on the authority invested with the permissive power:--

- (1) When the power is given for the benefit of persons who are specifically pointed out and the condition upon which it is to be exercised has also been provided for.
- (2) If it is to effectuate a legal right.
- (3) If it authorizes the doing of a thing for the sake of justice.
- (4) If it authorizes the doing of a thing for public good.
- (5) In the light of the consequences that would follow by construing it one way or the other."

22. Thus, both the cases of *Tajammal Hussain* and *Abdul Karim supra* also lay down the same rule ie., the word 'may' appearing in a statute will only be read as 'shall' if that is the context in which the word is used in the statute and if that reflects the intent of the legislation. The case of *Tajammal Hussain* also clarifies that when the statute is unambiguous as to the use of the word 'may', then the doctrine of telescoping and the doctrine of pragmatic construction should be avoided.

In the case at hand, it is clear from Rules 50 and 52 of the SMC Rules that on expiry of its mining lease, the applicant does not *ipso*

*facto* become entitled to its renewal, for that would then defeat the purpose of providing an expiry. Therefore, the words “lease may be renewed” appearing in Rule 52(3) of the SMC Rules are unambiguous and there is no reason to read them as “lease shall be renewed”. Consequently, the Petitioner cannot claim a renewal of its mining leases as a matter of right, and such renewal was at the discretion of the Licensing Authority, a discretion that is of course guided by the SMC Rules. Reliance can also be placed on the case of *Ghani Corporation v. Government of NWFP* (PLD 2011 Peshawar 1), where a Division Bench of the Peshawar High Court while commenting on the provisions of the NWFP Mining Concession Rules, 2005 also held that the petitioner had no vested right to claim an extension in its mining lease after the lease had expired.

23. The reason for which the Respondent No.2 declined to renew the mining leases of the Petitioner is contained in the minutes of the meeting of the Coal Mines Committee held on 24-05-2017, a copy of which was placed on the record by the AAG Sindh. These minutes read as follows:

<i>“Description / Discussion</i>	<i>Recommendations</i>
(5)	(6)
<p><i>M/s. PMDC has been furnishing monthly Production &amp; Dispatch Returns regularly. The account position could not be reconciled, as record of account of these leases, have not been handed over by the Directorate General Mines Mineral Development.</i></p> <p><i>The Committee observed that PMDC is selling coal in open market, with little quantity supplied to the Power Generation Projector (GENCO-IV). The GoS is in process of setting up a Coal Development Company at Lakhra and further establishment of coalfired power plant to meet the energy crisis.</i></p>	<p><i>Since the PMDC is a Federal Entity and the mineral (coal) is purely a provincial subject, as per provisions of Constitution of Pakistan.</i></p> <p><i>Therefore, in view of future plans for power generation projects by the Govt. of Sindh, the Committee recommends that Coal Mining Leases of PMDC may not be renewed and treated as expired Total area 5096-24 acres may also be resumed in favour of Government of Sindh.”</i></p>

The reason given by the Appellate Authority for dismissing the Petitioner's appeal under Rule 71 of the SMC Rules is in the conclusion of its decision dated 08-11-2018 as follows:

*"6. Decision:*

*(i) Rule 48 SMCR 2002 provide for an extension in an existing mining lease but it does not establish it as a right of the lessee therefore, DG Directorate of Coal Mines is within lawful authority if a lease period is not extended.*

*(ii) After passing of Eighteenth Amendment in the Constitution of Pakistan, the Provinces are well within their rights to develop their provincial resources on their own and through their Provincial entities rather than Federal entities like PMDC.*

*(iii) Based on the above & views of the Coal Mines Committee referred to in the impugned two notifications dated 20-09-2017, both subject appeals of PMDC are not accepted, the said notifications shall remain operative with the direction to the Directorate of Coal Mines Development to proceed under law/rules to take over the possession of the areas."*

24. The above mentioned minutes of the meeting of the Coal Mines Committee and the decision of the Appellate Authority both manifest that the mining-leases of the Petitioner were not renewed for the reason that the Government of Sindh had plans to use the coal mined from the Lakhra coal field for a coal-fired power plant that it intended to set-up in Sindh, which purpose could not be achieved by renewing a mining-lease (of the Petitioner) that did not cater for the said requirements of the Government of Sindh. It will be seen that under section 49 of the West Pakistan Land Revenue Act, 1967<sup>3</sup>, coal extracted within the Province is the property of the Provincial Government which has all powers necessary for the proper enjoyment of its rights thereto. The scheme of the SMC Rules is also to provide for the development of the mineral resources of

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<sup>3</sup>49. **Rights of Government in mines and minerals.-** Notwithstanding anything to the contrary in any other law, or in any order or decree of Court or other authority, or in any rule of custom or usage, or in any contract, instrument, deed or other document, all mines and minerals shall be and shall always be deemed to have been the property of Government, and Government shall have all powers necessary for the proper enjoyment of its rights thereto.

*Explanation-* For the purposes of this section, "Government", in relation to nuclear energy, mineral oil and natural gas, shall mean the Federal Government, and in relation to other mines and minerals, the Provincial Government.

Sindh, and with that, the development of technology, employment and skills in the mining industry in Sindh [see for example Rules 9, 13(1), 27(2), 38, 50(3)(c)(ii) of the SMC Rules]. Therefore, the aforesaid ground for not renewing the mining-leases of the Petitioner was neither arbitrary nor *malafide*. Consequently, we do not find any reason to interfere in the discretion exercised by the Respondent No.2 vide the impugned Notifications dated 20-09-2017 and the impugned decision of the Appellate Authority dated 08-11-2018 to not renew the mining leases of the Petitioner.

25. This brings us to the other challenge brought by the subject petitions, viz to the impugned Notifications dated 09-07-2018 whereby the Respondent No.2 granted mining permits to SLCMC. That challenge is contained in prayer clause 3 of the subject petitions, which is for a separate writ under Article 199(1)(a)(ii) of the Constitution of Pakistan. Such a writ can be sought by Petitioner independent of and irrespective of the fate of its challenge to the refusal to renew its mining leases inasmuch as, the non-renewal of its mining leases did not mean that the Petitioner could not be a contender for a fresh mining concession if it felt that it could fulfill the conditions set out by the Respondent No.2 and/or the Government of Sindh for the grant of such mining concession.

26. Accepted that the Respondent No.2 had the discretion to refuse a renewal of the Petitioner's mining leases on the premise that the interest of the Province lay in using the coal for its own energy project, but then there is nothing to show that the mining permits granted by Respondent No.2 to SLCMC had conditioned such permits on the supply of all or part of the extracted coal to the Government of Sindh for its power project. No such mineral agreement between the SLCMC and the Government of Sindh was brought forth by the Respondents. Rule 82 of the SMC Rules describes the rights of a holder of a Mining Permit by stating that "The provisions of Rule 47 shall apply with necessary modification in relation to a mining permit .....", and Rule 47, which lays down

the rights of a holder of a Mining Lease, states that the right of such lessee to sell or otherwise dispose of the mineral mined is “subject to any conditions of the mining lease or mineral agreement relation to the satisfaction of the internal requirement of Pakistan...”. Therefore, it is not that a mining permit cannot be conditioned on a mineral agreement with the Government. The fact that SLCMC is a company wholly owned by the Government of Sindh makes no difference when it is not the case of the Respondents that in the Province of Sindh the law allows for a Government owned corporation to carry on the business/industry of coal-mining to the exclusion of other persons. Furthermore, in the absence of a mineral agreement with SLCMC, the Government of Sindh would at best be entitled to a royalty for the coal extracted as stipulated in the SMC Rules. But then had the mining permits been put to a public auction, there could well be other contenders willing to pay more royalty or willing to a mineral agreement with the Government of Sindh on better terms. Therefore, the circumstances beg the question ‘why SLCMC only?’.

In the case of *Khawaja Muhammad Asif v. Federation of Pakistan* (PLD 2014 SC 206), the bidding process and the award of a LPG extracting project by the SSGCL to a private company was called in question. The Honourable Supreme Court of Pakistan emphasized as follows on the need to maintain transparency in dealing with mineral contracts:

“36. Natural gas and LPG extracted therefrom are precious mineral resources vesting in the State and ultimately in the People. SSGCL is a State enterprise in which the majority shareholding is held by the Government. SSGCL is therefore, not free to deal with such assets whimsically or in utter disregard of the fiduciary duty owed to the nation. Nor, we may add, does SSGCL have unfettered discretion to deal with national assets in a manner that does not protect and advance the best interests of SSGCL as a fiduciary and repository of the interest of the people of Pakistan who are, through the Government, beneficial owners, not only of the mineral resources of the country but also of a majority interest in SSGCL. It is also particularly important to note that LPG is being used in Pakistan by people who, for a

variety of reasons either do not have access to, or are unable to obtain natural gas. In our recent judgment in *Habibullah Energy v. WAPDA* (Civil Appeals 149 and 150 of 2010), it has been explained that "public sector enterprises... are public assets which belong beneficially to the people of Pakistan. While the State is entrusted with the management of such enterprises, the State agencies responsible for management do not thereby become owners of the enterprise and its assets". We had also emphasised that "rather than being owners of public sector enterprises, State agencies stand in a fiduciary relationship to the people" and also that the "basis of fiduciary relations is the exclusive benefit principle, according to which the fiduciary has a duty to act solely in the interests of the beneficiary". In another recent judgment in the case titled *Khawaja Muhammad Asif v. Federation of Pakistan* (2013 SCMR 1205) we held that "it is a fundamental right of the citizens of Pakistan under Article 9 of the Constitution that the national wealth/resources must remain fully protected whether they are under the control of the banks or the autonomous or semi-autonomous bodies." We may also have recourse to the decision in *Raja Mujahid Muzaffar v. Federation of Pakistan* (2012 SCMR 1651); and the judgment reported as *Suo Motu Case No. 13 of 2009* (PLD 2011 Supreme Court 619) wherein it was held that "in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied... In such matters, judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in the larger public interest.....".

37. Recently we have also dealt with cases and adjudicated issues of corruption, corrupt practices and non-transparency in the award of public contracts. In this regard reference may be made to ..... The cardinal principle which has been kept in mind by this Court is that waste, plunder or wanton and heedless use of public resources and funds must be prevented and public wealth wherever squandered must be recovered. The importance of fair, even handed and open competitive bidding has also been repeatedly emphasized by us while exercising our jurisdiction under Article 184(3) of the Constitution. In the matter of *Suo Motu Case No.13 of 2009: Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad* (PLD 2011 SC 619), we have emphasized that the Government and its instrumentalities are expected to act fairly, justly and in a transparent manner. Transparency lies at the heart of every transaction entered into by or on behalf of a public entity such as SSGCL. It was also observed by us that "any transaction which is not transparent and goes against the interests of the general



public constitutes violation of Article 9 of the Constitution". This Article guarantees the right to life as defined by this Court starting from the case of *Ms. Shehla Zia v. WAPDA* (PLD 1994 SC 693). The jurisdiction under Article 184(3) *ibid* is meant precisely for the purpose of ensuring that the assets belonging to the People (such as mineral resources) are managed and exploited for the benefit of the People of Pakistan and also for ensuring that waste or abuse of such assets is not allowed to take place or to continue."

In *Abdul Haque Baloch v. Government of Balochistan* (PLD 2013 SC 641) - the *Reko Dek* case - one of the many reasons cited for setting aside the 'exploration license' was the failure of the licensing authority to call for competitive bids as required of Rule 67 of the Balochistan Mining Rules, 2002.

27. We now advert to Rule 68 of the SMC Rules which requires the Licensing Authority to invite competitive bids for the grant of mining concessions in certain circumstances as follows:

**"68. Competitive Bids-** The licensing authority may on such conditions as it thinks, fit invite competitive bids on an open or (sic) basis-

(a) for the issue of an exploration license or a mining lease in respect of any area of land which is not subject to -

(i) a reconnaissance license which give the holder an exclusive right referred to in rule 16(3);

(ii) an exploration license, a mining lease or a mineral deposit retention license or a mining permit or

(iii) litigation or arbitration;

(b) where several applications have been received in respect of the same area for same the (sic) mineral;

(c) on an area of land which has been (sic) proven mineral reserves and has become available for the issue of an exploration license or mining lease as a result of the relinquishment, surrender, termination or, subject to paragraph (a)(iii) the cancellation of a license or lease with respect to that area of land.

and may, in accordance with these rules, issue the appropriate mineral title to the successful bidder."

28. Learned counsel for the Respondents had argued that in view of its sub-Rule (a), the calling of competitive bids under Rule 68 of the SMC Rules is confined to cases where the mining concession being offered is an 'Exploration License' or a 'Mining Lease'; and

since the mining concession granted to SLCMC was a 'Mining Permit', Rule 68 of the SMC Rules was not applicable. However, a closer examination of Rule 68 shows that its sub-rule (a) is only one of the instances attracting competitive bidding. The other two instances contained in sub-rules (b) and (c) are separate and distinct. When a case falls under sub-rule (b), i.e. where several applications have been received in respect of the same area for the same mineral, Rule 68 is attracted regardless of the type of mining concession being offered. Under sub-rule (c), if a mining concession is offered for an area with "proven mineral reserves" and the area is "available" for an exploration license or a mining lease, then Rule 68 is attracted. In our view, the word "available" as used in sub-rule (c) connotes a circumstance where an exploration license or a mining lease as the highest mineral title becomes available as an option and can, amongst other types of mining concessions, be offered for the area, as opposed to a circumstance where an exploration license or a mining lease is the only mining concession being offered for the area. That is so because the latter circumstance is already covered under sub-rule (a). It is another matter that where an exploration license or a mining lease can be offered, the Licensing Authority deems appropriate to offer a lesser mining concession such as a mining permit for small-scale mining. It will be seen that under Rule 85 of the SMC Rules, the Licensing Authority can even require an applicant of a mining permit to apply instead for a mining lease having regard to the fact that the application is not actually for small-scale mining.

In the case at hand, the area for which mining permits were granted to SLCMC was admittedly an area with "proven mineral reserves" within the meaning of sub-rule (c) of Rule 68 of the SMC Rules - proven by the fact that the Petitioner was last extracting coal from that area under mining leases, and proven by the very grant of mining permits to SLCMC. After the expiry of the Petitioner's mining leases, such area was "available" for a further mining lease, and then even if the Respondent No.2 decided to offer the area for a

mining permit instead, that did not take the matter out of the purview of sub-rule (c) of Rule 68 so as to avoid the calling of competitive bids.

29. The only remaining question is whether the calling of competitive bids under Rule 68 of the SMC Rules is mandatory or discretionary with the Licensing Authority inasmuch as, Rule 68 reads that “The licensing authority may .... invite competitive bids ....”. Here we may observe that the argument that had been advanced by Barrister Ghumro for Rule 52(3) i.e., that the word ‘may’ should be read as ‘shall’, is in fact apt for Rule 68. It will be seen that Rule 68 lists instances where it is attracted. Therefore until any of those instances arise, it may well be argued that the calling of competitive bids for granting a mining concession is at the discretion of the Licensing Authority. But once any of those instances arise, then, in our view there is no discretion left with the Licensing Authority and the calling of competitive bids becomes mandatory. To argue otherwise would make sub-rules (a) to (c) of Rule 68 redundant. Needless to state that such Rule of inviting competitive bids is there not only to ensure transparency in the grant of Government contracts, but as laid down in the case of *Khawaja Muhammad Asif (supra)*, it is also to assure the people of Pakistan that a national asset is being put to the most optimum use. Therefore, following the dictum laid down in the case of *Tajammal Hussain (supra)*, we hold that the word ‘may’ in the opening sentence of Rule 68 is to be read as ‘shall’, making the said Rule mandatory. Consequently, since the Respondent No.2 did not fulfill the mandatory requirement of Rule 68 for inviting competitive bids before granting mining permits to SLCMC for an area with proven mineral reserves, both the impugned Notifications dated 09-07-2018 issued by the Respondent No.2 are without lawful authority. Having concluded so, we need not address the other grounds urged by the Petitioner to challenge the impugned Notifications dated 09-07-2018.

30. For the foregoing conclusions, we decide these petitions as follows:

- (a) Having found no reason to interfere in the discretion exercised by the Respondent No.2 vide the impugned Notifications dated 20-09-2017 and in the impugned decision of the Appellate Authority dated 08-11-2018 to not renew the mining leases of the Petitioner, the petitions are dismissed for prayer clauses 1 and 2 with the observation that the Respondent No.2 is free to take action against the Petitioner for possession of the subject area;
- (b) The petitions succeed for prayer clause 3 in terms that the impugned Notifications dated 09-07-2018 granting mining permits to SLCMC (Respondent No.3) having been granted in contravention of Rule 68 of the SMC Rules, the same are without lawful authority and are therefore set-aside with the observation that for granting any mining concession in the subject area with proven mining reserves, the Respondent No.2 shall invite competitive bids by making public the terms and conditions of the mining concession offered.

A copy of this judgment shall be dispatched by the office to the Circuit Court at Hyderabad to be placed in C.P. No.D-2484/2018 and C.P. No.D-2485/2018, and a copy shall also be placed in C.P. No. D-7643/2018 pending before this Court at Karachi.

The petitions stand disposed off as above along with pending applications except contempt applications.

**JUDGE**

**JUDGE**

Karachi:

Dated: 22-05-2019