



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/12/1

TETHYAN COPPER COMPANY PTY LIMITED V. ISLAMIC REPUBLIC OF PAKISTAN

---

JUDGMENT OF THE SUPREME COURT OF PAKISTAN

---

07 January 2013

# Table of Contents

Judgment of the Supreme Court of Pakistan .....	1
---	---

# Judgment of the Supreme Court of Pakistan

1. By means of the instant short order, we intend to dispose of Civil Petition No. 796 of 2007 filed under Article 185(3) of the Constitution for leave to appeal against the judgment dated 26.06.2007 passed by High Court of Balochistan in Constitution Petition No.892 of 2006, Constitution Petitions directly filed before this Court under Article 184(3) of the Constitution and certain miscellaneous applications.
2. We have heard the learned counsel for the parties at length and have gone through the impugned judgment as well as the material placed before us.
3. On 25.05.2011, a consent order was passed by this Court in the instant case, reported as *Abdul Haq Baloch v. Government of Balochistan* (PLD 2011 SC 835), which contains uncontroverted facts between the parties summarized in Para. Nos. 2 to 6 & 8. The same are reproduced hereunder: -

"2. The uncontroverted facts that emerge from the concise statements, documents and submissions of the parties are that for the purpose of conducting exploration and development of mineral deposits of gold and copper in the agreed Exploration Area, in District Chaghai of the Province of Balochistan, Pakistan, Balochistan Development Authority (BDA) on the approval of the Government of Balochistan (GOB), entered into CHAGHAI HILLS EXPLORATION JOINT VENTURE AGREEMENT dated 29th July, 1993 (CHEJVA) with BHP MINERALS INTERNATIONAL EXPLORATION INC (BHP); a foreign company. BDA was to provide administrative support, necessary consents, approvals, NOCs, security clearances etc., etc., and relaxation of certain Rules of the Balochistan Mining Concession Rules, 1970. BHP was to undertake the work and entire cost of the exploration and infrastructure etc. thereof. The respective Percentage Interests were 25% for BDA and 75% for BHP. The Joint Venture was granted ten Prospecting Licenses (PLs) in 1996 for an area of 1000 Sq. Km. BHP carried out reconnaissance and detailed work up to 1999 in these areas and reported large deposits of Copper, Gold etc. at Reko-Diq. The Joint Venture thereafter surrendered 8-PL's and retained Two PLs of Reko-Diq. After the new National Mineral Policy and the enactment of Balochistan Mineral Rules, 2002, a consolidated Exploration License No.EL-5 was granted to the Joint Venture for a defined area of Reko-Diq in 2002 for three years. On two renewals thereof, EL-5 was to remain valid up to 18th February, 2011.

3. During the extended period of EL-5, ADDENDUM No.1 to the CHEJVA was signed between BDA/GOB and BHP, whereby inter alia, Government of Balochistan became a Joint Venture partner in CHEJVA with BDA as its Agent. ADDENDUM also permitted transfer or assignment of a party's interests in CHEJVA wholly or partly. Whereon through intermediary corporate instrumentalities, share interest of BHP in CHEJVA was routed and re-routed via Mincor Resources N.L./Tethyan Copper Company Ltd., of Australia (TCC) per the OPTION AGREEMENT/ALLIANCE AGREEMENT. And finally under the NOVATION AGREEMENT OF 2006 JVA was novated to substitute TCC for BHP as a full party with Deed of Waiver and Consent of GOB for such transfer. BHP was thus replaced by TCC in the Joint Venture which became TCC-BDA/GOB' CHAGAI HILLS JOINT VENTURE. The respective Percentage Interests were restated for GOB (25%) and TCC (75%). Antofagasta of Chile and Barrick

Gold Corporation of Canada; stated to be amongst the largest companies prospecting for gold and copper in the world, then stepped in and jointly purchased TCC's entire 75% Percentage Interest in the Joint Venture. Antofagasta and Barrick Gold; on thus acquiring TCC, carried out the drilling and exploration programme at EL-5 area of Reko-Diq at a claimed expense of millions of US \$, with no financial cost burden on GOB/BDA.

4. In 2006, C.P. No. 892 of 2006 was filed by Maulana Abdul Haq etc., in the Balochistan High Court challenging legality of CHEJVA, relaxation of 1970 Mining Rules by GOB and BHP's lukewarm exploration activity. The Government of Balochistan denied illegality of CHEJVA and its alleged contrariness to public interest. This Constitutional Petition was dismissed by the High Court of Balochistan through the impugned judgment dated 26-6-2007. The relaxation of 1970 Rules, acts of GOB/BDA and CHEJVA were held to be legal. Hence C.P.L.A. No. 796 of 2007 in this Court against the above judgment.

5. During the pendency of the leave petition, a major development took place. Exploration work including drilling was completed by TCC within the stipulated period. Substantial discoveries of gold and copper etc. were made. The license period expired on 18th of February, 2011. TCC submitted to GOB Feasibility Study Report; a study to ascertain the commercial feasibility of the mining of the resource, treatment of ore obtained in mining operation, expected optimum return, life of the mine, mineable reserves and grade and the results of geological and geophysical investigations etc. The Feasibility Study is admittedly under examination of GOB.

6. The above mentioned feasibility report was offered by the former Advocate General i.e. Mr. Salahuddin Mengal to be exclusively shared with this Court though claiming the same to be sensitive, confidential, highly technical and ordinarily beyond the Court's domain.

7. ... ..

8. During the hearing of the matter, TCC formally applied to the Government of Balochistan within the visualized period for the grant of the mining lease under 2002 Rules which statedly recognized the licensee's entitlement to apply for a mining lease on success of the licensee in the exploration."

The concluding paragraphs therefrom are also reproduced hereinbelow: -

"13. We are in agreement with the learned counsel for the parties and are of the opinion that at this stage it will not be proper for us to inquire into the Feasibility Study Report or to rule upon the entitlement of TCC to the mining lease. The reason is that under the governing law and 2002 Rules, this matter falls exclusively within the domain of the Government of Balochistan and the Government is also seized of the Feasibility Report as well as the application of TCC. All the parties have expressly admitted that the Government of Balochistan being the competent authority in this matter, should in due discharge of its obligation, make a decision on TCC's application impartially, objectively and in accordance with law and thus accept its legal responsibility thereof. In this view of the matter, it will not be proper for us to pre-empt the decision of the Government of Balochistan by entering into the merits of the case at this juncture.

14. As such accepting the consensus of all the learned counsel and for the reasons above recorded, the restraining order dated 3-2-2011 is recalled. The competent authority in the Government of Balochistan shall proceed to expeditiously decide TCC's application for the grant of mining lease transparently and fairly in accordance with the law and the rules. In so doing the Government

of Balochistan shall not be influenced in any manner whatsoever by the pendency of these proceedings or by the orders therein passed by this Court. Upon decision of the matter by the Government of Balochistan, the learned Advocate General of the Province shall inform the Registrar of this Court forthwith. The petitions shall remain pending on the file of this Court until the decision of the application by the competent authority."

4. Admittedly, application for grant of mining lease submitted by Tethyan Copper Company Pakistan (Pvt.) Ltd. (TCCP), incorporated in Pakistan, was dismissed by the Mines Committee constituted under the Balochistan Mining Rules, 2002 (hereinafter referred to as the BMR 2002) in its special meeting held on 14.11.2011 and the decision communicated to TCCP *vide* letter dated 15.11.2011. TCCP challenged the said decision by means of an administrative appeal before the Secretary, Department of Mines & Minerals, Government of Balochistan, as provided under the BMR 2002, which too was dismissed. Both these orders were not challenged by TCCP. However, Tethyan Copper Company (TCC), incorporated in Australia, invoked the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) against the Government of Balochistan (GOB) seeking specific performance of CHEJVA and grant of mining lease. The claim of TCC was not registered by ICSID. Later, TCC filed a claim against the Government of Pakistan on the basis of the Pakistan-Australia Bilateral Investment Treaty of 1998, which is reportedly pending for adjudication. The claimant also moved an application for provisional measures to immediately grant a temporary restraint order pending disposition of the request. In the said application, it was requested to freeze the work of the GOB in 99 square kilometers including H-4 'Tanjeel'. Dr. Samar Mubarakmand also entered appearance as a witness before the Tribunal on 06.11.2012 and stated that the GOB was planning to work in H-4 area as early as possible. The ICSID Tribunal *vide* decision dated 14.12.2012 rejected the application of TCC for provisional measures and allowed the GOB and Dr. Samar Mubarakmand to carry out mining in H-4 'Tanjeel' in Reko Diq. The plea of TCC regarding urgency and irreparable loss was also declined. However, the GOB was asked to keep the Tribunal informed of its specific plans and developments at the site. Simultaneously, TCC had also invoked the jurisdiction of the International Chamber of Commerce (ICC) primarily seeking specific performance of CHEJVA and grant of mining lease in the Reko Diq area of 99 kilometers comprising 14 deposits.

5. These facts have been noted to point out that TCCP on having accepted the order of rejection of application for grant of mining lease as well as the order of the appellate authority under the BMR 2002, instead of invoking the jurisdiction of the High Court under Article 199 of the Constitution for judicial review of both the orders, approached ICSID and ICC purportedly in light of the provision of Article 15 of CHEJVA executed between BHP and BDA. It may be advantageous to reproduce the said Article, which reads as under: -

#### 15.4 Arbitration

15.4.1 Any dispute in respect of which:

(i) amicable settlement has not been reached within one hundred and twenty (120) days of written notice of the dispute;

(ii) neither Party requests resolution of the dispute by the Expert within the thirty (30) day period

set forth in Clause 15.2 or a decision by the Expert pursuant to Clause 15.2 has not become final and binding pursuant to sub-clause 15.2.5; or

(iii) pursuant to sub-clause 15.2.2 the Parties fail to agree upon the appointment of an Expert,

shall be submitted to the International Centre for the Settlement of Industrial Disputes (the "Centre") established by the Convention for Settlement of Other States in effect since October 14, 1966 (the "ICSID Convention").

15.4.2 To the extent required by the ICSID Convention each of the Parties agrees to submit to arbitration under the ICSID Convention, but should sub-clause 15.4.8 operate, then the Parties agree to submit to an arbitration conducted pursuant to the ICC Rules.

15.4.3 In all cases of arbitration pursuant to this Clause 15.4:

(a) arbitration shall take place in London, United Kingdom, unless the Parties decide otherwise;

(b) the language of the arbitration shall be English and all hearing materials, statements of claims or defence, and awards and the reasons supporting them shall be in English; and

(c) the costs of the arbitration shall be borne by the losing Party.

15.4.4 In rendering their decision, the arbitrators shall consider the intention of the Parties at the time of entering into this Agreement insofar as it may be ascertained from the Agreement, Pakistan law, and as provided by Article 16, generally accepted standards and principles of international law applicable to the mining industry.

15.4.5 Any arbitrator(s) appointed pursuant to this Clause 15.4 shall have the full power to review and revise any decision, recommendation or opinion of the Expert related to the dispute. No Party shall be limited in the arbitral proceedings to evidence or arguments submitted to the Expert pursuant to Clause 15.2, and nothing shall prevent the Expert from being called as a witness to give evidence before the arbitrators.

15.4.6 The award of the arbitral tribunal shall be final and binding upon the Parties, and any Party may seek to enforce or execute the award in any court of competent jurisdiction. The Parties hereby waive any defence or sovereign immunity they may have or claim to have in relation to any action brought to enforce or execute any arbitral award.

15.4.7 For the purposes of arbitration pursuant to the ICSID Convention, the Parties agree that the transactions to which this Agreement relates constitute an investment within the meaning of [Article 25\(1\) of the ICSID Convention](#).

15.4.8 In case, for whatever reason, the Centre should not accept jurisdiction or should reject the arbitration request, the dispute shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules") and the provisions of sub-clauses 15.4.3, 15.4.4, 15.4.5 and 15.4.6 shall apply. Arbitration shall be conducted by one sole arbitrator appointed by mutual agreement of the Parties. This arbitrator shall have extended experience in the mining field. In case the Parties cannot agree on the choice of the arbitrator, arbitration shall be of a nationality other than that of the Parties and shall have extended experience in the mining field. In case the Parties cannot agree on the choice of the arbitrator,

arbitration shall be conducted by three arbitrators named in accordance with the ICC Rules.

6. Before submitting the application for issuance of Prospecting Licences (PLs) under the Balochistan Mineral Concession Rules, 1970 (BMCR 1970), the counsel of BHP Mr. Martin Harris had suggested relaxation of a number of rules, including the rule relating to persons by whom applications may be made. It appears that the request made by BHP's counsel was forwarded by BDA to the GOB and ultimately notification dated 30.01.1994 was issued, whereby following relaxations were granted: -
  1. Grant of Exploration Areas
  2. Area available for prospecting Licences
  3. Application for prospecting Licence
  4. Satisfaction of conditions attaching to prospecting Licences
  5. Exclusive right
  6. Other Minerals
  7. Government rights pre-emption acquisition merger, and taking control in National emergency
  8. Assignment
  9. Application for Mining Licence
  10. Royalty
  11. Penalties compensation and cancellation
  12. Employment and training
  13. Mining Lease
  
7. In the year 1996, BHP applied for 10 PLs, which were granted on 08.12.1996. It appears that CHEJVA, which was originally executed between BHP and BDA was suffering from certain legal deficiencies, therefore, Addendum No.1 to CHEJVA was executed on 04.03.2000, allegedly under the authorization of the then Governor of Balochistan, Justice (Retd) Amir-ul-Mulk Mengal. It is pertinent to note that through the Addendum, drastic changes were made in CHEJVA, inasmuch as permission was granted for transfer or assignment of a party's interests in the agreement wholly or partly. Further, the GOB was made a joint venture partner and the BDA represented itself as an agent of GOB through ratification of agency. Thus, there are serious question marks on the manner in which the then Governor of Balochistan granted authorization by executing an undated document. However, from certain documents it appears that the same was executed on 24.12.1999. Although prior to this authorization, former Governor Syed Fazal Agha had not signed the document, which was placed before him for the purpose of executing authorization, *prima facie*, for the reason that before 12.10.1999, the GOB through the Chief Minister had decided to constitute a two-member committee to examine the said document. The need and justification of the

Addendum is given in Paras A, B, C and D thereof, which read as under: -

A. The GOB, through the Chairman of the BDA, and BHPM intended to enter into a Joint venture Agreement for mineral exploration in the Chagai hills in the Province of Balochistan, which was executed on 29.07.1993 (... ..) and it is desirable to clarify the roles of each of GOB and the BDA under the JVA;

B. Pursuant to GOB's intention to appoint the BDA as its agent in connection with the JVA, the BDA has exercised its rights and discharged its obligations under the JVA as if it were a Joint Venturer rather than the agent of the GOB. The GOB and BHPM now wish (i) to clarify the role of the BDA under the JVA as agent of the GOB and the scope of its authority to act on behalf of the GOB in connection with the JVA, and (ii) to have the GOB confirm and ratify all past actions, matters and things done by the BDA in connection with the JVA;

C. Pursuant to the issue of the JVA, BHPM, on behalf of the Joint Venture, has completed Stage One Activities (as defined in sub-clause 1.1 of the JVA) and has identified certain anomalous mineralized areas in respect of which the BDA and BHPM have jointly obtained ten (10) Prospecting Licences in order to enable BHPM to conduct Stage Two Activities on behalf of the Joint Venture; and

D. The GOB and BHPM have agreed to amend certain terms of the JVA as set out hereunder."

Thus, by means of the Addendum, in the name of ratification in terms of section 196 of the Contract Act, 1872, instead of supplementing CHEJVA, its entire complexion was changed.

8. On the basis of the Addendum, an 'Option Agreement' was also executed and in the garb of reliance on one of the clauses contained in CHEJVA, namely, Article 14 'Assignment', Mincor option was created in favour of Mincor NL, a company incorporated in Western Australia, enabling it to enter into an Alliance Agreement under clause 3 of the Option Agreement. The Mincor Option gave the sole and exclusive right to Mincor or its nominee to enter into alliance with BHP to explore in the region. On 24.10.2000, TCC, as nominee of Mincor, exercised the Mincor Option and executed an Alliance Agreement on 19.04.2002. It may be mentioned that TCC was a company incorporated in Western Australia with its place of business situated at Perth. In 2006, Antofagasta, a Chilean company registered in the United Kingdom through its subsidiary Atacama Copper Pvt. Ltd., made an offer to buy the shares of TCC, which was accepted by the Board of TCC. As such, Antofagasta through Atacama acquired the total shares of TCC for AUD 220 million. TCC also purchased the claw back right of BHP for US\$60 million. In September 2006, Barrick Gold of Canada purchased 50% shares of Atacama from Antofagasta through share-purchase agreement and thus acquired 50% ownership interest of TCC. Pursuant to the share-sale agreement, an interim shareholders agreement dated 22.09.2006 was executed between Barrick Gold and Antofagasta to govern their relationship *vis - à - vis* the management of TCC. TCC started its operations in Pakistan through its Branch Office registered with the Board of Investment. It also incorporated a local subsidiary in Pakistan called TCCP. In December, 2007, TCCP approached the Lahore High Court for amalgamation of TCC's Branch Office in Pakistan and TCCP, incorporated in Pakistan, which had been functioning simultaneously until that time. Subsequently, the Islamabad High Court, to whose file the case was transferred on its establishment, *vide* order dated 11.04.2008 approved the amalgamation of both the companies as per the scheme of arrangement. As such, licences and properties held by Pakistan Branch of TCC stood transferred to TCCP. In the meanwhile, the BMR 2002 were enforced, and on 03.09.2002, TCCP applied for an Exploration Licence (EL) for copper, gold and associated minerals

in an area of 973.75 sq. km. in Chagai District and was granted EL-5 *vide* letter dated 09.09.2002. EL-5 was renewed twice and remained valid up to 18.02.2011.

9. In April 2006, BHP, TCC and GOB through its purported agent BDA, executed a Novation Agreement to CHEJVA, whereby the 75% interest of BHP in the agreement as well as in EL-5 was transferred to TCC. The detail of companies involved in the entire transaction and the transfer of interest *inter se* is given below: -

Company	Place of Incorporation	Nature of Interest	Interest received through	Owned by
BHP Minerals	Delaware, USA	Original party with 75% share	CHEJVA 29.07.1993	BHP Minerals Australia
Mincor NL	Western Australia	Assignable Mincor Option	Option Agreement 28.04.2000 for \$100	Shareholders from Iscor Ltd. of South Africa
TCC	Western Australia	Nominee of Mincor for Option Agreement	Alliance Agreement 03.04.2002 for future investment of \$2 to 3 million	Atacama
Atacama	UK	Purchased shareholding in TCC	Share Purchase for AUD220 million	Antofagasta and Barrick Gold
Barrick Gold	Canada	Shareholder of Atacama (50%)	Share Purchase Agreement	Itself Parent Company
Antofagasta	UK (FTSE-100)	Shareholder of Atacama (50%)	Original Holding Company of Atacama	Itself Parent Company
TCCP	Pakistan	Holder of EL-5	Amalgamated with TCC Branch Office	TCC

The Novation Agreement was purportedly made for the purpose of substituting CHEJVA, and the GOB was also made a party to the Joint Venture, which was not permissible under BMR 2002 as well as the Rules of Business of the Government of Balochistan, particularly Rule 7 and other rules. The GOB, in purported exercise of the powers vested in it under the BMR 2002, granted relaxations in violation of rule 98 *ibid* as no reason was assigned for the relaxation of the relevant Rules.

10. In addition to these defects, it is important to note that after having invoked the jurisdiction of the original as well as the appellate authority under the BMR 2002, TCC had submitted to its forum/jurisdiction. Both these authorities had derived their powers and jurisdiction from the BMR 2002, which were framed under the Act of 1948. The findings so recorded are adversely operating against them and, for all intents and purposes, they have no claim of any nature whatsoever against the

GOB or the Government of Pakistan.

11. It is also to be noted that in the Constitution Petition filed before the High Court of Balochistan, the GOB had opposed the petition. However, when the matter came up before this Court in CPLA in 2007 and orders dated 03.02.2011 and 25.05.2011 were passed, wherein certain issues were noted, the GOB supported the stance of the petitioners, who also filed additional grounds in light of the changed circumstances. This Court, besides being seized of CPLA, is also seized of Constitution Petitions under Article 184(3) of the Constitution and miscellaneous applications filed therein. Accordingly, CPLA as well as Constitution Petitions under Article 184(3) of the Constitution are simultaneously maintainable under the Constitution and the scope of the relief claimed by the petitioners can be enlarged in view of the facts and circumstances of the case.
  
12. Thus, for detailed reasons to be recorded later, CPLA is converted into appeal and the appeal as well as the Constitution Petitions under Article 184(3) of the Constitution are allowed with costs throughout whereas the Miscellaneous Applications are disposed of. The Chagai Hills Exploration Joint Venture Agreement dated 23.07.1993 is held to have been executed contrary to the provisions of the Mineral Development Act, 1948, the Mining Concession Rules, 1970 framed thereunder, the Contract Act, 1872, the Transfer of Property Act, 1882, etc., and is even otherwise not valid, therefore, the same is declared to be illegal, *void* and *non est*. The Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006, which are based upon, and emanate from, CHEJVA are also held to be illegal and *void*. All these instruments do not confer any right on BHP, MINCOR, TCC, TCCP, Antofagasta or Barrick Gold in respect of the matters covered therein. It is further held that EL-5 is tantamount to exploration contrary to rules and regulations as the claim of TCCP is based on CHEJVA, which document itself has been held to be *non est*. Therefore, before exploration it was incumbent upon it to have sought rectification of its legal status.