

SUPREME APPELLATE COURT GILGIT-BALTISTAN
(Original Jurisdiction)

SMC No. 10/2009

DIAMER BHASHA DAM

Present: **Mr. Justice Muhammad Nawaz Abbasi, C.J**
 Mr. Justice Syed Jafar Shah, J
 Mr. Justice Muhammad Yaqoob, J

Mr. Aleem Abbasi, Deputy Attorney General for Pakistan.

Advocate General Gilgit-Baltistan

Mr. Muhammad Issa, Sr. Advocate

Supreme Appellate Court GB.

Date of Hearing: 07-10-2010

JUDGMENT

Muhammad Nawaz Abbasi, CJ: This petition in original jurisdiction of this Court under Article 27 of the Northern Areas Governance (Amended) Order, 1994 substituted by Article 61 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 has been filed by Bashir Ahmed Khan, resident of Chilas, District Diamer of Gilgit-Baltistan for the declaration as under:

- a. The Construction of Diamer Bhasha Dam has been approved in the area of District Diamer of Gilgit-Baltistan with two Hydro Electric Power Houses for generation of electricity, one each on the left and right bank of river Indus, on the territory of Gilgit-Baltistan, therefore, the people of Gilgit-Baltistan have exclusive right of royalty of generation of electricity from Diamer Bhasha Dam.
- b. The area subject matter of boundary dispute between District Diamer Gilgit-Baltistan and District Kohistan Province of Khyber Pakhtunkhwa, as per existing boundary of the two Districts is included in District Kohistan, but originally this area forming part of District Diamer, was an integral and natural part of territory of Gilgit-Baltistan, therefore, claim of Province of Khyber Pakhtunkhwa in respect of royalty of electricity generation of proposed power house of Diamer Bhasha Dam, on left bank of River Indus in the area of District Kohistan is without any foundation and legal justification.
- c. The land owners and affectees of Diamer Bhasha Dam are entitled to the payment of compensation of their land acquired for the construction of mega project of Diamer Bhasha Dam on the basis of future potential value of the

land.

2. The petition is read as under:

Before the Hon'ble Justice Muhammad Nawaz Abbasi Chief Judge N.A Supreme Appellate Court.

SUBJECT:- APPLICATION FOR TAKING SUO MOTO ACTION REGARDING GRAVE INJUSTICE, DISCRIMINATION AND EXPLOITATION COMMITTING BY GOVERNMENT OF PAKISTAN AND WAPDA WITH THE POOR PEOPLE OF DIAMER AND OTHER PARTS OF NORTHERN AREAS.

Respectfully Sheweth;

The petitioner submits as under:

1. That the petitioner is bona fide resident of Goharabad Tehsil Chilas District Diamer and one of the effectee of Diamer Bhasha Dam.

2. That the Federal Government has started work on the Mega project of Diamer Bhasha Dam and with the result of the construction of the Dam more than fifty thousand poor people of Diamer will be directly effected due to construction of the said Dam. Their lands and houses will be totally drowned in the Dam water.

3 That the effectees of the Dam time and again demanded for their resolution of the genuine demands of the effectees while the government is not ready to accept the genuine demands for unknown reasons.

4. That the effectees of the Dam are demanding for prior payment of compensation of lands, house and trees at the rate of Rs. 20,00,000/- per Kanal and for each house according to market value and assessment for each tree Rs. 50,000/- they are also demanding for construction residential houses of effected persons, appointments against the posts of Dam project from amongst the effectees, payment of royalty of electricity to the people of Northern Areas. Demarcation of boundary between Diamer and District Kohistan prior to start of work at Dam.

5. That despite repeated demands of effectees, the government is not ready to meet their genuine demands of effectees, hence this application of suo moto notice on behalf of your lordship.

It is, therefore, very humbly prayed that by keeping in view the public importance of the issue your lordship may very kindly take suo moto action against these injustices, discrimination and for early resolution of their genuine demands of effectees and any other relief which your lordship deems fit and proper.

Dated: 08-07-2009.

Petitioner

Sd/-

Bashir Ahmad Khan
s/o Shehzada Khan
r/o Goharabad Tehsil Chilas,
District Diamer

3. The subject matter of this petition is equitable proportion of royalty of electricity generation from the proposed Power Houses of Diamer Bhasha Dam, which is a national project and has been approved for construction on River Indus in the area of District Diamer of Gilgit- Baltistan. The River Indus originates in the mountainous range of Baltistan Region which flowing through the Gilgit region passes from District Diamer into District Kohistan of Province of Khyber Pakhtunkhwa and in view of the importance of the matter relating to the royalty of electricity generation from power houses of Diamer Bhasha Dam, this Court having taken cognizance in the matter in exercise of the power under Article 27 of the Northern Areas Governance (Amended) Order 1994 substituted by Article 61 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 issued notice to all concerned vide Order dated 09-07-2009 as under:-

“Basher Ahmed Khan has moved this application for exercise of power under Article 45(2) readwith Article 19 of the Governance Order, 1994. The applicant has sought direction for payment of compensation to the effectees of mega project of Diamer Basha Dam expidiously for their settlement and has also claimed the payment of royalty of electricity to the people of Northern Areas. It is also prayed for direction of demarcation of the boundaries of District Diamer and Kohistan to resolve the controversy regarding the territorial jurisdiction of the two Districts and location of Power House of Diamer Basha Dam. The grievances of the applicant is that, despite repeated demands, the Government has not paid any attention to the above matters.

The matter relating to the payment of compensation is to be dealt with in accordance with law in due course of time, in terms of Article 24 of the Constitution. However, the question relating to the payment of royalty of electricity to the people of Northern Areas and demarcation of boundaries of Diamer and Kohistant is a matter of great public importance, which involves the interpretation of Article 161 of the Constitution readwith certain other Articles and the law on the subject, relating to the enforcement of fundamental rights of the people of the region.

This is a national project, therefore it appears appropriate to issue notice to Chairman Wapda and Secretary Water and Power Government of Pakistan for their comments

on the subject.

In view of the importance of the matter, the Attorney General of Pakistan has to assist the Court and additionally Malik Muhammad Qayume senior counsel and former Attorney General and Mr. Abdul Hafiz Pirzada, senior Advocate Supreme Court of Pakistan are requested to assist the Court as Amicus Curia . The expenditure on their traveling by Air first class and stay at Gilgit will be borne by Wapda. The case will be fixed for a date in the third week of August, 2009, as per convenience of learned Attorney General and learned amicus.”

4. In pursuance of the Order of this Court, the Secretary Water and Power, Government of Pakistan has filed comments to this petition though the Advocate General Gilgit- Baltistan whereas the comments on behalf of Government of Khyber Pakhtunkhwa (NWFP) have been filed by Mr. Waqar Ahmed Deputy Advocate General Khyber Pakhtunkhwa and Deputy Attorney General for Pakistan has filed separate comments.

The matters relating to the payment of compensation of the private land acquired for the purpose of construction of Diامر Bhasha Dam and the boundary dispute between District Diامر Gilgit-Baltistan, and District Kohistan, Khyber Pakhtunkhwa, are subjudice before the respective forums namely Land Acquisition Collector, Diامر and Boundary Commission setup by the Federal Government and in view thereof, we have observed in the above order, not to extend our jurisdiction to these matters, and that the adjudication in the present petition would confine only to the question relating to the proportionate of the royalty of Hydro Electric Power generation from the two proposed Power Houses of Diامر Bhasha Dam.

Mr. Tariq Masood Project Director of the Diامر Bhasha Dam has explained the project in detail and in the light thereof, the Court proceeded to pass the Order on 17.08.2009 as under:-

“Mr. Tariq Masood Project Director Diامر Basha Dam (WAPDA) states that due to cancellation of flight Ch. Mushtaq Ahmed Khan, Mr. Muhammad Aslam Khakhi and Attorney General of Pakistan have not been able to reach to attend the Court, and has requested for a date after Eid-ul-Fitr. He states that the requisite report has been prepared and will be submitted by 25th August, 2009.

The Project Director has explained that as per plan of the project one power house is to be constructed on the right side and one on the left side of the Dam for generation of power. The power house on the right side of the Dam is located within the territory of Northern Areas whereas the location of Power House on the left side is in the area presently included in District Kohistan of NWFP. The dispute in respect of royalty would be to the extent of this power house because the claim of Northern Areas is that the area on the left

side of the Dam is also territory of Northern Areas. Whereas, the stand of NWFP is that this area being part of District Kohistan falls within the territorial limits of NWFP and royalty would be right of NWFP. The project Director states that royalty of the Power House on the right side of Dam undisputedly would go to Northern Areas and right of the royalty of Power House on the left side would be subject to the decision of boundary dispute between NWFP and NAs. He stated that Project is still at initial stages as neither any work has been stated nor the boundary dispute has been resolved and situation may change subsequently.

The issue relating to the right of royalty will certainly be decided in the light of rule of territorial nexus of the Dam and Power House and notwithstanding the boundary dispute between NWFP and Northern Areas, the existing position is that Power House on the left side of the Dam falls within the territorial limits of NWFP and on the right side in Northern Areas, therefore, right of royalty subject to the decision of boundary dispute will be determined accordingly.

The Northern Areas is not a Province under Article 1 of the Constitution of Pakistan but it having the independent status of Provincial Government may be impliedly treated a Province for the purpose of royalty under Article 161 of the Constitution.

The next question requiring determination would be as to whether the land with other equipment used for the installation of power house are treated as part of Dam or the power house is independent and is not included in Dam, therefore the dispute in respect of royalty will be decided accordingly in terms of Article 161 of the Constitution.

The Provincial Government of NWFP is necessary party, we therefore, direct that A.G NWFP will appear on the next date. The matter is of National importance and if the Attorney General of Pakistan cannot appear before this Court due to other engagements, he may depute the Senior Deputy Attorney General to assist the Court.

Mr. Muhammad Issa, Senior Advocate, and President Supreme Appellate Court Bar Association Gilgit has submitted that the Provincial Government of Northern Areas and NWFP are directly involved in the matter, therefore both these Governments may be asked to submit their comments and similarly the comments of Ministry of Water & Power Government of Pakistan being controlling Authority are necessary.

In view of the nature of dispute, we direct that Chief Secretary Northern Areas and Chief Secretary, NWFP should submit their comments in the matter before the next date. The Secretary Water & Power Government of Pakistan Islamabad may also submit comments for assistance of the Court. The case is accordingly adjourned to a date to be fixed by the

office in the first week of October, 2009 under prior intimation to the Project Director and the Learned Counsels from outside Gilgit. “

Mr. Waqar Ali Khan, learned Deputy Advocate General Khyber Pakhtunkhwa opposed this petition firstly on the ground that pending decision of Boundary Commission on the boundary dispute between District Diamer Gilgit-Baltistan and District Kohistan Khyber Pakhtunkhwa, the proceedings in this petition may have no legal efficacy because the issue involved therein is directly connected with the issue of royalty of Hydro Electric Power Stations of Diamer Bhasha Dam and secondly, Province of Khyber Pakhtunkhwa, under Article 161 (2) of the Constitution of Pakistan also being entitled to the royalty of Hydro Electric power generation from one Power House of the Dam on left side of River Indus in the area of district Kohistan, is not subject to the territorial jurisdiction of this Court, therefore, in the light of provision of Article 184(1) of the Constitution of Pakistan, this Court may have no right of adjudication of the matter.

5. The learned Deputy Attorney General for Pakistan on the other hand without raising objection to the jurisdiction of this Court has submitted that in view of the nature of right and interest of the people of Gilgit-Baltistan and province of Khyber Pakhtunkhwa, the matter is of immense importance which certainly requires determination and decision on merits but since the boundary dispute is directly linked with the issue of royalty of the power house of Diamer Bhasha Dam, therefore till the decision of boundary dispute by the Boundary Commission this Court may not proceed in the matter involving substantial right and interest of parties. The learned Deputy Attorney General precisely argued that undoubtedly the proposed Dam as a whole is situated within the territorial limits of District Diamer of Gilgit-Baltistan but as per existing boundary of the two districts, of different jurisdiction, the Government of Gilgit-Baltistan may not be able to claim entire royalty of Power House, the installation of which falls in the area of District Kohistan of province of Khyber Pakhtunkhwa.

6. Mr. Muhammad Issa, learned Sr. Advocate, Supreme Appellate Court Gilgit-Baltistan, assisting the Court as amicus curie has submitted that the boundary dispute has no nexus with the issue of royalty of electricity generation, which cannot be decided merely on the basis of location of installation of one Power House in the area of District Kohistan and in that, the decision of the Boundary Commission will not affect the legal and factual position in respect of claim of Government of Gilgit-Baltistan in the royalty of power house on left side of River Indus, for the reason that ultimate decision of boundary dispute in favour of Government of Khyber Pakhtunkhwa (NWFP) will not create left of more than one half share in the royalty of the power house on the right bank of River Indus and similarly at the maximum Government of Gilgit-Baltistan, may not be able to get more than one half share in the royalty of this power house.

7. The learned counsel has forcefully argued that the area of District Kohistan on left bank of River Indus where the machinery of power house is to be installed is subject matter of dispute before the

Boundary Commission and this area was actually part of District Diamer which was subsequently included in District Kohistan for administrative reason and was never a natural part of District Kohistan, therefore, the claim of province of Khyber Pakhtunkhwa on the basis of provision of Article 161(2) of Constitution of Pakistan, has no foundation and further the constitution of Pakistan is not applicable with mandatory force in Gilgit-Baltistan as no provision of the Constitution of Pakistan can be invoked for the benefit of any other part of Pakistan adverse to the interest of Gilgit-Baltistan. Consequently, the province of Khyber Pukhtunkhwa, in principal cannot claim any right in the royalty of electricity generation from the power house proposed to be constructed on the disputed area on left bank of River Indus on the basis of provision of Article 161(2) of the Constitution of Pakistan.

8. The interim orders passed during the proceeding are reproduced hereunder for better application of the complex questions of law and facts involved in this matter.

“Order dated: 07-10-2009

Advocate General Gilgit-Baltistan and Deputy Advocate General NWFP (Barrister) Waqar Ali, along with DCO Kohistan and Mr. Muhammad Issa, Advocate, President Supreme Appellate Court Bar Association Gilgit-Baltistan are present, comments on behalf of Chief Secretary Gilgit-Baltistan as directed by this Court are not submitted as yet. The Advocate General is directed to make it sure that the said comments are furnished before next date of hearing Attorney General Government of Pakistan was also called but he is not in attendance. The Advocate General Gilgit-Baltistan states that a high powered boundary commission headed by Deputy Chairman Planning commission has been constitute by Government of Pakistan for demarcation and settlement of dispute regarding boundaries between Gilgit-Baltistan and NWFP, but the said commission has not finalized its recommendations as yet. Deputy Advocate General NWFP submits that comments on behalf of Government of NWFP have already been submitted. Attorney General of Pakistan may also be informed to make his attendance on next date and in case of his other engagements he may depute Senior Deputy Attorney General to assist the Court

Order dated: 08-11-2009

Mr. Waqar Ali Khan Deputy Advocate General NWFP has sought permission to file further comments on behalf of government of NWFP. He may do the needful before the next date. The learned Deputy Advocate General however submitted that the hearing of this matter may be postponed till the decision of the Boundary Commission on the boundary dispute in respect of the left side of the Basha Dam where the proposed Power House is to be constructed which is presently included in the territory of Province of NWFP whereas the

claim of Gilgit-Baltistan is that it is part of Gilgit-Baltistan therefore without the demarcation of boundary, it would not be possible for this Court to determine the question relating to the right of royalty of the Power House.

The learned Deputy Advocate General also has raised objection to the jurisdiction of this Court to entertain this petition and adjudicate the dispute of royalty in which province of NWFP is a party.

Mr. Raja Muhammad Aleem Abbasi, Deputy Attorney General for Pakistan representing the Attorney General for Pakistan and Federation has submitted that undoubtedly the question of royalty of Power House is linked with boundary dispute and the decision of Boundary Commission would be relevant for the determination of the right of royalty, which is to be decided by the competent forum in the Federal Government in due course of time, but in any case in view of the importance of issue involved in this petition the same requiring decision on merits cannot be thrown away on the basis of technical objection.

Learned Deputy Attorney General has submitted that the comments filed on behalf of the WAPDA may be treated comments on behalf of the Ministry of Water and Power, Government of Pakistan and that KA & NA division, Government of Pakistan for want of notice has not filed comments. He submitted that the Secretary KA & NA Division is also member of Boundary Commission therefore comments of KA & NA Division, Government of Pakistan are necessary for effective decision of the matter.

Mr. Muhammad Issa, Sr. Advocate and President Supreme Appellate Court Bar Association, has appeared as Amicus on the request of Court. He submitted that the boundary dispute as such has no nexus with the question of royalty as the right of royalty cannot be determined merely on the basis of ownership of land to be used for the Power House or only on the basis of right of water and thus without taking into consideration the accumulative effect of the above rights, the question relating to royalty cannot be decided.

The Project Director of the Basha Dam has informed us that due to the delay in the announcement of the award the construction of the project cannot be started by the target date fixed in December 2009 and as soon as the award is announced by the Land Acquisition Collector and physical possession of the land is handed over to WAPDA, the work will be started without any further delay.

Mr. Subtain, Deputy Secretary, Home Department of Gilgit-Baltistan states that the comments of the Chief Secretary are ready which will be filed within short time and that the Land Acquisition Collector has not been able to announce the award because of dispute of land owners on the

rate of compensation of land. This may be pointed out that land acquisition collector on the basis of determination of market value of land in terms of Section 23 of the Land Acquisition Act 1894 has to announce the award and any dispute in respect of the compensation is to be resolved by the concerned forum in due course of time, this is not understandable that why the announcement of the award is being withheld which may delay the project with loss of public time and exchequer as well as foreign aid for the project.

The matter being very important and sensitive the concerned authorities must settle the issue relating to the compensation of land on priority to start the work as early as possible.

The question relating to the determination of royalty may not be depending on the decision of Boundary Commission but we adjourn this matter as the comments of KA & NA Division, Government of Pakistan and the Chief Secretary, Gilgit-Baltistan are awaited. The Chief Secretary, Gilgit-Baltistan and KA & NA Division, Government of Pakistan will be asked for submission of comments before the next.

The Collector Land Acquisition also proceeding expeditiously should announce the award within two months to avoid delay in the construction of dam. This case is accordingly adjourned to a date in office on reopening of court after winter vacations. The office will convey this order to all concerned for necessary action.

Order dated: 16-03-2010

The Learned Advocate General states that due to other engagements, the Chief Secretary of the Provincial Government of Gilgit-Baltistan has not been able to submit his comments and the KANA Division has also not been able to submit comments and thus has requested for further time. The needful should be done by the KANA Division and Chief Secretary Gilgit-Baltistan within three weeks and case is accordingly adjourned for a date in the second week of April 2010.

The Advocate General NWFP and the Deputy Attorney General shall be intimated about the date with direction to appear for assistance of the Court.

Mr. Javed Iqbal Advocate learned counsel for WAPDA submitted that project is still at initial stage. Project Director Basha Dam stated that the dispute relating to the compensation of land almost has been settled and on final approval by the competent authority, award will be given on the basis of price mutually settled in the agreement with the land owners.

Order dated: 13-04-2010.

The Chief Secretary Gilgit-Baltistan and KANA Division have not furnished their comments in spite of lapse of

considerable time.

The Advocate General Gilgit- Baltistan submits that the comments will be submitted within 10 days. The Advocate General NWFP has sent an application for adjournment. District Revenue Officer Kohistan Mr. Muhammad Rafique present in person, while WAPDA is represented by Mr. Javed Iqbal Advocate. The Advocate General and Counsel for WAPDA submitted that dispute between the land owners and WAPDA authorities has been settled regarding compensation of land. However, the award has not been given by the collector and as soon as the rates of the land are approved by the competent authority, the award will be passed by the collector and compensation will be paid to the owners of the land.

The Advocate General submits that the mode of payment of compensation has also been settled by the Dispute Resolution Committee and the payment will be made accordingly. The case adjourned to 26-04-2010, for further proceedings.

Order dated: 26-04-2010.

Learned Deputy Attorney General appearing on behalf of the Federal Government and learned Advocate General Gilgit- Baltistan after arguing the case at some length have jointly requested for time to further prepare the various legal and constitutional questions involved in the matter. Mr. Javed Iqbal Advocate appearing on behalf of WAPDA, Mr. Muhammad Issa, Sr. Advocate Supreme Appellate Court and learned Deputy Advocate General NWFP (Khyber Pakhtoon Khwa) are ready to argue the case today but in view of the request of Deputy Attorney General for Pakistan and raned Advocate General Gilgit-Baltistan we adjourn this matter as part heard for 18-05-2010.

Order dated: 18-05-2010.

The Deputy Advocate General government of Khyber Pakhtoon Khwa has sent an application for adjournment on the ground that due to bad weather condition the flights are not available between Islamabad and Gilgit, the Deputy Attorney General, Government of Pakistan is also absent without any intimation.

The Advocate General Gilgit-Baltistan states that the comments on behalf of Chie Secretary Gilgit-Baltistan have already been submitted, and are placed on record.

Advocate General requests for exemption of personal appearance of Deputy Commissioner Diamer. The said official shall attend the court as and when required.

The case is adjourned to a date in office for further proceedings.

Order dated: 17-06-2010.

This is part heard matter and we reluctantly grant request for adjournment made on behalf of the Deputy Attorney General for Pakistan and Advocate General Khyber Pakhtoon Khwa. The learned Advocate General Gilgit-Baltistan also wants to supplement the comments. This matter is accordingly adjourned to a date in office immediately on reopening of the Court after summer vacations.”

9. The proceedings in the matter were concluded on 07-10-201- and we after hearing Mr. Muhammad Issa, Sr. Advocate and President Supreme Appellate Court Bar Association Gilgit- Baltistan Amicus Curie, Mr. Muhammad Aleem Abbasi, learned Deputy Attorney General for Pakistan, Mr. Asadullah Khan, learned Advocate General Gilgit-Baltistan, Mr. Muhammad Javed Iqbal, the learned Counsel for WAPDA, Mr. Waqar Ali Khan, learned Deputy Advocate General, Government of Khyber Pakhtunkhwa assisted by DCO Kohistan and having gone through the comments filed on behalf of all concerned have examined the matter in detail with the help and valuable assistance rendered by the learned counsel for the parties and disposed of this matter, in the light of the relevant provision of Constitution of Pakistan read with Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, as well as national and international law on the subject.

10. The preliminary question requiring determination relates to the jurisdiction of this Court to adjudicate the matter and to entertain this petition under Article 27 of the Northern Areas Governance (Amended) Order 1994 substituted by Article 61 of Gilgit-Baltistan (Empowerment and Self Governance) Order 2009. The question of jurisdiction and maintainability of this petition alongwith other questions involved therein would require examination in the light of the comments of the parties which are reproduced as under:-

“In re: **S.M.C. NO. 10/2009- DIAMER BASHA DAM
PETITION BY BASHIR AHMED KHAN OF DISTRICT
DIAMER.**

Sub:- **COMMENTS ON BEHALF OF WAPDA**

Respectfully sheweth:

The comments on behalf of WAPDA (answering respondents) are submitted here-under:-

- That the persons likely to be affected by the construction of the Diamer Basha Dam shall be compensated strictly in accordance with the law and the WAPDA will take care of each and every affected person and will make no discrimination whatsoever in the payments as well as other benefits in the payments as well as other benefits for which affectees would be entitled.

- That the payment of the royalty of the electricity to the people of the Northern Areas and the demarcation of the boundary between Diamer District of Northern Areas and District Kohistan of NWFP needs resolution and for that the necessary parties are the Government of the NWFP and the Government of the Northern Areas, which may kindly be made parties of deemed appropriate.
- It is worth mentioning that Diamer Basha Dam is one of the biggest projects of Pakistan meant for water storage for irrigation purposes and generation of 4500 megawatts of electricity. There would be two generating Units of the Project each having capacity of production of 2250 megawatts of electricity. One power House is situated exclusively in the Northern Area while the other lies on the left Bank in the area over which there is a dispute between the Government of the NWFP and the Northern Areas. A detailed map showing proposed dam and location of the Power Houses and high- lighting the area under dispute is attached (Annex-I).
- That the Government of Pakistan (Kashmir Affairs and Northern Areas Division) through Notification No. F.9(9)/2007-NA-I dated 6.12.2007 (Annex: II) has already constituted a high powered boundary commission consisting of the following to settle the boundary dispute:-
 - Deputy Chairman, Planning Chairman
Commission
 - Secretary, KANA Division Member
 - Chief Secretary, NWFP Member
 - Chief Secretary, NAs Member
 - A representative each from From
NWFP & NAs.

Further proceedings of the Commissions and the final outcome thereof is still awaited.

- That WAPDA being the executing agency is not a position to settle the Constitutional issue at its own which are to be settled between the Government of the Northern Areas and the Government of the NWFP.

Under the circumstances, it is humbly prayed that the petition may kindly be dismissed and the decision of the Commission referred to above may kindly be awaited.

-sd-Tahir
Masud
Project Director DBDP for
Chairman WAPDA

Comments of Government of Khyber Pakhtunkhwa (NWFP)

Subject: **SUO MOTO CASE IN DIAMER BASHA DAM
ISSUE**

Comments of Chief Secretary Government of NWFP. Solicited vide your Notice dated 22-08-2009 issued by Registrar in SMC No. 10/2009 are as follows.

Preliminary Objections

- That this august Court has got no jurisdiction to adjudicate upon any matter which comes within the definition of article 184 of the Constitution of Pakistan.
- The Court does not have jurisdiction to take cognizance to determine boundaries between two governments, or determine matters related to royalty of hydel power as they do not in any way fall under the definition of "fundamental rights" thus not covered under Article 27 of the Northern Areas Governance Order 1994 as amended from time to time.

On Facts

- The tribal territories of Kohistan comprising of Sazin, harban (where Basha is situated), Shatial etc. upon the written of their representatives to the Governor General, were added to erstwhile Hazara district through the North West frontier Province (Enlargement of the area and alteration of Boundary) Order 1955. The area now being claimed by the Northern Areas has been and is the property of Harbanwals and extends up to Basher Gah.
- Tribal territories as defined in Section 311 of the Government of India Act 1935 are the areas that neither form part of a province or a princely state. The areas added to erstwhile Hazara district being tribal territories of Kohistan were never part of Kashmir State or in any way under its administrative control before partition of Indian subcontinent. Therefore assertion that the area at any point of time remained part of Kashmir State and now of Northern Areas is factually and legally incorrect.
- Even if the Court forms the view, for any purpose, that the area was not tribal area, the written expression of consent given by the people of the area (Harban, Shatial etc.) to be added within the NWFP (erstwhile HAZARA District) has become past and closed transaction and thus attained finality.
- Section 34(a1) of the General Clauses Act 1897 as amended by Central Laws (Statute Reform) Ordinance, 1960 (with effect from 14th October 1955) and Section

39(a) of the West Pakistan General Clauses Act 1956 both define North West Frontier Province immediately before the fourteenth day of October 1955. Therefore opening a closed transaction after more than 50 years or amending provincial territories as accepted in the Constitution of Islamic Republic of Pakistan 1973 is beyond the competency of this Court.

- The Government of NWFP has been exercising administrative and judicial control of the area after October 1955 which is evident from the fact that land acquisition for Karakoram Highway up to Basherri Gah was done by Land Acquisition Collector Kohistan, criminal cases were registered in Police Station Basha and tried by courts set up by the Government of NWFP, and cases having cause of action arising in area adjudicated upon by civil courts of NWFP.
- The Surveyor General of Pakistan has clearly demarcated the boundary by a continuous line, now being taken up by this Court for determination; as an afterthought the words "Disputed Area" were stamped on one of the map sheets. It may be noted that where ever the delineation of boundary is disputed, the same is shown in broken line.
- Article 1 of the Constitution of Islamic Republic of Pakistan 1973 includes NWFP as territory of Pakistan, as such the jurisdiction of this Court does not extend to areas/territories defined as part of NWFP, therefore the Court does not have the jurisdiction to take suo moto notice or entertain the matter otherwise.
- Northern Areas for administrative purpose are under the control of the Federal Government. In case of a dispute between two governments as in the present case i.e. the Federal (inclusive of Government of Northern Areas) and NWFP governments, the supreme Court of Pakistan has the original jurisdiction to the exclusion of every other court, thus barring the Supreme Appellate Court Northern Areas from taking up any matter related to another government.

It is humbly prayed that on acceptance of these comments the SMC may be dismissed/withdrawn.

Chief Secretary, Government of NWFP

Comments of Government of Gilgit-Baltistan

No. SOH-62/2009(DBD)
Government of Gilgit-Baltistan
The Department of Home,
Gilgit-Baltistan Secretariat.

Dated the 1st Feb. 2010.

To,

The Assistant Registrar (J)
Supreme Appellate Court,
Gilgit-Baltistan,
GILGIT.

Subject:- **S.M.C. NO. 10/2009 (DIAMER BASHA DAM).**

I am directed to refer to your letter No. 10/2009 dated 10th December 2009 on the above subject and to submit the comments of the Gilgit-Baltistan Administration on the subject petition. Examination of the plaint reveals that primarily 5 issues have been highlighted by the petitioner. These issues may be summed up as:-

Issue No-1. That the affectees of the Dam should be paid compensation of land @ Rs. 20,00,000/- per kanal, trees @ Rs. 50,000/- per tree as well as houses.

Issue No-2. Construction of residential houses for dam affectees.

Issue No-3 Appointment against project posts from amongs the affectees.

Issue No-4 Payment of royalty of dam to people of Gilgit-Baltistan.

Issue No-5 Demarcation of boundary between Diamer and Kohistan.

Comments of Gilgit- Baltistan Administration on the above issues are as under:-

Issue	Comments
Issue No-1	Land compensation rate is the biggest issue which blocked any progress on physical work of Dam. The Collector Diamer last notified rates in the year 2008 according to which it was 5,80,00/- cultivated whereas the Dam Affectees demanded Rs. 25,00,000/- per kanal cultivated. So there was a difference of Rs. 19,20,2000/- between what the affectees were demanding and what the Collector had notified. In order to resolve this issue the Chief Secretary Gilgit-Baltistan constituted a committee headed by Secretary Home GB comprising of WAPDA and main representatives of the affectees. After many sessions, this committee agreed on a formula of compensation rates which was around Rs. 12,00,000/- per kanal for commercial/cultivated areas

	<p>besides other rates for different categories of land. WAPDA however prepare its PC-1 on the basis of the rates last notified by Collector and got the same approved from the Prime Minister without taking the aggrieved affectees into confidence. Resultantly, when the proposal of compensation rates as worked out by the committee headed by the Secretary Home GB was sent to WAPDA, they expressed their inability to incorporate the new rates because it entailed huge financial implications besides PC-1 had already</p>
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	<p>been approved by the ECNEC. Consequently, the Gilgit-Baltistan Administration presented the proposal worked out with the affectees to the Prime Minister on 30-9-2009 in Gilgit. Subsequently, the Prime Minister was pleased to constitute a committee to further analyze the proposal and resubmit to the Prime Minister fine-tuned for approval. This committee has so far not finalized its job.</p>
Issue No-II	<p>Construction of six model villages for the affectees has already been planned by WAPDA in their resettlement plan.</p>
Issue-III	<p>This issue already stands resolved in the meeting held under the Chairmanship of the Chief Secretary GB on 28-02-2009 whereby it had been decided that preference in appointments on all non technical posts of the Dam will be given to the people of District Diamer.</p>
Issue No-IV	<p>This issue is directly linked to the boundary dispute between Gilgit-Baltistan and Kohistan NWFP because of the fact that six of the twelve turbines are to be installed in the disputed area in the left bank of Indus river. In view of the sensitivity of this issue the Prime Minister has already constituted a Boundary Commission headed by the Deputy Chairman, Planning Commission to resolve the issue. The decision of this commission is awaited.</p>
Issue No-V	<p>As explained in issue No-IV above</p>

Hence comments are offered.

-sd-

**(Sibtain Ahmed)
Deputy Secretary Home
PH#05811-920219”**

11. The Deputy Advocate General Khyber Pakhtunkhwa during the proceeding by making an application, sought dismissal of this petition on the question of jurisdiction and also on merits as under:-

“APPLICATION FOR DISMISSING/WITHDRAWING THE SUO MOTO NOTICE ON THE GROUND OF JURISDICTION AS THE SUBJECT MATTER INCLUDES ISSUES/DISPUTES BETWEEN TWO GOVERNMENTS I.E. THE GOVERNMENTS OF NWFP AND GILGIT-BALTISTAN.”

Respectfully

Sheweth; FACTS

- That, the captioned case is fixed for hearing before this Hon’ble Court wherein the next date of hearing is 26.4.2010.
- That, the Government of NWFP has filed comments as per directions of this Hon’ble Court, wherein a preliminary objection has been raised to the jurisdiction of this Hon’ble Court in light of the provisions of Article 184 of the Constitution of Pakistan 1973.
- That, this application is submitted for dismissal/ withdrawal of the instant case on the following grounds amongst others;

GROUND

- Because, Article 184 of the 1973 Constitution provides that, “184(1). The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.” EXPLANATION to 184(1) provides that, ‘In this clause, ‘Governments’ means the Federal Government and the Provincial Governments”.
- Because, Northern Areas Court of Appeals (Establishment) Order, 1999 provides in order 1 that it extends to the whole of Pakistan and in Order 2(1) government has been defined as the Government of Pakistan.

It is, very humbly submitted that when the Suo Moto notice was taken by this Hon’ble Court on the application

of a resident of District Diamer, the Northern Areas were governed by the Governance Order, 1994, as amended by Northern Areas Council Legal Frame Work (amendments) Order, 1999. Hence, at the time of taking ‘ the notice’ the boundary dispute, for the purpose of Article 184, was between the Government of Pakistan and the Government of NWFP i.e. The Federal

Government and a Provincial Government.

- Because, Lahore High Court in 2005 was face with similar question, which was answered in its judgment reported in 2005 CLC 905 (Lahore). Citation B on page 909 of the judgment states that dispute, as to which of the Government (i.e. the Federal Government and the Government of Punjab) was the owner of the disputed property, fell within the ambit and exclusive jurisdiction of Article 184(1) of the 1973 Constitution. For the convenience of reference and academic enlightenment an extract from the said judgment is reproduced below;

“Para 6. The plain reading of the above provisions of the Constitution would show that whenever there is any dispute between any two or more Governments, the original jurisdiction of the Supreme Court gets attracted to the exclusion of every other court. The Object of this provision of the Constitution which is almost identified with the provision in the erstwhile constitutions was highlighted in the commentary on the Constitution of Islamic Republic of Pakistan, 1973 by the late Justice Muhammad Munir as under:-

“Object of the Article.--The underlying object of the article is that since in a federal system of a country as prevails in Pakistan, disputes may arise between Federal or Central Government and one or more Provincial Governments or between two or more Provinces there should be an Authority or forum with the Constitutional mandate for the resolution of such disputes. This forum has been provided in the Supreme Court which is the highest Court of the disputes may be obtained.”

- **Because, in the case of Senator Abdul Hayee, reported in PLD 1997 Quetta 37**, the Hon'ble Court held in Para 27 that, 27... On bare perusal of sub-article (1) Article 184 of the Constitution, it emerges that exclusionary clause has been inserted therein to bestow original jurisdiction upon Hon'ble Supreme Court of Pakistan, concerning disputes between any two or more Governments. It is manifest that framers of the Constitution, with intent to provide an exclusive judicial Forum to the federating Units and Federation itself, to settle their disputes, has conferred original jurisdiction upon the Hon'ble supreme Court, to pronounce declaratory judgments, in terms of sub-article (2) of Article 184 of the Constitution. Apparently object and aim of conferring such jurisdiction upon the Hon'ble supreme Court is that within the framework of the Constitution, at any juncture, when two federating units i.e provincial Governments of federation itself are at variance on any particular point, the High Courts functioning within the Province, would not be in a

position to effectively resolve the dispute, especially for want of territorial jurisdiction. It is known principle of interpretation of Constitution that its all parts should be understood, according to their practical significance and the phrases and words used therein should be defined in plain and unambiguous manner, in order to construe them in their original sense, without stretching them to cover the cases, which are never intended to govern”.

Furthermore citation G of the said judgment is also reproduced below for ready reference:

“The Hon’ble Supreme Court in above quotation has specifically laid down that jurisdiction demarcate the territories in which a particular Court shall function and over which its writ shall run. It may specify the person, in respect of whom, judicial powers to hear and determine, will be exercisable.”

- Because, the August Supreme Court of Pakistan in 2004 SCMR 1334, Pervez Iqbal Vs Federation (Para 7 at page 1337) that, provisions of Article 184 can be invoked by any citizen of Pakistan including the Northern Areas in matter of public importance involving the question of fundamental rights. At page 1338, it was held that the original jurisdiction of Supreme Court of Pakistan under Article 184 can be invoked in only two situations, i.e. case of dispute between any two or more governments and question of public importance with reference to the enforcement of any of the fundamental rights.

It is submitted, with utmost respect, that the resident of District Diamer who approached this Hon’ble Court for taking SUO MOTO notice of issues including boundary dispute between Gilgit-Baltistan and NWFP and issues of public importance relating fundamental rights ought to have approached the august Supreme Court of Pakistan, which has exclusive jurisdiction to pronounce declaratory judgments on subject matter or disputes between parties outside the territorial jurisdiction of this Hon’ble Court.

- Because, it was held (Para 12 at page 1391), in the Al-Jehad Trust case, reported in 1999 SCMR 1379, that it is an admitted position that the people of Northern Areas have the citizenship of Pakistan, in as much as they have been issued Pakistani identity cards and passports, they have reserved seats in Pakistani educational institutions and the Federal Government etc. It is an admitted fact that the Federal Government exercises De Jure administration in the Northern Areas. Pakistan has been exercising continuous effective occupation of the Northern Areas for the past 50 years with the intention to act as a sovereign. The International community in

general and the UNO, in particular, recognized the above position. Most of Pakistani statutes have been made applicable by the Government of Pakistan to Northern Areas e.g. the Pakistan citizenship Act 1951 etc.

- Because, even after the promulgation of Gilgit-Baltistan (Empowerment of Self-Governance) Order 2009, the instant boundary dispute is between two Governments. Article 2(h) of the said Order defines government as the Government of Gilgit-Baltistan, hence the dispute is between the Government of Gilgit-Baltistan and the Government of NWFP, which falls exclusively within the jurisdiction of the Supreme Court of Pakistan, which is competent to pass declaratory judgment relating to the Government of NWFP, at least.

It is therefore, most humbly submitted that this Hon'ble Court may graciously be pleased to dismiss/withdraw the instant SUO MOTO notice.

Government of NWFP

Through

Advocate General NWFP
Peshawar.”

12. The original jurisdiction for entertaining direct petition involving a question of public importance relating to the enforcement of Fundamental Rights contained in 19-A Northern Governance (Amended) Order 1994 and Chapter II (Articles 3 to 19) of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 is conferred to Supreme Appellate Court Gilgit-Baltistan under Article 27 of the Northern Areas Governance (Amended) Order 1994 substituted by Article 61 of the above order which provides as under:-

Original Jurisdiction:- (1) Without prejudice to the provisions of Article 71, the Supreme Appellate Court, on an application of any aggrieved party, shall if it considers that a question of general public importance with reference to the enforcement of any of the fundamental right conferred by Part II of this Order is involved, have the power to make declaratory order of the nature mentioned in the said Article.

The above Article of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 originate from Article 184(3) of the Constitution of Pakistan, which is read as under:-

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the fundamental right conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.

13. The plain reading of Article 61 of Gilgit-Baltistan Governance Order 2009, shows that Supreme Appellate Court Gilgit-Baltistan is empowered to take cognizance in a matter in which a question of public importance relating to the enforcement of any of the fundamental right conferred by Part II (Article 3 to Article 19) of the Gilgit-Baltistan (Empowerment and Self-Governance) Order, 2009 is involved. The Petitioner a resident of District Diamer with the consideration that Government of Gilgit-Baltistan has no independent source for development of the region and protection of the rights of people has filed this petition in representative capacity with the object of safeguarding the right and interest of people of the region of Gilgit-Baltistan in the royalty of electricity production of Diamer Bhasha Dam which may prove major financial source of Government of Gilgit-Baltistan.

14. The project of Diamer Bhasha Dam is considered most important and major source for the development of most backward area of Gilgit-Baltistan, where the people are deprived of even the basic necessities of life whereas they being the citizen of Pakistan are equally entitled to all facilities of life which are available to the people of other part of Pakistan. The Government of Pakistan through Government of Gilgit-Baltistan is constitutionally and legally obliged to protect the rights and interest of the territory of Gilgit-Baltistan for its economic development and better future of the people of this region, which is not possible without sufficient independent financial resource of region. The people of Gilgit-Baltistan have great expectation with the project of Diamer Bhasha Dam for development of their region as the source of royalty is being considered backbone of the future economy of Government of Gilgit-Baltistan, therefore, the question of royalty of Diamer Bhasha Dam is a matter of great public importance relating to the enforcement of Fundamental Rights of the people and would squarely fall within the ambit of Article 61 of Gilgit-Baltistan (Empowerment and Self Governance Order), for the purpose of adjudication by the Supreme Appellate Court Gilgit-Baltistan in its original jurisdiction. This Court in exercise of the power under the above Article may pronounce declaratory judgment in a matter of public importance relating to the enforcement of Fundamental Rights and similar power is available to the Chief Court Gilgit-Baltistan under Article 71 of the Governance Order. The difference of the scope of jurisdiction of two Courts is that Supreme Appellate Court Gilgit-Baltistan under Article 61 of Governance Order 2009 may not entertain a matter pertaining to individual grievance for enforcement of a Fundamental Rights.

15. The Government of Gilgit-Baltistan primarily being part of sovereign state of Pakistan with internal independence is under legal obligation to discharge the duty of protecting the rights of the people of Gilgit-Baltistan in particular the rights of basic necessities of life, property, food, health and comfort of people which have priority and in that under the doctrine of *Parens Patriae* which recognizes the principle that in the matter of sovereign interest, the state authority is

deemed to represent all its citizens, the Government of Gilgit-Baltistan in all matters of public importance is deemed to protect the public interest and represent the people of Gilgit-Baltistan. This principle of *parens patriae* is not only a necessary recognition of sovereign dignity but is also a rule for good governance with the duty of protection of individual and collective rights of people and Government of Gilgit-Baltistan by all means is considered the custodian of the rights of people of the region in which the right of royalty of Diamer Bhasha Dam is included being directly implicated proportion of inland waters of Indus River flowing in the territory of Gilgit-Baltistan. The Government of Gilgit-Baltistan is thus, legally obliged to protect the interest of people of Gilgit-Baltistan in the royalty of Bhasha Dam in equitable proportion and in all other matters in which the people of Gilgit-Baltistan have substantial interest and are bound by the action of their Government. The real beneficiary of royalty of Diamer Bhasha Dam are people of Gilgit-Baltistan through the Government of Gilgit-Baltistan, therefore, subject to all just exceptions the Government of Gilgit-Baltistan is transposed as petitioner in this direct petition and Advocate General Gilgit-Baltistan will represent the Government accordingly.

16. Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 manifestly has been issued by the Government of Pakistan under Article 258 of the Constitution of Pakistan, 1973, in the form of a sub-Constitutional document for political empowerment and self governance by the people of Gilgit-Baltistan through legislative, executive and judicial reforms. This Governance Order extends to whole of Gilgit-Baltistan, comprising of Districts Astore, Diamer, Ghanche, Ghizer, Gilgit, Hunza Nagar and Skardu. The People of Gilgit-Baltistan have been described as citizens under Article 2(b) of the above Governance Order for internal purposes and Government of Gilgit-Baltistan has been defined under Article 2(h) whereas, in Article 2(m) the property has been defined as under:-

- (i) "Property" includes any right, title or interest in property, movable or immovable, and any means or instruments of production.
- (ii) The Royalty is an intellectual property which in legal terms is a right and interest in moveable property.

17. The territory is defined a geographically area included within the jurisdiction of a particular Government or the portion of earth's surface, which is in exclusive possession and control of a state. The region of Gilgit-Baltistan in the light of above definition of territory has special status of "Area" in terms of Article 1(2) (d) of the constitution of Pakistan which impliedly forms part of territory of Pakistan but it is neither a province of Pakistan nor Government of Gilgit-Baltistan has been established under the Constitution of Pakistan rather the provincial setup of Government of Gilgit-Baltistan is under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and cannot be treated at par to the Provincial Government of a Province of Pakistan established under the Constitution of Pakistan

for the purpose of Article 161 (2) or Article 184(1) of the Constitution of Pakistan.

18. Article 184(1) provides as under:-

iii. **“184. Original jurisdiction of Supreme Court.** (1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in, any dispute between any two or more Governments.

19. The ‘Government’ under this Article of Constitution of Pakistan means the federal and provincial governments established under the Constitution, therefore, the judicial determination of the controversy over a matter between the Federal Government and a provincial Government or two Provincial Governments inter se, would squarely fall within the ambit of Article 184(1) of the Constitution of Pakistan and Supreme Court of Pakistan is exclusive forum for adjudication. The Government of Gilgit-Baltistan being not a Provincial Government under Constitution of Pakistan is not subject to the jurisdiction of Supreme Court of Pakistan under Article 184(1) of the Constitution of Pakistan. Whereas Supreme Appellate Court, Gilgit-Baltistan having original jurisdiction under Article 27 of the Northern Areas Governance (Amended) Order 1994 substituted by Article 61 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 similar to the jurisdiction of Supreme Court of Pakistan under Article 184(3) of the Constitution of Pakistan is empowered to entertain any matter of public importance relating to the enforcement of fundamental rights of people of Gilgit-Baltistan and the issue subject matter of this petition is a question of public importance relating to the enforcement of Fundamental Rights of the People of Gilgit-Baltistan.

20. The Supreme Appellate Court was established under Northern Areas Governance (Amended) Order, 1994 in consequence to the direction given by the Supreme Court of Pakistan to the Federal Government of Pakistan in the Case title Al-Jehad Trust VS Federation of Pakistan (1999 SCMR 1379) wherein the Court with reference to the judgment in Superintendent Land Customs, Torkham VS Zewar Khan and Others (PLD 1969 SC 485) defining the territory of state, held that executive authority of the state, in exercise of its sovereign power has the right to say as to which territory is recognized as a part of its state and courts are bound to accept this position. It was observed by the Supreme Court of Pakistan that if any doubt is felt with regard to the status of land or the territory, it would be incumbent upon the Court to make a reference to the government and to accept the opinion taken by the government in respect of the status of territory and by entertaining the petition in original jurisdiction under Article 184(3) of the constitution of Pakistan observed as under:-

b. “The people of Northern Areas are Citizens of Pakistan, for all intents and purpose of Citizen of Pakistan under citizenship Act 1951 would have the right to invoke the Jurisdiction of Court for enforcement of the fundamental rights as contained in Part II Chapter I of the Constitution of Pakistan involving a question of Public

Importance.”

In view of the special status of the region of Gilgit-Baltistan under Constitution of Pakistan, the Supreme Court of Pakistan had given direction to the Federal Government of Pakistan for providing highest independent judicial forum to the people of Gilgit-Baltistan within the framework of Northern Areas Governance Order, 1994 as under:-

- i. “As regards the right to access to justice through an independent judiciary, it may be observed that the Northern Areas has Chief Court, which can be equated with a High Court provided it is manned by the person of the stature who are fit to be elevated as Judges to any High Court in Pakistan. Its jurisdiction is to be enlarged as to include jurisdiction to entertain Constitutional Petitions inter alia to enforce the Fundamental Rights enshrined in the Constitution and to provide right to approach a higher forum through a petition for leave to appeal right to approach a higher forum through a petition to leave to appeal and/or by way of an appeal against orders/judgments of the above Chief Court.”

21. In consequence thereto the Government of Pakistan at the first instance established the Court of Appeal in Northern Areas as final court in all judicial matters almost equal to the status of Supreme Court of AJ&K and then by making an amendment in Northern Areas Governance Order, 1994 in 2007 changed the nomenclature of Court of Appeal as Supreme Appellate Court and under ‘Judicature’ Chapter in Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, the status of the Supreme Appellate Court has been equated with the status of Supreme Court of Pakistan within the territory of Gilgit-Baltistan. The Supreme Appellate Court Gilgit-Baltistan having the status of apex court in Gilgit-Baltistan undoubtedly has independent and absolute jurisdiction in respect of all matters in which the legal and constitutional rights of the people of Gilgit-Baltistan including all those Human Rights which are recognized as legal rights and are not indiscriminate to the Fundamental Rights guaranteed under the Constitution of Pakistan and Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009.

22. The people of Gilgit-Baltistan undoubtedly by virtue of Citizenship Act 1951 of Pakistan have the status of citizen of Pakistan and may have also entitled to all privileges of citizen but may not have all Constitutional rights available to them at par to the people of other parts of Pakistan. Therefore, subject to the statutes of Pakistan made applicable to this special territory and territorial laws including Northern Areas Governance Order, 1994 since substituted by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 the people of this area before establishment of Court of Appeal and Supreme Appellate Court, Gilgit-Baltistan would certainly be entitled to invoke the Original jurisdiction of Supreme Court of Pakistan under Article 184 (3) of the Constitution of Pakistan in a matter relating to the enforcement of a fundamental right involving a question of Public importance in pursuance of the judgment of Supreme Court of

Pakistan referred above, but after establishment of Court of Appeal, and thereafter Supreme Appellate Court, Gilgit-Baltistan with the same power and Original Jurisdiction under Article 61 of the Governance Order, 2009 which is available to the Supreme Court of Pakistan under Article 184(3) of the Constitution of Pakistan, the invocation of original jurisdiction of Supreme Court of Pakistan under Article 184(3) of Constitution of Pakistan in any matter pertaining to territory of Gilgit-Baltistan would amount to abridge and curtail the jurisdiction of Supreme Appellate Court. The judgment of Supreme Court of Pakistan in Al-Jahad Trust Case supra being of transitory nature would no more acknowledge the right of people of Gilgit-Baltistan of invoking the original jurisdiction of Supreme Court of Pakistan under Article 184(3) of the Constitution of Pakistan in a matter in which Supreme Appellate Court Gilgit-Baltistan has the Original Jurisdiction.

23. Pakistan in an Islamic state and also signatory of universal declaration of human rights, therefore in the light of Islamic provision in the Constitution and also the international obligation, certain basic Human Rights which have been incorporated in Part II Chapter-I (Fundamental Rights) of the Constitution of Pakistan and in Part II of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 even if would have not been given the status of fundamental rights, the citizen of Pakistan including the people of Gilgit-Baltistan would have inherent right to claim protection of these basic Rights as Fundamental Rights in which right of access to justice is included and people of Gilgit-Baltistan have equal protection of this right without any discrimination. The Supreme Appellate Court Gilgit-Baltistan with the status of apex Court in Gilgit-Baltistan derives original jurisdiction under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 for enforcement of Fundamental Rights in the same manner in which the Supreme Court of Pakistan derives jurisdiction under the Constitution of Pakistan for enforcement of fundamental rights guaranteed under the constitution of Pakistan and consequently Supreme Appellate Court Gilgit-Baltistan has legal obligation to protect the right of access to justice of the people of Gilgit-Baltistan. The territory of Gilgit-Baltistan has no independent sovereign rather being under the control of Government of Pakistan for all intent and purposes is part of the sovereignty of Pakistan and after liberation from Dogra Rule in 1947 has been governed under various governance models. The first Governance Order was Northern Areas Legal Framework Order 1975 and second Order was Northern Areas Governance Order, 1994. The present Government of Pakistan subject to the international commitment with a view to bring the region at par to the provinces of Pakistan without awarding the constitutional status of province to Gilgit-Baltistan, by maintaining its special status, promulgated Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, for evolving the system of governance in the region with maximum devolution of powers. This Legal Framework Order is like AJK Interim Constitution Act 1974 where under the Supreme Court of AJ&K has been constituted as highest Court of Appeal of AJ&K and in the same manner, Supreme Appellate Court under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 has been established as highest court of appeal with the status of an apex court

in the region of Gilgit-Baltistan. This Court in addition to the original and appellate jurisdiction has also advisory jurisdiction and its judgment is binding on all Judicial and executive authorities in Gilgit-Baltistan in the light of Article 63 of the Order, 2009 and is not subject to the jurisdiction of any Court in Pakistan.

24. The question of royalty of power house of Diamer Bhasha Dam is certainly a question of public importance relating to the enforcement of fundamental rights of people of Gilgit-Baltistan and the present petition under Article 27 of the Northern Areas Governance (Amended) Order 1994 substituted by Article 61 of Governance Order 2009 has been filed by a bona fide resident of District Diamer in a representative capacity with the object to advance the cause of people of Gilgit- Baltistan for enforcement of their Fundamental Rights through the process of law, therefore, failure of Supreme Appellate Court to exercise the jurisdiction in the matter would amount to deny the right of access to Justice to the people. The object behind this petition is to watch and safeguard the collective interest of the people with the purpose of welfare and development of this poor region which is not a limited interest of limited class of people or of Government of Gilgit-Baltistan, rather it relates to the benefit of the people of whole of the region of Gilgit-Baltistan and consequently, the Supreme Appellate Court Gilgit-Baltistan cannot deny the adjudication of this matter of public importance relating to the enforcement of Fundamental Rights of people of Gilgit -Baltistan for mere reason that province of Khyber Pukhtunkhwa also having claim in the royalty of one power house of Diamer Bhahsa Dam is not ordinarily subject to the territorial jurisdiction of this Court or Government of Khyber Pakhtunkhwa (NWFP) can invoke the jurisdiction of Supreme Court of Pakistan under Article 184(1) of the Constitution of Pakistan in the matter. The Supreme Appellate Court Gilgit-Baltistan is a final Court in all judicial matters in Gilgit -Baltistan and decision of this Court is not subject to the jurisdiction of Supreme Court of Pakistan, therefore, notwithstanding the right of Khyber Pakhtunkhwa to invoke the jurisdiction of Supreme Court of Pakistan by the Province of Khayber Pukhtunkhwa under Article 184(1) of the Constitution of Pakistan, the judgment of this Court would independently hold field in respect of right of people of Gilgit-Baltistan and neither can be overruled nor annulled by the judgment of Supreme Court of Pakistan. The judgment of this Court is also not redundant by the contrary or conflicting judgment of the Supreme Court of Pakistan on an issue pertaining to the territory of Gilgit-Baltistan rather in such a case the Federal Government in consultation with council of Gilgit-Baltistan and by giving representation to the Government of Gilgit-Baltistan may take the matter to Council of Common Interest or place the same before the joint session of legislative assembly of Gilgit-Baltistan and parliament of Pakistan for decision.

25. In the light of principle of judicial supremacy the judgment of the Court of independent jurisdiction, on a question of law relating to the affairs of territory of its jurisdiction may operate with

binding force even beyond its territorial jurisdiction and consequently, the judgment of Supreme Appellate Court, Gilgit-Baltistan may also operate beyond the territory of Gilgit-Baltistan with the same legal force as within the territory of Gilgit-Baltistan. The Supreme Appellate Court Gilgit-Baltistan is highest judicial forum in Gilgit-Baltistan which has been established under a legal frame work Order issued by the Government of Pakistan with the status of legislative Court of last resort in Gilgit-Baltistan, therefore, it has final judicial authority with absolute jurisdiction to adjudicate all matters involving legal rights of the people of Gilgit-Baltistan and its judgments are not subject to the jurisdiction of any executive or judicial authority in Pakistan. The issue relating to the royalty of Electricity generation from Hydro electric power houses of Diامر Bhasha Dam is directly connected with the basic rights of the people of Gilgit-Baltistan, guaranteed under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, therefore, the claim of Province of Khyber Pakhtunkhwa in the royalty of one Power House of Diامر Bhasha Dam on left bank of river Indus in the area of District Kohistan may not affect the jurisdiction of Supreme Appellate Court Gilgit-Baltistan to adjudicate the matter.

26. The present status of territory of Gilgit-Baltistan may not continue indefinitely and ultimately on the settlement of issue of Kashmir, may become permanent part of the territory of Pakistan but presently it having been not as such defined as territory of Pakistan under the Constitution of Pakistan, is not strictly governed by the provision of the Constitution of Pakistan, therefore, the objection raised by learned Deputy Advocate General, Government of Khyber Pakhtunkhwa (NWFP) that this Court by virtue of Article 184(1) of Constitution of Pakistan has no jurisdiction to entertain this petition and adjudicate the matter involving issue of royalty of Diامر Bhasha Dam in which Province of Khyber Pakhtunkhwa is also claimant has no legal foundation because the right of the people of Gilgit-Baltistan in the royalty of Diامر Bhasha Dam is not essentially determinable in terms of Article 161(2) of the Constitution of Pakistan.

27. The Supreme Appellate Court Gilgit-Baltistan is not a constitutional Court rather it is a legislative court which has been created under Northern Areas Governance Order 1994, substituted by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and this Court in exercise of its power of judicial review can examine any matter relating to the legally recognized rights of people of Gilgit-Baltistan for judicial determination, in the light of principle of territorial jurisdiction according to which a Court of independent Jurisdiction in a territory is not supposed to exercise jurisdiction beyond the limits of territory but at the same time the Court within territory is under legal duty to exercise jurisdiction and render decision in a matter pertaining to territory in accordance with law. The Court of absolute jurisdiction cannot be precluded from adjudication of a matter pertaining to the specified territory rather the Court may in its discretion following the doctrine of abstention defer the proceeding in a matter which is subject matter of adjudication before a judicial forum or quasi judicial forum beyond its territorial jurisdiction till the disposal of such matter by such forum or authority and this principle of abstention does not

involve abdication of jurisdiction rather the exercise of jurisdiction for the time being is postponed. The doctrine of abstention also does not preclude a person who has the option to choose another forum beyond the territorial jurisdiction of Court pending conclusion of proceedings before the Court which has already assumed the jurisdiction, therefore, subject to the principle of judicial restraint, the adjudication proceedings before a Court may not create bar for a party to avail the remedy of alternate method of resolution of dispute before another forum, if any, provided under the law, but the choice of forum may not effect the decision of the Court of independent jurisdiction which has already adjudicated the matter and the decision of Court in its own right would operate as force of law in the matter within the jurisdiction of Court.

The rule governing the doctrine of abstention in exercise of the equitable jurisdiction is that if the court in its discretion considers that no special circumstance exist to postpone the proceedings in a matter before it, may not abstain from exercising jurisdiction as the doctrine of abstention is not a general principle to be applicable in each case, therefore, a Court of independent Jurisdiction may or may not exercise the discretionary power of postponing the proceeding even if the matter before it is also pending before another forum. In any case this principle is not attracted in the present case in which no special circumstance exist to postpone the proceedings as the issue subject matter of adjudication before this Court is neither pending before any other court in Gilgit-Baltistan or in Pakistan nor has earlier been adjudicated.

28. The power to create and establish the courts in a state is an attribute of sovereignty which may be exercised by means of constitutional provisions or authority of law. The courts established under the constitution of a country are constitutional courts and the courts established under ordinary law are legislative courts and all courts exercise jurisdiction in their respective domain to be regulated by the constitution or the law under which a court is created. The Constitution of state or an ordinary or special law or enactment of the parliament may authorize the Government to establish certain Courts of general or special jurisdiction but no Court without the authority of law or Constitution can validly be established and a Court established without such authority is not a de jure Court. Similarly, a Judge who is not appointed with lawful authority is not a de jure Judge or a Judge lawfully appointed if before assuming the office has not fulfilled prerequisite of his office under the Constitution or law as the case may be also is not a de jure Judge, rather such a Court or Judge is defacto Court and defacto Judge. The Courts established under the Constitution and law may lose their legal status on reorganization under extra legal or extra constitutional order and Judges of such Courts by taking Oath under such extra legal or extra Constitutional order may acquire the status of defacto Judges.

29. The judicial system of Gilgit-Baltistan is same as in Pakistan but judicial history of Pakistan is entirely different to the judicial history of Gilgit-Baltistan. In Pakistan in the past, judiciary has been victim of constitutional crises and the courts established under

the constitution have been accustomed to function under unconstitutional and extra legal order. The judges of the constitutional courts by taking oath under the extra constitutional order have been assuming the role of defacto judges and these constitutional courts with defacto judges in departure to the mandate of constitution have been providing legal cover to unconstitutional and illegal military regimes. The new era of constitutional rule was expected on promulgation of Constitution of Pakistan 1973, but unfortunately, within a period of about four years of promulgation of Constitution of Pakistan 1973, the then Chief of Army Staff imposing Martial Law in the Country on 5th July, 1977 held the constitution in abeyance and Supreme Court of Pakistan by extending legal support to the martial law regime validated the illegal action of Military take over in Begum Nusrat Bhutto's case (PLD 1977 SC 657). The unique feature of this case was that Supreme Court of Pakistan not only provided legal protection to the extra constitutional order/rule in the country but also authorized the Chief Martial Law Administrator to amend the Constitution and in consequence thereto through amendments in the Constitution Maglis-e-Shura (Parliament) was constituted by nomination. The amended Constitution was restored by revival of Constitution Order, 1985 and Parliament established thereunder validated all acts of the Military Regime including amendment in the Constitution. The subsequent governments setup under the constitution have been satisfactorily running the affairs of country but once again on 12th October, 1999 as a result of Military take over the elected Government was dismissed and constitution of Pakistan was held in abeyance by declaring the emergency in the country. The office of Prime Minister was usurped by the Chief Of Army Staff in the name of Chief Executive by issuing a Provisional Constitutional Order 1999 and judges of superior Courts of Pakistan unhesitantly acknowledging the illegal action of dismissal of lawful government by the Military Command willingly and anxiously taking oath under Oath of Office of Judges Order 2000 over and above their oath under the Constitution assumed the role of defacto Judges. This is a matter of record that except a few judges in the High Courts of Pakistan and the then Chief Justice of Pakistan Mr. Justice Saeed Uz Zaman Siddiqui alongwith his few other colleague Judges in the Supreme Court of Pakistan, declined to take oath under Provisional Constitutional Order, 1999, all other judges of superior Courts including some of the Judges who are still holding the office readily accepted the action of subversion of the constitution in deviation of their oath of office under the Constitution. The Supreme Court of Pakistan in well known case "Zafar Ali Shah v. Chief of Army Staff and others" (PLD 2000 SC 869) while providing legal cover to the action of Military take over on 12th October 1999, also permitted the Chief of Army Staff (Chief Executive) to amend the Constitution to run the affairs of state at his convenience and in pursuance thereof certain amendments were made in the Constitution through legal Framework Order 2002. The election of the Parliament and Provincial Assemblies were held under this legal framework Order and the Parliament established thereunder without any reservation validated the action of 12th October 1999 alongwith Provisional Constitutional Order 1999 and all other Orders including Oath of Office of Judges Order 2000 and also with slight change made

the Legal Framework Order 2002 as part of Constitution by way of 17th amendment in the Constitution in affirmation of the judgment of Supreme Court of Pakistan in Zafar Ali Shah's Case supra.

30. This was misfortune of the nation that in consequence to the validation given by the Supreme Court of Pakistan to the illegal and unconstitutional action of Military take over in the above referred judgments, the Parliament and Provincial Assemblies constituted during these Military regimes instead of declaring the illegal acts of removal/dismissal of lawful governments and subversion of Constitution by the Military usurpers as unconstitutional provided them legal protection in departure to the mandate of Constitution. The present Parliament of Pakistan to the contrary in 18th Amendment of the Constitution of Pakistan declared the proclamation of emergency of 12th October, 1999 alongwith Provincial Constitutional Order 1999 as illegal and unconstitutional as a result of which the judgment of Supreme Court of Pakistan in Zafar Ali Shah's Case supra expressly and in Begum Nusrat Bhutto's Case impliedly stood annulled and 17th Amendment in the Constitution except certain provision which have been expressly saved also has been repealed. The oath of office of Judges Order 2000 under which the Judges of Superior Courts in Pakistan in violation of their oath under the constitution have taken oath also has been declared illegal and notwithstanding the legitimacy provided to the appointment of the Judges who have taken oath under oath of office of Judges Order, 2000 with their continuation in office, the illegal act of taking oath by the Judges in constitutional deviation would not be cured and also would not be distinguishable to the act of taking oath by the Judges of superior Courts in Pakistan under Oath of Office of Judges Order, 2007.

In Consequence to the 17th Amendment in the Constitution, the de jure status of the Judges of Superior Courts in Pakistan was restored and during the intervening period all acts done and proceeding undertaken by the state authorities under extra Constitutional Command and unconstitutional government established in pursuance of the Judgment of Supreme Court of Pakistan in Zafar Ali Shah's case supra were condoned including the act of subversion of constitution and also the act of constitutional deviation of taking oath by the Judges under Oath of Office of Judges Order, 2000. The similar situation arised as a result of event of 3rd November, 2007, when the judges of constitutional courts in Pakistan by taking oath under Oath of Office of Judges Order 2007 in departure to their oath under the Constitution acquired status of defacto judges and on restoration of constitution of Pakistan on 15th December, 2007 the defect caused in their status as de jure judges was removed on their taking fresh oath under the Constitution. There is difference between the laws made by a usurper and acts done by the state authorities under such law or under an extra constitutional order and unless such laws and acts are given legitimacy by the Parliament in due process the same obviously would have no legal sanction and protection. This is however settled principle that if Parliament in general terms validates the acts done, Ordinances made and proceedings undertaken by any state authority or purposed to have been done, made or under taken in exercise of power under extra constitutional

Order would be deemed to have been validated without any distinction and unless a specific act is declared illegal, all acts done, Orders made and proceedings undertaken would be deemed to have been provided protection and condoned under the doctrine of condonation whereas, a law made by a usurper without specific declaration of validity would not achieve the status of a valid law. The Parliament in the 18th Amendment having not specifically declared the act of taking oath by the Judges of the Superior Court under the Office of Judges Order, 2000 and 2007 as illegal has condoned the same in the light of the principle of implied condonation and would be deemed to have been condoned for all intents and purposes. Therefore, the classification of judges with reference to the Office of Judges Order, 2000 and 2007 is nothing but a conflict in the Constitution.

31. The Supreme Court of Pakistan is the creator of the constitution and may interpret the constitution and can also declare a law or an action of a state authority as illegal and unconstitutional but has no constitutional mandate or authority to provide any legal cover to an act of subversion and usurpation or to amend the constitution or permit to amend the constitution. This is an internationally recognized principle of law that the power which is not possessed by an executive or judicial authority cannot be delegated to any state authority, whereas the Supreme Court of Pakistan in *Begum Nusrat Bhutto* as well as in *Zafar Ali Shah's Cases*, referred to above in open violation of the mandate of the constitution and in departure from the law laid down by the Supreme Court of Pakistan itself in the judgment in *Zia Ur Rehman's Case (PLD 1973 SC 49)* permitted usurper governments in 1977 and 1999 to amend the constitution. In *Zia Ur Rehman's Case* the dictum of the Superior Court of Pakistan was as under:-

The Supreme Court has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will even confine itself within the limits set by the Constitution which it has taken oath to protect and preserve but it does not claim and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court.

This is a right which it acquires not *de hors* the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or supernatural right but this judicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself.

“In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it declares a legislative measure unconstitutional and void, it does not do

so, because the judicial power is superior in degree or dignity to the legislative power; but because the Constitution has vested it with the power to declare what the law is in the cases which come before it. It thus merely enforces the Constitution as a paramount law whenever a legislative enactment comes into conflict with it because, it is its duty to see that the Constitution prevails. It is only when the Legislature fails to keep within its own Constitutional limits, the judiciary steps in to enforce compliance with the Constitution. This is no doubt a delicate task which has to be performed with great circumspection but it has nevertheless to be performed as a sacred Constitutional duty when other State functionaries disregard the limitations imposed upon them or claim to exercise power which the people have been careful to withhold from them.”

32. In the case of *Miss Asma Jilani v. Government of Sindh etc* (PLD 1972 SC 139), the principle of state necessity in support of unconstitutional change was not approved by the Supreme Court of Pakistan with the observation that “laws saved by the doctrine of necessity do not achieve validity and remain illegal but acts done and proceedings undertaken under invalid laws may be condoned as past and closed transaction.”

The Supreme Court of Pakistan is certainly not above the Constitution of Pakistan and Judges of constitutional Courts having taken oath to protect and preserve the constitution cannot justify the act of deviation from constitution on the basis of political consideration or subsequent constitutional development and create distinction between two constitutional deviations in the same set of circumstances. The oath of office of Judges Order 2000 promulgated under Provisional constitutional Order 1999 and oath of Office of Judges Order 2007 issued under Provisional Constitutional Order 2007 would not be distinguishable on the basis of political change in the intervening period. The Parliament having declared the act of Military Take Over on 12th October, 1999 illegal in 18th Amendment in the Constitution also declared the usurpation of office of Chief Executive and President of Pakistan by General Pervez Musharraf the then Chief of Army Staff as illegal and unconstitutional and consequently notwithstanding any judgment of any court or subsequent Amendment in the Constitution, all judicial, executive and legislative authorities including the Judges of Superior Courts and members of Parliament established under Legal Framework Order 2002 having acknowledged the unconstitutional and illegal action of 12th October 1999 as legal and constitutional have equally contributed in the act of subverting the Constitution and shared the responsibility of constitutional deviation. Therefore, there is no moral or legal justification for any such authority or any other person to create constitutional distinction between the two actions and claim any constitutional or legal immunity for the person who were directly or indirectly privy to the act of subverting the Constitution on 12th October, 1999 on the basis of subsequent changes.

The event of 3rd November, 2007 was in continuity and

perpetuity of action of 12th October 1999 and since both actions were taken in the same manner by the same authority, without any distinction under the constitution therefore, the act of constitutional deviation of judges of superior Courts in Pakistan under oath of Office of Judges Order 2000 would not be distinguishable from such act in 2007 under the Constitution. The Parliament in its wisdom having found no legal, moral or constitutional logic to provide constitutional protection to the oath of office of Judges Order 2000 declared it illegal and unconstitutional in 18th Amendment in the Constitution but condoned the act of taking oath by the Judges and similarly has condoned the act of Judges of taking Oath under oath of office of Judges Order, 2007 without declaring the Oath of office of Judges Order 2007 as illegal. Consequently, the Parliament impliedly provided them protection to be continued in the office in the same manner as the protection has been provided to the Judges who have taken oath under oath of office of Judges 2000 to be continued in office. This is known to all that constitutional and judicial crises in Pakistan were the result of political crises for grasping the power and history will be the best judge to decide that what was the role of individual Judges of Superior Courts in these crises and who was responsible for such crises and who suffered.

Be that as it may during the emergency in the Country and enforcement of extra legal and constitutional orders, the superior Courts in Pakistan have been discharging functions with defacto judges and all Order passed, action taken and Judgments rendered by the Judges of these Courts have always been declared to have been passed with lawful authority. The actions of illegitimate governments also always have been given validation in the national interest on the basis of doctrine of condonation and continece as past and closed transaction. The Parliament of Pakistan in 18th Amendment following the same principle provided protection to PCO Judges of 2000 and in the same manner, applying the principle of implied condonation also condoned the act of taking oath by the Judges of superior Courts in Pakistan under Oath of Office of Judges Order, 2007, therefore, a contrary interpretation would amount to justify the conduct of judges who were privy to constitutional deviation in 2000 and condemned the Judges who committed same wrong in 2007. In principle, the artistic distinction being created between the two constitutional deviations by the Judicial authorities or the constitutional experts is in conflict to the constitution and may be only relevant for the satisfaction of their own intellect. The concept of doctrine of condonation and implied condonation is based on the principle of wisdom and Parliament except the illegitimate laws has always been following the principle of condonation for providing protection to the acts and proceedings undertaken as a result of unconstitutional change without any distinction and Courts also on the basis of principle of equal treatment and fair interpretation of law have been following the same principle without attributing ignorance of law to the legislature or claiming supremacy over the wisdom of Parliament and Constitution.

33. The Supreme Appellate Court Gilgit-Baltistan in Suo Moto Case, on independence of Judiciary reported in GBLR, 2010 Part-II

This is general perception that defective judicial system in Pakistan and impartiality of judicial authorities is main cause of the poor dispensation of administration of justice and past judicial history of Pakistan would show that this perception was not unfounded. The Supreme Court of Pakistan in Molvi Tamizuddin's case (PLD 1955 FC 240) in suppression of the recognized principle of the constitution and rule of law preferred to give legal cover to the unconstitutional action of dissolution of assembly by Governor General. In Doso's Case (PLD 1958 SC 533) the Supreme Court of Pakistan introducing the revolutionary theory justified the military coup and recognized the principle of 'might is right' for the change of political government. In Shorish Kashmiri's Case (PLD 1969 SC 14) and Baqi Baloch's Case (PLD 68 SC 313) the Supreme Court of Pakistan applying the test of reasonableness held that in the matter of preventive detention the court cannot substitute its opinion for the satisfaction of the detaining authority. The above unfluctuating judgments of the Supreme Court of Pakistan would apparently show the executive influence on the judiciary. The Supreme Court of Pakistan in Asma Jilani's case (PLD 1972 SC 139) declared Gen. Yahya Khan usurper at the time, when he was no more in power and applying the principle of continence and condonation validated the acts done by him in larger interest of the country but surprisingly to the contrary in Nusrat Bhutto's case (PLD 1977 SC 657) held that Military take over by General Zia-ul-Haq in the circumstances prevailing in the country was State necessity. The Supreme Court of Pakistan applying the same test in Zafar Ali Shah's Case (PLD 2000 SC 869) and in Iqbal Tikka Khan's case (PLD 2008 SC 178) justified the extra constitutional action taken by General Pervez Musharraf firstly on 12th October 1999 and secondly on 03rd November 2007. The Supreme Court of Pakistan also laid down the principle of Judicial Independence and rule of law in some of the cases of constitutional importance mentioned herein below:-

Federation of Pakistan v. Haji Muhammad Saifullah Khan (PLD 1989 SC 166), Ahmad Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646), Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473), Benazir Bhutto v. Farooq Ahmad Khan Leghari (PLD 1998 SC 388), Sabir Shah v. Federation of Pakistan (PLD 1994 SC 738), Al-Jehad Trust v. Federation of Pakistan (1999 SCMR 1379), Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 416), Farooq Ahmad Khan Leghari v. Federation of Pakistan (PLD 1999 SC 57), Sh. Liaqat Hussain v. Federation of Pakistan (PLD 1999 SC 504).

The above instances of constitutional violations brought a revolutionary change and lawyers community taking a very strong exception to the above constitutional deviation by the executive fought for the cause of Independence of Judiciary. The judicial crises in 2007 in Pakistan was the result of the controversy on the candidature of General Pervez Musharraf to contest the election for the office of President for the second term. The opposing candidate Mr. Justice (R) Wajihuddin Ahmed, a former judge of Supreme Court of Pakistan filed a direct petition under Article 184(3) of the Constitution before the Supreme Court seeking declaration that General Pervez Musharraf was not qualified to contest the election. Prior to this petition a similar petition was filed by Jamat-e-Islami through Amir and others (PLD 2009 SC 549) which was dismissed by the Supreme Court on the ground that direct petition under Article 184(3) of the Constitution in the matter was not maintainable as no fundamental right of any person other than the person whose candidature was being challenged in the petition was involved for adjudication and the interference of court in the matter would amount to deny the right of a candidate to contest the election. However during the hearing of the second petition filed by Mr. Justice (R) Wajihuddin Ahmed the executive authorities of the state on the basis of certain observations made by the Supreme Court during the hearing of the case gathered an impression that court would probably give verdict against General Pervez Musharraf therefore he in his capacity as Chief of Army Staff promulgated emergency in the country and held the Constitution in abeyance. The Oath of Office of Judges Order 2007 was issued and majority of Judges of Superior Courts having been not given oath ceased to be the judges.

The past experience of judicial and constitutional history of Pakistan would show that the concept of independence of judiciary was confined to the extent of the decisions of cases in private litigation without discharge of function as an independent institution in the matters of constitutional importance. The judges of the superior courts in Pakistan have always been in favour of giving legitimation to the unconstitutional governments of Army Generals and by taking oath of office under PCOs not only validated the Military takeovers but also allowed the Military rulers to amend the constitution for their convenience which was beyond the power and authority of the Supreme Court of Pakistan. In the past the Judiciary in Pakistan was under the constant influence of executive and now the independence of judiciary due to the environmental and political influence, is under serious threat. The declaring of an action of executive on the policy decision as illegal may be treated a popular decision but practically such decision if is not based on the consideration of rule of law may not advance the cause of independence of judiciary. The general concept of independence of judiciary is that the judicial authorities must discharge their function free from any executive or political influence or institutional environment or

personal liking or disliking or any consideration other than the will of law and in an Islamic society the concept of independence of judicial decisions is entirely based on the principle of fairness, equality, complete impartiality and neutrality in the command of Holy Quran and Sunnah of the Holy Prophet (PBUH) ﷺ

The superior judiciary in Pakistan has been controversial for rendering contradictory judgments at different occasions on controversial matters which have neither been proved helpful to advance the cause of justice nor could establish the rule of law in the society rather the judgments in the issues of national importance have been found more political and less in the interest of administration of justice. The inconsistency in the judgments would show that the will of judicial authority prevailed over the will of law and theory of independence of judiciary and concept of rule of law has always been subordinate to the discretion of courts and judges in conflict to the true spirit of law.

34. The position of Superior Courts in Gilgit-Baltistan is entirely different as these courts having been established under Legal Framework order issued by the government of Pakistan in exercise of the Power under Article 258 of the Constitution of Pakistan are legislative Courts. This Legal Framework Order for Gilgit-Baltistan has the status of sub Constitutional document and superior Courts having been established thereunder may have also the Constitutional recognition in Pakistan and Gilgit-Baltistan.

35. The Courts are generally classified as superior and inferior courts with reference to their jurisdiction and a court of narrow jurisdiction is not an inferior court or a court with large jurisdiction is not superior court and also the Courts of equal or parallel or concurrent jurisdiction are not inferior or Superior to each other, rather real distinction of Superior or inferior Courts in the Judicial hierarchy is based on original and appellate jurisdiction, therefore, the Superior legislative Courts in the region of Gilgit-Baltistan are not inferior to the Constitutional Courts in Pakistan and are also not subject to the jurisdiction of any Court in Pakistan. The Supreme Appellate Court is final Court in Gilgit-Baltistan and has absolute jurisdiction in all judicial matters under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 in the same manner as Supreme Court of Pakistan has the jurisdiction and power under the Constitution of Pakistan.

36. The functions of Courts is to administer justice in accordance with the rule of law and this function is to apply the law, whether the policy underlying the law is good or bad, and notwithstanding the general principle regarding the function of Courts, the constitutional or legislative courts may have the power to interpret the law and establish the principle for functioning of the concerned authorities as judicial precedents on a question of law and if no such precedent is already holding the field, may setup the rule of law as is considered proper in the litigation. The principle of separation of powers, is well accepted rule in democratic system of Governments and Courts being part of judicial branch of Government are not supposed to encroach upon the function of executive and legislative

branches of government or the official agencies of government and in the same manner the executive and legislative branches of government are prohibited from encroaching upon the domain of Judicial branch of Government. The Courts in the light of principle of separation of powers, must use extra and extreme caution when called upon to declare a law void or unconstitutional on the ground of Public Policy rather the Courts in their judicial function have to point out legislative defect in the statutes for cure, without change of spirit of law. It was held by the Supreme Court of Pakistan in Zia Ur Rehman's Case supra as under:-

“Judiciary in exercise of its judicial power, cannot strike down any provision of Constitution either because it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves have adopted for Indicating the form of Government they wish to establish Formal written Constitution, once lawfully adopted by a competent body accepted by the people, including the judiciary, as the Constitution of the country, the judiciary cannot claim to declare any of its provisions ultra vires or void, on basis of a document, however solemn or sacrosanct, if the document not incorporated in Constitution or does not form part thereof such document cannot control the Constitution Objectives Resolution of 1949 does not have the status or authority as the Constitution itself its appearance in Constitution only as a preamble makes It stand on no higher footing than a preamble It cannot control the substantive parts of Constitution Constitution of Pakistan (1972).

It was further held that:-

“On the other hand it is equally important to remember that it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law if it has made it competently without transgressing the limitation of the Constitution. Again if a law has been competently and validly made the judiciary cannot refuse to enforce it even if the result of it be to nullify its own decisions. The Legislature has also every right to change, amend or clarify the law if the judiciary has found that the language used by the Legislature conveys an intent different from that which was sought to be conveyed by it. The Legislature which establishes a particular Court may also, if it so desires, abolish it.”

The principle of separation of powers, is not rigid and if legislature has unquestioned authority of enactment of laws, the courts are also empowered to declare a law ultra virus to the fundamental law or constitutionally invalid and can also strike down an administrative action of executive branch of government involving the legal and constitutional rights of people if the action is found in conflict to the law. The principle governing the judicial review generally is that the Courts in their judicial function do not interfere in the prerogative of legislature to determine the constitutional validity of a law or a statute,

rather the courts invariably give careful consideration to a matter involving interpretation and application of law or Constitution. Therefore, the Courts must approach the constitutional and legal question with great deliberation and possible reluctance in declaring a provision of law or constitution void or invalid by giving effect to the initial presumption in favour of constitutionality and legality of statute unless an opinion is formed beyond reasonable doubt that statute under examination is in conflict to the recognized principle of law and constitution of the State.

37. The power of judicial review of the courts is discretionary which is not necessarily exercised in every matter rather the judicial discretion, is subject to the guidance of law, between doing or not doing a thing, therefore, it is not an absolute right of a person to demand the court for exercise of discretionary jurisdiction and at the same time, the refusal of exercise of jurisdiction to consider the question of law affecting the legal and constitutional rights of people is abuse of discretion. The reluctance of the court of Competent Jurisdiction to adjudicate upon a matter involving a question relating to the enforcement of Fundamental Rights in discretionary jurisdiction would amount to deny the rights of access to justice and would also be abuse of jurisdiction. The judicial power authorize the Courts to adjudicate the controversial question of law and facts in a matter involving real justiciable controversy for judicial determination and if the matter apparently or predominantly involves political question, the determination of which is a prerogative of the legislative or the executive branch of the government, the court must not lay hands in such matters. However, mere incidental involvement of political question may not make a controversy non justiciable to create a barrier for the Court to exercise the jurisdiction. The executive decision to the policy matters are wholly confided by the law and constitution to executive and legislative branch of government and Judicial domain is only to decide the cases brought to the courts involving the questions of law and facts for judicial determination, whether the claim is uncontested or is contestable.

The question relating to the royalty of Diemer Bhasha Dam involved in the present case is a real and substantial question of public interest requiring judicial determination therefore, desirability is in favour of authoritative decision of the question by this Court for guidance of the executive authorities.

38. There is a distinction between "judicial power" and "jurisdiction" of Courts. In a system where there is a tracheotomy of sovereign powers, the judicial power must be vested in the judiciary which has been defined in the Corpus Juris Secundum, Vol. XVI, para. 144, as follows:-

"The judiciary or judicial department is an Independent and equal coordinate branch of Government, and is that branch thereof which is intended to interpret, construe, and apply the law, or that department of Government which is charged with the declaration of what the law is, and its construction, so far as it is written law."

This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which, as Chief Justice Marshall put it, "the Legislature makes, the executive executes, and the judiciary construes, the law." Thus, the determination of what the existing law is in relation to something already done or happened is the function of the judiciary while the predetermination of what the law shall be for the regulation of all future cases falling under its provisions is the function of the Legislature.

It may well be asked as to what is meant by "jurisdiction"? How does it differ from "judicial power"? Apart from setting up the organs the Constitution may well provide for a great many other things, such as, the subjects in respect of which that power may be exercised and the manner of the exercise of that power. Thus it may provide that the Courts set up will exercise revisional or appellate powers or only act as a Court of a cessation or only decide constitutional issues. It may demarcate the territories in which a particular Court shall function and over which its writs shall run. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. These are all matters which are commonly comprised in what is called the jurisdiction of the Court. It expresses the concept of the particular res or subjectmatter over which the judicial power is to be exercised and the manner of its exercise. Jurisdiction is, therefore, a right to adjudicate concerning a particular subjectmatter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the Court."

39. The jurisdiction of court generally and variously has been defined as the power to hear and determine the cause of action presented to the courts and jurisdictional power is possessed by the Courts as is conferred upon them directly or indirectly, expressly or by implication by the constitution or by ordinary legislation and jurisdiction fixed by constitutional provision neither can be abridged by the legislature nor it can be enlarged by the court, rather the legislature can apply the jurisdiction by law to the new conditions and may also regulate the manner of exercise of power given by law or by the constitution. The mode of acquiring jurisdiction prescribed by the statutes must be applied in the same manner, failing which the proceedings may be a nullity as the judicial power is attribute of sovereignty and state legislature may with the constitutional and legal limits fix the jurisdiction of the court, therefore, unless the power and authority of a court to perform a contemplated act is found in the constitution and laws of the state, the act done by the Courts is coram non-judice. The superior Courts in Pakistan have the Judicial powers which have been conferred upon them by the Constitution of Pakistan and the statutes with inherent jurisdiction. Whereas, the Superior Courts in Gilgit-Baltistan having been established under Northern Areas Governance Order, 1994, now substituted by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, have the judicial power under the above Order, which has been issued by the state

authority of Pakistan under the constitution of Pakistan, with the status of a sub Constitutional document, for Gilgit-Baltistan, and consequently, the objection to the jurisdiction of Supreme Appellate Court, Gilgit-Baltistan to adjudicate the matter of royalty has no legal basis.

40. There is no cavil to the proposition that Province of Khyber Pukhtunkhwa is not as such subject to the territorial jurisdiction of the Courts of Gilgit-Baltistan, but in the light of nature of controversy, before this Court, in which rights of the people of Gilgit-Baltistan are involved, the plea ouster of jurisdiction of this Court cannot be taken and the Court also cannot be precluded to adjudicate the matter on any other collateral ground. There is clear distinction between the power to exercise discretionary jurisdiction and wisdom to exercise such jurisdiction and this is established principle of law that if the question of jurisdiction of a Court arised in a matter before it, the Court has necessary judicial power to determine its jurisdiction at any stage of proceedings and if forms an opinion that ultimately the question of jurisdiction can render the decision ineffective, may refuse to exercise the jurisdiction because in absence of proper jurisdiction, it is not possible for the Court to issue process to compel the satisfaction of its judgment. This is however settled principle of law that a court having jurisdiction in a matter must not decline to exercise jurisdiction in its discretion, rather must exercise the jurisdiction and render the decision in accordance with law as legal duty and unless the jurisdiction of a particular Court in a matter is specifically barred, the Court is not free to decline the jurisdiction conferred upon it by the law on the ground that the subject matter of litigation before it can also be adjudicated by another Court within or beyond the territorial jurisdiction of Court.

41. The principle is that a constitutional or legislative court is empowered to adjudicate a matter falling under its jurisdiction, but may not assume the jurisdiction in a matter in which cause of action is already pending before another court which has also jurisdiction of adjudication of the matter or where the question presented to a court for decision has been fully adjudicated in the proceeding before a court of independent jurisdiction. It has been a long accepted legal practice and principle that a court within its territorial limits should not relinquish its jurisdiction in favour of another Court of equal jurisdiction within or beyond its territorial limit or share the jurisdiction in the affairs of the specified territory of its jurisdiction with a Court beyond the limits of specified territory. It is also well established principle of law that a party having admitted jurisdiction of a court by some act or conduct, may not have the right of denying the jurisdiction at a subsequent stage simply because of change of interest or for the reason that the contrary stand regarding the jurisdiction of Court and adjudication of matter may not prejudice any other party. The substance of the matter is that in case of equal or parallel jurisdiction of two courts, unless it is shown that the decision to be rendered by the court which has first taken the cognizance, would be ultimately treated without lawful authority and void or voidable, the plea of lack of jurisdiction of Court is devoid of legal force. The collateral attack upon the jurisdiction of a Court of a specified territory, on the basis of

provision of law or Constitution of the state which do not regulate the jurisdiction of the Court, and also is not strictly applicable to the matter in which judgment is to be rendered by the Court may have no legal force, therefore, the objection to the assumption of jurisdiction by the Supreme Appellate Court in the matter with the assertion that judgment of the Court may not be validly enforceable in respect of the claim of Province of Khyber Pukhtunkhwa, has no legal force to ignore the judgment in the light of principle that full faith and credit must be given to the judicial proceedings of a Court or a Judicial forum of independent jurisdiction. The special territory of Gilgit-Baltistan, has its own separate judicial system under the legal Frame Work Order with complete independence and Supreme Appellate Court Gilgit-Baltistan having the status of highest judicial forum in Gilgit-Baltistan is recognized as apex Court and final judicial authority of the territory of Gilgit-Baltistan.

42. The Original Jurisdiction in general terms is a jurisdiction, in its essence to consider and decide the cases denovo and the real test to exercise this jurisdiction in the nature of controversy in the particular facts of a case is the determination of issue subject matter of adjudication. The declaratory judgments in original jurisdiction of constitutional or legislative courts are self executory and explanatory which do not require execution as the jurisdiction of the Court is not exhausted by rendition of judgment rather it continuous until the judgment is satisfied. The declaratory judgment of the Court if is not given effect, it is impairment of jurisdiction of the Court and in such an eventuality court is empowered to make order to give effect to its judgment with binding force and operative consequences. The Supreme Appellate Court in Gilgit-Baltistan region is final court and may render declaratory judgment in its original jurisdiction on a controversy involving rights and interests of the people of the region and notwithstanding the interest of a person or class of person or an authority or government or semi government organization or the Federal Government of Pakistan or the Provincial Government or any person beyond the territorial jurisdiction of Court, the decision rendered by the Court in respect of the rights and interest of the people of region cannot be without jurisdiction or excess of jurisdiction and must have legal force and consequence within and beyond its territorial limits.

43. There is no cavil to the proposition that a court cannot hear and determine a matter in its original or appellate jurisdiction, unless it is vested with the power and jurisdiction over the parties and the subject matter which may be defined as to the nature of cause of action and relief claimed therein. In the present case the cause of action and nature of relief sought would relate to the fundamental rights of people of Gilgit-Baltistan, which would certainly empower this court to hear and determine the issue, therefore, contention of Deputy Advocate General Khyber Pakhtunkhwa that the Government of Khyber Pakhtunkhwa having the interest in the matter can invoke the jurisdiction of Supreme Court of Pakistan in the controversy, in which the people of Gilgit-Baltistan may have also right of contest, has no force. The Supreme Court of Pakistan may have the jurisdiction and right of adjudication of a matter, which is bought before it but no Court

in Gilgit-Baltistan can be stopped from exercising jurisdiction over a matter within its competence and jurisdiction on the ground that a contesting party intended to invoke the jurisdiction of Supreme Court of Pakistan.

44. There is a distinction between jurisdiction in personam and jurisdiction in rem as a decision in personum imposes a responsibility or liability upon a person whereas a decision in rem does not impose personal responsibility, rather it operates as law in general terms in respect of legal rights and status subject matter of decision, irrespective of the fact whether a legal or juristic person is not subject to the territorial jurisdiction of the Court. The Court having jurisdiction over a matter may adjudicate the same, notwithstanding the fact that a contesting party in the controversy is physically beyond the territorial jurisdiction of the Court, therefore, in the light of principle of exercise of jurisdiction discussed above the Supreme Appellate Court Gilgit-Baltistan can conveniently adjudicate the matter relating to the royalty of the power houses of Diamer Bhasha Dam under construction on the territory of Gilgit-Baltistan, notwithstanding the fact that province of Khyber Pakhtunkhwa also having claim in royalty of Dam is not physically subject to the jurisdiction of Courts of Gilgit-Baltistan. The objection of jurisdiction on behalf of Government of Khyber Pakhtunkhwa (NWFP) even otherwise has no substance because the declaratory judgment of this court in any manner is not to be executed against province of Khyber Pakhtunkhwa rather in the light of principle of prior right of adjudication, the decision of the Supreme Appellate Court, Gilgit-Baltistan on the issue of royalty of Diamer Bhasha Dam, is to be implemented by the Federal Government of Pakistan.

45. Diamer Bhasha Dam has been proposed to be constructed on the inland waters of River Indus, which flow in the territory of Gilgit-Baltistan and Dam with one power house is located entirely within the territory of Gilgit-Baltistan, therefore, the matter being wholly within the territorial jurisdiction of Supreme Appellate Court, has been brought before this Court for adjudication on the basis of prior right of adjudication of the Court. The interest and claim of Government of Khyber Pakhtunkhwa (NWFP) in the royalty Diamer Bhasha Dam may not be a valid and legal ground to deny the jurisdiction of this Court on the excuse that Province of Khyber Pakhtunkhwa is beyond the territorial jurisdiction of the Courts of Gilgit-Baltistan and Government of Khyber Pakhtunkhwa (NWFP) has option to invoke the jurisdiction of Supreme Court of Pakistan whereas under the law the exercise of jurisdiction by a Judicial forum in Pakistan in the matter pertaining to territory of Gilgit-Baltistan will be subject to the principle of priority, according to which in a sovereign state a Court of independent jurisdiction in a specified territory of which is not subject to the jurisdiction of any other court in the state may operate as *resjudicata* in a matter before any other judicial forum or a constitutional or legislative court. The question of jurisdiction is governed by the principle of law that if more than one courts can exercise the jurisdiction to adjudicate the matter, a person has right to select the judicial forum for adjudication of his claim and may by choice invoke the jurisdiction of such forum and ordinarily the choice of forum is binding on the adverse party, even if alternate forum or

Court of independent jurisdiction is more convenient and suitable for the adverse party. The priority principle of jurisdiction is always subject to the complete opportunity of the parties for adjudication of their rights subject matter of lis and also emphasis that a Court in a sovereign State despite having the jurisdiction in the matter in which another Court of independent jurisdiction has rendered judgment must respect to the jurisdiction and decision of the Court, which first rendered the judgment.

46. The choice of forum is based on the doctrine of convenience and in the light of this doctrine this is not fair and proper for the Courts in Gilgit-Baltistan to decline the exercise of jurisdiction conferred by law and remit a resident of Gilgit-Baltistan to invoke jurisdiction of the Courts in Pakistan for mere reason that the matter also involves the interest of a person who is not as such subject to the territorial jurisdiction of this Court. The refusal of the Court to take cognizance and exercise power under Article 61 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 in a matter of public importance relating to the enforcement of Fundamental Rights of the people of territory of Gilgit-Baltistan on the basis of technical objection to the jurisdiction of Court would amount to deny the right of access to justice.

47. The source of substantive rights to be enforced by the courts is the law, declared by the legislature or by the courts and ought to govern the litigation found on that law therefore, a court which can exercise the jurisdiction in a matter under the law can also render judgment both in law and in equity. The territory of Gilgit-Baltistan despite having no independent sovereignty, the courts established in this territory by the state authority of Pakistan are independent in their Jurisdiction and the law declared by Supreme Appellate Court Gilgit-Baltistan which is highest Court in the region has binding force in the territory. This Court in Gilgit-Baltistan, is the final arbiter with absolute judicial authority to adjudicate upon the legal rights of the people of Gilgit-Baltistan, and determination of point of law by the Court may have force of stare decisis in the proceedings in a matter involving interest of Gilgit-Baltistan before the Courts of Pakistan.

48. The up-shot of the above discussion on the question of Jurisdiction is that Supreme Appellate Court Gilgit-Baltistan has absolute jurisdiction to hear and determine the question of royalty of electricity generation of the proposed power houses of Diamer Bhasha Dam to be constructed by the Federal government and the objection of jurisdiction taken in the matter on the ground that province of Khyber Pakhtunkhwa having interest in the matter is not subject to the territorial jurisdiction of the Courts of Gilgit-Baltistan has no legal foundation. The conclusion is that Gilgit-Baltistan has entirely independent judicial system and courts of Gilgit-Baltistan are not subject to the jurisdiction of any court in Pakistan, therefore, the validity of judgment of Supreme Appellate Court Gilgit-Baltistan relating to the rights of people of Gilgit-Baltistan is not questionable before any Court in Pakistan on any ground including the question of jurisdiction

49. The next question for determination relates to the right of royalty of Diامر Bhasha Dam. The real controversy between Gilgit-Baltistan and Government of Khyber Pakhtunkhwa (NWFP) is in respect of royalty of electricity generation of the proposed Power House of Diامر Bhasha Dam on left bank of River Indus. The claim of Gilgit-Baltistan is that since Dam is entirely situated within the area of District Diامر, therefore, Gilgit-Baltistan has the exclusive right of royalty of electricity generation from the power houses of the Dam in the light of principle of equity and law of natural justice, notwithstanding the fact that one Power House on left bank of River Indus partly falls in the area forming part of District Kohistan of Khyber Pakhtunkhwa which is subject matter of boundary dispute between District Diامر and District Kohistan, whereas the case of Province of Khyber Pakhtunkhwa is that the royalty of the power house on left bank of River Indus is the exclusive right of Government of Khyber Pakhtunkhwa (NWFP) in terms of Article 161(2) of the Constitution of Pakistan which provides as under:-

Article 161(2) of the Constitution of Pakistan 1973 provides as under:-

(2) The net profit earned by the Federal Government, or any undertaking established or administered by the Federal Government, from the bulk generation of power at a hydro-electric station shall be paid to the Province in which the hydro electric station is situated.

Explanation: For the purpose of this clause "net profits" shall be computed by deducting from the revenues accruing from the bulk supply of power from the bus-bars of a hydro-electric station at a rate to be determined by the Council of Common Interests, the operating expenses of the station, which shall include any sums payable as taxes, duties, interest or return on investment, and include any sums payable as taxes, duties, interest or return on investment, and depreciation and element of obsolescence, and over-heads, and provision for reserves.

50. Diامر Bhasha Dam is a national project and being wholly situated on the territory of Gilgit- Baltistan has much importance for the people of Gilgit-Baltistan. The Indus River is combination of various rivers of Gilgit-Baltistan and the water of Indus River flowing from the mountainous range of the territory of Gilgit-Baltistan enters into District Kohistan of Khyber Pukhtunkhwa from District Diامر of Gilgit-Baltistan, where the Project of Diامر Bhasha Dam with two power Houses one each on the right and left bank of River Indus is under construction. The Power House on the right bank of the River Indus is situated exclusively within the limits of District Diامر Gilgit-Baltistan, whereas the Power House on the left bank of the River Indus is partly in the area of District Kohistan and partly in District Diامر of Gilgit-Baltistan as the installation of machinery of the Power House is in area of District Kohistan and Source of water is entirely in the area of District Diامر, therefore, notwithstanding the Boundary dispute between District Diامر and Kohistan, the sole question for determination would be whether in the light of definition of Power

House in mechanical engineering, province of Khyber Pakhtunkhwa on the basis of existing boundary of two districts can claim exclusive right in the royalty of Power House on left bank of River Indus in terms of Article 161(2) of Constitution of Pakistan or may have a right of proportionate share with Government of Gilgit-Baltistan and if so, what shall be the ratio of their respective share.

51. The question in respect of the right of royalty of the power house of Diamer Bhasha Dam on left bank of River Indus is a mix question of law and fact which requires examination (i) in the light of definition of Hydro Electric Power Generation House, (ii) the connection of source of water with the installation of power house in the technical process of electricity generation, (iii) the rights in Inland Waters (iv) the doctrine of territorial nexus and (v) the right in royalty as intellectual property.

Hydro Electric Power House in mechanical engineering is a facility of producing electric energy by hydro electric generators which is also known as Hydro Electric Power Station and precise definition of Hydro Electric power Station is as under:-

“A complex of installations and equipment that is used to convert the energy of a stream of water into electrical energy. A hydroelectric power plant consists of a sequential chain of hydraulic-engineering facilities that provide the necessary concentration of water flow and create a head, as well as power -generating equipment for transforming the energy of water moving under pressure into the mechanical energy of rotation, which in turn is transformed into electrical energy.”

The Hydro Electric Power House has two essential components. The first is source of water and second is the installation in which water turbine and generators etc. are included. The electricity is generated at Hydro Electric Power Station with source of water through mechanical process as under:-

“Electricity to be produced from generators driven by water turbines which converts the energy by falling water to mechanical energy. The falling water rotates turbines which generates and converts the turbine’s mechanical energy into electricity”.

52. This is a matter of common sense that without the source of water, the turbine and generators installed in the Power Station cannot generate electricity and without installation of Turbine with generators and other related equipment of Power Station, the source of water itself cannot generate electricity. **In short the Hydro Electric Power Station is a place where with the source of water, the generators and water turbines function and with combination of the above two components of power house the electricity is generated though mechanical process.**

53. The electricity is generated though mechanical process with source of water and natural water of River Indus flowing on the

territory of Gilgit-Baltistan is element in the process of electricity generation of power houses of Bhasha Dam. The equipment of power house i.e. generators and water turbine without source of water by itself cannot generate mechanical energy for its conversion into electricity. The process of generation of electricity at Hydro Electric Power Station is "the falling or flowing water rotates water turbines which drive generators for conversion of the energy in falling or flowing water to mechanical energy which converts into electricity". The power house is not only the generators and water turbines rather it is composite of water turbines with generators etc and source of water. The Hydroelectric power plant consists of Hydraulic engineering facilities that provide the necessary water flow and creates a head as well as power generation equipment for transferring the energy of water moving under pressure into mechanical energy of rotation which in turn is transformed into electrical energy. There is no concept of Hydro Electric Power House without source of water and process of electricity generation at hydro electric station is based upon the principle of territorial nexus which is defined as under:-

"The Doctrine of territorial nexus is internal connection of two things to achieve an object and sufficiency of this territorial connection is that things must involve a consideration of two elements i.e. the connection must be real and not illusory, and the object to be applied must be pertinent to that connection."

The connection of apparatus of power house and source of water interse is territorial nexus of the two elements for the object of generation of electricity through mechanical process and consequently the determination of right of royalty is a matter to be decided in the light of principle of territorial nexus.

54. The principle of territorial nexus is well established doctrine of national and international law, which is essentially based on the fact that the connection between two components of an object is real and benefit to be derived from the object also pertain to this connection. The mechanical process of generation of electricity from Hydro Electric Power House is result of the connection of machinery installed in Power House with source of water and sufficiency of this territorial nexus is a pure question of fact which is proved by the connection of source of water with installation of power house for electricity generation. Therefore, the two components of power house i.e. source of water and installation of Hydro Electric Power House are equally essential for electricity generation. The installation of Diamer Bhasha Dam on the left bank of River Indus is in the area of District Kohistan whereas the source of water is exclusively in the area of District Diamer and the object of electricity generation is the result of connection of water with installation of Power House. The object of connection of the two components of power House i.e. source of water and installation of power house is generation of electricity through mechanical process which is based on the principle of territorial nexus and the royalty of electricity generation is intellectual property, therefore, the question relating to the right of royalty must be determined in the light of principle of territorial nexus.

55. The Hydro Electric Power generation is based on natural

waters which is economical and free of pollution and being more advantageous to other sources of generation Norway, Sweden, Canada and Switzerland heavily rely on Hydro Electricity as these countries have industrial areas close to mountains region where heavy rainfalls whereas United States of America, Russia, China, India and Brazil get small portion of electric power from Hydro generation.

56. The next essential and most important question requiring determination relates to the right of benefit arising out of the flowing waters of River Indus in the area of Gilgit-Baltistan which is national water of Pakistan and inland water of Gilgit-Baltistan in the light of definition of national and inland waters. The natural water in a state or territory are internal or Inland Waters of the said state or territory which have been defined in the International law as under:-

“Waters landward of the baseline are defined as internal waters, over which the state has complete jurisdiction; not even innocent passage is allowed. Lakes and rivers are considered internal waters, as are all “archipelagic waters”.”

57. This is internationally accepted legal position that the natural water such as water of Lakes and Rivers flowing within the territorial limits of a Country vests in that country and is considered the property of that country. The state in which natural waters are situated has complete jurisdiction on these waters and internal waters such as the Lakes and rivers flowing in a particular part or specified territory of the state alongwith things of value underneath is an economic zone for the specified territory or particular part of the country.

The Natural water is a scarce resource and water like air is a territorial resource which is not open to private ownership but natural water may subject to public interest have also private water rights. The state government or the government of specified territory may regulate the use of natural waters by legislation and may also on river and natural water way in its area construct Dam for irrigation and Hydro Electric Generation.

58. The territory of Pakistan as defined in Article 1 of the Constitution of Pakistan consists upon four provinces, capital Territory, Federally Administered Tribal Area and such other territories or areas as are or may be included in Pakistan by accession or otherwise. The territory of Gilgit-Baltistan by virtue of Article 1(2) (d) of Constitution of Pakistan is an area under the control of Pakistan and internal or inland waters such as lakes and rivers together with their mouths physically flowing in Gilgit-Baltistan are national waters of Pakistan, under national and international law but at the same time these waters are internal waters of the region of Gilgit-Baltistan under the laws of Pakistan. In the light of above factual and legal position of the natural waters of lakes, canals and rivers situated in specified territory of Gilgit-Baltistan these water are internal water of Gilgit-Baltistan and constitute an economic zone for the region of Gilgit-Baltistan. This is settled law at national and international level that the natural waters are national waters of the country in which these waters are situated

and are internal water of the area in which these waters are located and that the benefit arising out of the natural waters is the right of the territory or the area in which these waters flow or are situated.

59. In the light of definition of national water, the natural waters with all valuable things beneath the water situated in any part of Pakistan are national waters and the benefit arising out of these waters is certainly right of the specified territory or particular area or a province in which these waters are situated. Consequently, natural waters of River Indus flowing as internal waters in the region of Gilgit-Baltistan with things of value under the water and fisheries etc, constitute an important economic zone for Gilgit-Baltistan, therefore, the benefit arising out of the water of River Indus is intellectual property of the people of Gilgit-Baltistan and right in intellectual property is substantive right in law.

60. There can be no departure to the legal position under national or international law that the natural waters in a country are national waters of that country and are internal waters of specified area of the country where these waters are situated, therefore, subject to the laws of country, the people of area in which these waters flow or are situated have natural rights and interest in these internal waters. The national or internal water with the valuable thing underneath the water subject to the private rights of the people is a public property and the rights in natural waters are incorporeal which are rights in intangible property.

The term property would include anything subject to ownership and benefit attracted with the real and intellectual property in the society is an advantage conferred and protected by law as civil right. The royalty of electricity generation is an intellectual property of category of intangible rights, which are distinct and separate from property rights in tangible goods. The royalty is an intellectual property which has no physical existence to be controlled or operated as property. Therefore, the controversy relative to the royalty of electricity generation as an intellectual property in absence of specified law governing the rights shall be resolved under the ordinary law in the light of principle of equity and natural justice. The natural water flowing in River Indus with bed and banks is national water of Pakistan and in the territory of Gilgit-Baltistan, it is internal water of Gilgit-Baltistan, therefore, the Government of Pakistan may not regulate the water rights in the territory of Gilgit-Baltistan beyond certain points, adverse to the interest of Government of Gilgit-Baltistan.

61. The territory of Gilgit-Baltistan is not a province of Pakistan and Government of Gilgit-Baltistan also neither can be equated with a province nor with a Provincial Government established under the Constitution of Pakistan to be treated at par with the Provincial Government of a Province of Pakistan for the purpose of Article 161(2) of the Constitution of Pakistan, rather in view of special status of the territory of Gilgit -Baltistan under the Constitution of Pakistan, the matter pertaining to royalty of Diamer Bhasha Dam would essentially require decision on the basis of principle of equity and natural justice. The benefits arising out of the natural waters of River

Indus flowing as internal waters in the territory of Gilgit-Baltistan is the natural right of Gilgit- Baltistan and territorial connection of the water with the equipment of Power House in the mechanical process of electricity generation at Hydro Electric Power Station would create a very valuable legal right of the royalty of electricity generation, which is an interest in intellectual property, therefore, Federal Government of Pakistan is under legal and constitutional obligation to extend the maximum benefit of royalty of the power houses of Diامر Bhasha Dam to Gilgit- Baltistan, for the reason firstly that Dam is exclusively situated in the area of District Diامر of Gilgit-Baltistan, and secondly, the water of River Indus in the territory of Gilgit-Baltistan is entirely inland water of Gilgit-Baltistan and benefit attached with the water is natural right of Gilgit-Baltistan.

62. The electricity is generated at Power House by mechanical process of equipment of power house with the source of water and in the light of principle of territorial nexus of water with installation of Power House and interest in electricity generation as intellectual property right, the Government of Gilgit-Baltistan may have natural right of proportionate share in the royalty of Power House in the light of principle of equitable justice, on left bank of River Indus as the Hydro Electric Power House cannot generate electricity by mere installation of water turbine with related equipment without source of water which is basic element in the process of electricity generation at Hydro Electric Power House.

63. The construction of Dam with source of natural water and generation of electricity is within domain of federal government under Article 157 of the Constitution, wherein it is provided as under:-

Article 157: Electricity. (1) The Federal Government may in any Province construct or cause to be constructed hydro-electric or thermal power installations or grid stations for the generation of electricity and lay or cause to be laid inter-provincial transmission lines.

[Provided that the Federal Government shall, prior to taking a decision to construct or cause to be constructed, hydro-electric power stations in any province, shall consult the Provincial Government concerned.”; and]

(2) The Government of a Province may ----

- To the extent electricity is supplied to that Province from the national grid, require supply to be made in bulk for transmission and distribution within the Province.
- Levy tax on consumption of electricity within the Province.
- Construct power houses and grid stations and lay transmission lines for use within the Province; and
- Determine the tariff for distribution of electricity within the Province.

The proviso added to this Article in 18th Amendment is read as under:-

In case of any dispute between the Federal Government and a Provincial Government, the dispute may be brought to the Council of Common Interest for resolution by any Government.

64. The careful examination of Article 157 of the Constitution of Pakistan would show that the Federal Government of Pakistan has constitutional obligation to construct Hydro Electric Power and thermal Power installation for the purpose of generation of electricity and lay transmission lines from grid station, and Government of a Province may make distribution and transmission of electricity to be supplied to the Province from the national grid, in bulk and levy tax on consumption of electricity within the province. The government of a province may also construct power houses and lay transmission lines for use within the province and determine the tariff for distribution of electricity. The Provincial Government may utilize the internal waters in its area and construct as many Hydro Electric Power Hoses, as it can possibly construct and generate electricity for distribution in the manner as provided in Article 157 of Constitution of Pakistan. The Province of Khyber Pukhtunkhwa may with or without support of federal government construct power house on River Indus in its area and utilize the inland water of Indus in its territorial limits as its economic zone for the benefit of the people of this province instead of claiming share in the royalty of Diamer Bhasha Dam which is exclusive right of Gilgit-Baltistan.

65. In the light of principal of territorial operation of laws, equity and natural justice, the claim of royalty of power house on left bank of River Indus may not be strictly governed by the provision of Article 161(2) of the Constitution of Pakistan, which has no mandatory operation in the territory of Gilgit-Baltistan. Instead the special character and status of the territory of Gilgit-Baltistan, would require the determination of the question of Royalty of this power house of Diamer Bhasha Dam on the basis of combined effect of principle of equity, natural justice and provision of Article 161(2) of the Constitution of Pakistan. There is no cavil to the proportion that a Province of Pakistan on the basis of Provision of Article 161(2) of the Constitution, can claim royalty from Federal Government, in respect of bulk generation of electricity from a power house, which is constructed by the federal government exclusively within the territory of province with source of internal water of province but if the power house is partly in the area of a province without source of water and partly in an area beyond the territorial limits of province where source of water is available, the claim of the province of entire royalty of such Power House under Article 161(2) of the Constitution may have no legal justification.

Under Article 161(2) of the Constitution of Pakistan the royalty of hydro Electric Power Generation Station is the right of province in

which power station is situated and in plain words a Province may claim royalty of the Power House if it is wholly situated in the provincial territory but may have no exclusive claim in the royalty of Power House which is partly in its area and partly in another territory. The claim of Government of Khyber Pakhtunkhwa (NWFP) in the light of legal and factual position of Dam and definition of Hydro Electric Power station in respect of entire royalty of power house of Diamer Bhasha Dam on left bank of River Indus on the basis of Article 161 (2) of the Constitution is not only unfounded in law but is also in contradiction to the natural and substantive right of people of Gilgit-Baltistan. The Constitution of Pakistan is based on the principle of equity, fairness and natural justice and no provision of Constitution of Pakistan disadvantageous to the people of Gilgit-Baltistan can be invoked for the benefit of people of any other part of Pakistan as the territory of Gilgit-Baltistan is not stricto sensu governed by the Constitution of Pakistan.

66. The affairs of Gilgit-Baltistan are under the direct control of Council of Gilgit- Baltistan, the Chairman of which is the Prime Minister of Pakistan and territory of Gilgit-Baltistan practically forms part of territory of Pakistan, therefore, the Federal Government of Pakistan for generation of electricity from Hydro Electric Power Installation of Diamer Bhasha Dam may construct inter provincial transmission lines for supply of electricity to the provinces as envisaged under Article 157 of the Constitution and a Province may even without the approval of Federal Government, construct power house in its area, if source of water is available but a province without the source of Inland Waters cannot construct Hydro Electric Power House for electricity generation and in the same analogy cannot claim royalty of a power house constructed by the Federal Government merely on the basis of installation of power House in its area without source of water. Diamer Bhasha Dam is entirely in District Diamer within the territorial limits of Gilgit-Baltistan and notwithstanding the fact that Constitution of Pakistan is a superior law, Article 161(2) of the Constitution of Pakistan, may in principle apply but may not create exclusive right of royalty of power house of Dam on left bank of River Indus in the area of District Kohistan in favour of Khyber Pakhtunkhwa, rather in the light of the principle of territorial nexus of the source of water with installation of Power House in the process of generation of electricity Government of Khyber Pakhtunkhwa may have a proportionate share in the royalty of this power House. The mere location of installation of the power house in the area of District Kohistan of Khyber Pukhtunkhwa is not sufficient to claim entire royalty of this Power House on left bank of River Indus, as royalty of electricity generation from Power House is an intellectual property which is right and interest in moveable property and source of internal water of River Indus is intellectual property of Gilgit-Baltistan. The interest in intellectual property is substantive right which cannot be taken away in departure to the principle of equality which is squarrrly

would be in favour of equal distribution of royalty of Power House of Diامر Bhasha Dam on left bank of River Indus.

67. The essential question subject matter of debate are answered as under:-

- a. The Supreme Appellate Court Gilgit-Baltistan has absolute jurisdiction to adjudicate the question relating to royalty of Diامر Bhasha Dam and decision rendered by this Court of last resort in the territory of Gilgit-Baltistan is not subject to the jurisdiction of any Court in Pakistan.
- b. The boundary dispute of District Kohistan (Khyber Pakhtunkhwa) and District Diامر (Gilgit-Baltistan) is entirely a separate issue which has no nexus with the issue of royalty of the proposed power house of Diامر Bhasha Dam, on the left bank of River Indus in the area presently falling in District Kohistan of Khyber Pakhtunkhwa and claim of Province of Khyber Pakhtunkhwa in respect of the entire royalty of electricity generation from the power House of Dam on the basis of mere territorial location of the installation of power house has no legal justification.
- c. The ultimate decision of boundary dispute in favour of Government of Gilgit-Baltistan will extinguish the claim of Government of Khyber Pukhtunkhwa (NWFP) in the royalty of Diامر Bhasha Dam in toto and if the present boundary of two district is maintained by the Boundary Commission, still the Province of Khyber Pukhtunkhwa in the light of doctrine of territorial nexus will not be entitled to get more than one half share in the royalty of the power house on left bank of River Indus on the basis of installation of Power House in the area of District Kohistan.
- d. The provision of Article 161 (2) of the Constitution of Pakistan may not strictly apply with mandatory force to the issue of royalty for the reason firstly that power house on left bank of River Indus is not wholly situated in District Kohistan of Khyber Pukhtunkhwa and secondly, Gilgit-Baltistan is not a province of Pakistan rather this territory has special status of an area in the constitution of Pakistan, which is under the administrative control of Federal Government of Pakistan, and Diامر Bhasha Dam is located entirely in the area of District Diامر of Gilgit-Baltistan. Therefore, notwithstanding the installations of Power House of Diامر Bhasha Dam on left bank of River Indus in the area of district Kohistan of Khyber Pakhtunkhwa, the source of water being essential component of Power House as a whole is in District Diامر of Gilgit-Baltistan and water rights as an intellectual property belong to Gilgit-Baltistan. The right of royalty in the intellectual property is the substantive right of the people of

Gilgit-Baltistan.

- e. The mechanical and engineering definitions of Hydro Electric Power Station in law establishes that power house on left bank of River Indus is partly in District Kohistan and partly in District Diامر, therefore, the issue of royalty of electricity generation from this Power House must be determined on the basis of doctrine of territorial nexus and equitable distribution in the light of principle of natural justice and equity read with the provision of Article 161 (2) of the Constitution of Pakistan.
- f. The inland water of River Indus within the territory of Gilgit-Baltistan constitute an economic zone for the people of Gilgit-Baltistan with right of intellectual property in the nature of benefit arising out of natural water in the area and in principle Government of Gilgit-Baltistan may have claim of entire royalty of Diامر Bhasha Dam of both the power houses on the basis of location of Dam and the source of water for electricity generation, but in view of the position of Power House of Dam on left bank of River Indus which is partially in the area of District Kohistan and partially in District Diامر of Gilgit-Baltistan, Government of Khyber Pakhtunkhwa (NWFP) may have fairly one half share in the royalty of Hydro Electric Power House on left bank of River Indus.
- g. The comparative study of the provision of the Constitution of Pakistan and law on the subject would show that Hydro Electric Power Station installed for generation of electricity from Dam would include the water and turbine with related equipment to be utilized in the process of generation of electricity, and the distribution of net proceed of bulk generation of electricity from power house after deduction of taxes to be levied by the government will be made accordingly and consequently, the distribution of net proceed of bulk generation of electricity from power house of Diامر Bhasha Dam on left bank of River Indus between Government of Gilgit-Baltistan and Government of Khyber Pukhtunkhwa will be on the basis of doctrine of equitable distribution.

68. Diامر Bhasha Dam is admittedly situated within the territory of Gilgit-Baltistan with source of natural waters of River Indus flowing in Gilgit-Baltistan, which is inland water of Gilgit-Baltistan with all benefit and rights of natural water. The installation of one power house on right bank of River Indus with source of water is exclusively situated on the territory of Gilgit-Baltistan. The issue of royalty is seemed up in the following manner, the royalty of which is exclusive right of Government of Gilgit-Baltistan, whereas installation of one power house on left bank of river Indus, without source of water is on the disputed area of District Kohistan. The right of royalty of

Government of Power House on the left Bank of River Indus in the area of District Kohistan of province of Khyber Pakhtunkhwa, shall be determined on the basis of doctrine of territorial nexus and in the light of principle of natural justice, equity and equitable distribution read with provision of Article 161 (2) of the Constitution of Pakistan, and consequently, Government of Khyber Pakhtunkhwa (NWFP) and Government of Gilgit-Baltistan will have equal right in the royalty of this power House. The net result is that Government of Gilgit-Baltistan will get entire royalty of Power House on the right bank of the river Indus, whereas, the ratio of share in the royalty of power house of Diamer Basha Dam on left bank of River Indus will be equal between Government of Gilgit-Baltistan and Government of Khyber Pukhtunkhwa.

69. This is not out of place to mention here that the project of Kala Bagh Dam proposed to be constructed within the territory of Punjab is a project of national importance and the construction of this project was also dire need of the nation, but the Provincial Government of Khyber Pukhtunkhwa without any legal justification and technical reason having taken a strong exception to the construction of Kala Bagh Dam for political reasons has opposed this project mainly on the ground that the land of District Nowshehra and adjoining areas of Khyber Pukhtunkhwa would no more be cultivable and would go waste because of the Dam and that people of these areas will suffer irreparable loss whereas the people of District Diamer of Gilgit-Baltistan have sacrificed their valuable lands for the construction of national project of Diamer Bhasha Dam at the cost of permanent loss, and dislocation, for the benefit of people of Pakistan including Province of Khyber Pukhtunkhwa in terms of supply of electricity and its distribution. In consideration of the above feature of Dam, it will be unfair to deprive the people of Gilgit-Baltistan from their natural right of royalty of power houses of Diamer Bhasha Dam to safeguard the interest of province of Khyber Pakhtunkhwa, as the law, equity and morality is in favour of exclusive right of Gilgit-Baltistan in the royalty of electricity generation from Diamer Bhasha Dam, for the welfare of the people of this most backward and undeveloped region.

70. The Water and Power Development Authority, Government of Pakistan has acquired the land of District Diamer Gilgit-Baltistan for the Construction of Diamer Bhasha Dam, as a result of which a large population of District Diamer has been dislocated. The people of this area being real sufferers must be the real beneficiary of royalty of Dam in equity, and mere use of a small portion of land of district Kohistan of Khyber Pakhtunkhwa for installation of machinery of one Power House may not in law and equity justify the claim of entire royalty of Government of Khyber Pakhtunkhwa of that power House of Dam. The benefit of one half share in the royalty of Power House on the left bank of the River Indus to Government of Khyber Pukhtunkhwa, only for the installation

of equipment of power house in the area of District Kohistan is a big favour.

71. There is no special law or forum in Pakistan except Constitutional Forum of CCI for resolving the disputes in such matters relating to natural/internal waters in the provinces and the areas which are not included in provinces. Therefore, the Federal Government may if consider appropriate enact a special law to govern the matters in respect of rights in internal water and distribution of royalty of Hydro Electric powers houses installed by the Federal Government on inland waters flowing in the provinces of Pakistan and the territory of Gilgit-Baltistan and Azad Jammu & Kashmir.

72. The above are the detail reasons for the short order dated 07.10.2010, which is reproduced hereunder as part of this judgment:-

“This direct petition in original jurisdiction of this Court has been filed by Mr. Bashir Ahmed Khan, a resident of District Diamer Gilgit-Baltistan under Article 45(2) read with Article 19 of Northern Areas Governance Order 1994 which has been substituted by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. The matter in this petition pertains to the determination of the question relating to the right of royalty of the power houses of Diamer Bhasha Dam to be constructed within the territorial limits of District Diamer of Gilgit-Baltistan and District Kohistan of Province of Khyber Pakhtunkhwa. The above question is being of national importance requires examination in the light of provision of Article 161 of the Constitution read with Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and the principle of territorial nexus with definition of the “Power House” under the national and international law.

2. We have heard Mr. Muhammad Issa, Sr. Advocate, President Supreme Appellate Court Bar Association as Amicus Curie, Mr. Muhammad Aleem Abbasi, learned Deputy Attorney General for Pakistan, Mr. Asad Advocate General Gilgit-Baltistan, and Mr. Javaid Iqbal learned counsel for the WAPDA, Mr. Waqar Ali Khan, learned Deputy Advocate General Khyber Pakhtunkhwa assisted by DCO Kohistan having submitted the comments on behalf of Government of Khyber Pakhtunkhwa has assisted the Court in this matter and also addressed the Court on the question of jurisdiction of this Court and the maintainability of this petition.

3. We have examined the matter in detail in the light of the provisions of the Constitution of Pakistan read with Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 in conjunction with historical background and special characteristics of law on the subject with valuable assistance of the learned counsels on the legal proposition involved in this petition and have drawn the following conclusions:-

- a) Gilgit-Baltistan is not as such defined the territory of Pakistan in the Constitution of Pakistan 1973 but it may be treated an area included in Pakistan by virtue of Article 1(2)(d) of the Constitution of Pakistan which is governed by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, deemed to have been issued under Article 258 of the Constitution as a sub constitutional document for self governance under the administrative control of Federal Government without the status of a Province of Pakistan.
- b) Notwithstanding that Constitution of Pakistan has no direct application in internal affairs of Gilgit-Baltistan, the Constitution of Pakistan is followed in Gilgit-Baltistan as superior law, therefore, in the light of definition of Power House under national and international law, the principle of Article 161 of the Constitution of Pakistan will be applicable for the purpose of determination of the question of royalty of Power Houses of Diامر Bhasha Dam.
- c) The calculation and quantum of royalty is a question independent to the right of royalty and two matters are to be essentially dealt with by the different forums. The question relating to the right of royalty is the subject matter of this petition whereas the quantum of royalty and calculation of proportionate share of royalty is a matter for consideration of Government of Pakistan.
- d) The project of Diامر Bhasha Dam has the proposal of two power houses one each on the right and left bank of Indus River. The location of Power House on the right bank of Indus River is in the area of District Diامر of Gilgit-Baltistan whereas the location of power house on the left bank of the River as per existing boundary of District Diامر of Gilgit-Baltistan and District Kohistan of Province of Khyber Pakhtunkhwa is in the area of District Kohistan. The Government of Gilgit-Baltistan will have exclusive right of royalty of Power House of Diامر Bhasha Dam on the right bank of Indus River whereas, notwithstanding the boundary dispute pending before Boundary Commission, the Government of Gilgit-Baltistan will be entitled to the royalty of Power House of Diامر Bhasha Dam on the left bank of Indus River in proportionate share to be determined by the Federal Government.
- e) Gilgit-Baltistan is not as such a Province of Pakistan rather has the status of an area included in Pakistan for all intends and purposes including the administrative and policy decisions and is under direct control of Federal Government of Pakistan, therefore, in case of any dispute in relation to the ratio of share of royalty and power of Diامر Bhasha Dam of left bank of Indus River, the matter will be referred to the Council of

Common Interest (CCI) for decision with representation of Government of Gilgit-Baltistan.

f) The Supreme Appellate Court, Gilgit-Baltistan in the Judicature Chapter in Gilgit-Baltistan (Empowerment and Self Governance Order, 2009 is apex Court of Gilgit-Baltistan and has complete independence with exclusive jurisdiction of final Court in Gilgit-Baltistan in all matters of Judicial nature. The decision rendered by this Court on a question of law is binding on all executive and judicial authorities in Gilgit-Baltistan.

4. In view of the above conclusions, we declare and hold that Government of Gilgit-Baltistan has exclusive right of royalty of proposed power house of Diامر Bhasha Dam on the right bank of the Indus River and is also entitled to one half share of royalty of the power house of Diامر Bhasha Dam on left bank of Indus River. In case of any dispute in proportionate share, the Government of Pakistan may refer the matter to the Council of Common Interest (CCI) for decision with representation of Government of Gilgit-Baltistan.

5. We are thankful to learned Deputy Attorney General for Pakistan, learned Advocate General Gilgit-Baltistan and Mr. Muhammad Issa, President Supreme Appellate Court Bar Association who has assisted the Court as Amicus and learned Deputy Advocate General Khyber Pakhtunkhwa for their cooperation in concluding this matter of public importance and appreciate the valuable assistance rendered by them to the Court.

6. This Direct petition with the above conclusion, declaration and direction stands disposed of. The detail reasons shall be followed.

73. The detail Judgment is released with the certificate of its reporting.

Chief Judge

Judge

Judge