

Stereo. HCJD A.38.

## **Judgment Sheet.**

### **IN THE LAHORE HIGH COURT LAHORE JUDICIAL DEPARTMENT**

#### **Writ Petition No.39291/2015**

#### **JUDGMENT**

**Kamil Khan Mumtaz etc**

**Versus**

**Government of Punjab etc**

<b>Dates of Hearing</b>	28.1.2016,07.3.2016,10.3.2016,15.3.2016,29.3.2016, 05.4.2016,06.4.2016, 11.4.2016, 12.4.2016, 13.4.2016, 18.4.2016, 19.4.2016, 20.4.2016,25.4.2016, 26.4.2016, 27.4.2016, 02.5.2016, 03.5.2016, 05.5.2016, 06.5.2016, 10.5.2016,30.5.2016,31.5.2016, 01.6.2016, 02.6.2016,07.6.2016, 08.6.2016, 09.6.2016, 13.6.2016, 15.6.2016, 28.6.2016,04.7.2016,12.7.2016, 13.7.2016 and 14.07.2016
<b>Petitioners by</b>	Ms. Asma Jahangir, Advocate, Khawaja Ahmed Tariq Rahim, Advocate, Mr. Muhammad Azhar Saddique, Advocate assisted by Mr. Abdullah Malik, Mr. Humayun Faiz Rasool Bhutta, Mr. Munir Ahmad, Mr. Shabir Ismail, Shahanshah Shamil Paracha, Mr. Muhammad Irfan, Mr. Adeel Hasan, Advocates.
<b>Respondents by</b>	Mr. Shahid Hamid, Advocate alongwith Mr. Mustafa Ramday, Ms. Ayesha Hamid and Mr. Jahanzaib Inam, Advocates for respondents No.2,3 and 4. Mr. Ashtar Ausaf Ali, Attorney General for Pakistan alongwith Ch. Naseer Ahmad Bhutta, Additional Attorney General, Mirza Nasar Ahmad, Deputy Attorney for Pakistan. Mr. Shakil-ur-Rehman Khan, Advocate General, Punjab alongwith Mr. Imtiaz Kaifi, Mr. Shan Gull, Ms. Asma Hamid, Additional A.Gs, Ms. Samia Khalid

	Mehmood, Mr. Qasim Ali Chohan, Mr. Jamal-ud-Din Mamdot, Mr. Khalid Waheed Khan, Mr. Khurram Shahzad Chughtai, Ch. Sultan Mahmood, A.A.Gs. Asrar Saeed Chief Engineer, LDA, Ameer Hassan, Director Law,, LDA, Hasan Ahmad, Deputy Director, LDA, Nawaz Malik, Director Law, Environment Department.
<b>Amicus Curiae</b>	Syed Ali Zafar, Advocate.

**ABID AZIZ SHEIKH, J.** The petitioners have filed this constitutional petition challenging the legality of major transport project commonly known as “Lahore Orange Line Metro Train Project” (hereinafter referred to as project). Relevant facts are that in order to cater for traffic congestion and future transport demand in city of Lahore, a Metro Train Project was proposed by Government of Punjab. To execute said project, the Punjab Mass Transit Authority (“PMA”) was established under Punjab Mass Transit Authority Act, 2015 (“Act of 2015”). PMA entered into contract dated 20.05.2015 with Chinese Contractor M/s CR-NORINCO (hereinafter referred to CR-Norinco). A supplementary agreement dated 25.08.2015 between PMA and CR-Norinco was executed to assign civil work part of the project to Lahore Development Authority (“LDA”) being nominee of PMA. In the prayer of this constitutional petition, the petitioners are seeking multiple reliefs. However, during arguments, learned counsel for the petitioners agreed that

as legality of project being allegedly violative of Punjab Public Procurement Act, 2009 (PPRA), is also subject matter of separate writ petition No.5793/2016 (which is not yet ripe up for final arguments), therefore, in this constitutional petition, the petitioners will confine their submissions and relief to the extent of “Heritage” i.e. construction within the prohibitory zone of immovable protected antiquity/special premises and secondly “Environment” i.e. legality of Environmental approvals for project granted by Environmental Provincial Agency (“Provincial Agency”).

**Petitioners arguments on “Heritage”**

2. Mr. Mohammad Azhar Siddique and Khawaja Ahmed Tariq Rahim, advocates on behalf of petitioners argued that the project will severely damage and harm various properties including 26 heritage sites of Lahore City (detail of which are given in para No.23 of writ petition). Learned counsel submits that the said properties being immovable antiquities under section 2(g) of the Antiquity Act, 1975 (**Act of 1975**) and special premises under section 2(a) of the Punjab Special Premises (Preservation) Ordinance, 1985 (**Ordinance of 1985**) are required to be preserved and protected and no construction can be carried out within 200 feet distance of

these properties as required under section 22 of Act of 1975 and section 11 of Ordinance of 1985. Submits that if construction allowed to be continued within 200 feet distance, these heritage sites will not only be destroyed, damaged, defaced but will also be mutilated. Submits that these heritage sites and monuments are also to be protected by the state under various international conventions, to which Pakistan is signatory. Contends that Director General Archeology (**Director General**) was bound under Act of 1975 and Ordinance of 1985 to protect these sites and NOC for construction within 200 feet distance could only be given to advance and achieve the purpose of these laws and not to frustrate the object of these laws. Submits that NOC issued by Director General dated 16.11.2015 under section 22 of the Act of 1975 and NOC dated 30.11.2015 issued by the Committee under section 11 of the Ordinance of 1985 giving permission to carry on construction within prohibited limits of 200 feet of protected antiquities and special premises are not only arbitrary, malafide, patently illegal, without lawful authority but same are also without application of independent mind. Submits that before granting said NOCs, the purpose of the Act of 1975 and Ordinance of 1985 to preserve and protect these heritage sites and

monuments was grossly compromised. Submits that NOCs are based on extraneous and irrelevant considerations and were also given in blanket form without assessing individually that how much harm may be caused to each of these heritage sites by new construction within prohibited limit of 200 feet prescribed under the law. Submits that even provisions of Act of 2005 and various international conventions to which Pakistan is signatory, were not kept in mind by Authorities before granting NOCs and putting these precious heritage sites under serious threat and danger of being destroyed, damaged and mutilated. Further submits that no Archeological experts, historians or even the stakeholders including the petitioners were consulted or heard before granting NOCs. Contends that NOCs were granted due to undue influence of higher authorities as the Committee which granted NOC was headed by the Chief Secretary, Government of the Punjab and similarly Director General being an employee of Government was also pressurized to issue NOC within two days time without consulting any independent experts, therefore, entire process was just an eye wash. Further submits that Government can carry out development in accordance with law but at the same time, State being custodian of

national heritage and historical monuments, it is also the duty of State to protect these sites while under taking these developments.

3. Mr. Shakil-ur-Rehman Khan, Learned Advocate General, Punjab during course of arguments apprised this Court that NOC dated 16.11.2015 regarding antiquity properties has already been revised by Director General (Archeology) on 06.5.2016 in respect of each antiquity property separately. He also informed this Court that addendum dated 20.5.2016 has been issued to the NOC dated 30.11.2015 separately regarding each special premises. Learned Advocate General, Punjab recorded categorical statement, that after above revised and addendum NOCs, impugned NOCs dated 16.11.2015 and 30.11.2015 are no more are in the field. After the above development, the learned counsel for the petitioners though filed formal application to amend this constitutional petition. However, it was agreed between the parties that as this Court can take into account subsequent events, therefore, the petitioners will make their submissions regarding revised and addendum NOCs and there is no need to formally amend this constitutional petition. In view of above, learned counsel for the petitioner made following further submissions regarding

revised NOCs dated 06.5.2016 in respect of antiquities properties and addendum NOC dated 20.5.2016 in respect of special premises.

4. They contends that revised NOCs are also violative of provision of Act of 1975 because NOCs should have been issued at the time of making of plan and scheme under section 22 of the Act and not at subsequent stage when project is already started. Argued that revised NOCs regarding antiquity property and addendum NOCs regarding special premises are not only violative of the Act and the Ordinance but same have been issued in violation of international convention regarding buffer zone of 200 feet meant to protect and safeguard heritage sites. Submits that revised and addendum, NOCs have been issued without associating independent and impartial experts and reports relied upon are prepared by persons who are either government officials or associated with government in various projects/departments. Submits that notification of Advisory Committee dated 13.2.2016 is also not transparent as none of the members of Advisory Committee was independent and despite repeated requests, names proposed by petitioners were not considered for inclusion in Advisory Committee. Submits

that even otherwise, NOCs could not be revised or added during their suspension by this Court through interim order. Submits that in revised NOCs, reliance has been placed on EPA report dated 09.7.2015 which has already become redundant and fresh report dated 09.5.2016 was not considered. Submits that revised and addendum NOCs are based on Advisory Committee report, report of Dr. Javed Younas Uppal (**Dr. Uppal**) and Heritage Impact Assessment (**HIA**) prepared by Dr. Ayesha Pamela Rogers (**Dr. Pamela**) but all these reports are based on NESPAK report which was inadequate and defective. Submits that these reports and HIA are neither independent nor in accordance with international standard for preparing such reports and HIA. Submits that petitioner already filed objections on constitution of Advisory Committee and against Dr. Uppal, being associated with government and LDA in number of their projects. Submits that HIA has also not been conducted by independent commission as Dr. Pamela was not only part of Advisory Committee but she also represented Government of Punjab before UNESCO in proceedings regarding Shalimar Garden at Turkey. Submits that HIA does not fulfill even international standard prescribed by UNESCO for preparing HIA. Submits that though

revised and addendum NOCs are separately made in respect of each antiquity properties and special premises, however, they all are identical and ditto in letter and form. No independent assessment was carried out by the competent authority of each heritage site separately before issuing the NOCs. He submits that HIA report prescribed different levels of risk and damage which may be caused to each heritage site but none of aforesaid risk was taken into consideration while prescribing the stereo type same conditions and mitigating measures for each heritage sites in the revised and addendum NOCs. Submits that in HIA, it is pointed out that there will be permanent visual damage to heritage sites and therefore, no revised and addendum NOCs, could possibly be issued. Adds that advisory committee in its report asked for independent structure engineer however, LDA instead of appointing independent structure engineer submitted the report of Dr. Uppal who was already appointed by LDA to confirm the NESPAK defective report. Submits that in HIA, it was specifically mentioned that there is risk to fabric as well as permanent damage to the heritage sites but even that part of report was not considered while giving revised and addendum NOCs.

5. Ms. Asma Jahangir, learned counsel for the petitioners argued that petitioners are concerned citizens of Pakistan and resident of Lahore, therefore, they have fundamental right under Article 28 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution) that their culture and heritage may be preserved. Submits that Article 28 of the Constitution being a fundamental right must be given effect through judicial review. Adds that this Article is unique and there is no corresponding provision even in Indian Constitution. Submits that Article 29 of Indian Constitution only deals with right of minorities regarding their culture. She argued that NOC dated 16.11.2015 regarding antiquity properties and NOC dated 30.11.2015 regarding special premises are not sustainable. She elaborates that project commenced on 25.10.2015, whereas request for approval of NOC was referred to Director General Archeology by LDA much after commencement of work. Submits that said request for NOC was refused on 05.11.2015, but just after few days on 12.11.2015, Director General was transferred and on 16.11.2015, NOC was issued by newly appointed Director General Archeology. Adds that even otherwise LDA could not apply for NOC and it was only PMA who could apply for NOC to the authorities. Submits that NOC

dated 16.11.2015 was issued in violation of provision of Act of 1975 including section 22 thereof. Submits that NOC dated 30.11.2015 regarding special premises was issued by Committee in violation of section 5 and 11 of Ordinance of 1985 that the said committee was not independent but consists of Government Officials and there was no way they could refused NOC. Adds that there were only two independent Members of the committee and they both refused to sign the minutes of the meeting, therefore, even this NOC was not validly issued. Submits that impugned NOCs are based on presentation by LDA and NESPAK report, however both are not expert in heritage and NESPAK Report even otherwise has no basis because NESPAK was not appointed as “consultant” after fulfilling the requirement of PPRA Rules. Further submits that there is no correspondence on the record to show that NESPAK was appointed by PMA or LDA to carry out the inspection of special premises and said report was apparently issued after the NOC dated 15.11.2015 and 30.11.2015. Further submits that Heritage Impact Assessment Report dated February 2016 by M/S Dr. Ayesha Pamela Rogers of M/S Rogers, Kolachim Khan Associates (**RKKA**) was also after the issuance of these NOCs, therefore, does not

cure the defect in the NOCs. Submits that notwithstanding the above legal position, even in the said HIA report, it is mentioned that there is high risk to the heritage site, which proves that the NOCs were not issued with due consideration and application of mind. Learned counsel placed reliance on Jaffar Ali vs. Station House Officer, Airport Police (PLD 2016 Sindh 31), Binay Kumar Mishra vs. State of Bihar and others (AIR 2001 Patna 148) and Ramsharan Autyanuprasi vs. Union of India (AIR 1989 SC 549) to argue that balance must be drawn between sustainable development and protection of heritage sites. Further submits that u/s 5 of the Ordinance of 1985, no alternation or renovation etc can be made in respect of special premises without permission of the Government or the committee. Submits that no such separate approval has been granted u/s 5 and the NOC dated 30.11.2015, only related to construction within 200 feet which was also defective for reasons explained above.

6. She further contends that UNESCO Convention of 1972 (Convention) was implemented by introducing Act of 1975 and Ordinance of 1985 and u/s 22 of the Act of 1975 and section 11 of the Ordinance, 1985, the Director General and Committee could only issue NOCs in exceptional circumstances but in present case, NOCs

were issued without ensuring protection of immovable antiquities and special premises. Ms. Asma Jahangir, Advocate concluded that approval, plans and construction of project are violative of various laws including Act of 1975 Ordinance of 1985, Punjab Heritage Foundation Act, 2005 (Act of 2005), various international conventions and various Articles of Constitution including Article 9, 10-A,14,23,24,25,28,32,38 and 140-A of the Constitution.

7. Mr. Ali Zafar Advocate while appearing as Amicus Curiae referred to interim order passed by this Court dated 28.01.2016 and submits that this Court had rightly observed that under the Act of 1975 and Ordinance of 1985 there is a positive as well as negative duty on the part of Government to ensure protection of heritage sites. He submits that no doubt this Court cannot substitute the decision of policy makers however, discretion to be exercised by the policy makers must be structured and the order which is arbitrary, can always be interfered by this Court in judicial review. He submits that in such like mega projects where number of heritage sites and emolument are likely to be affected, the authorities concerned should have taken independent expert opinion from a panel of experts of international fame and not from

an individual. He submits that each heritage site, require different expertise and tools, therefore, HIA should have been conducted by a team with professional skills and not by individual. He submits that original NOCs were totally non-speaking and were rightly suspended by this Court. Submits that Government also by realizing the said defects in the said NOCs though issued revised and addendum NOCs but this does not cure the defects in original NOCs because they are not based on independent assessment and expert opinion. He submits that Advisory Committee based its findings on the presentation by LDA and report of NESPAK but neither LDA nor NESPAK are experts on the heritage sites. He adds that report of LDAs appointed consultant Dr. Uppal on vibration and HIA by Dr. Pamela who has represented government before UNESCO, cannot be treated as independent as both have either links or commercial interests with government. He submits that these reports could be sufficient if project was only to build a house or building but in such like mega project which is likely to effect number of heritage sites and entire look of the city, much more efforts should have been made including seeking independent experts opinion by the competent authority, before issuing NOCs. He submits that every one including, Advisory

Committee, LDA, the HIA by AKKA and report of Dr. Uppal, relied upon NESPAK Report. However, NESPAK report was neither independent nor sufficient document on heritage. Submits that in absence of any other independent assessment, the superstructure based merely on NESPAK report is not sustainable. Mr. Ali Zafar argued that under Section 22 of the Act of 1975 and Section 10 of the Ordinance of 1985, the NOC for construction within 200 feet could only be issued when there is a clear report that such construction will not harm historical sites. He submits that once the HIA has given report that the construction of project will cause harm to the heritage sites including permanent harm of visual nature, no NOC could be issued by the competent authority. He submits that NOC under the Act of 1975 and Ordinance of 1985 is not the matter of mitigation but it is a matter of ruling. Mitigation stage will only come if NOC was originally issued on the bases that there is no likelihood of any harm to heritage sites and subsequently, some unexpected circumstances arises for which mitigation measures were required. He submits that under the law no NOC can be issued simultaneously to harm historical sites and then also prescribing mitigating measures in same NOC against said harm. He submits that heavy construction just

few feet away from historical sites will definitely cause damage to it and there is always likelihood of some unfortunate incident like fallen of crane etc, which may permanently destroy the heritage sites. He in these circumstances concluded that in absence of any independent expert opinion of penal of experts no construction can be allowed within 200 feet of heritage sites.

**Petitioners arguments on environmental approval**

8. On the issue of Environment Impact Assessment approval, learned counsel for the petitioners argued that Environment Impact Assessment Approval dated 09.07.2015 (**Approval**) was passed by the Provincial Agency on the request/application of LDA dated 07.05.2015. He submits that on 07.05.2015, the LDA had no concern with the project as for the first time, LDA was assigned civil work being a nominee of PMA through supplementary agreement between PMA and CR-Norinco on 25.08.2015. He submits that the only Authority which could file application for EIA was PMA which had to carry out the project in view of contract dated 20.04.2015. He submits that u/s 12 of the Punjab Environmental Protection Act, 1997 (“Act of 1997”), only the proponent

of project could apply to Provincial Agency for EIA. He submits that the word “proponent” as defined in section 2(XXXVI) means a person who proposes or intends to undertake a project. He submits that as the EIA was not only confined to civil work but was in respect of entire project, therefore, it was only the PMA who could apply for approval the EIA and LDA was not a proponent to undertake a project or seek EIA approval. Learned counsel further submits that notwithstanding the fact that approval dated 09.07.2015 could not be issued even otherwise one of the conditions of approval was that unless the approvals and NOCs are obtained from other authorities, the project shall not be commenced. He submits that in clear violation of said approval, the civil work of the project was commenced in September 2015 whereas the NOCs by the Director Archeology under Act of 1975 and the NOC by Committee under Ordinance of 1985 were obtained much after the commencement of the project on 16.11.2015 and 30.11.2015. Learned counsel further submits that even as per clause 7 of Contract dated 20.04.2015 between PMA and contractor, the contract was to be given effect after effectiveness of the loan agreement. Submits that loan agreement was finally approved in January 2016 whereas the project commenced

in September 2016 which is clear violation of contract dated 20.04.2015. Further submits that originally Punjab Mass Transit Authority Act, 2012 (“Act of 2012”) was promulgated for the purpose of Metro Bus Project and allied functions. Submits that said Act does not relate to Train Project which is evident from the fact that Act of 2012 was repealed and Punjab Mass Transit Authority Act of 2015 (Act of 2015) was promulgated on 26.06.2015 to include the Metro Train Project within purview of PMA. He submits that before the promulgation of Act of 2015, on 26.06.2015, the agreement was already executed by PMA with the CR-Norinco on 20.04.2015, when PMA had no legal authority and jurisdiction to enter into an agreement as its is functions were only confined to Metro Bus under the Act of 2012 and therefore even PMA could not be treated as proponent for the purpose of EIA approval. Further submits that permission was allowed by the Provincial Agency notwithstanding the fact that the EIA did not fulfill the requirements to grant permission for EIA. He elaborates that as per various publications in newspapers, non-certified private laboratory had prepared the baseline profile regarding the environment impact assessment with sub-standard equipment.

9. Submits that environmental approval was granted in slip shod manner without making any quantitative and qualitative assessment of the documents and data furnished by proponent. He submits that under regulation 11 of Review of IEE and EIA Regulations, 2000 (Regulation 2000), the relevant environment Agency was required to constitute a committee of experts and also solicit views of concerned Advisory committee. Submits that Director General in such Mega Project was also required to constitute a special committee to inspect site of the project and thereafter based on quantitative and qualitative assessment of the documents and data furnished by the proponent and after obtaining views from the public and concerns agencies and committees was to give his independent decision an EPO. He submits that even requirements of regulation 13 has not been complied with. He referred to various documents filed by respondents No.9 and 10 and submits that after request dated 07.5.2015 by LDA, environmental Agency vide letter dated 14.5.2015 requested for detail information. He submits that no information was provided, therefore, on 22.5.2015, EIA was returned for resubmission after incorporating replies to certain observation made on 22.5.2015. He submits

that on 26.5.2015, copies of EIA report was resubmitted but on 27.5.2015, environmental Agency again asked for additional information including NOCs from stake holders, public and private institutions as well as letter that no archeological site will be damaged/disturbed by the project. Submits that on 27.5.2015, District Officer Environment (DOE) was also directed to visit the site and furnish comprehensive and suitable report by considering environmental, social and economic aspect of the project to proceed further. Submits that on 28.5.2015, LDA merely replied that NOCs are under process. Contends that notwithstanding the above fact, on the same day i.e.28.5.2015, without waiting for the quarries raised on 22.5.2015 for the NOC and site inspection report, the Assistant Director Environment confirmed that EIA is complete. He submits that in similar fashion, on 30.6.2015, committee of so called experts, discussed four different projects including Mega Orange Line Train Project and just in two paragraphs recommended the project for issuance of environmental approval. He submits that in the said report of experts, none of the documents and data filed with EIA were discussed or assessed quantitative or qualitative. Submits that the impact of the project on environment, noise, pollution

vibration impact on heritage site etc and mitigating measures required were not even considered by the experts but they only discussed crossing of pedestrian and parking places. He submits that non of the so called experts had any expertise and they were merely employees of various government departments, therefore, had not exercised their jurisdiction and applied their mind independently. Learned counsel submits that in order to cover up defect in expert report, a letter dated 11.6.2015 was written requesting information, which was actually never called by committee of experts who had already recommended issuance of environmental approval in its meeting dated 30.6.2015. He submits that said expert report itself showed that so called expert committee approved the project without discussing the merits and de-merits of the project. Submits that finally the environmental committee meeting was held on 07.7.2015 in which, 35 different projects including Orange Line Train Project was discussed and said committee while relying upon the aforesaid expert report approved the project and thereafter approval was granted on 09.7.2015. He submits that from the above documents, it is evident that impact of project on any of the heritage sites were not even touched upon by any of

the authorities including experts, DOE or the executive committee. He further submits that even otherwise, conditions prescribed in approval dated 09.7.2015 has not been fulfilled. Submits that clause 11 of approval dated 09.7.2015 requiring LDA to obtain NOC from concerned department before commencement of the work. He submits that work was admittedly commenced in September, 2015 whereas NOC for heritage sites were obtained on 15.11.2015 and 30.11.2015. Therefore, submits that in view of clause 9 of the approval dated 09.7.2015, the conditions of approval being not complied with, it automatically became null and void, consequently there is no environmental approval in field to carry out project any further.

10. Learned counsel for the petitioner argued that without prejudice to the defects highlighted in the approval, even otherwise, Regulation 2000 could not be applied to assess the EIA under Act of 1997 as amended in 2012. He elaborates that after 18<sup>th</sup> amendment in the Constitution, the Act of 1997 was amended and instead of "Federal Agency: the word "Provincial Agency" was inserted in the Act of 1997, however, no such corresponding amendment was made in Regulation 2000. Learned counsel further submits that approval of EIA is

also not sustainable for the reason that no Advisory Committee as required under section 5(6) of the Act was constituted to advise the Provincial Agency on its different functions as specified in section 6 of the Act including environmental impact on the project. He submits that only three committees were constituted on 12.11.2015 under section 5(6) of the Act, which relates to public awareness implementation of laws and committee on environment policy but no other committee was constituted to advise Agency before impugned approval. He further submits that even committee under regulation 22 which was mandatory was never constituted. He submits that review committee under section 11(2) of Act of 1997 was also not consists of independent experts rather same consists of Government Employees which is against the law settled by august Supreme Court in Lahore Development Authority through D.G and others vs. Ms. Imrana Tiwana and others (2015 SCMR 1739). Argued that appointment of independent committees and requirement to give reasons is sine-quo-non for the approval of EIA. He submits that in Ms. Imrana Tiwana case, august Supreme Court held that EIA is not required for reconstruction of existing project whereas, Orange Line Train Project being not existing project, the EIA

requirement and mandatory of provision of Act of 1997 and regulation thereunder were applicable. He submits that as EIA approval is patently illegal, therefore, right of appeal before Environmental Tribunal under section 22 of the Act is not an adequate and efficacious remedy. Further submits that petitioners have also challenged the constitution of Environmental Tribunal being against separation of power, as no approval of Chief Justice was obtained before appointing member of Environmental Tribunal and being important question of interpretation of various provision of law and constitution involved, appeal before Environmental Tribunal is not adequate and efficacious remedy.

**Respondents arguments on Heritage**

11. Mr. Shahid Hamid, Advocate appeared on behalf of LDA, TEPA and Land Acquisition Collector while giving the background of the project, submits that MV Asia, a UK based company was engaged by the Government of Punjab in the year 2006 to carry out study of Mass Transit System for entire Lahore. He submits that said company carried out the survey and recommended four projects for Mass Transit System. The green line project in the forum of Metro bus Project

was given priority, hence already implemented. Whereas for the instant Orange Line Train Project, it was originally recommended that out of total distance of 27.1 k.m, 6.9 k.m will be underground and total cost of the project will be approximate US dollar Rs.2 billion. He submits that in the said report various options were considered, however, the route could not be changed. Mr. Shahid Hamid submits that addendum to this feasibility report was carried out by NESPAK in 2014 in which to reduce cost under ground option was revised. Thereafter on 22.05.2014 Framework agreement in this behalf was executed between Government of Pakistan and Republic of China. He submits that in pursuance to Frame Work agreement bidding process was carried out in China for the project and CR-Norinco being the lowest bidder with 2.19 billion US Dollar was awarded the contract. He submits that as the cost of project offered by CR-Norinco was on high side, therefore, PMA through supplementary agreement dated 25.08.2015 took part of civil work of the contract and LDA was appointed as executing agency to execute civil work.

12. On the issue of heritage sites, he argued that NOCs are based on two NESPAK analyses reports, the report of the Advisory Committee constituted under the Act of

1975, the vibration control report of Dr. Uppal, the Heritage Impact Assessment report of Dr. Pamela and the report of the Experts Committee. Submits that these reports are not to be disregarded on the basis of critiques presented by the petitioners who have no engineering or archeological or environmental experience or qualifications. Submits that this Court, in exercise of its constitutional jurisdiction, cannot entertain or adjudicate upon disputed questions of facts as to who is right, the aforesaid experts or the petitioners and their counsel nor can this Court substitute its own opinion/decision on issues on which the recognized experts of various disciplines have given their expert views/recommendations/findings. Submits that bare comparison of the NOCs issued on 16.11.2015 in respect of antiquity monuments and 30.11.2015 in respect of special premises and the revised NOCs dated 06.5.2016 in respect of antiquity monuments and 20.5.2016 in respect of special premises, there is world of difference between the previous and revised NOCs. The revised and addendum NOCs have been individually issued in respect of each antiquity monument/special premises. The revised and addendum NOCs list the documents and reports that were considered by the DG, Archeology/Chief

Secretary's Committee before they exercised their statutory powers under the Act of 1975 and the Ordinance of 1985. The revised and addendum NOCs have been made subject to the advice/recommendations made by the said statutory authorities by the Advisory Committee under the Act of 1975 and the Chief Secretary's Committee/Experts Committee under the Ordinance of 1985. It is self-evident that these revised NOCs are the product of due process and application of mind and therefore cannot be set aside simply because petitioners considers them flawed. Argued that this Court in exercise of constitutional jurisdiction will not set aside the revised NOCs issued by the designated statutory authority and it can only do so, if it finds that there was no due process and/or no application of mind and that the revised NOCs are tainted with malafides. Submits that the record placed before this Court shows that due process was followed and there was application of mind. Submits that the DG Archeology was himself the Chairman of the Advisory Committee that recommended issue of revised NOCs for the five antiquity monuments. The Advisory Committee held as many as 5 meetings in which all aspects of the project were considered before grant of the revised NOCs. It cannot possibly be said that the DG Archaeology did

not apply his mind by simply adopting all the recommendations made by the Advisory Committee. Similarly the Chief Secretary's Committee held as many as 3 meetings and inter alia also considered the recommendations of the Experts Committee before deciding to issue the revised NOCs in regard to the Special Premises. Submits that the minutes of the 3 meetings shows that all relevant factors were duly considered before arriving at the final decision. Therefore, these decisions cannot be regarded as tainted with malafides on the bald averment of the petitioner that the participants were either government servants or stooges of the government. Submits that bulk of the civil works are in an advanced stage of completion. Nearly 50% of the budgeted expenditure of civil works has been spent. More than 70% of the budgeted expenditure for land acquisition has been disbursed. Submits that for these reasons also, there is no possibility of any change in the alignment or, for that matter, any change of technology for construction of the project. Submits that any decision of discontinue this mega project will lead to a number of gravely adverse consequences for Pakistan/Punjab including the cancellation of China's loan for project.

**Respondents arguments on Environmental Approval**

13. Mr. Shahid Hamid argued that EIA was originally filed by NESPAK in April, 2015, however, after certain queries by Environmental Authorities, revised EIA was filed in May, 2015. He submits that as per executive summary and clause 1.41 of EIA report, the PMA was proponent and NESPAK was consultant. He submits that NESPAK was appointed as consultant in compliance of rule 45(5) of PAPRA Rules, 2014. He submits that LDA was appointed as agency of PMA on 17.4.2015 and being an agent to PMA, it filed EIA on 07.5.2015. He submits that fact that LDA will be executing agency of PMA was duly approved by Ministry of Planning and Development as evident from documents placed on record. He submits that LDA was appointed as executing agency because PMA neither has engineering wing, nor it has execution wing, whereas such facility is available with LDA. He referred to commercial contract dated 20.4.2015 between PMA and CR-Norinco and submits that clause 2.12 and 5.1 shows that civil work will include environment assessment and land acquisition. He submits that through formal amendment in the contract was made on 25.8.2015, whereby LDA was appointed as executing agency, however, it was appointed as agent of PMA

much before this date on 17.4.2015. He submits that under section 6,13-A,15 and 17 of LDA Act, 1975, LDA can enter into an agreement with any person to execute project and further direction of government is also binding on LDA. He, therefore, submits that LDA could execute the project on behalf of PMA. He submits that august Supreme Court in *Imran Tiwana case* supra held that LDA scope of work is broad and it can also execute such kind of contracts. He further submits that as LDA is government owned organization and was also executing work without any fee and charges, there was no need to follow PAPRA in appointment of LDA. He further submits that the definition of proponent in section 2(XXXVI) of Act of 1997 include person entitle to execute project, therefore, LDA falls within the definition of “proponent”. He also referred to dictionary meaning of word “proponent” in Black’s Law Dictionary and submits that executor will come within the definition of proponent. On issue that in EIA approval dated 09.7.2015, it was specifically mentioned that all NOCs be obtained before commencement of work and in case of any violation, approval is deemed to be cancelled, he submits that though work on project was commenced on 25.10.2015 before obtaining NOCs from Archeology

Department on 15.11.2015 and 30.11.2015, however, no work was carried out till obtaining of NOCs within 200 feet on heritage sites. Further submits that under section 21 of Act of 1997, violation of condition cannot amount to cancel the approval, therefore, in any case, no such condition could be incorporated in the approval. He submits that EIA was prepared by NESPAK in accordance with the guidelines for general project as there were no special guidelines for Metro Train Project. He submits that the Environmental Authorities appointed experts under Regulation 11 to assess the EIA and thereafter the competent authority approved the EIA. He admitted that no advisory committee was constituted at the time of approval of EIA on 09.07.2015 and five Advisory Committees were constituted on 10.11.2015. However, submits that under Regulation 11(4), the Provincial Agency was only required to consider the report of the Expert whereas it was not mandatory to appoint advisory committee or seek its advice u/s 5(6) of the Act of 1997 before approval of project. He does not deny that as per Para 91 of the judgment passed by august Supreme Court in *Imran Tiwana Case*, the appointment of Advisory Committee and its opinion for approval of EIA was made mandatory, however, submits

that short order of august Supreme Court came on 08.07.2015 whereas detailed judgment came after the approval dated 09.07.2015, therefore, the EIA approval is not defective for not seeking advice from advisory committee at that time. Submits that subsequently in compliance of august Supreme Court judgment, Advisory Committee was constituted which held various meeting and also assessed the project. Submits that further conditions are incorporated in EIA approval on 09.5.2016 in compliance of Advisory Committee opinion. He further submits that in any case, if there is any defect in the approval, the petitioners have remedy before the Tribunal and then before Division Bench of this Court u/s 22 and 23 of the Act of 1997.

14. Mr. Shakil-ur-Rehman Khan, Learned Advocate General, Punjab referred to various documents filed in reply to writ petition to argue that EIA was approved after considering and assessing the documents qualitatively and quantitatively by the Environment Authorities. He submits that in response to queries by the Environment Authorities, the proponent provided various documents and also filed revised EIA. He submits that though in the final approval by Director General, the documents are not discussed, however, the entire process

carried out by the Environment Authorities should be read as part of decision and therefore, the final decision of approval of EIA is speaking and well-reasoned order. He further submits that subsequent to approval dated 09.7.2015, the Advisory Committee on Environmental Impact Assessment (EIA) was constituted on 24.11.2015 under section 5(6) of the Act of 1997 and said committee held various meeting. Submits that in pursuant to advisory committee views, addendum approval dated 09.5.2016 has already been issued in which additional conditions in approval dated 09.7.2015 have been incorporated. Submits that said conditions are reasonable and in accordance with law and if petitioners are aggrieved, they have statutory remedy of appeal against said orders. It has also been informed that appeal has already been filed before Tribunal against the impugned decisions dated 09.7.2015 and 09.5.2016 of Environment Protection Agency.

15. On question of heritage sites, learned Advocate General submits that before issuance of original NOC, the Director General considered the report submitted by the Director as well as the presentation given by the LDA and therefore, it cannot be said that the original NOC was given without considering the effect of construction on

heritage sites. Submits that the allegation of petitioner that previous Director General was transferred only to secure NOC is baseless because the then Director General was already working as Acting Director General and after appointment of regular Director General, he was posted back as Director Environment Protection Agency. He submits that now revised and addendum NOCs dated 06.5.2016 and 20.5.2016 have also been lawfully issued based on Advisory Committee report, HIA and report of Dr. Uppal, which are to be considered independently.

16. Mr. Ashtar Ausaf Ali, learned Attorney General for Pakistan on behalf of Federation argued that entire case of the petitioners is based on personal whims and wishes and no counter report has been presented to show the adverse impact of project on heritage sites. He submits that though malafide is pleaded but no evidence has been produced to support these allegations. Submits that this Court in exercise of judicial review can only look at the process but not the contents of the NOCs which are based on studies and expert opinion. He submits that there is no counter expert opinion available on record to impeach the feasibility, alignment impact as well as mitigating measures suggested by the experts. He submits that NOCs are not only well reasoned but also

prescribe that unless all conditions are fulfilled, they will automatically be cancelled. He submits that it is for the State to look after public interest and to provide transport facility as well as to ensure safety of heritage of sites. Submits that unless some law is violated, the policy decisions of the State cannot be substituted by this Court. He submits that petitioners are busy bodies and have filed this constitutional petition with malafide intention, which is not maintainable.

17. We have heard the arguments of learned counsel for the parties and perused the record with their able assistance. We would like to deal with issue of heritage at the first instance.

#### **HERITAGE ISSUE.**

18. Indo Pak generally and City of Lahore in particular is hub of ancient emoluments, cultural heritage, history and archeological sites. Cultural sculptural monolithic and artistic interests exist for centuries in Lahore. These national monuments and heritage sites not only give pride to the people of Lahore but also give them insight into past glory of their structural, cultural, sculptural artistic and archeological skills. These heritage sites are also source of the vision and wisdom to their ancestors. This

rich history calls for legal duty and moral responsibility of the State and public functionaries that these monuments and heritage sites be preserved and perpetuated so that succeeding generations remember their ancestors traditions, culture, civilization and to learn their art, architecture, aesthetic tastes imbibed by authors of the past to continue same traditions in future.

19. To protect, preserve and maintain cultural and historical heritage, there are not only national and provincial Statutes in place but International Conventions are also available and applicable in Pakistan. For protection of cultural and national heritage, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) was established in 1945. UNESCO adopted convention on 16.11.1972 concerning the protection of World Cultural and National Heritage (**“Convention”**). The Convention recognized that it is the duty of International community as a whole to protect the World Heritage. Nevertheless the Convention fully respected the sovereignty of the Member States on whose territory, the heritage is situated and therefore, every State party undertook not to deliberately damage directly or indirectly the heritage. Every State party to Convention has duty to the utmost of its own resources and with international

assistance, to ensure protection, conservation of heritage sites and its transmission to the future generations. The purpose of Convention is to safeguard tangible and intangible cultural heritage and demands the participants to take appropriate legislative, administrative and all other measures in this respect. Pakistan is a respectable member of International Societies of States and signatory to the Convention. Being Member State, it mandates Pakistan to foster respect for international obligations regarding protection and preservation of heritage sites.

20. Apparently in pursuance to Convention, Antiquity Act, 1975 was promulgated to preserve and protect antiquities. The words “antiquity”, “immovable antiquity” and “protected antiquity” are defined separately in said Act. As per section 2(c) of the Act of 1975, an “antiquity” interalia means ancient objects or historical sites. Immovable antiquity is defined u/s 2(g) which interalia means any archaeological mound, tumulus, burial place or any ancient garden, structure, building, erection or other work of historical and archaeological interest. “Protected antiquity” is defined in section 2(j) which means an antiquity which is declared u/s 10 of the Act of 1975 to be a protected antiquity by Federal Government through notification in the Official Gazette. The Act of 1975 casts

duty upon Director General Archaeology to protect and preserve antiquity, immovable antiquity and protected antiquity. Reading holistically, the scheme of Act of 1975 shows that though there is duty of Director General Archaeology to protect all antiquities, however level of protection and onus of preservation for “protected antiquity” is much higher comparing to the antiquity and immovable antiquity. To protect and preserve antiquity, there is not only a positive duty on the Director General Archaeology u/s 9, 12 and 15 of the Act of 1975 to preempt the sale, appoint guardian and acquire compulsorily the protected antiquity but there is also negative injunction provided in section 18, 19 and 20 of the Act of 1975 that “protected antiquity” shall not be used for any purpose inconsistent with its character and no person shall destroy, break, damage, alter, injure, deface or mutilate the “protected antiquity”.

21. Further to ensure that above functions and duties to protect and preserve protected immovable antiquities are not in any way interfered with and interrupted by future development schemes, plans and new construction in proximity of “protected antiquity”, a non-abstente clause of section 22 of the Act of 1975 was introduced which reads as under:-

**22. Execution of development schemes and new constructions in proximity to immovable antiquity.** – *Notwithstanding anything contained in any other law for the time being in force, no development plan or scheme or new construction on, or within a distance of two hundred feet of, a protected immovable antiquity shall be undertaken or executed except with the approval of the [Director-General].*

The over-riding non-absolute provision of section 22 of the Act of 1975 is self-explanatory and provides that no development plan or scheme or new construction on or within distance of 200 feet of a protected antiquity shall be undertaken or executed except with the approval of Director General Archaeology. Discretion vested with the Director General Archaeology to give permission under section 22 is not unfettered, unbridled and not to be exercised to frustrate the purpose of the Act of preserving and protecting heritage site. Such permission cannot be granted as ministerial job in routine at the whim and wish of Director General but such permission is only in exceptional circumstances subject to necessary inspections, expert opinions and unequivocal conclusion by Director General that such development plan, scheme or new construction on or within 200 feet of protected antiquity will not in any manner destroy, break, damage, alter, injure, deface, mutilate or impair the protected immovable antiquity. In case the development plan, scheme or new construction is likely to cause damage to

the protected antiquity in any way, the permission u/s 22 cannot be granted. The provisions of Act of 1975 are mandatory as their violation entails penal consequences.

22. In addition to Act of 1975, to specifically preserve certain premises of historical and architectural value in Punjab and to control and regulate their alterations, demolition, re-erection and ancillary matter thereto, the Punjab Special Premises (Preservation) Ordinance, 1985 was promulgated. Section 4 of the Ordinance of 1985 gives overriding effect to this Ordinance on any other law for the time being in-force. Sections 5 and 6 of the Ordinance of 1985 prescribe that no alteration, renovation, demolition or re-erection of such portion of a special premises as is visible from outside or any part of such portion shall be effected and no authority or legal body will approve any plan in relation to special premises without the prior permission of Government or the Committee. Section 7 of the Ordinance of 1985 imposes categorical prohibition that no person except to carry out purpose of the Ordinance, destroy, break, damage, injure, deface or mutilate special buildings. To properly preserve and conserve the special premises, the Government or the Committee not only can issue any direction to the owner but they can also acquire special premises. In line with

provision of section 22 of the Act of 1975, section 11 of the Ordinance of 1985 also prescribes negative injunction that no development plan, scheme or new construction on or within a distance of 200 feet of a special premises shall be undertaken or executed except with the approval of the Government or a committee. For convenience, section 11 of the Ordinance 1985 is reproduced hereunder:-

**11. Execution of development schemes and new constructions in proximity to Special Premises.**—*No development plan or scheme or new construction on, or within a distance of two hundred feet of, a Special Premises shall be undertaken or executed except with the approval of the Government or a Committee.*

As already discussed, in respect of section 22 of the Act of 1975, the permission u/s 11 of the Ordinance 1985 also cannot be granted in routine but it is only in exceptional circumstances, where the Government or Committee after due inquiry and inspection satisfied that development plan, scheme or new construction on or within 200 feet of special premises will not in any way destroy, break, damage, injure, deface or impair the special premises. The provisions of Ordinance of 1985 are also mandatory as their violation is subject to penal consequences.

23. Beside Act of 1975 and Ordinance of 1985, the Provincial Assembly in order to conserve, maintain, rehabilitate and develop “the Punjab Heritage,

promulgated the Punjab Heritage Foundation Act, 2005” (“Act of 2005”). Under said act, the Punjab Heritage Foundation was established to preserve, conserve, maintain and re-habilitate the Punjab heritage through various means including technical and financial assistance and also to create awareness among the people for preservation of the Punjab heritage. Other than sub-constitutional enactments, the heritage and culture is also protected under the constitutional provisions. Article 28 of the Constitution mandates that language, script and culture be preserved, whereas Article 9 of the Constitution protects right to life, which as per law settled by Apex Court includes amenities, facilities, dignity of life with cultural traditions and heritage.

24. The above discussion shows that in Pakistan not only international conventions but statutory and constitutional legal framework also available to protect and preserve heritage. In suo motu matter regarding cutting of trees for canal widening project **2011 SCMR 1743**, the Hon’ble Apex Court quoted:-

*“Any city gets what it admires and what it pays for and ultimately deserves. And we will probably be judged not for the monuments we build but the*

*monuments we destroy. (by Ada Louise Hustable, Pulitzer Prize Winning Architecture Critic)”.*

Admittedly, following buildings are protected immoveable antiquities under the Act of 1975; (i) Shalamar Garden, (ii) Gulabi Bagh Gateway, (iii) Buddha’s Tomb, (iv) Chauburji and (v) Zebunnisa Tomb. Whereas following historical buildings are declared as Special Premises under Ordinance of 1985; (i) Lakshmi Building, (ii) General Post Office (G.P.O), (iii) Aiwan-e-Auqaf (Shah Chiragh) Building, (iv) Supreme Court Registry Building, (v) Mauj Darya Darbar & Mosque. (For convenience brief history and description of these protected antiquities and special premises is annexed with this Judgment as **appendix ‘A’**). There is no dispute that said buildings and special premises are in vicinity of Orange Line Train Project and being effected by the alignment of the project as heavy construction is being carried on within prohibited 200 feet limits of all these historical sites. The petitioners in this petition have interalia challenged said construction within prohibitory zone. However, case of the respondents is that project and construction within 200 feet is lawful because Director General under section 22 of the Act of 1975 and Committee under section 11 of Ordinance of 1985 have

already granted NOCs dated 16.11.2015 and 30.11.2015 and subsequently revised and addendum NOCs dated 06.5.2016 and 20.5.2016 also issued after fulfillment of all legal and codal formalities.

25. Learned counsel for respondents raised preliminary objection to the maintainability of this petition on the ground that petitioners have no locus standi to invoke the constitutional jurisdiction of this Court. They further submit that petitioners are not bonafide litigants but busy bodies, therefore, this petition is liable to be dismissed being abuse of process of this Court. We have examined the above arguments. It is admitted position between the parties that heritage sites including “protected antiquities” and “special premises” are to be preserved and protected by the State under the Constitution and statutory enactment as well as international conventions. The dispensation of justice is not alone the function of Courts but public functionaries are equally responsible to act fairly, justly and in accordance with law being trustees of public power. It is settled law that where public functionaries have failed to perform their duties or they act illegally or in excess of their jurisdiction relating to public duties, any concerned person can invoke the constitutional jurisdiction of this

Court. The term aggrieved person under Article 199 of the Constitution would not confine to a person having strict legal right but would extend to any person having legitimate interest in performance of a public duty. The Hon'ble Supreme Court in case of M/S Al-Raham Travel and Tours Private Limited and others Vs. Ministry of Religious Affairs (2011 SCMR 1621) held that constitution is living organism and has to be interpreted to keep alive the tradition of past blended in the happening of present. The august Supreme Court further held that even the policy in conflict with provision of law or violation of fundamental rights can be challenged in constitutional jurisdiction.

26. In the matter of Human Rights case (2010 Supreme Court 759), the Apex Court on a petition filed by member of a Civil Society entertained the petition against project in public park, thus the scope of locus standi was extended to even conscious and concerned citizens who are alive to the illegality and excess of jurisdiction by Executive Authorities of the Government. In Javed Ibrar Paracha vs. Federation of Pakistan (PLD Supreme Court 482), the scope of public interest litigation was determined that firstly the matter should be of public interest and secondly the petitioner aims for

public good and for the welfare of general public. It is well settled by now that where infringement of law and constitution by Executive Authorities is involved, Court in judicial review would unhesitatingly and without the slightest qualms of conscious cast aside the technicalities of procedure in dispensing judicial review and entertain the petition filed by like minded public individuals. However, there is no dispute that the individuals who moved the Court for judicial redressed must act bonafide. Petitioners in this petition are concerned citizens and have invoked jurisdiction of this Court to protect and preserve their culture and heritage sites. The matter indeed concern public interest and aim for good of public. Therefore, petitioners have locus standi to invoke the constitutional jurisdiction of this Court, hence the preliminary objection is over ruled.

27. Learned counsel for the respondents also questioned the maintainability of this petition on the ground that when Government has taken the policy decision, it is not for this Court in exercise of judicial review to sit in appeal over such policy decision and substitute its findings. Reliance is placed on Young Doctors Association and othes vs. Government of Pakistan and others (PLD 2015 Lahore 112) and I.T

Commr. of Agricultural, Kerala vs. Planation Corpn. Of Kerala Ltd, Kottayam (AIR 2000 Supreme Court 3714) and Lahore Conservation Society through President and 3 others vs. Chief Minister of Punjab and another (PLD 2011 Lahore 344). There is no cavil with settled proposition that where decision is not ultra vires of law and also reasoned rational and reasonable, this Court in exercise of judicial review cannot set aside and displace such decision. There is also no doubt that development of roads and provision of better transport facility to public is the domain of State/Government and this Court is not substitute or interfere with policy matter and decision making of the competent authority. However, these propositions are with caveat that where such decisions and recommendations of the competent authority are not in accordance with law or same are arbitrary, irrational and unreasonable, than mere magnitude of costs involved in the project will not deter the courts to direct the State/Government to act strictly in accordance with law and to protect its own heritage and archeological sites.

28. Now we will examine whether original NOCs dated 16.11.2015 and 30.11.2015 were lawfully issued. As already discussed above, under section 22 of the Act of 1975 and section 11 of Ordinance of 1985, Director

General Archeology and the Committee respectively can grant permission for development plan, scheme and new construction only if such development plan, scheme and new construction will not in any way destroy, break, damage, injure, deface or impair the protected immoveable antiquities and special premises. If there is likelihood of injury to heritage any extraneous consideration for such permission will be against the mandatory provisions of law, Convention and the Constitution. With this legal position in mind, we have seen that in respect of original NOC dated 16.11.2015 for protected antiquities, when the matter was placed before the then Director General Archeology for issuance of NOC, he vide letter dated 05.11.2015 raised serious concerns being sites protected under the Act of 1975 and Ordinance of 1985. He on 06.11.2015, also constituted a special Committee concerning issuance of NOC. The said Committee on 09.11.2015 specifically mentioned in its report regarding certain sites, that project would be an irreversible intervention and it might result that minimum heritage of Pakistan will be removed from world heritage list permanently and same would also have negative impact on the tourism.

29. Notwithstanding the above letter by the then Director General and recommendations of the committee, just after three days on 14.11.2015, a presentation was given to a newly appointed Director General by Chief Engineer LDA and said Director General without application of independent mind and without expert opinion, in just two days time, after holding an in-house meeting issued NOC dated 16.11.2015 to carry out construction within 200 feet of all heritage sites. This Court while granting interim relief on 28.1.2016 already noted that NOC dated 16.11.2015 was merely based on correspondence and presentation by Chief Engineer LDA on 14.11.2015. No Heritage Impact Assessment, expert opinion from any archeologist, architect, historian or even the Committee which earlier dealt with issue of NOC was called for or consulted before grant of NOC for construction within prohibited area of heritage sites. This Court also noted that the Chief Engineer LDA was admittedly not an expert on archeology but he was a construction person, therefore, his opinion and presentation was apparently not relevant enough factor to put all heritage sites under threat of destruction due to heavy construction within prohibited limit of 200 feet. Further a general NOC was issued by Director General

and none of the protected antiquities properties were separately assessed, discussed and inspected to determine whether at all, it will be effected by construction of project in its vicinity and if at all NOC should or should not have been granted for any particular antiquity.

30. Regarding NOC dated 30.11.2015 under the Ordinance of 1985, we have also noted that NOC was granted as per plan presented by LDA for various special premises without seeking any expert advice or opinion from independent Advisory body. Further again no separate assessment regarding said special premises were made to determine whether at all NOC should or should not have been issued. The above defects in the NOCs dated 16.11.2015 and 30.11.2015 have apparently conceded by the respondents themselves when they issued the revised NOCs dated 06.05.2016 for each protected antiquity and addendum NOCs dated 20.05.2016 regarding special premises.

31. Plain reading of revised and addendum NOCs dated 06.05.2016 and 20.05.2016 show that attempt has been made to cure the defects in the original NOCs dated 16.11.2015 and 30.11.2015 by relying upon report of NESPAK, decision of EPA, report of Advisory

Committee, report of Dr. Uppal, heritage impact assessment report by RKKA and report by Committee of Experts appointed by the Committee. Admittedly none of the above reports and material was referred to in the original NOCs dated 16.11.2015 and 30.11.2015. Except NESPAK and report of EPA, no other material was even available at the time when original NOCs dated 16.11.2015 and 30.11.2015 were issued. In the given circumstances, there is no manner of doubt that the Director General Archaeology and Committee while granting original NOCs dated 16.11.2015 and 30.11.2015 have not applied their mind independently and acted illegally, unreasonably, irrationally and beyond their jurisdiction in giving permission to development plan, scheme and construction of project within 200 feet of protected antiquity and special premises.

32. Though the learned Advocate General Punjab made statement on 15.06.2016 and 23.06.2016 that original NOCs dated 16.11.2015 and 30.11.2015 are no more in the field and are replaced by revised NOCs dated 06.05.2016 and addendum dated 20.05.2016. However, the perusal of revised NOCs dated 06.05.2016 shows that these were issued in furtherance of the previous NOCs dated 16.11.2015 regarding protected antiquity. Similarly

addendum NOCs dated 20.05.2016 were issued in addition to and in furtherance of NOCs dated 30.11.2015 regarding special premises.

33. Now the next question is that once, original NOCs were based on irrelevant considerations and found to be illegal, whether revised NOCs dated 06.05.2016 and addendum dated 20.05.2016 can stand independent of the original NOCs. Bare reading of revised and addendum NOCs from their own language shows that they are not independent documents but in continuation and in furtherance to the original NOCs, therefore, strictly speaking once the original NOCs will not remain in the field, the entire superstructure will fall. Learned Advocate General, Punjab however, on instruction insists that revised and addendum NOCs dated 06.5.2016 and 20.5.2016 are independent permissions and must be validated having been granted in accordance with law. On these submission, notwithstanding the legal position discussed above, we intend to proceed and see if revised NOCs dated 06.5.2016 and addendum NOCs dated 20.5.2016 were lawfully issued.

34. We have carefully gone through the revised and addendum NOCs and documents referred therein. The

perusal of revised and addendum NOCs dated 06.5.2016 and 20.5.2016 shows that though they are separate in respect of each protected antiquity and special premises, however all revised and addendum NOCs are stereo type and identical in language. The Director General Archaeology and Committee were required to assess and evaluate each protected antiquity and special premises separately and there should have been well reasoned independent assessed NOCs for each site separately.

35. The revised and addendum NOCs dated 06.5.2016 and 20.5.2016 shows that they are based upon Advisory Committee report, report of Dr. Uppal, HIA, expert report and report of NESPAK and EPA decision. We have carefully gone through the above referred reports and material and found that non of these reports were independent and relevant consideration for issuing revised and addendum NOCs. Firstly, we analyzed the report of Advisory Committee. The Advisory Committee under section 3 of the Act of 1975 was constituted consisting of following members:-

*D.G., Archeology Punjab as a Chairman.*

*Professor (R) Khurshid Ahmad visiting Professor,  
National College of Arts.*

*Mr. Khalid Abdur Rehman, Architect.*

*Professor Dr. Kanwal Khalid, Government College for Women, Gulberg, Lahore.*

*Dr. Anjum Rehmani, Ex Director, Lahore Museum and Visiting Professor G.C. University.*

*Dr. Ayesha Pamela Rogers, Heritage Management Expert.*

*Khawaja Imran Nazir, MPA.*

*Engineer Qamar-ul-Islam Raja, MPA.*

The Advisory Committee had total five meetings and finally submitted its report on 29.2.2016. The minutes of Advisory Committee meetings shows that Advisory Committee merely relied upon NESPAK and LDA reports to reach to conclusion that there will be no negative impact of the project on heritage sites. The Committee being not expert to analyze the NESPAK report though found it appropriate to seek view of independent structural engineer, however, the Chief Engineer LDA informed the Committee that Dr. Uppal has already been engaged by LDA to give his report on NESPAK report. The Advisory Committee accordingly instead of appointing independent structural engineer relied upon the report of already appointed Structural Engineer by LDA. Further, the

Advisory Committee in its report also relied upon the HIA which was prepared by Dr. Pamela of RKKA, who herself was the member of the Advisory Committee. The constitution of the Advisory Committee shows that Director General Archeology who himself issued impugned original NOC dated 16.11.2015 was the chairman of the Advisory Committee. The other members of Advisory Committee were either working in Government owned and controlled institutions or they were Members of Provincial Assembly. Dr. Uppal who had to analyze the NESPAK report as structural engineer was admitted also remained associated with LDA and Government of Punjab on number of projects. Dr. Pamela who prepared HIA besides being member of Advisory Committee, also represented Government of Punjab before UNESCO in Turkey for meeting regarding Shalimar Garden being a world heritage. It is also not disputed that Advisory Committee was not originally constituted but formed only once the original NOCs were suspended by this Court. The entire basis for opinion of Advisory Committee was report of NESPAK and LDA. The Committee being not expert to analyze NESPAK report relied upon

report of Dr. Uppal and HIA by Dr. Pamela who were not independent experts being associated with Government and LDA. Further, the Director General Archeology who himself issued original NOC being Chairman of Committee could not be expected to render advise against his own permission/NOC. In our view, the Director General after giving opinion as Chairman of Advisory Committee has also compromised and surrendered his statutory duties and powers as Director General for grant of permission under section 22 of the Act of 1975, as he could not go against the advise of Advisory Committee of which, he himself was the Chairman.

36. Revised and addendum NOCs are also based on HIA. There was no statutory requirement for preparation of HIA. Apparently, HIA was prepared on request of LDA for UNESCO and not for Advisory Committee or Archeology department for issuance of revised and addendum NOCs. HIA report confirmed that impact and risk on heritage sites during construction phase be high and there will be risk to fabric, noise, dust, vibration from machinery, diminish access and fire risk. HIA report also confirmed that there will be permanent damage during

operational phase to visual impairment. The report also shows that distance on heritage sites from heavy construction work is only few feet. Perusal of HIA report holistically demonstrate that it is focused on permitting the project and prescribing mitigating measures and there was no option even considered to abandon the project near heritage sites if it causes harm and damage to said heritage sites. Further the HIA report is not in line with the guidelines provided by International Council on Monuments and Sites (“ICOMS”). The said guidelines provided that professional skills of those who conducted HIA are diverse, therefore, single professional cannot be enough to make a decision of HIA and therefore, it should be done by a team of professionals with specific analytical skills needed for a particular project or site. The guidelines also provide that what is needed to be done before starting of the HIA and the data, documents, method and approaches appropriate to heritage property, optimizing available tools, techniques and resources are also prescribed in the guidelines.

37. The HIA also indicates that the irrecoverable damage/impact will occur to most listed heritage sites.

The HIA shows that impact for all heritage sites has been classified as required impact measures (**“Required Mitigating Measures”**). Notwithstanding the above conclusion, the go-ahead was given to the project by recommending mitigating measures. The Director General Archaeology and Committee while granting approval under the Act of 1975 and Ordinance of 1985 were only required to see whether the project and construction will injure and damage the heritage sites and could not base their permission on the mitigating measures prescribed by the Government. From above, it is evident that notwithstanding the independence, credibility and standard of the HIA report, the serious impact of project highlighted in HIA report was not taken into account by competent authority while prescribing mitigating measures and issuing revised and addendum NOCs.

38. The revised and addendum NOCs also relied upon Dr. Uppal report. The perusal of vibration analysis report of Dr. Uppal shows that it is merely based on vibration analysis by NESPAK. Dr. Uppal being not appointed by Advisory Committee as an independent expert rather engaged by LDA for

preparation of report could not be treated as independent expert to evaluate the NESPAK and LDA report. The Advisory Committee in its meeting required that some independent structural engineer be appointed but instead of appointing independent engineer, the Committee relied upon report of Dr. Uppal who was already preparing the report on instructions of LDA. It is not disputed that Dr. Uppal remained associated with LDA and Government of Punjab in number of projects and he was also on the list of approved consultants of the Government, therefore, his report prima facie cannot be treated as totally independent report.

39. The report of the experts appointed by the Committee referred in NOCs shows that so called expert report was merely an eye washed. On 30.04.2016, two pager report was submitted by the department of Civil Engineering endorsing the report of NESPAK and the project in the proximity of heritage sites. This report by no stretch of imagination can be treated as expert report for permission of Mega construction in prohibitory zone. We have also noted that EIA approval dated 09.7.2015 referred in the revised and addendum NOCs has already been revised

by the Environmental Authorities on 09.5.2016. The revised EIA approval dated 09.5.2016 was neither available nor considered in the revised and addendum NOCs.

40. The perusal of report of Dr. Uppal, HIA and expert report shows that they are all based on NESPAK and LDA reports. Neither NESPAK nor LDA is expert in the field of Archeology. The Director General and the Committee were required to secure independent expert opinion and advice before granting permission. They had statutory duty under respective laws to ensure that all heritage sites are properly maintained so that cultural and historical heritage of Lahore and the beauty and grandeur of these heritage sites be secured and preserved. The Advisory Committee report also shows that it mainly relied on the LDA representation and report of NESPAK, to reach to conclusion that construction operation of project will not result and effect the project. This report on face of it was contrary to the conclusion drawn by the HIA, where it was shown that there will be impact of project on heritage sites including impact of permanent nature. We have also noted that as per provision of Section 22 of the Act of

1975 and section 11 of the Ordinance of 1985, NOCs were to be issued before commencement of the project, whereas revised and addendum NOCs were issued long after commencement of project.

41. The Director General and the Committee being public functionaries were burdened with heavy fiduciary duty to apply their mind independently and take advise from penal of experts who were independent and not under control and owned by the Government in any manner. In view of above, the revised and addendum NOCs to carry out construction within prohibitory zone without such independent expert opinion is not only unreasonable, irrational but same are also against mandatory statutory provisions of law. No doubt legal and reasoned decision by competent authority cannot be set at naught in judicial review. However, under the principle of trichotomy of powers, judiciary is entrusted with the responsibility that discharge of constitutional and statutory duties by the state functionaries is not in deviation to constitution and law. The power of judicial review being not an appeal from decision, the Court cannot substitute its decision for that of the decision maker. However, this Court cannot confer validity and

immunity to the acts and actions of public functionaries which suffers from malafide, excess of power and error of law. Indeed it is not for this Court to determine whether a particular policy or decision is fair or not but this Court has concern with the manner in which those decisions have been taken.

42. Mainly there are three grounds upon which an administrative action is subject to control by judicial review. Firstly illegality which means the decision maker must understand correctly the law that regulate his decision making power and must give effect to it. Secondly irrationality which means decision is not unreasonable and thirdly procedural impropriety. Judicial review would also apply to prevent arbitrariness and favoritism by government bodies. The aforesaid test of judicial review when applied to the impugned revised and addendum NOCs, it shows that not only the decision is illegal, unreasonable, arbitrary but there is also obvious infirmity in the decision making process. The baffling way in which the NOCs were granted is nothing but utter disregard of the fiduciary duty owed to the competent authority to the nation for protection and preservation of heritage sites. There was no unfettered

discretion with the Director General, Archeology and Committee to deal with protected antiquity and special premises in a manner that does not protect and advance the purpose of the Act of 1975 and Ordinance of 1985 as well as international conventions.

43. Learned counsel for the petitioners during course of arguments submits that petitioners are not against sustainable development or the project in question but their only concern is to protect heritage sites and rich culture of historical city of Lahore. Learned counsel for the petitioners in this regard categorically submits that if independent commission consisting of experts of international status be appointed and said commission give its opinion that instant project will not affect the antiquity properties and special premises, this will satisfy the writ petitioners. Learned counsel submits that in this regard, the petitioners have already filed separate application (C.M. No.2663/2016) for appointment of independent commission of experts. Learned Advocate General, Punjab when confronted with above offer made by petitioners counsel, he sought time to seek instructions in the matter. However, after instruction, learned Advocate General, Punjab

responded that such independent expert of international status is not acceptable to the Government. The reluctance on part of government to appoint independent experts of international status further strengthen the arguments of petitioners that above mentioned reports and authorities were not independent.

44. This Court is not insensitive to the fact that government has to pursue its public development project. But in this hot pursuit damage to protected antiquities and special premises is neither permissible nor desirable. The government at the time of preparing plans and feasibilities of project was required to device a coordinated and coherent plan to protect heritage sites simultaneously alongwith development project. The concept that development and ecology cannot go hand in hand together is a bygone concept. The development projects are essential for public welfare and economy of country but at the same time, environment culture and heritage has to be protected. This goal can be achieved by sustainable development. The essential features of sustainable development are that statutory authorities must anticipate, prevent and attack the causes of

environmental degradation. Where there are threats of serious and irreversible damage during development project, the State shall enact to protect and preserve the heritage culture along with sustainable development.

45. Learned Attorney General placed reliance on South Lakeland District Council Vs. Secretary of State (1992) 2 AC 141 and argued that while granting permission for construction and development, authority shall first decide/determine whether such development will cause any damage and harm to heritage sites and its appearance and if answer is in negative, permission be granted forthwith and if answer is in affirmative, authority shall balance out the benefit of construction with protection of heritage sites. Mr. Shahid Hamid, Advocate also placed reliance on Garner and ORs vs. Elmbridge Borough Council and ORs (2011) EWCA Civil 891, Liverpool city council vs. Regeneration Liverpool [2011] EWHC 48 (Admin.) and Historical Buildings and Monuments vs. Secretary of State [2009] EWHC 2287 (Admin.) to argue that where there is no harm to heritage sites or development project will outweigh the harm cause, permission for construction within

prohibitory zone can be granted by the competent authority. We have gone through the case law and found that in all these cases, dominant consideration for the Courts was that character and appearance of heritage and area be preserved and protected.

46. Conflict between protection of heritage and future development is not a new phenomena. The heritage and cultural sites against development project and construction are protected all over the world. In India “The Ancient Monuments and Archaeological sites and remains Act, 1958” was introduced. In Bangladesh “The Antiquities Act, 1968” was promulgated. In New Zealand “Historical Places Act, 1993” and “Antiquities Act 1975” was introduced. In USA Antiquities Act, 1906 was passed. In England “Civil Amenities Act of 1967” and “Planning (listed Buildings and Conservation Area) Act, 1990” was promulgated. To harmonize sustainable development and heritage sites, the Mayor of London Baris Johnson published detailed planning guidelines to ensure that future developments will enhance the rich character of the city.

47. The Courts in these countries also applied above laws strictly and protected heritage jealously. Some of the relevant case law in USA and UK is discussed below:-

i). The US Supreme Court in case of “Penn Central Co vs. New York City (438 US 104 1978) upheld the decision of New York citys landmarks preservation commission to deny permission to construct an office tower on top of historic property of Grand Central Terminal. This was a important decision where in order to protect heritage sites and implement city historic preservation laws, the private owner was denied highest and best use of his right of property. In “Barnwell Manor Wind Energy Limited vs. East Northampton District Council (2014) EWCA Civ 137, the U.K Court of Appeal refused permission for a four turbine wind farm as it will effect the visual impact of the historical building due to modern man-made feature. The relevant discussion is as under:-

*“In endorse Lang J’s conclusion that the inspector did not assess the contribution made by the setting of Lyveden New Bield, by viture of its being undeveloped, to the significance of Lyveden New Bield as a heritage asset. The Inspector did not grapple with (or if he did*

*consider it, gave no reasons for rejecting) the objectors' case that the setting of Lyveden New Bield was of crucial importance to its significance as a heritage asset because Lyveden New Bield was designed to have a dominating presence in the surrounding rural landscape, and to afford extensive views in all directions over that landscape and that these qualities would be seriously harmed by the visual impact of a modern man-made feature of significant scale in that setting”.*

ii) The High Court of Justice Queen Bench in *North Norfolk District Council Vs. Secretary of State for Communities and Local Government* (2014) **EWHC 279 (Admin.)** refused permission to wind turbine to preserve and protect historic sites. The Court held as under:-

*“The construction of the development plan policy is a matter of law for the court. In my judgment it is clear that the policy should be construed as providing for support and consideration in the context of sustainable development and climate change, taking account of the wide environmental, social and economic benefits of renewable energy gain and their contribution to over coming energy supply problems as a general policy to be applied when renewable energy proposals are put forward. However, that is supplemented by*

*a policy dealing specifically with the grant of planning permission in the second paragraph of policy EN7. It is not expressed as a restraint policy. Rather it is a commitment to permission but a commitment that is conditional on there not being, either individually or cumulatively, significant adverse effects in the specified respects, including landscape and historical features or areas.*

iii) In case of *Bath Society vs. Secretary of State for the Environment and others* (**Weekly law reports 6<sup>th</sup> December, 1991**), while setting aside permission granted by planning authorities, Court held as under:-

*“That the general duty imposed on local planning authorities and the Secretary of State by section 277(8) of the Act of 1971 when determining applications or appeals relating to proposed development in a conservation area, to pay special attention to the desirability of preserving or enhancing its character or appearance, was the first consideration for the decision maker, being a matter of considerable importance and weight; that the inspector’s report did not indicate that he had discharged that duty, since it contain no suggestion that the proposed development would enhance the character or appearance of the area but rather an inference that it would not preserve its appearance, and he had not*

*identified any benefits of the development which would outweigh its failure to preserve or enhance the character or appearance of the area so as to justify granting permission; and that accordingly, inspector's report was defective and the Secretary of State by accepting its recommendation had reached a decision that could not stand".*

iv) In South Lakeland District Council Vs. Secretary of State for Environment (1992) 2 WLR 204, the Court held that permission to erect a new house can only be granted if the character and appearance of area is preserved. The Court held as under:-

*"There is no dispute that the intention of section 277(8) is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission".*

v) In case of Heatherington (UK) Limited Vs. Secretary of State for Environment (1995) 69P & CR 374, Court held that development plan policy must

pay special regard to preserve special features of listed building.

48. In India, Courts also interfered in judicial review to protect heritage.

i) In case of Mahendra Lodha Vs. State of Rajasthan (RLW 2007 (2)RAJ 1428, the Rajasthan High Court while examining issues relating to construction related to high rise buildings held that permission for high rise buildings cannot be granted in protection of heritage building. The relevant observations are as under:-

*“It has been observed that permitting high rise (multi-storey) buildings throughout Jodhpur urban area is not desirable. Permission for high rise buildings (multi-storeyed) should be granted after considering the carrying capacity of the existing infrastructural facilities viz.; roads, sewerage, drainage, water, electricity, sanitation, etc. Other considerations should be parking space, fire safety, traffic density, green belts, heritage areas, proximity to aerodrome and defence establishments etc. For example, construction of high rise buildings in Parkota area of Jodhpur city will aggravate the traffic problems therein. **Construction of high rise buildings in natural scenic areas, within***

**heritage precincts and in surroundings of heritage areas spoil the quality of such areas”.**

- ii) In the case of EMCA construction company vs. Archaeological Survey of India (2009 (113) DRJ 446 (DB), the Division Bench of Dehli High Court prohibited construction/renovation of any structures or building within a prohibited area of 100 feet of Jlamayun’s Tomb. Similarly in case Bhanwar Sing and others Vs. Union of India, the Division Bench of Rajistan High Court restrained mining within 6 km area of boundary wall of fort Chittgarh.
- iii) The Supreme Court of India in case of Guruprasad RAO Vs. State of Karnatakka (2013) 8 Supreme Court cases 418 while considering the statutory provisions, opinion of experts and applying principles of sustainable development for protection of historical rights held that mining activities in core zone should be banned. The Court also held that ambit and scope of sustainable development includes preservation and protection of historical monuments for future generations.
- iv) The High Court of Madras in Sir Meanakri Gramities Vs. District Collector (2011 (2) CTC 684) held that quarrying operation outside prohibited zone

which is likely to damage ancient monument will not tie the hands of court to prohibit mining operations to preserve ancient monuments.

v) The Supreme Court of India in archeological survey of India Vs. State of Madhya Pardesh etc (2014) 12 Supreme Court case 34 held that substantial construction material and aslthetics involved in historical sights cannot be permitted.

vi) The Supreme Court of India in **(1997) 10 Sec 441** hited Rajen Mankotia Vs. Secretary to the President of India held that historical right of viceregal lodge in Shimla constructed in 1988 is an ancient and historical monuments and therefore, government should notify it as protected antiquity.

vii) In famous case of Taj Mahal, the India Supreme Court in MC Mehta Vs. Union of India (1997) 2 Supreme Court case 353 held as under-

*“The Taj, apart from being a cultural heritage, is an industry by itself. More than two million tourists visit the Taj every year. It is a source of revenue for the country. This Court has monitored this petition for over three years with the sole object of preserving and protecting the Taj from deterioration and damage due to*

*atmospheric and environmental pollution. It cannot be disputed that the use of coke/coal by the industries emits pollution in the ambient air. The object behind this litigation is to stop the pollution while encouraging the development of industry. The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time, the environment and ecosystems have to be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of ecosystems”.*

viii) Recently Supreme Court of India in SN BharDway vs. Archaeological Survey India (2016)

**Supreme Court cases 691** held that there will be no construction in the protected monument i.e. Tughlakabad Fort.

49. The case law discussed above shows that there is consistent view by United States Supreme Court, Courts of England and Indian Superior Courts that where construction of project will cause harm and damage to heritage, no permission can be granted for carrying out construction within prohibitory zone or even beyond.

**Environmental Approvals**

50. Now coming to the issue of EIA approval, the first argument of petitioners is that LDA could not file EIA as it was not a proponent of the project. The word proponent is defined in section 2(XXXVI) of Act of 1997 as under:-

*“proponent” means the person who proposes or intends to undertake a project”*

Record shows that contract was executed between CR-Norinco and PMA on 20.5.2015 and as per supplemental agreement dated 25.8.2015, PMA was awarded civil work part of the project. As per clause 2.12 and 5.1 of the contract dated 20.5.2015, civil work includes environmental assessment. However, as admittedly PMA had no engineering and executing wing for handling civil work, therefore, LDA was appointed as Executing Agency under the said supplemental agreement. Before supplemental agreement, vide letter dated 17.4.2015, LDA was already appointed as agent of PMA for the project and it accordingly filed EIA on 07.5.2015 on behalf of PMA. “Proponent” as defined under section 2(XXXVI) include a person who proposes or intends to undertake the project. LDA having been appointed as agent of PMA on 17.4.2015 and subsequently Executing Agency for the project through

supplementary agreement dated 25.8.2015, indeed is a person who proposes and intends to undertake a project. Therefore, LDA covered under the scope of “proponent” as defined in section 2(XXXVI) of the Act of 1997. In the given circumstances, it cannot be said that LDA was not proponent of project and could not file EIA for its approval under Act of 1997.

51. The next argument of petitioner that as per conditions of EIA approval dated 09.7.2015, the project could not be commenced before obtaining NOCs from other authorities. It has been clarified by the respondents that though civil work of the project commenced in October, 2015, however, no work was carried out within 200 feet of antiquities properties and special premises before obtaining NOCs from concerned authorities on 15.11.2015 and 30.11.2015. Nothing has brought on record to controvert above factual stance taken by the respondent side. Therefore, it cannot be said that conditions prescribed in EIA approval dated 09.7.2015 was violated. The argument of petitioners that PMA under Act of 2012 could only undertake bus project and not train project, suffice to note that after Act of 2015, PMA was duly authorized to undertake Metro Train Project. The question whether agreement between PMA

and CR-Norinco could be executed before Act of 2015 is not relevant to EIA approval and will be dealt with at the time when vires of contract will be looked into while deciding other writ petition No.5793/2016.

52. Regarding arguments of the petitioner that environment approval was granted in haste without seeking opinion of Advisory Committee and without making any qualitative and quantitative assessment of the document and data furnished by proponent. We have noted that at the time of approval dated 09.7.2015, only experts under regulation 11 were appointed to assess EIA and no Advisory Committee was constituted under section 5(6) of the Act of 1997. However, it is not disputed that subsequently, in the light of judgment of apex Court in Imrana Tiwana case supra, Advisory Committee on EIA was constituted under section 5(6) of the Act of 1997 and the project was also presented before said Advisory Committee for its opinion. The Advisory Committee discussed the project in its meetings held on 28.4.2016, 02.5.2016, 06.5.2016 and 07.5.2016. Perusal of Advisory Committee notification dated 24.11.2015 shows that Advisory Committee on Environment Impact Assessment consist of seven person. Except Director (EIA), EPA Punjab, other 6 persons are independent

person from different walk of life and fields including Environmental Sciences, Civil Engineering , Law and Journalism. The minutes of the meetings shows that Advisory Committee visited the project route on 02.5.2016 and unanimously observed that contractors were not following provisions of Environmental Management Plan given in EIA, non of the workers were using protective gear or mask, residential and commercial concerns on route were effected by the dust emanating from construction activities. The Advisory Committee was of the view that EPA, Punjab was negligent in implementing Environment Management Plan (EMP) properly and therefore suggested that high level committee be constituted to monitor construction activities and submit weekly reports. The Advisory Committee also noted that huge funds were ear marked for tree plantation, hence it advised that Parks and Horticulture Authority (PHA) should submit a plan for utilizing these funds transparently. The Advisory Committee also reviewed the entire process of grant of Environmental Approval, proceedings followed by Environmental Agency for approval of EIA and Environmental Impact Assessment in Annex-F and G of its report. The Advisory Committee after detailed

discussion came to the conclusion that all formalities for approval of EIA were fulfilled. The Advisory Committee after discussing loop holes in management plan advised further conditions for approval. The aforesaid recommendations and opinion of Advisory Committee have already been incorporated by way of addendum to environment approval on 09.5.2016. The proceedings and recommendations of the Advisory Committee shows that project and data was discussed and evaluated qualitatively and quantitatively even if same was not assessed in detail by the experts.

53. The next argument of petitioners is that after 18<sup>th</sup> amendment in the constitution, Regulation 2000 could not be applied to assess the EIA under the Act of 1997 as no corresponding amendment was made in Regulation 2000. In this regard, we have noted that after 18<sup>th</sup> amendment in the constitution, the Regulation 2000 are protected under Article 270-AA(6) of the Constitution. The said Article prescribe that notwithstanding omission of the concurrent legislative list by the constitution (18<sup>th</sup> Amendment), Act of 2010, all laws with respect to any of the matters enumerated in the said list included regulations in force in Pakistan immediately before the 18<sup>th</sup> amendment in the Constitution, shall continue to

remain in force until altered, repealed or amended by the competent authority. After the 18<sup>th</sup> amendment in the Constitution, the Act of 1997 and Regulation 2000 are provincial laws and shall remain in force under Article 270-AA(6) of the Constitution unless altered, repealed or amended. Merely because no correspondent amendment was made in Regulation 2000, it will not cease to have effect in view of Article 270-AA(6) of the Constitution.

54. We have also found force in argument of learned counsel for the respondents that if at all, there is any defect in the environmental approval granted by Agency, the petitioners have statutory remedies of two appeals, first before Tribunal under section 22 of the Act of 1997 and second appeal before Division Bench of this Court under section 23 of the Act of 1997. We have also noted that against impugned environmental approval dated 09.7.2015 and addendum dated 09.5.2016, appeal under section 22 of the Act of 1997 has already been filed by one Sumeria Awan, Advocate which is pending adjudication before the Tribunal. The legal question whether statutory appeal under Act of 1997 is an adequate and efficacious remedy, came up before august Supreme Court in Imrana Tiwana case supra where it was held as under:-

*“Further and more important is the fact that the impugned judgment has not recorded any objection to the EIA on its merits, nor have the respondents highlighted any objection that has remained unattended and yet is fatal to the EIA. Moreover, the statute provides an appeal to an Environmental Tribunal presided over by a retired judge of the High Court and a second appeal to a Division Bench of the High Court itself. Neither of these remedies have been availed by the objecting respondents. We cannot strike down the EIA upon a mere presumption or apprehension”.*

In the present case, as admittedly, the petitioners have not availed statutory remedies of first appeal and second appeal and further appeal filed by some other person is already pending before the Tribunal, the impugned environmental approvals cannot be strike down in this constitutional petition. So far as legal status of the members of environmental tribunal is concerned, no serious effort has been made from petitioner side to elaborate and substantiate this ground. It is also not disputed by the parties that this legal issue is already pending before larger Bench of this Court. Therefore, we are not inclined to adjudicate this ground in present constitutional petition. However, the petitioners if so advised may raise this issue through appropriate

proceedings before the Hon'ble Large Bench of this Court. In view of above, this petition to the extent of Environmental approvals dated 09.7.2015 and 09.5.2016 is not maintainable.

55. For reasons recorded above, this constitutional petition is partly allowed in following terms:-

- i) The original NOCs dated 16.11.2015,30.11.2015 and all revised NOCs dated 06.5.2016 and all addendum NOCs dated 20.5.2016 under the Act of 1975 and Ordinance of 1985 are set aside being issued without lawful authority and of no legal effect. Consequently, respondents shall not carry out any construction within distance of 200 feet of protected immovable antiquity and special premises mentioned in para 24 of this judgment.
- ii) The Director General Archeology is directed to engage independent consultants consisting of penal of experts of international status preferably in consultation with UNESCO, to carry out fresh independent study/report regarding protected immovable antiquities and special premises.
- iii) The request for permission under section 22 of the Act of 1975 and under section 11 of the Ordinance of 1985 will be considered afresh by the competent

authorities in the light of study/report by independent experts of international status referred above.

- iv) To structure the discretion of competent authorities for future permissions under section 22 of the Act of 1975 and section 11 of the Ordinance of 1985, the Government is directed to frame rules under section 37 of the Act of 1975 and section 16 of Ordinance of 1985.
- v) This petition to the extent of Environmental Approvals dated 09.7.2015 and 09.5.2016 is dismissed being not maintainable. However, the recommendations of Advisory Committee on environment (constituted under section 5(6) of the Act of 1997) in its report dated 07.5.2016 will be implemented in letter and spirit by the authorities concerned.
- vi) As we have decided the main petition, all pending applications of the parties in this constitutional petition are also disposed of in terms of this judgment.

**Petition partly allowed.**

**(SHAHID KARIM)  
JUDGE**

**(ABID AZIZ SHEIKH)  
JUDGE**

**SHAHID KARIM, J.** I have seen in draft the judgment of Justice Abid Aziz Sheikh, which shall be the judgment of the Court and I agree with the conclusions drawn therein. In view of the significance of the issues involved, I have chosen to write a separate note of my own.

**(SHAHID KARIM)  
JUDGE**

**ANNOUNCED IN OPEN COURT ON 19.8.2016**

**JUDGMENT/NOTE APPROVED FOR REPORTING**

**JUDGE**

**JUDGE**

*Rizwan*

**Shahid Karim J.**--

*The Cities are full of pride,  
Challenging each to each—  
This from her mountain-side,  
That from her burthened beach,  
And the men that breed from them  
They traffic up and down,  
But cling to their cities' hem  
As a child to their mother's gown.*

*(Rudyard Kipling)*

The relevant facts have been brought forth in the judgment of the Court. I shall only recapitulate and refer to those facts during the course of my opinion wherever it is required to be done. Also the submissions made by the learned counsels shall be referred to in the peculiar context of the conclusions that I shall reach during the course of this opinion.

2. In the beginning, let me acknowledge that the hearing of this matter led my curiosity to make a foray into the history of Lahore. It has been an enchanting experience and a literary tour de force since we found books about Lahore and its history, architecture and gardens that would fill an entire Library. Some of the books that caught our attention were:

*Lahore*  
*Topophilia of Space and Place*  
*By Anna Suvorova*

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*Lahore Recollected*  
*AN ALBUM*  
*By F.S. Aijazuddin*

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*Lahore*  
*The Architectural Heritage*  
 By Lucy Peck

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*Lahore*  
*Tales Without End*  
 By Majid Sheikh

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*The Illustrated*  
*Beloved City*  
*Writings On Lahore*  
 By Bapsi Sidhwa

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*Making Lahore Modern*  
*Constructing and Imagining a Colonial*  
*City*  
 By William J. Glover

3. In the foreword to 'Lahore, Topophilia of Space and Place by Anna Suvorova, Carl W.

Ernst has this to say:

*“Lahore is a city that creates loyalties. This thousand-year-old urban centre, in Pakistan’s Punjab, has been an important political capital off and on for much of its history. At the same time, it has been a frequent target of invasion and conquest, typically by Central Asian nomadic empires but also by the Sikhs and the British. Despite its turbulent career, Lahore has somehow managed to be a cultural centre with a distinctive resonance and charm. I, myself, admit to having fallen under its spell long ago.*

*Of course, scholars are supposed to claim objectivity so that they can occupy a position of lofty impartiality. In theory, such abstraction and distance is necessary to avoid charges of partisanship. Nevertheless, like many other visitors to the city, I have found that Lahore has an extraordinary charm that few other places can claim. That attraction is definitely worth exploring.”*

4. The image of Lahore ‘as a distinctive cultural and geographical space’ was described by *Anna Suvorova* thus:

*“Lahore was mentioned by the historians of the Delhi Sultanate and the Mughal Empire although, in keeping with the laws of the genre of medieval chronicles, they wrote more about the court’s place of residence than about city life. As is the case with Istanbul, the image of Lahore as a distinctive cultural and geographic space was first created by European travelers and Romantic writers (for example, Thomas Moore in his poem *Lalla Rookh*). In keeping with Walter Benjamin’s classification, their accounts focused on the fanciful architecture (from the Western standpoint), the bustling and colourful crowds, and the exotic customs. A holistic and vivid artistic image of the city was undoubtedly first created by Rudyard Kipling, who lived in Lahore for many years and knew it just as well as the natives. In the twentieth century, Kipling’s work was continued, first by Indian and then by Pakistani authors writing in Urdu; Lahore became the*

*setting and object of description of an array of Urdu literature. The work of Muhammad Iqbal, Faiz Ahmed Faiz, Saadat Hasan Manto, Intizar Hussain, and many other well-known Urdu writers is inseparably tied to Lahore.*

*The first serious historical and cultural studies of Lahore began to appear in the late nineteenth century. The most important of them, vis-à-vis the number of facts and abundance of cited written sources, is still Syed Muhammad Latif's book *Lahore: Its History, Architectural Remains, and Antiquities* (1892).*

*After the partition of India, and the establishment of Pakistan, in 1947 many intellectuals—Hindus, Sikhs, and Englishmen—were compelled to leave Lahore. In their recollections, Lahore eternally remains a lost paradise and the city of one's dreams. Some of these memories appear in the best book on Lahore of the past decade—the collection of essays, articles, narrative prose, and poetry edited by the well-known Pakistani writer Bapsi Sidhwa and entitled *Beloved City: Writings on Lahore*. Thanks to its variety of themes, approaches, and genres, this book creates a stereoscopic image of city life.*

*Unlike Athens, Jerusalem, and Benares, Lahore does not rank among the world's oldest cities. Nevertheless, its written history goes back approximately ten centuries to the time when Lahore became the capital of the Ghaznavid Empire in the eleventh century. Moreover, it is believed that Lahore was mentioned by Ptolemy, as Labokla, as far back as the second century. Clearly, such a long history makes it difficult to write an exhaustive historical description*

*of the city, which is not my aim in any case. I believe that it would be unproductive to subordinate this book to chronology because, in such an old yet living and constantly growing city as Lahore, time is not linear or, more precisely, many forms of time coexist: some city neighbourhoods belong to our century, others remain in the Middle Ages, while still others dream of the colonial era or straddle the boundary between different epochs. Similarly, the lifestyles of the different social groups also belong to different historical periods—the director of a major company who speaks English with a Harvard accent, the university professor with a refined command of Urdu, and the street seller who knows only Punjabi—meeting in space but not in time.*

*Lahore's cultural and chorological space is extremely vast and full of cultural artefacts, symbols, and signs of the past and present. One cannot grasp it in its entirety but only live it as a phenomenological experience and enter it as a Lebenswelt that consists of the givens of history, art, daily life, and imagination."*

*When we visit Oslo, Dublin, Paris, or Lahore it is difficult, at first, to separate the living images of the new places from the 'mental maps' that we have drawn up in the footsteps, and along the routes, of literary characters. Our experience gives us a feelings of reality only when it is supported by cultural memory and mediated on by it. If a person has no foothold in consciousness that confirms reality, he often reacts to new and even*

*powerful impressions in a banal way: he simply says that he is dumbstruck. It is topophilia that overcomes our eternal fear of space and emotional dumbness and gives us a living feeling of belonging to a place—the sense of city.”*

5. In her book, *Anna Suvorova* widely quoted *Kamil Khan Mumtaz*, the petitioner herein, from his work *Architecture in Pakistan, 1989*. The author referred to the works of *Kamil Khan Mumtaz* in the following words:

*“Some time ago, the well-known architectural historian Kamil Khan Mumtaz published the Lahore Urban Development and Traffic Study (LUDTS, 1980). It has served as the basis for a conservation and restoration project that is being implemented with the support of the World Bank. The project’s aim is to give new life to the Walled City, and modernize its structure while preserving its traditional appearance. It calls for reorganizing the energy, sewage, and transport infrastructure, and for providing a new ‘filling’ for dilapidated old building so making them fit for practical use and, most importantly, create new jobs.*

*Kamil Khan Mumtaz group selected the most densely built-up districts of the Walled City as a pilot project for the conservation and renovation. Particular importance has been assigned to widening the narrow streets by moving exposed drainage channels, opening sewage conduits (which are often*

*blocked up with waste) underground, and paving the streets. Over time, these efforts should allow the introduction of public transportation into the Walled City, replacing the current modes of transportation—noisy scooters and rattling antediluvian carts.”*

6. The challenge in this petition is to different acts of officers tasked to undertake those acts under the provisions of three different statutes. The first of these is the No Objection Certificate (**NOC**) issued by the Director General Archaeology (**D.G Archaeology**) under section 22 of the Antiquities Act, 1975 (“**the Act 1975**”). The second is the approval granted by the Committee set up in terms of the Punjab Special Premises (Preservation) Ordinance, 1985 (“**the Ordinance 1985**”). Third permission under challenge is the approval granted under section 12 of the Punjab Environmental Protection Act, 1997 (“**the Act 1997**”) by the Provincial Agency set up under that Act. I shall deal with each of these permissions separately.

*Standing:*

7. The learned Attorney General and Mr. Shahid Hamid, Advocate, made a flanking rather than a frontal attack on the standing of the petitioners to challenge the executive action. They have relied upon the following passage from a judgment of the Supreme Court of Pakistan reported as *Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others* (2012 SCMR 455):

*“50. While holding that these petitions are maintainable, we would like to strike a note of caution. The Court has to guard against frivolous petitions as it is a matter of common observation that in the garb of public interest litigation, matters are brought before the Court which are neither of public importance nor relatable to enforcement of a fundamental right or public duty. In Ashok Kumar Pandey v. State of West Bengal (AIR 2004 SC 280) the Court was seized of such a petition when it observed as follows:--*

*"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be*

*used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."*

8. We felt the objection to be a little unkind and improvident in respect of the petitioners. They are not busybodies by any stretch of imagination nor is there any allegation of 'private malice, vested interest or publicity seeking' on their part. These observations were cited from an Indian Supreme Court judgment and were to 'strike a note of caution'. It may be mentioned that the petitions in Dr. Akhtar Hassan Khan were held to be maintainable although the petitioners had

no personal interest in the matter. Also the Supreme Court of Pakistan referred to earlier precedents of the Supreme Court which allowed liberal and more open approach to the issues of Standing in matters of public importance where the standing of a petitioner must take a backseat and is upended by the overwhelming interest of the public generally in the matter brought before the Court.

9. There are substantial reasons for adopting a generous approach to standing in judicial review proceedings, seeking to exclude only the 'mere busybodies'. Busybody is:

*"someone who interferes in something with which he has no legitimate concern".*  
(*Walton v Scottish Ministers* [2012] UKSC 44 at 92 (Lord Reed)).

10. In the United Kingdom, the standing requirement for claims for judicial review rest on the 'sufficient interest' requirement. In matters of public interest, the rule has been summed up by the author in *De Smith's Judicial Review (Seventh edition)* as follows:

*“It may not be necessary for the claimant to show any personal proximity to the decision or special impact or interest over and above that “shared with the generality of the public”. The claimant does not necessarily need to come from the section of the community on which the alleged breach of public law has impacted. The Court of Appeal has drawn a distinction between “a person who brings proceedings having no real or genuine interest in obtaining the relief sought” (who accordingly will not have sufficient interest) and one “who, whilst legitimately and perhaps passionately interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest”.*

*“The process of liberalising the standing requirements for pressure groups has reached the stage where in R. v Secretary of State for Trade and Industry Ex p. Greenpeace Laws J. commented that litigation of this kind was now an “accepted and greatly valued dimension of the judicial review jurisdiction”. The corollary of this, however, is that a pressure group bringing a public interest challenge had to “act as a friend to the court,” meaning that its conduct in making an application has to be controlled with particular strictness—especially as regards the requirement that applications for permission be made promptly and in any event within three months of the impugned decision. In summary, it can be said that today the court ought not to decline jurisdiction to hear a claim for judicial review on the ground of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of governmental action. The good sense of this approach is emphasized by the ability of the courts to give permission to a*

*third party to intervene in the proceedings to assist the court, which is happening with increasing frequency.”*

11. It was held in *Walton v Scottish Ministers* [2102] UK SC 44 (per Lord Reed)

that:

*“Where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action. It is hardly desirable that a situation should exist where because all members of the public are equally affected no one is in a position to bring proceedings: such a situation would impede the rule of law.”*

12. These views have been affirmed by Aharon Barak in *“The Judge in a Democracy”*, who espouses liberalized tests for standing in the following passages:

*“The issue of standing appears to be marginal in public law. This is certainly the case if one adopts the view that only a person who has experienced an injury in fact possesses standing. But if we liberalize the tests for standing, we will usher in a new era for judicial decision making whose ramifications are far greater than the issue of standing itself. This is the case because liberal rules of standing enable courts to hear matters that ordinarily would not find their way before a court...*

*“...Liberal rules of standing have also allowed judicial review of claims challenging the legality of civil servants’ behavior even where no individual interests*

were harmed. The ordinary citizen would normally have no standing in these cases. The Court can consider these questions only if it adopts a liberal approach to the rules of standing...”

“How a judge applies the rules of standing is a litmus test for determining his approach to his judicial role. A judge who regards his role as deciding a dispute between persons with rights –and no more—will tend to emphasize the need for an injury in fact. By contrast, a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing...”

“...It was happy to learn that the Republic of South Africa adopted a similar solution in its constitution. Section 38, applicable only to the Bill of Rights, provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.”

“I take issue with a standing doctrine under which someone who claims that a public body unlawfully took his private money can resort to the courts, but someone who claims that a public body unlawfully took public money cannot. What is the principled argument, based on

*jurisprudence and the doctrine of separation of powers, to justify this distinction? In my view, recognition of the standing of the public petitioner closes the “circle of standing.” This circle beings with the requirement that, to have standing, a petitioner have a definable right that the government has violated. At the next level, the courts recognize the standing of a petitioner with an interest in a governmental action but no definable right. At the subsequent level, courts recognize the standing of a petitioner with no tangible interest but who complains of a substantial breach of the rule of la. Finally, the circle culminates in the realization that the petitioner’s right to insist on governmental compliance with the rule of law is imputed to the petitioner by his very status as a member of society. Thus, the “circle of standing” concept is based on the recognition that standing, at its core, derives from membership in society...”*

13. The Constitution of South Africa expresses this idea by providing that “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.

(Article 33, South Africa Constitution).

14. Applying the above principles, we find the petitions to be maintainable and the petitioners have a standing to bring these petitions. The petitioners are public spirited individuals who do not urge a vested or

personal interest in the matter. They have broached a subject which impacts the heritage and historical assets of the entire people of Pakistan. It relates to the antecedence and historical basis for claim to nationhood by its people and thus it would be a travesty of justice to deny the petitioners the invocation of the constitutional jurisdiction of this Court. They are aggrieved persons and must be held as such. Moreover during the course of these proceedings we have found no inkling of a personal benefit to accrue to the petitioners. The petitioners bring forth and identify a matter of public interest of grave importance.

***Right to Life.***

15. Inextricably linked to the question of standing is the fundamental right to life enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 (“**the Constitution**”). Article 9 of the Constitution reads as under;

*“9. Security of person.— No person shall be deprived of life or liberty save in accordance with law.”*

16. Article 9 imposes a negative obligation on the State namely the obligation to refrain from depriving a person of life and liberty save in accordance with law.

17. The concept of ‘life’ in Article 9 has been enlarged and expanded to include within it even peripheral rights or rights of penumbra. These rights have been defined as rights closely associated to the basic right which is specifically given in the Constitution which are also enforceable as basic rights. The provenance of these rights can be traced to the American case of *Griswold v Connecticut*, 381 US 479, which established the right of privacy as a penumbra of the right of liberty. Justice Douglas observed:

*“Previous cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”.*

18. The rights of penumbra have been derived from the Ninth Amendment of the American Constitution, which provides:

*“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”.*

19. Although there is no such provision in our Constitution, that has not deterred our courts from establishing certain rights as penumbras to the rights already enumerated.

20. In *Muhammad Nawaz Sharif* case, (PLD 1993 SC 473), the Supreme Court of Pakistan culled out penumbras from the right under Article 17 which merely guaranteed the right to form a political party and the right to be a member of a political party. It was held that the basic right to form or to be a member of a political party “comprises the right of that political party not only to form the political party, contest elections under its banner but also, after successfully contesting the elections, the right to form government of its members,

elected to that body, are in possession of the requisite majority....Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its formal tenure would, therefore, constitute an infringement of this fundamental right”.

Nasim Hassan Shah, J., observed:

*“Fundamental rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity that an individual can engage. Although constitutional guarantees are often couched in permissive terminology, in essence they impose limitations on the power of the State to restrict such activities. Moreover, basic or fundamental rights of individuals which presently stand formally incorporated in the modern constitutional documents derive their lineage from and are traceable to the ancient Natural Law. With the passage of time and the evolution of civil society great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They require to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future. Indeed, this progressive approach has been adopted by the Courts in the United States and the reason given for doing so is that:*

*‘While the language of the Constitution does not change, the changing circumstances of a*

*progressive society for which it was designed yield a new and fuller import to its meaning.'*

*It is on this principle of interpretation that the import of the right given in the U.S. Constitution such as the "right of assembly" and the "right of association", has been so expanded and so enlarged by the U.S. Supreme Court that even peripheral rights (or rights of penumbra as described in some judgments i.e. rights so closely associated to the basic right which is specifically given in the Constitution) are now being also enforced as basic rights."*

21. This was echoed in *Farooq Ahmad Khan Leghari v Federation of Pakistan, PLD 1999 SC 57, 196* by Ajmal Mian, J. in saying that "all efforts should be made to preserve and to enlarge the scope of the fundamental rights while interpreting constitutional provisions."

22. The expression 'life' has, likewise, received an expansive meaning at the hands of the superior courts in Pakistan and includes the right to protection against adverse effects of electro –magnetic fields (*Shehla Zia case PLD 1994 SC 693*); the right to pure and unpolluted water (*Salt Mines Union case – 1994 SCMR 206I*); the right of access to

justice (*Azizullah Memon case PLD 1993 SC 341*; *Al-Jehad Trust case PLD 1997 SC 84*; and *Khan Asfandyar Wali v Federation PLD 2001 SC 607, 924*).

23. The various facets of life and its manifestations are now, by judicial overreach, comprised in the expression 'life' as used in our Constitution as also in the U.S and Indian Constitutions. The leading authority on the meaning of 'life' as it occurs in the United States Constitution, fifth and fourteenth amendments, is *Munn v Illinois, 94 US 113*, and Field, J. observed:

*"By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."*

24. In the famous *Shehla Zia* case, Saleem Akhtar, J. observed:

*The word "life" is very significant as it covers all facets of human existence. The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.*

25. He went on to say –

*The Constitutional Law in America provides an extensive and wide meaning to the word 'life' which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clean life. The requirement of acquiring knowledge, to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedoms and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law.*

26. In a case *Cruzan v. Missouri Director, Department of Health, 497 US 261 (1990)*

which sought to include right to die' in the right to life, Justice Stevens, in his opinion described what life is:

*"Life, particularly human life, is not commonly thought of as a merely*

*physiological condition or function. Its sanctity is often thought to derive from the impossibility of any such reduction. When people speak of life, they often mean to describe the experiences that comprise a person's history, as when it is said that somebody "led a good life." They may also mean to refer to the practical manifestation of the human spirit, a meaning captured by the familiar observation that somebody "added life" to an assembly. If there is a shared thread among the various opinions on this subject, it may be that life is an activity which is at once the matrix for and an integration of a person's interests. In any event, absent some theological abstraction, the idea of life is not conceived separately from the idea of a living person.*

27. The broad meaning assigned to the expression 'life' by judicial interpretation has been referred to in order to lay the foundation for the proposition as to whether right to preservation and protection of heritage and history is comprised in the right to life? Aharon Barak, in his book '*The Judge In a Democracy*', while commenting on the Constitutional Interpretation and Fundamental Principles, said that:

*“...The constitution does not operate in a normative vacuum; outside and around the constitutional there are values and principles that the constitution must realize.*

*These values are not the personal values of the judge. They are the national values of the state: “It is a well-known axiom that the law of a people must be studied in the light of its national way of life.” The “national way of life” constitutes a source for the values and principles that the constitution ought to realize. These principles and values reflect the social consensus that underlies the legal system. They enshrine fundamental social outlooks. They are derived in part from the constitutional text and its history. They are derived in part from the historical experience of the people, their social and religious views, and their tradition and heritage...”*

28. Thus, according to Barak, the values and principles that the constitution ought to realize are derived in part from the historical experience of the people, their traditions and heritage. It follows indubitably that life includes the traditions and heritage that persons hold dear. As per Justice Stevens, ‘life is an activity which is at once the matrix for, and an integration of, a person’s interests.’ Also ‘when people speak of life, they often mean to describe the experiences that comprise

a persons' history'. And so if life comprises a person's history, is the history and heritage of a nation not comprised in 'life' of a person. The history of a people is the history of a vast number of persons and collectively refers to the life of a nation. If the right protects against the infringement of present and future life of a person, which is not confined to vegetative and animal existence, then does it not grant protection in respect of the history of a person? A history that connects him to his ancestry and his past. A person must preserve his past in order to sustain his future. That is of the essence of life. In the famous words of *George Orwell*, novelist, essayist and critic:

*"He who controls the past controls the future. He who controls the present controls the past."*

29. Also in the words of *Edmond Burke*:

*"In history, a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind."*

30. *Eric John Ernest Hobsbawm*, a British

historian has put it thus:

*“The destruction of the past or, rather, of the social mechanisms that link one’s contemporary experience to that of earlier generations, is one of the most characteristic and eerie phenomena of the late 20th century. Most young men and women at the century’s end grow up in a sort of permanent present lacking any organic relation to the public past of the times they live in.”*

*As a collective memory of the past of a nation, history attempts to bring to the fore the salient and significant part of events that occurred in the past, which could be utilized in building a prosperous national future. This is why every human society, no matter the level of advancement, has placed optimum priority to the bequeathing of a “useable past” from generation to generation. For instance, in ancient cultures every kingdom had its own history laureate whose task it was to remember the past. “3 Modernity has also been influenced greatly by the enhanced production of history. This is assisting nations (who have placed the needed emphasis on historical studies) in their tasks of nation building, promoting national consciousness, the flowering of moral leadership and ensuring overall national development.”*

*I therefore contend that for any nation to develop, the collective spirit of the people must be well nurtured and propagated. Here lies the significance of history. History, in the words Prof. Babatunde Fafunwa was a Nigerian educationist, scholar and former minister for Education. He said:*

*“To a people what memory is to the individual? A people with no knowledge of*

*their past would suffer from collective amnesia, grouping blindly into the future without the guide post of precedence to shape their course”.*

*In the first place, history offers a storehouse of information about how people and societies behave. Understanding the operations of people and societies is difficult, though a number of disciplines make the attempt. An exclusive reliance on current data would needlessly handicap our efforts. How can we evaluate war if the nation is at peace—unless we use historical materials? How can we understand genius, the influence of technological innovation, or the role that beliefs play in shaping family life, if we don't use what we know about experiences in the past? Some social scientists attempt to formulate laws or theories about human behavior. But even these recourses depend on historical information, except for in limited, often artificial cases in which experiments can be devised to determine how people act. Major aspects of a society's operation, like mass elections, missionary activities, or military alliances, cannot be set up as precise experiments. Consequently, history must serve, however imperfectly, as our laboratory, and data from the past must serve as our most vital evidence in the unavoidable quest to figure out why our complex species behaves as it does in societal settings. This, fundamentally, is why we cannot stay away from history: it offers the only extensive evidential base for the contemplation and analysis of how societies function, and people need to have some sense of how societies function simply to run their own lives. History Helps Us Understand Change and How the Society We Live in Came to Be The second reason history is inescapable as a subject of serious study follows closely on the first. The past causes the present, and*

*so the future. Any time we try to know why something happened—whether a shift in political party dominance in the American Congress, a major change in the teenage suicide rate, or a war in the Balkans or the Middle East—we have to look for factors that took shape earlier. Sometimes fairly recent history will suffice to explain a major development, but often we need to look further back to identify the causes of change. Only through studying history can we grasp how things change; only through history can we begin to comprehend the factors that cause change; and only through history can we understand what elements of an institution or a society persist despite change.”*

31. We are, therefore, in no manner of doubt that history and heritage of a person is comprised in the broad concept of the expression ‘life’ and is protected by Art. 9 of the Constitution. That right must be preserved inviolate. The petitioners have thus cause for concern as their right to life is under threat. That right can only be regulated in accordance with law and cannot be taken away. Any threat, howsoever remote, to the historical monuments is a threat to life of not only the petitioners but to the collective right of the people as a whole. Thus the D.G Archaeology

and the Committee were under a bounden duty to treat the entire matter as a matter affecting and impinging the rights of the people of Pakistan and protected by Article 9. So the public interest in preserving the monuments far outweighs the interest of persons who shall stand to derive the benefit of travel on Orange-Line Metro rail.

32. This was a paradigm case of epochal proportions. The D.G Archaeology and the Committee were called upon to consider the history written in retrospect so that we could live forwards. This was an onerous and gigantic task. There was thus a need for independence and lack of bias in the public authorities exercising the discretion. It called for decision-makers to be independent and impartial. This meant that decision-makers, to the greatest extent possible, should approach the issue with an open mind, independent of the government, vested interest of any kind,

public and parliamentary opinion, the media, political parties and pressure groups. We are, in this case, reminded of the deathless lines of *Omer Khayyam*, in the *Rubayat, Stanza 71*, which say that:

*The moving finger writes,  
And having writ, moves on.  
Nor all your piety nor wit,  
shall lure it back to cancel half a line,  
nor all your tears wipe out a word.*

33. The Supreme Court of Pakistan has consistently expanded upon the meaning of the expression 'life' over time and has filled the term with greater amplitude and sweep. In a nub, it seems now that the term encompasses all that a person deems essential in order to sustain life. The courts have not put a clog on that flight of imagination but has merely stamped its judicial approval to an expansive concept of life. And therefore if the petitioners urged that their right to life includes a right to enjoy their heritage in all its grandeur and beauty, there is no conceivable reason to hold that that right is not comprised

in the right to life. In Arshad Mehmood and others v. Government of the Punjab through Secretary Transport, Civil Secretariat, Lahore (PLD 2005 SC 1993), it was held that:

*The word "life" used in this Article of the Constitution has been defined in the case of Shehla Zia v. WAPDA (PLD 1994 SC 693), according to which "life" includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally". It is further explained therein that the, word "life" in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it.*

34. The observations were echoed in Suo Motu Case No.13 of 2009 (PLD 2011 Supreme Court 619) in the following words:

*...Any transaction, which is not transparent, and goes against the interests of the general public constitutes violations of Article 9 of the Constitution, which guarantees right to life to all persons. Right to life has been explained and interpreted by the superior courts in a large number of cases. It includes right to livelihood, right to acquire, hold and dispose of property, and right to acquire suitable accommodation, which could not hang on to fancies of individuals in authority, and includes all those aspects of life which go to make a man's life meaningful, complete and worth living. It implies the right to food, water, decent environment, education, medical care and*

*shelter. The fundamental right cannot be snatched away or waived off person to any agreement.”*

35. This has consistently been followed in *PLD 2010 SC 759; PLD 2012 SC 224; 2013 SCMR 1383 and 2014 SCMR 396.*

36. For the Indian Supreme Court view, suffice to refer to *AIR 1996 SC 1051* and the following observations in this regard:

*7. In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilized society implies the right to food, water, decent environment education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights. Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The*

*right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live, should be deemed to have been guaranteed as a fundamental right. As is enjoined in the Directive Principles, the State should be deemed to be under an obligation to secure it for its citizens, of course subject to its economic budgeting. In a democratic society as a member of the organised civic community one should have permanent shelter so as to physically, mentally and intellectually equip to improve his excellence as a useful citizen as enjoined in the Fundamental Duties and to be useful citizen and equal participant in democracy. The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being. Want of decent residence, therefore, frustrates the very object of the Constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself. To bring the Dalits and Tribes into the mainstream of national life providing these facilities and opportunities to them is the duty of the State as fundamental to their basic human and constitutional right.*

37. The later cases of *AIR 1999 SC 2979 (Common Cause v Union of India)* and *AIR 2011 SC 312 (Siddharam Satlingappa Mhetre v State of Maharashtra and others)*, merely

reiterate and broaden the contours of right to life.

*NOC by the D.G Archaeology:*

38. In order to lend actuality to the conclusion drawn by this Court, I would venture to refer to some basic facts at the cost of repetition. These are required to be recapitulated for the purposes of forming a backdrop to the opinion that follows in respect of the NOC granted by the D.G Archaeology and the sufficiency in law of that NOC. On 03.07.2015 a letter was written to the D.G Archaeology Department, Government of the Punjab, Lahore by the Chief Engineer, Lahore Development Authority (**LDA**) seeking the issuance of NOC in terms of section 22 of the Act, 1975. This letter set into motion the subsequent proceedings which culminated into an NOC being granted by the D.G Archaeology and which was challenged in this petition. This letter was replied to on

07.07.2015 by the D.G Archaeology and further information was sought from the Chief Engineer, LDA. It needs to be clarified here that the Punjab Mass Transit Authority is the contracting party with CR-NORANCO and is a body corporate set up in terms of the Punjab Mass Transit Authority Act, 2015. Amongst others, the functions of the authority is to plan construct, operate and maintain corridors for future as well as to plan, construct and maintain infrastructure for the public transport routes. For the purposes of this opinion, it would suffice to say that the LDA was nominated as the executing agency for the civil works on 17.4.2015 by the PMA. In its capacity as such, LDA applied to the D.G Archaeology on behalf of PMA to procure the issuance of the NOC under the Act, 1975. The Lahore Orange Line Metro Train Project is, in common parlance, referred to as the Orange Line and is one of the four

lines which are proposed with respect to the long-term network of roads and other means of transport in order to cater for traffic congestion and future demand. This has been brought forth in the feasibility study of NESPAK conducted on behalf of the Government of the Punjab. The Orange Line stretches between Multan Road and G.T Road, Lahore. The system that envisages four lines to be constructed is part of the Lahore Rapid Mass Transit System. The length of the Orange-Line is 27.1 K.M of which 25.4 K.M of Metro Train shall be elevated and 1.7 K.M will be constructed on the basis of cut and cover technology. Therefore, the Orange-Line is an amalgam of elevation of viaduct and cut and cover technologies. It is not necessary here to refer to the other facts relating to the Orange-Line and which can be referred to if need be at the relevant portions of this opinion.

39. The D.G Archaeology on 5.II.2015 presented a brief for the Minister of Youth Affairs, Sports and Tourism Department of which the Directorate General of Archaeology is an affiliate department. This has been stated in order to flag the fact that the Directorate General of Archaeology functions under the direct administrative control of the Department of Youth Affairs, Sports, Archaeology and Tourism Department and is for all practical purposes an extension of the Government of the Punjab. The significance of this will be referred to in the latter part of this opinion. On 6.II.2015, once again the D.G Archaeology wrote back to the Chief Engineer LDA seeking important clarifications with regard to the Orange-Line Project. On 6.II.2015 also, a Committee comprising of the officers including D.G Archaeology was constituted to examine the “impact of Lahore Orange-Line Metro Train Project on

archeologic sites falling on its alignment” submitted by the D.G, LDA. The remit of the Committee was to examine the attached drawings and to give its input regarding the issuance of NOC in relation to both the Act 1975 and the Ordinance, 1985. The members of the Committee were all officers of the Archaeology Department. It is not clear under what provision of law the Committee was constituted or was required to furnish its report. This can, at best, be referred to as the internal arrangement put in place by the D.G Archaeology and does not have a source in law as such. The report of the Committee was submitted on 9.II.2015 and makes an interesting reading. The relevant extracts of that report with regard to each monument are essential to be reproduced in the present context. It was stated in the report that:

*“Shalamar Garden is a World Heritage Site/monument that has just three years back removed from World Heritage in Danger List of UNESCO, after the efforts*

*of 12 long years. Pakistan is a signatory of “the Convention Concerning Protection of World Cultural and Natural Heritage, 1972”. Under this particular protocol Pakistan is under obligation to follow the guidelines of World Heritage Centre for the implementation of the Convention. Govt. of the Punjab has also notified Buffer Zone of 200 width all around the Shalamar Garden and its hydraulic tank. Any intervention in this Buffer Zone would invite severe criticism from international bodies and would result in placement of prestigious heritage on World Heritage in Danger List. As the Orange Line Metro track would be an irreversible intervention and it might result that this important heritage of Pakistan is removed from World Heritage List permanently. It will mar the architectural and aesthetic beauty of the world heritage site and will have negative impact on the tourism.*

*The option available to save it from delisting from UNESCO’s World Heritage List is to shift the train track as far as possible from the protected area of Shalamar Garden and the Hydraulic Tank. It is suggested that executing agency may acquire properties from the already built up private areas and construct this metro train track at that acquired/private area.*

*The other option, which is more appropriate but costly, is to use Cut and Care technology in front of Shalamar Gardens.*

*The monument is comparatively smaller monuments and there is no option available where this track could be shifted. It will certainly create a visual barrier for the monuments. However, this impact could be avoided by using the Cut and Cover technique in front of this particular monument. Conditional NOC may be granted for this monuments subject to the condition that the executing agency would*

*assure that monuments would not be affected due to use of heavy machinery and necessary arrangements are made for dust control which may damage the beauty of the monument. The executing agency has already assured on the basis of international standards that ground borne vibration will not affect the monument as it is expected to be remained less than 0.5 mm/second.”*

*“The monument is among the prize monuments of Lahore and there is no option available where this track would be shifted. It will certainly create visual barrier for the monuments. However, this impact could be avoided by using Cut and Cover technique for construction of Metro Orange line track in front of this important monument. Conditional NOC may be granted for this monument subject to the condition that the executing agency assure that monuments would not be affected due to use of heavy machinery and necessary arrangements are made for dust control which may damage the beauty of the monuments. The executing agency has already assured on the basis of international standard that ground borne vibration will not affect the monument as it is expected to be remained less than 0.5 mm/second.”*

*“The main architectural merit of the building is its rich mosaic decoration with which its entire façade including the octagonal corner minarets are brilliantly embellished. The minarets are slender for their height and end at the top in coved platforms which once carried arched pavilions. The panel over the main vault is inscribed with Ayat-ul-Kursi, a verse of Holy Quran, in blue enameled letters. At the end of this inscription, the year A.H. 1056 (1646 A.D.) is also given.*

*The monument is controlled and protected under Antiquities Act, 1975, Vide Notification No.47, dated 09-01-1913, as category-I monument.*

*The Google map photograph, superimposed by the monument of track is not legible. Further, technical details have not been provided for proper assessment. However, in the present situation the track would severely create visual barrier to Chauburji especially while coming from Bahawalpur Road. The LDA authorities may please be requested to use the Cut and Cover technique in front of Chauburji monument or shift the alignment track further away on the other side of the road rather than passing very close to Chauburji monument. “*

40. Upon a reading of the report, reproduced above, what starkly comes forth is the sensitivity with which the report had been prepared. During the course of the hearing of this petition and while going through the plethora of documents, brought on record, this report perhaps is the only document which considers the complexity of the matter and its nuances in its true perspective. The members of this Committee, it seems, were cognizant of their role and their obligations under the provisions of the Act, 1975. They were also alive to their duty to posterity as well as the underlying purpose and policy of the Act,

1975. It can clearly be seen that two things have been considered which were of paramount importance and which were at the heart of the entire matter. These two aspects have not been subsequently considered by the Archaeology Department in any of the measures taken for the issuance of the NOC or the revised NOC as will be referred to later on. One, the effect of the use of heavy machinery during the construction period in the proximity of the historical and heritage sites. Second, the visual barrier and mitigation caused by the construction of elevated viaduct. The report also alluded to the history of each of the six monuments protected under the Act, 1975 and took pains to mention that the Shalimar Gardens was a World Heritage Site/ Monument that had been removed from the World Heritage list of UNESCO, just three years back after 12 long years of strenuous efforts. It was also noted that Pakistan was a

signatory to the convention concerning the Protection of world cultural and National Heritage, 1972. The report then went on to mention that the Government of the Punjab has notified a Buffer Zone of 200 feet all around the Garden and its hydraulic tanks. It was thus suggested that in order to protect the gardens from being removed from the World Heritage list it was imperative to shift the track of the Metro Train as far as possible from the protected area or to use the cut and cover technology in front of Shalimar Gardens. Also with regard to Gulabi Bagh gateway, it was mentioned that the elevated structure of Metro Train will create a visual barrier for the monument. Similar remarks were made with regard to other protected sites and the crux of the report was for taking measures which will remove the cause of visual barrier of these historical sites and to use the cut and cover technology.

41. The learned counsels for the petitioners have referred to certain intervening events while the report of the Committee was being considered by the D.G Archaeology. They have alleged unlawful acts on the part of the Government of the Punjab in bringing influence to bear upon the D.G Archaeology. A notification dated 11.11.2015 by the Services & General Administration Department (S&GAD), Government of the Punjab has been referred to by which a new D.G Archaeology was posted and it fell upon the new D.G to consider the application for the grant of NOC. However, we have not gone into this aspect as we do not think that it materially impacts the outcome of this petition. Suffice to say that a meeting was held between D.G Archaeology and the Chief Engineer LDA on 14.11.2015 in which the Chief Engineer explained the various aspects of the Project and the data which was submitted

by the LDA for the consideration of the D.G Archaeology in order to enable him to grant the NOC under section 22 of the Act, 1975. On 16.II.2015, the D.G Archaeology issued the NOC regarding construction of Lahore Orange-Line Metro Train Project. The NOC and its contents are reproduced hereunder:

*“This is with reference to chief Engineer, LDA letter No.CE/LDA/PS/580 dated July 3, 2015, Chief Engineer, LDA letter No.CE/LDA/PS/637 dated July 27, 2015, DG, LDA Note diary No. 1765 dated November 4, 2015 and subsequent meeting with the Chief Engineer on 14-11-2015 and presentation given by him in the Directorate General of Archaeology, on the subject.*

*Under Section 22 of the Antiquities Act, 1975, the Directorate General of Archaeology, Government of the Punjab has No Objection for the construction of the Lahore Orange Line Metro Train Project (from Ali Town to Dera Gujran) near the protected monuments falling on its alignment subject to the following conditions:*

- 1. The executing agency would ensure that the Ground Borne vibration do not affect the monuments. It should remain within the permissible limits.*
- 2. The Construction methodology be such that in no manner it should affect monuments.*

3. *The Technical Staff of Directorate General of Archaeology will monitor the monuments regularly during the construction of Orange Line Metro Train project.*
4. *The proposed structure should be at least 12 meters away from the Shalamar Garden walls.*
5. *No building material or equipments would be stored/stockpiled within the protected area of the monuments.*
6. *Special arrangement would be made to keep the monuments stable during the execution of project.*
7. *If any damage occurred to the protected monuments during the execution of project, this NOC would be treated as withdrawn and executing agency would be dealt in accordance with the provisions of the Antiquities Act, 1975.*

42. This Court on 28.1.2016 considered the application of the petitioners for the grant of temporary injunction and passed the following injunction:

*“18. In view of above, this application is allowed, the NOCs dated 16.II.2015 and 30.II.2015 are suspended and respondents are restrained to carry out any construction within distance of 200 feet of protected*

*immoveable antiquity and special premises mentioned in para 9 of this order.”*

43. While passing the temporary injunction, the following observations were made in that order of 28.1.2016:

*13. The duty to give reasons has a statutory expression now and section 24-A, General Clauses Act, 1897 (Act of 1897), obliges an authority making an order or issuing a direction to give reasons. The duty cast by section 22 on the director was onerous and one of great responsibility. The provision has been enacted to work as a bulwark against any intrusion on the status of a protected immovable antiquity. That is the policy of the Act. It is a form of unreasonableness if public authorities were to set their faces against the policy of an Act. An extract from Administrative law, Eleventh Edition by H.W.R. Wade & C.F. Forsyth should be sufficient to shed light on the twin concepts of failure to give reasons and acting against the policy of law as being included in the categories of unreasonableness:*

*“The Padfield case, already discussed, shows the ‘statutory policy’ doctrine as applied to a minister of the Crown. The House of Lords held that in refusing to refer the milk producers’ complaint to the statutory committee the minister had acted so as to frustrate the policy of the Act, despite the fact that its words were merely permissive; and that the political and other reasons given were irrelevant and indicative of unlawful motives....”*

*“The House of Lords also rejected the Crown’s argument that the*

*minister need have given no reasons and that therefore such reasons as he volunteered to give could not be criticized. Going still further, the House declared that if in such a case he refused to give any reasons, the court might have to assume that he had no good reasons and was acting arbitrarily. In other words, the minister may not be able to disarm the court by taking refuge in silence... .”*

*Padfield v. Minister of Agriculture, Fisheries and Food [1968] AC 1997 was relied upon for the proposition. Prima facie, therefore, we are of the opinion that there was a general duty on the director to give reasons for his decision. We are aware of the no less important doctrine that the court must not usurp the discretion of the public authorities appointed by legislature to take the decision. However, decision which are extravagant or capricious cannot be legitimate.*

*“15. So far question of irreparable loss is concerned, the learned counsel has passionately urged that the project is liable to suffer irretrievable financial loss if a stay was granted. The entire gamut of his arguments centred on aspects relating to monetary damages. We are aware of the financial implications and have fast tracked the case to be heard on a day to day hearing from 04.1.2016. Monetary loss, to say the least, can be recovered and retrieved. What cannot be retrieved and repaired is the soul of a nation. If, in the construction of the project and thereafter during its operation upon completion, any harm is caused to the Special Immovable antiquity or Special premises, that would be irreparable and beyond retrieval. No amount of money would be sufficient to recompense it. The argument of the learned*

*counsel advances a special interest as against a general interest. We must minimize the risk to our heritage, and to our national pride by extension, while we can and to preserve it inviolate. This is the theme at the heart of the Act of 1975 and Ordinance of 1985. When monetary loss is equated with damage, which may be caused to heritage sites and monuments, we have no manner of doubt in our mind that protection of heritage sites as an interim relief should have precedent over economic interest. Even if there is a reasonable suspicion that some harm may be caused to precious heritage sites and monuments, it is better to grant stay rather wait till any monument or heritage site is actually damaged.”*

44. Although, a statement was made on 09.06.2016 by the learned Advocate General, Punjab that revised NOC had been issued by the D.G Archaeology and, therefore, the decision of the D.G Archaeology has been revisited by him on 04.05.2016, as also that the NOC dated 16.11.2015 is not in the field anymore, it would be proper to refer to the various aspects of the NOC granted by the D.G Archaeology on 16.11.2015. The effect of the statement of the learned A.G Punjab shall be considered at a later stage.

45. The NOC dated 16.11.2015 does not fulfill the criteria to be employed for the exercise of discretion by a public authority on whom the discretion has been vested under a provision of law. It has now been settled by respectable authority that any discretion conferred upon a public officer has to be exercised in a structured manner and the various tiers of that structure have been enumerated by the superior courts over a period of time. They form an important plank of the administrative and public law and ought to be in the contemplation of any officer while exercising discretionary powers. At first blush, the NOC dated 16.11.2015 is woefully lacking in following the criteria which the D.G Archaeology was under an obligation to comply with. The NOC so issued does not comport with the onerous duties cast upon the D.G Archaeology by section 22 of the Act, 1975. For one it has been noted above that

the Directorate General of Archaeology is merely an extended wing of Youth Affairs, Sports, Archaeology and Tourism Department of the Government of the Punjab and thus a greater responsibility lay upon the shoulders of the D.G Archaeology to have acted in a reasonable manner.

46. The NOC of 16.II.2015 considers the report by the Chief Engineer, LDA and the subsequent meeting with the Chief Engineer held on 14.II.2015 and the presentation given by the Chief Engineer to the D.G Archaeology on the subject. The NOC is conspicuous by the absence of any reference to the report of the Committee formed by the D.G Archaeology and which report was submitted on 9.II.2015. No reference at all has been made to the recommendations of that Committee and thus, the D.G Archaeology while forming an opinion has failed to take into consideration an important document

presented for the consideration of D.G Archaeology by the officers of Directorate General of Archaeology. The NOC of 16.11.2015, therefore, in our opinion should receive a short shrift and must be struck down on the basis that it has been issued without consideration of relevant and proper facts and documents. It will also be noticed that the meeting with the Chief Engineer was held on 14.11.2015 and the NOC was issued two days thereafter which goes to show that the D.G Archaeology paid scant regard to the entire facts and circumstances of the case as merely two days is an insufficient period by any stretch of imagination for a monumental task of this nature to be accomplished and an NOC issued thereby. This haste betrays an utter lack of application of mind on the part of D.G Archaeology. However, no further dilation is required to be made on the NOC of 16.11.2015 as according to the statement of

learned Advocate General, Punjab, referred to above, that NOC has lost its efficacy and is not valid anymore and has been replaced by another Revised NOC by D.G Archaeology to which reference will presently be made.

*Revised NOC:*

47. The learned Advocate General as well as other counsels for the respondents submitted that after the passing of the interim order by this Court on 28.1.2016, the D.G Archaeology embarked upon an exercise meant to rectify and right his earlier wrong. He became wiser, according to the learned counsels for the respondents, by the observations of this Court. This, to say the least, was abdication of discretionary powers to please this Court and of a different form, equally pernicious and improper. This Court had not required the D.G Archaeology to embark upon any such errand or to do any such thing. This merely bolsters our view that the D.G Archaeology

was utterly incapable of exercising independence of discretion and thus to form an opinion. Also while doing so, we have noticed, the D.G Archaeology was merely cherry-picking from our order of 28.1.2016 to suit his purpose. We are not convinced that this was a *bona fide* exercise of discretionary powers. We are also not convinced that this could have been done by the D.G Archaeology. If good faith and proper motives was the underlying theme in undertaking a revision of the original NOC, the D.G Archaeology ought to have required a halt to all works on the Orange-Line as a revision may have entailed a realignment and a fresh feasibility of the route of the Metro Train had the D.G Archaeology come to a finding that the construction could not take place within the buffer zone, contemplated by law. Since this was not done, we have reasonable basis to conclude that the

D.G Archaeology sat with preconceived notion and improper motives.

48. To complete the narration of facts leading to subsequent events and the issuance of a revised NOC of 6.5.2016, an Advisory Committee was constituted on 13.2.2016 through a notification issued by Government of the Punjab. This was done in exercise of the powers conferred under section 3(I) of the Antiquities (Amendment) Act, 2012. The following were the members of the Advisory Committee:

1. *Director General Archaeology, Punjab. Chairman*
2. *Prof. (Retired) Khurshid Ahmad/ Visiting Professor, National College of Arts, Lahore. Member.*
3. *Mr. Khalid Abdur Rehman, Architect. Member.*
4. *Prof. Dr. Kanwal Khalid, Government College for Women, Gulberg, Lahore. Member.*
5. *Dr. Anjum Behmani, Ex-Director, Lahore Museum, Lahore/ Visiting Professor Government College University, Lahore. Member.*
6. *Dr. Ayesha Pamela Rogers, Heritage Management Expert. Member.*
7. *Khawaja Imran Nazir, MPA. Member.*
8. *Engr. Qamar ul Islam Raja, MPA. Member."*

49. The Advisory Committee held four meetings, the minutes of which have been

produced before this Court. The first meeting was held on 15.2.2016 and the basis of the constitution of the Advisory Committee and its advice was sought to be justified and culled out from the order of this Court passed on 28.1.2016. The only aspect worth a mention from a reading of the minutes of the meeting is the observation made by one of its members Engineer Qamar Ul Islam Raja, MPA who was of the considered view:

*“However, technical studies of the NESPAK and LDA presented here, we have come to know that there would be no negative impact of this project on the heritage of Lahore. He pointed out as there is no structural engineer in the committee, therefore it will be appropriate that the views of independent structural engineer be taken in this report if he agrees with this report prepared by NESPAK then we should have no objection on the construction of this Orange Line Metro Train project as there would be no danger to the structure of heritage sites. The Chief engineer explained that a renowned structural engineering firm EPDC headed by Dr. Younas Uppal has already been requested to give independent report. The advisory committee desired to request Dr. Uppal to brief in this regard.”*

50. Therefore, one of the members of the Committee felt that there was need for an independent analysis of the reports submitted by NESPAK and LDA. For the purpose, the services of a structural engineer were sought to be requisitioned so that the contents of the report prepared by NESPAK could be verified and double checked. However, in the same vein it will be noted from the paragraphs, reproduced above, that the Committee yielded to the proposal of the Chief Engineer LDA to the effect that a structural engineer by the name of Dr. Javed Yunus Uppal had already been appointed by LDA to give an independent report. During the course of arguments, Dr. Javed Yonus Uppal appeared before this Court and stated that he had undertaken a considerable number of projects on behalf of the Government of the Punjab and the LDA and was on the panel of Structural Engineers maintained by the

Planning & Development (P&D) Department of the Government of the Punjab. Without casting any aspersions on the credibility of Dr. Javed Uppal, this fact alone disqualifies him from acting as an independent structural engineer. However, what can be seen from the minutes of the meeting of the Advisory Committee is that the Committee certainly felt need of an independent analysis of the reports submitted by NESPAK and LDA. Whether they proceeded to rely upon the report of Dr. Javed Uppal, is a question to be dealt with at a later stage. In the same meeting, Dr. Ayesha Pamela, one of the members of the Committee, was requested to conduct the heritage impact assessment of the Project and to share the extract of her report with the Advisory Committee. This aspect of the matter shall also to be alluded to in the latter part of this opinion. The second session of the Advisory Committee was held on 16.2.2016 in which

visit was made to the archaeology sites and monuments which are protected under the Act, 1975 and falling on the route of the Orange-Line Metro Train track. While visiting the Shalimar Garden, the members proposed the shifting of the route further away from the monument for this purpose. However, the members were easily convinced by the explanation offered by the Chief Engineer and in fact appreciated the proposal made by the Chief Engineer which consisted of shifting the track area in front of the Shalimar Garden as also for proper landscaping to be done to enhance the beauty of the park. Likewise, the rest of the monuments were visited as is depicted by the minutes of the meeting which records the observations made by the members which are non-technical and utterly ordinary to say the least. These members expressed their satisfaction on the explanation offered by the Chief Engineer and did not pose any technical

questions to the Chief Engineer as is apparent from a reading of the minutes of the meeting. In the third meeting of the Advisory Committee, held on 18.2.2016, once again the members were apprised of the various technical aspects presented by the Chief Engineer as also the Project Manager NESPAK. The various aspects of the study conducted with regard to comprehensive analysis were also laid before the Committee by the said officers. Once again, the entire reliance was on the report prepared by the NESPAK with regard to vibration analysis. It is apparent from paragraphs 8 and 9 of the minutes of the meeting which have been placed on record that the only questions asked by the members of the Committee were with regard to the dust during the construction phase which was sought to be mitigated by sprinkling of water. Also the members inquired about the plans for landscaping of the area around the monuments.

These were the only two questions raised by the members which can very well give a glimpse into and the seriousness with which the members of Advisory Committee approached the entire matter. In the fourth meeting of the Advisory Committee held on 21.2.2016, Dr. Ayesha Pamela Rogers and Dr. Javed Uppal presented the findings of their report. Dr. Ayesha Pamela who incidentally was also a member of the Advisory Committee, presented the core issues of Heritage Impact Assessment (HIA) report whereas Dr. Javed Uppal, a Structural Engineer, presented his findings about the effect of Metro Train at structure of these heritage sites. According to Dr. Ayesha Pamela, the methodology applied in carrying out HIA was based on international best practice as presented in the ICOMOS Guidance of Heritage Impact Assessments for Cultural World Heritage Properties (2011) and the Asian Academy for Heritage

Management. Thereafter, the minutes of the meetings delved into the various aspect of HIA report submitted by Dr. Ayesha Pamela. It is not necessary at this stage to refer to the various aspects of HIA report. Suffice to say here that the report brought forth serious and abiding impacts on the heritage sites and the risk was mentioned to be high both during the construction phase and also during the operational phase. A long list of mitigation plan was also mentioned in the said report. At the end of the report, it was stated:

*“The project needs to carry out the following as a matter of urgency in order to ensure the safety and continued significance of the historic properties:*

*Baseline documentation of the II historical buildings (by a qualified archaeologist) – reference dossiers and photo documentation of the building and its immediate environment.*

*Condition Assessment of the II historical buildings (by a qualified conservation engineer) – summary visual assessments based on professional qualification and experience.”*

51. The members also went through the report submitted by Dr. Javed Uppal which

was entitled “*Study of Control of Vibrations, Noise and Foundation Undermining for Protection of Heritage Sites*”. The minutes reproduced certain aspects of the report. However, one aspect stands out. According to the opinion of the structural engineer, it was noted that “the construction was taking place at a fast track. Consideration at this stage has therefore been given to suggest only those measures that are practically possible and which equally cost effective”. No further meetings of the Advisory Committee took place. Thereafter, a report of the Advisory Committee was submitted to the D.G Archaeology. Recommendations were made by the Advisory Committee with regard to each historical site. With regard to Shalamar Garden, it was provided that:

*“The Committee members examined all issues noted above in the light of the reports from LDA, NESPAK, independent consultants as well as information gathered during their visits to the sites and satisfied that the construction of the project and its operation will neither cause any physical*

*damage to the sites in question nor will it have adverse or harmful impact on the setting and appearance of the project. They have also noted on the basis of vibration analysis reports by both NESPAK and Dr. Javed Yunas Uppal that neither the construction nor the operation phase of the project will in any manner affect the monument and the vibrations during both phase are well within the recognized and internationally accepted range. The Committee further expressed satisfaction that the acquisition of number of structures on the south of the G.T. Road, resulted in more open space in front of Shalamar Garden which will not only preserve but rather enhance the setting and appearance of the monument.”*

**“8.1.2 RECOMMENDATIONS**

*The Advisory Committee gave following recommendations regarding Shalamar Garden:*

*The area around the Hydraulic tank should also be properly attended and developed into green belt.*

*A wall to camouflage the shabby structures on the southern side of the track should be constructed.*

*The decorative motifs of the Shalamar Garden should be replicated on the nearby station of the Garden.*

*The parking area in front of Shalamar Garden may be shifted and proper landscaping should be done in this area to enhance the beauty of this Garden.*

*Special allocation should be made for the conservation & preservation of Shalamar Garden.*

*Design and alignment of orange line is acceptable.”*

52. As to Gulabi Bagh Gateway, the following was recommended:

*“The Advisory Committee members checked the distance of monument on the maps which is 69 ft and compared it with on-ground situation. They were satisfied that in accordance with the vibration analysis report by NESPAK regarding the vibration of train which would be less than 0.3 mm/second at distance of 33-39 ft from pier, there would be no negative impact on the structure of Gulabi Bagh Gateway. However, the members of the Advisory Committee suggested that the Chief Engineer LDA may make necessary arrangements to control the dust pollution so it would not affect the decorative work of Gulabi Bagh Gateway.*

### **8.2.2 RECOMMEN DATIONS**

*The Advisory Committee gave following recommendation regarding Gulabi Bagh Gateway:*

- i. Tile mosaic motifs of the Gulabi bagh Gateway should be used on the decoration of nearby station of the Gateway.*
- ii. Design and alignment of Orange line is acceptable.”*

53. Also as regards Buddh’s Tomb, the following was recommended:

### **8.2.3 RECOMMENDATIONS**

*The Advisory Committee gave following recommendation regarding Buddhu’s Tomb:*

- i. The area around the Tomb should be developed into garden and conservation of the*

- decayed portions of the Tomb should be immediately carried out.*
- ii. *Tile mosaic patterns of the Buddha's Tomb should be used on the decoration of nearby station of the Tomb.*
- iii. *Design and alignment of Orange line is acceptable.*

54. As to Chauburji Gateway, the Advisory Committee recommended that:

*The studies conducted by the NESPAK and data provided by LDA, the issue of vibration has been properly addressed and nullified. According to feasibility study, this train will help in reduction of traffic congestion on side roads which will consequently reduce air, dust and noise pollution. Pollution can cause early deterioration of historical buildings and make these places unattractive for the tourists. So reduction in pollution due to this train will help in preservation of heritage sites and clean environment with hassle-free access will attract more tourists.*

#### **8.4.2**

##### **RECOMMENDATIONS**

- i. *Proper landscaping of part around Chauburji to further enhance its beauty.*
- ii. *Visual inspection of indicators other than cracks, such as loosening of decorative tiles will also be part of the Monitoring Plan.*
- iii. *The speed of the train should be reduced while passing in front of the monument.*

*iv. Design and alignment is acceptable.*

55. And as regards tomb of Zaib un Nisa, the recommendations were that:

#### **8.5.2**

##### **RECOMMENDATIONS**

- i. The situation of at the roof tops of the houses and commercial buildings is not giving a pleasant look. Government should also do something to improve their roof top condition to have a better look/view during operation of train. A proposal to develop the roof tops as a sort of Kitchen Garden was also given by the members.*
- ii. Design and alignment is acceptable*

56. One aspect clearly comes to fore from a reading of the report of the Advisory Committee. It is entirely based on the specifications and data/ reports, furnished by the Chief Engineer LDA and the Project Manager, NESPAK. In April, the vibration analysis was also undertaken by NESPAK which is a Federal Government instrumentality retained as a consultant by the Government of the Punjab. No other means were employed by the Advisory Committee. One of its

members, Dr. Ayesha Pamela prepared the HIA report which was also conspicuous by its reference in the final recommendations made by the Advisory Committee and that report contains serious instances of risks involved during the construction and operational phases of the project to the monuments protected under the Act, 1975. Dr. Javed Uppal, structure engineer was not appointed by the Advisory Committee but was appointed by the LDA and as brought forth above, is retained on the list of Structural Engineers maintained by the LDA as well as the Government of the Punjab and has undertaken a number of projects for LDA. It may also be mentioned that the members of the Committee were not entirely seen to be independent. This is not to say that the members did not act independently but the perception with regard to these members cannot be that they acted independent of the influence of the

Government of the Punjab in their capacity as the members of the Advisory Committee. The Chairman of the Committee is the Director General of Archaeology, Punjab who is certainly a government servant and heads a wing of a department of the Government of the Punjab whose administrative head is the Secretary of the Government of the Punjab. Professor (R) Khurshid Ahmad is a visiting Professor, National College of Arts, Lahore which college is under the direct control of the Federal Government. Be that as it may, the qualifications of Professor (R) Khurshid Ahmad have not been specified to be of much relevance in relation to the specialized work assigned to the Advisory Committee. Professor Dr. Kanwal Khalid is a Professor of Government College for Women, Gulberg, Lahore. We do not need to concern ourselves with the credentials of Dr. Kanwal Khalid as member of the Advisory Committee since she,

it seems, is an employee of a College, which is controlled by the Government of the Punjab. Also her expertise has not been highlighted so as to have any nexus with the functioning of the Advisory Committee. Dr. Anjum Rehmani is an Ex-Director, Lahore Museum and is currently a visiting Professor at the Government College University, Lahore, once again an institution under the direct control of the Government of the Punjab. However, Anjum Rehmani may have an expertise in certain aspects of history but his specialization and expertise with regard to the functions assigned to the Advisory Committee are not known. Dr. Ayesha Pamela is a heritage management expert. Suffice to say that her firm has been retained by the Government of the Punjab for the preparation of HIA report for being presented to the UNESCO in its meeting to be held at Istanbul, Turkey from 13<sup>th</sup> to 20<sup>th</sup> of July, 2016. This fact is

sufficient to disqualify her status as an independent member of the Committee. The rest of the members are members of the Provincial Assembly. However, these members of the Provincial Assembly belong to the party at the helm and none of them is a member of the opposition party.

57. It may be mentioned that from a reading of the notification setting up the Advisory Committee in terms of section 3(I) of the Act, 1975, the Advisory Committee has not been constituted for the specific purpose of analyzing the Orange-Line Train project. It is also not the mandate of section 3(I) of the Act, 1975 that the Advisory Committee be constituted for each project separately. It is meant to be constituted on a permanent basis although an amendment can certainly be brought about in its membership but the constitution of the Advisory Committee is a statutory mandate and ought to be established

for all times. The provision with regard to the constitution of Advisory Committee was brought into the Act, 1975 by way of an amendment through Antiquities (Amendment) Act, 2012 on 11.02.2012. Since the year 2012 when the amendment was promulgated, the Committee had not been constituted and it was only done on 13.2.2016 by the notification referred to above. The learned Advocate General Punjab as also the counsels for the respondents have stated that the constitution of the Advisory Committee is the result of the observations made by this Court in its order dated 28.1.2016. By coincidence, therefore, the first task that fell for the determination by the Advisory Committee was the analysis of the reports with regard to the Orange-Line Train project and the submission of its recommendations. It thus follows that the constitution of the Advisory Committee was an act in which the Government of the

Punjab had a real and tangible interest and, therefore, the constitution of the Advisory Committee and the selection of its members was a matter of grave concern for the Government of the Punjab. It was conscious to the core regarding the challenges pending with this Court and thus we have no doubt in our minds that the Advisory Committee was constituted with an eye on the Orange-Line Train project and the choice of its members was entirely from that point of view.

58. Reverting back to the report, submitted by the Advisory Committee and the recommendations with regard to Shalamar Garden, the entire narration of facts is based on the data provided by the Chief Engineer and NESPAK. No independent analysis has been carried out nor does any such analysis form the basis of the report or recommendations of the Advisory Committee. The Committee noted that vibration analysis

reports had been submitted both by NESPAK and Dr. Javed Uppal. This was a fallacy in which the Advisory Committee fell. No vibration analysis report was prepared by Dr. Javed Uppal and his report was merely based on the vibration analysis undertaken by NESPAK. Therefore, the very basis of the recommendations of the Advisory Committee is fallacious. It is also interesting to note that the Advisory Committee does not make a mention of the HIA report submitted by Dr. Ayesha Pamela whereas Dr. Ayesha Pamela was a member of the Advisory Committee and her HIA report was a seminal document which ought to have formed the basis of any recommendations of the Advisory Committee. It also seems that Dr. Ayesha Pamela did not assert herself in ensuring that her recommendations, observations and mitigating plans be factored in the final recommendations made by the Committee. In fact, the only

allusion in the report of the Advisory Committee to the HIA report prepared and submitted by Dr. Ayesha Pamela is to the following effect:

*“Dr. Ayesha Pamela briefed the members about the basis of her analysis in light of the international best practice. It was observed that the overall assessment leans in favour of the proposed project.”*

59. It is an unfortunate aspect of the report by the Advisory Committee that the HIA report by Dr. Ayesha Pamela was given scant regard in the entire report. Also the recommendations and mitigation plan was not given the due consideration that it deserved. A reference to the report of Dr. Ayesha Pamela in some detail will be adverted to in the proceeding paragraphs. The only recommendation of the Advisory Committee with regard to the Shalamar Garden was that the area around the hydraulic tank should be properly attended and developed into a green belt. Also that the decorative motifs of the

Shalamar Garden be replicated on the nearby stations of the Garden and finally that the design and the alignment of the Orange-Line was acceptable.

60. With regard to Gulabi Bagh Gateway, the recommendations were based on the analysis of the maps provided by the Chief Engineer and once again the vibration analysis report by the NESPAK was made the basis of the recommendations. This pattern continues for the rest of the protected sites in respect of which recommendations were made by the Advisory Committee. The entire gemut of recommendations were based on the reports submitted by the NESPAK and the Advisory Committee did not have the assistance or the support of independent experts in the preparation of the report. As adumbrated, none of the members of the Advisory Committee were experts in the nature of work that was assigned to them and which entailed a

specialized knowledge and expertise in the conservation of monuments and endangered sites. During the entire course of the meetings of the Advisory Committee, none of the members posed any queries which went to the root of the matter. No member of the Advisory Committee took pains to suggest that the vibration analysis undertaken by the NESPAK be examined by independent consultants of comparable standing with NESPAK and preferably of international standing. None of the members of the Advisory Committee realized the onerous and monumental nature of the task assigned to them. For example, in the column of general recommendations of the report of the Advisory Committee, it has been mentioned that “beyond a distance of 32 – 39 ft. from the main pier of rail the ground borne vibrations (GBV) will be negligible at 0.3 mm/sec, a measurement far below that recommended by

studies and industry standards. On this basis, it can be stated that there will be no adverse impact to historic fabric located more than 32 feet from the source of vibrations from operation of the trains". These observations by the Advisory Committee shed some light on the seriousness or lack of it with which the Advisory Committee approached the entire matter. It has been mentioned in the report of Dr. Ayesha Pamela that at quite a few places the historical sites will be located at less than 32 feet from the source of vibrations. It was thus that the report of Dr. Ayesha Pamela was not referred to while making these recommendations. In similar vein, the Advisory Committee has dealt with the aspect of visual barrier created by elevated train. With regard thereto, it was mentioned that:

*"The slight visual impacts should be mitigated / offset by sympathetic design of the viaduct and stations in terms of colour and reflectivity so that the setting and appearance of the heritage sites may be as far as possible preserved and enhanced. The visual envelope of these monuments has*

*already been compromised by already existing infrastructure, buildings and encroachment. The project will provide an opportunity for landscaping and streetscape to preserve rather enhance the setting and appearance of the environment around the monuments.”*

61. The Advisory Committee was completely oblivious of the importance and significance of the concept of visual barrier or impairment with regard to the historical and cultural sites. They were unaware of the facts that this was one of the basic and fundamental planks of the entire study regarding preservation of protected sites. The casualness with which the matter was dealt with leaves a lot to be desired.

62. To begin with the rule that resonated in our minds while judicially receiving the Revised NOCs and the discretion exercised by the D.G Archaeology can best be described in the words of *Lord Bingham* in the *Rule of Law*:

*“They have, in all probability, no expertise in the subject-matter of the decision they*

*are reviewing. They are auditors of legality: no more but no less."*

63. The D.G Archaeology issued a **revised NOC/approval regarding construction of Lahore Orange-Line Metro Train project south of Shalamar Gardens, Lahore (in respect of Shalamar Gardens) on 6.5.2016**. It may be mentioned that separate revised NOCs have been issued for all five of the protected antiquities in question. This was in contrast to the earlier NOC of 16.11.2015 which was a joint NOC for the five protected antiquities under the Act, 1975. The NOC and revised NOCs are stems of the same root and the illegality which afflicts and faints the original NOC equally strikes at the revised NOCs too as the revised NOCs merely gloss over the inherent and patent incompetence of the original NOC. As explicated, the learned Advocate General, Punjab made a statement that the revised NOC of 6.5.2016 (the date is the same for all revised NOCs) overrides the

earlier NOC of 16.11.2015 which should be considered to have been erased by the issuance of the revised NOC. This statement does not seem to be borne out from the revised NOC which has been produced before us. The revised NOC is, from its contents, in furtherance of the previous NOC, dated 16.11.2015 and does not mention that that NOC is no more alive or in the field. As stated, these revised NOCs bear the same date i.e. 06.05.2016. Interestingly, the language and the grounds of grant of NOC are also the same, *verbatim*. That is, for each protected antiquities, the same set of conditions have been prescribed for the grant of the approval. So much for an independent application of mind with regard to each protected antiquity. Once again, this betrays the lack of application of mind on the part of the D.G Archaeology while issuing the revised NOC in respect of five different protected antiquities bearing

different locations, architectural attributes as also requiring distinct and separate treatment for their preservation and conservation. Also, out of the nine factors considered by the D.G Archaeology while issuing the revised NOC, only three of these factors were of recent origin and came about after the issuance of the first NOC on 16.11.2015. These constitute the report of the Advisory Committee, the report of Dr. Javed Uppal and the HIA report by Dr. Ayesha Pamela. Once again, the conditions attached to the grant of approval in the revised NOC, do not make a reference to the HIA report prepared by Dr. Ayesha Pamela. Once again, for some strange reasons, the D.G Archaeology did not consider himself compelled to refer to and rely upon that report and to think it worthy of consideration in greater detail. From the contents of the revised NOC, we do not have any doubt that the D.G Archaeology has acted as an arm and

instrumentality of the Government and not as an independent regulator. It will be proper to refer to the conditions subject to which the approval was granted by the D.G Archaeology in terms of section 22 of the Act, 1975. They read as under:

- A) *No building material or equipment shall be stored/stocked piled within the protected area of the monuments.*
- B) *No change shall be made in the alignment of the track which brings any part of it nearer to the monument than the distances set out in the Report of the Advisory Committee.*
- C) *Dust pollution during construction shall be controlled through extensive sprinkling of water on regular basis.*
- D) *Such further special arrangements shall be made, as necessary, to keep the monument stable and un-damaged in all respects during the execution of the Project as specified in the HIA and Study of Control of Vibrations, Noise and Foundation.*
- E) *The design of the viaduct and nearby station in terms of colour and reflectivity should be in harmony with the setting and appearance of the monument.*
- F) *The area around the Hydraulic tank would be properly attended and developed into green belt.*
- G) *Shabby structures on the southern side of the Shalamar Garden would be camouflaged through construction of a wall in consultation of Directorate General of Archaeology.*
- H) *The decorative motifs of the Shalamar Garden would be replicated on the nearby station of the Garden to create a harmony with the historic Garden.*

- I) *Vibration monitoring must be undertaken as part of a Monitoring Plan using the crack measures devices such as Avogard Standard tell-tales throughout construction period of and for a period of 10 weeks after commencement of train operations and more time period if so directed. If levels of vibrations exceed safe limits further action must be taken to bring such levels down such as adjustment of train speed, additional buffers, etc., Visual Inspection of indicators other than cracks shall also be part of the monitoring Plan.*
- J) *An independent and experienced Conservation Engineer must be engaged by the executing agency, and later by the operating agency, to monitor the Project both during its construction and operational phases who shall submit monthly reports to the Advisory committee which shall in turn make such further recommendations as may be required to the Directorate-General Archaeology. This monitoring shall be in addition to monitoring by the technical staff of the Directorate-General Archaeology.*
- K) *The speed of the train shall be reduced while passing in front of the monument as recommended by the Directorate General of Archaeology from time to time on the basis of the available data.*
- L) *Recommendations of the Advisory Committee shall be complied by all the involved agencies in letter and spirit.*

*7. If any damage occurs to the monument during the execution of the Project or during its operations or any of the above noted conditions are violated, this NOC will be treated as withdrawn and the executing agency (LDA) and any other involved agencies shall be dealt in accordance with the provisions of the Antiquities Act, 1975.”*

64. As can be seen from the above, the conditions which have been attached to the approval have utterly compromised the somber and onerous nature of the function assigned to the D.G Archaeology in terms of the provisions of the Act, 1975.

65. The D.G Archaeology and the Committee are core public authorities, that is, 'bodies that so obviously have the character of a public authority that it is not necessary to mention them. [*R. (on the application of Quark Fishing Ltd.) v Secretary of State for Foreign and Common Wealth Affairs (No.2)* [2005] UKHL 57]. They exercise an overarching statutory duty of compliance with the policy of the laws they were empowered to act under. Any discretion to be exercised by them had to be rationally related to the aims of those laws.

66. *"Public law has rapidly advanced recently from a 'culture of authority' to a*

*'culture of justification.'*" (The words of late Prof. Etienne Mureinik of South Africa).

67. Let us here make an allusion to the justiciability and limits of judicial Review in the context of decisions by public authorities. It will suffice here to refer to a statement in *De Smith's Judicial Review (Seventh edition)* which captures and articulates the concept thus:

*"Judicial review has developed to the point where it is possible to say that no power – whether statutory, common law or under the prerogative – is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of a public power, its scope and its substance. As we shall see, even when discretionary powers are engaged, they are no immune from judicial review. Discretion has been described as the "hole in the [legal] doughnut", but that hole is not automatically a lawless void. Nevertheless, there are certain decisions which courts cannot or should not easily engage. Courts are limited (a) by their constitutional role and (b) by their institutional capacity."*

68. Closely related is the basic principles regarding the purpose of judicial Review also

brought forth in the same treatise in these words:

*“In a mature democracy, the courts and Parliament have distinct and complementary constitutional roles in securing good government according to the constitution. The courts will no longer avoid adjudicating on the legality of a decision merely because it has been debated and approved in Parliament or relates to nationally important policy pursued by a Minister accountable to Parliament. The distinctive roles of judicial review and parliamentary (and other) oversight of executive action create opportunities for synergy, with aspects of a particular decision being scrutinized in different ways by different bodies. Thus, a government decision may be examined in judicial review proceedings, in an ombudsman complaint and by a parliamentary committee. Judicial review proceedings may prompt parliamentary action, and vice versa. Judicial review also goes some way to answering the age old question of “who guards the guards?” by ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their own lawful powers.”*

69. It is also not an invariable rule that policy decisions are beyond the amenability of courts in judicial review. Policy decisions must conform to legal standards of procedural fairness etc. and according to De Smith:

*“The constitutional status of the judiciary should not, however, excuse the courts from any scrutiny of policy decisions. Courts are able, and indeed obliged, to require that decisions, even in the realm of “high policy” are within the scope of the relevant legal power or duty, and arrived at by the legal standards of procedural fairness. The courts display reserve in impinging upon the substance of policy decisions, but even here they may legitimately intervene if the decision is devoid of reason and not properly justified. Judges always possess the capacity to probe the evidence and assess whether the reasons and motives for decisions are rationally related to their aims. As will be shown in the chapters that follow, public law has rapidly advanced recently from a “culture of authority” to a culture of justification.”*

70. We must bear in mind that the Revised NOCs and Addendums are the products of bodies which are part of the executive. Conferring an unlimited discretion on these bodies as to how those approvals in which the executive has a vital interest, are to be granted seems to us to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our constitutional polity. If authority were needed for this proposition, it is to be found in *Regina v Secretary of State for the*

*Home Department, Ex parte Pierson [1998]*

*AC 539 (573)*. Lord Brown –Wilkinson said:

*“I consider first whether there is any principle of construction which requires the court, in certain cases, to construe general words contained in the statutes as being impliedly limited. In my judgment there is such a principle....From those authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen on the basic principles on which the law of the United Kingdom is based unless the statute conferring the power under it clear that such was the intention of Parliament.”*

71. We shall be analyzing the decisions and exercise of public functions by the D.G Archaeology and the Committee on the broad principles of ‘illegality’ which means that if the decision—maker:

- a. *misinterprets a legal instrument relevant to the function being performed*
- b. *has no legal authority to make the decision*
- c. *fails to fulfil a legal duty*
- d. *exercises discretionary power for an extraneous purpose*
- e. *take into account irrelevant considerations or fails to take account of relevant considerations*
- f. *improperly delegates decision-making power.*

Also that:

*The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or delegated legislation, but it may also be an enunciated policy, and sometimes a prerogative or other common law power. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments."*

*(De Smith's Judicial Review, Seventh Edition)*

72. It has been mentioned above that the D.G Archaeology did not mention the report prepared by Dr. Ayesha Pamela and the mitigation plan proposed therein. The revised NOC does not consider at all the factors which would impact the protected antiquities during the construction phase as also during the operational phase. For example, in every case, the severity has been mentioned as high in the HIA report with risk to fabric, noise, dust

and vibration from machinery as well as fire risk. None of these dangers have been mentioned let alone dealt with in detail by the D.G Archaeology. This is apart from the underlying consideration that the D.G Archaeology should have taken into account independent reports prepared by the consultants who were not under the influence of the Government of the Punjab which was the interested party in the execution of the Project. It did not cross the mind of the D.G that the Project was the first of its kind and he was making history while exercising his discretion under section 22 of the Act, 1975 and the onerous nature of the assignment required of him to take ingenious and out of box decisions. The D.G Archaeology has miserably failed to rise up to the occasion.

73. I shall now proceed to dissect the revised NOCs in order to demonstrate that the revised NOCs do not fulfill the standards of

rationality and reasonableness. Before that, one of the submissions of the learned Advocate General must be countered. He submitted that the issuance of NOCs (and approvals) under both the laws was an on-going process and the authorities could continue to issue and revise the approvals. This is a fallacy and in fact cuts across the statement made by the learned Advocate General that the original approvals were not there any more. The mandate of the law is for approvals to be obtained before works commenced. That mandate will be utterly compromised if it were otherwise as seems to be the case here since the revised NOCs and Addendums have been issued well after the work began. Thus it is made clear that the approvals must be granted before the work starts on the project as it might entail and require a review of alignment and other major aspects of the project.

74. The decisions of D.G Archaeology and the Committee are based upon failure to take account of relevant considerations. This is a *sine quo non* in the exercise of all discretionary powers. As to the criteria of those relevant considerations, let us revert to *De Smith* for an elaboration of the proposition that:

*“When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account...”*

*“If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked, even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements...”*

*“If the relevant factors are not specified (e.g. if the power is merely to grant or refuse a license, or to attach such conditions as the competent authority thinks fit), it is for the courts to determine whether the permissible considerations are impliedly restricted, and, if so, to what extent, although when the courts conclude that a wide range of factors may properly be considered, they will be reluctant to lay*

*down a list with which the authority will be required to comply in every case...*"

75. The leading case on the subject is *R v Boundary Commission for England Ex. p. Foot* [1983] 1 Q.B. 600.

76. Another rule of administrative law which is enmeshed with the rule regarding failure to take account of relevant considerations is the rule of to 'have regard' to the desirability of something. In the words of *De Smith*:

*"Duties such as these are described as "mandatory" but not imposing "a duty to achieve results". In challenges to alleged failures to fulfil "to have regard to" duties, the courts have laid down guidelines as to what is expected of a public body. The required approach is contextual: "'Due regard' is the 'regard that is appropriate in all the circumstances'". It is not sufficient for the public body to show merely that it made its decision with "a general awareness of the duty"; a "substantial, rigorous and open-minded approach" is required. The test whether a decision-maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and the duty must be performed with "vigour and an open mind". The duty requires a 'conscious directing of the mind to the obligations'. "Due regard" must be given "before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question". Due regard to the duty must be an "essential preliminary"*

*to any important policy decision, not a "rearguard action following a concluded decision". Consideration of the duty must be an "integral part of the formation of a proposed policy, not justification for its adoption"..."*

77. Since the revised NOCs have a common tenor, I shall proceed to deal with the revised NOC with respect to Shalamar Garden. Condition 'A' states that no building material or equipment shall be stored/stocked piled within the protected area of the monuments. This in itself brings forth the confusion that permeates the length and breadth of the revised NOC. It is not clear as to what is meant by protected area of the monuments. Perhaps the D.G Archaeology did not have in mind that the protected area of the monuments was the 200 ft zone envisaged by law. Condition 'B' states that no change shall be made in the alignment of the track as set out in the Report of the Advisory Committee. It will be recalled that the report of the Advisory Committee is based on the NESPAK design and is not on an

independent assessment of the distances between the monument and the work being done. Clearly, the need was for an independent assessment whether the alignment was in fact compatible with the standards set down for protected antiquities and not whether the alignment as given by the executing agency be accepted without demur. The important aspect to be considered was whether the existing alignment was harmful or not. It could not have been brought any nearer to the hydraulic tanks since it already crossed above the tanks in the existing alignment. Also in respect of other monuments too, the track is located within the distance at which it can cause harmful effects according to the HIA report.

78. Condition 'C' relates to the dust pollution during construction. The only remedy with regard thereto is the extensive sprinkling of water on regular basis. This was

too simple a solution to a deep-seated problem of dust pollution. The D.G Archaeology was required to determine the damage caused by dust and debris as well as noxious fumes from construction machinery. Dust was not the only element which could cause havoc to the monument and its structure. Therefore, sprinkling of water was an utterly inadequate remedy under the circumstances. The D.G Archaeology failed to consider the effect of all of this on the fabric and integrity of the monuments and also whether sprinkling of water was the proper mitigation. Further not all monuments were in the same state of maintenance and upkeep. Dust and fumes were thus liable to impact with varying degree upon each monument separately. Condition 'D' required further special arrangements to be made in order to keep the monument stable and free from damage during the execution of the Project. Here a reference is made to the

HIA and study of control of vibration, noise and foundation. It is incredulous to see that apart from making a reference to the HIA and some study for the control of vibrations etc., no specific mitigation plan has been spelt out in the revised NOC. The D.G Archaeology fails to specify with exactitude the steps which should be put in place in accordance with the HIA report. This also brings to fore the fact that the HIA report did mention elaborate procedure for protecting and preserving the monument during the construction and operational stages. The lack of specificity on the part of the D.G Archaeology speaks volumes about the manner in which the entire issue was approached. We will bear in mind that the failure to fulfill or carry out any of the conditions in the NOC can entail the cancellation of the NOC. Can it be discerned with any degree of certainty as to what precisely condition 'D' specifies? What were

those special arrangements? We have not been referred to any special arrangements in the HIA or the report of NESPAK. Also at places, the construction work shall be taking place perilously close to the monuments and an accident may occur by which the heavy machinery comes crashing down on the monument and causes damage beyond reparation. This has happened in the recent past on a number of construction sites and is a foreseeable possibility. What were the special arrangements given in the Revised NOCs to rule out such an accident and the eventual loss of the monument? None at all.

79. Condition 'F' relates to the hydraulic tank. It may be reiterated that the hydraulic tank has been the subject of intense UNESCO scrutiny and the damage caused to two of the hydraulic tanks during the construction of G.T. Road caused the Shalamar Garden to be included in the endangered list and it was the

only reason that through consistent efforts, Shalamar Garden was once again included in the heritage list maintained by UNESCO. This should have been the most compelling reasons for the D.G Archaeology to have paid extra attention to this aspect. And what does the D.G Archaeology suggest with regard to the hydraulic tanks? It was that the hydraulic tank to be properly attended and the area around it be developed into green belt. This amounted to making a mockery to such a serious issue. It is not disputed that part of the elevated viaduct of the Orange-Line passes right above the hydraulic tank and the works being undertaken are at a mere 7 feet from the hydraulic tank and this finds mention in the HIA report by Dr. Ayesha Pamela. No reference at all was made to this aspect by the D.G Archaeology. Condition 'T' relates to the monitoring plan for vibration and the said condition is most interesting in the way it has

been dealt with by the D.G Archaeology. It mentions that a monitoring plan be put in place through crack measures devices to be installed for the purpose. This really puts a huge question mark on the rationality of the decision. If there was even a semblance of danger to the structure during operation, the D.G Archaeology has not at all considered as to whether there existed any means at the disposal of the executing agency to remove that danger. Mitigation, it must be borne in mind, is a relative factor; it may or may not succeed. The key is to put in place measures to remove the danger now and not in future. If there is any danger at all at this stage, or looming in the horizon, the NOC must not be issued. That is of the essence of the discretion to be exercised under section 22 of the Act, 1975. This begs the question: why put the monument at risk at all? The discretion to permit the construction to be carried out within a zone of

200 ft. could only be undertaken if there existed no risk at all to the protected antiquity. While considering the issuance of an NOC, there is no scope for mitigation. If doubts were expressed regarding impact of vibrations on the monument, it was best to shift the track further away to rule this out completely. Moreover, we have mentioned above and it is reiterated that in case there was such a danger which had been flagged time and again and which was an issue around which the entire controversy revolved, the least that the D.G Archaeology ought to have done was to engage the services of an independent consultant to not only verify the analysis done by NESPAK but also to furnish a report which would compete with the report furnished by NESPAK and which would, in turn, place before the D.G Archaeology more options than one in arriving at a decision and for the

purposes of a proper and rational exercise of discretion.

80. Condition 'J' requires the appointment of an independent and experienced conservation engineer by the executing agency and later by the operating agency to monitor the Project. Once again, the question arises as to why the D.G Archaeology did not take steps for the appointment of such an engineer to advise him on the report of the NESPAK and LDA so as to enable him to form an informed opinion. It was certainly not enough for directing the conservation engineer to be appointed at the whim of the executing agency but it was essential that such an advice from a conservation engineer must have been sought by the D.G Archaeology at the stage of deciding about issuance of the NOC. This betrays the keenness on the part of D.G Archaeology to issue the NOC and leave the

rest to NESPAK and LDA to be completed at their sweet will.

8I. Apart from the above, and the irrational and unreasonable nature of the revised NOC issued by the D.G Archaeology, two aspects have been completely ignored by the D.G Archaeology in the issuance of revised NOC. The first relates to visual impairment of the protected antiquity. The second concerns the alternatives to the alignment plan submitted by NESPAK and sought to be implemented with regard to Orange-Line Train Project. These two were baseline questions which ought had to be dealt with by the D.G Archaeology and the mere fact that they have not been dealt with in the revised NOC, renders the revised NOC as *ultra vires* and without lawful authority. These two aspects could only have been dealt with if the D.G Archaeology had the assistance of independent advice. It was incumbent upon the D.G Archaeology to have

sought that advice in view of the overwhelming evidence before the D.G Archaeology to show that there was a perceived threat which was real and present to the protected antiquities in questions. If the mitigating factors were not sufficient and in fact were not to be considered for the purposes of NOC, the alternative routes of the Orange-Line train alignment ought to have been considered by the D.G Archaeology. On account of the failure of the D.G Archaeology to take into consideration the underlying factors delineated in law which ought to have been taken note of and considered while granting the revised NOCs, the revised NOC issued by the D.G Archaeology are *ultra vires* and incompetent.

***Heritage Impact Assessment (HIA) Report:***

82. The HIA has been prepared by Dr. Ayesha Pamela on behalf of Rogers Kolachi Khan and Associates Ltd. and it has been prepared for LDA as the client. The report has been prepared in February, 2016.

Therefore, at first blush, it may be mentioned that the report is not an independent HIA prepared and submitted to the D.G Archaeology or the Advisory Committee but was prepared on behalf of the LDA as a client and for a specific purpose of submission to the annual conference of UNESCO to be held at Istanbul, Turkey. (This was conceded to by Mr. Shahid Hamid, Advocate counsel for LDA). The reading of the report brings forth ineluctably that this was geared towards facilitating the project and for having it implemented and it is thus that the HIA rules out “no development” as an option. The report is also partial towards Shalamar Garden in particular which shall be referred to in the proceeding paragraphs. According to the learned counsel for the petitioners, since the report was prepared with particular focus on Shalamar Garden as the monument on the Heritage List of UNESCO, the HIA in a

skillful manner skirts the danger and the potential impact in the case of Shalamar Garden and actually downplays it. There is no requirement in law for an HIA to be compiled though UNESCO lays great stress on a study of HIA. From that point of view, the HIA is meant to be an independent study and solely for the benefit of the public authority empowered to exercise the discretion.

83. The terms of reference of the HIA as mentioned in the report, is to assess the nature and extent of any adverse and beneficial impact that may result from construction and operation of the Orange-Line train. The methodology of the HIA has been based on international best practice as presented in the ICOMOS Guidance on Heritage Impact Assessment for Cultural World Heritage Properties (2011). Table 3 in the report describes the major engineering works which will take place in proximity to the heritage

buildings. During the construction phase, the severity in respect of the heritage sites has been mentioned as high and the other risks mentioned in the column of severity are:

- I. Risk to fabric;*
- II. Noise, dust, vibration from machinery;*
- III. Diminished access; and*
- IV. Fire risk.*

84. Another important aspect mentioned in this table is the minimum distance from the works which is 7 feet in respect of the hydraulic tank of the Shalamar Garden and 6.2 ft. for St. Andrews Church. Another feature of this table is regarding the duration of an impact which in case of a number of protected sites has been described as “permanent”. The table further goes on to show that during the operational phase of the Orange-Line Metro Train the duration of impact shall be **permanent** in respect of the protected monuments. Likewise, in the column of

“severity” has been mentioned as high with regard to visual impacts, noise and vibration. This is a common strand running through all the protected monuments. This shows at once that there shall be a permanent impact with regard to visual impairment, noise and vibration during the operational phase of the Project. However, the precise scope of the term ‘permanent’ has not been elaborated upon. Relying upon its common sense meaning, as understood by a layman, it can be gleaned that the severity of the impact while the Metro Train is in operation shall be high and the impact of that severity shall be permanent. This also means that the noise and vibration shall have a consistent and permanent impact on the protected antiquity without any let up. The entire report does not allude to the effect which the operation of the Metro Train will have on the protected antiquity and the period of time for which the impact can be

sustained by that antiquity and the nature of damage that will be caused which, it is presumed, shall be irretrievable and permanent. The HIA further goes on to state relying upon a document of international repute that “demolition activities and new construction of neighboring sites, however, can cause immediate harm to the physical integrity of historic structure. It takes an improperly planned excavation blast to crack the foundation of an adjacent historic structure or for a steel beam to be dropped from a construction crane onto its roof, significant damage may occur.” This has been mentioned in the context of possible impact damage to historic monument during construction works. Having mentioned this statement, the HIA report fails to suggest any tangible steps for alleviating or to rule out the danger expressed in that statement. Needless to say that the D.G Archaeology also paid scant regard to this

statement. In Section 8.3.2, it has been stated that:

*“...it is concluded that beyond a distance of 10-12m (32 – 39.4 ft.) from the main pier of rail the ground borne vibrations (GBV) will be negligible at 0.3 mm/sec, a measurement far below that recommended by studies and industry standards. On this basis, no adverse impact is predicted to historic fabric located more than 10m. from the source of vibrations from operation of the trains.”*

85. This has been mentioned with specific reference to the impact of continuous occurring vibration from train traffic. As can be seen that the above statement is based on the data provided by LDA which relies upon some German standards regarding maximum vibration velocity at the foundation level of a heritage structure and it has been held that it should be less than 3 mm/sec. It was thus concluded that beyond a distance of 32 – 39.4 ft., from the main pier of rail, the ground borne vibrations (GBV) will be negligible at .03mm/sec., which was a measurement far below that recommended by studies and

industry standards. It will be seen that the distance has been determined as 32 – 39.4 ft. from the main pier. In the HIA report itself, it has been mentioned that in a number of protected antiquities the distance of that antiquity or any part thereof is less than 32 feet and it should follow ineluctably that those structures are within the distance in which the GBV is likely to sustain a permanent damage over a period of time. This would also lead to the conclusion that there is no adverse impact predicted in the HIA report to the historic fabric located more than 10m from the source of vibration from operations of the train. Any historic structure located within that distance is exposed to the danger of permanent damage on account of the source of vibrations. Although this was the conclusion drawn in the HIA report, the report fails to make any recommendations for the realignment of the route to be alluded to in this regard at least or

for the D.G Archaeology to have paid attention to this aspect in greater detail.

86. Table 6 of the HIA presents the analysis of potential impacts which may result from the proposed changes, works and interventions described in the project presentation. The first aspect of this table which required to be noted is that mitigation measures are held to be required in respect of heritage sources considered in the HIA. The definition of the term “requires mitigation measures” has been given in the report to mean “if there will be some adverse effects, but these can be eliminated, reduced or offset to a large extent by specific mitigation measures”. In the table 6, in the column concerning “Threat to significance” during the construction phase, the HIA makes a specific mention of the risk to the significance of the remains of the Mughal period hydraulic tank near the entrance to the Garden. It goes on to state that

the southern end of this structure is very close to the alignment and will, in fact, be partially underneath the elevated viaduct. Also with regard to the Shalamar Garden, the 'Impact' has been mentioned as high with regard to *inter alia* the vibration from machinery. However, interestingly, during the operational phase, the impact with regard to vibration from the operations of the train has been omitted to be mentioned. Also, interestingly, and rather inexplicably the HIA report mentions the concerns regarding the outstanding universal value of the Shalamar Garden and the UNESCO World Heritage Property as also the set of attributes which are found in the outstanding universal value. Having mentioned all of this, the HIA by a strange set of logical deduction concludes that "none of these attributes will be impacted by the operation of the Orange-Line Metro Train". This lends credence to the submission

made by the learned counsel for the petitioners that special care has been taken to construct the HIA report in favour of Shalamar Garden for the purposes of presentation to UNESCO. Table 9 of the HIA report presents the mitigation measures to be implemented during the operational phase in order to address the various potential impacts assessed in the HIA.

87. The HIA report also deals with the visual barrier and intrusion created by elevated train, stations and other elements of the assessment. According to the report, the visual quality of views to and from the heritage buildings were found to range from poor to very poor. Having concluded that the visual quality was already in the range of being poor, no mitigation measures were suggested to improve or do away with the visual barrier and intrusions and instead the HIA suggests that there shall be an improved visual viewing from the elevated train and the people sitting in the

train shall have dramatic views from the viaduct which occurs at all sites along with the elevated segment. The recommended mitigation measures given in the report are without any specification. In fact, no measures in real terms have been suggested in the report. It merely states that other impacts including dust, water, fire and noise can be mitigated yet fails to say with exactitude as to what those concrete mitigating measures ought to be. It has been explicated above that the conclusion in the HIA that “during construction and operation vibration will not exceed permitted limits” is based on the NESPAK report and is a contradiction in terms as the HIA report itself concludes that the GBV will not impact beyond a distance of 32 ft. whereas at a number of places the distance is far less than 32 ft. as referred to in the HIA itself.

88. At this juncture, we shall briefly revert to the credibility and competence of the report by

the Advisory Committee. At the outset, it has already been noted that the Committee did not have within its fold any conservation or a structural engineer as well as a vibration analysis expert. The need was felt for the appointment of structural engineer in the matter but the Advisory Committee felt satisfied with the one already appointed by the LDA. The Advisory Committee did not have any expertise to analyse the data submitted by NESPAK which was a highly sophisticated and scientific data prepared by the experts who were well-versed in their fields. Correspondingly, none of the members of the Advisory Committee had the expertise to analyse that data and the Advisory Committee did not take the trouble of appointing an independent consultant for the purpose of analyzing or preparing the data to compare with the report submitted by NESPAK. It relied upon the HIA report submitted by Dr.

Ayesha Pamela and Dr. Javed Yunus Uppal. It would bear reiteration that the above two experts were appointed by the LDA which was their client and it was difficult to conceive that they shall be acting independently or free from the influence of the LDA or Government of the Punjab. Even then a perusal of the report of the Advisory Committee would bring forth that the Advisory Committee did not analyse in minute detail the report by Dr. Ayesha Pamela and some of the aspects which have been highlighted ought not have escaped the attention of the members comprising the Advisory Committee. Interestingly, none of the members went through the report of Dr. Ayesha Pamela incisively nor did any of the members make any worthwhile contribution to the proceedings of the Committee so as to demonstrate that the members were alive to the issue and to their responsibilities as such. As stated above, most of the members are either

working with the Government or in Government institutions. Dr. Ayesha Pamela rendered herself disqualified from acting as a member of the Advisory Committee since she had a monetary interest in the entire matter having LDA as her client. The D.G Archaeology, in turn, based his revised NOC on the report submitted by Dr. Ayesha Pamela without regard to the fact that Dr. Ayesha Pamela had a bias in the matter and no reliance could be placed on her HIA report. Also the D.G Archaeology completely brushed under the carpet, the mitigation measures proposed in the HIA report as also the aspect that the mere fact that mitigation measures had been proposed required an independent analysis as also to explore the option of “no development” since there was a real likelihood that the mitigation measures may not be successful at all.

*Antiquities Act, 1975:*

89. The preamble of the Act, 1975 reads as follows:

*“WHEREAS it is expedient to repeal and re-enact the law relating to the preservation and protection of antiquities and to provide for matters connected therewith or ancillary thereto;”*

90. The preamble is a prefatory to the Act, 1975. As *Max Radin* wrote in 1942:

*“In modern statutes it has become increasingly common to set forth the purpose in elaborate detail in the preamble. Thus it may be well to add is far from being an innovation. At all times in English history, it was an extremely common practice, notable examples of which are the statute Quia Emptores and the statute of uses. But old or new, the practice gives us a fairly definite notion of what the statute means to accomplish”.*

*(Max Radin, a Short Way with Statute, 56 Harv. L. Rev 388, 398 (1942).*

91. A preamble is, therefore, a window to the main statute. Although, the preamble does not control the main enactment, it certainly gives an inkling of the intention of the legislature and as to the policy of the Act. The concept relating to the policy of the Act is of paramount importance and all interpretation

must be done in accordance with the policy and the intention of the legislature found therein.

92. Another principle that is now firmly embedded in Administrative decision-making and is a recognized ground for judicial invalidation is that the discretion must be 'used to promote the policy and objects of the Act'. From time to time public authorities have set their face against the policy of an Act, and either declined to implement it or else attempted to frustrate it. Needless to say, this is an unlawful motive. This has been dealt with in *Administrative law, H.W.R. Wade & C.f. Forsyth (Eleventh Edition)* in the following manner:

*"In two strong and almost simultaneous decisions of 1968 the House of Lords and the Court of Appeal boldly applied the law as so often laid down. In one, the House of Lords asserted legal control over the allegedly absolute discretion of the Minister of Agriculture and held that he had acted unlawfully..."*

*"In Padfield v. Minister of Agriculture, Fisheries and Food the House of Lords had to consider a dispute under the milk*

*marketing scheme established under the Agricultural Marketing Act 1958. The Act provided for a committee of investigation which was to consider and report on certain kinds of complaint 'if the Minister in any case so directs...'*

*Lord Reid expressly rejected 'the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion'. He said:*

*Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.*

*Lord Upjohn said that the minister's stated reasons showed a complete misapprehension of his duties, and were all bad in law. The scarcely veiled allusion to fear of parliamentary trouble was, in particular, a political reason which was quite extraneous and inadmissible. One of the fundamental matters confounding the minister's attitude was his claim to 'unfettered' discretion:*

*First, the adjective nowhere appears in section 19 and is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act*

*of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.”*

*“Yet as we have seen it is commonplace for the judges to impose limits on apparently unqualified discretions derived from ‘the policy and objects of the Act’. And in both the recent cases mentioned the judges, in fact, recognized that such limitations might be imposed and required that the discretion of the Secretary of State, although wide, be exercised in accordance with the rule of reason. Thus the incautious use of the word ‘unfettered’ to describe a broad statutory discretion does not adumbrate the rejection of the foundational principle of administrative law just described.”*

93. The importance of the Padfield decision was underlined by Lord Denning MR in *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 190:

*“The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v.*

*Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law.”*

94. Wade further elaborated the rule as:

*The Padfield case, already discussed, shows the ‘statutory policy’ doctrine as applied to a minister of the Crown. The House of Lords held that in refusing to refer the milk producers’ complaint to the statutory committee the minister had acted so as to frustrate the policy of the Act, despite the fact that its words were merely permissive; and that the political and other reasons given were irrelevant and indicative of unlawful motives...”*

*The House of Lords also rejected the Crown’s argument that the minister need have given no reasons and that therefore such reasons as he volunteered to give could not be criticized. Going still further, the House declared that if in such a case he refused to give any reasons, the court might have to assume that he had no good reasons and was acting arbitrarily. In other words, the minister may not be able to disarm the court by taking refuge in silence...”*

95. A determined ministerial attempt to frustrate the policy of an Act was condemned by the Court of Appeal in *Laker Airways Ltd. V Department of Trade* [1977] Q B 643.

96. From the preamble and its reading it is evident that the Act, 1975 relates to the preservation and protection of antiquities. As

a necessary corollary, any act which runs counter to the concept of preservation and protection of the antiquities is abhorrent to the policy of the Act, 1975. Section 2 is the definition clause and defines immovable antiquity as also the term “protected antiquity” has been defined as under::

*“(i) “protected antiquity” means an antiquity which is declared under section 10 to be a protected antiquity.”*

97. Section 3 relates to the constitution of an Advisory Committee consisting of archaeologists, architects, historians and members of the provincial Assembly of the Punjab and D.G Archaeology has been nominated as the Chairman of the Advisory Committee. The Advisory Committee has to be constituted “for the purposes of this Act”. This, in our opinion, constitutes the fundamental sinew of the role of the Advisory Committee. It is only for the purposes of the Act, 1975 which purpose relates to the

preservation and protection of the antiquities and none else. It cannot be used for the purpose of performing a function which is incompatible with the purpose of the Act, 1975. Apart from the mention that the constitution of the Advisory Committee is for the purposes of the Act, the precise role and the scope of the Committee is unspecific. There are no standards given in section 3 with regard to the appointment of its members and no scope of the functioning of the Committee has been spelt out. More importantly, it is not clear under what circumstances the Advisory Committee shall function or as to the exact mandate of the Advisory Committee. Furthermore, it is not known as to what effect the opinion given by the Advisory Committee shall have on the decision to be made by the D.G Archaeology in terms of section 22 of the Act, 1975. The constitution of the Advisory Committee seems to contradict the role

envisaged for the D.G Archaeology under section 22 of the Act, 1975, for, the discretion to be exercised under section 22 by the D.G Archaeology is the sole prerogative of the D.G Archaeology on a structured basis and by taking into account the entire facts and circumstances of the case upon reasonable and rational grounds. Therefore, it seems that the Advisory Committee is a body which functions separately from the D.G Archaeology and in particular in matters where an advice is sought by the D.G Archaeology for the purposes of exercise of discretion under section 22. It is difficult to conceive as to how the Advisory Committee shall be able to act independently and to render and advise free from influence and bias if the Chairman of the Advisory Committee is the D.G Archaeology himself. For the formation of an opinion under section 22 of the Act, 1975, the D.G Archaeology ought to be assisted by an independent

Advisory Committee which is not influenced in any manner by the views and opinions of the D.G Archaeology. In order to qualify as an independent report of the Advisory Committee, it must act without the D.G Archaeology as its member and only then a report submitted by the Advisory Committee can have an independent standing. Since the D.G Archaeology was to exercise his discretion under section 22 of the Act, 1975 and the mandate of the Advisory Committee it seems was precisely to advise the D.G Archaeology to arrive at a reasonable conclusion, the D.G Archaeology ought to have recused himself from participating in the proceedings of the Advisory Committee. That the D.G Archaeology became part of the Advisory Committee and its decision-making renders the report of the Advisory Committee as *non est* and a nullity. This aspect is accentuated in the peculiar facts and circumstances of the present

case. From the tenor and reading of section 3, it certainly does not follow that the scope of work of the Advisory Committee is to render assistance to the D.G Archaeology in reaching a decision. If that were so, then the D.G Archaeology would not be a Chairman of that Committee. Thus the Committee may have any other role but the role of advising the D.G in the exercise of his discretion, which clearly is not the task envisaged by section 3 for the Advisory Committee. That the D.G entirely based his decision on the report of the Advisory Committee of which he was a part, is in itself sufficient to render the decision of issuance of Revised NOCs illegal.

98. Section 5-A relates to accidental recovery of antiquity to be reported to the Director General whereas section 6 confers the power on the Director General to enter into and inspect any premises, place or area of which he may have reason to believe to contain an

antiquity. The owner or occupier of the premises is obliged under the law to afford all reasonable opportunity and assistance to the D.G for the purpose. Section 6, in our opinion, reinforces the core policy of the Act, 1975 to preserve and protect the antiquities though it may have the unsavory effect of impairment of the fundamental rights of privacy and dignity of a person. That is how strongly the legislature felt while enacting the Act, 1975. Section 7 of the Act empowers the Director General to acquire any land which contains any antiquity and any such acquisition shall be deemed to be acquisitioned for public purpose. Once again, the value and integrity of an antiquity has been hammered in by conferring upon the Director General the power to acquire any land which contains an antiquity and it shall be deemed for public purpose to do so. Section 10 gives to the Government the power by notification in the

official gazette to declare any antiquity to be a protected antiquity for the purpose of this Act.

Section 19, in our opinion, must be read in conjunction with section 22 of the Act.

Section 19 reads as under:-

*“19. Prohibition of destruction, damage, etc., of protected antiquities. – (1) No person shall, except for carrying out the purposes of this Act, destroy, break, damage, alter, injure, deface or mutilate or scribble, write or engrave any inscription or sign on, any antiquity or take manure from any protected antiquity.*

*(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.*

*(3) The Court trying an offence under sub-section (2) may direct that the whole or any part of the fine recovered shall be applied in defraying the expenses of restoring the antiquity to the condition in which it was before the commission of the offence.”*

99. Section 22 of the Act, 1975, which is also relevant for our purposes, is reproduced hereunder for facility:

*“22. Execution of development schemes and new constructions in proximity to immovable antiquity. – Notwithstanding*

*anything contained in any other law for the time being in force, no development plan or scheme or new construction on, or within a distance of two hundred feet of, a protected immovable antiquity shall be undertaken or executed except with the approval of the Director-General.”*

100. As stated above, section 19 and section 22 must be read together in order to lend some actuality to the analysis. Section 19 prohibits the destruction, breaking, damage, alteration, injuring defacement or mutilation or to engrave any inscription on any antiquity by any person “**except for carrying out the purposes of this Act**”. Therefore, any alteration, defacement, damage etc can only be caused for carrying out the purposes of the Act and for no other purpose. This is a clear and unequivocal prohibition. It is in the context of section 19 that the D.G Archaeology has to exercise his discretion under section 22 of the Act, 1975. While exercising that discretion, in case the Director General feels that there is any danger of the protected antiquity being destroyed,

damaged, altered, mutilated etc., the D.G shall not grant approval for any development plan or scheme or new construction to be undertaken within a distance of 200 feet of the protected immovable antiquity. We have demonstrated from the report of Dr. Ayesha Pamela and the mitigation measures suggested therein that there is a real likelihood of the monuments being damaged as a result of the Orange-Line Metro Train both during the construction as also the operational phase and thus the D.G Archaeology ought to have refused to approve the said project to be implemented within a distance of 200 feet from the protected immovable antiquities. At least, there was a strong apprehension expressed in the HIA which ought to have compelled the D.G Archaeology to have sought independent counsel to verify the data submitted by LDA and NESPAK. This was the least obligation cast upon the D.G

Archaeology who has utterly and miserably failed to take into consideration the circumstances which had a direct bearing on the integrity of these protected immovable antiquities. In our opinion, the discretion under section 22 of the Act, 1975 leaves a lot to be desired, was based on irrelevant and extraneous considerations and did not conform to the standards of reasonableness and rationality. The revised NOCs must, therefore, be set aside as without lawful authority and of no legal effect.

***Special Premises:***

101. We now move on to the “Special Premises” which are protected as such under the Punjab Special Premises (Preservation) Ordinance, 1985 (**Ordinance, 1985**). Special premises have been protected under the Ordinance, 1985 and the track and alignment of the Orange-Line Metro Train passes six of these special premises viz:

- 1) *Shrine of Hazrat Mauj  
Darya Bukhari*
- 2) *Saint Andrew's Church,  
Nabha Road*
- 3) *Supreme Court Lahore  
Registry Building*
- 4) *Shah Chiragh Building*
- 5) *General Post Office  
Building*
- 6) *Lakshami Building*

I02. Section II of the Ordinance, 1985, provides as under:

*“II. Execution of development schemes and new constructions in proximity to Special Premises. – No development plan or scheme or new construction on, or within a distance of two hundred feet of, a Special Premises shall be undertaken or executed except with the approval of the government or a Committee.”*

I03. It can be seen from a reading of section II of the Ordinance, 1985 that it is couched in the same terms as section 22 of the Act, 1975. It has been enacted in a negative language and imposes a prohibition on development plan or scheme or new construction to be erected within a distance of

two hundred feet of a special premises. Such a development plan or scheme or new construction within a distance of 200 feet of the special premises can only be undertaken or executed with the approval of the Government or a Committee. The constitution of the Committee is envisaged by section 3 of the Ordinance, 1985 and reads as follows:

*“3. Constitution of Committees. – (1) The Government may by notification appoint one or more committees for the purposes of this Ordinance which shall perform such functions as the Government may determine.*

*(2) The Government or a Committee may appoint a Committee of Experts to advise the Government or a Committee with regard to matters relating to this Ordinance.”*

I04. Thus, section 3 contemplates that the Government may by notification appoint one or more Committees for the purposes of this Ordinance and which shall perform such functions as the “Government may determine”. Therefore, the Committee has to be notified by the Government and the constitution of the

Committee should be to advance the purposes of the Ordinance, 1985 which have been delineated as the preservation of certain premises of historical, cultural and architectural value in the Punjab and matters ancillary thereto. Further, that notification must also spell out the functions that the Committee shall perform. The reasons in support of the policy underlying the Act, 1975 shall apply in equal measure to the policy that underlies the Ordinance, 1985 as well, for the purpose and intention of enacting the two laws is premised on the same factors. The fundamental basis of the two laws is the conservation and preservation of the immovable antiquity in the case of Act, 1975 and special premises in respect of Ordinance, 1985. There is a common strand running in the two laws and which culminates in a common intention which can be culled out from a reading of the two laws i.e. the conservation and preservation

of certain premises of historical, cultural and architectural value as also having universal outstanding value about them.

I05. Section 7 of the Ordinance, 1985 is in the same vein and is *in pari materia* with section 19 of the Act, 1975 and enjoins any person from destroying, breaking, damaging, injuring or mutilating such portion of a special building as is mentioned in section 5. As is the case for Act, 1975, section 7 of the Ordinance, 1985 must be read in conjunction with section II of the Ordinance, 1985 and any interpretation on the powers under section II must be based on the prohibition contained in section 7 of the Ordinance, 1985 in mind. The Committee constituted under section 3 of the Ordinance, 1985 issued an NOC on 30.II.2015 regarding the special premises falling on the alignment of the Orange-Line Metro Train track. The Committee at a latter stage issued an addendum on 20.05.2016 in

respect of each special premises and this addendum was issued in furtherance of NOC/permission dated 30.II.2015. The learned Advocate General made a statement in respect of the special premises as well stating, upon instructions, that the NOC of 30.II.2015 was erased by the issuance of an addendum on 20.05.2016 and the only document to be considered for the purposes of section II of the Ordinance, 1985 must be the addendum dated 20.05.2016 issued by the Committee for each special premises separately. We shall proceed to consider the submissions of the learned counsel for the parties on the basis of this statement made by the learned Advocate General.

I06. The provenance of the Committee set up under section 3 of the ordinance, 1985 is a notification dated 22.8.2013 issued by the Government of the Punjab, Youth Affairs, Sports, Archaeology and Tourism Department.

The following members were appointed to the Committee by the notification:

1. Chief Secretary, Punjab  
Chairman
2. Chairman, Planning &  
Development Board Member
3. Secretary, Finance Department,  
Govt. of the Punjab
4. Secretary, Local Government &  
Community Development Department, Govt. of  
the Punjab
5. Secretary, Housing, Urban  
Development & Public Health Engineering  
Department, Govt. of the Punjab
6. Secretary, Youth Affairs, Sports,  
Archaeology and Tourism Department, Govt. of  
the Punjab
7. District Coordination Officer,  
Lahore
8. Director General, Lahore  
Development Authority.
9. Principal, National College of  
Arts, Lahore.
10. Chairman, Architecture  
Department, University of Engineering &  
Technology, Lahore.
11. Chairman, History Department,  
Punjab University, Lahore.
12. Mr. Nayyar Ali Dada, Architect,  
Lahore.
13. Dr. Ejaz Anwar, (Retd) Professor,  
National College of Arts, Lahore.

I07. It may be seen that the Committee has an overwhelming membership of high Government officials and the Chief Secretary, Punjab is the Chairman of that Committee. The constitution of the Committee may not be objected to in ordinary circumstances where a private person makes an application for

bringing an alteration or renovation, demolition or re-erection of a special premises. However, the instant is a special case having polycentric and unusual facts. The applicant in this matter is the Government of the Punjab through its instrumentalities i.e P.M.A and LDA. The Government of the Punjab has a keen interest in the execution of the Project and therefore, any request by the Government of the Punjab for the grant of approval by a Committee in respect of the special premises and for the Project to be implemented required a more bipartisan constitution of the Committee. Also in terms of section 3, the Government is obligated to determine the functions which shall be performed by the Committee for the purposes of this Ordinance and from a reading of the notification of 22.8.2013, the purpose for which the Committee has been constituted or the functions to be performed by it have not been

determined by the Government in that notification. This omission leaves a lot to be desired. However, this question was not raised with vehemence by the learned counsel for the petitioners. The learned counsel in any case took pains to bring home his protest as to the independence and impartiality of the members of the Committee and it was submitted by the learned counsel that it was inconceivable that the members of the Committee shall act without fear or favour.

108. Let us pause here to state that though the aphorism “justice should not only be done but should manifestly and undoubtedly be seen to be done” (Lord Hewart, CJ) is used for courts of law, it equally applies to all public law decisions. It is thus that a whole bouquet of rules of administrative law has been formulated to ensure that all executive decisions are made justly and lawfully. The composition of the Committee was a crucial

initial step and the aphorism stated above ought to have been kept in view in this regard. Since the Government of Punjab was the applicant and had a vital interest in the implementation of the project at any cost, it was of fundamental importance that the Committee should have been reconstituted and independent members inducted. This was essential so that justice was “seen to be done”. Lamentably, with the current composition of the Committee that vital element of justness and impartiality is conspicuously lacking in the ultimate decision made by it. There is a presumption of the Committee acting on the dictation of the Government of Punjab. This aspect assumes importance in view of our holding that right to life comprises right to a person’s heritage and thus the Committee was called upon to address the fundamental right of a whole country.

109. The original NOC of 30.11.2015 was merely preceded by a working paper presented to the Committee by the D.G Archaeology, Government of the Punjab, Lahore. Thereafter, a notice was given by the D.G Archaeology on the members of the Committee for holding the meeting of the Committee on 30.11.2015. In that meeting, a presentation was given by the D.G LDA for the consumption of the members of the Committee. The meeting was held on 30.11.2015 in which the D.G LDA briefed the participants about the alignment of Orange-Line Metro Train. This presentation was the only information imparted to the members of the Committee in that meeting and on the same date i.e. 30.11.2015, an NOC regarding the construction of Lahore Orange-Line Metro Train Project was issued subject to the following conditions:

- I. *Excavation would be carried out in a way that it would*

- not affect any of exposed or buried structure of the Special Premises.*
2. *Wherever necessary special arrangement would be made to stabilize and strengthen the standing structures of the Special Premises.*
  3. *Area of the Special Premises would not be used for storing material or parking construction machinery.*
  4. *If any damage occurred to Special Premises the executing agency will conserve that part from its resources in consultation with the Directorate General of Archaeology.*
  5. *Safety arrangements during construction should be of best engineering practices.*

110. The original NOC was, therefore, issued without taking into account any of the relevant considerations. The Committee threw to the winds the purpose and policy of the law and no rational and reasonable basis were given for the issuance of the approval by relying entirely and solely upon a presentation given by the D.G LDA. This hardly fulfills the requirements of the provisions of the Ordinance, 1985 and the onerous responsibility placed on the members of the

Committee for the conservation and preservation of the special premises. What was so blatant and pernicious about the original NOC was that one NOC was issued in respect of six special premises without regard for the difference in their locations and the difference in the technology being employed for the construction of the Project in the proximity of a particular special premises. No independent advice was sought from any of the experts, although by virtue of section 3(2) of the Ordinance, 1985, the Committee could have appointed a Committee of experts to advise it with regard to the matters relating to the Ordinance, 1985. The original NOC was a sham and offended the principles regarding the exercise of discretion in a structured and reasonable manner.

III. The Committee decided to revise the original NOC having become wiser according to the learned Advocate General, Punjab on

account of the observations made by this court in its order dated 28.1.2016 as also on account of new reports having been furnished for the consumption of the Committee. Thus, a notice of the meeting of the Committee was served on the members on 11.4.2016 for a meeting to be held on 13.4.2016. From the contents of the notice, the meeting was being held to discuss the construction of Lahore Orange-Line Metro Train track in close proximity of the monuments declared as special premises under the Ordinance, 1985. Three meetings were held on 13.4.2016, 04.05.2016 and 06.05.2016. In the minutes of the meeting of the Committee held on 13.4.2016, it has been mentioned that a briefing was given by the D.G LDA that the NOC/permission should have been issued separately for each of the special premises after thorough diligence by the Committee. The HIA report of Dr. Ayesha Pamela as also the

report of Dr. Javed Uppal was placed before the Committee. The purpose of the convening the meeting of the Committee was “to find out if something was overlooked in the earlier meeting that could be thoroughly examined and considered and if necessary a revised NOC in the light of the observations of the Honourable High Court and data available in the studies could be issued.” Thus, it becomes clear that the meeting was convened at the instance of the D.G LDA who was of the view that a revised NOC be issued. By inference, therefore, it can be stated that by its own showing the LDA considered the original NOC to be inchoate document which was liable to be revised and thus, the entire exercise was being conducted afresh. Thereafter, General Manager, NESPAK made his presentation which was primarily based on the earlier reports regarding vibration analysis prepared by NESPAK. Thus so far nothing

new was brought before the Committee for its consideration. It was merely that while issuing the original NOC, the Committee had failed to consider any of the material whether presented by LDA or from independent source. This time the Committee was analyzing those documents for the first time. It is interesting to note that certain mitigating/precautionary measures were proposed during the presentation given by the G.M NESPAK and which have been mentioned in the minutes of the meeting and these are the same measures which have found their way in the addendum issued by the Committee on 20.05.2016. In the same vein, a Committee of experts was constituted in terms of section 3(2) of the Ordinance, 1985. This was upon the suggestion of the Chairman P&D Board who thought that information from expert engineers could be had as a matter of abundant caution. Once again, it may be flagged that the

members of the Committee were not satisfied by the independent character of Dr. Javed Uppal who had been retained by LDA and had prepared his report on the asking of LDA, in fact. The reports prepared by NESPAK and Dr. Javed Uppal were sent to the experts to be nominated by the Vice Chancellor of University of Engineering & Technology, Lahore (UET) for their review. In the next meeting of 4.5.2016, the report submitted by the expert committee set up by the V.C UET was considered. The report of the experts of VC, UET is as under:

*“In light of the undertaking of the consultants, M/s NESPAK, the endorsement by the Chinese counterpart M/s CEC, the views of the independent reviewer Dr. Javed Yunas Uppal and the preventive measures promised by M/s NESPAK, it is reasonable to accept the claim of the above parties. The results of the studies may be accepted in the construction stage and the work may be completed in the light of this report, the comments of the independent reviewer and the recommendations of M/s CEC.*

*After the construction, during the trial running of the loaded and unloaded train considering the most critical loading conditions, accelerometers, velocity*

*transducers and noise detectors must be installed on all the historic and nearby important buildings to make sure that the on-site produced vibrations and noise actually remain within the acceptable limits.”*

112. The analysis report of the experts of the UET should receive a short shrift. This report is entirely based on the study conducted by NESPAK as also on the HIA report as well as the report by Dr. Javed Uppal which were sent to the experts for analysis and comments. The conclusion drawn by the experts of UET is entirely based on that analysis and no independent studies were conducted nor any data was collected by the experts comprising the Committee. It is difficult to see as to how reliance can be placed on any such report formulated by the experts of UET or to lend any credibility to this report as a report formulated and finalized by experts. At the most, the experts of the UET could have analysed the data in the NESPAK report and either endorsed the findings in the report or

could have thrown it out. Since there was no independent data available with the experts of the UET, it was well-nigh impossible for the experts to have concluded at all that the report was a figment of imagination and ought to be discarded. It was presumed in the report of the experts of the UET that the acceptable limits prescribed in the vibration analysis conducted by NESPAK were, in fact, the limits within which the Metro Train shall operate and were also the limits which will not harm or damage the integrity of the monuments. Also the experts of the UET presumed that the views of Dr. Javed Uppal who was an independent reviewer without having regard to the fact that he had been retained by the LDA to conduct the study and was as much a consultant for the client as was NESPAK.

113. The addendum was issued by the Committee on 20.05.2016. It has been issued on the same date for each of the five special

premises and has been stated to be in addition to and in furtherance of the NOC/ permission dated 30.II.2015 regarding construction of Lahore Orange-Line Metro Train Project. The permission/ NOC granted on 30.II.2015 was supplemented with the following conditions in the addendum:

1. *An independent and experienced Conservation Engineer shall be engaged by Lahore Development Authority/Punjab Masstransit Authority, to monitor the Project during excavation, construction and execution phases who shall submit regular reports to the Directorate-General Archaeology which shall be presented to the Committee which may make further recommendations as may be required. This monitoring shall be in addition to monitoring by the technical staff of the Directorate-General Archaeology.*
2. *Excavation would be carried out in a way that it would not affect any exposed or buried structure of the Special Premises. Wherever necessary special arrangement would be made to stabilize and strengthen the standing structure of the Special Premises.*
3. *Area of the Special Premises would not be used for storing material or parking construction machinery and safety*

*arrangements shall be made in accordance with the best engineering practice during excavation, construction and execution phases of the Project.*

4. *The executing agency shall install accelerometers, velocity transducers and noise detectors nearby the Special Premises;*

5. *The executing agency shall ensure the implementation of the additional mitigation measures as mentioned in vibration analysis Reports by NESPAK and Heritage Impact Assessment.*

6. *In case of any adverse impact to the Special Premises during excavation, construction and execution phases of the Project, the executing agency will take all possible actions to conserve that part from its resources in consultation and as per advice of the Directorate General of Archaeology.*

7. *If case of any violation of the above-mentioned conditions during the excavation, construction or execution phases of the Project this Permission/NOC will be treated as withdrawn and the executing agency (LDA) and any other involved agencies shall be dealt with in accordance with the provisions of the Punjab Special Premises (Preservation) Ordinance, 1985.*

II4. One of the most astonishing and conspicuous aspects of the six addendums issued by the Committee that stares in the face

of a person are that the conditions which have been mentioned to supplement the NOC granted on 30.II.2015 are exactly the same without any change in a word let alone any condition for any of the six special premises. One of the most interesting conditions is condition No.6 which mentions that in case of any adverse impact to the special premises during excavation, construction and execution phases of the Project, the executing agency will take all possible actions to conserve that part from its resources in consultation and as per advice of D.G Archaeology. This is the most tendentious of conditions that can be imposed in an approval to be granted by a high-powered Committee with regard to special premises of historical, cultural and architectural value. The condition is bordering on callousness on the part of the Committee for in case of adverse impact, which has not been defined by the Committee, there may not be any options left

to conserve the premises any more in any manner. Also as regards condition No.5, the implementation of additional mitigation measures has been suggested in the vibration analysis report by NESPAK and HIA without regard to the fact that no additional mitigation measures has been suggested by NESPAK in its report and the mitigation measures suggested in the HIA are scant and unspecific to say the least as have been dealt with in the preceding paragraphs. The requirement that the executing agency shall install noise and vibration control devices near the special premises is also not based on rational and reasonable consideration. It has not been mentioned as to how long these devices are required to be installed and to remain in place. Also the Committee completely ignores the aspects that in case the vibration causes damage to the integrity and structure of the special premises, what are the alternatives which can

be put in place for the mitigation or completely doing away with the adverse effects brought about by such vibration.

115. With regard to the six addendums issued on 20.05.2016, the first ground on which these addendums ought to be struck down is the similarity in the language and phraseology of these addendums and the conditions which are exactly the same, *in verbatim*. Apparently the basis for the issuance of separate addendums with regard to the six special premises was the observations made by this Court in its order dated 28.1.2016. No useful purpose, however, has been achieved by the issuance of separate addendums and the issuance of six addendums separately do not make these addendums any different from a joint NOC issued in the first place. The purpose of having separate approvals for each special premises was the consideration of the peculiar circumstances of that special premises,

its location, integrity, the age of the monument, its current condition and the steps which are required for its preservation distinctly and separately. It cannot be perceived by any stretch of imagination that all six special premises can be treated alike and can be made subject to the same set of conditions with regard to the special and peculiar set of circumstances concerning that special premises. Even a cursory study of these special premises would demonstrate that they were built and erected during different times in history and the efforts of conservation and preservation have followed diametrically in each case. The adverse impact of the potential damage that may be caused by the construction works of Orange-Line Metro Train will befall differently in respect of each special premises distinctly and separate set of conditions ought to have been compiled while issuing the addendums. The addendums suffer from utter

lack of application of mind, are irrational and unreasonable and are set aside on this ground alone.

116. We need not reiterate our observations with regard to the HIA report and the report of Dr. Javed Uppal which have formed the basis of the addendums as well as the observations on these reports in the section relating to protected antiquities above, which shall apply *mutatis mutandis* to the case of special premises as well. On the twin grounds that the constitution of the Committee ought to have been non-partisan and its membership should have been taken from a cross section of the society and since the applicant in this case was the Government of the Punjab, the members ought to have been people who were not Government servant and were, therefore, beyond the reach of the Government of the Punjab as also the Committee while issuing addendums failed to apply its mind to each

special premises independently and to prescribe distinct and separate conditions with regard thereto, the addendums are liable to be set aside and held without lawful authority.

117. The D.G Archaeology and the Committee were performing core public functions. The decisions that they rendered were extravagant and capricious. They had an overarching statutory duty to keep in view the policy of the Act, 1975 and the Ordinance, 1985. The lackadaisical manner in which the original NOCs were issued reacted on their *bone fide*. The revised NOCs and the Addendums merely showed that they were bending over backwards to fill the gaps yet only with the aim to grant approvals and give a veneer of respectability to the whole act of approvals. The D.G Archaeology and the Committee lost sight of the policy which permeates the laws i.e. that these public authorities were themselves to act as a buffer

for the conservation and protection of the protected sites. The Addendums in particular do not evince that the Committee applied its mind. The approvals were granted *en banc* without taking into account the distinguishing and salient features of each special premises. The act of D.G Archaeology and the Committee in granting approvals debilitates the policy of the statutes.

118. In addition to the above, the Committee of experts appointed by the Committee was also comprised of teachers of UET, Lahore which is once again an institution directly under the control of the Government of the Punjab. That Committee of experts in any case rendered its finding on the basis of the reports of NESPAK and LDA and, therefore, no reliance can be placed on the findings of that Committee.

***Rebuttal Arguments:***

119. We will now advert to the rebuttal arguments, both oral and written submitted on

behalf of the petitioners in order to demonstrate that the petitioners have made tenable efforts in order to put forth substantial and counterveiling set of arguments which are an amalgam of their own points of view as also a critical analysis of the data submitted by NESPAK, HIA report and the report by Dr. Javed Uppal. At the outset, it may be stated that despite the pendency of the present petition as also a vociferous opposition raised by the petitioners on behalf of a large segment of the society to the implementation of the Project in the proximity of the protected antiquities as well as special premises, none of the petitioners or their representatives was associated in the revised NOC issued by the D.G Archaeology or the addendums issued by the special Committee. Also the Advisory Committee constituted under the Act, 1975 was constituted at the sole discretion of the Government of the Punjab without paying any

heed to bipartisanship and the independent character of the members comprising that Committee. Likewise, the Committee which issued the addendums in terms of the Ordinance, 1985 also did not engage the petitioners or any one on their behalf let alone independent scientific and technical advice for arriving at a conclusion. The petitioners made a PowerPoint presentation to the Court and also submitted a hard copy of that presentation in the form of a booklet. The issues raised by the petitioners in the presentation as also the booklet are being referred to for the sole purpose of demonstrating that there were substantial and cogent grounds which ought to have been taken into consideration and which highlighted the adverse impact that the Project was bound to have on the integrity, authenticity and fabric of these sites. We have found the presentation to have substantial merit and the presentation is, in fact, geared

towards underscoring the inherent contradictions which are writ large on the face of the reports submitted by NESPAK as also the blatant failure on the part of the consultant while compiling the HIA.

120. As a prefatory, we may refer to an international treaty of which Pakistan is a signatory and in terms of which Shalamar Gardens have been declared to be a world heritage site and is included in the World Heritage List maintained by the World Heritage Committee. The World Heritage Committee has been set up in terms of the Convention Concerning the Protection of World Cultural and Natural Heritage adopted in 1972 by the UNESCO member states. The Convention was to ensure as much as possible the proper identification, protection, conservation and preservation of irreplaceable world heritage. ICOMOS is one of the three formal advisory bodies to the World Heritage

Committee. It participates in the implementation of the Convention. With regard to the Shalamar Gardens, the focus of both the learned counsel for the petitioners as also the respondents remained on the meeting of the World Heritage Committee which took place between 13 to 20 July, 2016. One of the items on the agenda of the meeting of the Committee was the consideration of Fort and Shalamar Gardens in Lahore. The document which purports to contain information on the state of conservation of properties inscribed in the World Heritage Committee and the reports which are required to be reviewed by the World Heritage Committee in the forthcoming meeting has been placed on record by the learned counsel for the petitioners and no cavil was taken by the learned counsel for the respondents. The report mentions that the state party (Government of the Punjab) submitted a

report on the state of conservation of these properties as also the heritage impact assessment of Lahore Orange-Line Metro Train Project on 08.04.2016. Under the head “Analysis and Conclusions of the World Heritage Centre, ICOMOS and ICCROM”, it was noted by the Committee that:

*“It is however regrettable that despite repeated requests by the Committee and the recommendations of past Reactive Monitoring missions, the State Party has not yet formally established an enlarged buffer zone in order to adequately manage and effectively control encroachments and urban development at the property. This is a crucial step, especially in light of the current development proposal for the Orange Line Metro. The present buffer zone arrangements clearly lack formal recognition and can therefore be considered as ineffective. While the Antiquities Act 1975 restricts all constructions within a distance of 200 feet of a protected site, constructions on Government Land require special permission. The proposed metro line lies within the 200-foot protective zone and has unfortunately been endorsed by the Government of Punjab and the DOA.”*

Further that:

*“While the crucial need for a public transport and its overall benefit to the population and the environment are acknowledged, the actual location of the elevated viaduct girders would certainly impact negatively the Outstanding*

*Universal Value (OUV) of the property. The HIA unfortunately does not recognize the importance of buffer zone and interpret the lack of control mechanisms and the occurring encroachments as a validation for the location of the metro line. Therefore, it is recommended that the Committee object to the currently proposed location of the Orange Line, which potentially threatens the integrity and authenticity of the World Heritage property. It is also recommended that the Committee urge the State Party to immediately suspend any further work within the section of the Shalamar Gardens and, as a matter of utmost urgency, identify an alternative location beyond the buffer zone for this specific section of the Orange Line Metro.”*

121. The draft decisions proposed to be considered by the World Heritage Committee, were to the effect that:

5. *Expresses its serious concern about the development proposal of the Orange Line Metro, which will pass directly opposite the entrance of the Shalamar Gardens and above the remaining water tanks of the Shalamar hydraulic works;*
6. *Urges the State Party to immediately suspend any further work associated with the Shalamar Gardens of the Orange Line Metro and, as a matter of utmost urgency, to identify an alternative location for this specific section of the Orange Line Metro;*
7. *Reminds the State Party to submit to the World Heritage Centre, in conformity with Paragraph 172 of the operational Guidelines, technical details, including Heritage Impact Assessment (HIA), for all proposed projects that may*

*have an impact on the Outstanding Universal Value (OUV) of the property prior to their approval, for review by the Advisory Bodies;*

8. *Requests the State Party to invite a joint World Heritage Centre/ICOMOS Reactive Monitoring mission to the property as its earliest convenience, to discuss alternative solutions for the Orange Line Metro with the relevant Government authorities and to review the management and protection arrangements of the property.”*

I22. The report was required to be considered by the World Heritage Committee in the meeting as stated above. However, it is clear from a reading of the various portions of the report that the report recorded that despite repeated requests, the Government of the Punjab had not yet formally established an enlarged buffer zone in order to adequately manage and effectively control encroachments and urban development at the property. This was considered to be a crucial step. The report was also critical of the HIA and thought that the report did not recognize the importance of the buffer zone as also to interpret the lack of control mechanisms. It was also proposed that the World Heritage Committee objected to the

currently proposed location of the Orange-Line which potentially threatens the integrity and authenticity of the World Heritage property. It was also recommended that the Committee urged the state party to immediately suspend any further work and to identify an alternative location beyond the buffer zone. This was proposed in the draft decision of the Committee as well which has been reproduced above. The most important aspect of the proposal made in the report to the Committee was the need to oblige the state party to invite a joint World Heritage Committee Centre/ ICOMOS Reactive Monitoring mission to the property.

123. While on the subject, we may also make a reference to the guidelines on Heritage Impact Assessment for Cultural World Heritage Properties issued by ICOMOS. The salient features of the guidelines (which are extensive in nature and elaborately lay down the various processes involved in the undertaking of HIA), are reproduced as under:

*“In recent years the UNESCO World Heritage Committee has addressed considerable numbers of State of Conservation Reports related to threats to World Heritage properties from various forms of large-scale development. These developments include roads, bridges, tall buildings, “box” buildings (e.g. malls), inappropriate, a contextual or insensitive developments, renewals, demolitions and new infrastructure typologies like wind farms, as well as land-use policy changes and large scale urban frameworks. The Committee has also examined threats from excessive or inappropriate tourism. Many of these projects have had the potential to impact adversely on the appearance, skyline, key views and other different attributes that contribute to Outstanding Universal Value (OUV).*

*In order for the ICOMOS and the Committee to evaluate satisfactorily these potential threats, there is a need to be specific about the impacts of proposed changes on OUV. While heritage impact assessment exists in many countries, these seem less reliably used in the World Heritage context.*

*Currently, there are limited formal tools for identifying receptors and for assessing impact and few examples of excellence for Heritage Impact Assessment (HIA) undertaken for cultural WH properties. However, progress in 3D virtual representations and digital tools open new means to operate HIA.”*

*“Numerous visual assessment tools have been adapted to the assessment of impacts of proposed developments on the OUV of various World Heritage properties, especially those located within dynamic urban contexts, but so far these have rarely been linked to a more in-depth assessment of impact on all the attributes*

*of OUV. There are also new tools on recording and mapping intangible heritage and multiple layers of attributes that have not been exploited for use in WH properties.*

*World Heritage properties are very diverse, as are the potential impacts. Although development of new tools is potentially useful, for the foreseeable future, impact assessment processes need to be able to access a variety of existing tools, without relying entirely on any one of them.*

*Potential threats should be anticipated in the management system in a property-specific way – not “one size fits all”. Conservation policies embedded in the management system may also be used as a measure to assess potential adverse impacts.”*

*“The backgrounds and professional skills of those who conduct HIA are diverse, but training and capacity-building will often be needed. Single professionals cannot always do a total HIA – there is most often a need to bring together an HIA team with the specific analytical skills needed for a particular project or site. A number of professional environmental management institutions provide archiving and other tools. In some circumstance opportunities for partnerships could be explored. “*

#### *2-2-2*

*The overall process is summarized in Appendix I, but key elements include early and continued consultation with all relevant parties and agreement on the scope and expectations of the HIA before work commences. It is also important to identify possible negative impacts very early on in the process, in order to inform both the development design and the*

*planning process in a pro-active rather than reactive manner.*

2-2-6

*The Scoping Report should provide an outline description of the WH property and set out its OUV. It should have an outline of the proposed change or development including the need for change or development, a summary of the conditions present on the site and its environs, details of any alternative development being considered, an outline methodology and terms of reference for the HIA. The methodology should include organizations or people to be consulted, determining, for example, who are stakeholders and who is part of a heritage community related to the site, details of the baseline information to be collected including methods and appropriate study areas, likely sensitive heritage receptors and proposed survey and assessment methodology. It is also important at this stage to identify whether the proposed development is within a WH property or within a buffer zone or within the setting of the property but outside both. A scoping report SR should be used to flag large or critical impact-the full HIA Report can then assess any positive reaction in terms of the altered development.”*

I24. We shall not go into the intricate details of whether Dr. Ayesha Pamela fulfilled the necessary guidelines which have been prescribed by ICOMOS in considerable detail as the merits of the HIA done by Dr. Ayesha

Pamela has been critically reviewed while making a report to the World Heritage Committee and extreme dissatisfaction was expressed in that report with regard to the HIA prepared by Dr. Ayesha Pamela. We have referred to that portion of the report and since the HIA has been evaluated and commented upon by the experts of the World Heritage Committee, no further analysis of that report is required on our part.

125. In the skeleton arguments submitted by the learned counsel on behalf of the petitioners, the inherent contradictions which have crept in the vibration analysis report, HIA and the report of Dr. Javed Uppal have been flagged. The petitioners have brought forth that the consultants employed by PMA and LDA have seriously fallen short in assessing value of heritage assets and the professional judgment of these consultants is highly suspect and self-contradictory. These reports are

utterly lacking in the statement of outstanding universally value, details of how alternatives to changes are being considered and failed to outline the methodology and terms of reference as well as the baseline conditions.

I26. With regard to the NESPAK vibration analysis report, the petitioners submitted that the vibration assessment for the construction phase describes the guidelines for vibration values at the foundation (of heritage sites), however, despite describing these guidelines, there has been no assessment of the foundations of any heritage site by any of the consultants associated with the Project including the Advisory Committee or the HIA. The petitioners submit that “the foundations of heritage sites will typically be stepped and spreading bringing them much closer to the source of vibration than the monument wall. The current condition and materials originally used will impact the level of vibration the

foundations can withstand.” Also that the vibration assessment for the construction phase by NESPAK describes the “vibration levels at a minimum vibration source distance of 10m from monument walls whereas at least six of the eleven heritage monuments are at a distance of less than 4m from the zone of construction with both direct and indirect demolition indicated. This has also been brought forth in the skeleton arguments submitted by the learned counsel for LDA (Mr. Shahid Hamid Advocate), which skeleton arguments concede to this fact. In this regard, the NESPAK report itself mentions that the zone of construction is less than 4m from Saint Andrews’ Church, the General Post Office, Mauj Darya Shrine, Mauj Darya Mosque, Lakshami Building, Supreme Court Registry Building and Shalimar Hydraulic works. It has been emphasized again by the petitioners that no assessment has been made as to the position

and condition of the heritage site foundations by any executing agency or independent body. This is also supported by the fact that the threat to heritage sites is reflected in the high-very high impact zone for eight of eleven heritage sites during the construction phase in the HIA by Dr. Ayesha Pamela. In similar vein, other glaring defects have been pointed out in the NESPAK report including the visual impact on the protected sites as also the difference in the dimensions and measures of viaduct and the position of pillars and the distance from the monument to the piers.

127. The report by Dr. Javed Uppal is also the subject of a scathing attack by the petitioners who have supported their arguments with cogent and plausible reasons. For one, according to the petitioners, the report of Dr. Javed Uppal does not address vibration levels at heritage sites during the construction phase. It entirely relies upon the

report submitted by NESPAK to base his findings in the report. There is no evidence that independent measures have been taken by Dr. Javed Uppal during site visits. Secondly, seven of the sites were excluded from site visits. The report largely replicates the NESPAK plan.

128. The petitioners have also attacked the report of the Advisory Committee dated 29.2.2016 submitted to the D.G Archaeology. Serious doubts have been raised on the credibility of the members of that Committee as regards their specialization, qualification and experience which have little or no bearing on the heritage protection or management. The vibration impacts have been evaluated by the Advisory Committee entirely on the opinions provided by the executing agency and no independent support was sought. According to the learned counsel for the petitioners, the members of the Advisory Committee failed to

raise questions about the Shalimar hydraulic works. The petitioners have in their skeleton arguments, denounced the HIA report with regard to each of the monuments. It has been stated that the HIA fails to take into consideration the fact that in respect of Shalimar Garden, G.P.O, Aiwan-e-Auqaf, Saint Andrews Church, Mauj Darya Shrine and Mosque and Supreme Court Registry Building, the construction and permanent structures of the Project are within the heritage properties. In short, according to the petitioners, Dr. Ayesha Pamela is not in a position to make a determination of vibration impact on the foundation of heritage site which if damaged can cause a collapse of entire structure. Also the distance of 10-12 meter considered safe for the purposes of vibration analysis is not applicable to at least six sites where the distance is far less than 10m and is merely between 0-2.5m. In the case of special

premises, demolition of part of those premises have been negated in the report and plan prepared by NESPAK. For example, the cut and cover track is within the Church property and the Church building is sought to be demolished in the plan. The HIA report categorizes the threat to Saint Andrews Church as very high during the construction phase with specific threat to the historic fabric. As regards Mauj Darya Shrine Complex, not only demolition has been indicated in the plan submitted by NESPAK but also acquisition of property is proposed. This has been culled from the NESPAK plan as shown to the Special Premises Committee as also which has been brought on record. In those plans, Mauj Darya Mosque is sought to be demolished. The track passes through the Mosque and the graveyard of the Shrine Complex. The trenching to be done on the construction phase is less than 0.5m from the wall of Mauj Darya

Shrine and will come into the Shrine foundations. The plan confirms the demolition of Mauj Darya Mosque as well. Likewise, partial demolition has been suggested in the NESPAK plan for the General Post Office and the line of construction cuts through the G.P.O veranda, and the front porch and secondary dome (Mall side). In the NESPAK plans, the zone of construction is less than 1m from the G.P.O Building which severely threatens the monument foundation and may result in a collapse of the structure. Also demolition of the Lakshami Building or part thereof is indicated in the NESPAK plans. There is also a potential threat to the damage being caused from vibration impacts and direct cutting of foundations. The NESPAK plan envisages that the front portion of the Supreme Court Registry Building is to be demolished and the line of construction passes through the building. Not only that the plan perceives a

demolition of the boundary wall of the Supreme Court Registry Building but also that the Orange-Line infrastructure is less than 5m from the building. In this case, the position and condition of the foundations of the Supreme Court Registry Building have not been assessed and the plan endangers the monument as well as demolishes the boundary wall of the property.

*Submissions by Mr. Shahid Hamid, Advocate:*

129. Mr. Shahid Hamid, Advocate represents the respondents No.2, 3 and 4 and filed his written skeleton submissions. Mr. Shahid Hamid, Advocate represents the LDA which is the executing agency appointed by the PMA for the construction of the civil works. Therefore, it is not one of the contracting parties and does not have a direct interest. Mr. Shahid Hamid, Advocate, however, during the course of his oral arguments as also written skeleton arguments, sought to bring forth the technological aspects of the cut and cover

portion as well as the construction methods which shall be employed for both the elevated viaduct and the cut and cover. It is not necessary to refer to those methods alluded to by Mr. Shahid Hamid Advocate. The skeleton arguments, however, concede to the fact that the closest distance of some of the special premises will be far less than 10m. With regard to the revised NOCs, Mr. Shahid Hamid, Advocate submitted that no cavil can be taken to these NOCs as they have been individually issued in respect of each antiquity and special premises. This was, according to him, the first difference between original and the revised NOCs. We have dealt with the aspect hereinfore and do not find that the mere fact that the revised NOCs are specific should lend them any degree of credibility or competence. It hardly makes a difference to issue separate NOCs when the language of those NOCs and the conditions laid therein in

respect of each monument is unaltered and admits of no change. The second reason urged by Mr. Shahid Hamid Advocate to sustain the revised NOCs was that the revised NOCs were the product of due process and application of minds. Both of these grounds are bound to fail as neither due process was employed nor do the revised NOCs betray an application of mind. On the contrary, the revised NOCs as also the addendums are an emblem of irrationality and lack of application of mind as well as the taking into account of irrelevant considerations. Mr. Shahid Hamid, Advocate concedes that this Court can proceed to strike down the revised NOCs and the addendums if it were to find that there was no application of mind that the NOCs were tainted with *mala fide*. On both these grounds, we have found the revised NOCs to be unlawful and contrary to law. There is an interesting argument raised by Mr. Shahid Hamid, Advocate in the

skeleton arguments by saying that the hands of D.G Archaeology were tied and he could not have made a decision contrary to the recommendations made by the Advisory Committee since he was himself the Chairman of that Committee. This is precisely what we have held. The D.G Archaeology was to bring to apply his independent mind on the discretion to be exercised under section 22 of the Act, 1975 and thus ought to have recused himself from being part of the Advisory Committee, which was advising him in coming to a proper conclusion in the formation of his opinion.

***Heritage Conservation:***

130. The development of conservation principles in the second half of 20<sup>th</sup> century has been regarded by many as the most significant achievement of conservation activities, internationally. There principles or guidelines promulgated either as charters, resolutions, declarations or statements, were

drafted and adopted mainly by international organizations, such as UNESCO and ICOMOS, with the main objective of protecting cultural property which includes historical monuments, buildings, sites and towns around the globe, against various threats. The most significant guideline was the International Charter for the Conservation and Restoration of Monuments and Sites, commonly known as the Venice Charter 1964. No fewer than 40 such documents exist both at international and national level; these have been initiated mainly by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Council on Monuments and Sites (ICOMOS). In 1972, the scope of architectural heritage was reconciled at the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, otherwise known as the World Heritage Convention 1972.

131. 5 reasons why we should preserve heritage sites as given by UNESCO are:

(1). *Evolution of human consciousness is a continuous process.*

*History here serves as a laboratory and the past server as a demarcation to understand the regional laws and social structures. This understanding helps in our progress towards an ideal society.*

(2). *We are not born capable of judging fairly and wisely.*

*However learning about various cultures helps us be a good global citizen and improve our critical and analytical thinking.*

(3). *Every historical site has an important story to tell.*

*and these stories have inspired many people to strengthen their convictions and commitment to fight injustice and oppression.*

(4). *Heritage sites are our connection to the past.*

*We enjoy the best because of the past struggles of our ancestors. Heritage sites are hiring monuments and our real connection to our past. It proves the existence of our ancestors.*

(5). *Heritage sites are great for economics.*

132. We would like to refer to an article, *Heritage Preservation in Pakistan from National and International Perspectives*, by *Mohammad Rafique Mughal* which traces the story of heritage

preservation in Pakistan with an international outlook. Of particular interest is the section relating to conservation efforts in China and the constitution of a large advisory group of professionals to draft principles governing preservation and management of cultural heritage sites in China. It has been stated thus:

*“The Lahore Principles were adopted at the conclusion of an International Symposium on Conservation and Restoration of Islamic Architectural heritage held at Lahore in 1980. It acknowledged the existing charters for preservation of heritage in the world and recommend adoption of certain principles that would deal specifically with the conservation of Islamic architecture which they thought was threatened by blind copy of western mode of planning and westernization of Islamic society. It stated that preservation of architectural heritage was a duty of all Muslims who should respect the works of art in order to understand their own place in God’s creation. It emphasized that Islamic architecture was the common heritage of all Muslims who should maintain and intensify cooperation among countries outside of Islamic world. The Lahore Principles extended protection to towns and villages, gardens, craftsmen and indigenous settings, and addressed several issues and threats. It was not specific to any country but related to the Muslim Ummah (brotherhood) which was linked with a common thread of Islam and addressed a great number of issues in the urban areas and potential challenge for their protection. It provided for a change of function for monuments and stressed joint effort by the Muslim countries for conservation and*

*extending cooperation with non-Muslim countries containing Islamic heritage.”*

*“The drafting of Principles for Conservation of Heritage Sites in China (2000) is the best illustration of international collaborative efforts. There are more than 300,000 sites so far registered in China which are considered historically and culturally important, among which 1268 declared as “National Priority Protected” sites. This is the highest level of protection given to the sites including 99 historically and culturally famous sites. The conservation of monuments and sites in China has a long history. The available published sources indicate that by 1930s, conservation procedures were firmly established in China. As a result of open door policy adopted by China in 1978 there has been rapid economic development and as a result a great number of sites and monuments including commemorative buildings and contemporary places were affected. Before the turn of twentieth Century, China constituted a large advisory group of professionals consisting of architects, archaeologists, museum curators, conservators and urban planners to draft principles governing preservation and management of cultural heritage sites in China. The group of professionals included representatives from the Getty Conservation Institute and ICOMOS. A draft of principles for conservation of heritage sites in China was published in Chinese language in 2000 and its translation came out two years later by the Getty Conservation Institute. This document is the first of its kind produced in recent years by an Asian country which is specific to the local conditions and procedures to be adopted for heritage conservation. In a sense, it is a living document because it will be revised in the subsequent years. The China Conservation Principles, as the document is called, draws upon the wisdom of ICOMOS charters and other documents and emphasizes research documentation, and conservation process, identification and investigation by surveys. It*

*stresses preparation of inventories, selection of sites and ascertaining their cultural values, their state of preservation, management and interpretation. Four legal prerequisites are mentioned, namely the demarcation of boundaries and buffer zones of sites, information on the protected status of sites, creation and maintenance of archives, and an institution designated to protect and manage the sites. The document contains a lengthy commentary on various issues with specific explanations on (1) heritage sites, (2) conservation process to be adopted, (3) archival records to be maintained for reference and records and for drawing of proposals of preservation (4) system of management (5) assessment of the sites and state of conservation (6) preparation of conservation master plan (7) routine management maintenance and interpretation (8) physical protection and strengthening of sites (9) minor and major restoration and (10) relocation and reconstruction.”*

*“Australia’s ICOMOS Charter, known as the Burra Charter for the conservation of Place of Cultural Significance was first introduced in 1982, and then adopted by the ICOMOS in the 1988, revised in 1999, and again published with illustrations in 2004. The Burra Charter laid emphasis on the process of conservation, cultural significance of a place or area, recording of the fabric used and association of the historic place of the cultural significance. The main points stressed in the Burra Charter was the buildings must remain in their historical location; preservation measures should be limited to the protection and stabilization of the existing fabric; restoration done to the monument should contribute to prolong life of the ancient structures; respect must be shown for evidence of all periods of history represented at the monuments; reconstruction in rare cases may be allowed only to complete a depleted entity or fabric; and definition of cultural significance should include “aesthetic, historic, scientific or social value for the past, present or*

*future generations". The Burra Charter, originally designed for Australia is an important document in the history of protection and conservation of monuments and has been recognized as a valuable addition to the Venice Charter."*

*"In 1987, another favour Charter for Conservation of Historic Towns and Urban Areas, (known as the Charter of Washington) was adopted by the ICOMOS General Assembly which incorporated provisions of 'Venice Charter', and 'Recommendations of Nairobi'. It stated that urban communities should be treated as "memory of mankind" having traditional values of urban cultures. Therefore, conservation should be an integral part of the economic and social development policies. It takes into consideration the relationship between structures and open spaces, the design, scale, materials, traffic patterns, history of town, and various functions of the settlement. The Washington Charter later on was enlarged and is now known as US / ICOMOS Charter for Historic Towns, 1992."*

*"In the same Twelfth General Assembly of the ICOMOS, the Charter on the Built Vernacular Heritage was adopted which provided guidelines to undertake research and documentation of vernacular heritage and their accessibility as specified in other charters and principles applicable to the cultural heritage. In 2003, Principles for the Analyses, Conservation and Structural Restoration of Architectural Heritage were adopted at Victoria Falls, Zimbabwe by the 14<sup>th</sup> General Assembly of ICOMOS. It emphasized need for organized studies and strategies in dealing with heritage structures and their complex history to be conducted like those experts in other scientific disciplines who carry out diagnosis, therapy and treatment. It said that it was important to isolate causes of damage and decay and the choices which conservators have to make for taking remedial measures without allowing negative impact on the architectural heritage. The data collected and processed should*

*formulate the basis for drawing up comprehensive plans of activities in the light of real problems identified for conservation of structures.”*

*“The most significant of documents is known as the Florence Charter for the Preservation of Historic Gardens, 1981. It was an addendum to the Venice Charter and provided definition of garden as an architectural and horticulture composition of interest to the public from the historical and artistic point of view. It outlined architectural composition of historic gardens to include basic plan and topography, vegetation, proportions, color schemes, with spacing and respective heights, structural and decoration features, water running or still. The Charter emphasized cosmic significance of an idealized image of the world and included all parks and gardens of every dimension. It stressed preservation based on identification and listing and reconstruction or restoration of the missing parts, but not in the area where garden has been completely destroyed. The rest of the provisions were more or less similar to those applicable to the built heritage including administrative and legal protection, maintenance of records, protection and security and access of the public to the gardens.”*

*“The Lahore Charter (1980), as mentioned above, addressed some special issues which were not enunciated in the much advertised Venice Charter (1964) such as the preservation of Islamic heritage. For example, the management and conservation or repairs of monuments and the adjacent areas around religious buildings were traditionally maintained on permanent basis by creating ‘waqfs’ (Trust of revenue generating state property) throughout the world of Islam in Asia, Africa and parts of Europe. The waqfs with permanent sources of funds ensured not only maintenance of the buildings but also supported necessary staff of various categories kept at the site such as mosques, tombs, madras (educational institutions) and hospitals.”*

*Submissions of Amicus Curie.*

133. Mr. Ali Zafar, Advocate who is currently the President of Supreme Court Bar Association was requested by this Court to make submissions as a friend of the Court owing to the significance of the case in hand. Mr. Ali Zafar supported the submissions of the petitioners and in a nub, requested that the revised NOCs as also the addendums be declared illegal and void by this Court. Mr. Ali Zafar referred to the order of 28.1.2016 issued by this Court and remarked that the proposition has been correctly laid down in that order. Discretion, according to him, has to be structured and this is the rule laid down by respectable authority. The query that was posed by Mr. Ali Zafar was whether the revised NOCs and the addendums satisfy the Wednesbury rule of reasonableness and also raised the question as to what was to be done in such matters. He also referred to the guidance of UNESCO on HIA and the tools to be employed for undertaking any HIA. Mr. Ali

Zafar submitted that the entire reliance of the D.G Archaeology and of the Committee was on the report of the Advisory Committee, briefings by the LDA (which is an executing agency), report prepared NESPAK as also by the LDA appointed consultant Mr. Javed Uppal and Dr. Ayesha Pamela. These, according to the learned counsel, are not sufficient steps at all and the D.G Archaeology as also the Committee failed to obtain independent advice and thus there was not a grain of independence in the act of the approvals granted by the public authorities. Mr. Ali Zafar next referred to the HIA report to submit that the NOC is not a matter of mitigation; it is a matter of ruling out. Since the HIA recommended the mitigation steps to be taken, the NOC, according to the learned counsel, could not be issued if there was a semblance of damage likely to be caused to the monuments. The NOC could not have been granted if there was a potential harm which would visit the monuments and which harm had to be ruled out and mitigation was not a sufficient

answer to the potential harm. Moreover, the HIA refers to certain harms which are permanent in nature and, therefore, the D.G Archaeology ought to have stayed his hands while issuing the NOC. Mr. Ali Zafar lastly submitted that the matter of visual impairment has not been given consideration at all by either the D.G Archaeology or the Committee and thus the acts of these public functionaries suffer from wednesbury unreasonableness.

***Case Law:***

134. The learned counsel for the parties relied upon a cluster of precedents in support of the propositions laid at the bar. The Amicus Curie, Mr. Ali Zafar, Advocate relied upon an article titled “How are protected views shaping cities?” By Leo Hollis. The article dilates upon the crisis of verticality in the planning of the city of London based on protected rules. The following extracts from that article are relevant for our purposes:

*“In recent months, the council has been responding to widespread concerns that the city of “dreaming spires” was about to be swamped by a rash of tall new buildings. As a result, alongside English Heritage and other*

*agencies, the council has devised policies that create a series of protected views, triangular sections that cut across the map in order to preserve the vertical skyline of the city.”*

*“A section of city panoramas from particular points of historic or local interest have been protected, taking in not just individual historical buildings but also the topography, the city as a landscape of natural features, variegated heights and forms, combining into a pleasing image...”*

*“...Since the 1960s, different city governments have looked at the preservation of views as a way of controlling the shape, in particular the vertical outline, of cities. How tall should a building be and where should it fit in? Are skyscrapers only for downtown? What kind of building – office, monument, apartment block – should be allowed to rise into the sky? What can it obscure and what must it not overshadow?”*

*“...For some, cities are changing too fast and in the wrong places. They are losing their character and being replaced by an ubiquitous glass and steel architecture that offers no sense of location. Tall towers are replacing the human scale of the city’s heritage.”*

*“...Protected views are ways of managing change: restricting growth in some parts, ring – fencing and preserving the significant aspects. It prioritises the ocular encounter with the city. The metropolis must “look right to be right.”*

*“...there was public concern about the “Manhattanisation” of the financial district of San Francisco that many people thought would damage the “city pattern”. This was developed into a general plan passed into law in 1995, including the preservation of “major views whenever it is feasible, with special attention to the characteristic views of open space and water that reflect the natural setting of the city*

*and give a colourful and refreshing contrast to man's development."*

*"For example, are protected views the best way to preserve the heritage of the city? The 2006 Street View study conducted by Edinburgh city council noted some places were "fundamental" to the city, and key views were "precious" and even "sacrosanct" in providing a "sense of the city".*

*"The city's strategic view policy was first proposed in mayor Livingstone's 2005 London plan, with a list of 26 views. Notably, this was the year after the completion of 30 St Mary's Axe, the Gherkin, that heralded the vertical turn in London planning. The policy was intended to preserve some of the low level but historically significant aspects of the city; both places and scenes. Since then we have suffered an outbreak of towers that symbolise not just a rising up of the city, but a new strategy of investment and development that has very little interest in the past, instead turning the metropolis into a landbank."*

*"When we see development flourishing in places such as Vauxhall, Victoria and Southwark, we can no longer be sure that it abides either by the London View Management Framework [LMF] or by some form of political expediency..."*

135. The extracts reproduced above are reflective of the emphasis that city planners put on 'protected views' in order to preserve the fundamentals of a city and to protect the character of the landscape that characterizes the features of that city. It is an unfortunate aspect of the approvals that no attention

has been paid to the issue of 'protected view' and 'visual impairment' of the monuments by the authorities which seriously erodes the competence of the discretion so exercised.

136. Mr. Ali Zafar heavily relied upon the US Supreme Court judgment of *Penn Central Transportation Co. v. City of New York* 438 U.S. 104 (1978), which was a case relied upon by the learned counsel for the petitioners Mr. Azhar Siddiq, Advocate as well. In *Pen Central*, the U.S Supreme Court upheld the decision of the New York City's Landmarks Preservation Commission to deny permission to construct an office tower on top of Grand Central Terminal, a railroad station in midtown Manhattan. The decision is important to preservation for several reasons, in that, the Supreme Court laid to rest concerns over the appropriateness of governmental restriction on historic property by recognizing historic preservation as a legitimate governmental objective. The Court also strengthened preservation programs around the country by ruling

that New York City's historic preservation laws, which restricted changes to property designated as landmarks and historic districts, was an appropriate means for accomplishing historic preservation. The importance of the heritage and its linkage to "life" today has been brought forth in the judgment in the following words:

*"Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "Historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing – or perhaps developing for the first time – the quality of life for people."*

137. The U.S Supreme Court approved the conclusion drawn by the Commission which was in the following words:

*“We have no fixed rule against making additions to designated buildings – it all depends on how they are done....But to balance a 55-story office tower above a flamboyant Beaux-Arts façade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The ‘addition’ would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.*

*“Landmarks cannot be divorced from their settings – particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way – with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.” Id, at 2251.”*

138. The issue presented before the U.S Supreme Court was whether the restrictions imposed by New York City’s law upon appellants’ exploitation of the terminal site effect a “taking” on appellant’s property for a public use within the meaning of the fifth amendment read with the fourteenth amendment and

if so, whether the transferable development rights afforded appellants constitute “just compensation” within the meaning of fifth amendment. The holding of the U.S Supreme Court was that property owners are not entitled to the highest and past use of their property. As stated by the Supreme Court, “the submission that property owners may establish a *“taking” simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable*”.

139. The next judgment cited by Mr. Ali Zafar, Advocate is *Barnwell Manor Wind Energy Ltd. East Northamptonshire District Council etc. [2014] EWCA Civ 137*. This judgment by the UK Court of Appeal takes stock of almost the entire case law previously obtaining in the UK on the issue of conservation and planning permissions regarding listed buildings and monuments. It also refers the case law which has mostly been relied upon by the Advocate General and Mr. Shahid Hamid, Advocate

and I shall be dealing with this judgment in some detail. The appeal before the Court of Appeal was against the order passed by Lang J. while quashing the decision dated 12.03.2012 of a Planning Inspector, appointed by the Secretary of State granting planning permission for a four-turbine wind farm on land north of Catshead Woods, Sudborough, Northamptonshire. The dispute hinged upon section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, which provides:

*“In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”*

140. It is pertinent to note that the closest turbine in the wind farm site was around 1.3 km from the boundary of the registered park and 1.7 km from the New Bield itself. The central question before the Inspector was the extent to which the visible presence would affect the significance of the heritage assets

concerned. It was held by the Inspector that the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge. Also that reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting. On that basis, the Inspector held that the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other. On this basis, the effect on the setting of these designated heritage assets would not reach the level of substantial harm. While encapsulating the issue before the Court of Appeal, it was stated that:

*“What was Parliament’s intention in imposing both the section 66 duty and the parallel duty under section 72(1) of the Listed Building Act to pay “special attention . . . . to the desirability of preserving or enhancing the character or appearance” of conservation areas? It is*

*common ground that, despite the slight difference in wording, the nature of the duty is the same under both enactments. It is also common ground that “preserving” in both enactments means doing no harm: see South Lakeland District Council v Secretary of State for the Environment [1992] 2 Advisory Committee 141, per Lord Bridge at page 150.”*  
*“Was it Parliament’s intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament’s intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?”*

141. It will be seen from a reading of the above paragraphs that the Court of Appeal relied upon an observation in South Lakeland District Council that preserving in both enactments means doing no harm. This was a case relied upon by Mr. Shahid Hamid, Advocate as well. Further, the observation of Lord Bridge as to the statutory intention was reproduced which was that:

*“There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria.”*

I42. Thus, the emphasis in the South Lakeland case was also on giving high priority to the objective of preserving or enhancing the character or appearance of the area as also that if any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission.

I43. The Court of Appeal then considered the effect of *Hetherington (UK) Ltd. v Secretary of State for the Environment* [1995] 69 P. & C.R. 374 and

approved of the statement made therein in the following words:

*“...In my view, Glidewell LJ’s judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give “considerable importance and weight.”*

*“That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred (paragraph 20 above). It is true, as Mr. Nardell submits, that the ratio of that decision is that “preserve” means do no harm”. However, Lord Bridge’s explanation of the statutory purpose is highly persuasive, and his observation that there will be a “strong presumption” against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ’s conclusion in Bath. There is a “strong presumption” against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of “considerable importance and weight.”*

144. The decision of Ouseley J. in *Garner v Elmbridge Borough Council* [2014] EWCA Civ 891

was also referred and it was held that:

*“...Garner is an example of the practical application of the advice in policy HE9.I: that substantial harm to designated heritage assets of the highest significance should not merely be exceptional, but “wholly exceptional”.*

145. *Garner* has been relied upon by Mr. Shahid Hamid, Advocate and it can be seen from the above that the conclusion in *Garner* was held to be a valid for the proposition that substantial harm to designated heritage asset of the highest significance should not merely be exceptional but wholly exceptional. In summation, the conclusion of the Court of Appeal was as under:

*“For the reasons, I agree with Lang J’s conclusion that Parliament’s intention in enacting section 66(1) was that decision-makers should give “considerable importance and weight” to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission. The Appellant’s Skeleton Argument effectively conceded as much in contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the Inspector’s planning judgment. In his oral submissions Mr. Nardell contended that the Inspector had given considerable weight to this factor, but he was unable to point to any particular passage in the decision letter which supported this contention, and there is a marked contrast*

*between the “significant weight” which the Inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS22, and the manner in which he approached the section 66(1) duty. It is true that the Inspector set out the duty in paragraph 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out.”*

146. It will be seen from the above that the emphasis in any such decision has to be on the considerable weight to the desirability of preserving the setting of a protected building or monument when carrying out the balancing exercise. This is of the essence of the duty cast upon a public authority which has been conferred the power to carry out and grant the approval of this nature.

147. The next case, relied upon by Mr. Ali Zafar, Advocate was *North Norfolk District Council v Secretary of State for Communities and Local Government etc.* [2014] EWHC 279 (Admin). This is a judgment by the High Court of Justice,

Queen's Bench Division and the background was that wind turbine was to be erected in open countryside on the side of Cromer Ridge, which is one of the highest points in North Norfolk with implications both for visibility and for wind performance. There were a number of listed buildings in the area. The application for planning permission was revised by the Council on the ground of its impact on landscape and heritage assets. The High Court of Justice went on to hold that:

*“But the question remains whether in substance he did have that special regard to the desirability of preserving the settings of the heritage assets as part of the consideration that led to his decision, notwithstanding that, as I find, in approaching that question he did not expressly have regard to the statutory requirement as such. In approaching that question I remind myself of the helpful guidance in Garner that it is not necessary for the decision maker to pass through a particular series of legal hoops to comply with Section 66(1) nor, I would add, does he have to recite any particular mantra or form of words to demonstrate that he has done so. However, adopting the formulation of Mr Justice Ouseley approved by the Court of Appeal in Garner, that does not mean that the decision maker can “treat the desirability of preserving the setting of a listed building as a mere material consideration to which (he) can simply attach the weight (he) sees fit in (his)*

*judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So, if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is an obvious consequence of the statutory language rather than an illegitimate substance for it.”*

*“...However, the problem that it faces is that, on the conclusion to which I have come, the inspector did not in fact have regard to the statutory duty but applied a simple balancing exercise under paragraph 134 of the NPPF. In the particular circumstances of this decision it is not possible to know how the balance would or might have been affected if he had special regard to the desirability of the preservation of the settings in accordance with the approach helpfully summarized in Garner and set out in the other authorities to which I have referred.”*

148. The High Court of Justice considered the previous case law on the subject to which we have alluded to in Barnwell case. It was held that the overwhelming view as distilled from the precedents was that if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. Also that the decision-maker can treat the desirability of preserving the setting of a

listed building as a mere material consideration but the statutory language treats the preservation of the setting of a listed building as presumptively desirable.

I49. Mrs. Asima Jahangir, Advocate relied upon

*Binay Kumar Mishra v State of Behar and others*

(AIR 2001 Patna 148) and the following

observations made therein:

*“16. It needs no emphasis to mention that protection and preservation of our cultural property against the dangers of damage and destruction resulting from theft, vandalism, clandestine excavations and illicit traffic is our sacred duty, which we owe to posterity. Cultural heritage along with environment is very essential to the well being and to the enjoyment of man’s basic rights- even the right to life itself. This justifies on the statute book, the aforesaid legislations aimed at taking all possible measures to stop the impoverishment of the cultural heritage. The concern for protection of such heritage is not limited to India. Governments of most of the countries in the world today are addressing themselves to this problem. The entire humanity is anxious about it...”*

I50. It can be seen from the above that the Patna

High Court found a relation between cultural

heritage and right to life. Mrs. Asima Jahangir also

relied upon *K. Guru Prasad Rao v. State of*

*Karnataka and others (2013) 8 SCC 413, a*

judgment by the Supreme Court of India which related to the conservation plan for Jambunatheswara Temple. The following observations are pertinent for our purposes:

*“91. When seen in this light, the protection of ancient monuments has necessarily to be kept in mind while carrying out development activities. The need for ensuring protection and preservation of the ancient monuments for the benefit of future generations has to be balanced with the benefits which may accrue from mining and other development related activities. In our view, the recommendations and suggestions made by the Committee for creation of Core Zone and Buffer Zone appropriately create this balance. While mining activity is sure to create financial wealth for the leaseholders and also the State, the immense cultural and historic wealth, not to mention the wealth of information which the temple provides cannot be ignored and every effort has to be made to protect the temple.”*

151. Mr. Azhar Siddiq, Advocate also cited a plethora of case law. These are mostly judgments from the Indian jurisdiction and the jurisprudence which has been developed by the courts of India involving the preservation and protection of heritage sites which are in abundance in India. These judgments start from the famous *Taj Mehal* case reported as (1997) 2 SCC 353 which was a

watershed case of supervision done by the Supreme Court of India for three long years and which culminated in the passing of certain orders by which the industries situated within the Taj Trapezium Zone and emitting pollution by the use of Coal as fuel and causing damage to the Taj Mehal were ordered to be dealt with in a certain manner. An expert committee was appointed as also a number of other reports submitted by other committees were considered by the Court while passing the final judgment. The expert advice through UNESCO was also sought. The case is significant for its rulings that the objective behind the litigation was to stop the pollution while encouraging development of industry. It was held that sustainable development was the answer. In the final analysis the industries were directed to change over to natural gas as an industrial fuel. Other industries were directed to be relocated to other industrial areas.

152. *Rajeev Mankotia v Secretary to the President of India and others (1997) 10 SCC 441* was a public

interest litigation initiated by the petitioner against the decision of the Cabinet of Central Government to convert the Viceregal Lodge of Shimla into a Tourist Hotel. The Court finally decided that the Government of India should notify the entire area of Viceregal Lodge as a protected ancient monument and the Government complied with that Direction. The Court further directed that the Government should provide the necessary budget for effecting repairs and restoration of the building to its old grandeur. *EMCA Construction Co. v. Archaeological Survey of India and others (2009) 113 DRJ 446* is a Delhi High Court judgment which upheld the interim order passed by the court below and directed the Central Government to remove the structures within 100 meters of the Humayun's Tomb. This was a case which directed the Central Government to comply with the affirmative obligation of the Central Government by the Delhi High Court.

I53. Lastly, the learned counsel for the petitioners, Mr. Azhar Siddiq, Advocate relied upon K. Guru Prasad, which has already been dealt with hereinabove.

*Consideration:*

I54. The major flaw in the decision made by the D.G Archaeology and the Committee was that city planners were not involved in the process since any such permission relates to the skyline, topography and the landscape of the city. Obviously, the Project is a strain that puts pressure on the existing fabric of the city. These sites have architectural, artistic and historic significance of the highest magnitude. Regard must have been had by the D.G Archaeology as also by the Committee to the desirability of preserving the buildings or their setting or any features of special historical interest which these buildings and monuments possess. Importantly, there should have been a presumption in favour of the conservation of the designated heritage assets.

155. It will be seen that conspicuously no reasons at all have been given by the D.G Archaeology nor by the Committee. It was a *sine quo non* for any such decision that reasons ought to have been given which would have reflected that the authorities have conducted a balancing exercise with regard to the general duty to preserve a monument and in case harm would be caused to the setting of the buildings and whether it will be substantial or less than substantial. The reasons for the decision must comply with the following standard:

*“The reasons must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inferences will not readily be drawn. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced.”*

*(South Bucks Banking Court v. Porter (No. 2)  
2004 1 WLR 1953 per Lord Brown at  
paragraph 36.)*

156. Far from being intelligible and adequate and enabling the reader to understand why the matter was decided as it was, neither the D.G Archaeology nor the Committee have furnished any reasons for the decision. This alone should be sufficient to strike down the revised NOCs and addendums.

157. Importantly, the aesthetic value of these monuments delves from their visual association and with their setting. That is why the courts have insisted upon the weight to be given to the desirability of preserving a listed building or its setting. In Garner, Lord Justice Sullivan said at paragraph 7:

*“It is common ground that the same approach should be adopted to the desirability of preserving a listed building or its setting when applying Section 66(1) of the 1990 Act. The development which leaves the setting of a listed building unharmed will preserve that setting. Having cited an earlier passage ... from the speech of Lord Bridge, Ouseley J summarized the position as follows in paragraph 8 of the judgment. “Section 66 does not permit a local planning authority to treat the desirability of preserving the setting of a listed building as a mere material consideration to which it can simply attach the weight it sees fit in*

*its judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So if a development would harm the setting of a listed building there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is an obvious consequence of the statutory language rather than an illegitimate substance for it."*

*"I do not accept that in order to show that it had complied with the duty under section 66(1) the respondent had to pass through a particular series of legal hoops first to decide A and then, if not A, to decide B etc. The need to comply with Section 66(1) did not place the respondent in such a legal straightjacket when it comes to giving a summary of the reasons for its decision."*

158. *Garner* and *Barnwell* are also authorities as regards the question that the proposal will intrude on the historic sites or buildings they are within or considering or interpreting and the presence of the proposed development will not only be distracting so as to prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up the site. Thus, the key is the desirability of preserving the setting of the historical building or site.

159. We live in a complex and interdependent society. The people have legitimate expectation (and this is constitutional argument) for the preservation of heritage and the D.G Archaeology and the Committee did not weigh or consider these expectations; nor did they consider the expectations cast by the weight of history or the hope and appeal of posterity. These expectations are protected by Constitution and are based on objective rules and customs and must be understood in the light of the whole of our legal tradition. Substantial regulatory initiatives ought to be taken by the Government in this area but we are not here concerned with proposing any such initiatives or to lament the absence thereof. It was imperative that the D.G Archaeology and the Committee must have been imbued with a sense of history and a dire need to preserve it inviolate. They ought to be officers with a missionary zeal for the need to care and nurture heritage as an essential linkage of a nation to an ancestry and past. We have already remarked that a

nation without its history is a nation without its soul. Nations do not abdicate or let go of their historical moorings or claims based on ancient facts. This is of the essence of a country's standing in the comity of nations and at the heart of the decision-making were the issues of great public harm to the monuments, the close proximity of the Project to these monuments and an urgent need to prevent serious injury. The preferment of public interest in the execution of the Project has been touted as a single-most significant factor for the approval to be granted. However, the public authorities failed to weigh the competing public interest in preserving the heritage and the need for public transport. Both are matters of public interest and ought to have been weighed by a proper application of mind.

160. In our holding that the decision-making did not meet the standards of a structured discretion, we are seeking support from the observations of the Supreme Court of Pakistan in the case of *Lahore*

*Development Authority v. Imrana Tiwana* (2015

SCMR 1739), to the following effect:

*86. The government does not have an absolute discretion in the matter. For as Douglas J wrote in New York v U.S. 342 U.S. 882, 884, "Absolute discretion like corruption marks the beginning of the end of liberty". Even where legislative bodies confer discretion on regulators without meaningful standards it is the duty of those on whom such discretion has been conferred to structure it. They must develop standards to regulate it. They should confine their discretion through principles and rules. This has been the consistent view of this Court: Chairman RTA v. Pak Mutual Insurance Co. PLD 1991 SC 14 at 26."*

161. The discretion under section 27 of the Act, 1975 as also under section II of the Ordinance, 1985 does not have any meaningful standards for its exercise. The duty to structure it has obviously not been performed nor has the discretion been circumscribed and limited by policy guidelines. It was precisely for this reason that both the D.G Archaeology and the Committee kept groping in the dark and proceeded to revise the NOC and issue addendums at the whim and discretion of the executing agency and not on the basis of any standards evolved based on international best

practices. We have noted that countries have developed elaborate set of policy standards with a view to guiding the authorities who are tasked with exercising discretion in the matter of grant or refusal of planning permission around heritage sites.

I62. That the decision-maker was not independent of the government has never been a general legal requirement of institutional independence in administrative decision making. No administrative decision could be challenged as biased merely on that ground. We are certainly aware of that rule. But:

*“Independence is a structural feature of decision makers that tends to improve their capacity to act with impartiality. It means ‘not only a lack of hierarchical or institutional connection but also a practical independence’ (Ramsahai v. Netherlands (App no 52391/99) ECHR 15 May 2007, [325]). In Findlay v United Kingdom (1997) 24 EHRR 221, [73], the European Court of Human Rights said: ‘in order to establish whether a tribunal can be considered as “independent”, regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.” (Administrative Law by Timothy Endicott, Second Ed.)*

I63. A lack of independence can be a ground for judicial review of a public decision if it amounts to

‘the effective surrender of the body’s independent judgment’. (*R v Environment Feretory, ex p Kiskstall Valley Campaign Ltd.* [1996] 3 All ER 304, 321)

164. We do not propose to hold that merely because the D.G Archaeology or the Committees were not independent of the government, it was unlawful for these authorities to exercise the power. But we are definitely concerned with a form of separation of powers within the executive that was essential for the rule of law. Both the D.G Archaeology and Committee did not bring to bear their independent judgment on the exercise of discretion. The DG exclusively relied upon the report of the Advisory Committee which was, at best, set up to advise him and not to affect his independent judgment. The material that was used to arrive at the decision was almost entirely provided by the PMA and executing agency. The DG had to bear in mind that a public body that has been given responsibility for a decision must genuinely exercise

that responsibility and can not surrender its judgment. The DG ought to have taken steps to invite independent experts to pour over the reports submitted by NESPAK etc. and more appropriately to submit their own reports to rival NESPAK's reports. At least, the DG ought to have invited the petitioners (who raised genuine concerns and are respected individuals of international standing) to lay before him the opinion that they held and the exercise they had undertaken, to challenge the merits of the NESPAK feasibility and other studies. That the DG failed to do that raises a presumption of bias to exist in the exercise of discretion. The DG was required to consider that the decision was to impact a fundamental right inhering the people of Pakistan and so there was a dire need for a broader enquiry to be held and which was thus based on advise sought from skilled persons with no direct interest in the matter apart from rendering an unbiased opinion.

165. The Committee, we are afraid, was "politically predisposed "in favour of the project that they

preceded to approve. It was filled by officers who were answerable to the controlling political party and had no independence. Its acts betrayed an element of dictation and extraneous influence in their outcome. Yet it was under a greater obligation to be fair and carefully to consider the evidence brought before it. In *Dorset Yatch v Home Officer* [1970] *Advisory Committee* 1004, 1031, Lord Reid said:

*“Then there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his powers”.*

I66. For example, let us see how the revised NOCs came about. They were triggered on a case prepared by LDA for fresh consideration. The Chair stated in the meeting that:

*“The Chair at this point stated that it meant that primary objective of this meeting was to ensure that necessary studies have already been carried out and all possible measures have been taken for the safety and security of the heritage buildings along alignment of the Lahore Orange Line Metro Train.”*

I67. This was further elaborated by the DG LDA

by saying that:

*“...the objective of this particular meeting was to find out if something was overlooked in the earlier meeting that could be thoroughly examined and considered and if necessary, a revised NOC in the light of observations of Honourable Lahore High Court and data available in the studies could be issued. He requested the General Manager, NESPAK to give his presentation.”*

I68. Thus the process of issuance of the revised NOCs was not initiated by the Committee on its own but at the asking of the LDA. This betrays the callousness on the part of the Committee which did not feel anything to be amiss in the original NOC. Further, the process was merely to supply the omission ‘if something was overlooked in the earlier meeting’. It is interesting that the process did not involve the consideration of the refusal to grant the approval at all. Thus the reconsideration of the entire matter *de novo* was not the purpose of the meetings of the Committee commencing 13.04.2016. The Committee therefore sat with a preconceived opinion to grant the approval.

I69. I have read the judgment of my learned brother Abid Aziz Sheikh J. on the aspect of Environmental Approvals and concur in the reasoning and conclusion drawn. I have nothing to add of my own.

I70. I would, therefore, partly allow these petitions too in terms of the order of this Court and hold that the original NOC issued by the D.G Archaeology as well as by the Committee as also the Revised NOCs and Addendums are *ultra vires* and without lawful authority.

(*SHAHID KARIM*)  
JUDGE

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*Rafaqat Ali*