

In the Name Of ALLAH the Most Beneficent, and Merciful

TO 8059

**COMMERCIALIZATION OF LAND ALONG FEDERALIZED ROADS IN
PAKISTAN AND THE PRECARIOUS SITUATION**

OF

TO 8059

CONTRACTING PARTIES

by

by = III

Muhammad Waseem

A thesis submitted in partial fulfillment
of the requirements for the degree of
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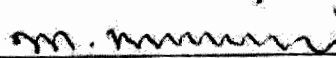
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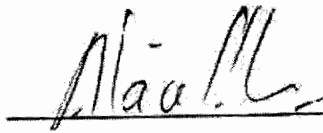
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Table of Contents

LIST OF ABBREVIATIONS	iv
DEDICATION	v
ACKNOWLEDGMENTS	vi
ABSTRACT	viii
LIST OF APPENDICES	ix
I COMMERCIALIZATION OF LAND	1
1.1 Introduction.....	1
1.2 Necessity for Commercialization of Land.....	3
1.2.1 NHAs Network of Roads.....	3
1.2.2 Coditions of National Highways.....	4
1.2.3 NHAs Maintenance Expenditures	5
1.2.4 Recognition of the Problem.....	7
1.2.5 Revenue Generation and Provision of Facilities to Road Users	8
1.3 Commercialization of Land along the Federalized Roads in Pakistan.....	9
1.4 Lease Agreements by NHA.....	11
1.4.1 Lease Agreements for Filling & CNG Stations.....	12
1.4.2 Lease Agreements for the Erection of Hotels/ Motels, Restaurants, Kiosks, Khokhas & other Amenities.....	14
1.4.3 Lease Agreements for Bus Stands/ Bus Bays.....	14
1.4.4 Lease Agreements on BOT Basis.....	16
1.5 Trunk Roads/National Highways of Foreign Countries and Facilities to Road Users.....	17
1.6 Shortcomings	20
1.7 Conclusion.....	20
II DISPUTE BETWEEN NHA AND PROVINCIAL AUTHORITIES	22
2.1 Introduction.....	22
2.2 Provisions Regarding Federalization of Roads.....	24
2.3 Federal Cabinet Decision.....	25
2.4 Mutation in Favour of NHA.....	26
2.5 Cancellation of Mutation.....	27

2.6	Un-ended Litigation.....	28
2.7	Unresolved Issue of Ownership of Federalized Roads.....	34
2.8	Laws Governing the Federal and Provincial Authorities.....	38
2.9	Law Precedents.....	42
2.10	Conclusion.....	46
III	STATUS OF CONTRACTING PARTIES.....	48
3.1	Introduction.....	48
3.2	Rights and Obligations of Contracting Parties.....	50
3.3	Unsecured Rights of Contracting Parties.....	53
3.4	Legal Status of Contracting Parties.....	55
3.5	Termination of Lease Agreements and Legal Implications.....	58
3.6	Shortcomings.....	63
3.7	Conclusion.....	65
IV	FINDINGS AND SUGGESTIONS.....	66
4.1	Introduction.....	66
4.2	Findings.....	68
4.3	Suggestions.....	73
	APPENDICES.....	75
A.	Definitions.....	76
B.	Federalized Roads.....	79
C.	NHAs Network.....	80
	BIBLIOGRAPHY.....	82

DEDICATION

This thesis is dedicated
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ABSTRACT

by

Muhammad Waseem

Indus Super Highway Board (ISHB) was established on 12 April, 1974 to improve and dualize the Indus Highway from Karachi to Peshawar under the administrative control of the Federal Government through Communications Division. Later on, Government of Pakistan decided on 07-08-1978 to federalize five important inter-provincial roads named as “National Highways” and converted ISHB into National Highway Board (NHB) for monitoring the development and maintenance of these federalized roads.

Deficiencies in highways infrastructure and future challenges forced the government of Pakistan to replace NHB by National Highway Authority (NHA) through an Act of Parliament, in 1991. Planning, development, operation, repair and maintenance of National Highways and strategic roads are now the responsibilities of NHA.

Under the provision of section 10(2)(xiii) of the Act, NHA is empowered to raise funds (local and foreign) through borrowing, floating of bonds, sharing or leasing of assets or any other means, from time to time. Section 10(2)(xv)b of the Act empowers the Authority to takeover Right of Way (ROW) of the roads declared as National Highway with the consent of provinces and approval of the Federal Cabinet and provinces shall simultaneously effect the mutation free of cost and without any liability or condition.

Though possession of those roads which were earlier controlled by provinces is taken over in due course, however, transfer of ownership of Right of Way (ROW) by mutation has not been effected and wherever it was effected, it has been cancelled, which is restraining NHA, inter alia, in exercising its powers as per section 10(2)(xiii). NHA has entered into lease Agreements with the private parties for commercial use of land along the federalized roads in Pakistan but the Provincial authorities are not effecting mutation in favour of NHA, thus adversely affecting the interests of contracting parties.

The purpose of this research work is to analyze the legal status of lease agreements and effect on contracting parties of non mutation of Federalized roads in Pakistan in favour of NHA.

The thesis has been divided into four chapters and relevant appendices have also been added at the end to make the study more useful.

In chapter I of the thesis, process of commercialization of land along the federalized roads has been discussed. Relevant statutory provisions, rules and regulations have been highlighted. The focus has also been drawn as to why need arose for the commercialization of land and NHA executed lease agreements with private parties.

Chapter II refers the introduction of dispute between NHA and Provincial authorities regarding attestation of mutation in favour of NHA. The relevant provisions of NHA Act, 1991 as amended in 2001, the Constitution of Pakistan, 1973 and of other relevant statutes have been discussed under this chapter.

Chapter III gives a detailed account of the status of contracting parties who entered into lease agreements in the process of commercialization of land along the federalized roads. The rights and obligations of the contracting parties have been

highlighted with special focus on non passing on possession of land to lessees by NHA and its legal implications.

In Chapter IV, the concluding views of the entire study have been highlighted. Thought provoking ideas and workable suggestions in my mind have been given in the end of the chapter.

LIST OF APPENDICES

Appendix

A. Definitions	73
B. Federalized Roads	76
C. NHAs Network.....	77

CHAPTER I

COMMERCIALIZATION OF LAND

1.1 INTRODUCTION

National Highway Authority has been established under the Act of Parliament in 1991. The purpose and functions of the Authority is to plan, promote, organize and implement programmes for construction, development, operation, repairs and maintenance of those National Highways and strategic roads which are entrusted to it by the Federal or Provincial Government or other authority concerned.

The affairs and administration of the authority vests in the Executive Board. The Chairman who is the Chief Executive of the Authority is also Chairman of the Board. The Powers and duties of the Authority has been explicitly mentioned in section 10 of the NHA Act, 1991 as amended in 2001.

The Authority is empowered to raise funds either local or foreign through borrowing, floating of bonds, sharing or leasing of assets. In the light of provision of section 10(2)(xiii) NHA Act, 1991 as amended in 2001, the Authority decided to raise funds through commercialization of land along federalized roads in Pakistan so that deficiency of funds may be catered and road users may be provided facilities along the

road. Therefore, commercialization of land along the federalized roads was started in Pakistan with the approval of NHA Executive Board.

In this chapter necessity for commercialization of land along the federalized has been explained. The relevant provisions of the Act have been discussed to explore the scope of leasing. Different lease agreements executed between NHA and private parties have been elaborated with reference to relevant rules and regulations. At the end conclusion has been drawn to sum up the whole process of commercialization of land and thereupon lease agreements executed between NHA and private parties.

1.2 NECESSITY FOR COMMERCIALIZATION OF LAND

1.2.1 NHAs Network of Roads

NHA is currently custodian of more than thirty roads which include National Highways, motorways, strategic roads and expressways. The total length of these roads is 11,485 Km which is only 4% of Pakistan's total road network but 80% commercial traffic ply upon it. Region-wise network of roads is as under:¹

<u>Province</u>	<u>Km</u>	<u>%age</u>
Punjab	2659	23.16
Sindh	1604	13.96
NWFP	1651	14.38
Balochistan	4629	40.30
NAs/AJK	0942	08.20
Total:	11485	100.00

N-5 is the largest and busiest highway in Pakistan connecting Karachi to Torkham vis Hyderabad, Sukkur, Rahimyar Khan, Bahawalpur, Multan, Sahiwal, Lahore, Gujranwala, Jehlum, Rawalpindi, Nowshera and Peshawar. It is the most important highway from the national economic perspective. Its importance from national perspective could be judged from the following salient features:-

- Runs from Karachi to Torkhum
- Carries about 65% of Pakistan's goods and passengers traffic
- Caters for about 80% of the country's economic activity and is Pakistan's main economic lifeline.

¹Ministry of Communications, NHA Year book 2007-2008 (Islamabad:Post office foundation press) , 16.

NHA undertook dualization of this highway, in 1991, in different sections in Sindh, Punjab and NWFP.² Most of the inter-provincial National Highways either take off from or terminate on it. It shows importance of NHA's network of roads from economic development view point. The purpose and functions of National Highway Authority, inter alia, is to repair and maintenance of National Hihways and strategic roads especially entrusted to it by the Federal Government, or by a Provincial Government or other authority concerned.³

1.2.2 Condition of National Highways

The network of federalized roads entrusted to NHA was in very bad condition. NHA conducted survey in the year 2005 on 10188 Km long National Highways entrusted to it. That survey showed that 43% of the NHA's network had remaining service life from 0 to 1 year which required major rehabilitation or reconstruction. The remaining portion of roads were required timely and adequate maintenance and rehabilitation actions otherwise it would be lost in the near future. Rutting (depth) condition of the roads was as under:

Un-rutted roads.	40.83%
Rutting < 6mm	28.07%
Rutting 6-12 mm	26.20%
Rutting 12-25 mm	4.04%
Rutting > 25 mm	0.86%

²National Highway Authority, MoC, Government of Pakistan, Islamabad Performance report 2001-02 & 2002-03, 41.

³Section 4 of NHA Act 1991 as amended in 2001.

Results of survey regarding cracking (width) of National Highways was as under:

Cracking < 2mm	45.93%
Cracking 2-6mm	23.55%
Cracking 6-10mm	9.34%
Cracking > 10mm	2.84%
Uncracked	18.34%

Roughness of the road greatly influences vehicle operating costs such as fuel and oil consumption, tires wear, parts replacement, vehicle depreciation, travel time and accidents. All these things causes adverse effects on economy.⁴

Huge amount was required to maintain NHA's road network. There was vast imbalance in development and maintenance expenditures due to insufficient funds. It was a great challenge for NHA to maintain and preserve its assets which were mostly in the shape of roads.

1.2.3 NHAs Maintenance Expenditures

Continuous maintenance, rehabilitation, up gradation and preservation of Pakistan's precious highway asset are absolutely vital to the growth of national economy. NHA's annual development expenditure has seen a manifold increase since the 1990's, whereas its maintenance allocations have stagnated at less than 4% of the annual development budgets. Consequently, the gap between maintenance funds demand and allocation has broadened every passing fiscal year. More alarmingly, the proportion of maintenance allocations actually released has declined sharply during the last decade, from almost 60

⁴National Highway Authority (Operation Wing), SOP for Road Maintenance Account-2002, 2.

percent to just over 20 percent of the allocated amounts.⁵

Statement placed in table below shows that NHA was able to spent Rs. 281.595 million released by MoC on maintenance in 1990-91. The figure touched Rs 660 million mark in 1999-2000 showing an average marginal increase of 13.4% per annum (over nine years period). But the figure of Rs.660 million suddenly reversed by a significant margin of Rs.178 million when NHA received Rs.482 million only in 2000-2001, thereby slashing the resources by 33%.⁶

Maintenance of National Highways (Provided as Government Grant).⁷

(Rupees in Million)

Financial Year	Demand	Allocation	Receipts
1990-91	600.000	281.595	281.595
1991-92	795.500	378.000	378.000
1992-93	930.000	410.000	410.000
1993-94	1097.000	430.000	430.000
1994-95	1317.000	452.000	452.000
1995-96	1554.000	475.000	356.000
1996-97	1760.000	522.000	521.000
1997-98	2010.000	600.000	600.000
1998-99	2350.000	Original 783.000 After Cut 604.632	604.632

⁵National Highway Authority, NHA Code 2005 Vol – II, Annexure-2, 4.

⁶National Highway Authority, MoC, Government of Pakistan, NHA Annual Report 2000-2001, 101.

⁷Ibid., Table 18.2,105.

1999-2000	6000.000	660.000	660.000
2000-2001	3000.482	720.000	482.000

1.2.4 Recognition of the Problem

The Government of Pakistan realized that if it continues to neglect maintenance and rehabilitation, the remaining road network will also crumble prematurely and the associated avoidable costs will form a formidable obstacle to the socioeconomic development of Pakistan. Thus, Government of Pakistan concluded that NHA must undertake preservation of the road network, which not only is an asset worth hundreds of billions of Rupees but also is absolutely vital to growth of the national economy. NHA articulated a new vision 2001 that envisages transition from the network expansion phase to a consolidation phase. The focus is now on preservation of road assets through timely maintenance and rehabilitation of the network.

Vision 2001 also states that NHA must grow into an efficient service provider to road users in Pakistan for safe and comfortable travel on National Highways and Motorways. To realize Vision 2001, NHA is following the concept of commercialization of the road sector embodying the following principles:

- bring road maintenance into market economy,
- put road maintenance on fee-for-service basis, and
- manage road maintenance like a business rather than a bureaucracy and promote corporate structure.

In this regard, NHA organized a country workshop, co-sponsored by the Ministry of Finance and the World Bank to develop consensus among the various stakeholders on achieving financial self-sufficiency and to win public support for the principle that road users should pay for the maintenance requirements that arise due to their usage of roads. All the participants reached a consensus that the additional revenues should come from road users and maintenance money should be channeled through a road fund.⁸

NHA tried its best to carry out maintenance and repair work through its own generated funds like toll collection but same was too meager to meet the ever increasing expenses on maintenance of roads. Therefore, it became essential for NHA to commercialize its land along the both sides of roads.

1.2.5 Revenue Generation and Provision of Facilities to Road Users

NHA established Road Asset Management Directorate (RAMD) to ensure conservation of road assets and providing safe, smooth and user friendly infrastructure to the road users in Pakistan. The prime aim for the establishment of RAMD was to generate maximum revenue resources through asset utilization for maintenance of the same asset. In fact, the road-user is now treated as a customer and his/her satisfaction is given preference over every other consideration. NHA is now endeavoring to significantly improve the condition of the national highway by conducting periodic inspections/surveys and timely and adequate allocation of funds for maintenance purposes and implementation of carefully drawn maintenance schemes on schedule. NHA is ensuring necessary facilities

⁸Road Maintenance Account (RMA)-2002 Revised in 2005.

like adequate filling/CNG stations to the motorists traveling on the National Highways with amenities such as separate toilets for ladies and gents, pure drinking water, tuck shops, mosque and tyre shops.⁹

All the above discussed factors i.e scarcity of funds, repairing and maintenance of network of roads, provision of facilities to road users etc. lead NHA to commercialization of land along the roads.

1.3 COMMERCIALIZATION OF LAND ALONG THE FEDERALIZED ROADS IN PAKISTAN

Traditionally NHA was collecting tolls on some of the road bridges, while the Provincial C&W departments continued to collect tolls on bridges on the existing carriageways and collection of approach rental/lease charges from petrol pumps etc. upto 30 July, 1999. On 20 July, 1999, Federal Government directed the Provincial Governments that the rights to collect all tolls on the National Highways wherever presently being exercised by the Provincial Governments, will hence forth stand transferred to the Federal Government/NHA of the Ministry of Communications under the NHA Act 1991 as amended in 2001 under section 10(2)(vii).

In order to meet the requirements for repairing and maintenance of big network of roads and provision of facilities to road users, NHA pursued various sources for generating funds through commercialization of Right of Way. National Highway Authority Act 1991 as amended in 2001 empowers NHA to license facilities on roads under its control. The terms and conditions for issuance of such licence may be fixed by

⁹Performance Report 2001-02 & 2002-03, National Highway Authority, Ministry of Communications, Government of Pakistan, Islamabad, 55.

the Authority itself.¹⁰ It is not lawful to construct or maintain any structure or make any excavation between building line and ROW.¹¹ The Act empowers NHA to raise funds (local and foreign) through borrowing, following of bonds, sharing or leasing of assets.¹² The Act also empowers NHA to takeover Right of Way of the roads declared as National Highways with the consent of provinces and approval of the Federal Cabinet and Provinces shall simultaneously effect the mutation free of cost and without any liability or condition.¹³

Pursuant to Federal Cabinet decision made in its meeting held on 3 October, 2001 the government of Punjab agreed on 19 January, 2002 to transfer the Right of Way of National Highways in the name of National Highway Authority free of cost and without encumbrance. Thereupon mutation was effected in favour of NHA.

The mutation of land within ROW was also required to be effected in favour of NHA on the same principle as given above by other provinces of Pakistan. NHA requested other Provincial Governments to take necessary action to effect mutation in favour of NHA. Meanwhile, NHA introduced amendments in National Highways and Strategic Road Control Rules, 1998 and framed SOPs for preservation and commercial use of ROW. NHA Executive Board accorded approval and NHA started commercialization of land along the federalized roads.¹⁴

¹⁰Section 10(2)(viii) of NHA Act 1991 as amended in 2001.

¹¹Ibid., Section 10(2)(ix).

¹²Ibid., Section 10(2)(xiii).

¹³Ibid.,Section 10(2)(xv).

¹⁴NHA Executive Board meeting no. 104 held on 29 May 2002.

1.4 LEASE AGREEMENTS BY NHA

National Highway Authority kept on pursuing various means provided by National Highway Authority Act 1991 as amended in 2001 for generating funds through its own sources. In this connection policy guidelines for tolls and commercial use of ROW were approved by NHA Executive Board.¹⁵ The National Highways & strategic roads (control) Rules 1998 were amended in 2002. These rules, inter alia, allows lease of Government land for the erection of filling/ CNG stations, restaurants, hotels/ motels, shops/ khokhas, nurseries etc.¹⁶ The Act empowers the authority to make regulations.¹⁷ By exercising this power, NHA Executive Board approved the amended rules and SOP to implement its policy for preservation and commercial use of ROW.¹⁸

In order to achieve above said objectives, NHA invited applications from general public through advertisement in all leading newspapers throughout Pakistan for installation of filling and CNG stations on National Highways network spreading over 1800 kilometers on N-5 from Karachi to Peshawar in November, 2001 and onward.

In response to above referred advertisements, private persons/parties applied in NHA for lease of different pieces of land for establishment of filling/CNG stations, nurseries etc. on different points and they submitted bank guarantees as security deposits, paid the demanded registration/NOC fees, deposited the required amounts for lease expenses and also completed all the codal formalities.

¹⁵NHA Executive Board meeting no. 92 held on 15 March 2000.

¹⁶Rule 13& 14 of the National Highway & Strategic roads (control) Rules 1998 as amended in 2002.

¹⁷Section 32 of NHA Act 1991 as amended in 2001.

¹⁸NHA Executive Board meeting no. 104 held on 29 May 2002.

All the applications for grant of leases were processed for a long period of two years through a transparent and open process. NHA after completing all the requirements ultimately approved the respective leases in favour of the private persons/parties. The lease money was deposited in NHA RMA and lease agreements were duly signed between NHA and private persons/parties.¹⁹

The Hon'able Lahore High Court has observed in a Judgment that National Highway Authority has competently entered into a lease agreement for the construction of cabins.²⁰

NHA entered into lease agreement with private persons/parties for a specific period for the following objectives:

- a. Lease agreement for filling & CNG stations.
- b. Lease agreements for the erection of Hotels/Motels, Restaurants, Khokhas & other amenities.
- c. Lease agreements for Bus stands/ Bus Bays.
- d. Lease agreements on BOT basis.

1.4.1 Lease agreement for filling and CNG Stations

NHA entered into lease agreements with private parties for establishment/ installation of two types of filling/CNG stations:

- i. Installation of Filling/CNG stations within ROW

¹⁹Justice Muhammad Muzammal Khan, Lahore High Court, Judgment dated 06.07.2005 in writ petitions 12693, 2078, 2705, 2725, 2853, 2941 of 2004/RWP.

²⁰Justice Muhammad Javed Butter, Lahore High Court, Judgment dated 05.01.2004 in writ petition No.17066 of 2003 titled as Abdul Hameed Butt Vs NHA.

ii. Installation of Filling/CNG stations outside ROW but using NHA land (ROW) for approaches.

i. Installation of Filling/CNG Stations within ROW

The filling/CNG stations established within ROW can be divided into two categories:

(a) Filling/CNG Stations already established within NHA Right of Way (ROW) without having any NOC from NHA and without payment of ground rental charges to NHA.

(b) Establishment of new Filling/CNG Stations on NHA land by submission of technical and financial proposals with payment of ground rental charges to NHA.

NHA registered already established Filling/CNG stations by collecting rents commencing from July 1999 as arrears and one advance rentals were also charged. The annual ground rental charges were used to assess initially @ 5% & later on 7% of the cost of land (utilized) as notified by the District Revenue Officer in the lease year and it would be appreciated @ 7% after every three (3) years.²¹ The lessee has to pay Rs. 50,000/- on account of No objection/registration fees.

ii. Installation of Filling/CNG Station Outside ROW but Using NHA Land (ROW) for Approaches

NHA charges for those filling/CNG stations which uses NHA land (ROW) for approaches/access to road but installed outside ROW. The private parties has to pay

²¹The National Highway and Strategic Roads (Control) Rules, 1998 as amended in 2002.

Rs.50,000/- as non refundable NOC charges, approach/access road rental charges in advance for the first five years which are revised on annual basis, Rs.250,000/- as a refundable cash security.²²

1.4.2 Lease Agreements For The Erection Of Hotels/ Motels, Restaurants, Kiosks, Khokhas & Other Amenities

The procedure laid down for the erection of hotels, motels, restaurants, kiosks, khokas & other amenities is very similar to that for installation of filling/CNG station except few changes. NHA charges ground rental charges minimum 2 ½ % of the land value assessed and notified by District Revenue Officer, for movable property like Nurseries, Khokas, Vendor stalls, Orchards, Kiosks etc, Rs.20,000/- as a registration/NOC fee, Rs.50,000/- as a refundable cash security in case of immovable property hotel/motels, restaurants, other structures & amenities etc and Rs.20,000/- for movable property like nurseries, orchards, Kiosks etc.²³

1.4.3 Lease agreements for Bus Stands/ Bus Bays

The smooth running of the traffic on the National Highways may be maintained if there is no hindrance on the way. The public transports pick and drop passengers during the journey on the road. It causes hinderance in the smooth running of traffic by stopping vehicles/ buses on the road. In order to ensure smooth running of traffic, NHA entered into lease agreements with private parties for the construction and operational purposes of

²²Regulatory frame work and standing operating procedures for preservation and commercial use of Right of Way (ROW) 2002.

²³NHA code 2005, Chapter V; Annexure-4.

Bus Stands/ Bus Bays along the federalized roads. NHA constructed Bus Bays/ Bus Stands by itself or on BOT (Public/Private partnership). The following seventeen different locations for construction of bus bays on BOT basis along N-5 were identified and were given to different firms/companies through open bidding for a period of seven years till 2009 and afterwards the agreements were extended or executed with some other firms/ companies depending upon the situation at that time:

- | | | |
|-------------------|----------------------|-------------------|
| (i) Hattian | (ii) Kamra | (iii) Hassanabdal |
| (iv) Taxila | (v) Rawat | (vi) Sohawa |
| (vii) Dina | (viii) Sarai Alamgir | (ix) Kharian |
| (x) Lalamusa | (xi) Ghakhar | (xii) Rahwali |
| (xiii) Alam Chowk | (xiv) Eminabad | (xv) Kamoke |
| (xvi) Sadhoke | (xvii) Muridke | |

The entry fee for the vehicles entering such Bus Stands/Bus Bays has been scheduled as under:

- a. Rupees five (5) for all kind of Cars/Taxies.
- b. Rupees ten (10) for wagon upto 12 seats, Pickup all types modified to carry passengers (Toyota Hilux single/double Cabin), Milk trucks T-3000 and equivalent.
- c. Rupees fifteen (15) for wagon 13-24 Seats, Coaster and Mini Bus built on T-3500 Mazda chassis (upto 24 seats) and Mini Truck/Tanker built on T-3500 Mazda Chassis and equivalent.
- d. Rupees twenty for buses (more than 25 seats).

The collection fee is required to be collected by the agency, person or firm procured by NHA and it should be deposited to NHA RM account Islamaabd as per agreement.

All the other Bus Bays/Bus stands established by Government agency or person or firm out of NHA Right of Way in their own land but using the NHA land for approaches were required to submit, NOC charges for the sum of Rs.50,000/-, refundable cash security to the tune of Rs.100,000/-, approach rental charges for the sum of Rs.100,000/- per year in major cities, Rs.75,000/- per year for minor cities and Rs. 50,000/- per year for Bus Bays.²⁴

1.4.4 Lease Agreements on BOT Basis

Investing in public infrastructure such as roads, bridges, public utilities, etc is conventionally considered to be a necessary pre-requisite for economic growth. Investments in capital-intensive infrastructure projects place enormous burden on public finances. This has been a major cause of burgeoning government budget deficits and foreign debt and signifies the need for resort to BOT(Build-Operate-Transfer) concept; which enables direct private sector investment in large-scale projects such as roads and bridges.

Realizing the GOPs financial constraints and in furtherance of the policy announced by the Government, NHA is currently pursuing to materialize Public Private Partnerships (PPPs) to augment the state resources to implement road projects through the mechanism of BOT concept.²⁵

NHA also entered into lease agreements on BOT basis for construction of Khokhas/Shops across the National Highways to facilitate the commuters.

²⁴NHA Code 2005, Chapter VIII; Annexure-4.

²⁵Performance Report 2001-02 & 2002-03, National Highway Authority, MoC, GoP, Islamabad, 54.

1.5 TRUNK ROADS/ NATIONAL HIGHWAYS OF FOREIGN COUNTRIES AND FACILITIES TO ROAD USERS

In the United Kingdom, the Department for Transport (DfT) is the government department responsible for the English transport network. The department is run by the Secretary of state for transport who is the member of the cabinet. The office used to be called the Minister of Transport. The Highways Agency is an Executive Agency of the Department for Transport, and is responsible for operating, maintaining and improving the strategic road network in England on behalf of the Secretary of State for Transport²⁶.

Part II of Highways Act, 1980 in UK empowers the Minister that he may by order direct that a highway or proposed highway shall become or cease to be a highway from the date as specified in the order²⁷.

Part VII of the Highways Act, 1980 in UK contains several powers for the provision of special facilities in highways²⁸, including picnic sites for users of trunk roads²⁹, Public convenience for highway users³⁰, and heavy goods vehicle parking areas (lorry areas)³¹. The Minister may provide these facilities on land adjoining, or in the vicinity of a trunk road³².

²⁶ www.highways.gov.uk/aboutus/about.aspx

²⁷ Section 10 of Highways Act, 1980.

²⁸ Stephen J. Sauvain, *Sauvain Highway Law*_Second Edition, (Lodon: Sweet & Maxwell 1997), 147.

²⁹ Section 12 of Highways Act, 1980.

³⁰ *Ibid*; section 112, 114.

³¹ *Ibid*; section 115.

³² Section 112(1) of Highways Act, 1980.

The Minister may erect buildings and equip them with such furniture and apparatus as may be necessary for the purpose of providing such conveniences or facilities³³. The Minister may make arrangements with some other person for provision of conveniences or facilities and the Minister is empowered to lease the trunk road picnic area or any part of it to that other person³⁴.

Chapter III of the National Highways Authority of India Act, 1988 empowers Central Government to vest or entrust, by notification in the official Gazette, any national highway or its any stretch in the Authority³⁵. Upon publication of notification, the assets and liabilities of central Government shall be transferred to the Authority³⁶. Any dispute regarding transfer of assets, rights or liabilities to the Authority shall be decided by the central Government³⁷. The Authority is empowered to construct offices or workshops and establish and maintain hotels, motels, restaurants and rest rooms at or near the highway vested in or entrusted to it³⁸. The Authority may provide such facilities and amenities for the users of the highways which in its opinion are necessary for the smooth flow of traffic on such highways³⁹. The Authority may make any contract with the prior approval of central Government for the acquisition or sale of immovable property or for the lease of

³³ Ibid., section 112 (2).

³⁴ Section 112(4) of Highways Act, 1980

³⁵ Section 11 of the National Highways Authority of India Act, 1988

³⁶ Ibid., section 12(1).

³⁷ Ibid., section 12(2).

³⁸ Ibid., section 16(2)(b).

³⁹ Ibid., section 16(2)(J).

any property for a term exceeding thirty days⁴⁰. The Authority may engage or entrust any of its functions to any person as per prescribed terms and conditions⁴¹.

In chapter I of the National Highways Authority of India Act, 1988, "National Highway" means any highway for the time being declared as national highway under section 2 of the National Highways Act, 1956 (48 of 1956)⁴². In National Highways Act, each of the highways specified in the schedule are declared to be a national highway⁴³. The Central Government may declare any other highway to be a national highway and it shall be deemed to be specified in the schedule on the publication in the official Gazette⁴⁴. All national highways vest in the union and for the purposes of the Act 'highways' include all lands appurtenant thereto, all bridges, culverts, tunnels, causeways, carriageways and other structures constructed on or across such highways and all fences, trees, posts and boundary, furlong and mile stones of such highways or any land appurtenant to such highways⁴⁵.

⁴⁰ Ibid., section 15(1).

⁴¹ Ibid., section 16(2)(h).

⁴² Ibid., section 2(e).

⁴³ Section 2(1) of the National Highways Act, 1956 in India.

⁴⁴ Ibid., section 2(2).

⁴⁵ Ibid., section 4.

1.5 SHORTCOMINGS

The National Highways Control Rules, 1998 were also amended with the approval of Executive Board in May 29, 2002. These rules have not been published in official gazette. In the absence of notification in the official Gazette these rules have no force in the eye of Law.

The distance between one amenity to the other is not mentioned in the rules/SOPs which may result mushroom of amenities across the road. Criteria for determining locations for leasing sites has not been mentioned. This situation may cause traffic hazards, rush and problem in future while expanding roads.

The construction period of amenities has not been mentioned in the Sops/lease agreements. It may cause unnecessary delay in construction of amenities and legal complications may arise.

The people having property adjacent to the lease places are not given privilege to enter into lease agreement with NHA to safeguard their interests. This situation may cause unrest among the interested parties and series of litigation may start.

1.6 CONCLUSION

The commercialization of land along the federalized roads in Pakistan has been promoted under Section 10(2)(viii)(Xiii) of NHA Act 1991 as amended in 2001. National Highway Board amended "The National Highways & Strategic Roads (Control) Rules, 1998" in 2002 wherein under rules 13,14 & 18(iv) , NHA may Lease Government Land. The road-user is now treated as a customer and his/her satisfaction is given preference over every other consideration. NHA is now endeavoring to significantly improve the condition of

the national highway by conducting periodic inspections/surveys and timely and adequate allocation of funds for maintenance purposes and implementation of carefully drawn maintenance schemes on schedule. NHA is ensuring provision of adequate filling/CNG stations to the motorists traveling on the National Highways with amenities such as separate toilets for ladies and gents, pure drinking water facilities and tuck shops. NHA may fulfill to some extent its funds requirements for maintenance of federalized roads by leasing Government Land as well as provide facilities to road users.

The above said rules have to be notified in official gazette before its implementation but it has not been done due to lack of proper pursuance. The Regulatory Framework and Standard Operating Procedures for Preservation and Commercial Use of Right of Way (ROW)-2002 do not protect the interests of parties having properties adjacent to the leased out sites which may cause litigation among parties. The leasing of sites close to each other may cause traffic hazards and future problems while expansion of roads. The lease sites may have been identified before entering into lease agreement. All the existing roadside amenities may have been examined and evaluated consistently to ascertain whether they meet the requirements of road user and standards of NHA. The provision regarding construction period of amenities may have been mentioned in the Sops/Lease agreements.

Despite a few lapses in the process of commercialization of land along the federalized roads, it may be concluded that it was started with the approval of Executive Board of NHA and after framing rules and regulations. It was an effort to generate revenue as well as provision of facilities to road users with active participation of private parties.

CHAPTER II

DISPUTE BETWEEN NHA AND PROVINCIAL AUTHORITIES

2.1 INTRODUCTION

National Highway authority is a statutory body incorporated under section 3 of National Highway Authority Act 1991 as amended in 2001. The authority took possession from provincial C & W departments of the 08 roads assigned to it in 1991 but due to non-transfer of ownership by mutation, revenue generation from the roads in shape of toll and lease remained a bone of contention. This arrangement also hampered smooth operations. However, all such rights were taken over by Authority in 1991, despite reluctance shown by concerned C&W departments. To help resolve the issue, the NHA Act was amended in 2001 by including a new sub-section (XV) under section 10 (2) of the Act which entitles the Authority to take over ROW of the roads declared as National Highways with the consent of Provinces and approval of the Federal Cabinet. Afterthat Provinces were required to simultaneously effect the mutation in favour of NHA. The mutation has to be effected free of cost and without any liability or condition.

Federal Cabinet of Pakistan accorded approval in 2001 for federalization of provincial roads. Now the Provinces had to effect mutation of ROW in favour of NHA. In this regard, first of all Government of Punjab agreed to effect mutation in the name of

National Highway Authority free of cost and without encumbrance as laid down in the NHA Act, 1991 as amended in 2001. Thereafter mutation was effected in favour of NHA in the year 2003. NHA also requested to other provinces to effect mutation in its favour. Meanwhile, Punjab Government cancelled the mutation already effected in favour of NHA which lead to unresolved issue of ownership of federalized roads and un-ended litigation among NHA, Provinces of Pakistan and the parties who executed lease or other agreements relating to ROW.

Now let us see the actual dispute between NHA and Provincial authorities regarding cancellation or non attestation of mutations in favour of NHA in the light of the Constitution of Pakistan, relevant statutes, rules and regulations. In this way legal aspects and implications of the issue will be explored to reach the conclusion.

2.2 PROVISIONS REGARDING FEDERALIZATION OF ROADS

National Highway Authority Act 1991 as amended in 2001 empowers the authority to take over ROW of the roads declared as National Highway. However, consent of provinces and approval of the Federal Cabinet is mandatory prior to taking over ROW of the roads declared as National Highway. As soon as consent of the provinces is obtained and approval is granted by Federal cabinet, mutation has to be effected by the provinces. It is mandatory for provinces not to charge mutation fee and mutation be effected without any liability or condition.²⁶

In National Highway Act, 1991 as amended in 2001, one schedule with its two parts has been added. This schedule mentions the designation of National Highways alongwith route and its length in Km. Eleven National Highways and four Motorways i.e. M-1, M-2, M-3 & M-9 has been federalized in Part-1 of the schedule. In the second Part of schedule only one strategic road i.e. S-1, KKH (Gilgit) Skardu has been federalized. A road specified in Part-I of the schedule and any road declared to be National Highway by Federal Government by notification in the official Gazette is known as National Highway.²⁷ A road specified in Part-II of the schedule and any road declared to be a strategic road by Federal Government by notification in the official Gazette is called strategic road.²⁸ The land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority is known as Right of Way.²⁹ The roads

²⁶Section 10(2)(xv) of NHA Act 1991 as amended in 2001.

²⁷Ibid., Section 2(g).

²⁸Ibid., Section 2(m).

²⁹Ibid., Section 2(J).

assigned to the authority has been specified in schedule of NHA Act, 1991 as amended in 2001. In the definition of road includes land within the right of way and all works such as carriageways, footpaths, bridges, side drains, berms, cartways, culverts, fences, tunnels, sign boards, posts, plantation, lighting arrangements, intersections and medians assigned to the Authority.³⁰

The above discussion clearly depicts that road does not only mean metaled road upon which vehicles ply but also land within the right of way and all works like carriageway, tunnels, bridges, footpath etc falls within the definition of road. Right of way is the road assigned to NHA or the land acquired by it for the purpose of construction of a National Highway. Therefore, it is statutory obligation of the Provinces of Pakistan to effect mutation free of cost and without any liability or condition under section 10(2)(xv) of NHA Act, 1991 as amended in 2001. ROW of the roads declared as National Highways in the Act has been handed over to NHA by the Provinces which amounts to consent of the Provinces and NHA has spent huge money in repairing, maintenance, rehabilitation etc. of ROW. Let us see the status of approval of the Federal Cabinet regarding ROW and attestation of mutation by Provinces in favour of NHA.

2.3 FEDERAL CABINET DECISION

Federal Cabinet of Pakistan granted approval on 3 October 2001 to federalize the provincial roads in accordance with section 10(2)(xv) of NHA Act 1991 as amended in 2001. Thereupon, Secretaries to the Government of the Punjab, law & Parliamentary affairs Department and Communication & works Department and legal counsel of NHA

³⁰ Section 2(K) of NHA Act 1991 as amended in 2001.

convened a meeting on 19 January 2002 in the office of Member (Planning) NHA, Islamabad. In the meeting issue of proper handing over/ taking over of Right of Way of various Provincial roads to NHA and their mutation in favour of NHA was discussed.

The outcome of the meeting was decision of the Punjab Government to transfer to NHA ROW of GT road (N-5), Indus Highway (N-55), Multan Rakhni (N-70), Khanewal-Lodhran and Islamabad (Kashmir Chowk) Satra Mile, Lower Topa, Kohola road falling in Punjab Province inclusive of Provincial bridges, toll plazas and other Assets within ROW. In this regard decision of Punjab Government was conveyed to Chairman NHA wherein it was agreed that the Government of Punjab shall effect mutation in favour of National Highway Authority free of cost and without encumbrance in accordance with the provisions of NHA Act, 1991 as amended in 2001. NHA was left free to exercise all such rights and privileges without seeking prior approval of the Government of Punjab which were exercised previously by C&W Department of the Government of Punjab and any difficulty which arises in exercise of such rights by NHA shall be removed by the Government of Punjab.³¹

2.4 MUTATION IN FAVOUR OF NHA

National Highway Authority requested the Board of Revenue that Land/ Right of Way may be transferred in favour of the authority as per decision of the Government of Punjab. The Deputy Secretary (Assessment), Board of Revenue, Punjab through a memorandum dated 15 February 2003 directed all the concerned DORs to transfer the

³¹Deputy Secretary (Highways) letter No.SOH- (C&W)/1-4/2000 (RWP) dated 30-01-2002 addressed to Chairman NHA, Islamabad.

ownership of Right of Way in favour of NHA through mutations without charging mutation fee³². Thereupon mutations were effected in favour of NHA regarding all the federalized roads in the Province of Punjab.

In the above said memorandum, the words Road of Ways were erroneously written which were subsequently substituted by the words Right of Way³³.

2.5 CANCELLATION OF MUTATION

The decision of the Government of Punjab, regarding attestation of mutations of Right of Way of federalized roads in favour of NHA was communicated by Deputy Secretary (Highways), C&W Department, Government of Punjab. The copy of that letter alongwith others was also forwarded to Senior Member Board of Revenue, Punjab, Lahore. The mutations were sanctioned accordingly upon the direction dated 15 February 2003 of Deputy Secretary (Assessment), Board of Revenue, Punjab.

Secretary (Revenue),BOR, Punjab issued directions on 10 January 2005 to the DORs of Multan, Khanewal, Lodhran, Sahiwal, Rahim yar khan, Bahawalpur, Lahore, Gujranwala, Sheikhpura, Gujrat, Jhelum and Rawalpindi Districts, for cancellation of mutation of ownership sanctioned in favour of National Highway Authority. The justification for cancellation of mutation was given that the matter was placed before the Punjab Cabinet in its meeting held on 3 November, 2004 wherein it was decided that ownership of federalized roads must remain with the Provincial Government.³⁴

³²Deputy Secretary (Assessment) Board of Revenue, Punjab, letter No.159-2003/05-LR-I, dated 15 Feb 03.

³³Secretary (Revenue), Board of Revenure, Punjab, letter No.1059-2004/46-LR(1) dated 10 Januray, 05.

³⁴Ibid.

Upon the direction of Deputy Secretary (Assessment), Board of Revenue, Government of Punjab mutations were effected to implement the decision which was taken after conducting meetings with NHA officials but the decision of cancellation of mutations was taken unilaterally. The Inter Provincial Co-ordination Committee (IPCC) in its meeting held on 4 April 1998 had also approved the transfer of Right of Way of all National Highways in favour of National Highway Authority. Therefore, decision taken by Government of Punjab does not in consonance with the spirit of NHA Act, 1991 as amended in 2001 and decision taken by IPCC and approval of Federal Cabinet regarding federalization of roads.

2.6 UN-ENDED LITIGATION

Chairman NHA requested to Secretary Communications that the issue may kindly be taken up with Provincial Government of Punjab to review their latest decision and transfer the ownership of Federalized roads including ROW to NHA on behalf of Federal Government of Pakistan as already decided and conceded.³⁵

NHA feeling aggrieved with the decision of Punjab Government, regarding cancellation of mutation of ownership sanctioned in favour of National Highway Authority, filed a writ Petition No.989 of 2005 in the Lahore High Court, Rawalpindi Bench, Rawalpindi, inter-alia contending that:

- a. NHA in pursuance of NHA Act 1991 as amended in 2001 has vested right over ROW.

³⁵ Chairman NHA letter No.4(34)/GM(Lands)/NHA/05 Islamabad the 24 January, 2005 addressed to Secretary Communications.

- 7H 8059
- b. Mutation regarding ownership of ROW has been sanctioned in favour of NHA.
 - c. After sanction of mutation of ROW in favour of NHA, it can not be cancelled unilaterally by Government of Punjab.
 - d. The High court has already accepted NHA's contention in writ Petition No. 1765/03 and in other writ Petition No. 17066 /2003 titled as Abdul Hameed Butt Vs. National Highway Authority through its General Manager, Shahpur Interchange Lahore etc.³⁶

The Hon'able Lahore High court, Rawalpindi suspended the impugned order/ letter dated 10 Jan, 2005. The writ Petition No.989/ 2005 (National Highway Authority Vs. Nasrullah Khan, Secretary BoR etc) was disposed of by Hon'able Lahore High Court at Lahore along with eight other writ petitions, as common question of law was involved in all those petitions. The cases were heard on 15 February,2007 and judgment was announced on 9 July, 2007. The points discussed in the judgment are as under:

A. CASE OF NHA

The contention of NHA was that

- i. the cancellation of Mutations is without any notice to NHA and as such violative of principles of natural justice.
- ii. Federal Law will prevail under article 148(1) of the constitution of Islamic Republic of Pakistan, 1973.
- iii. Once the order passed by lawful authority, and implemented cannot be revoked on the principle of *locus poenitentiae*.

³⁶National Highway Authority through its Chariman vs. Mr. Nasrullah Khan Chattah Secretary, Board of Revenue, Government of the Punjab, Lahroe & others, writ Petition No.989/2005 dated 2 April, 2005.

- iv. Writ Petition is maintainable because no alternate adequate remedy was available.

B. CASE OF THE BOARD OF REVENUE, GOVERNMENT OF PUNJAB

The BOR, Government of Punjab contented that

- i. the Mutations were wrongly attested, yet the ownership was never transferred to NHA.
- ii. NHA is in cultivation column (like a tenant) but not in ownership.
- iii. NHA has no title in the property, therefore, it cannot lease out the property without the permission of owner (Government of Punjab).
- iv. Principle of *Locus Poenitentiae* is not applicable as the title and ownership was never transferred to NHA.
- v. Instant case falls within the exception and right of hearing in such matters cannot be claimed as a matter of right.
- vi. Ownership has not passed on to NHA by combined reading of entry no.34 and entry no. 37 of Federal legislative list and Section 2 (K) of NHA Act, 1991 as amended in 2001.

C. LAW DISCUSSED

The following laws were discussed:

- i. The Constitution of Islamic Republic of Pakistan, 1973.
- ii. The Colonization of Government Lands (Punjab) Act (V of 1912).
- iii. The Rules of Business, 1974 (The Punjab Government).
- iv. The West Pakistan Highways Ordinance, 1959.

The Hon'able High court observed that the legal title of disputed land vests with the Secretary (Colonies), Government of Punjab, by virtue of section 4 of the

Colonization of Government Lands Act 1912. The Board of Revenue can grant such land to any person with the approval of Government of Punjab under section 10 of the Colonization of Government Lands Act, 1912. Administrative control of highways vests with Communication and Works Department by virtue of Rules of Business and West Pakistan Highways ordinance, 1959.

It was further observed that Communication and Works Department and Secretary C&W has administrative control of land under discussion but its legal title vests in Colony Department of Government of Punjab. The questions, like transfer of Right of Way to NHA and its approval by Government of Punjab was granted or not, C&W Department had the authority to direct mutation in favour of NHA or not, mutation was sanctioned with limited authority or name of NHA was incorporated in the column of cultivation or ownership and that all the rules and procedural formalities were fulfilled as mutation was effected, relate to facts. The questions of facts can be determined by recording evidence and its closer and thorough examination. Therefore, the Honourable court left these issues upon relevant authority to decide them after hearing the relevant parties.

As far as letter of cancellation of mutation was concerned, the Hon'able court set aside that letter being violative of principles of natural justice. The court observed that the review of mutation was not merely an executive order but it involved determination of valuable rights of the parties, therefore it should have been passed through well reasoned, speaking order after hearing the relevant parties. The function of cancellation of mutations has been assigned to Revenue officers but this exercise has been undertaken by Secretary Board of Revenue. This exercise has deprived the affected party of right of

appeals and revision in the hierarchy of Board of Revenue. Therefore, Secretary Board of Revenue will determine the issue of Jurisdiction before Proceeding further in the matter. The Hon'able court decided that the District Officers (Revenue) will decide the matter of cancellation of mutations after hearing the parties.³⁷

The study of Pakistani case law - National Highway Authority through Chairman Vs Nasrullah Khan Chattah, Secretary, Board of Revenue, Government of the Punjab Lahore and 3-others - reveals that the matter of mutation in favour of NHA can not be determined in writ petition. The questions like mutations already sanctioned in favour of NHA and subsequently cancelled, the proper procedure and formalities were followed or not, can only be determined through recording evidence which can be done by the relevant authority. The Secretary Board of Revenue can not exercise a power which has been assigned to revenue officers. Therefore, direction to District Officers (Revenue) by Secretary, BOR for cancellaion of mutations already effected in favour of NHA was without jurisdiction. In view of the matter, the court set aside the letter whereby District Officers (Revenue) were directed to cancel the mutations already effected in favour of NHA.

The study of judgement reveals that the court discussed each aspect of the case and ultimately set aside the letter whereby mutations were directed to be cancelled. But at the same time the Honourable court left the matter of cancellation of mutations on District Officers (Revenue) to decide it after hearing the parties. This decision pulled NHA towards un-ended litigation.

³⁷National Highway Authority through Chairman Vs. Nasrullah Khan Chattah, Secretary, Board of Revenue, Government of the Punjab Lahore and 3 others, 2007 CLC 1794 Lahore High Court, Lahore.

National Highway Authority has to appear before District Officers (Revenue) through out Punjab. The matter of attestation of mutations of Right of Way was not between private parties which have to appear before the District Officers (Revenue); instead it was decision of Government of Punjab to effect mutation in favour of NHA or otherwise. BOR or its representatives at District level have only to implement it. It is impossible for any District Officer (Revenue) to go against the direction of BOR or decision of Government of Punjab. The issue of federalization of roads as per NHA Act, 1991 as amended in 2001 can only be decided at Federal and Provincial level rather by District Officers (Revenue).

The other view may be that as the action of cancellation of mutations was taken upon the letter issued by Secretary Board of Revenue, that letter was set aside by the Honourable court. It ultimately reverses the action taken upon that letter. But it was not done and District Officers (Revenue) were required to decide the matter of cancellation of mutations. Every District Officer (Revenue) has to follow the decision of the Government of Punjab and directions of the BOR. Therefore, it is not possible for any DOR to give his own verdict on policy matter against the decision of the Government of Punjab and directions of the BOR communicated vide letter dated 10 January 2005. NHA was to appear before representatives of the BOR in different Districts of the Punjab which was not only a hectic but also a finance consuming exercise without any destination. In the circumstances, NHA was forced to run on the way that had no end. On the other side, NHA had to deal with the lease cases which were held in abeyance due to litigation between NHA and the Government of Punjab.

2.7 UNRESOLVED ISSUE OF OWNERSHIP OF FEDERALIZED ROADS

The Hon'able court set aside the letter through which cancellation of mutation was ordered but at the same time the issue of impugned cancellation of mutations was left on the mercy of District officers (Revenue) in Punjab who were to decide it afresh after hearing the parties.

N-5 is passing through almost each big district of Punjab. NHA has to appear before each District officer (Revenue) in Punjab in whose Jurisdiction N-5 is passing. All the cases were pursued through regional Legal Bureau offices of NHA as well as at Head Quarters. In this exercise, Assistant Director (Legal) NHA HQ alongwith NHA's counsel appeared before the District Officer (Revenue)/Collector District Jhelum and argued the case for attestation of mutations in favour of NHA.

DOR Jhelum passed an order wherein attestation of mutation was refused. It was observed in the Judgment that NHA has been given Right of Way and not its ownership. Its ownership lies with the Government of Punjab and Senior Member Board of Revenue, Punjab is its custodian. District officer (Revenue) is its custodian as representative on district level. To get ownership transferred, Board of revenue should have been approached. There are no instructions regarding transfer of ownership of land in favour of NHA from the Board of Revenue. In the absence of instructions from Board of Revenue, District collector has no authority to transfer the ownership at its own.

District Officer Revenue Jhelum decided that the Government of Punjab which is the owner party does not intend to sanction mutations in favour of NHA. District officer Revenue has no authority at its own to sanction mutations in the absence of willingness

of either party. NHA is directed to approach the Government of Punjab through Senior Member Board of Revenue, Punjab.³⁷

An appeal under section 161 of the land Revenue Act, 1967 was preferred before the Executive District Officer (Revenue), Jhelum. The appeal was disposed of with the direction to move the Board of Revenue Punjab for the purpose. The court held that the land situated in Jhelum forming GT road, presently known as N-5, is in the ownership of Provincial Government in the revenue record. NHA has obtained only control of road on the spot whereas mutation of land can only be effected in favour of NHA if the Government of Punjab permits for the same. Therefore, NHA was directed to move the Board of Revenue, Punjab for effecting mutation in its favour.³⁸

National Highway Authority also approached the court of District Officer (Revenue)/ District Collector, Gujrat for attestation of mutation in favour of NHA. But the decision of DOR was not different as discussed above. It was decided that the entries passed in revenue record regarding the Provincial Government in the column of ownership and National Highway Authority in the column of cultivation are fairly right. The question of leasing of Right of Way required interpretation of a Federal Statute and a policy decision between Provincial Government and a Federal Authority, therefore, it was referred to the Board of Revenue, Punjab Lahore to take up the matter at proper forum.³⁹

³⁷National Highway Authority Vs Revenue department, Review No. 51/2008 (Abstract of Judgment dated 8.5.2008 by Muhammad Akram Bhatti DOR, Jhelum).

³⁸Muhammad Shafique Butt Vs DOR Jhelum etc (order dated 22-07-2008 by Muhammad Azam Awan EDOR, Jhelum).

³⁹National Highway Authority Vs. The Secretary, BOR, etc. (order dated 19.12.2008 by Khawar Kamal, DOR, Gujrat).

The above order of the Revenue court also placed hinderance before NHA to implement its policies regarding lease of Right of Way. NHA was unable to pass on possession of leased out sites at Kharian and lessees were unable to construct as per lease agreement with NHA.

National Highway authority challenged the above said order of DOR Kharian before EDOR, Gujrat. EDOR upheld the decision of DOR Kharian and decided that Provincial Government has not transferred the right of ownership of land to National Highway Authority. Only possession of land for maintenance has been transferred to NHA.⁴⁰ Similarly District Officer (Revenue) Bahawalpur also decided that the ownership of land will remain with the Provincial Government and the mutations already sanctioned in favour of NHA in column of ownership were reviewed.⁴¹

The above decisions confirmed it that all the DORs or EDORs are not going against the directions of the BOR issued in letter dated 10 January 2005 whereby it was directed to cancel the mutation in favour of NHA. Therefore, NHA was unable to act in accordance with the provisions of NHA Act, 1991 as amended in 2001 to lease out ROW.

Almost same situation/order is expected from other District officers (Revenue) in Punjab and issue of mutation in favour of NHA regarding ownership of federalized roads shall remain unresolved.

⁴⁰National Highway Authority through its Chairman Vs. The Secretary, BOR, Punjab, Lahore etc. (order dated 22 April 2009 by Sardar Muhammad Akram Javed, EDOR, Gujrat).

⁴¹National Highway Authority through its Chairman Vs. The State (order dated 18 March 2008 by Dr. Faisal Zahoor, DOR, Bahawalpur).

The other provinces of Pakistan also seem reluctant to transfer ownership of ROW in favour of NHA. Secretary Communications, Government of Pakistan, Ministry of Communications issued a letter to all Chief Secretaries of Provinces wherein it was requested to direct their Boards of Revenues to effect the mutation of the federalized roads in the name of National Highway Authority enabling it to provide proper public service and satisfy the imperatives of road safety.⁴² General Manager (Sindh) also requests on 12 March, 2005 to Chief Secretary, Government of Sindh, Karachi to issue necessary instructions to the concerned quarters for transfer of Right of Way in the name of NHA but to no avail.⁴³ Project Manager (M-9), NHA on 26 February, 2007 writes, with reference to above said letter, to Senior Member Board of Revenue, Government of Sindh for demarcation of Right of Way of road (M-9) so that it may be fenced and mutation can be effected in favour of NHA.⁴⁴

The outcome of all these efforts seems nothing and NHA is facing problems while implementing its policies under NHA Act, 1991 as amended in 2001 to lease out the Right of Way. The agreements, which were already executed between NHA and private parties, also remained undecided and non functional. The DCOs did not issue final NOCs to the lessees for the construction as per lease agreement with NHA. This situation may further lead to litigation between NHA and private parties who entered into lease agreements for construction of CNG/ petrol pumps, khokhas shops, hotels/ motels etc.

⁴²Secretary Ministry of Communications letter No.13(1)/88-Roads dated 04-12-2001.

⁴³General Manager (Sindh) letter NO.NHA/GM(S)/IS&LM/2005/148 dated 12th March, 2005.

⁴⁴Project Director (M-9) NHA letter No.NHA/PD/M-9/2007/013 dated 26-02-2007 addressed to Senior Memebr, Board of Revenue, Karachi.

2.8 LEGISLATIVE POWERS AND ADMINISTRATIVE RELATIONS BETWEEN FEDERATION AND PROVINCES

NHA Act 1991 as amended in 2001 empowers NHA to take over ROW of the roads declared as National Highways with the consent of provinces and approval of the Federal Cabinet and the provinces shall simultaneously effect the mutation free of cost and without any liability or condition.⁴⁵ Provincial authorities are not ready to transfer ownership of ROW in favour of NHA which is causing problems in the proper functioning of the authority. In order to understand the Legislative powers and administrative relations between Federation and Provinces, we consult the Constitution of Islamic Republic of Pakistan, 1973. There are relevant Articles in Part V of the Constitution which renders guidance in this regard. Majlis-e-Shoora (Parliament) has been given the Constitutional power to make laws including laws having extra-territorial operation for the whole or any part of Pakistan subject to the Constitution.⁴⁶ Parliament is exclusively empowered Constitutionally to make laws with respect to any matter in the Federal Legislative to the Constitution.⁴⁷ In entry 34 of Federal Legislative List, Federal Government may make laws relating to National Highways and strategic roads.⁴⁸

The Article 141, 142(a) and entry 34 of Federal legislative list makes it clear that Federal Government is fully empowered by the Constitution of Pakistan to make laws

⁴⁵Section 10(2)(xv) of NHA Act, 1991 as amended in 2001.

⁴⁶Article 141, the Constitution of Islamic Republic of Pakistan, 1973.

⁴⁷Ibid., Article 142 (a).

⁴⁸Ibid., Fourth Schedule, Part I.

like National Highway Authority Act, 1991 as amended in 2001. Any provision enacted in National Highway Authority Act, 1991 as amended in 2001 is binding upon the Provinces of Pakistan. If there is any provision repugnant to any provision of a Provincial Assembly, the existing law shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void. It is immaterial whether the Act of Majlis-e-Shoora (Parliament) was passed before or after the Act of the Provincial Assembly.⁴⁹ Therefore, National Highway Authority Act, 1991 as amended in 2001 prevails over any Act of the Provincial Assembly.

The Constitution of Pakistan makes it binding upon the Provincial Government to exercise its Executive Authority in such a manner to secure compliance with Federal laws which apply in that Province.⁵⁰ The decision of Government of Punjab for cancellation of mutations already effected in favour of NHA is against the spirit of NHA Act, 1991 as amended in 2001 as well as Article 148 (1) of the Constitution. Similarly, other Provinces of Pakistan should effect mutation in favour of NHA in compliance of the Act.

The failure on the part of Executive Authority of any Province may lead to the giving of such directions to that Province as may appear to the Federal Government to be necessary for that purpose.⁵¹ Not only this but also Federal Government may give directions to any Province as to the Construction and maintenance of means of communication declared in the direction to be of national or strategic importance.⁵² The

⁴⁹Article 143, the Constitution of Islamic Republic of Pakistan, 1973.

⁵⁰Ibid., Article 148(1).

⁵¹Ibid., Article 149(1).

⁵²Ibid., Article 149(3).

Executive Authority of the Federation is empowered by the Constitution of Pakistan to direct the all Provinces to act in accordance with the Provisions of NHA Act, 1991 as amended in 2001 and effect mutation in favour of NHA so that National Highways and strategic roads entrusted to NHA may be constructed and maintained, inter alia by generating funds through leasing of ROW as envisaged in the Act.

The conduct of business of Provincial Government has been made clear in the Constitution of Pakistan. The Constitution says that any executive action taken by the Provincial Government shall be expressed to be taken in the name of the Governor.⁵³ The Provincial Government may exercise executive authority in the name of Governor through Secretary.⁵⁴ It has been held by superior courts that all executive actions of Provincial Government would be expressed to be taken in the name of the Governor and would be deemed to be valid and it will not be suffering from any Jurisdictional defect.⁵⁵ Therefore, Federal Government may direct to Governors or Chief Ministers of Provinces to follow the Provisions of NHA Act and mutation in favour of NHA may be ensured in the column of ownership so that NHA may perform functions in letter and spirit in the light of NHA Act.

Rule 11 of the Punjab Government Rules of Business deals with the method of authentication of orders, instruments, agreements and contracts. Rule 11(2) provides that save in cases where an officer has been specifically empowered to sign an order or

⁵³Ibid., Article 139 (1).

⁵⁴PLD 1979 Lah. 15.

⁵⁵1992 MLD 654 (e); 1986 CLC 54; PLD 1960 Kar.

instrument of the Government, every order or instrument shall be signed by, inter alia, the Deputy Secretary in the Department concerned, and such signature shall be deemed to be proper authentication of such order or instrument.⁵⁶

In the Punjab, the formal decision to transfer ROW, free of cost and without encumbrance, was communicated by the Communication & Works Department of the Government of Punjab, to Chairman NHA through letter No. SoH-46 (C & W) 11-4/2000 (RWP) dated 30 January 2002 duly signed by Mr. Abrar Sultan, Deputy Secretary (Highways). The copies of that letter were sent to Senior Member Board of Revenue Punjab, Secretary, Government of the Punjab, Law and Parliamentary Affairs Department and Deputy Secretary General/Staff Officer to Chief Secretary Punjab and Section Officer (Roads), Government of Pakistan, Ministry of Communications, Islamabad.

The second point of Section 10 (2) (XV) of the NHA Act 1991 as amended in 2001 is the approval of the Federal Cabinet which was granted on 3 October 2001 by it.

The above discussion makes it clear that Federal Government is empowered by the Constitution of Pakistan to enact NHA Act, 1991 as amended in 2001 and the Provincial Governments are bound by the Constitution to exercise their Executive Authority to secure compliance with Federal law i.e. NHA Act, 1991 as amended in 2001. The substantive and procedural formalities were complied with to transfer Right of Way from the provincial Government to NHA. The cancellation of mutation by the Government of Punjab and non attestation of mutation by other Provinces is against the provisions of the Constitution and National Highway Authority Act 1991 as amended in 2001.

⁵⁶The Punjab Government Rules of Business, 1974.

2.9 LAW PRECEDENTS

The authorities set in by the superior courts while interpreting Articles of the Constitution of Pakistan wherein powers regarding legislation of Federal Government and the Provincial Governments have been given are hereby discussed to understand the provisions of the Constitution of Pakistan, 1973.

A Full Bench of the Lahore High Court has made a detailed discussion on Article 143 of the Constitution (PLD 1995 Lahore 56) in the light of judgments of superior Courts of India and Pakistan. It has been held that Article 143 is attracted only if the Provincial Law is repugnant to the law of Majlis-e-Shoora (Parliament) which means that the two can not stand together. Thus, by virtue of Article 143, Central Law is to prevail.⁵⁷

Further, in a case the Supreme Court held that the Provincial Law may be repugnant either there is a direct conflict between the two provisions or though there may not be any direct conflict between the two statutes, but it is evident that the parliament intended its legislation to be a complete and exhaustive code relating to subject. In such a case it shall be taken that Central law has replaced the Provincial Law relating to the said matter.⁵⁸

The Indian superior courts have held up to the extent that even where a Central Act is not exhaustive, repugnancy may arise if it occupies the same field as a Provincial Act.⁵⁹

⁵⁷Zaver Bhatti v. State of Bombay, AIR 1954 SC 752.

⁵⁸State of Asain V. Harizon Union, AIR 1967 SC 442.

⁵⁹Tika Ramji v. State of Uttar Pradesh, AIR 1957 SC 676, Deep Chand v. UP, AIR 1959 SC 648.

The superior courts in Pakistan, while interpreting Article 143 of the Constitution of Pakistan, have also held that under Article 143 of the Constitution, if any provision of an Act of the Provincial Assembly is in conflict with any provision of a Federal Law, then the Federal Law shall prevail and the Provincial Law shall, to the extent of repugnancy or conflict, be void.⁶⁰

The Supreme court of Pakistan in a case even held that the existing legislation by the Provincial Assembly which is inconsistent with Federal Laws will be void. The Judgment observes that the Act of Majhlis-e-Shoora (Parliament), shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void. It is immaterial that the Act of Parliament was passed before or after the Act of the Provincial Assembly.⁶¹ It has been held by the Superior courts that Parliament has the exclusive power to make laws with respect to any matter in the Federal list which has been given in fourth schedule of the Constitution.⁶² Entry 34 in fourth schedule of legislative list reads National Highways and strategic roads for Federal Government.

It has also been observed by the Superior courts that Article 143 of the Constitution envisages that in the event of provision of a statute being repugnant to Federal Statute, provision contained in the latter would prevail and provision of Provincial State to the extent of repugnancy would be void.⁶³ The superior courts have also held that where any provision of Provincial statute was in conflict with any provision

⁶⁰Kashif Nadeem alias Pappi v. The State, 1992 P.Cr.L.J. 1799.

⁶¹Shams Textile Mills V. Province of Punjab, 1999 SCMR 1477.

⁶²PLD 1992 Lah. 462 (o) and 2003 SCMR 162.

⁶³1995 CLC 1409; 1990 SCMR 1524.

of Federal statute, then Federal Law would prevail and Provincial Law, would to the extent of repugnancy or conflict, be void.⁶⁴

Under Article 149 of the Constitution, Supreme court of Pakistan enshrined the Executive Authority of the Federal Government and held that the Article 149 of the Constitution empowers the Federal Government to give directions to the Provincial Governments. So as to protect & advance its own Executive Authority in discharging its responsibilities under the Constitution and the Laws. Thereby Federal Government obliges the provincial Government to comply with such directions.⁶⁵

The Supreme Court of Pakistan has also held that the Provisions of Articles 148 and 149 of the Constitution of Pakistan regulate relationship between the Federation and a Province. If a Federal law is applicable in a Province and a situation has arisen in which it is to be considered as to how the Federal law is to be made applicable to bring about the desired result and be effective so that proper remedial measures are adopted to contain and control the situation. Federal Government has to adopt supervisory role and give directions to the Province in which the Federal law is being applied.⁶⁶

The Executive Authority of the Province would be exerciseable subject to the Constitution.⁶⁷ The Hon'able High court of Sindh has held that the Executive Authority of Province vests in the Provincial Governor. The Governor may exercise that authority himself or through other functionaries under the Constitution of Pakistan. Rules of

⁶⁴PLD 1995 Lah. 56(a); 1987 CLC 1503; PLD 1986 Quetta 181; PLD 1991 Sc 824.

⁶⁵Iftikhar Hussain Shah Vs FoP through Secretary, Ministry of Defense, Rawalpindi, 1991 SCMR 2193.

⁶⁶Mohtarma Benazir Bhutto and another vs President of Pakistan and others, 1998 PLD 388.

⁶⁷PLD 1966 SC 1; PLD 1964 SC 21; PLD 1971 SC 811

Business framed under Article 139 (2) of the Constitution allow Chief Minister and other Ministers of his cabinet to exercise Executive Authority as delegatee of the Provincial Governor.⁶⁸

Article 129 of the Constitution of Pakistan vests Executive Authority of Province in Governor. This Executive Authority is either directly exercised by Governor or through his subordinates. Chief Minister or his cabinet exercise this authority to aid the Governor in exercise of his functions.⁶⁹

The above discussed citations make it clear that the Executive Authority may be exercised directly by Governors or his subordinate Chief Ministers or other Ministers of their cabinet who aid in the performance of functions in the Provinces. However, Central law prevails and Executive Authority by the Provinces should be exercised in compliance of Federal Laws. Federal Government may give directions to the Provincial Governments in this regard. If there is any contrary decision by any province, Federal Government should play supervisory role to control the situation. Therefore, in the case of NHA, Federal Government may direct to Provincial Governments of Pakistan to effect mutations in favour of NHA in the true sense of NHA Act, 1991 as amended in 2001.

⁶⁸Abdul Haq Vs Province of Sindh, 2000 PLD 224.

⁶⁹Malik Habibullah Vs Province of the Punjab through Secretary Mines and Mineral department, Lahore, 2006 CLC 1723.

2.10 CONCLUSION

National Highway Authority Act, 1991 as amended in 2001 empowers NHA to take over ROW of roads declared as National Highway. Federal Cabinet granted approval to Federalize the Provincial road assets vide decision dated 3 October, 2001. Federal Cabinet decision was communicated to Provincial Governments. The Government of Punjab issued notification on 30-01-2002 wherein endorsed the decision of the government of Punjab to transfer the ROW to NHA through mutation in the name of National Highway Authority free of cost and without encumbrance as laid down in the NHA Act, 1991 as amended in 2001.

The process for effecting the mutation in favour of National Highway Authority was under process, the Board of Revenue, Punjab without assigning any reason and giving any opportunity of hearing stopped the mutation. Not only this but also directed all the District Officers Revenue concerned in Punjab to cancel the mutation which were effected in favour of NHA. National Highway Authority approached the High Court and challenged the action of Government of Punjab. The Court set aside the letter whereby DORs were directed to cancel the mutations already effected in favour of NHA. However, the decision of the Court whereby matter of cancellation of mutations were left for the decision of DORs pulled NHA towards un-ended litigation. The lessees who executed lease agreements with NHA also sued against NHA on different forums for transfer of possession to start construction as per lease agreements. This situation badly effected the process of Commercialization of land along the federalized roads in Pakistan.

The other Provinces are also reluctant to effect mutation in favour of NHA. The executive Body of provinces is under obligation to exercise and secure the compliance of

Federal Laws and the direction of the Federal Government is binding on the Provincial Government. Not only this but also under section 33 of National Highway Authority Act, 1991 as amended in 2001 Federal Government may make such order as may appear to be necessary to remove the difficulty which arises in giving effect to any of the provisions of the Act. Therefore, Federal Government may give directions to the Provincial Governments to effect mutation of ownership in favour of NHA to implement the provisions of NHA Act, 1991 as amended in 2001.

CHAPTER III

STATUS OF CONTRACTING PARTIES

3.1 INTRODUCTION

National Highway Authority was established in 1991 but the provincial C&W departments continued collection of tolls on bridges, carriageways and collection of lease rentals/ approach charges from petrol pumps etc upto 30 July, 1999. National Highway Authority Act authorizes NHA to levy, collect or cause to be collected tolls on National Highways, strategic roads and from all other roads entrusted to it and bridges thereon. Therefore, Federal Government on 20 July, 1999 directed the provincial Governments to transfer the rights of toll collection to NHA under section 10(2) (vii) of NHA Act, 1991.

The Government of Punjab agreed on 19 January, 2002 to transfer the Right of Way of National Highways to NHA with all rights and privileges as were being exercised by C&W department of Government of Punjab. Mutation of Right of Way was effected accordingly in favour of NHA and it was expected that other provinces of Pakistan shall also follow the same principle. NHA Executive Board in its 92nd meeting held on 15 March, 2000 approved the policy guidelines to run the affairs of toll collection on federalized roads as well as commercial use of ROW. 104th meeting of NHA Executive Board was held on 29 May, 2002 wherein National Highways and Strategic Roads Control Rules, 1998 as amended in 2002 and SOPs for preservation and commercial use of Right of Way were approved.

Section 10(2) (xiii) of NHA Act, 1991 as amended in 2002 and thereupon rules and SOPs empowers NHA to raise funds through leasing of ROW. Therefore, NHA executed lease agreements with private parties/ persons but the Punjab Government cancelled mutation which was previously attested in favour of NHA. The other provinces also remained reluctant to attest mutation in favour of NHA. In the situation, NHA failed to put the lessees in possession of leased out land and lessees stopped the payment of ground rentals/ charges to NHA.

In this chapter rights and obligations and legal status of contracting parties has been discussed in detail. It has been tried to explore the legal stand of contracting parties.

3.2 RIGHTS AND OBLIGATIONS OF CONTRACTING PARTIES

NHA entered into approximately 213 lease agreements with private parties for establishment of CNG/ Petrol pumps, hotels/ restaurants, khokhas/ shops etc. along the federalized roads in Pakistan within ROW. Most of the lease agreements are valid for a period of three hundred and sixty (360) months.¹ The governing laws for lease agreements are NHA Act 1991, National Highways and Strategic Road Control rules 1998 as amended in 2002 and regulatory Framework and Standard Operating Procedures for preservation and Commercial use of Right of Way (ROW).² Conditions of lease agreement do not mention explicitly obligation of NHA i.e. lessor, except to state legal capacity of NHA to lease out land on National Highways, Motorways and strategic roads or any other road assigned to it.³ It is obligatory on NHA not to disclose information relating to the affairs and business of the lessee and all information shall be kept confidential.⁴ Furthermore, NHA has been given right to terminate the lease agreement and recover loses if any bribery or collusion is proved through concrete evidence in relation to obtaining or in the execution of the agreement.⁵ NHA has been given right to terminate lease agreement if any deviation occurs from the conditions laid down in the agreement.⁶ Furthermore, NHA is entitled to terminate the agreement at any time for his

¹ Clause 4.17, Conditions of lease agreement executed between NHA and Private Parties.

² Ibid., Clause 4.15.

³ Ibid., Clause 5.

⁴ Ibid., Confidentiality clause 4.24.

⁵ Ibid., Clause 5.

⁶ Ibid., Deviation clause 4.12.

own convenience but for the purpose of planned utilization of the leased land by the authority.⁷ Authorized officer of NHA has been given right to inspect the lessee's project from time to time to ensure fair services to the road users and fulfillment of terms and conditions of agreement.⁸ Default of NHA has been restricted to non performance of the lessor (NHA) under the terms of the agreement.⁹

On the other hand, lessee has been burdened with number of obligations to be fulfilled to the satisfaction of the lessor or his representative(s). The lessee is bound to fulfill his financial as well as operational obligations under the conditions of lease agreement. The Primary financial obligation of the lessee is to pay various rentals and fees including ground rental charges, NOC/registration fee, access passage rent, security deposit in an amount equivalent to 50% of one year ground rental charges and Bank guarantee amounting to Rs. 250,000/- as an earnest money of the lessee to construct the cut off drain and other road user facilities such as drinking water, tyre shops, ladies and gents toilets, fire fighting equipment and reverse slope of approach roads.¹⁰

All the operational obligations lie on the lessee such as obtaining non objection certificates from all concerned departments before the commencement of commercial operation on leased out land, construction and maintenance of access/ approach road and tax liabilities.¹¹ All other specific obligations have been mentioned under the heading

⁷Termination clause 4.10, Conditions of lease agreement executed between NHA and Private Parties.

⁸Ibid., Authorization clause 4.13.

⁹Ibid., Default of the lessor clause 10.

¹⁰ Ibid., Clauses 4.2, 4.3 & 4.4.

¹¹ Ibid., Clauses 4.6, 4.8 & 4.21.

“Obligations of the lessee” whereunder lessee is required to maintain discipline, avoid illegal business, observe labour laws of Pakistan, payment of utility charges and maintenance of site¹². Default of lessee has been restricted to non performance and non fulfillment of any or all obligations of the lessee under the terms of the agreement.¹³

The relationship between a lessor and a lessee is contractual. The conditions of agreement create certain rights and obligations inter parties. However, contractual relationship also creates statutory rights and obligations between the parties. The provisions of the Transfer of Property Act, 1882 are statutory obligations which the parties must fulfill. The Transfer of Property Act, 1882 sets out a list of rights and obligations placed upon the lessor and lessee.¹⁴ The lessor has been made bound to put lessee in possession of the property.¹⁵

The Hon’able High court has held that the onus of proving that the lessee was put in possession would be initially on the lessor so as to entitle him to make a claim for rent. If lessor fails to discharge his liability to put lessee in possession of the property, he would not be entitled to make any demand for payment of lease money; otherwise there would be no consideration for the payment of rent.¹⁶

It has been reported that the essential features of lease is transfer of interest to enjoy property with exclusive possession given to the transferee of the property and

¹² Clause 6, Conditions of lease agreement executed between NHA and Private Parties

¹³ Ibid., Default of the lessee, clause 11.

¹⁴ Section 108, the Transfer of Property Act 1882.

¹⁵ Ibid., Section 108(b).

¹⁶ PLD 1959 Kar. 777.

conveyed in consideration of the price paid or promised.¹⁷ If the lessor fails to discharge his statutory obligations and does not hand over possession of the property, he is not entitled to claim rent from the lessee. In case of breach of an agreement for lease the tenant is entitled to claim damages from the landlord.¹⁸ The lessee is entitled to enjoy the properties leased out without interruption and there is an implied covenant that the lessor's title is such that no entry, eviction or interruption will occur.¹⁹ A lease is a transfer of a right to enjoy leased out property for a certain time in consideration of a price paid or promised.²⁰ The lessee acquires statutory right to exclusively enjoy the property in consideration of a price paid or promised. Ownership of physical property consisted of a number of rights and the owner of such property when created a lease, would transfer to the lessee a part of the right of ownership i.e. the right of enjoyment of property for a certain period for consideration.²¹ Any agreement made between the parties without consideration is void.²²

3.3 UNSECURED RIGHTS OF CONTRACTING PARTIES

Conditions of lease agreement executed between NHA and private parties place most of the obligations on private parties. NHA has been given least obligation in the conditions of lease agreement. However, the Transfer of Property Act, 1882 places obligations on

¹⁷ 2005 CLC Karachi 1982 (c).

¹⁸ PLD 1960 Kar. 433.

¹⁹ PLD 1960 Kar. 616.

²⁰ Section 105, the Transfer of Property Act, 1882.

²¹ 2004 CLC 1276(b).

²² Section 25, the Contract Act, 1872.

NHA which are statutory and it must be fulfilled.²³ The lessor i.e. NHA must put the lessee i.e. private party in possession of the leased out land.²⁴ NHA is legally bound to ensure that the lessee holds the property during the time limited by the lease without interruption.²⁵

It has already been discussed in previous chapter that the provinces have either not effected mutation in favour of NHA or it has been cancelled after giving effect to it. This situation has placed National Highway Authority where it fails to fulfill its statutory obligations to provide possession of land without interruption to the lessees.

On the other hand, lessees have been tightened through conditions of lease agreement to fulfill their obligations. These obligations are financial as well as operational. The provincial authorities are not issuing NOCs for construction of CNG/Petrol pumps, hotels/ motels etc. District Coordinator Officers (DCOs) are refusing issuance of NOC except to 56 lessees who have obtained NOCs well before cancellation of mutation against NHA. The private parties have deposited NOC/registration fee and rental charges in RMA account of NHA while executing lease agreement with it but they have not been provided possession of leased out sites. Most of the lessees have stopped payment to NHA as DCOs are not issuing NOC and NHA has failed to fulfill its statutory obligation due to dispute between NHA and Provincial authorities.

The above discussion makes it clear that the right of NHA to gain rental charges of leased out land has been made unsecured due to non-effecting of mutation in favour of

²³ Section 108, the Transfer of Property Act, 1882.

²⁴ Ibid., Section 108 (A)(b).

²⁵ Ibid., Section 108 (A)(c).

NHA. On the other hand, right of lessees to take possession of land without interruption has been infringed.

3.4 LEGAL STATUS OF CONTRACTING PARTIES

The contract Act, 1872 lays down essential elements of a contract. These include free consent of parties, competent to contract, there must be lawful consideration and object of the agreement²⁶. Every person can make contract who has attained majority except a person who is of unsound mind or disqualified to enter into a contract by any law enforceable in Pakistan.²⁷ Every person who is entitled to transferable property and competent to contract can transfer such property as per enforceable law in Pakistan.²⁸ It is an established principle of law that a person can not transfer a better title/ right than he has in the property. It has been held by Hon'able Peshawar High Court that one could not transfer a better title/ right than he had in the Property.²⁹

The above discussion establishes that one can enter into a contract subject to legal competency for entering into a contract and having legal title for property required to be transferred. It is, therefore, necessary to determine these elements to conclude legal status of contracting parties i.e. NHA and lessees who entered into lease agreement.

National Highway Authority was established under the National Highway Authority Act, XI of 1991 as amended in 2001 with a mandate for planning, operation,

²⁶ Section 10, the Contract Act, 1872.

²⁷ Ibid., Section 11.

²⁸ Section 7, the Transfer of Property Act, 1882.

²⁹ Talat Qayum Qureshi, J, 2001 CLC 1021(c).

Development and maintenance of National Highways and strategic roads especially entrusted to it.³⁰ National Highway Authority is a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property.³¹ The administrative affairs of the authority vests in the Executive Board headed by Chairman with designation of Chief Executive.³² The Authority can take measures and exercise power which is necessary for carrying out the purposes of National High Authority Act, 1991 as amended in 2001.³³ National High Authority Act, 1991 not only confers general powers for the purpose of carrying out the purposes of the Act but also gives special powers like entering into and performing all such contracts as it may consider necessary³⁴, collection of tolls on National Highways, strategic roads and from other roads entrusted to it³⁵, issuance of license facilities on roads under its control³⁶, raising of funds through borrowing, floating of bonds, sharing or leasing of assets or by any other means³⁷. The Act specifically mentions the power of the Authority to take over ROW of the roads which are declared as National Highways subject to consent of provinces and approval of the Federal Cabinet. Thereafter, provinces are bound to simultaneously effect

³⁰ Section 4 of National Highway Authority Act 1991 as amended in 2001.

³¹ Ibid., Section 3(2).

³² Ibid., Section 7&9.

³³ Ibid., Section 10(1).

³⁴ Ibid., Section 10(2)(vi).

³⁵ Ibid., Section 10(2)(vii).

³⁶ Ibid., Section 10(2)(viii).

³⁷ Ibid., Section 10(2)(xiii).

the mutations free of cost and without any liability or condition.³⁸

The above discussion depicts that NHA is a corporate body which can enter into agreements with private parties and lease agreements have been validly executed for the purpose of carrying out the purposes of National Highway Authority Act, 1991 as amended in 2001. NHA appears to derive its title to the leased out property from section 10(2) (xv) of the National Highway Authority Act, 1991 as amended in 2001. National Highway Authority has taken over ROW with the consent of provinces and approval of the Federal Cabinet but the provinces are not effecting mutation simultaneously as required by the Act.

It has been held by the Supreme court of Pakistan that the record of rights maintained under section 39 of the West Pakistan Land Revenue Act, 1967 is maintained for fiscal purposes only. It does not decide questions of title with any finality nor confer right of ownership to the property.³⁹ However, it will be impossible for NHA to legally pass on the right of exclusive possession of the leased out property to the lessees unless mutation is effected in favour of NHA which will reflect the title of NHA to the leased out property.

In a situation where NHA fails to pass on exclusive possession of the leased out property, the Contract Act, 1872 becomes operative. Where parties enter into agreement for doing an act which is impossible or it becomes afterward impossible or unlawful that

³⁸ Section 10(2)(xv) of National Highway Authority Act 1991 as amended in 2001.

³⁹ Muhammad Munir Vs Muhammad Saleem, 2004 SCMR 1530 and Muhammad Baksh Vs Zia Ullah, 1983 SCMR 988.

agreement is void and the promiser must make compensation to the promise.⁴⁰ However, superior courts of Pakistan has held that section 56 of the contract Act, 1872 is applicable to lease agreements where the property in question has been destroyed or title whereof has been lost by the lessor through operation of law or otherwise.⁴¹ In the present case, where the provincial authorities are not acting in accordance with the NHA Act, 1991 as amended in 2001 and not effecting mutation in favour of NHA, the situation is different and it does not amount to the loss of title of leased out land by NHA.

What has been discussed above, clearly disclose that NHA and private parties validly entered into lease agreement but the provincial authorities are creating hurdles to pass on passion by NHA.

3.5 TERMINATION OF LEASE AGREEMENTS AND LEGAL IMPLICATIONS

Commercialization of ROW has undergone a protracted litigation on various issues on different occasions. Ministry of Communications vide order dated 24th June, 2004 cancelled the already executed lease agreements between NHA and private parties/ persons for establishment of CNG stations/ petrol pumps, restaurants, khokhas, shops and nurseries etc. without assigning any lawful reason for the decision. Lessees filed writ petitions in Lahore High court wherein it was claimed that cancellation order by the Ministry of Communications was bad at law. The parties asserted that NHA was an autonomous authority controlled and administered by a law wherein Ministry of

⁴⁰ Section 56, the Contract Act, 1872.

⁴¹ Haji Khudai Dad Vs. Ghulam Yaseen, 2004 CLC 1302 and Alhaj Qutubuddin Vs Abu Jafar, PLD 1963 Dacca 304.

Communications did not figure anywhere for an action like the one taken against lessees.⁴²

NHA counsel and Deputy Attorney General on behalf of Ministry of Communications opposed all writ petitions and argued that lessees had no vested right in the property which was owned by the Federal Government who had cancelled all leases without any exception through a decision related to policy matter.

The Hon'able High court allowed all writ petitions by striking down the action in dispute and observed in the judgment that general directions, administration, management and affairs of NHA rest in its Executive Board which functions under NHA Act XI of 1991. Control rules 1998 as amended upto date and the Board through 92nd meeting dated 15 March 2000 and 104th meeting dated 29 May 2002 empowered NHA to implement its policies of preservation/ commercial use of ROW regarding establishment of filling/ CNG stations, restaurants, hotels/motels etc. Ministry of Communications does not figure anywhere in the entire framework of the NHA Act, 1991 and the rules above referred to take action of cancellation/ rescission of acts done by NHA.⁴³

The Judgement of the Hon'able Lahore High court decided that Right of Way falls within the exclusive jurisdiction of NHA and it can be utilized by NHA for generation of funds in accordance with its laid down policy. However, process of commercialization of ROW was suffered and generation of funds was badly effected due

⁴² W.P. Nos 12693, 2078, 2705, 2725, 2853, 2941 of 2004 titled as Uzma Jawad Vs NHA, Muhammad Naeem Khan Vs NHA, Air Martial (R) Najeeb Akhtar Vs Chairman NHA, Muhammad Sharif Khan Vs. Federation of Pakistan, Muhammad Iftikhar Vs NHA, Muhammad Yousif Vs NHA, respectively.

⁴³ Messrs Fuel Auto Supply Company and 6 others vs. Federation of Pakistan , 2005MLD 1844.

to litigation but various mis-conceptions regarding statutory powers of NHA was made clear through the judgement of the Hon'able High court.

The process of commercialization of Right of Way continued till 2007 and more than 56 out of 213 private parties/ persons established CNG stations/ petrol pumps, hotels, restaurants, nurseries etc along the federalized roads of Pakistan. The other parties/persons were under the process of getting NOCs from different departments like cantonment Board, CDA, Sui Gas, WAPDA, Afforestation, NH&MP, explosive department & final NOC from concerned DCO for construction of CNG/petrol pumps, etc. while the Provincial Government of Punjab cancelled the mutation of ownership already sanctioned in favour of NHA. DCOs refused to issue final NOC to the private parties i.e. NHA lessees and they could not construct as per lease agreement. Parties stopped payments to NHA till the possession of leased out land.

The Minister for Communications recommended to the Speaker of the National Assembly that a committee may be constituted to review the leasing policy of NHA. The case was subsequently taken up by ECC where Prime Minister directed MOC to formulate a new leasing policy in consultation with NHA and till that time ECC froze the fresh leasing in September, 2006. Upon that Minister for Communications constituted a committee to examine the lease cases in the light of ECC decision NO. ECC-144/10/2006 dated 27.09.2006⁴⁴. The committee in the Ministry of Communications prepared a summary report for the Prime Minister before its submission to ECC wherein it was recommended that out of 213 lease cases, 157 cases where lease agreements were signed

⁴⁴ Section Officer (Roads) letter No.9(2)197-Roads dated 6 July, 2007.

between NHA and private parties, however, lessees did not deposit the dues/ securities may be terminated as per agreement.

On the basis of above said report/ summary General Manager (Operations) NHA issued termination notices to 80 out of 157 non operational lease cases and 7 out of 56 established facility cases on 2 February, 2008. The rest 77 lease agreements were pended to issue termination letters/ notices for some other time.

The provision of conditions of lease agreement gives right to NHA to forthwith terminate the lease agreement upon a default of payment of ground rent that persists for more than 90 days.⁴⁵ Therefore, the termination notices issued to 80 lessees by NHA without prior notice would be a valid exercise, provided it was justified by the failure of the lessee to pay rentals for a period exceeding 90 days.

NHA failed to put lessees in possession due to cancellation of mutation in Punjab and in other provinces due to non attestation of mutations in favour of NHA. It is statutory obligation of NHA to put lessees in possession of leased out land.⁴⁶

In this situation private parties may sue against NHA. NHA would have to compensate the lessees for any loss which they sustained through the non performance of the promise.⁴⁷ On the other hand NHA would be bound to restore such part of the total lease consideration received from the lessees that does not match the consideration actually shown to them by NHA under the lease agreement.⁴⁸

⁴⁵Clause 4.10.2 (b) of the Conditions of lease agreement executed between NHA and private parties.

⁴⁶Section 108(b), the Transfer of Property Act, 1882.

⁴⁷Section 56, the Contract Act, 1872.

⁴⁸Section 65, the Contract Act, 1872.

One of the lessees of NHA filed a suit on 9 August 07 for declaration and injunction before the Hon'able Karachi High Court, Sindh. The leased out land was situated opposite Baqai University on North Carriageway of Super Highway (M-9). The court observed that there is a legal battle between Provincial Government, who claims to be the owner of the land, and National Highway Authority, who claims ownership under NHA Act 1991 as amended in 2001. The court held that the lessee has completed all the formalities for installation of CNG/Filling Station on the suit property, therefore he was allowed to construct and run the petrol pump at his own risk as to costs and consequences subject to final adjudication of suit. The matter of ownership of ROW was left for adjudication after recording evidence.⁴⁹

For what has been discussed above, it is clear that termination of lease agreements by NHA is not justified. It will once again lead to litigation and entail heavy cost to NHA. This exercise would unleash unlimited hazards in the way of commercialization of land along the federalized roads in Pakistan which would seriously damage the vital interests of the authority like revenue generation through commercialization of ROW and provision of facilities to the road users as well as it will create unrest among the investors.

⁴⁹Mushtaq Ali Jatoy Vs. Gul Muhammad alias Waryo and 5 others, 2008 CLC 829.

3.6 SHORTCOMINGS

NHA entered into lease agreements with private parties for the establishment of CNG/ petrol pumps, restaurants, hotels, motels, khokhas, shops etc. The conditions of lease agreement lies total obligations upon the lessees and NHA has been assigned least obligation. The lessee has been left on the mercy of other departments. The lessee has to obtain NOCs from Cantonment Board, CDA, Sui Gas Department, WAPDA afforestation, NH & MP, explosive department and finally from concerned DCO which is an hectic exercise for all lessees. There is no provision in the conditions of lease agreement which bound NHA to put lessees in possession of the leased out land. However, it is statutory obligation of NHA to ensure possession of leased out land to the lessees.

NHA entered into lease agreements with private parties in accordance with the provisions of NHA Act, 1991 as amended in 2001 and rules framed thereupon but interference of other agencies has badly deteriorated the process of commercialization of land along the federalized roads and goal of revenue generation has not been achieved so far. NHA should have not entered into lease agreements with private parties/ persons unless mutation has been effected in favour of NHA in all provinces of Pakistan. In the absence of clear title, lessees could not be put in possession of leased out land which might cause litigation against NHA. The case of attestation of mutation have not been properly pursued through Federal Government of Pakistan under section 33 of the National Highway Authority Act, 1991 as amended in 2001 wherein Federal Government may make such order as may appear to be necessary for the purpose of removing the difficulty. The parties/ persons who have established CNG /petrol pumps etc are reluctant

to pay rentals to NHA due to dispute between NHA and provincial authorities. In this way Right of Way has been left on the mercy of private parties/ persons which are getting benefit/ advantage without paying further rentals to NHA or provincial authorities which is loss to Government of Pakistan.

3.7 CONCLUSION

National Highway Authority validly entered into lease agreements with private parties/ persons. NHA has been given vast rights through conditions of lease agreement whereas lessees have to fulfill all financial as well as operational obligations. It is statutory obligation of NHA to put lessees in possession of leased out land without which lessees can not proceed further as per lease agreement.

The Hon'able courts have already decided that NHA is empowered to utilize ROW for the purpose of generating funds. Non attestation of mutation in favour of NHA amounts to violation of NHA Act, 1991 as amended in 2001. The process of commercialization of ROW has gone protracted litigation which has badly effected it and desired results have not been achieved. The Federal Government should have taken immediate action to resolve the difficulty but no such step has been taken which has placed contracting parties in a precarious situation.

Taking advantage of dispute between NHA and Provincial authorities, Public may occupy Right of Way for residential or commercial purposes. The encroachment along the road may cause fatal accidents as well as loss of property and lives. This practice may lead to failure of revenue generation which will ultimately appear a burden on the economy of Pakistan. The investors will become reluctant to participate in Government launched projects which will also badly effect the economy of Pakistan. Therefore, act of

the Provincial Governments for cancellation of mutation or non attestation of mutation in favour of NHA and decision of NHA through Ministry of Communications for termination of lease agreements is against the spirit of law and conditions of lease agreements.

In the circumstances, any litigation regarding lease cases may lead NHA to consumption of time and money. The adverse decisions, if any, would cause heavy monetary loss to NHA. The result would be decrease in revenue instead of generation of revenue as envisioned in the policy for commercialization of federalized roads and non provision of facilities to road users.

CHAPTER IV

FINDINGS AND SUGGESTIONS

4.1 INTRODUCTION

National Highway Authority started Commercialization of land along federalized roads in Pakistan in 2001. In this regard lease agreements were executed between NHA and private parties to construct CNG/petrol pumps, hotels/ motels, restaurants, shops, khokhas etc. The process of commercialization of federalized roads was underway and the Government of Punjab cancelled the mutations which were previously effected in favour of NHA. The other Provinces also showed reluctance to effect mutation in favour of NHA. This situation badly effected the process of commercialization of federalized roads. In the circumstances, NHA was unable to put in possession of leased out land to the lessees to construct as per lease agreements. The lessees stoped making payment of rental charges to NHA. NHA started cancellation of lease agreements on the basis of non payment of rental charges/ dues by the lessees. The lessees approached the High Court as well as other forums against NHA. NHA also filed a Writ Petition in the High court against the decision of the Government of Punjab. The court cancelled the letter wereby cancellation of mutation was directed to DORs but the decision of cancellation of mutation was left on the DORs concerned. The DORs were unable to go beyond the decision of the Government of Punjab and directions of the BOR. In the circumstances,

NHA could not implement its policies regarding commercialization of land along the federalized roads. The cancellation or non attestation of mutation placed NHA and its lessees in precarious situation.

In the instant research work, the effort has been made to analyze the legal status of lease agreements and effect of non mutation of federalized roads in Pakistan in favour of National Highway Authority. A comprehensive study of the process of commercialization of land has been made. The issue of cancellation of mutation or non attestation of mutation in favour of NHA has been discussed in the light of NHA Act 1991 as amended in 2001, the Constitution of Pakistan, 1973, law precedents, relevant rules and regulation. Legal status of NHA and private parties who concluded lease agreements has been explored by discussing relevant laws, rules and Standard Operating Procedures. All the issues have been highlighted, elaborated and finally concluded at the end of each chapter of the thesis.

Now at the end of research work, I submit my findings to finally conclude the issues and valuable suggestions are given to resolve the matter which has placed NHA and its lessees in precarious situation.

4.2 FINDINGS

National Highway Authority is a corporate body, established through National Highway Authority Act, 1991 as amended in 2001 which is a federal legislation enacted by Parliament of Pakistan. It is the custodian of more than thirty roads having 11,485 Km length throughout Pakistan. The requirement of funds for repairing and maintenance of National Highways and strategic roads always used to remain insufficient.

The survey conducted in the year 2005 on 10,188 Km long National Highways entrusted to NHA revealed that 43% of the roads had remaining service life from 0 to 1 year and the remaining roads were required timely maintenance and rehabilitation. The maintenance and rehabilitation can be done with the funds. In the absence of funds NHA can not provide reliable roads for smooth plying of traffic .

The roads are not only an asset but also important for the growth of national economy. Therefore, timely maintenance and rehabilitation is necessary for preservation of road assets. National Highway Authority has to preserve the road assets within limited resources. The scarcity of funds was major hinderance before the authority to implement its policies in the light of NHA Act, 1991 as amended in 2001.

National Highway Authority tried its level best to repair and maintain the National Highways and strategic roads within allocated funds and self generated revenue but it was too meager to meet the ever increasing expenses on maintenance of roads. In the circumstances, the one way before the Authority was to repair and maintain the roads within the allocated funds and left the remaining roads in bad condition. The other way was to generate revenue by mobilizing its own resources and improve the condition of National Highways and strategic roads. The authority resorted to second option and

adhered to its mission statement to secure delivery of efficient, reliable, safe and environment friendly National Highway network with the view to improve quality of life in Pakistan. Therefore, concept of self generation of funds through toll collection and commercialization of land along the federalized roads was implemented with the approval of NHA Executive Board.

National Highway Authority Act, 1991 as amended in 2001 empowers NHA to collect tolls on National Highways and strategic roads and raise funds through leasing of its assets. Therefore, policy guidelines for collection of tolls and commercial use of ROW were approved by NHA Executive Board. The National Highways & strategic roads (control) rules 1998 were amended in 2002 whereby NHA was allowed to lease out Government land for the erection of CNG/ petrol pumps, restaurants, shops/ khokhas, hotels/ motels etc. SOP for commercialization of land was also approved by NHA Executive Board. Therefore, NHA started commercialization of land along the federalized roads within the ambit of law, rules and regulations. Lease agreements were executed with private parties for erection of hotels/ motels, restaurants and installation of CNG/ petrol pumps etc along the federalized roads within ROW of federalized roads. Previously C&W Department of Government of Punjab was exercising this power and collecting rental charges from the lessees. Therefore, exercising of this power by NHA was logical and within the ambit of statutes.

Federal Cabinet of Pakistan accorded approval on 3 October 2001 to federalize the provincial roads as envisaged in section 10 (2) (xv) of NHA Act, 1991 as amended in 2001. Thereupon the Provincial Governments of Pakistan were requested to effect mutation of ROW in favour of NHA. Deputy Secretary C&W, Government of Punjab

conveyed the decision of Punjab Government to transfer the federalized roads in Punjab in favour of NHA. NHA was communicated to exercise all such rights and privileges which were exercised by C&W Department of Punjab without seeking prior approval of the Government of Punjab. The mutations were effected in favour of NHA accordingly. National Highway Authority entered into lease agreements with private parties in Pakistan for construction of CNG/ petrol pumps, restaurant, shops, hotels/ motels, hospitals etc. The lessees deposited rental charges/ dues in NHA RM account. It was statutory obligation of NHA to pass on possession of land to the lessees. There was nothing bad in the eye of law but the cancellation or non attestation of mutations stopped the lessees to proceed further as per lease agreement and NHA was prevented from further leasing.

All the process of attestation of mutation in favour of NHA and commercialization of land along the federalized was happening in accordance with law, rules and regulations. All of sudden Secretary (Revenue), BOR, Punjab, after lapse of two years, issued directions to all District Officers (Revenue) concerned in Punjab for cancellation of mutations of ownership already effected in favour of NHA and ownership of Provincial Government was restored accordingly. The other Provinces of Pakistan also showed reluctance to transfer the ownership of federalized roads in favour of NHA. This situation badly effected the process of commercialization of roads. The lease agreements executed between NHA and private parties remained in abeyance due to dispute between NHA and the Provincial Governments.

National Highway Authority requested the Secretary, MOC, Islamabad to took up matter with the Provincial Government to review the decision of cancellation of

mutations and effect mutation of ownership in favour of NHA. Further, NHA challenged this decision in the Lahore High court of Pakistan. The Hon'able court rightly set aside the letter through which decision of the Government of Punjab was communicated to DORs of Punjab for cancellation of mutation of ownership of ROW which was previously effected in favour of NHA. However, Hon'able court decided that the matter of cancellation of mutations will be decided by the District Officers (Revenue) concerned after hearing the parties. DORs are the representatives of BOR which can not decide against the decision and instructions of the BOR, Government of Punjab. This situation once again placed NHA in hot waters. Now NHA has to face litigation before all DORs concerned in whole of the Punjab as well as cases filed by lessees against NHA for transfer of possession of leased out land. NHA was forced to face un-ended litigation instead of working in accordance with the provisions of NHA Act, 1991 as amended in 2001.

The study of the Constitution of Pakistan, 1973 and Federal Legislative List clearly depicts that Federal Government is fully empowered to make laws and NHA Act, 1991 as amended in 2001 has been enacted within the ambit of the Constitution. The Constitution of Pakistan makes it binding upon the Provincial Governments to exercise their executive authority in such a manner to secure compliance with Federal laws which are applicable in the Provinces. The decision of the Government of Punjab for cancellation of mutations and reluctance of other Provinces for non attestation of mutations in favour of NHA is against the provisions of NHA Act, 1991 as amended in 2001 and the Article 148 (1) of the Constitution.

Under section 33 of National Highway Authority Act 1991 as amended in 2002, Federal Government of Pakistan may give directions to all provinces of Pakistan to effect mutations in favour of NHA to implement the provisions of NHA Act, 1991 as amended in 2001. The Executive Authority of the Federation is empowered by the Constitution of Pakistan to give such direction. Previously, the Provincial Governments were also reluctant to hand over Toll Plazas to NHA but upon the clear directions of Federal Government, the same was done. Similarly, Federal Government may give directions to the Provincial Governments to effect mutations of ownership in favour of NHA. The superior courts of Pakistan has also observed that the provisions of the Articles 148 and 149 of the Constitution of Pakistan regulate relationship between the Federation and a province. Where a situation arises as to how the Federal law is to be made applicable to bring about the desired result, Federal Government has to adopt supervisory role and give directions to the Provincial Government.

National Highway Authority may perform better and implement its policies in the light of NHA Act, 1991 as amended in 2001 as the mutation of ownership of ROW is effected in its favour. The cancellation of mutation or non attestation of mutation in favour of NHA is the major hinderance in the way of NHA to implement its policies for preservation and commercial use of ROW. Therefore, provincial authorities are poised against the rights of contracting parties who have concluded lease agreements for commercial use of land along federalized roads in Pakistan. This has badly effected the process of commercialization of land along the federalized roads and placed NHA and private parties in precarious situation.

4.3 SUGGESTIONS

After perusal of the Constitution of Pakistan, 1973, NHA Act, 1991 as amended in 2001, rules and regulations, and other relevant laws regarding commercialization of land and execution of lease agreements between NHA and private parties, I have concluded my findings. In order to get resolved the issue of cancellation of mutations or non attestation of mutations, the following suggestions are made:

1. The process of commercialization of land along the federalized roads may be stopped and no further lease agreements be executed with private parties till the decision of ownership of ROW or so authorized by the Provincial Governments.
2. The Governors or the Chief Ministers of each province may be approached to get resolved the issue of attestation of mutations in favour of NHA so that policies of NHA including commercialization of land along the federalized roads may be materialized.
3. Federal Government of Pakistan may be asked to give directions to the Governments of Provinces to cause effect mutations of ownership of ROW in favour of NHA as envisaged in NHA Act, 1991 as amended in 2001.
4. The lease agreements may be suspended with the mutual consent of the parties till the decision of ownership of ROW or approval of the provinces is obtained to materialize the operation of already executed lease agreements.
5. As far as lease agreements already executed between NHA and private parties are concerned, NHA may also consider these cases in the light of arbitration clause of the conditions of lease agreement.

6. To avoid legal complications and burden of payment of compensation to private parties, NHA may negotiate with the provincial Governments to the extent of already executed lease agreements and mechanism may be devised to resolve the issue.
7. NHA should take up matter with the Provincial Governments regarding collection of rental charges/dues from the lessees who have already established facilities along the federalized roads so that revenue loss may be avoided due to dispute between NHA and the Provincial authorities.
8. The Provincial Governments should also look into the matter in the large public interest and facilitate the investors who executed lease agreements with NHA for provision of facilities to road users as well as contributed in revenue generation.
9. The Provincial Governments should give priority to resolve the matter of attestation of mutation of ROW in the best interest of inhabitants of respective province which will ultimately not only bring prosperity for that province but also for whole of the Nation.

APPENDICES

APPENDIX A

DEFINITIONS

Unless the context otherwise requires, the following terms wherever used in the thesis have the following meanings:

- a. “Authority” means to the National Highway Authority established under section 3 of NHA Act 1991 as amended in 2001.¹
To carry out the purposes of National Highway authority act 1991 amended in 2001 an authority known as National Highway Authority has been established.²
- b. “National Highway” means a road specified in a part I of the schedule (attached with the NHA Act) and includes a road declared by the Federal Government by notification in the official Gazette, to be a National Highway.³
- c. “Right of Way (ROW)” means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority.⁴
- d. “Road” means a road including land within the Right of Way and all works, such as, carriageways, cartways, footpaths, berms, side drains, culverts, bridges, tunnels, fences, posts, sign boards, plantation and lighting arrangements, inter sections and medians assigned to the Authority.⁵

¹Section 2 (b) NHA Act 1991 as amended in 2001.

²Ibid., Section 3.

³Ibid., Section 2 (g).

⁴Ibid., Section 2(J).

⁵bid., Section 2(k).

- e. "Strategic Road" means a road specified in part-II of the Schedule (attached with NHA act 1991) and includes a road declared by the Federal Government by notification in the official Gazette, to be a Strategic Road.⁶

The following terms used in this research work are defined in "NHA code 2001" which are reproduced hereunder:⁷

- a. "Approach Rental Charges" means the charges prescribed by the authority for use of NHA land for approaches to filling/CNG station, structures and other amenities established out of NHA Right of Way (ROW).
- b. "Ground Rental Charges" means the value of the land within Right of Way (ROW) charged at prescribed percentage on annual basis or 3 years in advance or as prescribed by the authority.
- c. "Lease" means a letting of land or building to a person for specified rent and period.
- d. "NHA RMF Account" means NHA Road Maintenance Fund Account.
- e. "Regulatory Framework" means Regulations framed under Clause 32 of the act (NHA Act 1991 as amended in 2001).
- f. "Revenues" means revenues accruing to NHA from road users and other sources specifically from commercial use of right of way (ROW).
- g. "SOP" means the Standard Operating Procedures approved by the NHA Executive Board for Regulatory Framework and Standard Operating Procedures for Preservation and Commercial Use of Right of Way (ROW).

⁶Section 2(m) NHA Act 1991 as amended in 2001.

⁷National Highway Authority Regulatory Framework and Standard Operating Procedures For Preservation and Commercial use of Right of Way (ROW) – 2002, 3 to 6.

The Contract Act, 1872 defines the following terms as under:

- a. "Contract" is an agreement enforceable by law.⁸
- b. "Agreement" means every promise and every set of promises forming the consideration for each other.⁹
- c. "Promise" is a proposal when it is accepted.¹⁰
- d. "Proposal" means when a person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.¹¹
- e. "Void agreement" is an agreement not enforceable by law.¹²
- f. "Voidable agreement" means an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the others is voidable contract.¹³
- g. "Void Contract" A contract which causes to be enforceable by law becomes void when it causes to be enforceable.¹⁴

⁸Section 2 (h), the Contract Act 1872.

⁹Ibid., Section 2 (e).

¹⁰Ibid., Section 2 (b).

¹¹Ibid., Section 2 (a).

¹²Ibid., Section 2 (g).

¹³Ibid., Section 2 (i).

¹⁴Ibid., Section 2 (j).

APPENDIX B

FEDERALIZED ROADS

Part-I & II of the Schedule in NHA Act, 1991 as amended in 2001 wherein detail of National Highways is given as under:

PART-I

<u>Designation of National Highway</u>	<u>Route</u>	<u>Approved Length Km</u>
N-5	Karachi-Thatta-Hyderabad-Moro-Multan-Sahawal-Lahore-Jhelum-Rawalpindi-Peshawar-Torkham (formerly known as G T Road)	1819
N-10	Liari-Gwadar-Gabd	653
N-15	Mansehra-Naran-Jalkhad	175
N-25	Karachi-Bela-Khuzdar-Kalat-Quetta-Chaman	813
N-35	Hassanabdal-Abbottabad-Thakot-Gilgit-Khunjrab	806
N-40	Lakpass-Naukundi-Taftan	610
N-45	Nowshera-Dir-Chitral	309
N-50	Khuchlak-Zhob-DI Khan	531
N-55	Kotri-Shikarpur-DG Khan-DI Khan-Kohat-Peshawar (Indus Highway)	1264
N-65	Sukkur-Sibbi-Saryab	385
N-70	Qilla Saifullah-Loralai-DG Khan-Multan	447
M-1	Islamabad-Peshawar Motorway	155
M-2	Lahore-Islamabad Motorway (including 32 Km links and Lahore Bypass)	367
M-3	Pindi Bhattian-Faisalabad Motorway	53
M-9	Karachi-Hyderabad Motorway	136

PART-II

S-1	KKH (Gilgit) – Skardu	167
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APPENDIX C

NHAs NETWORK

NHA is currently custodian of the following National Highways, Motorways, Expressways and Strategic roads:

Route No.	Route Detail	Length (Km)
N-5	Karachi-Thatta-Hyderabad-Moro-Multan-Sahawal-Lahore-Jhelum-Rawalpindi-Peshawar-Torkham	1819
N-10	Liari-Gwadar-Gabd (Makran-Coastal Highway)	653
N-15	Mansehra-Naran-Jalkhad-Chillas	240
N-25	Karachi-Bela-Khuzdar-Kalat-Quetta-Chaman(RCD Highway)	813
N-30	Basima-Khuzdar	110
N-35	Hassanabdal-Abbottabad-Thakot-Gilgit-Khunjrab (KKH)	806
N-40	Lakpass-Noushki-Naukundi-Dalbandin-Taftan	610
N-45	Nowshera-Dir-Chitral	309
N-50	Khuchlak-Zhob-DI Khan	531
N-55	Kotri-Shikarpur-DG Khan-DI Khan-Kohat- Peshawar (Indus Highway)	1264
N-65	Sukkur-Sibbi-Saryab (Quetta)	385
N-70	Qilla Saifullah-Loralai-DG Khan-Multan	447
N-75	Islamabad-Satra-Mile-LowerTopa(Murree)-Kohala	90

N-80	Tarnol-FatehJang-Jand-Khushhalgarh-JKohat	146
N-85	Hoshab-Panjgur-Nag-Basima-Sorab	487
N-90	Khwazakhela-Alpuri-Besham	64
N-95	Chakdara-Mingora-Khwazakhela-Madyan-Bahrain-Kalam	135
M-1	Islamabad-Peshawar	155
M-2	Lahore-Islamabad	367
M-3	Pindi Bhattian-Faisalabad	53
M-7	Dadu-Dureji-Hub	270
M-8	Gwadar-Hoshab-Awaram-Khuzadar-Ratodero	892
M-9	Karachi-Hyderabad	136
M-10	Karachi Nothern Bypass	57
S-1	Jaglot(KKH)-Shangrila-Skardu	167
S-2	Kohala-Muzaffarabad	40
S-3	Muzaffarabad-Chakothe	55
E-3	Pindi Bhattian-Wazirabad	100
E-4	Faisalabad-Khanewal	184
E-5	Khanewal-Lodhran	100
Total =		11485

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