

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Mian Shakirullah Jan
Mr. Justice Saiyed Saeed Ashhad

CONSTITUTION PETITION NO. 36 OF 2005.

(Conversion of Public Park into a Mini Golf Course)

Moulvi Iqbal Haider

Petitioner.

versus

Capital Development Authority etc.

Respondents.

For the Petitioner : Raja Muhammad Ibrahim Satti, ASC a/w
Moulvi Iqbal Haider,
Ch. Muhammad Akram, AOR.

For respondent No.1 : Malik Muhammad Nawaz, ASC.
Rai Muhammad Nawaz Kharral, ASC.
Raja Abdul Ghafoor, AOR.

For Respondent No. 2 : Mr. Ahmer Bilal Sufi, ASC. a/w
Mr. Arshad Ali Chaudhry, AOR.

Date of hearing : 07.02.2006.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – This petition, filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 [herein after referred to as “the Constitution”], involves the question of public importance with reference to enforcement of fundamental rights, detail whereof, article-wise, has been mentioned in memo of the petition.

2. Petitioner has voiced against leasing out a piece of land, measuring approximately five acres, known as Jubilee Park, situated in Sector F-7, Islamabad by Capital Development Authority [herein after referred to as

“CDA”] (respondent No.1), to Shah Sharabeel, owner of Al-Falah Mini Golf (respondent No.2), a Lahore based party, for development/ running a **“Mini Golf Course”**, as a joint venture, with local and international parties, It is also alleged that the deal between respondent No.1 and 2 shall cause huge loss to the public exchequer.

3. It is spelt out from the memo of petition that a Public Park, situated in Sector F-7, has been allowed to be converted into a Mini Golf Course and the land in this behalf has been leased out in favour of respondent No.2 for a period of 15 years, with extendable period, at the rate of Rs.2.55 million per annum, with increase of 25% in rent after every 5 years. It is also mentioned in lease agreement that the rent will start after twenty months (8+12=20) from the functioning of Mini Golf Course project. It is most important to note that CDA (respondent No.1) had also delegated its powers to respondent No.2 to enter into joint venture and franchise or give licence to local or international parties, food chains etc. Petitioner has alleged that as per the contents of the lease agreement, respondent No.2 has also been authorized to hold promotional functions like golf tournaments, funfair, Basant festival, theoretical activities, without paying any extra charges or rent to the CDA or seeking its prior permission, without caring that such a prime land has actually been reserved for general public park. It is alleged that initially respondent No.2 had deposited Rs.5 lacs with respondent No.1 at the time of signing of lease agreement and has been bound down to pay the amount of rent Rs.2.55 million per annum at the time of starting of the project. The transaction of leasing out five acres land concluded in an obscured manner as before allowing the conversion of the Public Park into the Mini Golf Course no opportunity was given to the

general public and other stakeholders to submit their objections. Inasmuch as lease has been granted to respondent No.2 without inviting bids from the general public through newspapers, as such the transaction is unconstitutional and has no legal effect.

4. The petition was admitted on 26th December 2006 by means of following order :--

“Notice to respondents.

2. Learned counsel for the respondent No.2 stated that he needs some time to file documents. The petitioner who appeared in person argued that valuable plot measuring 5 Acres situated in F-7, Islamabad has been given on lease without adopting a transparent procedure. He has further stated that an amenity plot has been given on lease to respondent No. 2 which cannot be converted for commercial activities. According to him respondent No. 2 intends to construct outdoor entertainment park comprising of mini-golf etc, which would be out of reach of the members of the general public because all the activities shall be on commercial basis against the entry fee. In this behalf, it may be noted that this Court in the case of “Mian Fazal Din vs. Lahore Improvement Trust, Lahore and others” (PLD 1969 SC 223) has observed “that the plots in a Housing Scheme for public use cannot be converted for other use”, the relevant para for the convenience therefrom is reproduced herein below: -

“---The deprivation of such a facility would, in our opinion, confer a sufficiently valuable right upon the residents of the scheme to enable them to maintain an application for enforcing the Trust to discharge its obligation of executing the Scheme as sanctioned by the Government.”

3. After hearing learned counsel and having gone through the above judgment, we direct that pending decision of the petition, no further construction or other developments or any other commercial activity shall be carried out on the plot. The order be communicated to Inspector General of Police, Islamabad for its enforcement/implementation forthwith. He shall submit report on the next date of hearing in this behalf. Adjourned to a date in office in the month of February, 2006.”

5. Petitioner submitted an application for initiating proceedings of contempt of Court as allegedly during pendency of the petition, the order passed by this Court reproduced herein above has been, prima facie, violated. Thus separate proceedings by means of order dated 6th February 2006 have been issued which shall be disposed of independently.

6. On behalf of petitioner, it is contended that :---

- a) Whenever, a scheme under the Provisions of Section 12 of the Capital Development Authority Ordinance 1960 [herein after referred to as “the Ordinance, 1960”] is prepared by the CDA, immunity plots including the plot for Public Park, playing field, graveyard, and incidental open places, etc. are earmarked separately.
- b) Under Regulation No.3 of the Islamabad Land Disposal Regulation 1993 [herein after referred to as “the Regulation”] for the purpose of establishing Mini Golf Course on the Public Park, no permission was sought from the Federal Government nor objections were invited in this behalf in accordance with Section 19 read with Section 20 of the Ordinance, 1960.
- c) The transaction has been made by respondent No.1 with respondent No.2 without any lawful authority and jurisdiction, as such, in this manner the fundamental rights of the general public enshrined in Articles 9 and 26 of the Constitution have been denied.

- d) In a public park, citizens including children are not required to purchase tickets and once Mini Golf Course is established, the entry of general public would be obstructed in terms of imposing conditions, including purchase of tickets and to enjoy other amusement against payments.
- e) CDA is committed to provide a Public Park for the residents of Sector F-7, which will be maintained by the authority itself and it cannot be allowed to be converted into a commercial project by the third party, in terms of Article 12(3) of the Regulation.

7. On the other hand learned counsel appearing for respondent No.1 contended that :--

- a) CDA being the competent authority has jurisdiction to lease out a property which has been acquired by it for the purpose of establishing public/amusement Park, to ensure entertainment facility to the inhabitants of the area.
- b) The transaction entered into by respondent No.1 with respondent No.2 is highly transparent as it was concluded after observing all code formalities including making the same open through publication, allowing to interested parties to participate in bid and as respondent No.2 fulfilled the requisite criteria, therefore, its firm was declared successful bidder.

- c) Petition is not maintainable under Article 184(3) of the Constitution because no right of petitioner, guaranteed by the Constitution has been violated by respondent No.1.

8. Learned counsel appearing for respondent No.2 argued that:---

- i) Respondent No.1 had not converted a Public Park into a commercial activity, except that an amusement Park for the purpose of entertainment, being built up with better facilities to entertain general public including the inhabitants of the area.
- ii) Lease has been given to respondent No.2 by respondent No.1 after observing all codel formalities, therefore, the same is not liable to be declared illegal as it is the obligation of the Courts to make all efforts to safeguard the official acts of the Government.
- iii) Respondent No.2, by now, had spent a considerable amount on the development of the Park, therefore, a valuable right has been created in his favour which is not to be interfered.

9. We have heard the parties counsel at length and have also gone through relevant record carefully including the concise statement submitted by CDA.

10. The concise statement filed by CDA proves that:---

- i) The site, on which Mini Golf Course is being established, is a **Public Park**. It has not been developed into regular Park and its typography has remained intact all through.

- ii) The area of the land leased out to respondent No.2 is about five acres, situated in Markez F-7 and it is separated by a “Nullah” from the constructed and developed portion of Sector F-7.
- iv) The depth of the site of Mini Golf Course varies at different places from road level and there is a long ditch on this side as well, as such it is an ideal place for Mini Golf Course.

11. It is true that CDA vide publications appeared on 1st and 2nd February 2004 in “Daily Frontier Post” and “Daily Jang”, respectively, issued notices for development of entertainment spots, including Mini Golf Course on its land, to be leased out to provide entertainment, recreation projects and its allied features in Islamabad for its general public and invited proposals for the accomplishment of the project, on terms and conditions noted therein. These publications in newspapers were followed by a second publication appeared in “Daily Jang” and “Daily Dawn” dated 14th August 2004. In this publication technical/financial proposals were invited from interested parties to obtain the project on lease basis. For reference contents of the publication dated 14th August 2004 are reproduced herein below:---

“Development of Entertainment
Spots on lease basis
(Directorate General Environment)

CDA intends to develop Entertainment Spots on the following sites on lease basis :

Sr.No.	Site	Entertainment Activity
1.	Jubilee Park F-7 Markaz	Mini Golf course
2.	Rawal Park	Joy Land and other allied recreation
3.	I-8/3 &F-9 Park	Go carting
4.	Hill Park F-6/3	Rock Climbing, paint ball and skating Rink
5.	F-6 Markaz Foot Ball Ground	Remote Control Car Racing
6.	F-7/4 Children Park	Fun Games
7.	Suitable open spaces	Community Sports Grounds

- i) No heavy Civil Structure will be allowed.
- ii) Open and soft landscaping will be done.

- iii) Rides should be environment friendly.
- iv) Heavy rides will only be allowed in joy land.

The interested parties are required to submit their technical / financial proposal on lease basis for development of entertainment spots with layout/design alongwith the names of firms its Legal status, Registration with government / Semi Government Organizations, details of Technical staff, list of works of similar nature executed in past, List of similar works in hand and present status, list of T/P, Financial status, Income tax Registration with certificate with latest renewal and non-litigation certificate.

The interested parties/ contractors fulfilling the above requirements should submit their technical /financial proposals for designing and construction of entertainment spots in a sealed cover so as to reach in this office of Directorate General Environment located in Room No.7, Block No.2 Sector G-7/4, latest by 26-08-2004. The undersigned can be contacted during the office hours for any information required.

Director General Environment, CDA.”

12. It is most important to note that learned counsel for the CDA was time and again called upon to produce the order of the competent authority, on the basis of which the above noted projects, were launched, but he failed to do so. However, a perusal of summary prepared for the Board dated 22nd April 2005, copy of which is available alongwith the concise statement, filed by CDA, indicates that CDA Board in its meeting held on 15th February 2005 considered the summary (Non Agenda item No.8109/1006/2005-741/BF dated 15th February 2005). A perusal of this admitted document reveals that after making publications on 1st and 2nd February 2004 in “Daily Frontier Post” and “Daily Jang” respectively, some of the parties have given their proposals for development of Entertainment Spots etc. which also include the proposal of M/s Al-Falah Mini Golf, Lahore and its proposals were accepted for the following major terms and conditions:--

“The following major terms and conditions are framed for the agreement and will be made as a part of the lease agreement by the Authority for the lease of the said Jubilee Park which shall be binding on the firm /developer:--

- i. 18 holes golf course to be completed within 8 months from the date of lease agreement and possession of the site.
- ii. Rs.2.55 million (Twenty five lacs and fifty thousand only) annual consolidated rent inclusive of all charges such as sponsorship tools/ signs in the project with 25% increase every five years for the land which is approximately 5.05 acres also known as jubilee park in F-7 Markaz as shown in the survey plan.
- iii. The title of the land will not be changed and CDA will remain the Sole Owner of the land and the total area of the park will be utilized for the development of the Mini golf course and its allied features keeping it predominantly open.
- iv. The covered / built up area for indoor services and facilities as office / Administration Block = 100 Sq. Yards, store room = 25 Sq. Yards, toilets = 20 Sq. Yards, ticket + Clubs / Putter booths = 20 Sq. Yards, Juice Bar = 60 Sq. Yards, indoor chai Ghar (Tea House) = 275 Sq. Yards and coffee shop / fast food café = 450 Sq. yards will be up to the maximum aggregate of 950 (Nine Hundred and Fifty) Sq Yards will be allowed.
- v. Semi Covered areas with all sides open, covered from the sky for table top games, snooker, pool and multiple ground level games /rides for families and children activities & eating Court. will be up to 1500 (Fifteen Hundred) Sq Yards.
- vi. All remaining area utilized for Mini Golf Course and other open air facilities and allied features will be highly landscaped.
- vii. No permanent structures/ construction will be allowed in the area so granted to the firm / developer except as mentioned above.
- viii. The entire area so granted by the Authority will be developed and maintained by the firm / developer at their own cost.
- ix. The party / firm will submit site specific design and a complete master plan with features of services and allied facilities

conforming to international standard of Golf Hole Designs.

- x. A Bank draft / Pay order, in favour of Directorate Sports & Culture, CDA to an amount of Rs.500,000/- (Rupees five hundred thousand only) will be furnished by the developer as security at the time of signing of the lease agreement.
- xi. The execution of the lease agreement and the possession of the park will be completed within two weeks from the approval of the Board and execution of construction work will commence within 3 months of the possession.
- xii. Multiple ground level / bare minimum height rides and other similar sports / entertainment activities are allowed.
- xiii. The rent will be charged one year after the start of mini golf operations to sustain stability which is the launch/opening of commercial operations.
- xiv. The lease period for the project is 15 (fifteen) years and is renewable for another term on the satisfactory performance of the developer.

The above conditions were subsequently incorporated in the lease agreement dated 5th June 2005.

13. From perusal of publications, appeared initially on 1st and 2nd February 2004 in “Daily Frontier Post” and “Daily Jang” respectively as well as the publication appeared on 14th August 2004 in “Daily Jang” and “Daily Dawn”, it is abundantly clear that no area was earmarked for the purpose of establishing/developing Mini Golf Course at the site of Jubilee Park in Sector F-7. It seems that this device was adopted to keep the interested parties out of competition, except the respondent No.2, who statedly had the experience of running identical project at Lahore. Thus, we are of the opinion that disclosure of the area, on which the Mini Gold Course was to be developed, was necessary in the publication and in this

way the interested parties would have given much higher bids than the one, on which CDA had leased out land to respondent No.2 i.e Rs.2.55 million per annum. We were told that admittedly the plot of five acres, leased out to respondent No.2, is situated in most expensive location of Sector F-7 and is situated adjacent to the main road, therefore, it is a prime land being situated in the heart of the Capital.

14. There is yet another important aspect of the case which requires serious consideration namely as per the contents of the publication dated 14th August 2004 in "Daily Dawn" the interested parties were prohibited not to raise heavy civil structure, whereas according to the terms of the lease agreement, construction of the area equal to 950 sq. yards has been allowed to respondent No.2. In this behalf, reference be made to the conditions No.4 & 5, which have been reproduced herein above. So far as condition No.5 is concerned, as per its contents, the provision of an eating place on 1500 sq. yard has also been allowed, meaning thereby that a big space has been allocated for the purpose of selling and catering eatables.

15. What we have understood from above documents is that in the Capital territory, a master plan was prepared at the time of its inception and subsequently under different schemes, different sectors were set up. In this behalf, reference to the preamble and Sections 11 and 12 of the Ordinance, 1960 may be made. In the scheme of a sector, some of the areas have been earmarked as a Public Park to attract general public. According to Article 12(3) of the Regulation, the public parks, playing fields and graveyards are to be developed and maintained by the CDA. Thus the conclusion is that during the classification of the plots, under Article 3 of the Regulation, if a

piece of land has been earmarked for the purpose of Public Park, same cannot be leased out and CDA itself is bound to develop the same.

16. There is yet another important provision of law, which prohibits CDA to amend the scheme i.e. Sections 19 and 21. Admittedly, in instant case, in terms of these Sections, neither the permission was sought to convert the Public Park into the Mini Golf Park nor before doing so objections were invited from the general public in terms of Section 21 of the Ordinance, 1960. This Court way back in 1969 in the case of **Mian Fazal Din v. Lahore Development Trust, Lahore** (PLD 1969 SC 223) has held that “the plots in a Housing Scheme for public use cannot be converted for other use”. Relevant para from this judgment has already been reproduced in the order dated 26th December 2005. Admittedly a Public Park, if is earmarked in a housing scheme, creates a right amongst the public and that right includes their entry in the Park without any obstacle, being fundamental right enshrined in Article 26 read with Article 9 of the Constitution. It may be noted that liberty of a person, to have access or utilize a right available to him, cannot be taken away by converting such facility into commercial one, for the purpose of extending benefit to a third person, because in instant case considerably a big plot of land, measuring five acres, has been handed over to respondent No.2 at a throughway lease money, causing huge loss to the public exchequer, therefore, tax payers have a right to inquire from CDA as to how a right of life and liberty can be denied to them. As in instant case, above facts are admitted, therefore, no formal evidence is required to prove these facts. Reference in this behalf can be made to **Government of Punjab v.**

Crescent Textile (PLD 2004 SC 108). Relevant para therefrom is reproduced herein below:--

“15. The argument that a number of questions of facts were involved in the case which were required to be decided, therefore, the respondent, writ petitioner should have been directed to seek alternate remedy of filing suit, for evidence to determine disputed questions of facts could not be recorded within the scope of Constitutional Jurisdiction under Article 199 of the Constitution has also no force though there can be no cavil with the general proposition of law as contained in this argument. The only question which was involved in this case was as to the date with reference to which the price of the land is to be determined and charged from the respondent writ petitioner, as such the same could legally be decided in the Constitutional jurisdiction.....”

17. It has been noted that deal between respondent No.1 and 2 has not been made in a transparent manner, coupled with the fact that the lease of a Public Park has been given for 15 years at the rate of Rs.2.55 million per annum, which shall be paid after about 20 months as according to lease agreement the project is to be completed within eight months and the rent would be due after one year from the date of the functioning of the project with clear delegated authority to the lessee that it can issue licence to the local or international parties for the purpose of providing amusement/commercial activities, etc. whereas the law, on the other hand, is, as discussed herein above, that such Parks are to be developed or to be maintained by the CDA itself. Essentially, when a party makes investment, may be meager one, it would make money by granting licences, franchise, etc. for which it will enter into agreements with local and international parties and the burden of the same ultimately is to be borne by the general public, in terms of tickets, amusement fee etc.

18. It is to be observed that under Section 49 of the Ordinance, 1960 CDA retains powers for the purpose of leasing, selling, exchanging the land etc. vested in it. For the purpose of achieving the object of this Section, from time to time, Rules and Regulations are framed, as it is evident from the contents of Notification dated 18th December 1993 (No.CDAS-30(2)(NOTI)-Coord 93.) Reference of some of the Regulations, framed thereunder, has already been made herein above. [The Islamabad Land Disposal Regulation 1993]. It is equally important to note that learned counsel for petitioner when called upon to satisfy as to whether in terms of Ordinance 1960, the master plan is available with the CDA, he produced the same but stated that according to its contents Sector wise division of the Capital has not been made. He also explained that in Sector F-7, one public park under discussion was created by means of preparing PC-1, therefore, it may be presumed that the plan submitted alongwith PC-1 must be having separate identification of the Jubilee Park, where the Mini Golf Course is being established. In this behalf he has referred to a copy of the site plan attached with the reply of the CDA to demonstrate that the Jubilee Park is situated in the area of Markaz F-7. He was called upon to produce the original file/documents, including PC-1 as we wanted to ascertain the status of the plot in question for the purpose of examining the proposition that in terms of Section 49 of the Ordinance, 1960, the lease has rightly been executed in favour of respondent No.2 by CDA or not? But despite of our demand, said file was not produced and ultimately Chairman CDA gave a

statement in writing expressing disability of the authority to produce the file. The contents, whereof are reproduced herein below for reference :---

“The file of PC-1 of Sector F-7 is presently not available and being traced out. It will be produced before the learned Court as it is found out.

Sd/-
Chairman CDA.”

Non-production of above file persuades us to draw adverse inference against the CDA, necessarily with all consequences.

19. It is quite surprising to note that the CDA though claimed that the transaction of leasing out the Jubilee Park Markaz F-7, is transparent but it had miserably failed to demonstrate the same for the reasons, one of them noted herein above, and the others are being discussed below. It is a matter of record that before inviting proposals for leasing out different open areas for the development of Mini Golf Course, etc. no decision was taken by the Board of CDA, constituted under Section 6 of the Ordinance, 1960. Thus publications, dated 1st and 2nd February 2004, appeared in Daily Frontier Post and Daily Jang, respectively, were without any legal sanctions. It seems that in pursuance of publications, interested parties submitted their proposals and out of them, after short listing, respondent No.2 and M/s Family Entertainment Center were selected. It may be noted that M/s Family Entertainment Center claims itself to be developers, promoters and project manager of Tourist Resorts, Amusement/Theme Parks, Miniature Golf, Water Play Amenities, Attractions Developments and is acting as a consultant/ collaborator in developing the required Golf Course on behalf of a company known as M/s LOMMA Enterprises Incorporation of Scranton, Pennsylvania, USA through its CEO Mr. Adnan Hameed, and respondent No.2 i.e. Al-Falah Mini Golf were pre-qualified to participate in

the bid. Later on, in pursuance of the publication appeared in newspapers i.e. Daily Jang and Daily DAWN, on 14th August 2004 they were called upon to submit their tenders for acquiring the land on lease to develop the Mini Golf Course.

20. At this juncture, to unfold the mala fides on the part of respondent No.1 i.e. CDA, it is to be noted that in the publication, neither specification of the area of Jubilee Park Markaz F-7 was mentioned, on which Mini Golf Course was to be developed nor the period for which the lease was intended to be given. Inasmuch as, it was not disclosed in the publication that what is the reserved lease money fixed by the CDA because in absence of such information, the genuine bidder could not offer bid accurately except those bidders who have the blessings of the authority competent to accommodate any one of them out of way. It is also important to be kept in mind that volume of the lease money depends upon the area of the land, as we are of the opinion that if CDA had disclosed in publication that an area of 5.05 acres is available for the purpose of development of Mini Golf Course, there was every possibility of fetching much higher lease money, than one, on which it has been given to respondent No.2. We are told that the plot is situated in the commercial area of Markaz F-7, where the prices of the property are extremely on a high side but with ulterior intentions, this important information was concealed.

21. Be that as it may, out of both the pre-qualified interested parties, M/s Family Entertainment Center offered 2.5 million (Rs.25 lacs) per annum for the subject matter, whereas respondent No.2 offered Rs.6 lacs per annum rent for the subject matter for a period of at least 15 years, with 25% increase on every three years. It is stated that the CDA evaluated both the

offers and rejected the one quoted by M/s Family Entertainment Center, as it has failed to secure requisite points as obtained by respondent No.2, as such respondent No.2 was called upon to increase/match the bid up to Rs.2.5 million. However, the report of evaluation committed is not available to ascertain as to whether it was carried out independently or otherwise. Thus it is held that in such like situation, CDA if at all was interested to lease out the Public Park, instead of developing the same, may have invited fresh proposals instead of calling upon respondent No.2 to enhance the lease money because in granting contracts for the purpose of fetching money to support the public exchequer, the competent authority had an obligation to adopt such devices on the basis of which more money could be procured as it has been held in **Captain-PQ Chemical Industries (Pvt) Ltd. v. A.W. Brothers** (2004 SCMR 1956). CDA seems to be interested to grant lease of Jubilee Park to respondent No.2, as it is evident from preceding narration of facts. The negotiation with respondent No.2 culminated in its success because of its agreeing to match the bid to the extent of Rs.2.5 million, which was however, subject to extending him extra ordinary benefit in formulating the conditions of agreement, two of them are most important, which may be referred to from the conditions reproduced herein above i.e. being No.4 & 5, which, later on, became part of the lease agreement dated 4th June 2005 as conditions No.14 and 15. These concessions were allowed to respondent No.2 contrary to the restriction imposed in the advertisement published on 14th August 2004 namely, no heavy civil structure will be allowed, open and soft landscaping will be done, whereas contrary to it, respondent No.2 has been allowed to construct area of 1000 sq. yards besides 1500 sq. yards for family and

children activities and eating court, which is impossible unless a concrete flooring is made. It is also to be seen that nothing was mentioned in the publication in respect of concession expected to be available to successful bidders in terms of period of lease, the area, as it has been pointed out herein above, the period of completion of project and commencing date for the purpose of making payment of lease money i.e. after a period of about 20 months, etc.

22. It is an unfortunate aspect of the case that prime land situated in one of the most posh area of the capital city has been leased out in a most opaque manner, causing colossal loss to the public exchequer for which CDA had no authority, as discussed above. It is also to be noted that 2nd contesting party i.e. M/s LOMMA Enterprises Incorporation through its CEO Mr. Adnan Hameed i.e. M/s Family Entertainment Center, challenged the approval of the bid in favour of respondent No.2 before the High Court by way of filing Writ Petition. Written reply of the same was also submitted by respondent No.1. In that Writ Petition very serious allegations were leveled, which though were repudiated but subsequently, writ petition was got dismissed in absentia, reasons known to the writ petitioners as well as to respondent No.1 because on the date of dismissal of writ petition, CDA also opted not to appear in the Court, therefore, for such reason no favourable inference can be drawn in respect of conduct of respondent No.1 during the proceedings.

23. Thus, in view of above discussion, it is held that the mala fides of respondent No.1 in concluding the transaction with respondent No.2 are abundantly apparent on record. This Court in the case of **Government of West Pakistan v. Begum Agha Abdul Karim Shorash Kashmiri**

(PLD 1969 SC 14) has held that mala fide is to be proved on record. This view has been reiterated by this Court in the case of **Ahmad Hassan v. Government of Punjab** (2005 SCMR 186). Therefore, applying the test laid down in these judgments on the facts of the present case, we are inclined to hold that in view of the admitted facts on record, mala fides on the part of respondent No.1 in granting lease to respondent No.2 are apparent, thus, the lease agreement dated 4th June 2005 is not transparent.

24. Learned counsel for respondent No.2 however, persuaded to convince us that as status of the Public Park has not been changed, therefore, provisions of Regulation No.12(3) of the Regulation would not be attracted. To substantiate his plea, he made reference from the books written by Architects with regard to explain the idea of planning and development of the Islamabad. One of the para from the said book compiled by CDA, Government of Pakistan i.e. Communities & Housing, composed by DOXIADIS Associates, Consulting Engineers is reproduced herein below for convenience :---

“305. The second and third categories of open spaces, that is the public playgrounds, playing-fields, parks and public gardens, have to be reckoned together as this stage, since it is as yet too early to define exactly how much will go for playing-fields and how much for green spaces. These spaces are usually planned together in broader areas, and only after detailed planning is a decision taken in each case as to exactly how much will go for playgrounds and how much for gardens and parks. It has to be borne in mind that all these are general averages, since the need for parks, gardens and playgrounds differs enormously from area to area, and from one social, professional or income group to another. For example, high income groups, which have their private gardens, do not need public gardens and parks as such as the low income groups, which are deprived of the

benefit of having their own private garden. On the contrary, higher income groups may need playing-fields requiring more space, like tennis, playgrounds, etc. which the lower income groups may not need to the same extent.”

A perusal of above para is sufficient to hold that the Jubilee Park of Public Park is meant for the use of general public, majority of which i.e. more than 90% is living in the vicinity. Under Article 26 of the Constitution, it is fundamental right of the citizens to have access to public places of entertainment or resorts. As per the socio-financial status of the citizens of Pakistan, majority of public is not in a position to afford luxury of joining Mini Golf Course alongwith children, subject to payment of tickets etc.

25. Learned counsel stated that the right of entertainment can only be made available subject to law as it is defined in Section 2(d) of the West Pakistan Entertainment Act, 1958. There is no cavil with his this argument but subject to the condition that if the arrangements of providing such entertainment to the citizens is made in transparent manner by an authority in exercise of lawful jurisdiction which lacks in instant case as discussed above.

26. Learned counsel emphasized that it` is the obligation of this Court to safeguard the acts of the Government. To support his arguments, he referred to **Lahore Improvement Trust v. Custodian of Evacuee Property** (PLD 1971 SC 811).

In above judgment it has been held that “before an order passed by a public authority is struck down, it is the duty of the court to explore every possible explanation for its validity and examine the entire field of powers conferred on the authority in pursuance to which the impugned order has

been passed. We subscribe to the principle laid down in this judgment but it is to be seen whether the authority who has granted lease to respondent No.2 has acted fairly, transparently, judiciously and above any suspicion. Unfortunately, these elements are lacking in instant case, therefore, allowing respondent No.2 to avail the benefit out of the lease agreement, would tantamount to perpetuate the unlawful/illegal acts of both of them.

27. Learned counsel vehemently emphasized that respondent No.2 has acquired a right to enjoy the lease hold rights, as after taking over possession, he spent a considerable amount in the development of the Jubilee Park.

In this behalf it may be noted that in the concise statement respondent No.2 has admitted that a foreign investment of telecommunication concern namely “WARID”, which is a multinational company, with funds to utilize for public service development and if petition is entertained and allowed, it would result in irreparable loss to respondent No.2 as well as many other future service projects under the patronage and support of this multinational company. With reference to this statement of fact, it is to be noted that respondent No.2 had taken over the possession of five acres prime land, after paying only security amount of Rs.5 lacs and had constructed a boundary fence temporarily, on which a logo of “WARID & CDA” was applied. This fact is available in Criminal Original Petition No. 1 of 2006, which is being dealt with separately. Essentially alongwith a commercial multinational company to get the publicity of its product by using even temporarily constructed boundary fence, means to attract business for the said company and such concession obviously cannot be allowed, without any consideration. Moreover,

Investor of the multinational company has not entered into contract with the authority or the Government of Pakistan directly. Actually they wanted to run the business with respondent No.2 being a lessee, which he has obtained by means of illegal transaction, which has got no legal sanctity. For such reason, no concession can be extended to respondent No.2 or any other party who is not before the Court. If at all, the multinational company is interested in the business, it could have participated in open bid for obtaining development lease hold rights, subject to law from the CDA. Furthermore, if the company had not apparently provided any facility to the general public, how they can sacrifice their fundamental rights, solely for the reason that it has got permission to publicize its product, in collaboration with respondent No.2 for the purpose of earning profit at their cost. In addition to it, in future, if such multinational company alongwith others would be permitted to use the plot for other commercial purposes, its financial burden has to be borne by an ordinary person, in violation of the Article 26 of the Constitution, which is not permissible.

28. It may be noted that a vested right of an individual can be protected, if the order passed in his favour is lawful as it has been held in **Engineer-in-Chief Branch v. Jalaluddin** (PLD 1992 SC 207) and **Abdul Haque Indhar v. Province of Sindh** (2000 SCMR 907). Therefore, the arguments so put forward by the learned counsel has no force.

29. Now turning towards the maintainability of the petition under Article 184(3) of the Constitution, as according to learned counsel for respondent No.1, the petition is liable to be dismissed in view of the judgments reported in **Muhammad Shahbaz Sharif v. Federation of Pakistan** (PLD 2004 SC 583) and **All Pakistan Newspapers Society v.**

Federation of Pakistan (PLD 2004 SC 600). In both these judgments it has been held that petition can be maintained subject to establishing by the petitioner that question of public importance with reference to enforcement of fundamental rights has been made out. According to learned counsel, as both these elements are missing, therefore, a person, who is outsider i.e. is not resident of Islamabad could not maintain such petition.

30. Learned counsel for petitioner when confronted with above arguments of learned counsel for respondent No.1, contended that the Court is not bound to examine the credential of an individual who has laid information before the Court but to see the nature of action under challenge. Reliance in this behalf has been placed by him **Pakistan Tobacco Company Ltd. v. Federation of Pakistan** (1999 SCMR 382). It would be appropriate to quote reference from the judgment for convenience, wherein this Court has highlighted very important principle to attract the provisions of Article 184(3) of the Constitution :---

“maintainability of a petition under Article 184(3) of the Constitution is to be examined not on the basis as to who has filed the same but if the controversy involves question of public importance with reference to enforcement of any of the fundamental right, petition will be sustainable”

In addition to above principle, this Court in the case of **Javed Ibrahim Paracha v. Federation of Pakistan and others** (PLD 2004 SC 482) has held that “a person can invoke the Constitutional jurisdiction of the superior Courts as pro bono publico but while exercising this jurisdiction, he has to show that he is litigating, firstly, in the public interest and, secondly, for the public good or for the welfare of the general public. The word ‘pro bono publico’ as defined in Blacks Law Dictionary, Chambers Dictionary and

Oxford Dictionary generally means ‘for the public good’ or ‘for welfare of the whole’ being or involving uncompensated legal services performed especially for the public good. ‘Public interest’ in the Black Law Dictionary, has been defined as the general welfare of the public that warrants recognition and protection. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation. It thus signifies that in case of public interest litigation, one can agitate the relief on his own behalf and also on behalf of the general public against various public functionaries, where they have failed to perform their duties relating to the welfare of public at large, which they are bound to provide under the relevant laws. Viewing the bona fide of petitioner in the above contest, we are of the opinion that the petitioner has not been able to show that he was aggrieved person within the meaning of Article 199 of the Constitution and can agitate his grievance as ‘pro bono publico’.”

Thus, following the above principles, we are of the opinion that petition on behalf of petitioner is maintainable in view of above noted facts and circumstances of the case.

31. Now we will examine whether in view of the given facts and circumstances of the case, any of the fundamental rights guaranteed to the citizens of Pakistan have been denied. Islamabad, being a capital city, attracts representation from all over Pakistan in different capacities. Thus it is their right to enjoy access to the places of entertainment like the Jubilee Park, etc. under Article 26 of the Constitution. The same is the position of the inhabitants of the area where the Park is situated. As it has been stated herein above that necessary documents have been withheld by the CDA from the Court for which, observation have been made herein above. Thus,

it is held that Jubilee Park was earmarked in the original scheme of Sector F-7, as it was meant for low income group, who are deprived of the benefits of having their own private gardens, comparing to higher income groups, therefore, converting such Parks for commercial activity with the collaboration of multinational companies, would deny the rights guaranteed to them.

32. Next question in this regard is whether the action violating the fundamental rights can be perpetuated merely for the reason that petitioner is outsider. In our considered opinion, for such reason alone, the person who approaches the Court for exercising the jurisdiction under Article 184(3) of the Constitution by this Court is not disqualified and the petition can be maintained accordingly. So far as the judgments relied upon by the learned counsel for respondent No.1 are concerned, those are not attracted in view of the fact that in both the case, rights of individuals were involved and the conditions laid down under Article 184(3) of the Constitution that the question of public importance with reference to enforcement of fundamental rights are not available, whereas in instant case on account of conversion of Jubilee Park into a commercial oriented amusement Park, fundamental rights of the public have been violated and due to non-enforcement of the public rights, enshrined in Article 26 of the Constitution, the question of public importance has been made out, therefore petition is maintainable, particularly when there is no disputed fact as it has been noted herein above. This Court and the High Courts in such like cases have encouraged invoking jurisdiction of Courts directly

with a view to do complete justice. Reference in this behalf may be made to **Muhammad Bashir v. Abdul Karim** (PLD 2004 SC 271). Relevant para therefrom reads as under:--

“15.We are not persuaded to agree with Sardar Muhammad Ghazi, learned Advocate Supreme Court for appellant that the scope of Article 199 is limited and such like controversy could not have been dilated upon and decided by the High Court while exercising Constitutional jurisdiction for the simple reason that record was crystal clear and accordingly the controversy being not ticklish and complicated could have been decided. It is well settled by now that “Article 199 casts an obligation on the High Court to act in aid of law, protect the rights of the citizens within frame work of the Constitution against the infringement of law and constitution by the executive authorities, strike a rational compromise and a fair balance between the rights of the citizens and the actions of the State functionaries, claimed to be in the larger interest of society. This power is conferred on the High Court under the Constitution and is to be exercised subject to Constitutional limitations. The Article is intended to enable the High Court to control executive action so as to bring it in conformity with the law. Whenever the executive acts in violation of the law, an appropriate order can be granted, which will relieve the citizen of the effects of illegal action. It is an omnibus Article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the Constitution. If the citizens of this country are deprived of the guarantee given to them under the Constitution, illegally or, not in accordance with law, then Article 199 can always be invoked for redress”. (Ghulam Mustafa Khar v. Pakistan and others PLD 1988 Lah. 49, Muhammad Hussain Khan v. Federation of Pakistan PLD 1956 Kar. 538 (FB), S.M. Yousuf v. Collector of Customs PLD 1968 Kar. 599 (FB). It is to be noted that “paramount consideration in exercise of Constitutional jurisdiction is to foster justice

and right a wrong”. (Rehmatullah v. Hameeda Begum 1986 SCMR 1561, Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236). There is no cavil with the proposition that “so long as statutory bodies and executive authorities act without fraud and bona fide within the powers conferred on them by the Statute, the judiciary cannot interfere with them. There is ample power vested in the High Court to issue direction to an executive authority when such an authority is not exercising its power bona fide for the purpose contemplated by the law or is influenced by extraneous and irrelevant considerations. Where a statutory functionary acts mala fide or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party”. (East and West Steamship Co. v. Pakistan PLD 1958 SC (Pak) 41). In our considered view, technicalities cannot prevent High Court from exercising its Constitutional jurisdiction and affording relief which otherwise respondent is found entitled to receive.....”

33. It is most important to note that functionaries, exercising statutory powers like CDA, are bound to discharge their functions strictly in accordance with law, otherwise the action contrary to law would not be sustainable and such authority shall expose itself for disciplinary action. This Court in the case **Fazal Din v. Lahore Improvement Trust** (PLD 1969 SC 223), reference of which has already been herein above, has discouraged denial of valuable rights of the residents in respect of the plot, meant for specific purpose. This principle has also been reiterated in the case of **Ardeshir Cowasjee v. Karachi Building Control Authority** (1999 SCMR 2883), wherein it has been held that without obtaining no objection from the general public, such plots cannot be used for any other purpose. As it has been noted herein above that in instant case, objections

were not invited from the general public by the competent authority before converting the Jubilee Park into a commercial oriented amusement Park, with the collaboration of multinational companies, delegating powers to respondent No.2 to enter into joint venture or franchise for giving licences to local or international parties, food chains etc. In our opinion, such delegation to private person to watch his financial interests of the high degree tantamount to depriving the authority as well as the public from their valuable rights, for whose benefits such authority has been created, and apparently such action has got no legal sanctity, therefore, action against such responsible officer/official of the authority is called for in view of the judgment of this Court **Pervaiz Oliver v. St. Gabriel School** (PLD 1999 SC 26), wherein it has been held that “no public property big or small, tangible or intangible, can be disposed of except in accordance with law. Those who transgress, expose themselves to the severest penalty under the law”. As a consequence of this observation, finally following directions were made to the authority:--

“While, in this background, upholding the order of the High Court, we dismiss the above listed three petitions with costs, the one filed by the Assistant Administrator also on the ground of limitation, we would also direct the Chairman of the Evacuee Trust Board to personally hold an enquiry about the conduct of the abovesaid several functionaries involved by departmentally proceeding with the matter and taking appropriate action(s). This would also include the examination of the question as to by whom and under what circumstances sanction was accorded firstly, for defending the petition in the High Court and secondly, for preferring the leave petition in this Court. The Chairman of the Board would be required to submit the final enquiry report(s) with details of action taken, within four months before the High Court of Balochistan, copies being endorsed to this Court. It will

then be for the High Court to pass such orders in the matter as it deems fit, including due activation, if required, of the Federal Ombudsman and the Chief Ehtesab Commissioner. A copy of this order would be forwarded to the Chairman of the Board, the Chief Ehtesab Commissioner, the Federal Ombudsman and the Secretary, law and Justice Division, of the concerned Ministry, for action and for record.”

34. Thus for the foregoing reasons, petition is accepted in the following terms:---

- a) The lease agreement dated 4th June 2005, executed by respondent No.1 with respondent No.2, for the development of Mini Golf Course on the site of Jubilee Park, Sector F-7, is not sustainable in the eye of law, being contrary to fundamental rights of the General Public, enshrined under Article 26 of the Constitution.
- b) Respondent No.2 is directed to handover vacant possession of the plot, lease of which has been obtained by him from respondent No.1 within a period of four weeks, in its original condition, subject to complying with the supra direction. Respondent No.1 will refund Rs.5 lacs to respondent No.2 deposited by it as security. Enquiry report shall be sent to Registrar within three months for our perusal in Chambers and passing further order, if need be.
- c) The Board of CDA shall examine the case thoroughly to explore possibility of initiating disciplinary/penal action before the competent forum against the delinquent Officers/ Officials, responsible for executing the lease with respondent No.2, in view of the law laid down

by this Court in the case of Pervaiz Oliver (ibid).

- d) The Board of CDA will take steps to find out the record of Jubilee Park, F-7 i.e. PC-1, etc. and if record is not made available, then report shall be lodged before the competent law enforcing agency, according to law.
- e) CDA, however, shall be free to develop Jubilee Park itself for the purpose of providing entertainment to the public of Islamabad, in discharge of its duties under the law.

No order as to costs.

CJ.

J.

J.

Islamabad,
07.02.2006.
Irshad /*

APPROVED FOR REPORTING.