

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**

**CASE NO. : ICA NO.109/2017**

**BNP (Private) Limited & Another**

**Vs.**

**Capital Development Authority etc.**

**Appellants by : Mr. Makhdoom Ali Khan, Senior ASC**  
**Mr. Saad M. Hashmi, Advocate**  
**Dr. M. Ferozh Nasim, Advocate**  
**Mr. Babar Sattar, Advocate**  
**Mr. M. Ali Raza, Advocate**  
**Ms. Meryam Ali Abbas, Advocate**  
**Malik Qamar Afzal, Advocate**  
**Mr. Asad Zia, Advocate**  
**Mr. Saad Khan, Advocate**  
**Mr. Anique Salman Malik, Advocate**  
**Mr. Rashideen Nawaz Kasuri, Advocate**

**Respondents by : Mr. Kashif Ali Malik, Advocate**  
**Mr. Aamir Latif Gill, Advocate**  
**Mr. Muhammad Munir Paracha, Advocate**  
**Mr. Nauman Munir Paracha, Advocate**

**Date of hearing : 05.07.2018**

**AAMER FAROOQ J.** This judgment shall decide instant appeal as well as other Intra Court Appeals mentioned in Schedule-A attached herewith, as they assail judgment dated 03.03.2017 passed by the Judge-in-Chambers in W.P. No.3043-2016 filed by the appellant, in the instant appeal, and as common questions of law and facts are involved.

2. The facts, leading to filing of above mentioned appeals, are that the controversy pertains to the cancellation of leasehold rights granted to the appellant by the Capital Development Authority (CDA). In this regard, the property in question is a Plot measuring 13.5 acres (650098 sq.yds.) situated at the end of the Constitution Avenue, Islamabad adjacent to the Convention Centre. In 1996, Federal Government granted approval for construction of Monument as well as Convention Centre, which was to be completed by 1997. Approval was also accorded by the Cabinet for amendment in the Master Plan for Islamabad for construction of the Monument and the Convention Centre, as the same, in its original form, did not permit any construction in the vicinity.

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After its construction, in 1997, the Cabinet decided to privatize Convention Centre and also decided to construct a Five Star Hotel at the given site. It is pertinent to mention that for the said purpose, neither the Master Plan was amended nor any scheme was sanctioned under Capital Development Ordinance, 1960. Pursuant to the decision of the Cabinet in 1996, Master Plan of Islamabad was amended on 06.05.1997 providing for construction of Convention Centre, as originally, the area was earmarked for Kashmir Highway and Murree Road, Islamabad. On 02.07.1997, a proposal was placed before the Cabinet for modification of the Master Plan of Islamabad by allowing construction of a Five Star Hotel, Shopping Mall etc. along with Convention Centre, but no approval was granted by the Cabinet. In May 1998, Cabinet Committee on Privatization, constituted a Sub-Committee to negotiate with M/s Daewoo Corporation for privatization of the Convention Centre; on 31.05.1999, Capital Development Authority, in its meeting held on 10.11.1997, approved byelaws for construction of Five Star Hotel to have 20-storeys. Subsequently, since there were issues regarding height of the Building in light of the Zoning Regulation of Capital Development Authority, therefore, height was decreased from 180-feet to 150-feet. On 18.02.2004, senior officials of the Capital Development Authority gave presentation to the Secretary, Ministry of Interior for construction of Six Star Hotel adjacent to the Convention Centre. On 12.04.2004, Ministry of Interior granted approval for advertising the aforementioned Plot for construction of Five Star Hotel; pursuant to the same, Capital Development Authority published an advertisement inviting Requests for Pre-qualification from interested parties for construction of a Five Star Hotel. The advertisement specifically provided that the construction was for Five Star Hotel and according to the published byelaws, the construction was to include Five Star Hotel-cum-Convention Centre; maximum number of rooms

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mentioned in the byelaws was 500 including 20 VVIP Suites. The bidding took place, however, the appellant i.e. BNP Private Limited did not participate in the process and only two entities namely M/s Pakistan Services Limited and M/s Hashwani Hotels Limited qualified in the bidding process. The bidding could not materialize for administrative reasons and hence was cancelled. On 28.09.2004, a fresh advertisement was made inviting applications for Pre-qualification; again the invitation was to construct and operate a Five Star Hotel at the property/Plot. Through a separate advertisement, bidding was also invited for construction of a Shopping Mall as well as a Five Star Hotel. The bidding documents provided all the relevant details which included that the target date for opening of the Hotel was in 2008 and scope of construction was a Five Star Luxury Hotel. Subsequently, Federal Government turned down the proposal for construction of a Shopping Mall. It is pertinent to observe that only bidders, who were prequalified by CDA, made a bid. In this regard, BNP Private Limited did not participate in the process however four juridical persons i.e. Bismillah Textile Pvt. Ltd., Niagara Mills Pvt. Ltd., Paragon City Pvt. Ltd. & Belhasa International Company LLC, made a bid under the joint venture termed as 'BNP Group'. On 25.02.2005, in response to the query of one of the bidders namely M/s Hashwani Hotels Limited, CDA sent letters to all the bidders including BNP Group clarifying that 'Serviced Apartments' shall form integral part of the Hotel Property, which are to be operated by the Hotel Management and the same shall not be for sale. The same clarification also covered the shops which were again not to be for sale. On 07.02.2005, a document was issued again clarifying that construction on the Plot was for the purposes of a Five Star Hotel along with Serviced Apartments and related facilities. Meanwhile, one of the bidders namely Hashwani Hotel Limited filed a petition (W.P. No.586 of 2005) before Hon'ble Lahore High Court, Rawalpindi Bench Rawalpindi, which was

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dismissed on 27.04.2005. An Intra Court Appeal (ICA No.64 of 2005), assailing the judgment dated 27.04.2005, was filed but the same was dismissed for non-prosecution on 25.05.2005. On 09.03.2005, BNP Group made a bid of Rs.75000 per sq.yd., which was accepted hence it was the successful bidder. The successful bidder had to pay a sum of Rs.4,888,235 million in 15-years and was also required to furnish a Bank Guarantee and a Performance Guarantee. In this behalf, 15% of the total construction amount was to be paid within 45-days. On 28.07.2005, a lease deed was executed between BNP Pvt. Ltd./the appellant and the CDA. It is pertinent to mention that BNP Pvt. Ltd. was neither a Member of BNP Group nor it had made the bid in its individual capacity, but was allowed to execute lease deed by CDA. On 15.06.2005, since the appellant/BNP Pvt. Ltd. did not adhere to the terms of payment of installments and requested for rescheduling the same. On 26.02.2007, the matter was placed before the Economic Coordination Committee (ECC), which decided that CDA was competent to decide the issue regarding rescheduling of installments. Meanwhile, building plans were also submitted for approval and as those contained Luxury Apartments therefore the architects were informed accordingly that the same are in violation of terms of lease. On 16.08.2007, payment schedule of the installments was rescheduled and pursuant thereto, amended lease agreement was executed on 04.10.2007 modifying earlier payment schedule. On 29.03.2008, building plans were submitted which included Hotel Tower Apartments and Serviced Apartments. Meanwhile, the appellant requested for issuance of No Objection Certificate in favour of banks and prospective third party buyers pursuant to clause 2.6 of the lease deed which was turned down by CDA. On 26.08.2008, the appellant/BNP Pvt. Ltd. sent a letter denying that they are constructing and re-selling Residential Apartments and it was clarified that Serviced Apartments were being constructed as per the approved drawings.

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Meanwhile, the issue regarding height of the Building was again raised, as Civil Aviation Authority/Ministry of Defence raised an objection. On said issue, the appellant filed a Suit before the Civil Court at Islamabad. Meanwhile, explanation was sought from CDA regarding the appellant being a non-member of the Consortium Group. The reminders were also issued time and again. A settlement was reached between CDA and appellant and consequently, the latter withdrew the Suit and a second amended lease deed was executed on 07.01.2013, by virtue of which, height of the Building was reduced from 45 to 23 storeys. An audit objection was also raised by the Public Accounts Committee regarding payment schedule of the installments on the ground that terms of the contract, once settled, could not be altered in light of Rule 19 (iv) of the General Financial Rules of the Federal Government. The Public Accounts Committee issued directions to CDA in light of Audit Para. A petition under Article 199 of the Constitution (W.P. No.3755-2014) was filed by the appellant, which was decided vide judgment dated 03.03.2016 and CDA was directed to grant opportunity of hearing to the appellant. Pursuant to the referred directions, opportunity of hearing was granted by the Board of CDA before the Committee constituted for the said purpose. The report of the Committee was placed before the Board of CDA and in light of which, respondent Authority decided to cancel the lease granted to the appellant. The referred decision was challenged by the appellant and others by way of a petition under Article 199 of the Constitution (W.P. No.3043-2016) before this Court, which was dismissed by the Judge-in-Chambers vide the impugned judgment dated 03.03.2017. In ICA No.229/2016 CDA has challenged the decision by the Judge-in-Chambers to refer the matter to CDA Board for providing opportunity of hearing before taking any action against BNP (Pvt.) Limited.

3. There are two sets of appeals before this Court; one being filed by the appellant which is the lessee with respect to the Plot in question and the other filed by the third party interest holders, who claim to be the sub-lessees on the basis of sub-lease executed by the appellant with them.

4. Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court of Pakistan, appearing on behalf of the appellant, *inter alia*, contended that the Judge-in-Chambers has held that the appellant was unable to show a single document that the Plot in question was created, offered for sale or advertised for construction other than a Five Star Hotel let alone Residential Apartments. In this behalf, it was contended that bidding process expressly referred to Serviced Apartments and the said concept was also mentioned in the scope of the Project as well as byelaws of the Project; that CDA's letter dated 25.02.2005 addressed to Hashwani Hotels referred to Serviced Apartments as well as the judgment of the Hon'ble Lahore High Court dated 27.04.2005 in W.P. No.586-2005. It was further contended that lease deed dated 28.07.2005 also contains three recitals wherein reference to Serviced Apartments has been made and clause 2.6 permits sublease without prior notice to CDA; that clause 3.3 refers to Apartments. Moreover, approval of the Building Plans also refers to Serviced Apartments/Tower B&C. It was contended that if there is any ambiguity in the documents, the same has to be construed in favour of the appellant. The invitation to submit qualifications and lease deed was approved by CDA and they have to be interpreted *contra proferentum*.

5. Learned counsel for the appellant further contended that the Judge-in-Chambers did not take into account that no special favour was granted to the appellant; that there is no special relationship between appellant and CDA and lease was executed as was in other similar cases including Serena and Centaurus. It was also submitted that observation by the Judge-in-Chambers that CDA,

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being the Regulator, gave up its obligation, is totally uncalled for and there is no collusion and irregularity either on part of appellant or the respondent Authority.

6. Mr. Makhdoom Ali Khan, ASC also submitted that appellant had challenged letter dated 03.08.2016 issued by CDA, whereby it was informed that lease in favour of the appellant, with respect to the Plot in question, stands cancelled on the basis of the meeting of CDA Board held on 29.06.2016; the reasons provided therein were violation of CDA byelaws, violation of lease agreement as well as change in the entity. It was submitted that lease has been cancelled without assigning any reason, which is in violation of Section 24-A of General Clauses Act, 1897 inasmuch as no specific reason has been stated and the order is non-speaking. It was argued that the Judge-in-Chambers did not discuss the letter of cancellation in the impugned judgment and there is also no discussion on the decision by the CDA Board in the judgment.

7. The dispute between the parties namely appellant and CDA was contractual and a petition under Article 199 of the Constitution is maintainable in contractual disputes, it was argued by learned counsel for the appellant. Reliance was placed on cases reported as 'Deewan Petroleum Vs. GOP' (2010 CLD 988), 'Hazara Development Trust Vs. Qaisara Elahi' (2005 SCME 687), 'Ramna Pipe Vs. SNGPL (2004 SCMR 1274), 'Daewoo Corporation Vs. National Highway Authority' (2000 MLD 1745), 'Airport Service Manager Vs. Quaid-e-Azam International Airport' (1998 SCMR 2268), 'M/s Wak Orient Power and Light Limited Vs. GOP' (1998 CLC 1178) & 'M/s Pacific Multinational Pvt. Ltd. Vs. IG Sindh Police' (PLD 1992 Karachi 283).

8. It was also contended on behalf of learned counsel for the appellant that appellant had challenged the cancellation of lease by CDA and the proceedings were adversarial in nature and not inquisitorial and the Judge-in-Chambers could not have looked beyond the reasons stated in the letter of cancellation; that the

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Judge-in-Chambers could not have examined the reasons stated in the Minutes of the Meeting of CDA Board and the impugned judgment is liable to be set aside on that score. Reliance was placed on case reported as ‘Ministry of Inter Provincial Coordination Vs. Maj. (Retd.) Ahmad Nadeem Sadal’ (2014 CLC 600).

9. Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court of Pakistan submitted that the decision of CDA Board is on eight points. In this behalf, points No.1 to 3 pertains to JV participation in the bid and the appellant managed to sign the lease deed. It was argued that one of the participants of the bid was Elite Home Fashions Pvt. Ltd., the name of which was changed to BNP Pvt. Ltd. and where such is the case that name of the Company is changed, there are penal actions provided in the Companies Laws of Pakistan. It was submitted that the Judge-in-Chambers did not take into account the referred provisions of law and the Companies Law. It was highlighted that a Memorandum of Understanding was executed on 01.12.2004 between JV Partners constituting BNP Group and subsequently an agreement was executed by the referred Partners on 16.03.2005; that clauses E&G of JV Agreement provide for utilization of existing company-Elite Home Fashions Pvt. Ltd. for the Project; that JV Agreement was shared with CDA and the lease deed was executed in favour of BNP Pvt. Ltd.; likewise, letters by CDA approving rescheduling for payment addressed to BNP Pvt. Ltd. and the amendment of the lease deed were executed in favour of the appellant; even, settlement between BNP Pvt. Ltd. and CDA and the Certificate for remortgage was issued in favour of the appellant. In the referred backdrop, it was contended that there is estoppel by conduct against CDA. Reliance was placed on cases reported as ‘Nazim-ud-Din Vs. Sheikh Zia-ul-Haq Qamar’ (2015 SCMR 24), ‘Dr. Muhammad Javaid Shafi Vs. Syed Rashid Arshad’ (PLD 2015 SC 212), ‘Mian Muhammad Saeed Vs. The Province of West



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Pakistan’ (PLD 1964 SC 572), ‘TATA Iron & Steel Co. Ltd. Vs. Union of India’ [(2001) 2 SCC 41]. The appellant also placed reliance on the case law with respect to the agreement that CDA failed to give reasons and the decision of CDA Board is in violation of Section 24-A of General Clauses Act, 1897; ‘Muhammad Majid Vs. Secretary, Ministry of Manpower’ (PLD 2017 Islamabad 19), ‘Muhammad Amin Muhammad Bashir Limited Vs. Government of Pakistan’ (2015 SCMR 630), ‘Airport Support Services Vs. Airport Manager’ (1998 SCMR 2268), ‘Federation of Pakistan Vs. Tahir Latif’ (2007 SCMR 152), ‘Secretary, Ministry of Health Vs. Dr. Rehana Hameed’ (2010 SCMR 511) & ‘United Bank Limited Vs. Federation of Pakistan’ (2014 SCMR 856). Learned counsel further submitted that the Judge-in-Chambers erred in observing that possession has been handed over to the third party without completion certificate by CDA. In this behalf, it was contended that possession has not yet been handed over and the third party buyers/sub-lessees did not occupy the premises; that there is no finding on this issue and no transfer of occupation.

10. Learned counsel further submitted that there are numerous findings by the Judge-in-Chambers in the impugned judgment which are against CDA and after doing so, the fate of third party purchasers has been put in the hands of the respondents, which could not have been done. It was also argued that State Agencies stand in a fiduciary relationship to the people who are the beneficial owners of state owned assets. It was also submitted that it is an established principle that no one can benefit from his wrong. Reliance was placed on cases reported as ‘Justice Hasnat Ahmad Khan Vs. Federation of Pakistan’ (PLD 2011 SC 680), ‘Union of India Vs. Major General Madan Lal Yadav’ (AIR 1996 SC 1340), ‘Mian Allah Buksh Vs. Fazal Karim’ (PLD 1969 Quetta 13) & ‘Khairpur Textile Mills Ltd. Vs. Central Board of Revenue’ (PLD 1969 Karachi 163). It was also argued that the Hotel was not constructed without any fault of the

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appellant. In this behalf, it was submitted that on 08.10.2005, due to earthquake, Margalla Towers collapsed and CDA revised the Building Codes and in this backdrop, on 23.02.2006, the appellant applied to the Prime Minister for rescheduling of payments and the matter was renegotiated and on 29.11.2006, the appellant submitted the building plans and on 16.08.2007, the appellant's schedule was altered and first amendment to the lease deed was executed on 04.10.2007, whereupon the appellant paid a sum of Rs.120 millions and the remaining amount was to be paid in 12-equal yearly installments of Rs.334,833,125/-. It was contended that even the issue of height cropped up which delayed the Project and even NAB intervened and the settlement was reached between the parties on 07.12.2012, consequent whereupon, second amendment to the lease deed was executed; that on 14.02.2014, revised building plans were submitted which had not been approved by CDA till date.

11. Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court of Pakistan argued next that power of CDA to cancel lease is not inherent and can only be done under Regulation 19 of the Islamabad Land Disposal Regulation, 2005, which include non-payment of dues, non-completion of building, violation of terms and conditions of allotment, violation of byelaws/regulations/instructions, whereas in the instant case, it was submitted, building was being constructed in accordance with lease deed and third part rights were created in accordance with clause 2.6 of the lease deed; that no byelaws/regulations/instructions were violated and Hotel construction was delayed due to CDA's failure to approve revised building plans, hence the reasons given by CDA for cancellation of the lease i.e. violation of byelaws of CDA as well as lease deed, are not tenable. It was contended next that there were findings of illegality in the impugned judgment to the effect that construction and sale of Residential Apartments is illegal however there is no finding to the effect that lease deed was void,

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therefore, section 65 of the Contract Act, 1872 applies, where agreement is declared void ab-initio and the person, who has received such advantage, is bound to restore it or to make compensation for it to the person, from whom, he received it. Reliance was placed on case reported as 'Lakhra Power Generation C. Ltd. Vs. Karadeniz Powership Kaya Bey' (2014 CLD 337).

12. Learned counsel further submitted that effect of non-registration of the lease deed dated 28.07.2017 is non-consequential, as it was not a reason given by CDA Board in its decision dated 29.07.2016, hence the terms and conditions contained therein are binding; that section 49 of the Registration Act, 1908 operates in a manner so as to invalidate transfer of property in question. Reliance was placed on section 53-A of the Transfer of Properties Act to argue that rights may not be enforced against an individual having taken possession in part performance of the agreement. In support of his contentions, learned counsel placed reliance on cases reported as 'Kalimuddin Ansari Vs. Director, Excise & Taxation, Karachi & Another' (PLD 1971 SC 114) & 'Mst. Ghulam Sakina Vs. Umar Bakhs & Another' (PLD 1964 SC 456). It was also argued that in light of Section 47 of the Registration Act, 1908, lease deed shall operate retrospectively. Reliance was placed on case reported as 'Ghulam Rasool & Others Vs. Akbar Ali & Others' (2011 SCMR 794). It was contended that lease deed was signed and executed between BNP and CDA on 28.07.2005 and in light of Section 47 of the Registration Act, 1908, if Sale Deed is registered with the Joint Sub-Registrar today i.e. 15.05.2008, the lease deed shall operate from the date of its execution.

13. Mr. Babar Sattar, Advocate Supreme Court of Pakistan, appearing on behalf of appellants in ICA No.102-2017, *inter alia*, contended that stranger to the *lis* is not prohibited to file an appeal. Reliance was placed on case reported as 'H.M. Saya & Com. Karachi Vs. Wazir Ali Industries Limited, Karachi and

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others' (PLD 1969 Supreme Court 65) and it was also contended that sub-lessees have vested right therefore have *locus standi* to file the instant appeal.

13. Learned counsel, on facts, adopted the arguments by the learned counsel for the appellant in ICA No.109-2017.

14. It was argued that CDA, being the state functionary and the Regulator, performs obligatory duty to the public which is a sacred trust and so is the exercise of statutory functions; that the impugned judgment disregarded the settled principle that right of innocent third party ought to be protected and no person should be made to suffer on account of acts of public functionary. Reliance was placed on cases reported as 'The Montgomery Flour and General Mills Ltd. Montgomery Vs. The Director Food Purchases West Pakistan, Lahore and others' [(PLD 1957 (W.P.) Lahore 914)], 'Ikram Bus Service and others Vs. Board of Revenue, West Pakistan and others' (PLD 1963 Supreme Court 564), 'Habib Ullah Energy Limited and another Vs. WAPDA through Chairman and others' (PLD 2014 Supreme Court 47) & 'Owaisco Vs. Federation of Pakistan' (PLD 1999 Karachi 472).

15. Mr. Babar Sattar, ASC further argued that court can look into the contractual matters in its jurisdiction under Article 199 *ibid*. It was also argued that rights of third party have been ignored and disregarded. In this behalf, the distinction between occupation and possession was ignored; that the Judge-in-Chambers decided the issues beyond the subject matter and pleadings of the parties and failed to draw a distinction between void and voidable orders. It was contended that writ petition ought not to be exercised in aid of injustice; that the conduct of CDA attracts estoppel against it and it cannot approbate and reprobate and the doctrine of substantial compliance has been ignored. Learned counsel took the Court through various doctrines including legitimate expectation and *locus poenitentiae* and contended that same are attracted in the

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facts and circumstances of the case in favour of the appellant. Reliance was placed on cases reported as ‘Federal Government Employees Housing Foundation Vs. Muhammad Akram Alizai, Deputy Controller, PBC, Islamabad’ (PLD 2002 Supreme Court 1079), ‘Munir Ahmad Ghulam Muhammad Akhtar Vs. Pakistan Defence Housing Authority (DHA)’ (2004 YLR 2047 Karachi), ‘Pakistan through the Secretary, Ministry of Finance Vs. Muhammad Himayatullah Faruki’ (PLD 1969 Supreme Court 407), ‘Council of Civil Services Union Vs. Minister for the Civil Services’ [(1985) A.C. 374], ‘National Buildings Construction Corporation Vs. S. Raghunath’ [(1988) 7 SCC 66] & ‘Food Corporation of India Vs. Kamdhenu Cattle Feed Industries’ [(1993) 1 SCC 71].

16. Learned counsel further contended that in case of immovable properties, the monetary compensation is not an adequate remedy and the specific performance is. Reliance was placed on case reported as ‘Province of Punjab through District Coordination Officer, Okara and others Vs. Market Committee, Okara through Chairman/Secretary’ (2011 SCMR 1856). Learned counsel took the Court through the provisions of Registration Act, 1908 as well as Transfer of Property Act, 1882 to argue that documents in question are enforceable and do not suffer from any illegality. Reliance was placed on cases reported as ‘Board of Trustees through Chairman/Additional Secretary, Government of Pakistan, Islamabad and another Vs. Jamila Akhtar and Another’ (2003 SCMR 1174), ‘Mst. Saadia Vs. Mst. Gul Bibi’ (2016 SCMR 662), ‘Ali Rehman Vs. Fazal Mehmud and 8-others’ (2003 SCMR 327), ‘Mst. Ghulam Sakina Vs. Umar Baksh and Another’ (PLD 1964 Supreme Court 456) & ‘Tufail Muhammad through L.Rs Vs. Messrs Siddique Textile Mills Ltd. and others’ (2009 SCMR 1091). It was contended that allegation of fraud ought to have been proved. Reliance was placed on cases reported as ‘Ghulam Ghous Vs. Muhammad Yasin and Another’

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(2009 SCMR 70) & ‘Messrs Vinder Textile Mills Ltd. Vs. Industrial Development Bank of Pakistan’ (1999 YLR 1188).

17. The other learned counsels for the appellant adopted the arguments by learned counsels for the appellants in ICA No.109-2017 & 102-2017, however, Mr. Ali Raza, Advocate Supreme Court contended that questions involved, in the instant case, are disputed and need factual inquiry hence the matter ought to have been referred to the courts of plenary jurisdiction and findings on merits should not have been given by the Judge-in-Chambers.

18. Similarly, Mr. Rashideen Nawaz Kasuri, Advocate, appearing on behalf of Bank of Punjab, *inter alia* contended that the property in question was mortgaged with the Bank of Punjab and since the appellant defaulted in repayment of finance therefore the Bank is pursuing its legal remedy.

19. Learned counsel for the respondent CDA, *inter alia*, contended that instant appeals are not maintainable in light of proviso to section 3(2) of Law Reforms Ordinance, 1972. In this behalf, it was contended that Regulation 4.1.22 of Islamabad Land Disposal Regulation, 2005 provides right of appeal to CDA Board hence these appeals are not maintainable. It was further submitted that new respondents have been impleaded in the appeal, which could not have been done; that Federation of Pakistan was added in two of the appeals i.e. ICA No.125/2017 & ICA No.127/2017; that equitable relief cannot be granted to any party, which approaches the Court with unclean hands, as the remedy is discretionary; that the land belongs to the people of Pakistan and held by CDA as a fiduciary therefore its disposal has to be fair, open and transparent; that the appellant has committed fraud with CDA by selling the commercial area to Bank of Punjab and obtaining loan for the appellant on fake and bogus documents and collecting Rs.5.3 billion from buyers by sale of the Apartments which was not permissible; that booking with respect to the Apartments is for a sum of

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Rs.7.3 billion. It was also contended that sale of Apartments in commercial space to third party is void in light of Section 23 of NAB Ordinance, 1999 inasmuch as NAB is investigating the matter and in this behalf, inquiry is pending.

20. Mr. Kashif Ali Malik, Advocate High Court contended that lease deed is not registered hence is not enforceable in light of Section 17 read with Section 49 of the Registration Act, 1908. Reliance was placed on cases reported as ‘Government of Sindh Vs. Muhammad Shafi etc. (2015 SC 380) & ‘HBL Vs. Dr. Munawar Ali Siddiqui’ (1991 SCMR 1185). It was further submitted that factual controversy has been raised by way of challenging the cancellation of lease; construction issues, land disposal issues, payment issues and scope of the Project, which cannot be looked into in Constitutional jurisdiction; that document not produced before the Court in Writ Petition, cannot be considered in ICA. Reliance was placed on case reported as 2007 SCMR 130; that plea not taken before the Court in Writ Petition, cannot be introduced in Intra Court Appeal (PLD 2002 Lahore 28). It was further contended that scope of Intra Court Appeal is like a review petition under Order 47 Rule 1 CPC meant to correct errors apparent on the face of record (2004 CLC 1104).

21. Learned counsel contended that scope of the Project was construction of a Five Star Hotel and Serviced Apartments and was not for Residential Apartments. The number of rooms was restricted to between 250 to 300, with other amenities to form integral part of the Hotel and to be managed by the Hotel management; that the Apartments or commercial space was not meant for sale or sub-lease in view of CDA letter dated 25.02.2005; that Project did not include a Shopping Mall but the shops were meant to be part of the Hotel, as is the practice in other cases. It was further submitted that through collusion and fraud, the scope of the Project was changed and enlarged in the lease deed, which was not possible and the leasehold rights were to be passed on payment

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of 100% of cost of land. Learned counsel further submitted that BNP Pvt. Ltd. has no experience of a Five Star Hotel which could only be attributed to Belahasa which is part of BNP Group and had nothing to do with the Company. Even Belhasa was a Real Estate Management Company; that terms of conditions of auction along with building parameters were issued by CDA and the byelaws were placed before the Chairman, CDA for perusal and not for approval, whereas byelaws duly approved by CDA Board on 11.10.1997, were ignored at the time of disposal of Plot. It was further contended that terms of auction as well as lease deed did not allow creation of sublease and therefore the referred sub-lessees are strangers and have their remedy, if any, against the appellant and not against CDA. It was contended that even-otherwise, referred sub-lessees do not have any interest or right in the Apartments, as the transfer was void in light of Section 23 of NAB Ordinance, 1999. Moreover, it was argued that even subleases have been created through an unregistered document, which again is not tenable; that the height of the Building could not have been increased without approval from the Federal Government; that re-scheduling of the payment was a form of post-bid change. Learned counsel also submitted that the appellant is a distinct entity from Elite Home Fashions Pvt. Ltd. as well as BNP Group and that BNP Pvt. Ltd. cannot be equated with BNP Group; that sale of the Apartments by the appellant to the strangers as Residential Apartments is violation of building laws of CDA; that leasehold rights were mortgaged without obtaining a formal NOC; that the appellant is in default of CDA dues and the Project is in violation of the Islamabad Master Plan and building regulations. In this behalf, it was contended that the appellant had violated the provisions of CDA Ordinance, 1960, CDA Building Regulation, 2005, CDA Land Disposal Regulation, 2005 and CDA Property Manual (Instructions, Policies and Practices).



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22. The arguments on behalf of learned counsels for the parties have been heard and the documents, placed on record, have been examined with their able assistance.

23. The facts, leading to filing of instant appeals, have already been mentioned hereinabove with brevity therefore need not be reproduced.

24. The appellants are aggrieved of cancellation of leasehold rights by CDA.

25. In order to examine the legality of the action taken by CDA, it is imperative to draw chain of documents and the obligations created upon the appellant. In principle, the Government of Pakistan decided to construct a Monument, Convention Centre and a Banquet Hall at the Southern End of the Constitution Avenue, Islamabad between the existing Murree Road and Shahra-e-Kashmir. This decision was taken on 11.01.1996 and it was also decided to amend the Master Plan to permit right-of-way of Shahra-e-Kashmir to 700-feet. After its construction, a decision was taken to privatize Convention Centre and to this effect, decision was taken on 06.05.1997. It was also acknowledged that under the Master Plan, the area was earmarked for Kashmir High Way and Murree Road therefore the same was modified partially. Subsequently, a decision was taken by the Federal Government on 17.06.1997 for construction of a Five Star Hotel, Shopping Mall etc. along with Convention Centre and permission was sought for alteration of Master Plan as well as change in the Zoning Regulations. In this behalf, an advertisement was made for construction and operation of a Five Star Hotel, which is evident by examination of the same appearing in Daily 'DAWN' on September 25, 2004. The applications were also invited for pre-qualification to participate in the bidding process for 99-years' lease to construct the Hotel and operate the same. The payment was to be made within 15-years. Under the terms, the Project's scope was explained as under: -

### **PROJECT SCOPE**

*The CDA seeks the development of a Five Star Luxury Hotel near Convention Center Islamabad with a target opening date of fall 2008, in close proximity of state of the art, Conventional Center. The CDA's larger goals through the development of the Project are to provide a positive economic impact resulting in quality jobs for the Islamabad workforce and contribution to the long-term economic growth objective.*

*The CDA's interest in developing this facility is to provide a quality facility in the city. At present there are only two hotels, Serena and Marriot, catering to the needs of corporate, government and private sector.*

*CDA wants construction of a 250-300 rooms facility with a major international brand with related amenities and facilities. The CDA desires that such amenities and facilities feature at least ten presidential suites. Other amenities and facilities may include service apartments, restaurants, various lounges, a business center and ease of access to communication and internet technologies throughout the facility. Provision of adequate parking facilities is one of the basic pre-requisite.*

*This is not intended to limit Respondents creativity or ability to propose an alternative scale or set of features and amenities deemed to better suit the purpose of providing such facility through this Project.*

The said terms and conditions also laid down the experience and qualifications which is as follows: -

#### **I. Experience and Qualifications**

*A. Description of the Development Team: A brief description of the developer operator, builder, architect, and consultant team—including the following:*

- 1. Name and contact information of participating teams.*
- 2. Name of lend firm and lend contract person.*
- 3. Years established.*
- 4. Size of each firm, indicating the number of principals.*
- 5. The role of each firms in the project.*

*B. Statement of Project Understanding: the Development team should submit statement of understating of the opportunities the site presents. The statement should convey to CDA the vision for the site and how the developer intends to achieve a high quality luxury hotel. Limit it to too pages. CDA is not requiring detailed building designs at this time, however the proponent may include a conceptual design.*

*C. Key Project Personnel: The names and qualifications of the principal and project manager in charge; for both the developer and other team members. Please limit to one page per team member.*

*D. Project Team Qualifications: An outline of the firm and team member qualification including relevant experience with similar projects such as full service hotels, multistory office with underground parking in an urban environment or multistory commercial facility in the suburban area.*

E. *Experience: A brief narrative, graphics and/or photos of the projects developed by each firm that are most similar to this project. The project description should include the following:*

1. *Project name and location.*
2. *Names of the firms involved.*
3. *Summary of the project.*
4. *Project budget or cost.*
5. *Role and level of involvement of key personnel.*
6. *Dates of construction or completion.*

F. *Reference, Related Experience, and Examples of Work: Reference for related projects, Specify the project, location, developer's role, project manager, financing, and the level of participation by public agency, if any.*

G. *Successful experience with project in the development and operation of a world wide recognized hotel chain is required.*

H. *Financing Capabilities: The developer must explain the financing structure of the last major projects they have completed in order to demonstrate the team's ability to finance the project through both debt and equity financing.*

I. *A bank draft or Pay Order of PKR 25,000 (non-refundable) in the name of "Project Development Cell" Capital Development Authority should also be submitted as security fee.*

Apparently, BNP Group, being the Consortium comprising Members mentioned hereinabove, was shortlisted and qualified. The conditions and byelaws, provided in the bidding, are mentioned herein below: -

### **Vision**

*CDA envisions that besides providing Islamabad with much needed facility; the developer will build an iconic building symbolizing the model and moderate capital.*

*CDA is visualizing a "performance criteria" for the selected developer to follow. These Performance criteria have been prepared to provide flexibility to the bidder while ensuring that a five star hotel facility as per international standard is built. The bidders is to ensure that standards of comfort safety, including structural, and fire are fulfilled and are in accordance with criteria of a international chain of operators of five star hotel facilities.*

BNP Group was declared as a successful bidder and consequently, a lease deed was entered into between the appellant and CDA. The referred document is dated 28.07.2005 and is registered with the Rent Controller, Islamabad as required under Islamabad Rent Restriction Ordinance, 2001. It is pertinent to observe that the referred document is not registered with the Registrar of Documents under Registration Act, 1908. It is also pertinent to observe that

referred document proposes to create a lease in favour of the appellant for a period of 99-years and hence was required to be compulsorily registered under section 17 of the Registration Act, 1908.

26. The Capital Development Authority, vide meeting held on 29.07.2016, took decision to cancel the lease created in favour of the appellant, which was accordingly communicated to the Chief Executive of the appellant on 03.08.2016. The decision of the Board of CDA is as follows: -

### **DECISION**

*The Board after hearing point of view from both parties and carrying out deep analysis of the arguments presented, observed/decided the case on the following basis:*

- *That BNP Group (comprising of i.e. Bismillah Textile (Pvt.) Ltd., ii. Niagara Mills (Pvt.) Ltd., iii. Paragon City (Pvt.) Ltd., iv. Belhasa International Company LLC, participated in the bidding process and was declared as the highest bidder.*
- *BNP (Pvt.) Limited formerly known as Elite Home Fashions (Pvt.) Limited, which was a separate business entity from the 'BNP Group' without participating in the entire bidding process managed to sign the sale deed with CDA on 28.07.2005.*
- *That as per company ordinance 1984, any private limited company that under goes into such agreement under such circumstances is bound to declare both present and former names of the companies side by side on all legal contracts for at least a period of one year.*
- *That the several relaxations are extended to BNP Group from time to time in contradiction to rules and regulations which facilitated the developer to the detriment of the CDA and thus caused huge loss to the CDA.*
- *That the BNP Group affected these changes in terms & conditions and are accountable for their actions at appropriate forum.*
- *That without seeking completion certificate the petitioner has committed a serious violation of CDA laws and regulations by handing over possession to third parties as has been mentioned in the writ petition filed in Islamabad High Court. The creation of third party interests without obtaining 'completion certificate' or permission from CDA was absolutely illegal and amounted to fraud.*
- *That as regards the involvement of CDA officials in this project at the relevant times, the Board decided that appropriate action may be initiated by the competent forums.*
- *That the site which was initially declared as hotel site and auctioned as one is not utilized yet, which was an integral part of the project. This along with several other issues pointed out above is a clear violation of CDA by-laws.*

*Accordingly, the Board decided to cancel the lease agreement/allotment of M/s BNP (Pvt.) Ltd., in accordance with law after completion due*

*process. The concerned directorate should complete all codal formalities in this regard”.*

27. As noted above, the decision of CDA was challenged through a petition under Article 199 of the Constitution, which was dismissed by the Judge-in-Chambers vide the impugned judgment.

28. One of the main grounds for cancellation of lease agreement is that the appellant i.e. BNP Pvt. Ltd. never participated in the process of bidding and was not prequalified. In this regard, the pre-qualification was of BNP Group and participation was also by it in the bidding process, which is a Consortium comprising Bismillah Textile Pvt. Ltd., Niagara Mills Pvt. Ltd., Paragon City Pvt. Ltd. & Belhasa International Company LLC. At the time of prequalification, Memorandum of Understanding was presented to CDA and later on, Joint Venture Agreement entered into between the parties, was also placed on record. It was only at the time of execution of lease deed that BNP Pvt. Ltd. surfaced. It is pertinent to observe that CDA, at the time, did not raise any objection regarding legal status of BNP Pvt. Ltd. or at least there is no document on record to the effect. The JV Agreement between the parties is dated 06.03.2005; under the same, the object of the Company was to implement the Project. In Clause 3.1, it was provided that the parties shall change the name of existing Company i.e. Elite Home Fashions Pvt. Ltd. to BNP Pvt. Ltd. The authorized share capital of the Company was to be Rupees 20-million and its shareholders were to be Abdul Hafeez Sheikh, Imran Ahmed, Shazia Hafeez Sheikh, Muhammad Abdul Hameed Sheikh & Abdul Majeed Sheikh. The Management of the Company was to vest in its Directors and Bismillah Textile Limited was to nominate/appoint two Directors, whereas Niagra Mills Ltd. and Paragon City Pvt. Ltd. were to nominate/appoint one Director each. Pursuant to the said Agreement, change in the name of Elite Home Fashions (Pvt.) Limited took

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place on 02.05.2005 and a Certificate was accordingly issued by the Securities & Exchange Commission of Pakistan. The list of shareholders, appended with Articles of Association, indicates Farooq Ahmad Sheikh, Shazia Hameed Sheikh & Razia Sheikh as its shareholders. Form-29, appended with the appeal, indicates that Mr. Abdul Hafeez Sheikh is the Chief Executive with Shazia Hafeez Sheikh and M. Abual Adham Sheikh as Directors. In the referred position, it is evident that appellant is a 'distinct entity' from BNP Group. Moreover, Joint Venture Agreement between JV Partners envisaged formation of a Company and appointment of Directors and shareholders in a particular manner and of number which did not materialize. The examination of the requirements for prequalification for construction of the Hotel and running the same, required expertise and experience in the Hotel business, which the appellant and its shareholders do not possess hence the prequalification was made of a person/entity different from one, which signed the lease deed.

29. It is fundamental principle of Company Laws that a Company formed and incorporated under the law, is a 'distinct person' from its shareholders and as is commonly termed that when a company is formed, "veil of incorporation" is cast between the entity created and its shareholders. In certain situations, veil of incorporation can be lifted to examine who effectively is running the Company and managing its affairs. In the present case, as noted above, BNP Pvt. Ltd. is a different entity from BNP Group and even to examine the assertion of the appellant that it is one and the same, if the veil of incorporation is lifted, it is seen that the appellant is a private affair of Mr. Abdul Hafeez Sheikh and his family primarily. The Joint Venture Agreement envisaged appointment and nomination of the Directors of JV Partners, however, Form-29, appended with the record, does not reflect the same. The execution of lease deed between CDA and appellant was not in conformity with the bidding process, as the entity

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which executed the lease deed, was not the same, which participated in the process. No document or verbal assertion was made on behalf of the appellant to show that the shareholders of the appellant have requisite experience and expertise in construction of a Hotel and running the same. The deal by CDA with appellant and its Management, if not in collusion, is reflective of incompetence on its part. The finding by the Judge-in-Chambers, on the issue in hand which is one of the reasons for cancellation of lease agreement, does not suffer from any factual or legal infirmity as CDA did not conclude the transaction in a transparent manner.

30. The other main reason ascribed in the decision by the Board of CDA for cancellation of lease in favour of the appellant, is violation of CDA laws including Rules and Regulations. In this behalf, the parent statute which governs the functioning of CDA, is the Capital Development Authority Ordinance, 1960. Under section 11 of the same, there has to be a Master Plan for Islamabad Capital Territory and in all schemes/sectors, development work is to be carried out according to said Master Plan. Section 51 of the 1960 Ordinance, authorizes CDA to frame regulations for the purposes of carrying out its functions. Pursuant to referred provision, CDA has framed various rules and regulations. The relevant ones, for the purposes of present controversy, are Islamabad Capital Territory (Zoning) Regulation, 1992 and Islamabad Land Disposal Regulation, 2005.

31. As noted above, initially when approval for construction of Convention Centre was granted, Master Plan was accordingly amended, however there is no document on record which shows that Master Plan was amended for constructing a Five Star Hotel with other amenities, as advertised. This is in violation of provisions of CDA Ordinance, 1960. Under the Islamabad Capital Territory (Zoning) Regulation, 1992, the Islamabad Capital Territory is divided

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into five Zones as delineated in the Master Plan. The property in question falls in Zone-III, which includes Margalla Hills National Park as notified under section 21 of the Islamabad Wild Life (Protection, Preservation, Conversion and Management) Ordinance, 1979. Other protected ranges, forest areas and unacquired land fall between Margalla Hills and North of Murree Road, Islamabad. Under clause 4, the development for the land in the Zones, is subjected to certain conditions. In this regard, clause 4(iii) provides for the land use in Zone-III. The bare reading of the land use shows that no sale/purchase of land which entails change in the land use, is to be allowed and neither any residential scheme could be floated in the Zone nor construction of houses would be allowed. The appellant has controverted the position by arguing that the land does not fall within Zone-III however, no cogent material was placed on record to substantiate the referred argument.

32. The land is to be disposed by CDA pursuant to the Islamabad Land Disposal Regulation, 2005. In this regard, the land use has been placed in various categories by classification of plots as provided in Regulation 3. Regulation 3(2) defines commercial and business plots and includes plots for Hotels. Under Regulation 6, all commercial and business plots are to be sold or leased out through open auction as commercial plots for activities provided under Regulation 3(2). In this regard, under Regulation 6(2), plots are leased out or sold for any of the activities within the scope of commercial plot as defined in clause 3(2). Under clause 3, CDA may permit a different land use subject to payment of conversion fee however plots allotted for construction and use as *inter alia* Hotels/Five Star Hotel/Sites for Multi Storey Building, will not be allowed any conversion. Under Regulation 16, the construction is to be completed within the prescribed time period, however under Regulation 17 *ibid*, the completion period may be extended. Regulation 19 provides for cancellation of plots on



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account of non-payment of dues within the prescribed period, non-completion of building within the specified period, violation of other terms and conditions of allotment e.g. non-conforming use and violation of municipal byelaws and building zoning and other regulations.

33. Admittedly, the appellant has not paid the installments, which it was required to do under the lease deed and the amendments made thereto; even the building is not yet complete and the plot was leased out for construction of a Five Star Hotel with Serviced Apartments and other amenities but it is an admitted position that the Apartments constructed have been sold out/subleased to strangers, for consideration, to be used as Residential Apartments; the above facts amount to violation of terms of allotment and hence compelled CDA to cancel the lease of Plot as provided under Regulation 19. The conditions of lease and byelaws clearly provide that the purpose of the Project is to build a Five Star Hotel or of higher rating along with Serviced Apartments and related facilities. It has been argued vehemently that since the Apartments shall be managed by the Builder/appellant by way of maintenance, therefore, they are Serviced Apartments, hence there is no violation. The referred argument is spurned inasmuch as the concept of Serviced Apartments in the common parlance is that it is a letting for a shorter or longer term generally on the basis of a license; they are furnished and provide amenities for house-keeping and allied services for guests. The Serviced Apartments offer facilities much like a traditional Hotel but with added space, convenience and privacy like a home (The concept as is provided by Association of Serviced Apartments). The sublease(s) executed between the appellant and others does not envisage this concept and creates a sublease for a period shorter than 99 years for consideration. Moreover, the bare perusal of the sub-lease agreement shows that permitted use is residential. The examination of terms and conditions

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makes it evident that the transaction is more or less sale of the leasehold rights defeating the purpose for which, the Plot was to be utilized. Likewise, the advertisement was for amenities related to hotel business including shops etc. and did not provide for establishment of a Shopping Mall. Reliance has been placed, on behalf of appellant, on clause 2.6 of the lease deed to justify mortgaging or subleasing its rights. The recitals in the lease deed make reference to the newspaper advertisement and bidding by BNP Group however, the word 'Serviced' has been omitted there-from, which could be inadvertent or deliberate on part of CDA officials. As noted above, all along in the advertisement as well as in the conditions for sale and byelaws, it was emphasized that a Five Star Hotel and Serviced Apartments are to be constructed. The notable omission of the word 'Serviced' in the Lease Deed shows that appellant along with CDA has flouted the purpose for which, the Plot was to be used. The lease agreement could not deviate from the purpose, for which, the property was leased out. The construction and sale of Residential Apartments is in clear violation of Islamabad Land Disposal Regulation, 2005 as well as 1992 Zoning Regulation, which has the status of law, as the same have been framed under section 51 of Capital Development Authority Ordinance, 1960. It is trite law that any agreement, which is in violation of law, is not sustainable.

34. It has been argued on behalf of appellant that CDA is estopped from denying the position regarding construction of Residential Apartments and/or other infirmities raised by it. It is an admitted position that there can be no estoppel against law. The Plot was leased out specifically as a Hotel site and was to include Serviced Apartments and not Residential Apartments, as has been done through sub-leases. As mentioned above, sublease defeats the purpose of Serviced Apartments, as the word or concept is understood in the common usage.

35. Another aspect of the matter though is not provided in the Minutes of the Meeting of CDA Board, whereby it was decided that the lease shall be cancelled but was argued before the Court, is the effect of non-registration of lease deed. The CDA executed lease in favour of appellant for a period of 99-years. Under section 17 of the Registration Act, 1908, where lease is for a period of more than eleven months, the same is compulsorily registered. Under section 49 of the Registration Act, 1908 if a document which is required under the law to be compulsorily registered is not registered, it does not create any right. The amendments made in the lease deed were also not registered. The appellant has placed reliance on section 53-A of Transfer of Properties Act to argue that where purchaser is put in possession in part performance of sale agreement, he is deemed to be the owner. We are afraid that the referred argument is not tenable however no detailed deliberation is required on this aspect of the case inasmuch as the lease was not cancelled on the basis of unregistered document. However, since the document is unregistered, it did not create rights for 99-years therefore lease could have been revoked/cancelled.

36. The appellant filed a petition under Article 199 of the Constitution against cancellation of lease. This Court, in exercise of powers under Article 199 of the Constitution *ibid*, had limited scope to examine the administrative action taken by CDA. In this regard, three general principles, on the basis of which, judicial review against any administrative action is undertaken, are illegality, irrationality and procedural impropriety. The detailed questions of fact cannot be gone into, in a petition under Article 199 *ibid*. The impugned action of CDA does not suffer from referred principles namely illegality, irrationality and procedural impropriety inasmuch under the law, CDA is empowered to cancel the lease and

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the appellants were provided opportunity of hearing before doing so. The action taken is within the parameters of law.

37. Third parties, which claim to have acquired interest on the basis of sub-leases executed by the appellant in their favour, sink or sail with the appellant. An argument was advanced that they are bonafide purchasers for value without notice. This argument is not sustainable in jurisdiction under Article 199 of the Constitution, as it requires evidence and the sub-lessees may agitate the matter in the court of competent jurisdiction. The sub-lessees also have the remedy against the appellant which they may agitate before court of competent jurisdiction. In light of case law reported as 'H.M. Saya & Com. Karachi Vs. Wazir Ali Industries Limited, Karachi and others' (PLD 1969 Supreme Court 65), no specific permission was granted to sub-lessees to file appeals as they were not parties in the writ petition, however they were heard and the appeals are being decided on merit.

38. Moreover, all along, it was advertised and existed in the documents that Apartments were Serviced Apartments and not Residential Apartments therefore no misrepresentation existed on part of CDA to the public at large. At best, CDA failed to warn the public when it came to its notice that Apartments are being sold for residential purposes. As regulator, it was expected of CDA to be more vigilant and avoid the situation which has been created due to their inaction, in the form of third party rights and erection of twin towers. The impugned judgment does not suffer from any error of law or factual infirmities calling for interference in appeal.

39. In view of above, above mentioned appeals except ICA No.229/2016 are without merit and are accordingly dismissed. ICA No.229/2016 is dismissed as

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having become infructuous. All pending applications are accordingly disposed of.

(MOHSIN AKHTAR KAYANI)  
JUDGE

(AAMER FAROOQ)  
JUDGE

Announced in Open Court on 03.09.2018

Zawar JUDGE

JUDGE

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