

FORM NO.HCJD/C
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT

C.R. No. 380 of 2016.

**Munawar Baig
Mughal, etc.**

Versus

Capital Development Authority.

Date of hearing: 06.12.2017.

Petitioners by: Mr Niazullah Khan Niazi, Advocate for the petitioners in the instant petition as well as for the respondents in C.R. no. 327 of 2016.

Respondent by: Mr Tariq Mahmood Jahangiri, Advocate for the respondent in the instant petition as well as for the petitioner in C.R. no. 327 of 2016.

Athar Minallah, J: Through this consolidated order I shall decide the instant civil revision along with C.R. no. 327 of 2016. The Capital Development Authority (hereinafter referred to as the "**Authority**") through C.R. no. 327 of 2016 has assailed the judgment and decree, dated 31.05.2016, passed by the learned Additional District Judge-VII (West) Islamabad. Likewise, an Attorney, claiming to have the authority of the legal heirs of Munawar Baig Mughal namely Mst. Saleem Akhtar Khan w/o Bashir

Ahmed Khan and Mst. Shaheen Akhtar w/o Pervez Akhtar Bhatti, has also assailed the same judgment and decree through C.R. no. 380 of 2016. The latter civil revision has been filed by Haroon ur Rashid Butt son of Abdul Rashid Butt (hereinafter referred to as the "**Attorney**").

2. The facts, in brief, are that a suit was filed on 10.04.2006 by Munawar Baig Mughal, Mst. Saleem Akhtar Khan and Mst. Shaheen Akhtar (hereinafter referred to as the "**Petitioners / Plaintiffs**") seeking a declaration, permanent and mandatory injunction. The admitted facts as asserted in the plaint are that the Authority, through public auction held on 08.01.1991, had offered commercial plot no. 27, measuring 60x80 (533.33 sq. yards), situated at the Industrial and Trading Centre of Sector G-10/4, Islamabad (hereinafter referred to as the "**Property**") for its lease to the highest bidder. The Petitioners / Plaintiffs participated in the public auction and were declared as successful bidders. After acceptance of the bid the Authority, vide letter dated 19.06.1991 (Ex.P.2), specified the terms and conditions of the lease which, inter alia, included the following clause;

"If any amount of arrears or delayed payment charges etc due thereon remains unpaid (whether formally demanded or not) for a period of two months from the due date, it shall be lawful for the Authority to cancel the lease and resume

possession of the plot in accordance with the terms and conditions therein”.

3. The Property was offered to the general public on 'as is where is basis' and the same was explicitly mentioned in the bidding document i.e. brochure. The bid of Rs.5400/- per square yard was declared successful and thus the total premium which was required to be paid amounted to Rs.2,879,982/-. Pursuant to the terms and conditions of the auction, the Petitioners / Plaintiffs deposited 25% of the total premium i.e. Rs.720,000/- at the time of acceptance of the bid and the balance premium amounting to Rs.2,159,982/- was to be paid in four quarterly installments. The schedule, which was explicitly mentioned in the letter dated 19.06.1999, is as follows;-

- (i) 1st installment of Rs.539,996/- by 06.09.1991.*
- (ii) 2nd installment of Rs.539,996/- by 06.12.1991.*
- (iii) 3rd installment of Rs.539,996/- by 06.03.1992.*
- (iv) 4th installment of Rs.539,996/- by 06.06.1992.*

4. It is noted that at the time when the Property was put to public auction there was no representation made to the prospective bidders by or on behalf of the Authority that the payment of the premium would be subject to

providing infrastructure facilities. There was also no representation to the effect that the payment of the premium could be delayed. The bidders were also not informed that the Board of the Authority may grant extension in payment of the total bid amount. The bidders were expressly informed and they undoubtedly fully understood that the Property was being offered for lease on 'as is where is basis'. The Petitioners / Plaintiffs did not pay the installments according to the prescribed schedule and, therefore, the Authority, vide letter dated 22.09.1993, directed payment of the premium within fifteen days. After issuing notices the lease of the Property was cancelled vide letter dated 01.08.1994. The Petitioners / Plaintiffs filed an application in February 1995 for restoration of the lease of the Property. The Board of the Authority, in its meeting held on 04.06.1995, decided to restore the lease of the Property, and a fresh schedule was prescribed vide letter dated 30.10.1995 and the same was as follows;-

- (i) *1st installment of Rs.539,996/- by 01.01.1996.*
- (ii) *2nd installment of Rs.539,996/- by 01.04.1996.*
- (iii) *3rd installment of Rs.539,996/- by 01.07.1996.*
- (iv) *4th installment of Rs.539,996/- by 01.10.1996.*

5. The Authority, without receiving the payment according to the prescribed schedule, handed over possession of the Property to the Petitioners / Plaintiffs on 18.01.1996. However, the payments were not made as per the prescribed schedule and, therefore, show cause notice, dated 26.07.1999 (Ex.P.9), final show cause notice, dated 16.03.1998 (Ex.P.10) and notice, dated 28.10.1997 (Ex.P.11) were served on the Petitioners / Plaintiffs. Another notice, dated 21.01.2000 was also received by the Petitioners / Plaintiffs and ultimately the lease of the plot was cancelled on the sole ground of default on the part of the Petitioners / Plaintiffs to deposit the outstanding premium as per the prescribed schedule. The Petitioners / Plaintiffs vide letter, dated 27.11.2002, requested review of the decision and submitted therewith a pay order amounting to Rs.2160,000/-. However, since the lease of the Property had been cancelled, therefore, the pay order was returned. The Petitioners / Plaintiffs, therefore, instituted a suit through the Attorney on 10.04.2006. The suit was contested by the Authority. The learned trial Court vide order, dated 29.07.2009, framed six issues out of the divergent pleadings. The Attorney entered the witness box as PW.1 and placed on record documentary evidence. Likewise, Ghulam Muhammad, Sub-Assistant Estate Management-II appeared as witness on behalf of the Authority. The learned trial Court, after recording of evidence and affording an

opportunity of hearing to the parties, dismissed the suit vide judgment and decree, dated 05.01.2016. An appeal was filed by the Attorney and the same was allowed vide judgment and decree, dated 31.05.2016. The Authority and the Attorney on behalf of the Petitioners / Plaintiffs have assailed the said judgment and decree, dated 31.05.2016.

6. The learned counsel appearing on behalf of the Authority has contended that; the judgment and decree has been rendered by the learned appellate Court by excluding from consideration the principles and law laid down by the superior Courts; the impugned judgment and decree is based on misreading and non-reading of evidence; the Property was put to auction on 'as is where is basis'; the plot was cancelled on 24.05.2000 and it is admitted in paragraph 34 of the plaint that a pay order was submitted on 27.11.2002; till 27.11.2002, the Petitioners / Plaintiffs, despite having been afforded several opportunities including rescheduling of payments, were not willing to fulfill their obligation; it is an admitted position that the Petitioners / Plaintiffs failed to pay even a single installment as per the prescribed schedule; the first installment became due on 06.09.1991 and till cancellation of lease of the Property on 24.05.2000 they preferred not to pay installments; the non-payment of the total bid amount in accordance with the prescribed schedule is a violation of the principles of transparency; the appeal was filed by the Attorney, who had

admitted during his cross examination before the learned trial Court that the executor thereof i.e. Munawar Baig Mughal, had passed away in 2014; the Attorney could not place on record a duly executed power of attorney by the legal heirs or on behalf of the other Petitioners / Plaintiffs; the judgment and decree rendered to by the learned appellate Court has the effect of extending a benefit to the Petitioners / Plaintiffs to which they are not entitled; violation of the conditions of bidding/auction inevitably results in loss to the public exchequer.

7. The learned counsel who appeared on behalf of the Petitioners / Plaintiffs has argued that; the learned appellate Court has rightly placed reliance on the judgments rendered by the august Supreme Court, wherein it has been held that the Chairman of the Authority is exclusively empowered to order cancellation of a Property which vests in the latter; restoration having been made subject to payment of delay charges is a violation of the rights which accrued in favour of the Petitioners / Plaintiffs being successful bidders; the delay in payment was on account of failure on the part of the Authority to provide infrastructure facilities and the same stands admitted in the light of the letter dated 30.10.1995 (Ex.P.14); the judgment and decree, dated 31.05.2016, to the extent of restoring the lease of the Property against payment of the balance premium in addition to the delay charges is not in consonance with the

law; the delay charges are not attracted since admittedly the infrastructure facilities were not made available.

8. The learned counsels for the parties have been heard and the record perused with their able assistance.

9. The admitted facts have been noted above. The lease of the Property was offered to the general public through public auction. It is not denied that no representation was made by or on behalf of the Authority through the published advertisements or the bidding documents that the payment of the bid amount could be delayed or that it was dependent on providing infrastructure facilities etc. It is also not denied that the Property was put to auction on 'as is where is basis'. The auction was held in January 1991 wherein the Petitioners / Plaintiffs were declared as successful bidders and, pursuant thereto, a letter of lease, dated 19.06.1991 was issued and the terms and conditions mentioned therein were accepted by the Petitioners / Plaintiffs. The schedule of payment was also explicitly provided in the lease letter, dated 19.06.1991. However, the Petitioners / Plaintiffs, on one pretext or the other, kept delaying the payment and, therefore, the persistent default ultimately led to cancellation of the lease of the Property. The Board of the Authority restored the plot and prescribed a fresh schedule for payment of the premium in installments. However, the Petitioners / Plaintiffs, having

been extended this extraordinary opportunity, did not pay the balance amount. Several show cause notices, including a final show cause notice, was also issued to them and ultimately the lease of the Property was cancelled on 24.05.2000. Instead of challenging the cancellation of the lease, the Petitioners / Plaintiffs belatedly made an attempt to get the same restored by submitting a pay order on 27.11.2002. The learned trial Court, after appreciating the evidence and on the basis of balance of probabilities dismissed the suit. However, the appeal preferred by the Attorney, purportedly on behalf of the Petitioners / Plaintiffs, was allowed by the learned Additional District Judge. The latter accepted the appeal mainly on two grounds, firstly, placing reliance on the judgment of the august Supreme Court rendered in the cases titled "*Capital Development Authority through Chairman and another versus Zahid Iqbal and another*" [PLD 2004 S.C. 99] and "*Capital Development Authority through Chairman and another versus Mrs. Shaheen Farooq an another*" [2007 SCMR 1328] and, secondly, that the Petitioners / Plaintiffs were justified in delaying the payment because the Authority had not provided infrastructure facilities. The learned appellate Court, therefore, decreed the suit by declaring cancellation of the lease Property vide letter dated 24.05.2000 as illegal. The decree is silent regarding the terms and conditions on which the lease is to be restored. A plain reading of the impugned judgment and decree shows that the learned

appellate Court appears to have excluded from consideration the fact that the Property was vested in the Authority and, therefore, the principles of transparency could not have been compromised. Moreover, the learned appellate Court also did not consider the fundamental factor in the instant petitions that the lease of the Property was offered to the general public and the auction was held on 'as is where is basis'. The learned appellate Court also did not take into account the conduct of the Petitioners/Plaintiffs which, inter alia, could have been enough to non suit them because they had sought equitable relief. The properties which vest in the Authority in fact belong to the State and, therefore, its disposal in any form has to strictly comply with the principles of transparency. No person can be allowed to make gains which may result to loss being caused to the exchequer, in this case to the Authority. Adherence to principles of transparency is mandatory while dealing with public property and it is by now settled law that violation thereof is abuse of powers vested in a public office holder.

10. The Authority has been established under the Capital Development Authority Ordinance, 1960 (hereinafter referred to as the "Ordinance of 1960") The said enactment is a self contained, comprehensive and special statute enacted for making arrangements for the planning and development of Islamabad as the Federal Capital of Pakistan within the framework of the Master Plan. The Authority is

vested with enormous and exclusive powers as a regulator which, inter alia, empowers it to acquire land pursuant to preparing a scheme and such land then vests in the latter. The Authority, therefore, enjoys the status of holding properties vested in it as a trustee on behalf of the people of Pakistan. It holds the vested land as a trust property on behalf of every citizen of Pakistan, thus giving rise to a relationship which is fiduciary in nature. As a consequence the power of disposal of land definitely attracts the duties and obligations of a fiduciary. The sanctity and functions entrusted to the Authority have been highlighted by the august Supreme Court in various judgments. It has been held in *"Muhammad Ikhtlaq Memon versus Capital Development Authority through Chairman"* [2015 SCMR 294] that the Authority, as a statutory organization, has to act in the public interest. In *"Suo Motu Case No. 13 of 2009"* [PLD 2011 SC 619] the apex Court has observed in the context of the importance of the statutory duties and obligations of the Authority that Islamabad, being the Capital of the country, every inch of its land belongs to the entire public of Pakistan. In the case titled *"Human Rights Cases No. 4668 of 2006, 1111 of 2007 and 15283-G of 2010"* [PLD 2010 SC 759], it has been declared and held that the provisions of the Ordinance of 1960 and the rules and regulations made there under are of mandatory nature and binding, so much so that a liberal construction thereof is not permissible. Reference is also made to the judgments rendered in

"Capital Development Authority through Chairman and others versus Dr Abdul Qadeer Khan and others" [1999 SCMR 2636], "Saad Mazhar and others versus CDA, etc" [2005 SCMR 1973] and "Moulvi Iqbal Haider versus CDA, etc" [PLD 2006 SC 394].

11. As a fiduciary, the Authority is, therefore, saddled with the statutory obligation to strictly observe the principles of transparency in dealing with the property vested in it. Every inch of land vested in the Authority can only be disposed of strictly in consonance with the principles and law laid down by the august Supreme Court.

12. The Property in this case vests in the Authority and was offered for lease through public auction. In the recent past the august Supreme Court has laid down principles and law in a chain of judgments regarding disposal of State owned properties. The same principles and law are definitely attracted in the case of properties which vest in the Authority under the Ordinance of 1960. It would, therefore, be beneficial to survey the precedent law in this regard.

13. In the case titled "Habibullah Energy Limited and another versus WAPDA through Chairman and others" [PLD 2014 S.C. 47], the august Supreme Court has

succinctly described the status of holders of public office and their obligations towards the citizens. The relevant portion is reproduced as follows;-

"We have on numerous occasions emphasized the fiduciary nature of the interaction between the State and the citizen. In Muhammad Yasin v. Federation of Pakistan (PLD 2012 S.C. 132), we held that 'holders of public office are first and foremost fiduciaries and trustees for the people of Pakistan.....And when performing the functions of their Office, they can have no interest other than the interests of the honourable People of Pakistan.' The basis of fiduciary relations is the exclusive benefit principle, according to which the fiduciary has a duty to act solely in the interests of the beneficiary. Fiduciary obligations depend on the complete commitment of the fiduciary to act in the best interest of the principle."

"At this point, it is important, it is important to note that not all decisions by state functionaries are to be subjected to an exacting judicial oversight. This is because the principal, (the people) has in fact vested state agencies with discretionary power of an administrative nature. Such delegation of authority by the principal is

essential to the efficient functioning of the government. However, given the possibility of the agent's deliberate or negligent deviation from the best interests of the beneficiary, the court will enforce fiduciary obligations under certain circumstances. A breach of the duty of loyalty, such as in the case of a self dealing transaction or one involving conflict of interest, will trigger heightened scrutiny by the court. Further, if public officials fail to exercise the duty of care that is expected of a prudent manager, the court will assess the underlying action or transaction to ascertain whether the state functionaries have breached their fiduciary obligations to the people of Pakistan."

14. The august Supreme Court in case titled "*Suo Motu Case No. 13 of 2009 and C.M.As. Nos. 4204 and 4686 of 2009*" [PLD 2011 S.C. 619], has enunciated principles and law relating to obligations and duties of executive authorities while dealing with public assets and services in the following words:-

"The Government bodies are invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they are expected to act fairly, justly

and in a transparent manner and such powers cannot be exercise in an arbitrary or irrational manner. Transparency lies at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids is a prerequisite. The reservations or restrictions, if any, in that behalf should not be arbitrary and must be justifiable on the basis of some policy or valid principles, which by themselves are reasonable and not discriminatory”.

15. The august Supreme Court in the case titled *"Raja Mujahid Muzaffar and others versus FOP and others"* [2012 SCMR 1761] emphasized the observance of principles of transparency in relation to government largesse and the same is as follows:-

"Public funds, public property, licenses, jobs or any other government largesse is to be dealt with by public functionaries on behalf of and for the benefit of the people. Public authority must necessarily be examined in accordance with law keeping in view the Constitutional Rights of the citizens. Thus, this Court has not hesitated in the exercise of its jurisdiction of judicial review conferred by Article 184(3) of the Constitution to

scrutinize matters where public money is being expended through procurement or public property is being sold, so as to ensure that transactions are undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality”.

16. In the case titled "*Punnen Thomas versus State of Kerala*" [AIR 1969 Kerala 81] Kathew J., while dissenting, dilated upon the scope of the executive authorities in matters relating to largesse and the same is reproduced as follows:-

"Even so, the Government is not and should not be as free as an individual in selecting the recipients for largess. Whatever its activity the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal”.

17. The above principles were reiterated and affirmed by the apex Court in the judgment reported as "*Khawaja Muhammad Asif versus FOP and others*" [PLD 2014 S.C. 206]. Regarding the standards of transparency

required to be observed by every public functionary entrusted with State assets, wealth or other financial interests, the august Supreme Court, in the case titled Khawaja Muhammad Asif (supra), has observed and held as follows;-

"In the matter of Suo Motu Case No. 13 of 2009: Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad (PLD 2011 Supreme Court 619), we have emphasized that the Government and its instrumentalities are expected to act fairly, justly and in a transparent manner. Transparency lies at the heart of every transaction entered into by or on behalf of a public entity such as SSGCL. It was also observed by us that 'any transaction which is not transparent and goes against the interests of the general public constitutes violation of Article 9 of the Constitution'. This Article guarantees the right to life as defined by this Court starting from the case of "Ms. Shehla Zia v. WAPDA (PLD 1994 S.C. 693)."

18. In the case titled "*Muhammad Afsar versus Malik Muhammad Farooq*" [2012 SCMR 274], the august Supreme Court has emphasized the duty cast on a public

functionary to act in a transparent manner, and the relevant portion is as follows;-

"The Courts are duty bound to uphold the constitutional mandate and to keep up the salutary principles of rule of law. In order to uphold such principles, it has been stated time and again by the superior Courts that all acts should be done by the public functionaries in a transparent manner after applying judicious mind and after fulfilling all requirements. The public functionaries are supposed to adhere to the principle of transparency in the performance of their duties and are not bound to carry out/implement any order which is not in accordance with law and they are only obliged to carry out the lawful orders of their superiors and if they are being pressurized to implement an illegal order, they should put on record their dissenting notes. But unfortunately, the officers in the Estate Office not only implemented the illegal orders but apparently acted for their own personal benefits/gain".

19. Likewise, the august Supreme Court in the case titled *"In the matter of Human Rights Cases Nos. 7734-G/2009, 1003-G/2010 and 56712 of 2010"* [2012 SCMR 773]

has urged the need for transparency in respect of resources and assets of the state in the following words;-

"Every action taken by the Government must be in public interest and its action would be liable to be invalidated on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid."

20. In the above judgment, the august Supreme Court has quoted with approval from a judgment of the Indian Supreme Court rendered in "*Ram and Shyam Company versus State of Haryana and others*" [AIR 1985 S.C. 1147] and the same is as follows;-

"Disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. The welfare State may be able to expand its beneficent activities by the availability of larger funds.....where disposal is for augmentation of revenue and nothing else, the State is under an obligation to

secure the best market price available in a market economy."

21. The august Supreme Court in the case titled *"In the matter of: Human Rights Cases Nos. 4668 of 2006, 1111 of 2007 and 15283-G of 2010" [PLD 2010 S.C. 759]*, while following the law laid down in the case titled *"Messrs Airport Support Services versus The Airport Manager, Quaid-e-Azam International Airport, Karachi and others" [1998 SCMR 2268]* has observed that time and again it has been emphasized that public functionaries ought to adhere to the principles of transparency in the performance of their duties. Reference is also to be made to *"Malik Atta Muhammad and another versus Government of Punjab through Secretary, Local Government and Rural Development, Lahore and others" [2007 SCMR 178]*.

22. It is obvious from the above authoritative declarations of the apex Court that the principles of transparency cannot be compromised in any manner while dealing with assets which vest in the State. The law envisages strict liability in the case of disposal of State properties in the context of ensuring transparency. It would therefore be relevant to explore the scope of transparency, or in other words what is the minimum threshold or test for ensuring compliance with the principles of transparency,

particularly in relation to properties which vest in the Authority.

23. A 'Commercial or Business Plot' cannot be disposed of otherwise than through public auction. Public auction sans transparency would definitely tantamount to disposal of land in violation of the Land Disposal Regulations. Openness and transparency in the case of disposal of land falling under the category of 'Commercial and Business Plot' is mandatory otherwise the entire proceedings would be void and thus vitiated. The 'Advanced Law Lexicon (3rd Edition)' defines the expression 'transparency' as follows:-

"Transparency. Visibility and clarity of laws and regulations. Some of the codes of conduct negotiated during the Tokyo round sought to increase the transparency of non-tariff barriers that impede trade.

The concept that actions of government and decision processes should be clear and open to easy scrutiny by the public."

Likewise, the Black's Law Dictionary (9th Edition) defines the transparency as follows:-

"Transparency. Openness, clarity; lack of guile and attempts to hide damaging information. The word is used of financial disclosures,

organizational policies and practices, lawmaking, and other activities where organization interaction with the public.”

24. Transparency is mandatory at every stage i.e. planning disposal, inviting interested persons, bidding process, evaluation of bids, declaring a successful bidder and the execution of the lease or contract pursuant thereto. At the first stage the plot and its category must be clearly described in the sanctioned Scheme; second, the terms and conditions for pre qualification or eligibility must be intelligible and free from any ambiguity and provided to the interested persons in writing; third, advertisements published in daily newspapers ought to unambiguously mention the category and description of the plot being offered and the terms and conditions; fourth, the timings, dates and venue for the bidding must be open and transparent; lastly, the terms and conditions of the proposed lease or contract must not only be strictly in conformity with the description mentioned in the published advertisements but should also have been in the knowledge of the participants prior to the submission of bids. Any deviation, at any stage, from the terms and conditions published in the advertisements would vitiate the process and render the disposal as opaque. Any doubt about whether the person who is ultimately allotted a plot had participated in the bidding process would render the disposal non transparent unless such a person can give a plausible explanation to the

satisfaction of the Authority that it had actually participated in the bidding process and was declared as the successful bidder. It is, therefore, noted that the principles of transparency are not restricted to the description given in the advertisements. Transparency would extend to the pre bidding process i.e. the preparation of the specifications, the approval mechanism, methods of advertisements and the entire process till the contract has been concluded with the successful bidder. The opening and evaluation of bids, formulating evaluation of the criteria are an integral part of the disposal of land under the Land Disposal Regulation. The test of transparency is to allow the widest possible competition, and which is not favourable to a selected class of bidders nor puts any person, who may have been interested, at a disadvantage. The object of inviting applications or bids through advertisements published in the daily newspapers is to make certain that all eligible and interested entities and persons are afforded an opportunity to compete in a fair and transparent bidding process. Transparency is the key to ensuring that the widest possible competition is made possible so that the maximum price for the land being disposed of can be fetched. It is further noted that a non-transparent process in the disposal of land is not sustainable in law. It would be apt to reproduce the observations and law enunciated by the august Supreme Court in the case of *"Ali Sarwar and others versus Syed Shujat Ali Naqvi and others"* [PLD 2011 SC 519]:-

"The Governmental bodies are invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner. Transparency lies at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids is a prerequisite. The reservations or restrictions, if any, in that behalf should not be arbitrary and must be justifiable on the basis of some policy or valid principles, which by themselves are reasonable and not discriminatory."

"The CDA, which is a statutory body, established by law, is mandated not only to make arrangements for the planning and development of the Capital City, but is to be authorized/compelled to perform functions of a Municipal Committee, inter alia, to promote interests of different sections of the society including taxpayers. Any transaction, which is not transparent, and goes against the interests of the general public constitutes violation of Article 9 of

the Constitution, which guarantees right to life to all persons."

25. In the instant case the Property was put to auction explicitly on 'as is where is' basis. This crucial fact is not disputed. The bidders had submitted their respective bids knowing well that the disposal of Property was on this basis alone. They were, therefore, fully aware that payment of the bid amount had no nexus with provision of infrastructure facilities. The bids were obviously influenced by the said fundamental condition. Higher bids would have been expected if the conditions had been different e.g. if the payment had been unambiguously made subject to fulfilling the obligation on part of the Authority to provide infrastructure facilities or declaring before the holding of the auction that the Board could consider re scheduling the payment or allowing time in this regard, which may extend to two decades. If such conditions were not prescribed through explicit language at the time of inviting the bids then any change later by way of re scheduling payments was definitely in violation of the principles of transparency. No power is vested in the Board of the Authority to alter or modify the terms and conditions of auction after the fall of the hammer, because the latter in any case does not have jurisdiction to dispose of properties without strictly complying with the principles and law relating to transparency. The re scheduling of payments in such an

eventuality or extending time to the successful bidder to deposit the bid amount in disregard to the terms and conditions under which an auction has been conducted was violative of the mandatory principles of transparency. The terms and conditions of auction and the pursuing lease contract have to be strictly construed. The expression 'as is where is' essentially means that the property has been offered for auction in the condition in which it exists. It is an offer by the seller to sell a property in whatever condition it exists and the buyer understands and is aware that the bids are on this basis and thus the latter accepts the property with all its faults. As noted above, the bid offered by prospective buyers is influenced by the terms and conditions which are made public at the time of inviting the bids.

26. There is yet another important dimension regarding disputes relating to disposal of properties by public functionaries. The status of a successful bidder or, if pursuant thereto a contract in respect of disposal of public property has been executed with the latter, is not different from that of a person who is seeking any other equitable relief e.g of specific performance. The willingness and intent of the plaintiff seeking equitable relief would be paramount. The conduct of the plaintiff for the purposes of exercise of discretion by a court becomes relevant and crucial. If, therefore, a person invokes the equitable jurisdiction of a plenary court in matters relating to public property which

has been disposed of through auction, the latter must establish through conduct that he or she was and continues to be willing and ready to make the payment by depositing the same either in the Court or with the Authority under protest strictly in accordance with the terms and conditions of payment. If this is not the case then the court would be justified in exercising its jurisdiction by refusing to grant equitable relief. This becomes more important keeping in view the increasing prices of real estate. The overriding consideration would always be to safeguard the interests of the general public by ensuring that public properties are disposed of in the most transparent manner and for the highest price at the time of putting them to auction. As a corollary, the plaintiff without waiting for an order from the court, must demonstrate through conduct his or her bonafides by depositing the bid amount strictly according to the prescribed terms and conditions regardless of the outcome in the suit.

27. In the instant case nothing has been brought on record to show that the Property had been offered otherwise than on the basis of 'as is where is basis'. The learned appellate Court, by excluding this from consideration, appears to have misread the terms and conditions which had influenced the bidders while offering bids. By no stretch of the imagination could the payment have been delayed nor did the Board have the authority to

alter or modify the terms and conditions after the fall of the hammer by re scheduling the payments. If the bidders, at the time of inviting bids, had been unequivocally informed that the Board at a later stage could consider re scheduling and allow delayed payments then the situation may be different. But if there was no such clear representation to the general public at the time of inviting the bids then any concession extended by the Board later would be in violation of the principles of transparency and a breach of its fiduciary duty. The auction was held on 08-01-1991 and there is nothing on record to show that the Petitioners/Plaintiffs, prior to 27-11-2002, had shown their willingness or bonafides to deposit the bid amount in accordance with the terms and conditions of auction or as specified in the letter dated 19-06-1991. The learned appellate Court has reversed the judgment and decree by misreading or non reading the evidence, particularly the terms and conditions of auction read with letter dated 19-06-1991. The locus standi of the Attorney to file the appeal on the basis of power of attorney executed by the late Munawar Beg was also not considered. The learned appellate Court was also required to have examined whether the conduct of the Petitioners/Plaintiffs entitled them to the discretionary equitable relief.

28. For what has been discussed above, Civil Revision no. 327 of 2016 filed by the Authority is **allowed** and the Civil Revision no. 380 of 2016 filed by the Petitioners

/ Plaintiffs is hereby ***dismissed***. The impugned judgment and decree, dated 31-05-2016, is hereby ***set aside***. The appeal shall be deemed to be pending and the learned appellate Court, after affording an opportunity of hearing to the parties, is expected to decide the same, inter alia, having regard to the principles and law highlighted in this judgment.

(Athar Mjnallah)
Judge

Announced in the open Court on 07.03.2018.

Judge

Approved for reporting.

Asad K/*