

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE GHULAM RABBANI

SUO MOTU CASE NO. 13 OF 2009

[Action on press clipping from the Daily
"Patriot", Islamabad dated 04.07.2009
regarding Joint Venture Agreement
between CDA and Multi-Professional
Cooperative Housing Society (MPCHS) for
development of land in Sector E-11,
Islamabad]

ON COURT NOTICE

For the CDA: Mr. Khalid Anwar, Sr. ASC
Raja Abdul Ghafoor, AOR
Mr. Waqar Ali Khan, Director (Land)

For MPCHS: Mr. Zulfiqar Khalid Maluka, ASC

Amicus Curiae: Mr. Muhammad Akram Sheikh, Sr. ASC

FOR THE APPLICANTS

CMA No. 4204/2009: Mr. M. Ikram Chaudhry, ASC
CMA No. 4686/2009: Dr. Aslam Khaki, ASC

Dates of hearing: 8th to 10th & 14th March, 2011
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JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – In December
2008, the Capital Development Authority (CDA) entered into a
Joint Venture Agreement (JVA) with M/S Multi Professional
Cooperative Housing Society (MPCHS) for development of 54

acres of land located in northern strip of Sector E-11, Islamabad. A news report appeared in the DAILY PATRIOT dated 04.07.2009 stating that prime land belonging to the CDA had allegedly been given to MPCHS through an underhand deal. The press clipping was registered as Human Rights Case No. 3557-G of 2009 vide order dated 06.07.2009 passed by one of us (Iftikhar Muhammad Chaudhry, CJ) and a report was called from the Chairman CDA. It was, *inter alia*, stated in the report that originally CDA owned 78 acres of land at northern strip of Sector E-11, out of which 24 acres were utilized for adjustment of the outstanding claims of the locals as per directions of the High Court and the remaining land was under adverse possession, therefore, considering that the said land would be consumed to settle the claims, which were the subject matter of many petitions pending in different Courts, CDA entered into the JVA with MPCHS. It was further stated that in pursuance of decision of CDA Board, Expression of Interest was invited from interested parties and after due consideration and evaluation, the said JVA was signed. The matter was registered as Suo Motu Case No. 13 of 2009 and was fixed in Court.

2. In the concise statement filed on behalf of the CDA, it is submitted that in 1968, land measuring 654 acres in Golra Revenue Estate comprising Sectors E-11 (203 acres), E-12 (36 acres), F-11 (45 acres), F-12 (77 acres) and Blue Area (293 acres) was exempted from acquisition by the Federal Government with the approval of Field Marshal Muhammad Ayub

Khan, the then President of Pakistan. In 1969, the CDA acquired land falling in Sector E-11 at a nominal cost of Rs.208/- per kanal, but did not announce Award in respect of houses/built up property nor any compensation/allotment of plots was made to the affectees/occupants. In 1983, the CDA with the approval of the then President of Pakistan decided to exchange and consolidate in Sector E-11 the land of Golra Revenue Estate situated in Sectors F-11, F-12, E-12 and Blue Area. In 1986, six Cooperative Housing Societies including the National Police Foundation with the approval of CDA purchased land in Sector E-11, took possession from the affectees/occupants and developed it. Only 78 acres of land located in the northern strip of Sector E-11 remained with the CDA. Subsequently, 24 acres were allotted to locals against their claims, leaving a balance of 54 acres.

3. It is further stated that in December 1992, CDA in exercise of the powers conferred by section 51 read with section 11 of the CDA Ordinance, 1960 framed with the approval of the Federal Government the Islamabad Capital Territory (Zoning) Regulation, 1992, hereinafter referred to as 'the Regulation'. The Regulation divided the Capital Territory into five Zones, viz., Zones 1 to 5. The development of Zone 1 was entrusted to CDA, while private parties were authorized to buy and develop land falling in Zones 2 and 5. Although Sector E-11 was located in Zone 1 and was to be developed by the CDA itself, but on account of consolidation of land, it was provided in regulation

4(1)A(iv) of the Regulation that no private scheme of any kind whatsoever shall be allowed except in Sector E-11 where the schemes would be regulated by the provisions applicable to schemes in Zone 2. In June 1993, the CDA framed Modalities and Procedures under the Regulation for development of private housing schemes in Zones 2 and 5.

4. In 2005, the CDA, in exercise of powers conferred by section 51 read with section 49 of the CDA Ordinance, 1960 framed the Islamabad Land Disposal Regulation, 2005. Regulation 4 thereof provided that the CDA Board may decide to enter into JVAs with any private or public sector agency regarding property vested in it for any specific project.

5. On 30.06.2005, the CDA, by advertisement published in the Daily Dawn, invited Expression of Interest for development/construction of high-rise residential apartments, commercial, educational, health centres and recreational facilities in the northern strip of Sector E-11. Some developers showed interest, but the proposal could not mature due to adverse possession of the land and built up property in the area.

6. On 14.03.2008 the CDA, by advertisement in the Daily Dawn and Jang again invited Expression of Interest. Three bids from M/S Services Cooperative Housing Society, M/S Golra Associates and M/S MPCHS were received. The proposal of MPCHS, having been approved by the CDA Board was accepted and the JVA dated 02.12.2008, after completion of the codal formalities, was signed. The MPCHS got vacated the possession

from the occupants, got approval of planning and engineering designs and 80% of the work had already been completed. The CDA has not spent a single rupee on acquiring possession of land, preparation of its master plan, engineering designs and execution of development works, etc. It was pointed out that on the contrary the CDA had failed to take over possession of the acquired land in Bheka Syedan Sector F-11, Sector E-12, Sector F-12 and Sector G-12.

7. It is pleaded that the other bidders did not object to the award of contract to MPCHS. All major projects relating to buildings, bridges, flyovers, source development of water supply, planning/construction of sewerage treatment plants, etc., were carried out by engaging specialized planners, architects, consultants and contractors of repute.

8. Mr. Khalid Anwar, Sr. ASC who appeared on behalf of the CDA submitted that CDA has observed all rules and regulations while entering into the JVA in a transparent manner and selecting a party. The CDA, by advertisement published in the Daily Dawn dated 30.06.2005 invited Expression of Interest for construction of high rise apartments in Sector E-11 having shopping centre and other facilities such as community centre, school, mosque, playfields, health centre in the northern acquired strip of land measuring about 70 acres on joint venture basis. The Expression of Interest was invited from high profile well-reputed national and international development firms having vast experience in development of housing/construction. However,

nobody came forward mainly because of adverse possession on the land in question.

9. The issue was then considered by the CDA Board in its meeting held on 28.02.2008. It was decided that the housing societies already working in Sector E-11 and having possession of the land will be allowed to have a joint venture with CDA on the land which is owned by the CDA, but is in possession of the societies. Accordingly, by a fresh public advertisement dated 14.03.2008, expression of interest was again invited from the private parties/real estate developers, societies of good repute to develop 54 acres of land in E-11. It was given out that the subject land, though validly owned by CDA, was under adverse possession of certain illegal squatters and the selected party would have to get the area cleared off and ready for development at its own risk and cost. Reference in particular was made to clauses 3 and 4 of the advertisement, which are reproduced below: -

- "3. Preference will be accorded to societies already operating in Sector E-11. Such preference will be determined, in addition to other parameters, by the contiguity and adjacency to the northern strip of sector E-11.
4. Only those societies of Sector E-11 which have clear, undisputed title and possession will be considered. Application of Societies/Parties of E-11, which possess land in excess of their ownership will not be entertained and will be summarily rejected."

In response to the above advertisement, three proposals, including that of MPCHS were received, which were scrutinized by the evaluation committee in its meeting held on 09.07.2008. MPCHS was found to be qualified as against the other two firms, namely, M/S Services Co-Operative Housing Society and Golra Associates (Pvt.) Ltd. who had only submitted expression of interest but not the technical and financial bids. The credentials of the two firms were checked and it was observed that they did not fulfil the conditions prescribed in clause 4 of the advertisement. The CDA Board in its meeting held on 21.07.2008 approved the proposal of MPCHS and JVA was entered into with it. To ensure transparency in the execution of the works by the MPCHS, it was agreed, *inter alia*, that the MPCHS shall, in consultation with the CDA, appoint at its sole cost consultant of international repute through open advertisement in two leading English Daily Newspapers with national circulation for planning, designing and supervision of development work of the project and the terms of reference shall be formulated in accordance with CDA planning requirements/standards. The work will be awarded to contractors duly registered with PEC in the respective category. After approval of the development plan and as full and final consideration for the all actions and activities undertaken by MPCHS under the agreement and the letter of intent, including without limitation executing development works, the remaining area under residential plots, commercial area, medium rise/high rise apartment buildings, super store, petrol pump, education

centre, health centre and other recreational places like hotel and community clubs if and as provided shall be divided between the parties on 57 : 43 ratio, though initially MPCHS in the draft JVA submitted along with the financial proposal had proposed 50 : 50 ratio. It being a transparent transaction, the Suo Motu Case be disposed of in the interest of justice.

10. Mr. Zulfiqar Khalid Maluka, who appeared on behalf of MPCHS submitted that MPCHS was registered with the Registrar of Cooperative Societies, ICT, Islamabad. The objectives of the society are to promote economic interests of its members on the principles of cooperation, self help, on no profit – no loss basis. On account of excellent developmental work, integrity and experience, MPCHS is registered by Moody International for complying with the requirements of ISO 9001:2008 and ISO 14001:2004. The Senate of Pakistan commended excellent performance of MPCHS and rated it next to Defence Housing Society. It had completed different schemes for which CDA had issued final NOC. The land in Golra Revenue Estate was exempted from acquisition as far back as the year 1968-69 by the then President of Pakistan as a mark of respect for the Great Pir of Golra Sharif. The provision allowing operation of private societies in Sector E-11 is to be seen in the context of adverse possession and the consolidation in the said sector of land of Golra Revenue Estate spread over in different sectors. MPCHS had acted in pursuance of the advertisement duly published in the press dated 14.03.2008 wherein other parties also

participated and the bid offered by his clients was accepted after duly verifying its credentials. The JVA was concluded with MPCHS as a result of open bidding in the transparent manner at the benefits most suitable to CDA.

11. On the other hand, Mr. Muhammad Akram Sheikh, Sr. ASC who appeared as an *Amicus Curiae* on Court's notice, submitted that the Regulation framed by the CDA was *ultra vires* of the provisions of the CDA Ordinance, 1960. The word "agency" defined in section 2 of the Ordinance does not include a private company. The powers and duties of the CDA are provided in Chapter – III of the Ordinance. Section 11 provides for the preparation of master plan and master programme. Section 12 provides that all schemes will be prepared by a local body or an agency of the Federal or Provincial Government. The manner and form of a scheme to be prepared by the Authority are provided in sections 13 and 14 while the enabling powers of the Authority are laid down in section 15. The power of the CDA to enter into and perform contracts under clause (v) of subsection 2 of section 15, as also its power under section 49 of the Ordinance to retain, lease, sell, exchange, rent or otherwise dispose of any land vested in it are not attracted in the instant case.

12. The learned *Amicus Curiae* has stated that sections 22 to 32 of the Ordinance empower the CDA to acquire land as per procedure laid down therein, while section 49B read with section 49D provides for summary ejectment of unauthorized occupants with police assistance. But, in the present case, the CDA

functionaries never tried to exercise such powers. Chapter VII of the CDA Ordinance, 1960 provides "Penalty and Procedure" for contravention of any provisions of the Ordinance or Rules or Regulations made or schemes sanctioned thereunder. The CDA has tried to justify its action under regulation 4(1)A(iv) of the Regulation, but the said Regulation does not apply to the facts and circumstances of the present case as the same applies to unacquired sectoral areas whereas the land in question is an acquired land and the CDA has its own mechanism of its development under the relevant provisions of the Ordinance and Rules or Regulations made thereunder. As regards authority to enter into the JVA with any private and public sector agency by the CDA Board it is provided in section 4 of the Islamabad Land Disposal Regulation, 2005, however, the same is not applicable to the instant case in view of regulation 2B of the said Regulation and section 2(a) of the Ordinance, which defines the word "agency" and private & public sector agencies are not included therein. Moreover, the first proviso to regulation 4 of the Regulation, 2005 is inconsistent with section 51 of the Ordinance and thus has no legal sanction and binding force.

13. On the issue of transparency in the JVA, the learned *Amicus Curiae* submitted that the aforesaid clause (iv) of Regulation 4(1)A seems to have been added to benefit Mr. K. U. Faruqi, the President of MPCHS who was then Cabinet Secretary to the Government of Pakistan and had prepared summary for the Prime Minister of Pakistan and the first proviso to regulation

4 of the Regulation also seems to have been added just to swindle a public property valuing billions of rupees for the benefit of Mr. K.U. Faruqui, which raises many questions on the transparency in the JVA and smacks of *mala fides* on their part. In the concise statement, the CDA functionaries have not provided exact *khasra* numbers of the 54 acres land in question and have also not provided names of the occupants at the time of acquisition of the land in the years 1968-69 and have also not provided the names of the occupants of the land at the time of entering into the JVA. Nothing has been said about the agreement entered into between one Rashid Mehmood Khan and MPCHS whereby said Rashid Mehmood Khan had agreed to get the land vacated on payment of commission/service charges @ 3% of the purchase price though the CDA had its own Enforcement Directorate, which was authorized to eject unauthorized occupants summarily with the assistance of local police.

14. Mr. Akram Sheikh next submitted that regulation being delegated legislation have to be consistent with the statute under which they were framed. Delegated legislation could be described as orders, rules, regulations, schemes, licences and instruments, the nomenclature used would be the one laid out by the enabling Act. A delegated legislation, in this case the Regulation, could be struck down as ultra vires on five main grounds, namely, if statutory procedure prescribed for making them had not been followed; if they were repugnant to provisions

of some other statute; if they conflicted with the parent Act itself; if they were uncertain; and if they were unreasonable. The regulation in question is not within the parameters envisaged by the parent Act, therefore, the same is ultra vires. He has referred to the definition of "regulation" from Advanced Law Lexicon, 3rd Edition 2005, Black's Law Dictionary, Seventh Edition. He also referred to Khawaja Ahmad Hassan v. Government of Punjab (2005 SCMR 186), Mian Ziauddin v. Punjab Local Government (1985 SCMR 365), Province of East Pakistan v. Nur Ahmed (PLD 1964 SC 451), Ummatullah v. Province of Sindh (PLD 2010 Karachi 236) and Kerala Samsthana Chethu v. State of Kerala [(2006) 4 SCC 327].

15. We have heard the learned counsel and have gone through the relevant provisions of the CDA Ordinance, 1960 and the record produced by the CDA.

16. The first question, which requires to be determined by this Court in the instant case is whether it was permissible for the CDA to have framed a Regulation, which was inconsistent with the parent statute, i.e. the Ordinance. It may be seen that subsection (1) of Section 12 of the Ordinance provides that the CDA may, pursuant to the master plan and the master programme, call upon any local body or agency operating in the Specified Areas to prepare, in consultation with it, a scheme or schemes in respect of matters ordinarily dealt with by such local body or agency, and thereupon the local body or agency shall be responsible for the preparation of the scheme or schemes,

whereas, subsection (5) provides that no planning or development scheme shall be prepared by any person or by any local body or agency except with the concurrence of the Authority. Under subsection (2), the schemes may relate to land use, zoning and land reservation, public buildings, industry, etc. Subsection (3) empowers the Federal Government to add to, alter or amend the list of subjects (schemes). Under subsection (4), the expenditure on the preparation of such schemes is to be borne as agreed to between the CDA and the local body or agency while under subsection (5), no planning or development shall be prepared by any person or by any local body or agency except with the concurrence of the CDA. The term "agency", as defined in section 2(a) means any department or organization of the Federal or Provincial Government and includes a corporation, or other autonomous or semiautonomous body set up by the Federal or Provincial Government. The term "local body" as defined in clause (j) *ibid* means the local body, the local council or the municipal body as defined in clauses (23) (24) and (27) of Article 3 of Basic Democracies Order, 1959 (P.O. 18 of 1959), or the Cantonment Board, having jurisdiction in the area concerned, and includes an Improvement Trust within such area.

17. The word 'regulation' as defined in Advanced Law Lexicon referred to by the learned *Amicus Curiae* means a rule or order prescribed by superior for the management of some business or for the government or a company or society. It is a rule, ordinance or law by which conduct etc., is regulated. It

implies a rule for a general course of action, but does not apply to a case in which specific instructions are to be given applicable to that case alone. According to Black's Law Dictionary, the term 'regulation' means a rule or order having legal force issued by an administrative agency or a local government. In *Khawaja Ahmad Hassan (supra)*, it was held as under: -

"25. It must be kept in view that "when the legislature confers power on Government to frame rules it is expected that such powers will be used only bona fide, in a responsible spirit and in the true interest of the public and in furtherance of the object for the attainment of which such powers were conferred". (*Land Realization Co. Ltd. v Postmaster-General* (1950) 66 TLR (Pt. 1) 985, 991, per Romer, J. (1950) Ch. 435. It is to be noted that rule-making authority which falls within the ambit of subordinate legislation as conferred upon the Government by virtue of section 191 of the Ordinance is neither unlimited nor unbridled and the limitations as mentioned in section 191 of the Ordinance must be adhered to in letter and spirit.

29. It is a well-recognized principle of interpretation of statutes that if the rules framed under the statute are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then those provisions must be regarded as ultra vires of the statute and cannot be given effect to. (*Barisal Cooperative Central Bank v. Benoy Bhusan* AIR 1934 Cal.537; *Municipal Corporation v. Saw Willie*, AIR 1942 Rang 70, 74)".

30. In the case of statutory rules the Court can always examine the question as to whether the same are inconsistent with the statute under which they are made. In this regard we are fortified by the dictum laid down in *Hazrat Syed Shah Mustarshid Ali Al-Quadari v. Commissioner of Wakfs* AIR 1954 Cal. 436.

31. A rule-making body cannot frame rules in conflict with or derogating from the substantive provisions of the law or statute, under which the rules are framed. No doubt that the rules-making authority has been conferred upon the Government but "a rule, which the rule-making authority has power to make will normally be declared invalid only on the following, grounds: -

(1) Bad faith, that is to say, that powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden;

(2) that it shows on its face a misconstruction of the enabling Act or a failure to comply with the conditions prescribed under the Act for the exercise of the powers; and

(3) that it is not capable of being related to any of the purposes mentioned in the Act. (Shankar Lal Laxmi Narayan Rathi v. Authority under Minimum Wages Act, 1979 MPLJ 15 (DB).

Rules cannot go beyond the scope of the Act M.P. Kumaraswami Raja AIR 1955 Mad. 326 nor can they, by themselves, enlarge the scope of statutory provisions. K. Mathuvadivelu v. RT Officer, AIR 1956 Mad. 143. They cannot also militate against the provision under which they were made. (Kashi Prasad Saksena ro. State of U. P. AIR 1967 All. 173.

32. There is no cavil with the proposition that "the power of rule making is an incidental power that must follow and not run parallel to the present Act. These are meant to deal with details and can neither be a substitute for the fundamentals of the Act nor can add to them. PLD 1975 Azad J&K 81 = PLJ 1975 Azad J&K 89. There are two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to abdication and self-effacement. The only requirement of law in such situations is to insist that the subordinate body charged with the duty of making rules must strictly confine itself within the sphere of its authority for the exercise of its subordinate legislative power and in each case it is the duty of the Courts in appropriate proceedings to be satisfied that the rules and regulations so made are: --

- (a) by the authority mentioned in the Act, and
- (b) that they are within the scope of the power delegated therein. (PLD 1966 Lah. 287).

"36. It is a well-recognized principle of interpretation of statutes that if the rules framed under the statutes, or bye-laws framed under the rules, are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then

these provisions must be regarded as ultra vires of the statute and cannot be given effect to. (Barisal Cooperative Central Bank v. Benoy Bhusan, AIR 1934 Ca1.537, 540)."

In Nur Ahmad's case (supra), it was held that reading the rule in the above manner would be tantamount to enlarging its scope by depriving the aggrieved party of the right of being heard which he has. The Basic Democracies Order does not deprive him of that right. The rule-making Authority therefore, cannot clothe itself with power which the Statute itself does not give. In Mian Ziauddin's case (supra), it was held that the rules framed under the Ordinance could not go beyond and over-reach the Ordinance itself. In Ummatullah's case (supra), it was held that Strong presumption as to constitutionality, legislative competence, legality, reasonableness and intra vires attached to a statute is also attached with full force to subordinate legislative instruments as well, such presumption though refutable, onerous burden is cast on person challenging validity or vires of legislative instrument, on any count. In order to strike down a subordinate legislative instrument, challenger has to show that any of the disqualification exist namely (a) it impinges upon fundamental rights guaranteed under the Constitution (b) it is in conflict with any Constitutional provision (c) it is beyond the legislative competence of the delegatee making it, and or (d) it is violative or beyond the scope of the parent or enabling statute. (see KBCA v Hashwani Sales and Services Ltd. PLD 1993 SC 210 @ 228 C, Maharashtra State Board of Secondary Education and Higher Secondary Education and another v. Paritosh Bhupesh

Kurmarsheth AIR 1984 SC 1543). It was further held that when the parent law i.e. Sindh Buildings Control Ordinance 1979 does not provide for matter relating to change in land use classification, or conversion of one category of land into another it cannot through delegated legislative instrument confer, bestow or delegate any power and duties on "Concerned Authorities", which powers and performance of duty are not within its own domain or scope of authority. It is settled principle of law that what cannot be done directly cannot be done or allowed to be done indirectly. It is also trite principle of law; what is not possessed can neither be conferred nor delegated. In Kerala Samsthana Chethu's case (supra), it was held that the power of the Government was to make rules only for the purpose of carrying out the purposes of the Act and not *dehors* the same. In other words, rules cannot be framed in matters that are not contemplated under the Act. Reference in the above case was made to Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group [2006 (3) SCALE 1], wherein it was held that a policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the Appellants that the courts cannot exercise their power of judicial review at all. By reason of any legislation whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart

from being intra vires the Constitution should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith. In the case of Vikramaditya Pandey v. Industrial Tribunal, Lucknow [(2001) 2 SCC 423] the Indian Supreme Court has held that the provisions of the regulations in question to the extent of their inconsistency with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen Compensation Act, 1923 and any other Labour Laws for the time being in force, if applicable to any cooperative society or class of cooperative societies shall be deemed to be inoperative. By plain reading of the said Regulation it is clear that in case of inconsistency between the Regulations and the provisions of the Industrial Disputes Act, 1947, the State Act, the Workmen Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any cooperative society or class of cooperative societies to that extent Regulations shall be deemed to be inoperative. In other words, the inconsistent provisions contained in the Regulations shall be inoperative, not the provisions of the other statutes mentioned in the Regulation.

18. From an examination of the above case law it is clear that a rulemaking body cannot frame rules in conflict with, or in derogation of, the substantive provisions of the law or statute, under which the rules are framed. Rules cannot go beyond the

scope of the Act. Thus, we are inclined to hold that no rule can be made which is inconsistent with the parent statute, whereas, no regulation can be made inconsistent with the parent statute or the rules made thereunder and the provisions of these rules or regulations, as the case may be, to the extent of their inconsistency with the parent statute or the rules shall be inoperative.

19. The thrust of the arguments on the issue whether the CDA was authorized to enter into JVA with a private entity for preparation of a scheme in terms of section 12 of the Ordinance was that it was allowed to do so in terms of the provision of regulation 4(1)A(iv) of the Regulation, which provides that the development of land in the zones shall be subject to the following conditions: -

- A. Un-acquired Sectoral Areas: In these areas of Zone-1,
 - (i) land shall be acquired under a phased programme and developed by the Authority in accordance with the land use pattern spelled out in the Master plan;
 - (ii) no sale/ purchase of land which entails change in land use shall be allowed;
 - (iii) no construction of houses or buildings shall be allowed. However, repair of old houses and expansion of existing houses may be allowed by the Authority to the native residents subject to the conditions that the site is located within the main body of the village. The covered area of such construction shall not exceed 1000 Square feet including expansion and such permission shall not in any way impede the right of the

Authority to acquire the property whenever needed; and

- (iv) no private scheme of any kind whatsoever shall be allowed, except in sector E-11. Schemes in E-11 will be regulated according to the provisions applicable to schemes in Zone 2.

Above clause (iv) is couched in negative terms, inasmuch as it provides that no private scheme of any kind whatsoever shall be allowed in Zone-1. However, as an exception, a private scheme is allowed to be launched in Sector E-11, but the same will be regulated by the provisions applicable to schemes in Zone-2. It may be noted that the said provision is not in consonance with the mandate and scope of section 12 of the Ordinance, which lays down that all schemes pursuant to the master plan and the master programme are to be prepared by a local body or agency. The CDA could not have extended the scope of section 12 by framing regulation and allowed preparation of schemes by the private organizations even with prior approval of the Federal Government. This is something not envisaged by the Ordinance and something, not permitted by the statute could not be allowed to be done by the subordinate legislation.

20. In the case in hand, as noted earlier, the exception to clause (iv) of Regulation 4(1)A providing for development of a private scheme in Sector E-11 falling in Zone 1, which is to be developed by the CDA either itself or through an agency of the Federal or a Provincial Government or a local body in terms of section 12 read with section 2(a) & (j) of the Ordinance is

inconsistent with the Ordinance, and hence inoperative. Such an arrangement is against the primary aim and object of the Ordinance as reflected in its preamble, viz., the Capital Development Authority is established for making all arrangements for the planning and development of Islamabad within the framework of a regional development plan, which is further reinforced by section 13 of the Ordinance, which provides that the Authority may, pursuant to the master-programme, itself prepare schemes relating to matters enumerated in subsection (2) of section 12 of the Ordinance. In this view of the matter, the JVA with a private organization is not sustainable.

21. The learned counsel appearing for the CDA as well as the learned counsel for the MPCHS made repeated reference to clause (3) of the JVA, which obligates the second party (MPCHS) to clear off from the occupants (affectees/illegal encroachers) all the area under the northern strip (54 acres) and planned right of way for the construction of north and east service roads of Sector E-11. The stance of the learned *Amicus Curiae*, on the other hand, was that the CDA was legally and physically equipped with the necessary powers and infrastructure in the shape of Enforcement Directorate, duly authorized to deal with the situation of the kind in a summary manner and get the land owned by the CDA vacated from the illegal occupants. Though an attempt was made to depict the inability of the CDA to get cleared its lands from the illegal occupants in various Sectors, e.g. G-12, F-12, etc., but no reference was made to the

countless instances where the CDA had, in exercise of its powers and by use of police force, got vacated its lands in various sectors/other areas, such as Bani Gala, etc. Clearly, it was abdication of the exercise of lawful powers and jurisdiction in favour of the land grabbers, which can hardly be allowed to be pressed into service to the great detriment of the general public. Illegal occupants cannot be allowed to take advantage of their illegal acts and wrongful gains. Instead of allowing the law to take its course, the approach and the conduct of the CDA appear to be aimed at encouraging illegal encroachments upon the State lands. In the circumstances, the act of payment to illegal occupants was not warranted by law. The much trumpeted card is not available to the CDA functionaries and no support at all could be drawn from it.

22. It was argued by Mr. Zulfiqar Khalid Maluka, ASC that MPCHS, as provided in its Byelaws of 2005, was a cooperative housing society formed with the objectives of promoting economic interests of its members on the principles of cooperation, self-help, on no profit – no loss basis, such as to arrange, buy or otherwise acquire land, buildings, prepare layout plans, establish, construct and maintain residential colonies, apartments, commercial areas, farm houses, etc. It may be pertinent to mention here that a 'housing society', as defined in section 3(h)(4) of the Cooperative Societies Act, 1925, means a society formed with the object of providing its members with dwelling houses on conditions to be determined by its bylaws.

Therefore, the objectives of the society can hardly be pressed into service to meet the initial obligation of the CDA either to develop land itself or get it done through an agency of the Government or a local body. Even otherwise, the learned counsel also failed to show that development of sectoral land was the expertise of MPCHS and it was hardly equipped to undertake construction work.

23. As far as a limb of argument that MPCHS had made huge investment of over one billion rupees, firstly in getting cleared the land from the illegal occupants, and secondly in developing the land in question, therefore, any finding/decision at this stage nullifying the JVA would result in great loss to a private investor, who had come forward to make investment in the government sector at a time when the economy of the country was passing through a difficult period. Such a decision would discourage investment, which is the lifeblood of any economy, and more particularly of a developing economy. However, the learned counsel failed to place on record any valid documentary evidence in support of their claim. The issue in the case in hand revolves around transparency in a transaction entered into by or on behalf of a public body, which cannot be allowed to be compromised in any event.

24. It is well-settled that in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However, in such matters, judicial review is intended to prevent arbitrariness or

favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process. It is also a well-settled principle of law that since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by *mala fides*. Reference may be made to (1) Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489; (2) Tata Cellular v. Union of India (1994) 6 SCC 651 = AIR 1996 SC 11; (3) Raunaq International Ltd. v. I.V.R. Construction Ltd. (1999) 1 SCC 492; (4) Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617; (5) Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd. (2007) 8 SCC 1] and (6) judgment dated 24.08.2009 of the Andhra High Court in Nokia Siemens Networks Pvt. Ltd. v. Union of India. In Air India Ltd. v. Cochin Int., Airport Ltd. (AIR 2000 SC 801), it was held as under: -

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in R. D. Shetty v. International Airport Authority ; Fertilizer Corporation Kamgar Union v. Union of India ; Asstt. Collector, Central Excise v. Dunlop India Ltd. ; Tata Cellular v. Union of India ; Ramniklal N. Bhutta v. State of Maharashtra and Raunaq International Ltd. v. I.V.R. Construction Ltd. . The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In

arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

In Tata Cellular v. Union Of India (AIR 1996 SC 11) = [(1994) 6 SCC 651], it was held as under: -

"85. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is

exercised for any collateral purpose the exercise of that power will be struck down.

86. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

89. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

90. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

In Sterling Computers Ltd. v. M/s. M. & N. Publications Ltd. (AIR 1996 SC 51), it was held as under: -

19. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans, [1982] 3 All ER 141, where it was said that "The purpose of judicial review."

"... is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the state. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the North Wales Police v. Evans (supra), the Courts

can certainly examine whether 'decision making process' was reasonable, rational not arbitrary and violative of Article 14 of the Constitution.

20. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision.

... ..

26. The cases aforesaid on which reliance was placed on behalf of the appellants, have also reiterated that once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14; the executive does not have an absolute discretion, certain precepts and principles have to be followed, the public interest being the paramount consideration. It has also been pointed out that for securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and due to compelling reasons which must stand the test of Article 14 of the Constitution, departure of the aforesaid rule can be made. This Court while upholding the contracts by negotiation in the cases referred to above has impressed as to how in the facts and circumstances of those cases the decisions taken by the State and the authorities concerned were reasonable, rational and in the public interest. The decisions taken in those cases by the authorities concerned, on judicial scrutiny were held to be free from bias, discrimination and under the exigencies of the situation then existing to be just and proper. On the basis of those judgments it cannot be urged that this court has left to the option of the authorities concerned whether to invite tenders or not according to their own discretion and to award contracts ignoring the procedures which are basic in nature, taking into account factors which are not only irrelevant but detrimental to the public interest."

25. A part of the argument vehemently canvassed at the bar was that the main purpose of awarding contract to this party was to get the CDA land cleared off from the illegal occupants, which the CDA was unable to do. In this behalf, reference was made to agreements containing recitals of payment of different sums of money made to certain persons in lieu of their vacating such land. According to the aforesaid agreements, huge sums of money running into millions of rupees were allegedly paid. But, surprisingly, no details of payment, such as bank drafts, pay orders, cheques, etc. were given in the said agreements. It is not believable that such large sums of money were paid in cash. Besides, the agreements in question were documents not registered in accordance with law. There was, so to say, no valid proof of payment furnished to our satisfaction. Further, no details of the land allegedly in the illegal possession of the land grabbers along with the names/number of encroachers were provided. Thus, looked at from any angle, the transaction appears to be a sham deal. The whole exercise appears to be an eyewash. This also negates the claim of huge investment made by the MPCHS in this project.

26. Having held that the CDA was not competent to allow private societies to operate in Zone-1, even otherwise the transaction could, in no manner, be termed as transparent. There was complete absence of fair and open competition in the bidding process where only three parties had submitted the expression of interest, two of whom did not meet the requirement of

submission of technical and financial proposals along with the bid/letter of intent, thus practically leaving only one party in the field. Such a situation did call for making a fresh advertisement, which was not done. On the other hand, the CDA Board, in its meeting held on 18.07.2009, approved planning and development of an area measuring 53.86 acres owned by the CDA in the northern strip of Sector E-11 on joint venture basis with MPCHS with the following land use: -

Built up area

Residential apartments	14 acres	25.99 %
Commercial	3.73 acres	6.92 %
Social Services	3.41 acres	6.33 %
Residential plots	5.94 acres	11.03 %

- ? Roads 15.89 acres
- ? Green area 2.8 acres
- ? Proposed land use analysis of the scheme is given below: -

Schedule of plots

S. No.	Use	Area in kanals	%age
1.	Residential plots	47.58	11.05
2.	High rise and medium rise plots	112.05	25.99
3.	Commercial	29.86	6.92
4.	Institutional	70.51	16.35
5.	Education & health	27.28	6.33
6.	Roads	127.12	29.05
7.	Parks & open spaces	16.64	3.86
	Total:	430.39	100

The non-saleable CDA area was shown as under: -

- (i) Road area, parking & footpath 102.15 kanal
- (ii) Parks, green area & Nullahs 32.27 kanal
- (iii) Mosque 03.68 kanal
- (iv) Facilitation centre 03.04 kanal
- (v) Fire station 01.89 kanal
- Total: 143.08 kanal

The break-up of the non-divisible/saleable area is as under: -

(i)	Five star hotel plot No. 88	22.28 kanal
(ii)	Super Mart plot No. 69	14.95 kanal
(iii)	Filling station plot No. 68	3.61 kanal
(iv)	Hospital plot No. 64	6.00 kanal
(v)	Education enclave plot No. 63	21.88 kanal
(vi)	Entertainment enclave plot No. 65	21.87 kanal
	Total:	90.59 kanal

The break-up of the divisible/saleable area is as under: -

A RESIDENTIAL AND APARTMENTS PLOTS

CDA 57 %

(i)	Plot No. 87 G+ 15	27.54 kanal
(ii)	Plot No. 86 G+ 15	28.46 kanal
(iii)	Plot No. 82 G+ 6	07.93 kanal
	Total:	63.93 kanal

MPCHS 43 %

(i)	Plot No. 85 G+ 15	21.96 kanal
(ii)	Plot No. 84 G+ 15	20.22 kanal
(iii)	Plot No. 83 G+ 6	05.90 kanal
	Total:	48.08 kanal

B COMMERCIAL PLOTS

CDA 57 %

(i)	Plot No. 80 G+ 4 size 61'x80'	542.22 sq. yds.
(ii)	Plot No. 81 G+ 4 size 61'x80'	542.22 sq. yds.
(iii)	Plot No. 77 G+ 4 size 70'x90'	700.00 sq. yds.
(iv)	Plot No. 72 G+ 4 size 66'x70'	513.33 sq. yds.
(v)	Plot No. 73 G+ 4 size 66'x70'	513.33 sq. yds.
(vi)	Plot No. 70 G+ 4 size 70'x70'	544.44 sq. yds.
(vii)	Plot No. 71 G+ 4 size 70'x70'	544.44 sq. yds.
	Total:	3899.98 sq. yds. = 06.45 kanal

MPCHS 43 %

(i)	Plot No. 74 G+ 4 size 66'x70'	513.33 sq. yds.
(ii)	Plot No. 75 G+ 4 size 66'x70'	513.33 sq. yds.
(iii)	Plot No. 76 G+ 4 size 70'x95'	738.88 sq. yds.
(iv)	Plot No. 78 G+ 4 size 66'x80'	586.66 sq. yds.
(v)	Plot No. 79 G+ 4 size 66'x80'	586.66 sq. yds.
	Total:	2938.87 sq. yds. = 04.86 kanal

C RESIDENTIAL PLOTSCDA 57 %

- (i) Plot No. 61, 62
(2 each measuring 35'x80' = 311.11 sq. yds) 622.22 sq. yds
- (ii) Plot No. 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 35, 38, 39, 40, 41, 42, 43 and 44
(22 each measuring 50'x90' = 500 sq yds.) 11000.00 sq yds.
- (iii) Plot No. 1, 9, 10, 18, 27, 28, 37 and 45
(8 each measuring 60'x90' = 600 sq yds.) 4800.00 sq yds.
Total: 16422.22 sq yds. = 27.14 kanal

MPCHS 43 %

- (i) Plot No. 46 to 60
(15 each measuring 35'x80' = 311.11 sq yds.) 4666.65 sq yds.
- (ii) Plot No. 2 to 8, 29 to 34
(13 each measuring 50'x90' = 500 sq yds.) 6500.00 sq yds.
- (iii) Plot No. 19 & 36
(2 each measuring 60'x90' = 600 sq yds). 1200.00 sq yds.
Total: 12366.65 sq yds. = 20.44 kanal

D SPECIALIZED BUSINESS/OFFICE BUILDINGCDA 57 %

Plot No. 66 G+18 15.05 kanal

MPCHS 43 %

Plot No. 67 G+18 11.31 kanal
Grand total: 53.87 acres (430.93 kanal)

Terms and conditions, such as the ratio of plots to be offered to the intending bidders, etc., were not published in the advertisement and a full picture was not given to them. If the advertisement had mentioned the details of the benefits to be offered to the bidders, e.g., share in the plots for residential, commercial, 5-star hotels and multi-storeyed buildings, certainly more parties would have been attracted and so better offers would have come.

27. By the earlier advertisement published in 2005, expression of interest was invited from well reputed national and international development firms having vast experience. They were required to provide the detail of company/consortium, experience and list of housing projects/construction projects undertaken by them. However, in the advertisement of 2008, the terms and conditions were changed drastically to the effect that the expression of interest was invited from private parties/real estate developers/societies of good repute. They were required to submit precise mode of partnership, specifying method and quantum of benefits to be shared with CDA. It was stated that most reliable, credible and beneficial formula would be preferred. The purpose was the development of northern strip of Sector E-11. In the said advertisement, it was also stated that preference would be accorded to Societies already operating in Sector E-11. Only those societies of E-11 which had clear, undisputed possession would be considered. Those who had land in excess of their ownership would not be entitled and the parties would be responsible for clearing off the strip at their own risk and cost. It seems that this device was adopted to keep the interested parties out of competition, except MPCHS who fulfilled the said conditions.

28. It was argued by the learned counsel for the CDA that changes were brought about in the terms and conditions offered in the advertisement in terms of the decision of the CDA Board dated 28.02.2008. In the first advertisement, bids were invited

from national and international development firms, private parties/real estate developers/societies and preference was be accorded to Societies already operating in Sector E-11. It is to be seen whether the CDA Board could have, in all fairness, agreed to terms and conditions, which were totally different from those mentioned in the advertisement and render the transaction bereft of the essential attributes of transparency and fairplay. 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.

29. In the case in hand, in response to the advertisement dated 14.03.2008, three parties, namely, M/S Services Coop Housing Society Islamabad, M/S Golra Associates (Pvt.) Ltd., Islamabad and MPCHS submitted their bids. The first two parties only submitted application/letter along with the requisite pay order. M/S Golra Associates also filed one map along with the application. MPCHS alone submitted financial and technical proposals. To evaluate the bids, the Chairman CDA constituted

an evaluation committee consisting of the following officers of the CDA: -

- (i) Financial Advisor/Member
- (ii) Member Estate
- (iii) Member (Planning & Design)
- (iv) Head of Treasury
- (v) Director PMO
- (vi) Director (Land & Rehabilitation)

The Evaluation Committee, in its meeting held on 09.07.2008, examined the bids and found that the first two firms had only submitted their expression of interest without technical and financial bids, therefore, the same did not fulfil the conditions prescribed in clause 4 of the advertisement, hence their expression of interest was not accepted. The Committee recommended that MPCHS, at that initial stage, was qualified for further processing of the case. Thereafter, the CDA Board, in its meeting dated 21.07.2008 approved that Director Lands & Rehabilitation to issue letter of intent to MPCHS.

30. Though it was an open bid invited through advertisement in the press, but only three parties came forward out of which two did not submit the financial and technical proposals along with their applications, which depicted their non-seriousness in the matter. Only one firm, MPCHS submitted the application accompanied by the financial and technical proposals, which was accepted by the CDA authorities. Thus, with only one party left in the field, practically there was no competition. The non-submission of financial and technical proposals, in the circumstances, appeared to be collusive and *mala fide*. In such a situation, the CDA, instead of going for further advertisement of

the tender, chose to be content with the one and the only party in the field and thus deprived of the advantage of competitive bidding. This action of the CDA functionaries contravened the provisions of Article 18 of the Constitution and caused a great detriment to the public exchequer as well.

31. In the case of Fast Food outlet in F-9 Park Islamabad titled as Human Rights Cases No. 4668/06, etc., (PLD 2010 SC 759), having noted that the spaces reserved for cuisine area, bowling alley, etc., in the un-approved Master Plan did not have the proper legal sanction at their backing and the CDA authorities thus rendered bereft of the power to go ahead with the preparation of schemes in relation thereto, as envisaged by section 13 of the CDA Ordinance, 1960, it was held that the issuance of licence to M/S S&S Enterprizes was illegal and unsustainable and liable to be withdrawn/cancelled. It was further held that regulation 12(3) of the Islamabad Land Disposal Regulation, 1993 obligated the CDA to itself develop and maintain public parks, playing fields and graveyards, which the CDA violated by awarding lease/licence in favour of M/S S&S Enterprizes and M/S Siza Foods. Earlier, this Court in the case of Iqbal Haider (supra) noticed that in the Capital territory, a master plan was prepared at the time of its inception and subsequently under different schemes, different sectors were set up. In this behalf, reference to the preamble and sections 11 and 12 of the Ordinance, 1960 was made. It was noted that in the scheme of a sector, some of the areas were earmarked as public

parks for the general public, playing fields and graveyards and according to Article 12(3) of the Regulation, the same were to be developed and maintained by the CDA. Thus, it was concluded that during the classification of the plots, under Article 3 of the Regulation, if a piece of land was earmarked as a public park, it could not be leased out and CDA itself was bound to develop the same.

32. It is important to note that Islamabad being the Capital of the country, each inch of its land belongs to the entire public of Pakistan. Admittedly, it is a prime land situated in Sector E-11, which is a most expensive location of the capital city. 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. Right to life has been explained and interpreted by the Superior Courts in a large number of cases. It includes right to livelihood, right to acquire, hold and dispose of property, and right to acquire suitable accommodation, which could not hang on to fancies of individuals in authority, and includes all those aspects of life which go to make a man's life meaningful, complete and worth living. It

implies the right to food, water, decent environment, education, medical care and shelter. A fundamental right cannot be snatched away or waived off pursuant to any agreement. This Court, in the case of Moulvi Iqbal Haider v. Federation of Pakistan (PLD 2006 SC 394) dealt with a somewhat similar transaction as under: -

"17. It has been noted that deal between respondents Nos.1 and 2 has not been made in a transparent manner..... Essentially, when a party makes investment, may be meager one, it would make money by granting licences, franchise, etc. for which it will enter into agreements with local and international parties and the burden of the same ultimately is to be borne by the general public, in terms of tickets, amusement fee etc.
20. At this juncture, to unfold the mala fides on the part of respondent No.1 i.e. C.D.A., it is to be noted that in the publication, neither specification of the areas of Jubilee Park Markaz F-7 was mentioned, on which Mini Golf Course was to be developed nor the period for which the lease was intended to be given. Inasmuch as, it was not disclosed in the publication that what is the reserved lease money fixed by the C.D.A. because in absence of such information, the genuine bidder could not offer bid accurately except those bidders who have the blessings of the authority competent to accommodate any one of them out of way. It is also important to be kept in mind that volume of the lease money depends upon the area of the land, as we are of the opinion that if C.D.A. had disclosed in publication that an area of 5.05 acres is available for the purpose of development of Mini Golf Course, there was every possibility of fetching much higher lease money, than one, on which it has been given to respondent No.2. We are told that the plot is situated in the commercial area of Markaz F-7, where the prices of the property are extremely on a high side but with ulterior intentions, this important information was concealed.

21. Be that as it may, out of both the pre-qualified interested parties, D M/s. Family Entertainment Centre offered 2.5 million (Rs.25 lacs) per annum for the subject matter, whereas respondent No.2 offered Rs.6 lacs per annum rent for the subject matter for a period of at least 15 years, with 25% increase on every three years. It is stated that the C.D.A. evaluated both the offers and rejected the one quoted by M/s. Family Entertainment Centre, as it has failed to secure requisite points obtained by respondent No.2, as such respondent No.2 was called upon to increase/match the bid up to Rs.2.5 million. However, the report of evaluation committed is not

available to ascertain as to whether it was carried out independently or otherwise. Thus it is held that in such like situation, C.D.A. if at all was interested to lease out the Public Park, instead of developing the same, may have invited fresh proposals instead of calling upon respondent No.2 to enhance the lease money because in granting contracts for the purpose of fetching money to support the public exchequer, the competent authority had an obligation to adopt such devices on the basis of which more money could be procured as it has been held in *Captain-PQ Chemical Industries (Pvt.) Ltd. v. A.W. Brothers* (2004 SCMR 1956). C.D.A. seems to be interested to grant lease of Jubilee Park to respondent No.2, as it is evident from preceding narration of facts. The negotiation with respondent No.2 culminated in its success because of its agreeing to match the bid to the extent of Rs.2.5 million, which was however, subject to extending him extraordinary benefit in formulating the conditions of agreement, two of them are most important, which may be referred to from the conditions reproduced herein above i.e. being Nos.4 & 5, which, later on, became part of the lease agreement dated 4th June, 2005 as Conditions No.14 and 15. These concessions were allowed to respondent No.2 contrary to the restriction imposed in the advertisement published on 14th August, 2004 namely, no heavy civil structure will be allowed, open and soft landscaping will be done, whereas contrary to it, respondent No.2 has been allowed to construct arcs of 1000 sq. yards besides 1500 sq. yards for family and children activities and eating court, which is impossible unless a concrete flooring is made. It is also to be seen that nothing was mentioned in the publication in respect of concession expected to be available to successful bidders in terms of period of lease, the area, as it has been pointed out herein above, the period of completion of project and commencing date for the purpose of making payment of lease money i.e. after a period of about 20 months, etc.

22. It is an unfortunate aspect of the case that prime land situated in one of the most posh area of the capital city has been leased out in a most opaque manner, causing colossal loss to the public exchequer for which C.D.A. had no authority, as discussed above.

.....

23. Thus, in view of above discussion, it is held that the *mala fides* of respondent No.1 in concluding the transaction with respondent No.2 are abundantly apparent on record. This Court in the case of *Government of West Pakistan v. Begum Agha Abdul Kharim Shorash Kashmiri* (PLD 1969 SC 14) has held that mala fide is to be proved on record. This view has been reiterated by this Court in the case of *Ahmad Hassan v. Government of Punjab* (2005 SCMR 186). Therefore, applying the test laid down in these judgments on the facts of the present case, we are inclined

to hold that in view of the admitted facts on record, *mala fides* on the part of respondent No.1 in granting lease to respondent No.2 are apparent, thus, the lease agreement dated 4th June, 2005 is not transparent."

21.3233. For the foregoing reasons, it is held and directed as under: -

- (a) Clause (iv) of regulation 4(1)A of the Regulation is declared to be inconsistent with sections 12 and 13 read with section 2(a) & (j) and consequently the JVA entered with MPCHS is rendered inoperative and ineffective *qua* CDA.
- (b) The CDA Board is directed to takeover the project and complete the same in accordance with the provisions of the Ordinance.
- (c) The Chairman CDA shall ensure implementation of the above direction and submit compliance report within a period of one month from the date of this judgment.
- (d) MPCHS will, however, be at liberty to pursue the remedy for recovery of any amount spent on the project in accordance with law.

CHIEF JUSTICE

JUDGE

Islamabad

Announced in Court on 15.04.2011.

C.J.

APPROVED FOR REPORTING