

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. NO. 3043 of 2016.

BNP Pvt. Ltd. etc.
VERSUS
Capital Development Authority.

Petitioners by : Barrister Aitzaz Ahsan, Barrister Gohar Ali Khan, ASCs in the instant writ petition.
Khawaja Haris Ahmed, ASC in W.P. No. 3160 of 2016.
M/S Asma Jahangir, Mr Khurram M. Hashmi and Barrister Salman Afridi, ASCs in W.P. No. 3259 of 2016.
Mr Babar Sattar, ASC in W.P. No. 4023 of 2016.
Mr Muhammad Ali Raza, ASC and Ms Maryam Ali Abbasi, Advocate W.P. No. 3750 of 2016.
Mr Khalil ur Rehman Abbasi, Advocate in W.P. No. 3488 of 2016.

Respondents by : Syed Iftikhar Gillani, ASC, Mr Kashif Ali Malik and Mr Aamir Latif Gill, Advocates for the respondent / CDA.

Date of Hearing : **27-01-2017.**

ATHAR MINALLAH, J.- Through this consolidated judgment, I shall decide and dispose of the instant writ petition along with the petitions listed in "Annexure-A", attached hereto, as common questions of law and facts are involved.

2. The petitioners in all the petitions have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "***Constitution***"), assailing the decision of the Board of the Capital Development Authority (hereinafter referred to as the "***Authority***") taken

in its 13th Board Meeting, whereby the plot allotted on the basis of lease to M/S BNP (Pvt) Limited (hereinafter referred to as the "**Petitioner / Company**") has been cancelled. The instant petition has been filed by the latter, while the petitions listed in Annexure-A, attached hereto, by petitioners who have paid sale consideration for the purchase of respective apartments (hereinafter referred to as the "**Purchasers**") in the building which is under construction at the site. Collectively they shall be referred to as the "Petitioners".

3. The controversy raised through these petitions stems from the cancellation of the plot measuring 13.5 Acres (65098 square yards), situated at the end of the Constitution Avenue, adjacent to the Convention Centre, Islamabad (hereinafter referred to as the "**Plot**"). In order to understand the controversy in its correct perspective, it would be pertinent to briefly refer to the facts involved, particularly the background of the creation of the Plot and its status. The facts in chronological order are as follows:-

*"The Plot is situated in one of the most prime areas of the Capital of the Islamic Republic of Pakistan. The Master Plan of Islamabad did not provide for the construction of a building on the site where the Plot is situated, nor had the sanctioned scheme prepared under the Capital Development Authority Ordinance, 1960 (hereinafter referred to as the "**Ordinance of 1960**") proposed this site for raising a building. The initial proposal was conceived for the first time in the context of the 50th Anniversary of the Independence of Pakistan."*

08.01.1996.

The Cabinet, in its meeting, gave approval for the construction of a monument and a Convention Centre, which was to be completed by January, 1997. Approval was also accorded to modify the Master Plan of Islamabad to permit the right of way of Shahra-e-Kashmir to be restricted for the construction of the monument and the Convention Centre. The Convention Centre was inaugurated in 1997.

03.04.1997.

The Cabinet decided to privatize the Convention Centre and in this regard directed the Authority to advertise it for sale as a package site for a 'Five Star Hotel'. Moreover, the Authority was directed to cancel the allotment of plots for hotels on which the allottees had failed to construct a building within the prescribed time. It is evident from the record that neither a formal proposal was prepared and placed before the Cabinet nor the Master Plan and the sanctioned Scheme prepared under the Ordinance of 1960 was modified or amended in the prescribed manner.

06.05.1997.

Pursuant to the decision of the Cabinet taken on 08.01.1996, the Master Plan for the specified area was partially modified by making a provision for the construction of the Convention Centre. This area was earmarked in the original Master Plan for the Kashmir Highway and the Murree Road.

02.07.1997.

A proposal was placed before the Cabinet for the modification of the Master Plan of Islamabad by including the construction of a 'Five Star Hotel', Shopping Mall etc along with the Convention Centre. The Federal

Cabinet, however, did not give its approval and, rather, reiterated its earlier decision of 30.04.1997.

May, 1998.

The Cabinet Committee on Privatization constituted a Committee to negotiate with M/S Daewoo Corporation in connection with the privatization of the Convention Centre.

31.05.1999.

Pursuant to the negotiations with M/S Daewoo Corporation, the Board of the Authority, in its meeting held on 10.11.1997, approved Byelaws for the construction of a 'Five Star Hotel' having 20 storeys. The terms in this regard had been approved by the Committee of the Privatization Board on 26.02.1999. The matter was referred to the Cabinet for approval.

23.06.1999.

The Authority raised objections regarding the proposed increase in the height of the building for construction of a hotel on the Plot from 65 feet to 180 feet i.e. 20 storeys. It was objected on the ground that the zoning of the area did not permit the same. The Negotiating Committee of the Privatization Commission agreed with the Authority. Earlier the Cabinet in its meeting held on 11.12.1995, had taken a decision that the maximum height of a building in Islamabad would be 150 feet.

18.02.2004.

The Chairman and other senior officials of the Board of the Authority gave a presentation to the Secretary, Ministry of Interior. It was, inter alia, proposed to invite bids for the construction of a 'Six Star Hotel' adjacent to the Convention Centre. It was decided that a summary in this regard be initiated for consideration of the Prime Minister.

27.02.2004.

The Authority held a meeting with the Minister for Interior and the minutes unambiguously refers to a proposal for the construction of a 'Six Star Hotel' on the Plot.

14.04.2004.

The Authority proposed to the Ministry of Interior that approval of the Prime Minister be sought for disposal through auction of the Plot for the construction of a 'Five Star Hotel-cum-Conference Centre' without 'Shopping Mall'. This proposal was pursuant to a summary initiated by the Ministry of Foreign Affairs dated 27.01.2004, wherein construction of a 'Hotel-cum-Conference Centre Facility' was proposed for hosting the 'Extra-Ordinary Summit Conference of the Organization of Islamic Countries' (hereinafter referred to as the "**OIC**").

12.04.2004.

The Ministry of Interior gave its approval to the Authority for advertising the Plot for construction of a 'Five Star Hotel'.

13.04.2004.

The Authority published an advertisement in leading daily newspapers, inviting requests for pre-qualifications from interested parties for the construction of a 'Five Star Hotel'. A copy of the advertisement is attached with W.P. No. 3043 of 2016 at page-37. The advertisement unambiguously described that the Plot was offered for the construction of a 'Five Star Hotel'.

22.05.2004.

The date for submissions of R.F.Q's was extended to 05.06.2004 through an advertisement published in various daily newspapers. A copy

of the advertisement is attached at page 38 of WP No 3043 of 2016, explicitly mentioning that 'Plot offered in Islamabad for 5 Star Hotel'. Pursuant to the said advertisement, nine entities pre-qualified to participate in the bidding process. The published Bylaws clearly describe the Plot for the construction of a 'Five Star Hotel-cum-Convention Centre' (*copy at page-42 of W.P. No. 3043 of 2016*). The maximum number of rooms mentioned in the Bylaws was 500 rooms including 20 V.V.I.P. suites.

09.07.2004.

The Authority held a pre-bid meeting with the pre-qualified parties. It is noted that the Petitioner / Company had not participated in the bidding process.

30.07.2004.

The Chairman of the Authority was informed that only two entities, namely M/S Pakistan Services Limited and M/S Hashwani Hotel Limited, could qualify and that it was not conducive to proceed with the bidding process.

31.07.2004.

The Chairman of the Authority decided not to proceed further with the bidding process. The participants of the bidding process were informed that due to administrative reasons bids were cancelled.

28.09.2004.

An advertisement was published in daily newspapers inviting fresh applications from interested parties for pre-qualification (Copy of the advertisement is attached with WP No 3043 of 2016 at page 48). The advertisement unequivocally mentioned that the applications were being

invited from parties interested to construct and operate a 'Five Star Hotel' at the Plot.

22.10.2004.

The date for submission of bids was extended and the last date fixed was 02.12.2004. The said advertisement, besides referring to the construction of a 'Five Star Hotel', also referred to a separate advertisement which had been published on 07.10.2004 in respect of a 'Shopping Mall'. The bidders were provided with bidding documents (Copy placed at pages 50 to 56 of W.P. No. 3043 of 2016). The documents titled 'Invitation to submit Qualifications' expressly described the scope i.e. construction of a 'Five Star Luxury Hotel' near the Convention Centre with a target opening date in the fall of 2008. The terms and conditions relating to payment were also mentioned therein. It is evident from the record that separate bids were submitted for a "5 Star Hotel" and "Shopping Mall". Reference in this regard may be made to the copy of a letter of the Authority dated 7-12-2004, attached as Annexure K, at page 70 of Volume III of CMA No. 4934/2016 filed in WP No. 3043 of 2016. It is noted that the Federal Cabinet had turned down the proposal for the construction of a "Shopping Mall", nor had the Master Plan or the sanctioned Scheme been amended in the prescribed manner for this purpose.

Bidders were pre-qualified by the Authority. The Petitioner / Company as a juridical person had not offered a bid. However, four distinct juridical persons had collectively submitted a bid under the name of 'BNP Group' and was pre-qualified. The four juridical persons who had offered the bid as a group were as follows:-

- (i) Bismillah Textile Pvt. Ltd.
- (ii) Niagara Mills Pvt. Ltd.
- (iii) Paragon City Pvt. Ltd.
- (iv) Belhasa International Company LLC.

*The above bidders shall hereinafter be referred to as the "**Consortium**". The juridical persons of the Consortium had executed a 'Memorandum of Understanding' dated 01.12.2004.*

16.02.2005.

One of the pre qualified bidders, namely M/S Hashwani Hotels Limited, sought certain clarifications from the Authority, inter alia, in relation to the size of rooms / apartments.

25.02.2005.

The Authority, in response to the queries raised by M/S Hashwani Hotels Limited, sent letters to all the bidders, including the BNP Group, wherein it was unequivocally clarified that the 'Serviced Apartments' shall form an integral part of the hotel property, to be operated by the hotel management, but they shall not be for sale. Moreover, regarding the shops it was also unambiguously stated that they would also not be for sale.

07.02.2005.

A letter was issued by the Direct Staff to the Chairman of the Authority along with the copy of a document titled 'Conditions and Bylaws' (Copy placed at page 62 and 63 of WP No. 3043 of 2016). It was clearly

mentioned that the Plot was for the purposes of construction of a 'Five Star Hotel' along with 'serviced apartments' and related facilities.

01.03.2005.

One of the bidders requested for extension of time in submitting the bid.

05.03.2005.

One of the bidders filed W.P. No. 586 of 2005 before the Lahore High Court, Rawalpindi Bench, Rawalpindi.

27.04.2005.

W.P. No. 586 of 2005 was dismissed.

25.05.2005.

Intra Court Appeal No. 64 of 2005 was filed assailing the order dated 27.04.2005, but the said appeal was later dismissed for non-prosecution.

15.06.2005.

A proposed lease deed was placed before the Chairman of the Authority for his consideration and it was approved on the same date, as is evident from the copy of official internal notings placed at page-86, Volume-II of C.M. No. 4934 of 2016 filed in W.P. No. 3043 of 2016.

16.06.2005.

A bid dated 09.03.2005 by the Consortium for Rs.75,000/- per square yards was accepted by the Authority and declared as the

successful bidder. The total consideration required to be paid in 15 years instalments was Rs.4,888.235 million. The acceptance of the bid, inter alia, was subject to furnishing of an irrevocable bank guarantee and a performance guarantee. The Consortium was required to pay 15% of the bid amount within 45 days.

28.07.2005.

A lease deed was executed by the Petitioner / Company and the Authority. It is noted that the Petitioner / Company was not one of the partners of the Consortium. It is asserted that the name of another juridical person i.e. Elite Home Fashions (Pvt). Ltd, which was part of the Consortium, had changed its name to the Petitioner / Company on 02.05.2005. The Petitioner / Company asserts that it was incorporated pursuant to the 'Memorandum of Understanding' executed by the juridical persons who were partners in the Consortium. However, there is nothing on the record of the Authority to indicate how and under what authority a distinct juridical person, which was not part of the Consortium nor had participated in the bidding process, had executed the lease deed. The recitals of the lease deed unambiguously mentioned that it was executed pursuant to the advertisements published in the newspaper inviting bids for the construction and operation of a 'Five Star Hotel' on the Plot. Clause 2.6 of the lease deed provides that the Petitioner / Company, without prior notice or permission from the Authority, had full and unrestricted right and power to transfer, assign, mortgage, or sub lease its rights to any third party. The other terms and conditions, inter alia, included revocation due to default in payment or use of the property for illegal activities.

08.10.2005.

An earthquake jolted Pakistan and a multi storey building in Islamabad collapsed.

05.05.2006.

The Petitioner / Company requested for rescheduling of the instalments.

22.02.2007.

The Chairman of the Authority sent a summary for approval of the Economic Coordination Committee in relation to the request for rescheduling of payments.

26.02.2007.

The Economic Coordination Committee considered the summary and opined that the Board of the Authority was competent to take a decision regarding the rescheduling of payments. However, by no stretch of the imagination could this decision be construed as giving approval of rescheduling.

07.04.2007.

The Architect of the Petitioner / Company submitted plans / drawings.

28.05.2007.

The Authority explicitly informed the Architects of the Petitioner / Company that luxury apartments were not allowed and that only 'serviced apartments' were permissible within the approved parameters.

16.08.2007.

The Board of the Authority approved the rescheduling of payment.

04.10.2007.

An amended lease deed was executed having the effect of modifying the payment clause of the earlier executed lease deed, dated 28.07.2005.

20.11.2006.

The Petitioner / Company submitted its plans and designs for approval.

29.03.2008.

Building plans of the Petitioner / Company were approved. It is important to note that the building plans included 'Hotel Tower Apartments' and 'Service Apartments'. The total number of apartments approved was 200. The approval was valid for a period of five years.

23.04.2008.

The Petitioner / Company requested the Authority to issue a 'No Objection Certificate' in respect of the banks and prospective third parties for assigning and sub-leasing parts of the project pursuant to clause 2.6 of the lease deed. The Authority declined the request on the ground that no portion could be sub leased to third parties.

26.08.2008.

The Petitioner / Company sent a letter to the Authority and the contents explicitly show that the sale of 'service apartments' was denied. It was unambiguously mentioned in the letter that 'there was a false impression in the market created by certain people that they are constructing and selling 'residential apartments''. Moreover, it was clarified that only 'serviced apartments' were being constructed as per the approved drawings. An assurance was also given to abide by the terms and conditions of the lease deed.

10.11.2008.

The Civil Aviation Authority raised an objection and informed the Petitioner / Company that the latter could not construct more than a 33.40 feet tall building. The approved building plans of the Petitioner / Company allowed construction up to 725 feet in height.

12.01.2009.

The Ministry of Defence confirmed the stance of the Civil Aviation Authority and an objection to this effect was also raised by the Pakistan Air Force.

02.10.2010.

The Petitioner / Company filed a suit i.e. C.S. No. 1194 of 2010, before the learned Senior Civil Judge.

08.12.2011.

It appears that for the first time the Authority realized that the Petitioner / Company was not part of the Consortium which had participated in the bidding process and thus a clarification was sought in this regard. The same was reiterated vide letters dated 16.05.2012, 21.05.12 and 13.06.2012. There is nothing on record to show that the Petitioner/Company had given a plausible explanation. It appears that the Authority also did not pursue the matter.

07.12.2012.

A settlement was reached between the Authority and the Petitioner/Company and pursuant thereto the Board of the Authority approved new terms whereby the payment clause was amended yet again. The suit filed by the Petitioner/Company was withdrawn.

07.01.2013.

The second amended lease deed was executed, having the effect of extending the payment of instalments till 2026. The height of the proposed building was reduced from 45 storeys to 23 storeys.

05.04.2013.

The Commission, appointed pursuant to an order passed by a learned Single Judge of this Court in W.P. No. 3515 of 2011, submitted its report wherein it was observed that rescheduling in the case of the Petitioner / Company had prolonged the period of payment by eight years.

2014.

Audit para no. 2.4.8 was made part of the Audit Report for 2011-2012, prepared by the Auditor General of Pakistan. It was alleged that the Authority had illegally altered the terms of the lease deed since the terms of a contract once entered into could not have been varied, as mandated under Rule 19 (iv) of the General Financial Rules of the Federal Government.

14.05.2014.

The Departmental Accounts Committee considered the audit para but the same was not settled.

29.05.2014.

The audit para was placed for discussion before the Public Accounts Committee of the National Assembly of Pakistan.

29.05.2014.

The Public Accounts Committee issued directives in relation to the audit para.

28.08.2014.

The Petitioner / Company filed W.P. No. 3755 of 2014, challenging the proceedings before the Public Accounts Committee.

29.01.2015.

W.P. No. 303 of 2015 was filed but the same was dismissed as withdrawn on 09.07.2015.

13.08.2015.

The National Accountability Bureau addressed a letter to the State Bank of Pakistan and a separate inquiry was initiated by the Federal Investigation Agency.

03.03.2016.

W.P. No. 3755 of 2014 was decided by this Court and vide para-19 thereof directions were given, inter alia, to the Authority for convening a meeting of the Board and affording an opportunity of hearing to the Petitioner / Company.

08.03.2016.

The Board of the Authority held its meeting and constituted a Committee to afford an opportunity of hearing to the Petitioner / Company and, thereafter, submit a report.

22.03.2016.

The Authority filed an Intra Court Appeal No. 229 of 2016, assailing the order dated 03.03.2016. The Intra Court Appeal is pending.

01.07.2016.

The Committee constituted by the Board of the Authority submitted its report to the latter.

01.07.2016.

The Board of the Authority held its meeting and pursuant to Agenda Item No. 11.6 considered the report submitted by the Committee.

02.07.2017.

The Petitioner / Company filed W.P. No. 2734 of 2016. The Court was informed that pursuant to order, dated 03.03.2016, passed in W.P. No. 3755 of 2014, the Board of the Authority had convened a meeting on 29.07.2016 in order to afford an opportunity of hearing to the Petitioner / Company.

29.07.2016.

The Petitioner / Company, through its authorized representative, appeared before the Board and explained its position.

29.07.2016.

The Board, in its meeting, decided to cancel the lease deed of the Petitioner / Company for violating the bylaws and the Regulations.

03.08.2016.

A formal letter was issued to the Petitioner / Company informing the latter of the decision taken by the Board in its meeting held on 29.06.2016.

4. A plain reading of the above facts show that the Cabinet had not given its approval at any stage for amending the Master Plan and the sanctioned Scheme made and prepared under the Ordinance of 1960 for the creation of a plot for a hotel, let alone a plot meant for the construction of 'residential apartments'. At no stage was any approval given by the Board for the creation of a plot at the site for construction of a multi story building meant for residential apartments. The distinction

between a plot created for the construction of a '5 Star Hotel' and a 'multi storey building meant for residential apartments' is critical for adjudication of the instant petitions, as will be discussed later. The record clearly shows that all the advertisements published in the newspapers, inviting response from interested parties, had explicitly described the Plot as being offered for the construction of a '5 Star Hotel'. Not a word in the published advertisements can be construed as even remotely suggesting that the Plot was being offered for any other activity or business, let alone the construction of residential apartments for sale. The Petitioner/Company, since executing the lease deed, has paid an amount of Rs.1227.253 million to the Authority and Rs.3654.998 million is outstanding. The advertisements had prescribed a period of 15 years for payment of the total consideration.

5. During the proceedings before this Court, it was inquired from the learned counsel for the Petitioner / Company regarding the number of apartments which have been sold to members of the general public. The latter submitted the details, according to which 240 apartments have been sold for an amount of Rs.7,191.101 million, out of which Rs.5398.050 million has been, admittedly, received by the Petitioner / Company. Document showing details of the Purchasers submitted by the Petitioner / Company has been made an integral part of this judgment and attached hereto as Annexure-B. The possession of the Plot after cancellation has been taken over by the Authority.

6. The cancellation of the Plot has led to the filing of the present petitions by invoking the jurisdiction of this Court under Article 199 of the Constitution, challenging the cancellation of the lease deed.

7. Mr Aitzaz Ahsan, senior ASC appearing on behalf of the Petitioner / Company has contended that; the latter was part of the Consortium in the name of 'Elite Home Fashions (Pvt) Ltd'; the Petitioner / Company was incorporated pursuant to the 'Memorandum of Understanding' between the partners; the partners had tendered the bid; the lease deed was witnessed by the partners; the partners of the Consortium did not raise any objection nor the Authority objected to the execution of the lease deed by the Petitioner / Company; the Authority is estopped from questioning the change of the name of the Petitioner / Company; it is an established practice in such large projects that the successful bidder executes the lease deed in a name different than the partners; the same was also the case relating to auction of the plot where Centaurus has been constructed; it is misconceived that the construction of 'residential apartments' was not allowed and only 'service apartments' managed by the hotel administration was part of the prescribed terms; the apartments constructed by the Petitioner / Company are 'service apartments' since facilities such as cooling, heating, cleaning, maintenance, etc are provided by the Petitioner / Company; all 'residential apartments' in Islamabad provide services and are thus 'service apartments'; the learned counsel has placed on record copies of international and national practice of the industry and copies of emails and brochures in support of the description of 'service apartments'; the Authority is misinterpreting the expression 'service apartments'; the lease deed has express reference to apartments and the expression 'service apartments' and 'apartments' have been used interchangeable i.e. 3rd and 4th recital, clause 3.3; the Petitioner / Company had informed the Authority that it was constructing 'service apartments'; it was informed

that the character of the building was not being changed; another hotel namely 'Serena Hotel' includes a commercial office building; the contention of the Authority that apartments could not have been sold or sub-leased to 3rd party is fallacious; clause 2.6 of the lease deed explicitly authorized the Petitioner / Company to sub-lease and transfer the rights to 3rd party without intimation to the Authority; the said clause remained unchanged in subsequent amendments; the background to the entire bidding process clearly established that the 'service apartments' could be sold to 3rd party; no permission from Capital Development Authority was required for creating 3rd party rights; the creation of 3rd party rights stands established and possession has also been handed over; the Petitioner / Company had submitted an application for completion certificate but the same has not been issued; the Authority has not issued completion certificate to several other buildings such as Centaurus, Safa Gold, etc and , therefore, the Petitioner / Company has been treated differently; the Authority in its report dated 27.12.2016, has unequivocally admitted that several other constructed buildings have been occupied without issuance of a completion certificate; the Petitioner / Company has constructed the apartments in accordance with its approved building plans; the Civil Aviation Authority had restricted the height to 330 feet; density violation is not part of the conditions; the approved area has not been violated; the other buildings such as Centaurus had constructed more than the approved apartments; the latter has also not yet started construction of its hotel; obtaining permission and approval from Civil Aviation Authority was the responsibility of the Authority and not the Petitioner / Company; the delay in the construction was due to the dispute relating to the objection raised by the Civil Aviation Authority; the

Authority could not resolve the dispute within time; the rescheduling of payment had been approved by the Board of the Authority pursuant to the decision of the Economic Coordination Committee; the rescheduling of payment was in accordance with law; there has been no default on part of the Petitioner / Company; it is a false allegation that the bank guarantee and the performance guarantee for project completion has not been submitted; bank guarantee was submitted by the Petitioner / Company on 28.07.2005; a performance guarantee was also submitted hence there has been no violation; the status of the Petitioner / Company is that of a lease holder and not an owner and, therefore, it was not required to make 100% payment of the lease amount; the lease deed is a registered document certified by the Authority; the lease deed was registered with the learned Rent Controller and an amount of Rs.21.4 million was also paid as registration fees; the cancellation could only have been made on the ground mentioned in clause 3.5 of the lease deed i.e. default and illegal activities; the Petitioner / Company is committed to construct a 3rd tower and in this regard is ready to provide an insurance guarantee under an amount of Rupees One Billion and that the latter shall be entitled to encash the same if the hotel tower is not constructed. The case law relied upon by the learned counsel is attached with the written arguments.

8. Ms Asma Jahangir, Sr ASC, Khawaja Haris, Sr ASC, Mr Ali Raza, ASC and Mr Babar Sattar, ASC appeared on behalf of the Purchasers. They have argued that the rights of the purchasers cannot be denied; the Purchasers cannot be punished for the negligence of the Authority; due to the conduct of the Authority, the Purchasers were justified in believing that the construction was in accordance with law; 3rd party rights have accrued; the rights of the Purchasers cannot be denied

to them in violation of the principles of natural justice; Public office holders have fiduciary responsibility which requires that it be exercised as a trust for the benefit of the citizens; it is a case of regulatory negligence and regulatory discretion; the Authority cannot become a judge in its own cause and benefit from its own wrongs; a regulatory action ought to be proportionate to the alleged wrong doing; the authorities' failure to check the alleged irregular construction has created legitimate expectation amongst 3rd party; the Authority is established from revoking the lease on the basis of the principles of promissory estoppel; the Authority has no jurisdiction in the matter; it is settled law that a thing ought to be done in a prescribed manner and, therefore, it was mandatory for the Authority to have proceeded under section 49-C of the ordinance of 1960.

9. On the other hand, the Authority was represented by Syed Iftikhar Hussain Gillani, senior ASC and Mr Kashif Ali Malik, Advocate. The gist of their arguments is that; the lease deed was not signed by the partners of the Consortium who had participated in the bid; the participants of the bidding process had been unequivocally informed that 'service apartments' and the shops could not be sold; the Petitioner / Company had given an undertaking to the Authority that the apartments were not being sold and that a false impression had been created in the market; clause 2.6 of the lease deed has been misinterpreted since it was only for the purposes of obtaining finance facility and in furtherance of a project; the Petitioner / Company has played fraud and deception by offering the apartments for sale; an unregistered deed is void and reference in this regard was made to section 107 of the Transfer of Property Act, 1882 and Section 49 of the Registration Act, 1908; the Plot at no stage was approved for construction of 'residential apartments'; the

only approval given by the Cabinet was for construction of a 'Hotel-cum-Convention Centre'; the master plan of Islamabad and the sanctioned scheme under the Ordinance of 1960, does not include construction of 'residential apartments' at the Plot; the Plot is situated in an area where the scheme under the Ordinance of 1960, has already been executed and, therefore, it could only have been changed in the prescribed manner; the Cabinet had not approved the proposal made by the Authority for including a Shopping Centre, etc; the only approval given by the Cabinet was for construction of a 'Five Star Hotel' and a 'Convention Centre'; under clause 3.12.11 (b) of The Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005 (hereinafter referred to as the **"Building Control Regulations"**), explicitly provides that no person shall occupy or permit others to occupy any such building or use or permit to use any part thereof until a completion certificate / permission to occupy has been obtained; the provisions of the Ordinance of 1960 and the Regulations made thereunder are mandatory; it was candidly conceded that the Authority had failed in enforcing the provisions of the Ordinance of 1960 and the Regulations; the learned counsel have relied on the case law appended with their respective written arguments.

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

11. The controversy relates to the cancellation of the lease deed in respect of the Plot. The Plot is situated in one of the most prime areas of Islamabad, i.e. between Shahra-e-Kashmir and Murree Road. Adjacent to the Convention Centre, the two towers under construction are located at the end of an avenue called the 'Constitution Avenue'. It is the case of the Petitioner / Company that they have not violated the terms and

conditions of the lease deed and, therefore, the Authority was not justified in cancellation thereof. Rather it is alleged that the conduct of the Authority has exposed it to loss. The Purchasers are claiming a right on various grounds. The Authority, on the other hand, admits its regulatory failure in enforcing the provisions of the Ordinance of 1960 and the Regulations made there under, but it has taken the stance that the construction of the 'residential apartments' is in violation of the lease deed and despite its negligence an illegality cannot be allowed to be perpetuated. The Authority itself has questioned the transparency of the bidding process which had led to the execution of the lease deed. In a nut shell, the dispute is essentially regarding the construction of 240 'residential apartments', which as per the documents placed on record by the Petitioner / Company, have been sold to the Purchasers. In order to answer the questions raised by the learned counsels it would be beneficial to first briefly survey the provisions of the Ordinance of 1960, and the Regulations made there under.

12. The Authority has been established under the Ordinance of 1960. The Authority was established pursuant to the decision of the Cabinet taken on 01-06-1960 to succeed the Federal Capital Commission to develop, plan and manage the Capital of the nation in accordance with the Master Plan and Master Programme conceived and prepared by the Greek Consultant Dr. C.A Doxiadis and his internationally renowned firm, namely Doxiadis Associates. The latter was appointed by the Cabinet as a consultant of the Federal Capital Commission. The descriptive form of the Master Plan and the Master Programme is contained in the written reports, particularly the final report, consisting of an Introduction and three volumes (hereinafter referred to as the "Master Plan". I have had

the opportunity to go through the said report, which indeed is crucial for discerning the legislative intent in enacting the Ordinance of 1960, particularly the legislative sanctity of the Master Plan in the context of the Ordinance of 1960 and its public importance. The provisions and scheme of the Ordinance of 1960 are, therefore, briefly surveyed as follows.

13. The Authority, Board and Chairman are defined in clauses (b), (c) and (f) of section 2 of the Ordinance of 1960. Clause (o) of section 2 defines 'scheme' as meaning a 'planning scheme' or a 'development scheme' made under the Ordinance of 1960. The Board of the Authority has been established under section 4 and it is a body corporate, having perpetual succession and power to acquire and hold property. The general direction and administration of the Authority and its affairs vests in the Board and the latter is authorized to exercise all powers and to do all acts and things which may be exercised or done by the Authority. Sub-section (2) of section 5 explicitly describes that the Board, in discharging its functions, shall act on sound principles of development, town planning and housing and shall be guided on questions of policy by such directions as the Federal Government may from time to time give. Sub-section (3) of section 5 mandates that if any question arises as to whether any matter is a matter of policy or not, the decision of the Federal Government shall be final. Section-11 provides that the Authority shall prepare a master plan and a phased master programme for the development of the Capital Site and may prepare a similar plan and programme for the rest of the Specified Areas. Section-12 is in respect of the preparation of schemes. Sub-section (2) of Section-12 enumerates the scope of a scheme which, inter alia, includes land use, zoning and land reservation. Section 13 empowers the Authority to

prepare a scheme pursuant to the master programme in the specified areas. The powers of the Authority have been described in section 15. Section 19 provides for the amendment of a scheme which has been prepared under sections 12 or 13 or the Ordinance of 1960. Section 49-C describes the power in relation to removing, demolishing or altering the building, structure or work, or erection, construction or use of building, structure, work or land in contravention of the Ordinance of 1960. The Authority is vested with the power under Section 51 to make regulations not inconsistent with the rules. Chapter-VIII of the Ordinance of 1960 provides for consequences for contravention of the provisions of the Ordinance of 1960 and the rules or regulations made there under. Moreover, scheme sanction under the Ordinance of 1960 also exposes the person to a penalty under Section 46.

14. It is obvious from reading the provisions of the Ordinance of 1960 as a whole that it 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. It is for this public purpose that the Authority has been established and every citizen of Pakistan has a stake. The Authority is vested with enormous and exclusive powers as a regulator and its jurisdiction extends to the entire area defined as the 'specified areas' under clause (p) of section-2 and the details whereof are given in the schedule of the Ordinance of 1960. The 'specified areas' have been exclusively dedicated for the Capital of Pakistan, so much so that a declaration has been made through the Ordinance of 1960 that they shall be liable to be acquired. The Ordinance of 1960 empowers the Authority to acquire land pursuant to preparing a Scheme and such land then vests

in the latter. The Authority, therefore, has been entrusted with the statutory status of a Trustee. It holds the land in trust on behalf of every citizen of Pakistan, thus giving rise to a relationship which is fiduciary in nature. As a corollary, the power of disposal of land would attract the duties and obligations of a fiduciary. The master plan and the master programme referred to in Section-11 of the Ordinance of 1960, has reference to the Master Plan prepared by the founders of the planning of the Capital of Pakistan. The Ordinance of 1960 has entrusted the task of preparing Schemes under sections 12 or 13, as the case may be, for the unacquired land and to jealously guard every sanctioned Scheme executed in the acquired land. A sanctioned and executed Scheme can only be changed in the prescribed manner. Any construction made in violation of a sanctioned Scheme or the Master Plan is adverse to the legislative intent. In amending a sanctioned scheme the Authority will have to justify and demonstrate that the proposal is an outcome of an exercise carried out pursuant to 'acting on sound principles of development, town planning and housing' as expressly mandated under section 5(2) of the Ordinance of 1960. The sanctity of the 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 *"Human Rights Cases No. 4668 of 2006, 1111 of 2007 and*

15283-G of 2010” [PLD 2010 SC 759] the august Supreme Court has 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 may also be 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]*. As a sequel, no construction can be justified or allowed to exist if it is violation of the scheme of the Ordinance of 1960, and the subordinate legislation made there under by way of rules or regulations.

15. The next important sub legislative instrument for our consideration is the Islamabad Capital Territory (Zoning) Regulation, 1992 (hereinafter referred to as the ***“Zoning Regulation”***) which has been made in exercise of powers conferred under section 51 of the Ordinance of 1960 read with section 11 thereof. The said regulations are a reflection of and give effect to the Master Plan. "Completion Certificate", "I.C.T", "Illegal Construction", "Master Plan" and "Zone" are defined in clauses 8, 13, 14, 19 and 27, of Regulation II. The entire area of the Islamabad Capital Territory i.e. the 'Specified Area' has been divided into five distinct Zones i.e. Zone-1 to Zone-5. The said zoning has been made on the basis of the extensive studies and deliberations carried out by the Federal Capital Commission and its internationally famed consultant M/S Doxiadis Associates. Each Zone prescribes mandatory conditions separately for acquired and unacquired land. In the instant case the Plot is situated in Zone-4. Regulation 4 (4) provides for the conditions of development

controls in respect of Zone-4 and makes it mandatory that the development of land therein shall be subject to the conditions specified there under. The Zoning Regulation imposes restrictions and conditions regarding the development activities within the respective zones. No Scheme can be prepared under the Ordinance of 1960 in violation of the Zoning Regulation. It would be pertinent to refer to the judgment of the august Supreme Court in the case of "*Suo Motu Case No. 10 of 2007*" [PLD 2008 SC 673] wherein some of the provisions relating to Zone 4 were declared as ultra vires. The said judgment is binding on this Court, but with great reverence, it appears that the august Supreme Court had not been assisted, nor for reasons best known to the Authority was a review filed by the latter.

16. The next relevant instrument made by the Authority in exercise of its powers under Section-51 of the Ordinance of 1960 is the Islamabad Building Regulation, 1963 (hereinafter referred to as the "***Building Regulation***"). The said regulations extend to the Capital Site as defined *ibid*. Regulation 6 makes it mandatory for every person who intends to erect or re-erect a building to submit an application in writing to the Authority, in the prescribed form, for permission to execute the work. The requirements in this regard have been mentioned in detail. Regulation 11 provides that the written drawings along with the approved plan signed by the Chairman, or any officer duly authorized by him, shall be sufficient evidence of permission. Regulation 12 empowers the Authority to cancel permission. Regulation 13 provides for the consequences for any work carried out without permission. Regulation 17 makes it mandatory for every person who intends to commence or carry out building work to give notice to the Authority in writing and the former

cannot proceed unless the latter has given verification of the building lines. Regulation 18 empowers the Authority regarding inspection of the building. Regulation 20 vests the power in the Authority in relation to any work carried out in violation of a rule, regulation or order. Regulation 21 places an obligation on every person who carries out and completes building work to give notice in the prescribed form of such completion, together with the other documents specified therein. Regulation 22 provides that after of the receipt of the notice of completion, an officer of the Authority is required to be deputed to inspect the work and pursuant to such inspection either approve or disapprove the building for occupancy or to make further orders. Sub-regulation (2) of Regulation 22 unequivocally bars the occupation or permission to occupy a building or its use until permission has been granted by the Authority. The latter provision is couched in negative language and, therefore, places an absolute bar till the stipulated condition of issuance of a completion certificate has been met. The other requirements have been prescribed in detail in the rest of the Regulations.

17. The other relevant legislation in relation to the adjudication of the instant petitions is The Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005 (hereinafter referred to as the **"Building Control Regulation"**). The said regulations have been made pursuant to powers conferred under Section-51 of the Ordinance of 1960, and extend to all private and public lands / plots in the Islamabad Capital Territory, except those in the Diplomatic Enclave. Regulation 1.2.5 defines 'apartment' as meaning an independent residential unit in a building consisting of at least one bed room etc. Regulation 1.2.10 defines 'Authorized Use of Buildings' as authorized by the Authority. A

'Commercial Building' is defined in Regulation 1.2.32. 'Flat' has been defined in Regulation 1.2.54 as meaning an apartment consisting of two or more habitable rooms with kitchen and bathroom. 'House' and 'Housing Unit' are defined in Regulations 1.2.72 and 1.2.73 respectively. 'Non-Conforming Use' is defined in Regulation 1.2.92 as meaning the use of a Plot or structure thereon not conforming to the purpose authorized or permitted under the Regulation or the conditions of allotment. 'Principal Building' is defined in Regulation 1.2.111 as meaning the building in which the principal use is authorized or permitted, while 'Principal Use' is defined as meaning of the use of the 'principal building' for which the plot of land is allotted or conveyed to the owner, as distinguished from a subordinate or ancillary use. 'Residential Building' is defined in Regulation 1.2.121 as meaning a building authorized for residential occupancy by one or more families but does not include hotels or lodging houses. 'Residential Plot' is defined in Regulation 1.2.122 as meaning a plot allotted exclusively for residential purpose. Likewise, 'Residential Use' is defined in Regulation 1.2.123 as meaning building or part of it authorized for residential occupancy by one or more families. "Multi Unit Building" is defined in Regulation 1.2.90. The definitions are instructive for the adjudication of the instant petitions. Regulation 2.1.1 explicitly provides that only such types of buildings / structures can be constructed in Islamabad Capital Territory on plots, which are in accordance with the Master Plan / functional plan, the regulations and/or as described in the terms and conditions of the allotment of respective plots. Moreover, in express terms it is mandated that plots / buildings can only be used for the purposes for which they have been allotted or conveyed and non-conforming use has been strictly barred. Regulation 2.1.4 provides that a non-conforming use

of a building, inter alia, may lead to cancellation of the apartment / conveyance deed of the plot. Regulation 2.2 makes it mandatory for every person to comply with the provisions of the Zoning Regulations and the Building Regulations. Regulation 2.2.5 provides that a building plan shall remain valid for a maximum period of five years, or for the construction period stipulated in the terms and conditions of the allotment. Regulation 3.9 empowers the Authority to cancel the permission if it is satisfied that it was sought on the basis of material misrepresentation or fraudulent statement. Regulation 3.10 provides for the consequences for work carried out without permission. Regulation 3.12, besides placing an obligation on the allottee of a plot, makes it a duty of the Authority and its officers to carry out inspections at various stages of construction. Regulation 3.12.9 is in relation to the powers of the Authority if the works carried out are found in violation of the approved plans. Regulation 3.12.10 makes it mandatory for every person who completes the construction work to give notice to the Authority, and Regulation 3.12.11, inter alia, unambiguously provides that no person shall occupy or permit to be occupied any completed building or house, or permit any other person to use any part of such building until the completion certificate / permission to occupy has been obtained. Regulation 4.1.23 authorizes the Authority by general or special order to exempt any land or building from the operation of the building Control Regulations. Regulation 5.3 prescribes the conditions and procedure for 'approval of plans'.

18. The Islamabad Land Disposal Regulation, 2005 (hereinafter referred to as the **"Land Disposal Regulations"**) have also been made pursuant to the powers conferred under Section-51 of the Ordinance of 1960. Regulation 3 has classified the plots into nine distinct categories.

Regulations 4 to 15 provide for the manner in which the respective plots may be disposed of. For the purposes of adjudication of the instant petitions, Regulation 6 is in respect of the category titled 'Commercial and Business Plots' and is relevant. Regulation 6 (1) prescribes that the plots falling in this category shall be sold or leased out through open auction for one of the specific activities mentioned in clause 3 (2). Clause 3(2), inter alia, includes two distinct categories i.e. hotels and sites for multi-storeyed buildings meant for shops, offices or for 'residential apartments'. It is, therefore, obvious that 'hotel' is a distinct category from 'residential apartments'. The latter will fall within the expressions "Residential Building" or "Multi Unit Building". Regulation 6 (3) empowers the Authority to give approval for a 'commercial and business plot' to be used for a commercial activity different from the activity for which it had been originally allotted. Such change of activity is subject to payment of conversion fee. However, the proviso to Regulation 6 (3) bars the conversion in relation to the commercial activities specified therein and it, inter alia, includes a plot allotted for construction of a 'Five Star Hotel'. Regulation 19 provides for cancellation of the plot, inter alia, for violation of the terms and conditions of allotment e.g. non-conforming use etc and violation of zoning and other regulations and instructions of the Authority.

19. From the above survey of the provisions of the Ordinance of 1960 and the relevant regulations made there under, it is obvious that from the stage of planning of the land use till occupation of the building on its completion, stringent statutory requirements and procedures have been put in place. As already noted, it is settled law that compliance of these requirements, conditions and procedures are mandatory. A Scheme prepared under section 12 or 13, as the case may be, has to have regard

to the Master Plan. The Scheme in respect of land use must describe each plot distinctly in relation to its category in the context of the Land Disposal Regulations. A plot can only be disposed of by the Authority in the manner prescribed in the Land Disposal Regulation, if it is shown in the Scheme, clearly identified and described in terms of a particular category e.g "Residential Plot" or "Commercial and Business Plot" etc. In case of the latter category, a plot created and shown in a sanctioned Scheme can only be disposed of through open auction and, therefore, attracting the principles of transparency. At this stage it would be pertinent to discuss the minimum threshold or the test in relation to the expression 'transparency'.

20. 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."

21. 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."

22. Having discussed the relevant legal provisions, I shall now advert to the facts of the instant petitions. Nothing has been placed on record to show that the Plot was part of a sanctioned Scheme or that it was included in the manner as prescribed under the mandatory provisions of the Ordinance of 1960. There is also nothing on record to reflect that the Authority, at any stage, had prepared a Scheme in discharge of its functions on the basis of sound principles of development and town planning, as expressly mandated under section 5(2) of the Ordinance of 1960. From the time of conceiving the idea of the construction of a monument and the Convention Centre in commemoration of the 50th

Anniversary of the Independence of Pakistan till the last amendment of the lease deed by way of modifying the payment schedule, the record placed before this Court reflects that decisions were influenced and dictated by officials having no experience in town planning, particularly in relation to the land use of the Plot. At one stage the Authority had suggested to the Cabinet to include a 'Shopping Centre etc' but it was turned down. However, the sanctioned Scheme was never amended in the prescribed manner since there is nothing to this effect on the record. It has been held by the august Supreme Court in the case "*Human Rights Cases No. 4668 of 2006, 1111 of 2007 and 15283-G of 2010*" [PLD 2010 SC 759] that alteration or modification of a sanctioned Scheme is only permissible in the manner prescribed under the relevant statute.

23. The Plot was offered twice for disposal. Four advertisements were published in various daily newspapers i.e. on 13-04-2004, 22-05-2004, 28-09-2004 and 22-10-2004. In all these advertisements the Plot was exclusively offered for the construction of a 'Five Star Hotel' and the payment was to be made in 15 years. Copies of the advertisements have been attached with the petition and, therefore, the contents thereof are admitted. The advertisement, dated 22-10-2004, also referred to another distinct advertisement in respect of a 'Shopping Mall' and as noted above, the bids were submitted separately. The Byelaws and all documents provided to the bidders during the course of the bidding process expressly referred to '5 Star Hotel' and 'serviced apartments', which were to be managed and operated by the successful bidder. It is noted that 'serviced apartments' ought to have been included in the advertisement and not doing so was definitely a material breach of the principles of transparency. Nevertheless, the Authority, vide letter dated 25-02-2005, had

unequivocally clarified and informed all the bidders, including the BNP Group, that the 'serviced apartments' nor the 'shops' were permitted to be sold. The Architect firm, which had submitted plans for approval on behalf of the Petitioner Company had been informed vide letter, dated 28-05-2007, that 'Luxury apartments' were not allowed and that only 'serviced apartments' were permissible within the approved parameters. The Chief Executive Officer of the Petitioner Company, namely Abdul Hafeez Sheikh, vide letter dated 26-08-2008, had explicitly denied the sale of apartments and had clarified to the Authority that a false impression was being created by certain people in this regard. The Petitioner Company, vide letter dated 23-04-2008, had requested the Authority to issue a 'No Objection Certificate' for the sale of apartments to third parties but the same was never issued. The offer letter, dated 16-06-2005, unambiguously and exclusively refers to 'construction of a Five Star Hotel'. The Recital to the lease deed dated 28-07-2005 expressly mentions that it is being executed pursuant to the advertisements published in the daily newspapers, which have already been discussed above. All the correspondence between the parties refers to the construction of a 'Five Star Hotel'. The Petitioner / Company has not been able to show a single document even remotely indicating that the Plot was created, offered for sale or advertised as for the construction of any building other than a 'Five Star Hotel', let alone for a multi unit building for residential apartments. The stress of the learned counsel for the Petitioner/Company relating to clause 2.6 of the lease deed, dated 28-07-2005 and reference to 'serviced apartments' therein is misconceived on three grounds. Firstly, as already discussed in detail, the Plot was offered exclusively for the construction of a 'Five Star Hotel' and not a 'Multi Unit Building meant for residential

apartments and, secondly, the terms of the lease deed are to be interpreted in the light of the description given in the published advertisement, which admittedly did not include 'residential apartments and, lastly, assuming that the argument is accepted, even then the process would be vitiated and void for material breach of the principles of transparency. It is, therefore, held that the construction of the residential apartments on the Plot and the purported sale thereof is illegal, void and in flagrant abuse and violation of the Ordinance of 1960 read with the Zoning Regulations, Building Regulations and the Building Control Regulations.

24. It is also beyond comprehension as to how a distinct and separate entity, which was not part of the Consortium, was permitted to execute the lease deed. The Petitioner / Company is a juridical person and was, admittedly, not one of the partners of the Consortium. There is nothing on record to even remotely indicate as to how a juridical person which had not participated in the bidding process was permitted to execute the lease deed and, thereafter, construct a building on the Plot. It appears from the correspondence between the parties, that at a belated stage the Authority had realized this material irregularity. There is nothing on record to show that from execution of the lease deed, dated 28-07-2005 till the cancellation of the Plot the relevant official/authorities had complied with the mandatory obligations under the Building Regulations and the Building Control Regulations. The bank guarantee nor the performance guarantee were kept alive. It is a classic case where both the Petitioner / Company as well as the Authority have blatantly violated the provisions of the Ordinance of 1960, and the rules and regulations made there under. The Authority can by no stretch of the imagination justify its

regulatory failure and negligence. It allowed the Petitioner/ Company, through its conduct, to induce members of the general public to part with their hard earned money. It has been informed that widows, retired officials and many expatriates are amongst the 240 victims who have been deceived by the false impression that the two tallest buildings could only have been constructed lawfully. I am afraid that the victims also did not make queries from the Authority, probably because a reasonable prudent person would have been justified in not believing that the construction could have been manoeuvred illegally. The Petitioner / Company, admittedly, has collected an amount of Rs.5,398.050 million from the Purchasers and at the same time had been asking for extension of the payment schedule, and the Authority extended this benefit in violation of the terms and conditions, which were explicitly mentioned in the published newspapers and, thus, had breached the principles of transparency.

25. The Authority placed on record copies of the internal official notings relating to the Plot. It is a reflection of how the officials have been bending over backwards by extending undue benefits to the Petitioner/Company in complete disregard of the mandatory regulations, thus causing loss to the exchequer on the one hand and on the other enabling the Petitioner/Company to defraud and deceive members of the general public. With respect, it speaks volumes for procedural impropriety, arbitrariness and disregard for the legislative intent in enacting the Ordinance of 1960. The Authority has evidently breached its fiduciary duties and obligations in holding, disposing and managing the property vested in it for the benefit of the people of Pakistan. The august Supreme Court in the case titled "*Saad Mazhar and others versus Capital*

Development Authority through Chairman, Islamabad and others” [2005 SCMR 1973] has acknowledged the fiduciary status of the Authority by declaring that the occupants of the building which had collapsed due to the earthquake of 2005, were entitled to damages to be paid by the Authority for the latter's regulatory negligence in failing to ensure proper supervision of the construction of the building in accordance with the standards prescribed under the Regulations. It is noted that under Regulation 7 of the Capital Development Authority, Conduct of Business Regulation, 1985 (hereinafter referred to as the '**Regulations of 2005**'), made pursuant to the powers conferred under Section-51 of the Ordinance of 1960, the Chairman and each Member of the Board of the Authority are jointly and severally responsible. Thus as a corollary, besides the Authority as a statutory organization, the concerned Chairman and every Member of the Board are jointly and severally accountable for any loss caused on account of regulatory failure or negligence.

26. The learned counsels for the Petitioners, particularly the Purchasers, have vehemently argued that since there has been an established regulatory failure and negligence, therefore, their petitions be allowed and the impugned orders whereby the Plot has been cancelled be set aside. I am afraid that the Petitioners have invoked the extra-ordinary discretionary jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The powers vested in this Court are in the nature of exercising judicial review, intended to prevent arbitrariness, enforcement of fundamental rights, and to exercise the powers in the larger public interest. The august Supreme Court in the case titled "*Suo Motu Case No. 13 of 2009*" [PLD 2011 SC 619] has observed and held that the basic test for exercising the power of judicial review is

to see whether there is any infirmity in the decision making process. It is warranted when actions are vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety. It can definitely not be exercised so as to have the effect of condoning a material breach of the principles of transparency and violation of the mandatory provisions of law. It cannot be exercised in a manner that would lead to perpetuating illegality. The Court cannot direct statutory authorities to act contrary to the law. The power vested under Article 199 of the Constitution is designed to effectuate the law, to enforce rule of law and to ensure that all the authorities and organs of the State act in accordance with the law. The Petitioner / Company has indeed committed a fraud against the Purchasers, as the record unambiguously establishes that the latter was conscious that the plot was never meant for the construction and sale of residential apartments. The construction of 'residential apartments' on the Plot is illegal, void and a negation of the rule of law.

27. The learned counsels appearing on behalf of the Purchasers have vehemently argued that rights have accrued in their favour as bonafide purchasers. This Court definitely sympathises with the victims who have been made to suffer either because of complicity or regulatory capture of the Authority as a regulator. Rights cannot be claimed on the basis of an illegality. No right had accrued in favour of the Purchasers since the title of the Petitioner/Company was contingent upon obtaining a completion certificate under the provisions of the Ordinance of 1960 read with the Building Regulations and the Building Control Regulations. Moreover, ignorance of law can also not be pleaded as a valid ground. Expectations may give rise to a right if it can be shown that they are legitimate. An illegal and void foundation cannot create a right and any

superstructure built thereon would equally remain illegal and void. Moreover, no right can be claimed in violation or supersession of statutory provisions, in this case the Ordinance of 1960 and the regulations made there under. The Purchasers, despite their bonafides, had taken a risk. This Court is under a duty to uphold the rule of law and give effect to the intent of the legislature enforced through legislative enactments. The learned counsels for the Purchasers, despite their enviable advocacy skills, have not been able to make out a case that a right has accrued in their favour. A right only exists if it is a legal right. However, the Petitioner / Company as well as the Authority, due to its regulatory negligence, have exposed themselves to claims of damages for the loss suffered by the Purchasers. Needless to mention that the representations made by the Petitioner / Company to the members of the general public, in the facts and circumstances of this case, could possibly be construed as dishonestly inducing members of the public at large with the intent to deliver money and valuables, as defined in Section 9 of the National Accountability Ordinance, 1999. The 240 Purchasers in this case have been robbed of their hard earned savings solely due to regulatory failure and negligence of the Authority and the Federal Government as well. It is, therefore, their duty to ensure that the rights of the Purchasers to the extent of being compensated is protected and enforced. The breach of fiduciary duty and regulatory negligence is not only obvious but admitted.

28. During the course of proceedings, the learned counsel for the Petitioner/Company had argued that the latter has been singled out since all other similarly placed allottees have been treated differently. Information was sought from the Chairman of the Authority regarding other buildings which have been constructed and occupied in violation of

the provisions of the Ordinance of 1960, and the regulations made there under. The latter had filed an affidavit along with a report wherein details of all such buildings were given. The list is indeed appalling and alarming. It presents a picture which suggests that the Authority has given up its mandatory obligations under the Ordinance of 1960. The learned counsel for the Petitioner/ Company has strenuously argued that since regulatory failure and violation of mandatory regulations is a common phenomenon across the jurisdiction of the Authority, therefore, the Petitioner/Company may also be treated alike. It would be pertinent to answer this question in the light of the observations made by the august Supreme Court in "*Khalid Saeed versus Shamim Rizvan and others*" [2003 SCMR 1505] and the same are as follows:-

"The petitioner cannot justify his illegal venture by saying that similar other illegal activities are going on. If this plea is accepted the result would be disastrous and dacoits/thieves would justify their actions simply by saying that other dacoits/thieves having committed similar acts have not been punished."

29. It is, therefore, axiomatic that no person can justify an illegality by contending that similar other illegal activities were going on. Reliance in this regard is also placed on "*Mst. Mukhtar Begum and others versus Ala-ud-Din and others*" [1999 SCMR 914]. This plea was also raised by the illegal homeless occupants of the acquired land in I 11/2 Islamabad. Rule of law can be upheld by effectuating and enforcing the law, rather than condoning and giving legitimacy to violations of law. Legitimizing illegality definitely leads to chaos and thus results in violation of the fundamental rights of the citizens.

30. This case has brought to surface the most conspicuous example of undermining the rule of law by one of the most important regulatory authorities established under the Ordinance of 1960. The Federal Government also cannot ignore its statutory duty mandated under section 5 of the Ordinance of 1960. The documents placed on record by both the parties have brought to surface the urgent need to enforce the law in letter and spirit. It is a challenge for the Federal Government, the Authority, the concerned Standing Committees of the Parliament and all other organs of the State to work in unison to enforce the provisions of the Ordinance of 1960 and make the Islamabad Capital Territory a bastion of rule of law. Let no one have a complaint that he or she is being discriminated against because others are not being ruled by law. It is the statutory duty of the Federal Government to ensure that the sanctity of the Master Plan is restored in compliance with the intent of the legislature, by enforcing the provisions of the Ordinance of 1960. It would not be out of place to quote from a report of the Commission for the Location of the Capital constituted in 1959 and the same is as follows;

"The Capital of a country is not merely just another city; it is a LEADER among cities. To this city come leaders of administration and politics, commerce and trade, literature and art, religion and science. From this city flows the inspiration which pulsates life into the nation. It is a symbol of our hopes. It is a mirror of our desires. It is the heart and soul of the nation. It is, therefore, essential that the environment of the Capital should be such as to ensure continued vitality of the nation".

31 The above quote is part of the descriptive portion of the Master Plan in the Chapter titled "Islamabad, A Symbol - A Name". The

key to making the Capital the heart and soul of the nation is to uphold rule of law and enforce the provisions of the Ordinance of 1960 and the regulations made there under in letter and spirit.

32. For the above reasons, the instant petitions are without merit and, therefore, accordingly ***dismissed with costs.***

33. Before parting it may be noted that the Federal Government has a pivotal statutory role in the light of Section 5 of the Ordinance of 1960. The Purchasers would not have fallen in the trap of the Petitioner / Company if the Federal Government and the Authority had not been negligent or complicit. It is, therefore, a duty of the Federal Government to ensure that the victims i.e. the Purchasers do not suffer due to its own wrongful actions and omissions, particularly when the regulatory failure of the Authority stands admitted. The Federal Government is also expected to take immediate and appropriate measures to ensure that the members of the general public do not suffer in future at the hands of developers. As a first step, this Court expects that the Federal Government and the Authority shall enforce the provisions of the Ordinance of 1960 and the regulations made thereunder in letter and spirit and uphold rule of law.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 03rd February, 2017.

JUDGE

Approved for reporting.

ANNEXURE-A

Sr. No.	W.P. No.	Title of the case.
1.	3160/2016	Sadia Hayat, etc versus CDA, etc.
2.	3259/2016	Tariq Majeed, etc versus CDA, etc.
3.	3488/2016	Rubina Akhtar versus CDA, etc.
4.	3750/2016	Ehsan Mani, etc versus CDA, etc.
5.	4023/2016	Maria Nisar, etc versus CDA, etc.

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