

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.452/2014

Muhammad Ibrar Khan and another

Versus

Capital Development Authority through its Chairman and another

Dates of Hearing: 13.09.2018, 12.09.2018, 10.09.2018,
17.08.2018, 16.08.2018 and 06.02.2014.

Petitioners by: Ms. Ayesha Hamid, Advocate.

Respondents by: Mr. Muhammad Nazir Jawad, Advocate
for the respondents.
Mr. Rashid Hafeez, learned Deputy
Attorney-General.
Ms. Sitwat Jehangir, learned Assistant
Attorney-General.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners, Muhammad Ibrar Ahmed and Khalid Mehmood Bhatti, impugn notice dated 27.11.2013, issued by the Enforcement Directorate of the Capital Development Authority (“C.D.A.”) calling upon the petitioners to refrain from carrying out construction activity on their land falling in Zone-3 of the Islamabad Capital Territory (“I.C.T.”). Furthermore, the petitioners have called in question the *vires* of the Islamabad Capital Territory (Zoning) Regulations, 1992 (“the 1992 Regulations”) to the extent of the restriction imposed thereby on the use, construction and sale of un-acquired land in Zone-3 of I.C.T.

2. Learned counsel for the petitioners submitted that the petitioners’ forefathers were the original residents and owners of substantial land in village Shah Allah Ditta which falls in Zone-3 of Islamabad; that the petitioners also purchased land in the said Zone; that C.D.A. had been empowered by the provisions of the Capital Development Authority Ordinance, 1960 (“the 1960 Ordinance”), to acquire land in Islamabad; that till date, C.D.A. has not acquired the petitioners’ land; that the owners of land in the said village, including the petitioners, are enjoying possessory and proprietary rights over their land; that the Constitution does

not permit the imposition of unreasonable restrictions on the use of land; that vide notice dated 27.11.2013, restriction has been imposed by the C.D.A. on the petitioners' right to utilize their land; that the said notice violates the petitioners' rights under Articles 4, 18 and 24 of the Constitution; and that such restriction could not have been imposed on the utilization by the petitioners of their own land.

3. Learned counsel for the petitioners further submitted that unlimited restrictions could not have been imposed on the sale or construction of land in Zone-3 of I.C.T. for an indefinite period; that the petitioners have not caused any destruction to the wildlife and scenery in Zone-3 of I.C.T.; that the 1992 Regulations to the extent of restricting the petitioners from utilizing their own land in Zone-3 of I.C.T., is unconstitutional; that the petitioners have been discriminated against inasmuch as the C.D.A. has permitted construction activity in the National Park area as specified in the Islamabad Wildlife (Protection, Reservation, Conservation and Management) Ordinance 1997 ("the 1997 Ordinance"); that the respondents have changed the master-plan and allowed construction activity in Sectors E-7, E-8, E-9, E-10 and E-11, Islamabad; that the impugned notice dated 27.11.2013 has the effect of dispossessing the petitioners from their own properties without any compensation; and that the respondents can acquire the petitioners' land on payment of compensation in accordance with law but cannot impose unreasonable restrictions on the petitioners regarding the use of their own land. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein. In making her submissions, learned counsel for the petitioners placed reliance on the cases of Abdul Qadeer Khan Vs. Chairman, C.D.A. (1999 YLR 247), Capital Development Authority Vs. Dr. Abdul Qadeer Khan (1999 SCMR 2636), Salah ud Din Vs. Collector, Land Acquisition, Peshawar (1999 CLC 776), East and West Steamship Co. Vs. Pakistan (PLD 1958 SC 41), Gadoon Textile Mills Vs. WAPDA (1997 SCMR 641), Pakistan Broadcasters Association Vs. Pakistan Electronic Media

Regulatory Authority (PLD 2016 SC 692), Muhammad Mubeen-us-Salam Vs. Federation of Pakistan through Secretary, Ministry of Defence (PLD 2006 SC 602), City School Private Limited Vs. Government of the Punjab (PLD 2018 Lahore 509), D.G. Khan Cement Company Ltd. through its Chief Financial Officer. Vs. Federation of Pakistan through Secretary Ministry of Law (PLD 2013 Lahore 693), Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. Vs. Federation of Pakistan through Secretary Ministry of Interior (PLD 2007 SC 642), Government of the Punjab through Chief Secretary, Punjab, Lahore Vs. Naseer Ahmad Khan through L.Rs. (2010 SCMR 431), Suo Motu Case No.10 of 2007 (PLD 2008 SC 673), Arshad Mehmood Vs. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore (PLD 2005 SC 193), Pakistan Refinery Limited Vs. International School of Choueifat through Principal Officer (2009 YLR 2000), Ch. Muhammad Ishaque, Advocate Vs. Cantonment Executive Officer, Chunian, District Kasur (PLD 2009 Lahore 240), Dr. Miss Hajira Abdullah, Professor of Paediatrics (Rtd.) F.J. Medical College, Lahore Vs. Lahore Development Authority, Lahore (PLD 1997 Lahore 464), Karachi Building Control Authority Vs. Hashwani Sales and Services Limited (PLD 1993 SC 210) and Messrs Shaheen Cotton Mills, Lahore Vs. Federation of Pakistan, Ministry of Commerce through Secretary (PLD 2011 Lahore 120),

4. On the other hand, learned counsel for C.D.A. submitted that the 1992 Regulations have been framed in exercise of the powers conferred under section 51 of the C.D.A. Ordinance; that the I.C.T. has been divided into five Zones; that the petitioners' land is situated in Zone-3; that ever since the making of the 1992 Regulations, no sale/purchase of land which entails change in land use has been allowed in Zone-3; that land situated in Specified Area as defined in the Capital of Republic (Determination of Area) Ordinance, 1963, is subject to acquisition under the provisions of the C.D.A. Ordinance; that under section 22 of the C.D.A. Ordinance, the entire land situated in Specified

Area of I.C.T. is liable to acquisition; that the Hon'ble Supreme Court, in *Suo Moto* Case No.10, has upheld the *vires* of the 1992 Regulations; that the development of a residential or an Orchard Scheme is not permissible in Zone-3 of I.C.T.; that the petitioners' land is admittedly situated in Zone-3 of I.C.T.; that the petitioners have carried out development activity on their land in violation of the C.D.A. Ordinance and the 1992 Regulations; and that as and when the petitioners' land is acquired by the C.D.A., proper compensation will be paid to them. Learned counsel for the C.D.A. prayed for the writ petition to be dismissed. In making his submissions, learned counsel for the C.D.A. placed reliance on the judgment passed by the Hon'ble Supreme Court in *Suo Moto* Case No.13/2009 (PLD 2011 SC 691), Park View Enclave Pvt. Limited Vs. Capital Development Authority (2018 CLC 947), and judgment dated 09.07.2018, passed by the Full Bench of this Court in writ petition No. 676/2017, titled "Shahzada Sikandar ul Mulk Vs. the Capital Development Authority".

5. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

6. Article 211 of the 1962 Constitution provided that the Capital of the Republic shall be Islamabad situated in the district of Rawalpindi at the site selected for the Capital of Pakistan before the enactment of the said Constitution. Article 211(2) of the said Constitution provided that the area of the Capital shall be determined by the Central Legislature but shall not be less than two hundred square miles. The Capital of the Republic (Determination of Area) Ordinance, 1963 was promulgated on 26.10.1963. Section 2 of the said Ordinance provides that the area specified in the Schedule measuring 350 square miles or thereabout within the district of Rawalpindi in the Province of the Punjab at the site selected for the Capital of Pakistan shall be the area of the Capital of the Republic. It is not disputed that the land owned by the petitioners is situated within the area specified in the Schedule to the said Ordinance.

7. The C.D.A. Ordinance was promulgated on 27.06.1960. Under the provisions of the said Ordinance, the C.D.A. was established for making all arrangements for the planning and development of Islamabad within the framework of a regional development plan. Section 2(e) of the said Ordinance defines "*Capital Site*" as the part or parts of the Specified Areas declared to be the site for the Pakistan Capital under section 3 of the said Ordinance. Section 2(p) of the said Ordinance defines "*Specified Areas*" as areas specified in the Schedule, and such other area or areas as may from time to time be included therein by the Federal Government by notification in the official gazette. Section 3 of the said Ordinance provides that the Federal Government may, from time to time, by notification in the official Gazette, declare any part or parts of the Specified Areas to be the site for the Pakistan Capital. It is also not disputed that petitioners' land falls within the limits of the Capital Site earmarked in the Schedule to the C.D.A. Ordinance.

8. Martial Law Regulation No.63 was made on 12.07.1984. Paragraph 4 of the said Regulation provides that the authority may, if it is of the opinion that any structure has been or is being erected in violation or deviation of the approved master-plan or the programme of the Federal Capital or that its existence or construction is prejudicial to the public interest or morality, it may by order in writing *inter-alia* direct that such structure be demolished by the C.D.A. with the use of such force, as may be necessary.

9. The C.D.A., in exercise of the powers conferred by Sections 11 and 51 of the C.D.A. Ordinance, made the Islamabad Capital Territory (Zoning) Regulations, 1992 ("the 1992 Regulations"). Under the 1992 Regulations, Islamabad Capital Territory was divided into the following five Zones:-

"(1) *Zone-1. This zone constitutes sectors upto the existing alignment of the G.T. road from the point of intersection of G.T. road with Shahrah-e-Kashmir to the point of the Nicolson Monument inclusive of sector H-14, H-15, H-16, H-17, I-14, I-15, I-16, I-17.*

- (2) *Zone-2. The zone consists of an area bounded by G.T. road in the north & north east, north of Shahrah-e-Kashmir and Capital limits in the west, comprising residential sectors G-15 (part), G-16, G-17, F-15 (part), F-16, F-17, E-15 (part), E-16, E-17, D-16, D-17, C-17 and B-17.*
- (3) *Zone-3. Margallah Hills National Park as notified under section 21 of the Islamabad Wild Life (Protection, Preservation, Conservation & Management) Ordinance, 1979, other protected ranges, forest areas and unacquired land falling between the Margallah Hills & north of Murree Road shall constitute this zone .*
- (4) *Zone-4. This zone comprises Islamabad Park and rural periphery wedged between Murree road towards north and Lehtrar road towards south and extending beyond Simly road upto the ICT limits in the north-east. This zone excludes the part of Margallah Hills National Park and Rawal Lake.*
- (5) *Zone-5. This zone comprises areas falling south of Islamabad Park and extending upto outer limits of ICT towards south, south west and south east."*

10. Under Regulation 4(3) of the 1992 Regulations, the following restrictions have been imposed on land falling in Zone-3.

- (a) *no private residential, framing, orchard, poultry and dairy farming scheme shall be allowed;*
- (b) *no change in land-use will be permissible except for such projects as may be related to conservation, preservation, afforestation and recreation and area covered by Margallah Hills National Park Management Plan;*
- (c) *no sale/purchase of land which entails change in land use, shall be allowed;*
- (d) *some of the existing rural settlements, being central and important villages, shall be allowed to stay under controlled programme to cater for the basic necessities of the local population, selection of such settlements shall be in accordance with the provisions of Margallah Hills National Park Management Plan. These rural settlements would not be allowed to expand;*
- (e) *no residential scheme can be floated in this zone, nor construction of house shall be allowed.*

11. *"Illegal construction" has been defined in paragraph 2(14) of the 1992 Regulations as "construction carried out without the permission of the Authority and in contravention of the rules and regulations or any laws for the time being in force in the ICT".*

12. Now, it is an admitted position that the petitioners wanted to establish a housing society on their land falling in Zone-3. It is also an admitted position that in furtherance of such desire, the petitioners have carried out some developmental work on their

land. Four/five houses are also said to have been constructed on the developed land.

13. By virtue of the impugned notice dated 27.11.2013, the Directorate of Enforcement, C.D.A., informed the petitioners were informed that there was a restriction of every nature on construction over land in Zone-3, Islamabad. Furthermore, the petitioners were called upon to refrain from carrying out construction activity in the said area failing which proceedings in accordance with the law would be taken against the petitioners.

14. Now, Under section 11 of the said Ordinance, the C.D.A. has been mandated to prepare a master-plan and 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, and all such plans and programmes shall be submitted to the Federal Government for approval. Under Section 12 of the C.D.A. Ordinance, the C.D.A. 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 C.D.A., 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 within a reasonable time. The schemes prepared by the C.D.A. may also relate to housing. Section 12(5) of the C.D.A. Ordinance 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.

15. It is an admitted position that till date, no plan or programme for the petitioners' land in particular and for Zone-3 in general has been prepared or submitted for the approval of the Federal Government and or C.D.A. Neither has C.D.A. nor any local body or agency prepared any planning or developmental scheme for a housing society in Zone-3 of I.C.T. Before carrying out developmental work on their land, the petitioners did not obtain the concurrence of C.D.A. in terms of section 12(5) of the C.D.A. Ordinance. Therefore, the construction and development activity

carried out by the petitioners on their land in Zone-3 comes within the meaning of *“Illegal construction”* as defined in paragraph 2(14) of the 1992 Regulations.

16. Under the provisions of *“Modalities and Procedures framed under I.C.T. (Zoning) Regulation, 1992 for Development of Private Housing Schemes in Zones Two & Five of Islamabad Capital Territory Zoning Plan”* a housing scheme can be sponsored by a registered company or a cooperative society for an area not less than one hundred acre falling within Zone-2 and 50 acres falling within Zone-5 of the I.C.T. Zoning Plan. Admittedly, no regulations have been framed for a housing scheme to be sponsored or developed in Zone-3 of the I.C.T., where the petitioners’ land is situated.

17. It is an admitted position that the petitioners did not obtain permission from the C.D.A. to construct buildings on their land. The petitioners have carried out developmental work in violation of the prohibition contained in Regulation No.4(3)(a)&(e) of the 1992 Regulations. One of the reliefs prayed for by the petitioners in the writ petition is to declare the notice dated 27.11.2013 illegal and without lawful authority. For this, Court to grant the petitioners the said relief would tantamount to validating the development and construction works carried out in stark violation of the law. The grant of such relief is not permissible in the equitable jurisdiction of this Court. For the reasons mentioned above, I find that this notice is strictly in conformity with the provisions of the C.D.A. Ordinance as well as the above referred Regulations made thereunder. Since the construction and development carried out by the petitioners on their land in Zone-3 is not pursuant to any plan or programme approved by the Federal Government or the C.D.A., the same cannot be termed as lawful. Even otherwise, there is an absolute bar imposed by paragraph 4(3) of the 1992 Regulations on private residential, farming, orchard, poultry and dairy farming schemes in Zone-3.

18. As regards the petitioners’ challenge to the *vires* of the 1992 Regulations to the extent of the restrictions imposed therein on

construction of housing schemes on land in Zone-3, suffice it to say that although not identical but similar restrictions were also placed on the development of private housing schemes and on the sale and purchase of land and the change of land use in Zone-1 of I.C.T. These restrictions contained in paragraph 4(1)A. of the 1992 Regulations were examined by the Hon'ble Supreme Court in *Suo Moto* Case No.13/2009. The restrictions on the sale and purchase of land which entails change in land use; the restriction on the construction of houses and buildings; and the restriction on the establishment of private housing schemes in Zone-1, were held to be valid. However, the permission for the establishment of private schemes in Sectors E-11 was held to be repugnant to section 12 of the C.D.A. Ordinance. Therefore, I cannot hold the restriction on the development and construction of a housing scheme in Zone-3 imposed by the 1992 Regulation, to be *ultra vires* the Constitution.

19. Now, the petitioners have not challenged the *vires* of any of the provisions of the C.D.A. Ordinance. It is my view that the 1992 Regulations were made to further the purposes and objectives regarding urban town planning envisaged by the provisions of the C.D.A. Ordinance, in general and sections 11 and 12 of the said Ordinance in particular. The petitioners have not challenged the said sections 11 and 12 of the C.D.A. Ordinance. Not having done so, isolated challenge could not have been thrown to the provisions of the 1992 Regulations, whereby restriction on residential schemes, etc. and construction of houses in Zone-3 has been imposed. Proceeding on hypothesis, even if it is assumed that the 1992 Regulations had not been made, the petitioners would not have been in a position to carry out construction or development of a housing scheme in Zone-3, since a restriction on the preparation of planning and development schemes by any person without the concurrence of the C.D.A. has been imposed through section 12(5) of the C.D.A. Ordinance.

20. Since I have been given no reason to hold that such a restriction is violative of any provision of the C.D.A. Ordinance and or the petitioners' fundamental rights guaranteed under the

Constitution, the restrictions on such schemes imposed with respect to land in Zone-3 is held to be *intra vires*. It is well settled that strong presumption as to constitutionality, legislative competence, legality, reasonableness and *intra vires* attached to a statute is also attached in equal force to subordinate legislative instruments. Onerous burden is said to be on the person challenging the validity of *vires* of a legislative instrument on any account. A reference in this regard may be made to the case of Ummatullah Vs. Province of Sindh (PLD 2010 Karachi 236). In the judgment reported as PLD 2011 S.C. 619, it has been held as follows:-

“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.”

21. Furthermore, in the case of Lahore Development Authority Vs. Ms. Imrana Tiwana (2015 SCMR 1739), the Hon'ble Supreme Court has enumerated the following principles which are to be applied and considered by the Court while striking down or declaring a legislative enactment as void or unconstitutional:-

“(i) There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two;

(ii) Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;

(iii) A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

(iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds;

(v) Court should not decide a larger Constitutional question than was necessary for the determination of the case;

(vi) Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;

(vii) Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality;

(viii) Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and

(ix) Mala fides should not be attributed to the Legislature."

22. Section 22 of the C.D.A. Ordinance provides that all land within the Specified Areas shall be liable to acquisition at any time in accordance with the provisions in Chapter-IV of the said Ordinance. Section 33 of the said Ordinance empowers the Deputy Commissioner to acquire land in cases of urgency. Section 51 of the said Ordinance empowers the C.D.A. to make regulations on all matters for which the regulations are necessary or expedient. In exercise of the powers conferred under section 51 of the C.D.A. Ordinance, the Land Acquisition Regulations, 1961, have been framed. These Regulations set out an elaborate procedure for the acquisition of land in the I.C.T.

23. Ever since the promulgation of the C.D.A. Ordinance and the making of the land acquisition regulations, no step has been taken by the C.D.A. or the Federal Government to acquire the petitioners' land in accordance with the provisions of the said Ordinance and the Regulations made thereunder. Therefore, the petitioners' woes and anguish is understandable. They can neither sell their land which entails a change in land use nor can they construct, develop or establish any private residential, farming, orchard, poultry and dairy farming scheme on their land. The C.D.A. and or the Federal Government cannot expect the petitioners to wait indefinitely for the said acquisition to take place. Since the Government's intention to acquire land in Zone-3 is stated in the form of a statutory declaration (i.e., section 22 of the C.D.A. Ordinance), it is expected that the Federal Government

shall make sufficient budgetary grant in favour of the C.D.A. so as to enable it to fulfill its declared objective of acquiring the said land within a reasonable period.

24. In view of the above, the instant petition is dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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