

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

WRIT PETITION NO.1337/2001

COL. (R) JAVED AGHA ETC.

Vs.

ARSHAD MAHMUD, ETC.

PETITIONER BY:

**Syed Naeem Bukhari, ASC & Mr. Ijaz Janjua
Advocate in Writ Petition Nos.1337/2001,
1790/2011.**

**Mian Tahir Iqbal & Ms. Asma Shabbir Malik,
Advocate in Writ Petition No.2209/2008 & 2175 of
2009.**

**Mr. Samad Mehmood, Advocate in Writ Petition
Nos.1753, 1754, 1755, 1756, 1757, 1799, 1908,
2038, and 2744 of 2012, 1203, 2239 & 313 of
2014.**

**Mr. Mussarat Abbas Siddiqui, Advocate for
petitioners in Writ Petitions No. 3249, 3250, 4360,
4507 of 2013.**

**Mr. Naveed Malik, Advocate, in Writ Petition
No.2098/2013.**

**Barrister Saad M. Hashmi, in Writ Petition
No.2025, 2165 of 2014.**

**Mr. Waseem Abid, Advocate in Writ Petition
No.313/2014.**

RESPONDENTS BY:

**Mr. Haseeb Muhammad Ch. Advocate for CDA in Writ
Petition No.3249, 3250, 4360, 4507 of 2013 and 313,
1203, 2165, 2238/2014.**

**Mr. Rehan Seerat legal Advisor & Raja Adnan Aslam
Advocate CDA.**

**Malik Javid Iqbal Wains, Advocate in Writ Petition
No.2274/2012.**

**Syed Husnain Ibrahim Kazmi, learned DAG
Mr. Yousaf M. Qureshi, S.C
Mr. Ali Raza ASC, Sardar M. Ishaq Khan and Mr. Wasim
Abid Advocate for petitioner in W.P No.4056/2014.**

DATE OF HEARINGS:

**08.09.2014 TO 11.0-9.2014 & 18.09.2014 in Writ
Petition No.4056/2014.**

SHAUKAT AZIZ SIDDIQUI; J: Through this Single Judgment, Writ petitions detailed in the table given below are being disposed of together, having same subject matter i.e. regarding use of the residential accommodations for commercial activities commonly known as Non-conforming use in Islamabad. Writ petitions No with title, nature of usage & business conducted by the petitioners is given as under:-

Sr. No.	WRIT PETITION NUMBER WITH TITLE OF THE CASE	NATURE OF USAGE & DETAIL OF BUSINESS
1.	W.P No.1337 of 2001, Col. ® Javed Agha Etc. Vs. Arshad Mehmud, etc.	Guest Houses
2.	W.P No.2209 of 2008, Khawar Manzoor Atta etc. Vs. Sajjad Hussain Shah and others	T.V 1 Channel
3.	W.P No.2175 of 2009 Dr. Manzoor Hussain Chaudhry Vs. Mohammad Najeeb Aslam & others	Guest House
4.	W.P No.4032 of 2010 Muhammad Yousaf Vs. Capital Development Authority etc.	Guest House
4.	W.P No.1790 of 2011 Mian Naeem Afzal Vs. Ajmal Bukhari, Deputy Commissioner, CDA	Guest House
5.	W.P No.1753 of 2012 Cristina Afridi Vs. Special Magistrate, CDA etc.	Restaurant
6.	W.P No.1754 of 2012 Muhammad Naeem Asmat Vs. Special Magistrate, CDA etc.	Restaurant
7.	W.P No.1755 of 2012 Attique Ullah Khan Vs. Special Magistrate, CDA etc.	Restaurant & Catering Services
8.	W.P No.1756 of 2012 Mobeen Nisar etc. Vs. Special Magistrate, CDA etc.	Club/Restaurant
9.	W.P No.1757 of 2012 M/s Hang Chang Enterprisers, Vs. Special Magistrate, CDA etc.	Resturant
10.	W.P No.1799 of 2012 Raja Fida Hussain Vs. Special Magistrate, CDA etc.	Resturant/K.C Grill
11.	W.P No.1908 of 2012 Baigum Nussrat Akhtar etc. Vs. Special Magistrate, CDA etc.	Restaurant
12.	W.P No.2038 of 2012 Mrs. Samina Malik Lakhani Vs. Special Magistrate, CDA etc.	Restaurant & Boutique
13.	W.P No.2744 of 2012 M/s Kuch Khaas Vs. Special Magistrate, CDA etc.	Association/centre for arts, culture & dialogue etc.
14.	W.P No.2098 of 2013 Rizwan Ullah etc. Vs.	Guest Houses

	Capital Development Authority, etc.	
15.	W.P No.3249 of 2013 Syed Basir Ali Shah Vs. Capital Development Authority, etc.	Student Hostel
16.	W.P No.3250 of 2013 Muhammad Munir Vs. Capital Development Authority, etc.	Student Hostel
17.	W.P No.4360 of 2013 Sikandar Ali Vs. Capital Development Authority, etc.	Guest House
18.	W.P No.4507 of 2013 Tanveer Ahmed Vs. Capital Development Authority, etc.	Boys Hostel
19.	W.P No. 313 of 2014 Tanveer Akhtar Vs. Special Magistrate CDA, etc.	Restaurant
20.	W.P No. 1203 of 2014 Sameer Randhawa Vs. Special Magistrate CDA, etc.	Restaurant
21.	W.P No.2025 of 2014 Muhammad Shahid Vs. Deputy Commissioner, CDA, etc.	Office for Architectural work
22.	W.P No.2165 of 2014 ALAYZ School Vs. Deputy Commissioner, CDA, etc.	School
23.	W.P No. 2239 of 2014 Attique Ullah Khan Khattak, Vs. Special Magistrate CDA, etc.	Restaurant
24.	W.P No. 4056 of 2014 K.C Grill & others Vs. Federation of Pakistan, etc.	Restaurants, Saloons, shopping centers, Café, Gym, etc.

The petitioners have prayed for the issuance of similar nature of writs in their separate writ petitions, so the prayer made in the writ petition No.1337 of 2001 is being reproduced as under:-

- A. A declaration that petitioners have a constitutional right to engage in any lawful trade or profession and that business of running guest houses in residential buildings where short term residential facilities are provided is a lawful business which cannot be stopped by the CDA and the action of the CDA of forcible closure of the guest houses is violative of Article 9, 12, 14 and 18 of the constitution.**
- B. A declaration that the summons issued by Respondent No.1 under section 68 of Cr.PC to the petitioners and proceedings taken by him pursuant to the same are without lawful authority and of no legal effect;**
- C. A declaration that use of the residential premises for providing short terms residential facilities, is neither violative of any provision of the CDA**

Ordinance, 1960 nor it is a criminal offence and the action of the Respondents to treat it as criminal offence or to lodge criminal prosecution of the petitioner is illegal, malafide, abuse of the official authority, void and of no legal consequence.

- D. A declaration that residential buildings are being used for non residential purposes by scores of other category of persons, and only petitioners are being discriminated and forced to close their business of Guest Houses, which action of the respondents is violative of Article 25 of the Constitution, is malafide in law and facts and is liable to be declared a nullity in the eye of law.**
- E. A declaration that respondents No 1 is not "Magistrate" appointed under the Cr.PC and does not have any judicial powers hence he cannot try the petitioner for any criminal offence and in any case the allegation against the petitioner for violation of any Regulation does not constitute a criminal offence.**
- F. A direction restraining the respondent No 1 for issuing any notice/ summons to the petitioner in respect of the running of their business of Guest Houses on the ground / allegation that the same constitutes a "non-conforming use" or that activity is violative of the Building Control Regulations 1993 and from entertaining any complaint of CDA official in this behalf.**
- G. A declaration that cognizance of any offence under the CDA ordinance 1960, can only be taken by a Court and that Respondent No 1 is not a criminal court constituted or governed under Section 6 Cr.Pc**
- H. A declaration that Respondent No 1 is not a duly appointed member of "Bench of Magistrate" for Islamabad Capital Territory not vested with the powers of a Magistrate of any class by the "Provincial Government" for purposes of "Islamabad Capital Territory"**
- I. A declaration that Respondent no 1 who is receiving salary and other facilities from the CDA is not a Court subordinate to the High Court and that his appointment as a CDA Magistrate is violative of the Constitutional provisions relating to separation of judiciary from the executive.**
- J. A declaration that the proceedings before Respondent No 1 being violative of injunctive orders of the Senior civil Judge, Islamabad are otherwise also without lawful authority and of no legal effect.**
- K. A declaration that Respondent No.2 is not a Deputy commissioner of the District. Also, he has not vested the powers of District management and is not a court constituted under any law and notice dated 10.04.2001 issued by Respondent No.2 is absolutely without lawful authority, an abuse of the nomenclature of "Deputy commissioner" which is of no legal effect or consequence.**
- L. A direction to Respondent No.2 to refrain from passing orders of similar nature, to any of the other petitioner.**

- M. A declaration that section 49-c of the CDA (Amendment) Act, 1966 is ultra vires of the CDA ordinance 1960, the constitution and a declaration under section 15,46b & 51 are simultaneously void and can have no application qua Building Regulations 1993 made by Capital Development Authority itself.**
- N. A declaration that the Building Regulations 1993 have not been made "to carry out the purpose of" the CDA ordinance and the said Regulations have not been approved by the parliament nor made by the central Government hence the same have no legislative significance.**
- O. A declaration that so-called "non-confirming use" is not an offence under the ordinance or the Rules and cannot be treated as a criminal offence in exercise of general powers under the Ordinance. The notices issued by the Respondent by No.3 are without lawful authority and of no legal effect.**
- P. A declaration that Regulation Nos. 2.15, 2.20, 2.21, 2.25, 2.38, 2.39, 2.44, 5.01, 5.02 and 5.03 of the Building control Regulation 1993, are ultra-vires of the CDA ordinance, 1960, suffer from excessive delegation, are violative of the fundamental rights of the petitioners, are unreasonable and irrational and/or use of residential buildings as Guest Houses does not constitute a non-conforming use.**
- Q. A direction to CDA to act in accordance with law, justice, fairness and honesty to regulate the business of the petitioners under a uniform scheme without destroying their livelihood.**
- R. A direction to Respondent No.2 through its chairman to refrain from initiating proceedings of any sort against the petitioners for alleged violation of Building control Regulation, 1993, prohibiting business of Guest Houses as 'non-conforming use' of residential buildings.**
- S. A direction to WAPDA and SSP Islamabad to refrain from acting upon any direction from CDA qua the petitioners based on 'non-confirming use or commercial activity' and refrain from disconnecting electric connections to the guest houses at the behest of CDA or to forcibly close the guest houses.**
- T. Appropriate orders enforcing the fundamental rights (Articles 9, 14 and 18) of the petitioners to run the Guest houses in the residential buildings without interference from CDA and its officials on the basis or grounds that the same constitutes "non-conforming use" or a commercial activity and from disconnecting water supply to the guest houses on the above basis or ground.**
- U. A declaration that the action of CDA qua the petitioners business activity of Guest Houses is per se discriminatory and appropriate orders enforcing fundamental rights guaranteed by Article 25 of the constitution.**
- V. Any other relief, writ, or order or direction deemed just, appropriate or necessary by the honourable Court may be granted, issued or passed.**

Naeem Bukhari, ASC, argued that Guest houses in Residential premises exist not only all over Pakistan but around the world. That CDA Ordinance 1960 defines a building but not a residential house and by taking in guest, the nature of a residential plot does not change as there is no difference between a residence for rent for a month or for a week or a night. The bar is created by CDA Regulations under which the authority can regulate an activity which per se is not illegal but cannot prohibit. The **section 46 read with 49 C** order *ibid* makes it an offence to contravene a Regulation, suffer from excessive delegation of powers. The Regulations are unreasonable and irrational apart from exceeding the parameters of the Ordinance; therefore, direction or challan or threat to close down the guest houses is in violation of Article 9, 14, 18, 24, 38(b) of the constitution of Islamic Republic of Pakistan. It is lastly contended that house magistrate is being paid salary by CDA but exercise judicial powers, which violates the doctrine of separation of powers.

3. Learned Counsel for petitioners, in other connected Writ Petitions argued that it is the domain of the Federal Government to notify Rules viz subject matter of land required to be used with respect to the master plan; therefore, in absence of such rules, the CDA cannot exercise its power under section 51 of the Ordinance to frame Regulation which pertain to the specific issue of land use. The impugned Zoning Regulations and ILD Regulations on account of the subject matter of the impugned regulations are without authority and issued in excess of powers vested in the CDA. Hence, they are illegal and of no legal effect. The impugned Regulation 2.1.5 is in conflict with the apparent unexceptional and prohibitory provisions of the earlier stated regulations, allows for an exemption and vests in the CDA the unfettered discretion to change the nature of land use on request of allottees provided that the layout and functional plan permits such changes. Therefore, the declared 'land use' at the time of allotment by CDA's own formulation is not written on stone and is capable of being altered when necessary. By virtue of CDA Ordinance, the CDA has been vested with a certain discretion, which it may use in discharge of its statutory functions. However, such discretion as per the judgments of the Superior Courts has to be reasonable and within the four corners of the law. That the Regulation 4.1.23 of the Zoning Regulations vests in CDA power to exempt any person, from any of these regulations as no criteria or parameters or circumstances are defined or prescribed through which the discretion can be regulated. Resultantly, the same falls under the

domain of unfettered discretion and is liable to be declared as unlawful and illegal. Similarly, in Regulation 2.1.7 the Authority has itself retained the power to exempt or permit resident professionals from using the residential premises for home occupation. Learned counsel further contended that such unfettered discretion can be nothing but a patent violation of the Constitutional guarantees as enshrined under Article 9, 18 and 25 of the constitution and a gateway to corruption which has destroyed the fabric of our society.

4. On the other hand, learned counsel for respondents/ CDA has contended that CDA is a development authority which is focused towards taking care of the general public of the Capital and important community interests. Chapter 2 of the CDA ordinance provides the duties and powers of CDA. Section 11 provides that "the authority shall prepare a master plan and a phased master-programme for the development for the rest of the specified Areas and all such plans and programmes shall be submitted to the Federal Government for approval". This section is followed by section 12 which provided that the Authority 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 the Authority, 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 preparations of the scheme or schemes within a reasonable time. Such schemes may relate to:-

- a) Land use, zoning and land reservation.**
- b) Public buildings.**
- c) Industry.**
- d) Transportation and communications, highway, road, streets, railways, aerodromes.**
- e) Telecommunication, including wireless, television, radio, telephone.**
- f) Utilization of water , power and other natural resources.**
- g) community planning housing slum clearance amelioration.**
- h) Community facilities including water supply, sewerage, drainage, sewage, disposal, electricity supply, gas supply and other public utilities.**
- i) Preservation of objects or places of historical, scientific interest or natural beauty.**

The perusal of above schemes clearly shows that CDA is aimed towards protecting important community interest and the whole community of the capital and not individual, therefore, restriction on non-conforming use provided by CDA is a restriction which is actually aimed at serving the interest of the whole community view

and even if it affects the constitutional rights of a few individuals, it cannot be considered as unreasonable but a reasonable restriction permitted by law. It has been held through number of pronouncements by the superior courts of the country that Fundamental rights are subject to law and reasonable restrictions can be imposed by law. The reasonableness of restriction has also been elaborated upon in these case laws such that the restrictions are reasonable if they have been made to protect the rights of other persons or important community interest, reliance is placed on PLD 2011 SC, 44, PLD 2013 Lahore 693 and PLD 2007 SC 642. It is further contended that Authority may make regulations, not inconsistent with the rules, if any, on all matters for which regulations are necessary or expedient; and such regulations shall be published in the official Gazette. Moreover, Section 50 provides that the Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this Ordinance. Provided that no rules shall be made on any of the matters specified in section 38 and intention behind enacting of this section was to allow the authority to make regulations so as to effectively dispose of the policies provided for in the Act. The question whether the Building Control Regulations 1993 suffer from excessive delegation is concerned, it is contended that excessive delegation takes place where a certain piece of legislation does not provide any policy or framework and shifts the same to the executive to legislate but the policy framework for non-conforming use has already been provided in Section 49C and these regulations are simply elaborating the same for effective disposal, therefore, these regulations are not inherent of excessive delegation.

5. It is further contended that Special Magistrates and Deputy Commissioner, CDA are the employees of CDA for the purpose of acquisition proceedings and is not a court under section 4 of the Cr.P.C, therefore, cannot pass any sentence or impose any penalty thereof or is authorized to pass judicial order or have the power to pass any sentence order under the CDA Ordinance, 1960, since are being paid from CDA thus is not a Court subordinate to High Court. Therefore, the appointments as CDA Deputy Commissioner or Magistrate is in violation of the constitutional provisions. So far the separation of judiciary from the Executive is concerned, the Islamabad High Court, Islamabad vide its judgment reported as PLD 2011, Islamabad 36 already observed that notice dated 23.05.2011 issued by the Deputy Commissioner CDA is in accordance with the CDA Rules and suffer from no legal infirmity on the grounds that

under section 36-A(2) of the Capital Development Authority Ordinance, 1960, the Deputy Commissioner or the Commissioner exercising powers under this Ordinance shall be deemed to be a Court for the purposes of Section 480 and 482 of the Code of Criminal Procedure, 1898. A proceeding before him shall be deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the Pakistan Penal Code, (XLV OF 1860). Moreover, clause 2.17.3 of the Islamabad Residential Sectors, Zoning, (Building Control) Regulation-2005, empowers the Deputy Commissioner to impose penalty on non-conforming use of a residential building which reads as under:-

2.17.3 "A non-conforming use of a residential building may render the owner and the occupant of the building liable on first conviction to pay a fine of Rs.0.5 Million and in the case of failure to discontinue to non-conforming use within 15 days of the conviction, to an additional fine which may extend to five thousand rupees (Rs.5000/ -) for every day during which he has persisted in the failure. After a persistent non-conforming use for a period of three months, the owner or as the case may be the occupant shall be liable to be evicted from the building summarily and the allotment/conveyance deed of the plot may also be cancelled.

2.17.4. The penalty mentioned above in this regard, shall be imposed by the Deputy commissioner only."

In view of above, the court observed that, petitioner in the instant petition has not denied the non-conforming use of the premises; hence, respondent No.1 has rightly issued the impugned notice dated 23.05.2011 to the petitioner. The notice dated 23.05.2011, issued by the Deputy Commissioner; CDA is in accordance with the CDA Rules and suffers from no legal infirmity.

6. Learned counsel for Respondents further argued that although Article 18, of the Constitution of Islamic Republic of Pakistan provides the **freedom to conduct lawful trade business or profession** provided that nothing in this Article shall prevent,

(a) The regulation of any trade or profession by licensing system; or

(b) The regulation of trade, commerce or industry in the interest of free competition therein; or

(c) The carrying on, by the Federal Government or a provincial government, or by a corporation controlled by any such Government, or by a corporation controlled by any such Government, of any trade, business,, industry or service to the exclusion, complete or partial of other persons.

The freedom of trade, business or profession is controlled by the said Article itself. The word lawful trade, business or profession

is sufficient to qualify such right. A profession, trade or business can be hedged to the extent of a lawful prohibition imposed upon it by law where after such trade or business becomes unlawful."

In view of above, the word lawful trade, business or profession is sufficient to qualify such right. The right to life and liberty of a citizen can only be restricted or abridged if it is in "**accordance with law**"; such right is therefore, not **unfettered**. It is lastly contended that comparison with such type of other wrongs by the Government itself in Islamabad and other individuals/corporations in other cities has no force as it cannot be made basis to justify further wrongs on the plea of equal treatment or non-discrimination. In view of above submissions, learned counsel for CDA prayed for dismissal of writ petitions.

7. I have considered the arguments advanced by the learned counsel for the parties and have gone through the available material with their eminent assistance.

8. The perusal of pleadings of the parties reveal that there is no controversy about the fact that the premises which are in the use/occupation of the petitioners were allotted to the petitioners or their predecessor in interest for residential purpose and as per the terms and conditions of the allotment orders these premises should only be used for residence and any other use of these premises would tantamount to non-conforming use which is not within the mandate of the allotment. In their petitions the petitioners have admitted that they have established or intend to establish restaurants, schools, guest houses, offices and other commercial entities in the premises which are/were allotted to them or their predecessors in interests. The main contention of the petitioners who have been using their premises as guest houses is that even after the establishment of the guest houses, the nature and use of these premises had not been changed as the guest use the premises for residence.

9. Learned counsel for the petitioners who have been using their premises as guest houses has contended that concept of guest house is well established not only in the developed countries of the West but also in the neighboring States as guest houses provide shelter to the persons visiting the Capital City at a cheaper rate. It is the contention of the learned counsel for these petitioners that the guest houses were established after obtaining the license under the Sarias Act 1867 and the alleged interference by the respondents in the business of the petitioners is violation of the fundamental rights of the petitioners enshrined in the Article 18 of the Constitution of

Islamic Republic of Pakistan. The learned counsel for the petitioners who have established the schools and other commercial activities in the premises has argued that right to life and liberty is fundamental right enshrined in the Constitution of Islamic Republic of Pakistan. Learned counsel for the petitioners has further argued that Article 9 gives the right of life and liberty and if the state or any of its agency stops the source of livelihood from any person more so from the petitioners, this will be the attempt to take the right of life as no one can survive without source of making both ends meets.

Learned counsel for the petitioners has further referred to Article 25 of the Constitution of Islamic Republic of Pakistan wherein it is provided that all the citizens will be equal before the law and Article 4 which provides that every citizen will be treated equally in accordance with law and contends that a number of government offices, courts and even the office of respondent No 1 are established in the residential premises and so far no action has been taken against them but the petitioners have been screened out by the respondents who are being targeted without any legal excuse and justification in the sheer violation of the Article 25 of the Constitution of Islamic Republic of Pakistan. Learned counsel for the petitioners has further argued that the most of the commercial activities in the disputed premises were established prior to the making of the Islamabad Residential Sector Zoning (Building Control) Regulation 1993 and as it was not an offence before 1993 therefore, it cannot be made offence through the above mentioned Regulation as it will be violative to the mandate of Article 12 of the Constitution of Islamic Republic of Pakistan. Learned counsel for the petitioners has further questioned the authority of the Special Judicial Magistrate and Deputy Commissioner CDA with the contentions that these two officers are getting the salary from the CDA and cannot enjoy judicial powers which result in the violation of the principle of separation of power. Learned counsel for the petitioners has further argued that the respondents are estopped by virtue of principle of promissory estoppel and acquiescence to proceed against the petitioners, that Section 15, 46(b), 46 (C) and 51 of the CDA Ordinance 1960 are unconstitutional and penal Regulations in the Islamabad Residential Sector Zoning (Building Control) Regulation 1993 are also unconstitutional and illegal as these are phenomena of excessive delegation of power. Learned counsel for the petitioners has further argued that the discriminatory treatment is being meted to the petitioner that there are 100 of guest houses, schools,

offices etc functioning in the residential areas of Islamabad.

10. I have considered all the above mentioned contentions of the learned counsel for the petitioner in the light of the relevant provisions of Articles of the Constitution of Islamic Republic of Pakistan, CDA Ordinance and Islamabad Residential Sector Zoning (Building Control) Regulation 1993 and have reached to the conclusion that these contentions of the petitioners are nothing but to conceal and a legal cover for the illegal activities of the petitioners who have not only been committing violation of the provisions of the CDA Ordinance and Islamabad Residential Sector Zoning (Building Control) Regulation 1993 (these regulations have been substituted by regulations of 2005) but have also broken the solemn undertaking given by them at the time of applying for the allotment of the residential plots in the Capital Territory. Contentions of the learned counsel for the petitioners that the use of the residential building for commercial activities and especially for the purpose of guest houses is not a non-conforming use, is not well founded as at the time of establishment of Capital of Pakistan, the Federation decided to establish a State of the Art city, with full discipline and sense of security for its residents and a breathtaking splendid and arrogant look for the visitor. For this purpose the authority prepared a master plan wherein the separate places / areas for business purpose were left and all the commercial activities were supposed to be carried out in those specific commercial areas. The residential portion was to be used only and solely for the residence of the families after fulfilling all the terms and conditions of the allotment for the residential building and the concerned Regulation reveals that the scheme was to give the plots to shelterless persons to live peacefully with their families and it was never meant to be given to the persons having some housing facility in this city or other cities and to use residential area for commercial purposes.

11. The concept of guest house as explained by the learned counsel for the petitioners is not acceptable to norms of state of Islamic Republic of Pakistan as no person in this society will be willing to share its residence with a stranger even for a short period. The concept of the guest houses as has been prevailing in the west or the neighboring country is concerned, it is observed that the guest houses are being managed in compliance of the laws of the respective countries with the condition that the family lives in the very said house and one or two rooms are reserved to be offered to the guests for some rent. The whole of the pleadings of the petitioners do not reveal

that the petitioners have been living in the disputed premises with their families and they have reserved one or two rooms of their residences to be used as guest house. The concept of guest house is dependent upon the presence of host in the building but in the present petitions the hosts are living somewhere else and they have employed some persons to run the guest houses in the full-fledged building. The contentions of the learned counsel for the petitioners that the guest houses have been registered in accordance with the Sarias Act 1867 and the petitioners have also been paying the sales tax, it is observed that the Registration of a business under one law cannot defeat purpose of other law.

12. The basic law on the subject which is regulating the reservation of the land, development of the land, allotment of the land, construction of the building and the use of the building in the Capital Territory under Capital Development Authority Ordinance 1960 which provides no room for the establishment of the guest houses in the residential building. Section 46 of the Ordinance provides that whoever contravenes any provision of this Ordinance or any rules or Regulations made or Scheme sanctioned thereunder shall, if no other penalty is provided for such contraventions, be punished with imprisonment which may extend up to 06 months or with fine or with both. Section 49 (C) of the said Ordinance provides that if any building, structure, work or land is erected, constructed or used in contravention of the provisions of this Ordinance or any Rules & Regulations made thereunder, the Deputy Commissioner or any person empowers in this behalf may require any person in control of such building or user to remove, demolish or so alter the building structure or to desist from using so as to be in accordance with the said provisions. Section 50 of the Ordinance provides that the Central Government may make rules to carry out the purpose of this Ordinance whereas Section 51 authorize the authority to make the Regulations not inconsistent with the Rules, if any, on all the matters for which regulations are necessary. This reveals that there is a check on the use of any property in contravention of the Ordinance, rules and regulation. The contentions of the learned counsel for the petitioners that the regulation have been hit by the principle of excessive delegation is concerned, it is observed that it is without any substance as the offence of using a property in contravention of provision of any or rules or regulations made therein has been made offence by the Ordinance itself and the disputed regulation only explain the above said provision of the Ordinance.

13. It is the right of every person to be treated in accordance with law under Article 4 of the Constitution of Islamic Republic of Pakistan, whereas Article 25 of the Constitution of Islamic Republic of Pakistan provides that every citizen is equal before the law. If the petitioners want to protect the source of their livelihood they have option to purchase the land from the commercial centers and to establish their hotels and guest houses in that areas and then the state would protect their rights to livelihood and nobody will be supposed to interfere in that process. The petitioners have failed to point out any illegality in the impugned order of the respondents who have been proceeding in accordance with law to implement the rules and regulations. The contention of the learned counsel for the petitioners that the petitioners have been discriminated and have been screened out is concerned, it is observed that one wrong cannot justify other wrong if some persons who have been using the residential buildings for commercial purposes have not been proceeded against no advantage or concession can be extended in favour of the petitioners on this score. Learned counsel for the respondents had submitted that respondents have prepared the list of the residential buildings which have been used for commercial purpose and the proceedings against those persons / buildings is in pipeline. The version of the petitioners that the respondents are estopped on account of promissory estoppel and acquiescence to question the use of the building by the petitioners is concerned, it is observed that the petitioners / their predecessors in interest were also bound by the promissory estoppel and acquiescence not to use the building for any commercial use which they had taken through allotment on the undertaking that they would only use the same for residential purpose.

14. It is further observed that petitioners of some of the properties have been running restaurants, clubs, boutiques and schools and they have also questioned the action of the respondents on the grounds hereinbefore mentioned. It is observed that in case of “Seeds High School through Project Director Vs Government of Pakistan” “PLD 2004 Lahore 305” the petitioner was running a school in the residential area and the CDA demanded the petitioner to stop the commercial activity in the residential building. The Hon’ble Lahore High Court, Lahore was pleased to dismiss the writ petition of the petitioner and it has been held by the Hon’ble Lahore High Court, Lahore that form of true business or profession as guaranteed by Article 18 of the Constitution of Islamic Republic of Pakistan is qualified by the words lawful profession

or occupation. In the case before this court the petitioners are engaged in lawful business but the place of business is not, as the place is provided to the petitioners / or their predecessors in interest for the purpose of residence only and the law, rules and regulations have placed restrictions on any other use of this place except for residence purpose and petitioners violated the lawful restrictions, therefore, they cannot seek the help of Article 18 of Constitution of Islamic Republic of Pakistan as they have no right to establish their business in the residential area. It is further observed that if the concerned authorities have not taken actions against some similarly placed schools, the school of the petitioner has accrued no vested right to operate in residential area as it is prohibited. In the petitions before this court the same is the stance of the petitioner as they have also opened a school in the residential area and now want to protect their business in the garb of the guarantee provided in Article 22 of the Constitution of the Islamic Republic of Pakistan. It is observed that the businesses of the petitioners may be lawful but the places where the businesses have been started are not meant for business and this restriction imposed by the government through CDA Ordinance 1960 and the regulations framed thereunder are lawful restrictions in the supreme welfare of the inhabitants.

15. Regulation 20 of the Islamabad Land Disposal Regulations 2005 provides the penalty of the cancelation of allotment in case of non-conforming use of building or plot. Admittedly the petitioners have been in non-conforming use of their respective premises and they have become liable for the cancellation of their allotments if they did not mend their ways and change the use of the premises. The respondent No 1 is proceedings with the complainant against the petitioners and petitioners are with the right to deny the charge and the complaint is to be decided in accordance with law on the basis of the facts produced by the prosecution. On the other hand the petitioners are also free to answer the notice issued by the Deputy Commissioner about the non-conforming use of the residential premises and thereafter the Deputy Commissioner will proceed in accordance with the regulation and in this way the respondents have already provided a fair opportunity to the petitioners and they have not been condemned unheard. Furthermore, the petitioner may take the objection about the alleged jurisdictional defect of Special Magistrate and Deputy Commissioner which they have to decide in accordance with law and any findings in this regard can be assailed by the petitioner.

16. The contention of the learned counsel for the petitioners on the basis of Article 25 of the Constitution of Islamic Republic of Pakistan also does not advance the case of the petitioners. Mere differentiation and inequality in the treatment does not perse amount to discrimination as it is necessary to show that selection or differentiation is unreasonable or arbitrary and in this regard this court has found support of its view by the dicta rendered in the case of “Ard Sher Kaus Gee & 9 others Vs Muhammad Naqi Nawab & 05 others” PLD 1993 Kchi 631. It would not be enough to say that piece of legislation or a policy formulated thereunder is discriminatory but it is to be substantiated by applying certain well entrenched principles on the subject of discriminatory legislation which are as follows ;

- i. The expression “equality before law” or “equal protection of law” does not mean that it secures to all persons the benefit of the same laws and the same remedy. It only requires that all persons similarly situated or circumstanced shall be treated alike.
- ii. The guarantee of equal protection does not mean that all laws must be general in character and universal in application and the state has no power to distinguish and classify persons or things for the purpose of legislation.
- iii. The guarantee of equal protection of laws forbids class legislation but does not forbids reasonable classification for the purpose of legislation. The guarantee does not prohibit discrimination with respect to things that are different. The State has power to classify the persons or things and to make law applicable only to the persons or things within the class.
- iv. The classification, if it is not to offend the constitutional guarantee must be based upon some intelligible differential bearing a reasonable and just relation to the object sought to be achieved by the legislation.
- v. Reasonable classification is a matter for the court to determine and when determining this question, the courts may take into consideration matters of common knowledge, matters of common report, the history of times and to sustain the classification, they must assume the existence of any state of facts which can reasonably be conceived to exist at the time of legislation.
- vi. The classification will not be held to be invalid merely because the law might have been extended to other persons who in some respect might resemble the class for which the laws is made because the legislature is the best judge of the needs of particular classes and the decree of harm so as to adjust its legislation according to the exigencies found to exist.

- vii. One who assails the classification must show that it does not rest on any reasonable basis.
- viii. Where the legislature lays down the law and indicates the persons or things to whom its provisions are intended to apply and leaves the application of law to an administrative authority while indicating the policy and purpose of law and laying down the standards or norms for the guidance of the designated authority in exercise of its powers no question of violation of article 25 arises. In case however, the designated authority abuses its power or transgresses the limits when exercising the power, the actual order of the authority and not the state would be condemned as unconstitutional.
- ix. Where the state itself does not make any classification of person or things and leaves it in the discretion of the Government to select and classify person or things without laying down any principle or policy to guide the Government in exercise of discretion the statute would be struck down on the ground of making excessive delegation of power to the government so as to enable it to discriminate between the person or the things similarly situated (Reference PLD 2011 SC 44)

17. The above mentioned conditions were laid down by august Supreme Court of Pakistan to strike down any law, rule or regulation on the basis of excessive delegation of powers but the ingredients mentioned in the case law are not available in the cases of the petitioners as the petitioners themselves accepted the rules and regulation before filing the application for the allotment of residential plots in the Capital Territory with the solemn affirmation that they would reside in the building to be constructed. It is further observed that clause 2 k of Islamabad Land Disposal Regulation 2005 define a house as a separate dwelling for human habitation for a family. The family has been defined in Clause 2 (I). In regulation No 3 the classification of the plots is provided which divide the plot in several categories. This regulation provides that there will be nine classes of the plot only one class is reserved for residence whereas remaining 08 classes are for business / semi-business activities and if the legislature has provided a restriction that the residential plot can only be used for the residence of a family, it has given free hand to the petitioners and other to avail the opportunity and to assert their constitutional right of free trade and business in the remaining nine classes of the plots. Regulation No 19 provides the penalty of the cancellation of the plot if used for any other purpose then for which these plots were actually obtained. These regulations have been made in accordance with the powers conferred upon the Capital Development Authority u/s 51 of the Ordinance and these

regulations in no way are in violation of the Statute itself or to any rules. The Islamabad Residential Sector Zoning (Building Control) Regulation 2005 provides the penalty for the non-conforming use of the property which is also in accordance with law and it is not discriminatory in any manner whatsoever. The Islamabad Land Disposal regulation 2005 in the classification of the plots have provided the plots for the commercial activities, industrial needs and business concern including the guest houses and all the petitioners have the right to obtain those properties plots and to established the guest houses there. Mess of non-conforming use has disrupted civic fiber of the City, manipulated master plan of the capital and infringed fundamental rights of inhabitants increasing violation posed serious security threats and enhanced diminishing law and order situation.

18. Before parting with this judgment it is observed that the Capital Development Authority (CDA) was established in 1960 through the Capital Development Authority Act 1960 with high hopes that it would manage the establishment of a state of art city in Pakistan but it appears that this authority has failed or is reluctant to discharge its lawful obligations as a number of commercial activities have commenced right under the nose of the authority but nobody has taken strict action in this regard. Only when some matter comes before the courts and direction is issued then authority shows some fake progress and thereafter shuts its eyes. It appears that either the authority is helpless to respond to the violation of the laws, rules and regulations or it has given the consent to such sort of activities for ulterior motive. The petitioners have also questioned the conduct of the authority that it is proceedings in a discriminatory way. Being a civic body it is expected to discharge its obligations beyond the shadow of any discrimination. During the course of these proceedings respondents have submitted list of the illegal guest houses and commercially used residential properties in the Capital Territory which shows that havoc is being committed with the city as a large number of residential buildings have been changed / converted to commercial purpose and no strict action has been taken. The authority is creation of law and it is supposed to proceed in accordance with law. It is expected to discharge its legal obligations under the Ordinance and the regulation framed by itself without any fear and the iota of the discrimination.

In view of the above discussion, it is held that

- a. No declaration is required to be issued that the Special Magistrate does not have any judicial power and on the other hand he is discharging his lawful obligations and any objection to his assumption of jurisdiction should be agitated before him.
- b. No declaration is required to be issued that Deputy Commissioner is not vested with the power of the court and the proceedings before him are without lawful authority and any objection regarding his jurisdiction should also be agitated before him.
- c. No declaration is required that Section 49 (a) of the CDA Ordinance 1960 alongwith Section 15, 46 (b) & 51 and Building Regulation 1993 are ultra-vires and illegal as the Building Regulations 1993 substituted by the Building Regulations of 2005 have been made to carry out the purposes of the Ordinance.
- d. The non-conforming use is certainly an offence provided in Section 46 of the Ordinance and also in Regulation 2.17.3 of the Building Regulation.
- e. No discretion lies with civic body to allow non-conforming use and if powers containing under regulations No.2.1. 1, 2.1.2, 2.1.7 and 4.1.7 permit so, they lead to arbitrary exercise of authority, paving ways of corruption, and calling questions about the "Master Plan" therefore, same are declared to be of no consequence. CDA is not vested with powers to allow commercialization of residential buildings offensive and invading to the Sector/Zonal and Master Plan of ICT.
- f. CDA immediately take steps to bring the residential areas into original conditions within three months where commercial activities like Guest Houses, Restaurants, Display Centers, Show Rooms, Beauty Parlour, Saloon, offices of Government departments, private sector, NGO's, educational institutions, offices of T.V Channels, clinics etc. and in any other name and style are being carried out and falls within the definition of non-conforming use.

19. The crux of the above discussion is that the petitioners have failed to make out a case for the issuance of the writ in their favour. Therefore, these writ petitions are hereby dismissed with the directions to the respondents to act in accordance with law, justice, fairness and honesty by enforcing the laws and regulations. No order as to cost.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

Announced in Open Court on 21-01-2015.

JUDGE

Approved for Reporting.

"Waqar Ahmad"