JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT.

W.P No.801/2016.

Waheed Ahmed, etc **Vs.** **Baber Khan, etc**

Petitioners by:	**Mr.Sajeel Sheryar Sawati, Advocate.**
Respondent No.1 by:	**Mr.Qamar ul Haq Kha Niazi & Mr.Jameel Hussain Qureshi, Advocates.**
Date of hearing:	**18.04.2016.**

MOHSIN AKHTAR KAYANI, J:- Through this Constitutional Petition under article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners have assailed judgment and decree dated 07.11.2015, passed by learned Rent Controller (West) Islamabad, whereby eviction petition filed by the respondent No.1 was accepted and the petitioners were directed to hand over the vacant possession of the rented premises to the respondent and judgment and decree dated 11.02.2016, passed by learned Additional District Judge (West) Islamabad , whereby appeal of the petitioners was dismissed.

2. Brief facts leading to the filing of instant writ petition are that respondent No.1 filed an eviction petition under Islamabad Rent Restriction Ordinance, 2001 before learned Rent Controller (West) Islamabad against the petitioners, stating therein that respondent No.1 is Special Attorney of the owners of rented premises; that respondent No.1 is the landlord of shops No.2 & 3 situated on the ground floor of Plot No.8-B, Pacific Center, F-8 Markaz, Islamabad, whereas the petitioners are tenant in the said shops; that first agreement was executed on 1.5.2006 between previous Special Attorney of the property Muhammad Jahangir and Muhammad Tanveer Iqbal/petitioner No.2; that the lessee paid a refundable security of Rs.45,000/- to Muhammad Jahangir/previous Special Attorney and the rent was fixed @ Rs.15,000/- per month; that the second rent agreement was executed between Muhammad Jahangir and waheed Ahmed and Tanveer Iqbal/petitioners No.1 & 2; that Rs.100,000/- was fixed as security, in which previous security

amount was adjusted and security amount of Rs.55,000/- is still unpaid; that at the time of second agreement rent was fixed @ Rs.16,500/- per month; that at the time of handing over the possession of the rented shops, the same were fully furnished with glass walls, wall to wall carpets and also with furniture and five luxury glass top imported tables; that the petitioners have paid the monthly rent of the said shops till April, 2011 and then stopped the payment of rent and thus become willful defaulter; that the petitioners have violated the terms and conditions of the agreement; that the petitioners have made structural changes in the suit shops by removing central wall of the said shops; that respondent No.1 time and again requested the petitioners to pay the outstanding rent from May, 2011 up till now and also not to violate the terms and conditions of the agreement and reconstruct the central wall of the suit shops but they refused to honour the genuine request of the petitioner, therefore, they are liable to be evicted from the rented premises.

3. From pleadings of the parties following issues were framed.

ISSUES.

1. Whether the respondents are a willful rent defaulter since April, 2011?OPA
2. Whether the respondents violated the terms and conditions of the agreement?OPA
3. Whether the respondents made structural changes in the demised premises?OPA
4. Whether the petitioner has no cause of action to file the instant suit?OPR
5. Whether the petitioner has not come to the court with clean hands?OPR
6. Whether the petition is no maintainable in its present form?OPR
7. Whether the petition is false, frivolous, vexatious and respondents are entitled to get special costs u/s 35-A, CPC?OPR
8. Relief.

4. After framing of the issues, both the parties produced their respective evidence and after hearing the learned counsel for the parties, learned Rent Controller (West) Islamabad accepted the eviction petition on the ground of structural change referred in issue No.3 vide order dated 07.11.2015, whereas the ground of rent default as well as violation of terms of agreement was decided in favour of the petitioners.

5. Feeling aggrieved of the said judgment, petitioners filed an appeal u/s 21 of IRRO, 2001 before learned Additional District Judge (West), Islamabad, which was dismissed.

6. Learned counsel for petitioners contends that the impugned order is result of mis-understanding of law as according to section 17(2)(iii) of IRRO, 2001, eviction can only be ordered, if the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land, whereas both the learned Courts below failed to give any finding on this ground as to whether the removal of the central wall impaired materially the value or utility of the leased premises. Learned counsel for the petitioner further contends that structural change is of temporary nature and is reversible, therefore, eviction could not be allowed on the ground of structural change. That the leased property has been given for longer period and tenant can make minor adjustments as per his convenience keeping in view the business in the leased premises. Learned counsel for the petitioners further contends that landlords have enhanced the security to Rs.100,000/- in order to allow the petitioners to adjust the leased property according to their needs. That learned Rent Controller has totally ignored the motive of the landlords as attorney Baber Khan/A.W.1 has categorically stated that the motive for eviction could be for personal need or for selling the property and learned Rent Controller has acted beyond his jurisdiction and it is inalienable right of the petitioners to be treated in accordance with law. Learned counsel for petitioner has relied on 1995 SCMR 194, 1982 SCMR 8, 1999 SCMR 54, AIR 1987 SC 617, AIR 1996 SC 111, 1989 CLC 604, 1989 CLC 599, 1989 CLC 757, 1985 MLD 1530, 2012 SCMR 954 and 2013 CLC 963.

7. Conversely, learned counsel for respondent No.1 had relied upon concurrent findings of the facts recorded by learned Rent Controller as well as first Appellate Court. Learned counsel for respondent No.1 further states that leased shops were given to the petitioners with common wall in between the two shops and the petitioners were never granted permission to remove the wall and that the learned Rent Controller as well as first Appellate Court given their findings and concurrently held that structural change has been made by the petitioners without

permission. That the portion of statement, which remained unchanged during cross-examination is to be presumed to be accepted by the other party as the petitioners have failed to cross-examine the respondent on certain parts relating to ownership even he has taken specific stance that the petitioners in their written reply before the learned Rent Controller has taken evasive denial of specific pleas, hence, the same could not be considered as specific denial. Learned counsel for respondent No.1 has relied upon 2015 YLR 500, 2011 MLD 373, PLJ 2009 Lahore 671 and 2015 YLR 2290.

8. I have heard the arguments and have gone through the record.

9. Perusal of the record shows that shops No.2 & 3 Ground Floor of Plot No.8-B, Pacific Centre, F-8 Markaz, Islamabad are owned by the three landlords, who appointed respondent No.1 as their special attorney for the purpose of eviction of petitioners, although the lease agreements dated 01.05.2006 and 5.11.2010 were admitted between the parties and the rate of rent is also admitted between the parties, however, question of structural change was specifically raised in the eviction petition, the petitioners resisted the same. Respondent No.1 has taken specific stance, in which it has been categorically stated that the petitioners have made structural change in the leased shops and have removed the central wall of the said shops, hence, they violated the terms and conditions of the agreement although the petitioners were specifically directed to reconstruct the same but so far they have not placed any evidence on record, through which they can justify that they have constructed the wall in between the said shops. Respondent No.1 appeared as A.W.1 and taken specific stance regarding removal of the central wall of the said shops have been taken. In Para No.4 of Exh.A.2, all the details of fixtures and fittings have been mentioned but during the cross-examination, the petitioners have not suggested that no structural change has been made, even otherwise the allegation of structural change has not been controverted during the cross-examination.

10. Tanveer Iqbal/petitioner No.2 appeared as R.W.1 and in Exh.R.1he has only taken the stance that they have improved the said leased shops after due permission of Muhammad Jehangir, Special Attorney, however, he has not referred a single

word regarding structural change in examination in chief, rather during the cross-examination he has admitted that

یہ بات درست ہے کہ ہم نے دونوں دکانات کے درمیان سے دیوار نکالنے کی بابت بیان حلفی تحریر نہ کی ہے۔ یہ درست ہے کہ بیان حلفی میں ہم نے اس بات کے بارے /سامان میں کچھ نہ لکھا ہے۔ ازخود میں نے کہا کہ جہانگیر مززا جو ان کا اٹارنی ہے۔ اس سے اجازت لے کر دونوں دوکانات کی Renovationخود کروائی ہے۔

Hence, from this admitted factual position, there is not an iota of evidence to suggest that the petitioners have denied the factum of structural change rather they have admitted that improvements have already been made in the said shops by way of fixation of glass, AC, wallpaper and tiles, etc, even otherwise petitioner No.2 has admitted in his evidence that he could not produce any written permission before the Court.

11. The term of structural change in section 17(2)(iii) of IRRO, 2001 refers as "impair materially the value or utility" but the said concept is available if the petitioners have given any suggestion or taken any plea in their written reply or evidence that removal of central wall does not impair materially or such structural change will not effect the case referred by respondent No.1 but the entire pleadings of the petitioners are silent to that extent, although learned counsel for petitioner has given the definition of material alteration from the Black's Law Dictionary, which is as follow:-

> **"*alteration.*** *(1803)1. Property. A substantial change to real estate, esp. to a structure, usu. not involving an addition to or removal of the exterior dimensions of a building's structural parts. Although any addition to or improvement of real estate is by its very nature an alteration, real estate lawyers habitually use alteration in reference to a lesser change. Still, to constitute an alteration, the change must be substantial---not simply a trifling modification.*
>
> **material alteration.** *A significant change in something; esp., a change in a legal instrument that alters the instrument's legal meaning or effect.*
>
> **structural alteration.** *(1905) A significant change to a building or other structure, essentially creating a different building or structure."*

12. Learned counsel for the petitioners has also relied upon **1995 SCMR 194 (INTEZAR AHMED KHAN vs Mst.KHATOON Hadi and another),** in which it was held that:-

"In support of above appeals Mr.Talmiz S. Burney has relied upon the unreported judgment of this Court in C.A. No.155-K/82 (Mirza Mustafa Beg v. Mst. Hadi Khatoon), decided on 2-6-1991, the relevant portion of which has been quoted in the leave granting order which reads as follows:--

> *"The question agitated before us is that in spite of removal of the wall it was necessary for the respondent to have proved that such removal has materially impaired the value and utility of the building. According to Mr.Muzaffar Ali Khan, learned Advocate-on-Record for the appellant, there is nothing on record to prove this fact. We have examined the evidence of the parties and find that both the learned Courts have presumed that removal of wall automatically amounts to causing material impairment of the value and utility of the building. Such presumption cannot be drawn from each and every unauthorized act. However, there may be cases in which such presumption cannot be ruled out. If any tenant makes structural changes, closes down or removes the windows, doors and the staircase then in such circumstances and subject to the facts of the case the Court will be justified to presume that value and utility of the building has been materially impaired. The unauthorized act in the present case is not of a nature from which such conclusion can be drawn."*

1982 SCMR 8 (Haji Sh.Fazal Elahi vs Sh.Muhammad Ayub and others) in

which it was held that:-

> "*It may, at once be said, that from the finding that the premises was converted from residential to commercial use; indeed that the very purpose for which tenancy was created being for use as a residential hotel, it follows that suitable changes in conformity with its intended use, were implicit in such agreement between the parties. It could not, therefore, be held that the making of these changes ipso facto impaired the utility of the building. However, this is precisely what the High Court held, as shown above. The real question, for consideration, that emerged from the aforesaid finding was whether the tenants had sued the premises in such a way as to impair its value or utility".*

1999 SCMR 54 (Messrs Organon Pakistan (Pvt). Ltd vs Rafat Ali Khan), in

which it was held that:-

> *"There can be little cavil with the proposition that mere impairment is not enough to sustain an order of eviction under the above clause. The impairment has to be material. However, such impairment can be either of the value or of utility of the premises, the two being separated by the disjunctive word "or". Even then, eviction may also be based upon a finding that a particular act or omission has materially impaired both the value and utility of the premises because if one of the same qualifies a case for eviction, both can do no other".*

AIR 1987 SC 617 (Om Prakash vs. Amar Singh and another), in

which it was held that:-

> *"In determining the question the Court must address itself to the nature, character of the constructions and the extent to which they make changes in the front and structure of the accommodation, having regard to the purpose for which the accommodation may have been let out to the tenant. The Legislature intended that only those constructions which bring about substantial change in the front and structure of the building should provide a ground for tenants' eviction, it took care to use the word "materially altered the accommodation". The material alterations contemplate change of substantial nature affecting the form and character of the building. Many a time tenants make minor constructions and alterations for the convenient use of the tenanted accommodation. The Legislature does not provide for their eviction instead the construction so made would furnish ground for eviction only when they bring about substantial change in the front and structure of the building. Construction of a Chabutra, Almirah, opening a window or closing a verandah by temporary structure or replacing of a damaged roof which may be leaking or placing partition in a room or making similar minor alterations for the convenient use of the accommodation do not materially alter the building as in spite of such constructions the front and structure of the building may remain unaffected. The essential element which needs consideration is as to whether the constructions are substantial in nature and they alter the form, front and structure of the accommodation".*

AIR 1996 SC111 (Pratap Narain And Another vs. District Judge, Azamgarh And…), in which it was held that:-

> *"Therefore, even if it is held that the structural changes were made by the appellant with out the consent of the landlord, the suit could not be decreed unless it was further found that the changes resulted in diminishing the value of the building. The High Court has not adverted to this aspect at all. Since the High Court omitted to record the findings on a vital aspect, the order passed by it cannot be maintained".*

1989 CLC 599 (Sye Qudrat Ali vs. Mst.Maqbool Fatima and 3 others), in which it was held that:-

> *"The word 'impair' connotes the idea of making worse, less valuable or weaker; of lessening injuriously; of damaging. In order to establish the acts likely to impair the value or utility of a building much more convincing evidence was required than the one produced by the appellant. Even the technical evidence to show that the floor of the shop was damaged due to the acts of respondents is lacking in this case.*

1985 MLD 1530 (Badiul Hasan vs. Munawwar Hussain), in which it was held that:-

> *"There is no evidence on the file that the respondent by his act caused such damage to the property which reduced its value or utility. The controversy was only with regard to Machan. The respondent in his evidence has totally denied having caused any damage to the premises or having made any addition and alteration which could impair the value and utility of the premises. Section 13(2)(iii) provides that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land. It is, therefore, quite clear that only alteration and addition could not be considered such an act which makes the tenant liable to eject unless the same impairs materially the value or utility of the building. Since the legislature has qualified the acts which render liable the tenant to be ejected as these impairing materially the value or utility, the mere statement about alleged raising of 'Machan' cannot be considered to be sufficient for making the tenant liable to eviction. It seems that the learned Rent Controller rightly decided the issue in the negative."*

1995 SCMR 730 (Hafiz Muhammad Ishaq vs. Ch. Muhammad Siddique), in which it was held that:-

> *"There should have been a clear finding by the Rent Controller on the above points, but he as well as the High Court had not recorded any finding that the appellant had committed default or impaired value and utility of the building in question".*

13. From the above referred judgments, it is clear that in order to prove a case within parameters defined in section 17(2)(iii) of IRRO, 2001, concept of "impair materially the value or utility of the building has to be proved and in some cases the removal of wall has to be considered with reference to foundation, in which an expert evidence is required but in those cases referred above by learned counsel for the petitioners, the tenants have taken specific stance and raised all these questions as to whether the structural change with or without consent of landlord impair materially the utility whereas the present case is distinguishable on the ground that the petitioners have not admitted in written reply that they have made any structural changes or removed the central wall as they denied the entire claim, even otherwise the petitioners have not suggested a single word or suggestion in Exh.R.1 by giving explanation of materially impairment as the learned counsel for the petitioners have argued on the strength of above referred judgments and tried to persuade this Court that removal of wall does not impair the utility of the leased shops but surprisingly the entire evidence is silent about this aspect and the arguments advanced by

learned counsel for the petitioners have not been based upon evidence got recorded by the petitioners before the learned Rent Controller.

14. Keeping in view the arguments of learned counsel for the petitioners, I am of the view that the case laws referred by learned counsel for the petitioners are based upon sound principles of law but the basic criteria is to give an explanation in favour of structural change in their pleadings and when there is no such plea raised by the tenant, it means that they have taken evasive denial of the material question, especially when the allegations have not been controverted in the cross-examination or there is omission to cross-examine the statement of opponent then the same would amount to admission. I am fortified with the view taken in the judgment reported as **2012 SCMR 954 (Abdul Rehman and another vs. Zia ul Haq Makhdoom and others)**, in which it was held that:-

> *"For the alleged omission to cross-examine the statement of respondent and the effect thereof is concerned, it is held that the general statement in the examination-in-chief, not containing the concrete and material facts, does not attract the rule, rather the rule shall be applicable where the specific and material fact of utmost importance, with significant impact on the case remain unchecked in the cross-examination, we find that this is not the position in the case in hand".*

15. The material question of structural change referred in the pleadings and in evidence of the parties is reproduced here-in-below:-

Eviction petition of respondent No.1. Grounds	***Written reply of the petitioners.***
6-C) That in the Lessees/respondents made structural changes in above said shops by removing central wall of said shops, hence liable to be evicted.	That para No.6-C is vehemently denied being incorrect.
Evidence Ex.A1 Babar Khan	**Evidence Ex.R1 Tanveer Iqbal**
5) That further the Lessees/respondents violated the terms and conditions of the agreement and Lessees/respondents have also made structural changes in above said shops by removing central wall of said shops, hence, respondents are liable to be evicted from the said shops.	مزید یہ کہ من محلف نے تمام تزین و آرائش کے اخراجات من محلفان نے مسمی محمد جہانگیر سے بعد از اجازت کروائی ہے جس پر من محلف کا تقریبا -/600,000 .Rs روپے خرچ آیا ہے۔
Evidence Ex.A2 Muhammad Jahangir	Cross-examination of Tanveer Iqbal
5) That further the Lessees/respondents violated the terms and conditions of the agreement and Lessees/respondents have also made structural changes in above said shops by removing central wall of said shops, hence, respondents are liable to be evicted from the said shops.	یہ بات درست ہے کہ ہم نے دونوں دکانات کے درمیان سے دیوار نکالنے کی بابت بیان حلفی تحریر نہ کی ہے۔ یہ درست ہے کہ بیان حلفی میں ہم نے اس بات کے بارے /سامان میں کچھ نہ لکھا ہے۔ ازخود میں نے کہا کہ جہانگیر مززا جو ان کا اٹارنی ہے۔ اس سے اجازت لے کر دونوں دوکانات کی Renovation خود کروائی ہے۔

اس وقت تحریری اجازت نامہ بابت فِٹنگ وغیرہ عدالت حضور میں پیش نہ کر سکتا ہوں۔ یہ غلط ہے کہ میں اس بابت غلط بیانی سے کام لے رہا ہوں جہانگیر مرزا سے نہ میں نے کسی قسم کی اجازت لی اور نہ ہی فِٹنگ وغیرہ پر مبلغ چھ لاکھ روپے خرچ کیے۔	

16. Hence, it is clear from the above portion of pleadings and evidence that the petitioners have not referred the reasons, explanation, factors or plea, which confers the application of principle "impair materially the value or utility of the building", therefore, the requirement of section 17(2)(iii), IRRO, 2001 were duly raised and proved by respondent No.1 but contrary to that the petitioners failed to prove the effect of removal of wall in between the shops in their favour.

17. Even otherwise, the evasive denial made by the petitioners in their reply does not absolve them from their illegality as they have not proved through cogent evidence that they ever obtained permission from respondent No.1 to remove the wall in between the two shops. Hence, I am of the considered view that learned Rent Controller as well as First Appellate Court has rightly decided the eviction petition in terms of findings on issue No.3. The impugned judgment and decree dated 07.11.2015 does not call for any interference, therefore, the same is upheld. The concurrent findings of the fact regarding structural change has not been controverted by any stretch of imagination nor there is any element which favours the stance of the petitioners surfaced on record, which needs interference, even otherwise concurrent findings of the fact cannot be interfered in writ jurisdiction. In this reliance is placed on **PLD 2007 SC 45 (Shajar Islam V.s Muhammad Sddique and 2 others)** wherein it was held that:-

> *"High Court in exercise of its constitutional jurisdiction is not supposed to interfere in the findings on the controversial question of facts based on evidence even if such finding is erroneous. the scope of judicial review of High Court under article 199 of the constitution in such cases, is limited to the extent of misreading or non reading of evidence or if the finding is based on no evidence which may cause miscarriage of justice but it is not proper for the High Court to disturb the finding of fact through reappraisal of evidence in writ jurisdiction or exercise this jurisdiction as a substitute of revision or appeal".*

Hence, the instant writ petition being devoid of merits is hereby dismissed.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on_____

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam