

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. **JUDICIAL DEPARTMENT.**

Civil Revision No. 163/2019.

Arslan Khan Burki, etc.

Versus

Capital Development Authority, Islamabad, etc.

Petitioners by: Mr. Nasir Mehmood, Advocate.

Respondents by: Mr. Intizar Hussain, Advocate.
Azam Khan Lodhi, Director Traffic Engineering and
Raheem Khan, Deputy Director Building Control,
CDA.

Date of Hearing: 21.11.2019.

MOHSIN AKHTAR KAYANI, J:- Through this Civil Revision, the petitioners have assailed the order dated 06.03.2019, passed by learned Senior Civil Judge (East), Islamabad, whereby application for appointment of local commission in terms of Order XXVI Rule 9 & 12 CPC read with Order XXXIX Rule 7 CPC and Section 151 CPC has been dismissed.

2. Learned counsel for the petitioners contends that petitioners have filed suit for declaration, injunction and enforcement of fundamental rights against the CDA with the claim that two letters dated 23.01.2019, issued by CDA are illegal and without lawful authority, whereby permission was granted to the petitioners for direct access from Islamabad Highway to Petrol Pump on Islamabad Highway was withdrawn; that petitioners had installed and constructed petrol pump on their private land after seeking due permission from the competent authorities including CDA and they were allowed access/right of way from Islamabad Highway to petrol pump vide letter dated 05.05.1991, issued by Regional Planning Directorate, CDA, whereby, petitioners were permitted to construct approach road at their own cost; that during the pendency

of civil suit petitioners have filed application U/O XXVI Rule 9 & 12 CPC for appointment of local commission for investigation and report whether the existing entry and exit arrangements to and from petrol pump at all pose security and traffic hazards and whether it is at all possible to access the petrol pump from Kurri Road/Service road but the said application was dismissed without considering the technicalities of the entire case which is based upon the right of petitioners as well as right of general public to access the fuel station as by revocation of permission granted to the petitioners for access of right will create serious problem, however, all these aspects have not been considered by the trial Court while passing impugned order.

3. Conversely, learned counsel for CDA contends that matter is sub-judice since 2009 and it is yet to be concluded after recording of evidence of parties and if commission is appointed, it will further delay the proceedings; that CDA has technical experts who can give reasons on the question raised.

4. Arguments heard, record perused.

5. Perusal of record reveals that petitioners are mainly aggrieved with the order dated 06.03.2019, whereby their application in terms of Order XXVI Rule 9 & 12 CPC read with Section 151 CPC was dismissed, whereby petitioners have requested the Court for appointment of local commission for elucidating the matter in dispute regarding withdrawal of NOC qua the access and exit from Islamabad Highway to petrol pump which was constructed in the year 1996 after approval from CDA, whereas intervening distance between main road and petrol pump is 1600 feet. The main reason for withdrawal of the access road referred by CDA/respondents in their letter is the security and traffic hazards due to the right of way granted to the petitioners earlier, whereas on the other hand case of the petitioners is that oil tankers and motor vehicles which transport

fuel to the petrol pump could not enter into the fuel station from Kuri Road/Service road and the issue of traffic hazards and security could be verified by way of appointing local commission.

6. There is no denial to the proposition that reasons rendered by the CDA in the letter of withdrawal of NOC requires completed adjudication on its factual side in which it is necessary to place clear picture on record after inspecting the site by way of technical inspection and verification as to whether right of way given by the CDA prior to their withdrawal is a security and traffic hazard. The mandate of Section 75 CPC read with Order XXVI Rule 9 & 12 CPC is to resolve such kind of controversy to place clear picture before the Court for its just and fair decision, hence, while considering the impugned order dated 06.03.2019, learned trial Court has gone into the lawful exercise of authority of the CDA without going into the real controversy as to whether reasons referred in the letter dated 23.01.2009 for withdrawal of facility of direct access road from Islamabad Highway granted to the petitioners vide letter dated 07.05.1994 are valid and justiciable on the basis of reasonableness and are not oppose to the public policy whereas such aspects have not been discussed as the matter in issue relates to factual controversy, which could only be resolved by appointment of local commission.

7. In view of above, this Court has already directed the CDA as well as petitioners to propose the names of technical experts, if such question requires a factual technical inspection, whereby, petitioners have submitted the name of "Sheher Saaz Private Limited" 21-Dyall Singh Mansion 57-The Mall Lahore and CDA have nominated Azam Khan Lodhi, Director Traffic Engineering and Raheem Khan, Deputy Director (Building Control), CDA as technical experts to be appointed as local commission.

8. In view of above position, appointment of local commission in terms of Order XXVI Rule 9 CPC read with Section 75 CPC is meant to be appointed for local investigation for purpose to resolve the issue and to elucidate the matter in dispute and after the submission of joint report, the trial Court is equipped and would be in a better position to determine the real controversy under the law, therefore, instant civil revision is allowed, impugned order dated 06.03.2019 is hereby set aside and joint local commission is appointed comprising of:-

- i. *Sheher Saaz Private Limited.*
- ii. *Azam Khan Lodhi, Director Traffic Engineering, CDA.*
- iii. *Raheem Khan, Deputy Director (Building Control), CDA.*

9. The above mentioned local commission is directed to visit the site/fuel station (Kurang Petroliaam Service), prepare report by way of pictorial diagram, technical specification alongwith record available with the CDA, whereby approved plan was submitted by the petitioners and to answer the following questions:-

- (i) *Whether the existing entry and exit arrangements to and from the petrol pump will be considered as security and traffic hazards?*
- (ii) *Whether it is possible to access the petrol pump from Kurri road/service road?*

The subject report will be submitted before the trial Court within a period of 30 days by all means. The petitioners are directed to pay the costs to their nominated expert company Sheher Saaz Pvt. Ltd. at their own end whereas they shall also pay an amount of Rs.50,000/- each to both the officers/officials of CDA for their time, efforts in preparation of the report after inspection of the site. It is

made clear that all three experts will visit the site within this period and no further extension in time will be allowed.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 28th Nov 2019.

JUDGE

Zahid