

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

Civil Revision No.115/2019.

Muhammad Javed etc.

Vs.

CDA through its Chairman etc.

Petitioners by: Raja Inam Ameen Minhas and Ch.
Waqas Zamir, Advocates.

Respondents by: Mr. Amir Latif Gill, Advocate for
CDA, Ch. Hafeez Ullah Yaqoob and
Ms. Zaitoon Hafeez, Advocates for
SNGPL and Mr. Faisal Bin Khurshid,
Advocate for IESCO. Dr. Shahid
Mehmood, Member (P & D), CDA,
Ijaz Ahmad, Director Urban Planning,
CDA, Raheem Bangash, Deputy
Director BC-III, CDA.

Date of Decision: 25.09.2019.

MOHSIN AKHTAR KAYANI, J:- Through this civil revision, the petitioners have assailed the order dated 04.03.2019, passed by learned District Judge (West) Islamabad, whereby application filed by the petitioners under Order XXXIX Rule 1 & 2 CPC in appeal has been decided in the following manner:-

"After taking into considerations all aspects of the matter, the orders passed by the Hon'ble Supreme Court of Pakistan and apprehension of learned counsel for contesting respondents, this appeal is partly allowed by modifying the impugned order dated 13.11.2018 and the final order is as under:-

- i. Till the final decision by the hon'ble Supreme Court of Pakistan in similar matters, constructions already made by contesting respondents shall not be demolished by appellant and at the same time, contesting respondents shall not be entitled to raise new constructions by an inch or lay a brick thereupon.*
- ii. The parties shall appear before learned trial Court on 08.03.2019 and on the same day, the learned Civil Judge shall appoint a local commission who shall submit a comprehensive report by indicating the constructions made till that day. Positions of project place shall be secured through photographs and video which shall also form part of report. (Note. If learned Civil Judge is on leave the matter shall be placed before duty Civil Judge who shall make compliance of this order).*
- iii. Report shall be submitted in Court within a period of one month at every cost by local Commission.*

- iv. *The report of local commission then shall be deemed to be the position in existence on the day when local commission inspected the spot and that shall continue till final decision by the honorable Supreme Court of Pakistan.*
- v. *The local Commission shall be appointed at the expenses of both sides and fee of local commission shall be reasonable keeping in view of assignments to be made."*

2. Learned counsel for the petitioners contends that the petitioners filed a civil suit for declaration, permanent and mandatory injunction against CDA, IESCO, SNGPL, Deputy Commissioner, Islamabad and SSP Operations, Islamabad in order to protect rights of housing and construction project in Sector H-13, Islamabad on private land and also sought declaration that residential complex comprising of 2 basement plus 10 storeys is not amenable to the Islamabad Capital Territory (Zoning) Regulation 1992 and Regulation 2005; that the petitioners also sought mandatory injunction against the respondents to restrain them from interfering into affairs of petitioners' construction project rather IESCO and SNGPL may be directed to provide electricity and gas connection; that impugned order of learned District Judge may be set aside and the petitioners may be allowed to complete the construction project in order to settle third party interest.

3. Conversely, learned counsel for CDA, IESCO and SNGPL contend that the petitioners' construction project falls within area of Zone-1 fully explained in Islamabad Capital Territory (Zoning) Regulation 1992, whereby the petitioners cannot be permitted to raise any construction without due permission of CDA, however, any construction raised by the petitioners is illegal and as such the petitioners are guilty of non-confirming use.

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

5. Perusal of the record reveals that the petitioners have constructed high rise building in Sector H-13 after purchasing private land and CDA/respondent has initiated different actions against the petitioners and as a result whereof the petitioners filed civil suit for declaration, permanent and mandatory injunction with the claim that the land does not fall within the parameters of Islamabad Capital Territory (Zoning) Regulation 1992. The petitioners also claim a direction to IESCO and SNGPL to provide electricity and gas connection. Learned District Judge in appeal on application under Order XXXIX Rule 1 & 2 CPC passed the impugned order with specific directions on the basis of orders passed by Apex Court.



6. The prayer made in application under Order XXXIX Rule 1 & 2 CPC in civil suit is reproduced as under:-

“That in view of the submissions made hereinabove, respondent No.1 may graciously be restrained from issuing media statements and ads qua plaintiffs project and also restrain defendant No.1, 5 and 6 from interfering into plaintiffs project or to damage it in any manner, whatsoever. It is also prayed to direct the respondents No.2 and 3 and 4 to provide electricity and gas connections to the petitioners premises”.

7. The above referred prayer discloses that media statements issued by CDA is effecting working of the petitioners, whereas no prayer has been made to the effect that CDA be restrained from taking any coercive measures. The main bone of contention of the parties is the interpretation of section 4(1)A Chapter-III of Islamabad Capital Territory (Zoning) Regulation, 1992, which is reproduced as under:-

“4. DEVELOPMENT STRATEGIES OF ZONES.—*The development of land in the Zones shall be subject to the following conditions:*

(1) Zone-1.

A. Unacquired Sectoral Areas. *In these areas of Zone-1,*

- (i) land shall be acquired under a phased programme and developed by the Authority in accordance with the land use pattern spelled out in the Master Plan;*
- (ii) no sale/purchase of land which entails change in land use shall be allowed;*
- (iii) no construction of houses or building shall be allowed. However, repair of old houses and expansion of existing houses may be allowed by the Authority to the native residents subject to the conditions that the site is located within the main body of the village. The covered area of such construction shall not exceed 1000 Square feet including expansion and such permission shall not in any way impede the right of the Authority to acquire the property whenever needed; and*
- (iv) no private scheme of any kind whatsoever shall be allowed, except in Sector E-11, Schemes in E-11 will be regulated according to the provisions applicable to schemes in Zone 2.”*

8. While considering above background and the recent law enunciated by this Court in judgment reported as **PLD 2019 [Islamabad] 365 (Shahzad Sakandar ul Mulk and 4 others vs. CDA)**, wherein following directions have been passed by larger Bench of this Court to deal with the concept of unauthorized construction:-

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- “(i) *As it has become inevitable to review the existing Master Plan and assess its efficacy, we direct the Federal Government to forthwith take steps of constituting a Commission, inter alia, of professional experts, preferably of international repute, in the field of town planning, environmental management and finance. The Commission shall make recommendations to the Federal Government. The terms of reference shall also be formulated by experts. The Federal Government is expected to complete the proceedings within six months from the date of receiving a certified copy of this judgment.*
- (ii) *The Federal Government is directed to forthwith constitute the Commission under MLR-82.*
- (iii) *The Chief Commissioner is directed to aid and assist the Authority in ensuring that no building or house is constructed in any area of Islamabad.*
- (iv) *The recommendations made by the Commission on the Environmental status of Islamabad Capital Territory, in its report dated 19-10-2015, are to be read as an integral part of this judgment having direct nexus with the controversy at hand. The implementation of the recommendations has become inevitable for controlling the damage and risks due to illegal construction, particularly in the environmentally sensitive areas. We, therefore, appoint Dr Pervaiz Hassan, who had chaired the said Commission and who had successfully brought all the stakeholders together, as Committee for implementing the recommendations. The existing Committee notified by the Federal Government, pursuant to directions given by this Court, shall be chaired by Dr Pervaiz Hassan. The Federal Government is, therefore, directed to forthwith amend the notification of the Implementation Committee. We are guided in this appointment by the judgment rendered by the Lahore High Court in the case titled ‘Syed Mansoor Ali Shah and 4 others v. Government of Punjab, through Housing, Physical and Environmental Planning Department, and 3 others’ [PLD 2007 Lahore 403].*
- (v) *No illegal building or construction shall be regularized unless the Federal Government certifies, pursuant to recommendations made by the Commission which has been directed to be constituted in clause (i) above, that it shall not in any manner adversely affect the environment or have adverse effects relating to climate change.*
- (vi) *The Federal Government is further directed to forthwith take steps to make the Environmental Tribunals functional, preferably within ninety (90) days from the date receiving a certified copy of this judgment.”*

9. Besides the above referred directions of this Court, learned counsel for the petitioners has heavily relied upon 1999 SCMR 2636 (Capital Development Authority and others vs. Dr. Abdul Qadeer Khan and others).

10. The above referred background reveals that this Court has to adjudicate upon application under Order XXXIX Rule 1 & 2 CPC in appeal only, which

requires specific ingredients to be observed i.e. (a) Whether the property in dispute in suit is in danger being wasted, damaged or alienated by any party to the suit (b) Whether the defendant threatens or intends to remove or dispose of the property with a view to defraud the creditors, however, in this case the claim of the petitioners is prima facie based upon legal proposition as to whether Islamabad Capital Territory (Zoning) Regulation 1992 is applicable to the suit property. The said question is core issue before learned Trial Court and any observation by this Court to that extent may harm merits of the case, therefore, this Court confines itself only to the extent of injunctive relief in terms of prayer made in application under Order XXXIX Rule 1 & 2.

11. The right conferred in Zone-1 under Islamabad Capital Territory (Zoning) Regulation 1992 is self explanatory, however, till the time the said regulation is struck down no other interpretation could be made. CDA cannot be restricted from exercising its supervisory role under the law and if any third party right has been created under this project, it might harm public at large and in such eventuality CDA shall be liable for its misconduct.

12. I have gone through the impugned order, which has been passed after due deliberation, however, CDA cannot be restrained from its legal actions of informing public at large although as per claim of CDA construction has been raised by the petitioners on private land, which falls within non-confirming use as the petitioners did not take the permission for construction. The Member Planning CDA, Director Urban Planning and Director BS-III took specific stance before this Court that construction raised by the petitioners without permission is illegal whether it has been raised on private land of individuals unless an application is filed before CDA for permission to raise construction is decided in accordance with rules and bye laws of CDA.

13. The above referred situation spells out that no application has been filed by the petitioners before CDA seeking permission to raise construction till date, therefore, the petitioners are directed to file application before CDA, which shall be decided by CDA in accordance with law within period of three (03) months.

14. The petitioners have constructed high rise building, which is near to completion and electricity and gas connections are required, however, the petitioners are ready to furnish any kind of security for the protection of third party interest but at this stage when the CDA has not yet started development work in sector H-13 nor acquired the property, whether the private individuals can be restrained from raising construction, the answer is "YES" subject to law but the conduct of CDA is highly depreciable, who has not taken appropriate action at the relevant time when the construction was at initial stage, whereas in this case six storeys structure has been raised by the petitioners. Even otherwise, similar proposition has been placed before the Apex Court in C.M.A. No.7800, 7986/2018 and C.Ps. No.3491, 3424, 3425, 3426, 3466 and 3467/2018, wherein case of different developers against CDA has been taken into consideration and the Apex Court passed following order on 17.09.2018:-

"Having heard the learned counsel for the parties, we do not find that the impugned judgment suffers from any factual or legal error; rather we concur with the said judgment that all the construction raised in the areas of Mouza Banigala and E-11 are without authorization and for this reason the learned High Court has rightly provided a mechanism to regularize the unauthorized construction on these properties. Obviously, this mechanism also caters to the grievance of the petitioners before us. Resultantly, we direct that CDA should immediately proceed with the mechanism so provided and examine and deal with the buildings constructed in these areas strictly in accordance with the principles laid down in Capital Development Authority vs. Abdul Qadeer Khan (1999 SCMR 2636) and the recommendations made by the learned High Court in the impugned judgment thereby to resolve the issue. Periodical progress reports be filed in this Court after an interval of two months. In the meantime the properties already constructed shall not be demolished by CDA but no person shall be entitled to raise new construction by any inch or lay a brick from this day onward. All those properties which are sealed shall remain sealed and any person who violates or breaks such seal shall be held for contempt of court on account of disobedience of the Court's order. These matters are accordingly disposed of."

15. Similarly, the Apex Court has also dealt with similar proposition in case reported as 2008 SCMR 493 (Farooq Hamid and others vs. L.D.A. and others), wherein it has been held that:-

"Entire construction was raised illegally without seeking any permission from authorities---Owner. of building did not provide structural calculations and structure stability certificate from any qualified structural engineer---Plea raised by owner of building was that when a plan was submitted with Lahore Development Authority seeking its approval for construction of a project and if such approval was neither granted nor refused within sixty days

*then builder was entitled to presume grant of such approval and was thereafter legally entitled to construct such project---Validity--
-In absence of such certificate stability of such huge structure was open to serious doubts---Nothing was on record to indicate that during construction of building any proper testing of structure at crucial stages of construction had ever been done because no certificate was ever supplied by owner in such connection---
Retaining walls of basements required extraordinary safety precautions, quality control and workmanship for stability and sustainability of structure at all times---Nothing was ever offered by owner to establish any such guarantee---Adequate fire-fighting arrangements' had to be made in building and there was no proof that the same had been done---Adequate and convenient access to building had to be provided to meet any emergency situation but there was no proof that such had ever been done---Supreme Court declined to permit such structure to stay as in given circumstances--
--Supreme Court observed that no responsibility could be taken for stability of such structure and consequently of lives of persons using the same or persons who would at any time be present in adjoining areas or adjacent properties---Owner of building had not only shown a brazen and determined disregard and contempt for laws regulating the subject but had also displayed a callous disrespect for human lives and public properties---Plea raised by owner of building had lost sight of the fact that even if Regln. No.10 of Lahore Development Authority Building Regulation, 1958, could be read for benefit of builder then such benefit was available only to a structure raised in accordance with law and not to something done in violation thereof---Supreme Court directed the authorities that illegally constructed structure, stability and safety of which was also not beyond serious doubts, be demolished at risk and cost of the owner."*

16. The concept protection has also been considered by Sindh High Court in case reported as 1990 CLC 83 [Karachi] (Mst. Sardar Begum Faruqui and 6 others vs. Rashida Khatoon and 2 others) in the following manner:-

14. We are of the view that if we were not to grant an ad interim injunction, it would not be just and proper, as admittedly respondent No.1 has no legal basis to go on with the construction work of an unauthorised building under the cover of status quo order. Though it has been averred that the construction work is at E the stage of finishing work, there is no guarantee that respondent No.1 will not construct one or two additional storeys. Furthermore if respondent No.1 is not restrained from completing or entering into any agreement of sale of flats or parting with the possession thereof, it will create further complications.

15. Apparently the instant case falls within the category of public litigation as the public-at-large is interested to ensure that the constructions are not raised in violation of the building bye-laws and the Ordinance by misusing a status quo order of a Court. The intervention by this Court will discourage the aforesaid illegal practice obtaining in Karachi.

16. We may also observe that there seems to be lapse on the part of respondent No.2 in allowing respondent No.1 to go on with the un-authorised construction under cover of a status order and not filing of an application before the Senior Civil Judge for an interim order against respondent No.1.

17. We, therefore, allow the above application and restrain the respondent C No.1 from carrying out any further construction work and from entering into any agreement of sale and/or completing any agreement of sale or parting with the possession of any of the flats. The Nazir is appointed as Commissioner to visit the site and to prepare the report today as to the stage of the construction. The petitioners will deposit a sum of Rs.1,000."

17. It is duty of the Building Control Section, CDA to look into affairs of unauthorized structure and has authority to seal the premises by implementing its law as held in PLD 1998 [Karachi] 283 (Mir Afzal Khan and 21 others vs. Karachi Development Authority through Director General and 4 others) in the following manner:-

"Where any unauthorized structure came to be occupied, Authority would have jurisdiction to forcibly evict unauthorized occupants---Unauthorized buildings could also be sealed pending further action---Authority has to implement law which has created it."

18. The petitioners in absence of any approved plan have failed to make out prima facie case for grant of interim injunction in terms of CDA bye laws. Reliance is placed upon PLD 2000 [Karachi] 288 (Mrs. Razia Ahmed and another vs. Karachi Building Control Authority and 2 others).

19. The status of Building Control Regulations has been observed by this Court in reported judgment 2016 CLC 2010 (M/s Al-Safa Golden Co. (Pvt.) Limited vs. CDA through Chairman and 4 others), wherein it has been held that:-

"Petitioner could not claim any vested right accrued to it by violation of Regulations."

20. It has also been held in the above referred judgment that under clause 3.12.11 of 2005 Regulations no one can occupy any building unless completion certificate or permission to occupy the same has been obtained from CDA.

21. The status of Islamabad Capital Territory (Zoning) Regulation, 1992 has also been dealt by this Court in writ petition No.452/2014 titled Muhammad Ibrar Khan and another vs. Capital Development Authority through its Chairman and another), wherein it has been held as under:-

"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

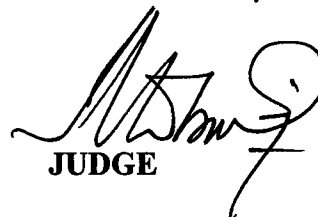
Regulations were examined by the Hon'ble Supreme Court in Suo Moto Case No.13/2009. The restrictions on the sale and purchase of land which entails change in land use; the restriction on the construction of houses and buildings; and the restriction on the establishment of private housing schemes in Zone-1, 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 C.D.A. Ordinance. Therefore, I cannot hold the restriction on the development and construction of housing scheme in Zone-3 imposed by the 1992 Regulation, to be ultra vires the Constitution."

22. In the given circumstances, the petitioners have no prima facie case to seek restraining order against the CDA for issuing media statements qua the said project and it is trite law that when a matter can be compensated by way of damages, no restraining order will be passed. The balance of convenience also does not lie in favour of the petitioners as they have not filed application seeking permission before raising any construction, therefore, no legal cover can be provided at this stage. It is also pertinent to mention here that CDA being regulatory authority of Islamabad is duty bound to protect the rights of citizens of Islamabad and to keep them aware about the status of any housing scheme/construction project launched in Islamabad and in this regard no restriction can be imposed upon CDA, rather CDA is well in its powers to issue media statements qua any project started in Islamabad in order to create awareness among public at large as well as to protect their hard earned money. The impugned order passed by learned District Judge although does not commensurate with the prayer made in the application under Order XXXIX Rule 1 & 2 CPC but it settles certain issues. The petitioners have failed to point out that the jurisdiction exercised by the Courts below was not vested in them or that they exercised their jurisdiction wrongly. No interference is required by this Court.

23. In view of the above discussion, the instant civil revision bears no merits, therefore, the same is hereby dismissed.


(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 2.10.2019.


JUDGE