

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

Writ Petition No.4158 of 2016

Ghulam Ahmad Qureshi

Versus

Commissioner CDA Sector G-11, Islamabad and another.

Petitioner by:	Malik Muhammad Zulfiqar, Advocate.
Respondents by:	Mr. Rehan Seerat, Advocate.
Date of hearing:	24.03.2021.

Tariq Mehmood Jahangiri, J: The petitioner has filed the

instant writ petition with the following prayer:-

“In the given facts and circumstances, it is very humbly prayed that the impugned order dated 29.09.2016 may kindly be set aside while a direction may kindly be given to the CDA office to remove the fine imposed upon the petitioner.

Any other relief which this Honourable Court may deem fit and proper may also be granted in favour of the petitioner and against the respondent”.

02. Precisely, the facts necessary for the adjudication of instant writ petition are that the petitioner is owner of house No. 407 Nazimudin Road F-11/1, Islamabad. The said house was rented out for residential purposes to one Muhammad Asadullah Khan vide lease agreement dated 27.05.2010. On 28.08.2013 it was reported by the CDA officials that the tenant has established an office in the above said premises in violation of Clause-9 of the said lease agreement. In this regard a legal notice was served upon the tenant on 30.08.2013. Subsequently an ejectment petition was filed by the petitioner which was accepted vide judgment and decree dated 03.07.2014 and after filing the execution petition the

house was got vacated from the tenant. The Deputy Commissioner CDA, vide order dated 26.03.2014 imposed a fine of Rs. 5,00,000/- under Clause 2.17.3 of Islamabad Residential Sectors Zoning Building Regulation, 2005 with the direction to pay fine within 05-days and remove the non-confirming use within 15-days, failing which after expiry of 15 days violator was liable to pay a fine of Rs. 5,000/- per day. Recovery of fine was to be made under Land Revenue Act, 1967. It was also mentioned that after persistence non-confirming use for a further period of three months, violator / occupant shall be liable to be evicted from the building summarily and allotment / conveyance deed of the said house will be liable to cancel and possession will be taken over by CDA.

03. Thereafter, an appeal was filed against order dated 26.03.2014 passed by the Deputy Commissioner, CDA, Islamabad which was upheld by the Deputy Commissioner, Islamabad by exercising the powers of Commissioner CDA, Islamabad, vide impugned order dated 29.09.2016, hence the instant writ petition.

04. Learned counsel for the petitioner, inter-alia, contends that the house was rented out, so the owner is not responsible for non-confirming use of the residential house, hence the impugned order, passed against the petitioner, is liable to be set aside.

05. Conversely, learned counsel for the CDA has controverted the arguments advanced by the learned counsel for the petitioner and stated that the petitioner being the allottee / owner of the house is responsible for any violation of

building By-laws of CDA including the use of residential house for commercial purposes, hence the impugned order has rightly been passed.

06. Arguments advanced by the learned counsel for the parties have been heard and record has been perused with their able assistance.

07. It is admitted by the petitioner that an office was established in the residential house owned by him and the same was used for commercial purposes / non-confirming use. The only objection raised by the petitioner is that house was rented out and the tenant has committed violation of building By-laws of CDA and the petitioner being owner is not responsible for the said violation.

08. Record shows that tenant of the petitioner vacated the house before 15.12.2014, whereas the impugned order was passed by the Court of Deputy Commissioner, Islamabad while exercising powers of Commissioner CDA, Islamabad on 29.09.2016. The relevant regulations under the Islamabad Residential Sectors Zoning (Building Control Regulations, 2005) for putting the building into non-confirming use are reproduced as under;

2.17 BAN ON NON-CONFORMING USES.

2.17.1 *No land or building shall be put to a non-confirming use.*

2.17.2 *Any building or structure designed or intended for a use, not authorized or permitted under these Regulations or conditions of allotment, shall either be removed or converted into a building or structure designed or intended for a use authorized or permitted under these Regulations or conditions of allotment.*

2.17.3 *A non-confirming 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 the non-confirming 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.*

09. According to the regulations *ibid*, the owner / allottee is responsible to follow the building By-laws of Capital Development Authority. In the instant case the tenant had left the premises before 15.12.2014 and the impugned order was passed on 29.09.2016 i.e. after about 2 years of vacating the house by the tenant, so according to law the tenant cannot be held responsible by CDA for any violation after vacation of the premises. It is the sole responsibility of owner / allottee to rent out the premises for the residential purposes only, as and when any violation of the building By-laws has committed by the tenant, the owner / allottee is bound to get the premises vacated or to get the violation removed by the tenant but in the instant case before issuance of notice by CDA, the owner / allottee has not taken any action against his tenant for putting the residential house to non-confirming use which reflects that the said violation was carried out with the consent of owner / allottee.

10. Learned counsel for the petitioner has not produced any law in which the owner / allottee is absolved from the responsibility of following the building By-laws of CDA when the premises is given on lease / rented out.

11. In the regulations *ibid* the words “owner and the occupant” are mentioned, who are liable for conviction of fine etc., so both are responsible, but if the tenant / occupant has vacated the premises then only the owner is liable for the

penalties. If the argument advanced by the learned counsel for the petitioner, that only the tenant is responsible for penal action even after vacating the house, is accepted, then every second owner, in case of violation will produce a lease agreement before the CDA with the request / plea to initiate proceedings against the alleged tenant, which is neither warranted under the By-laws / rules, nor possible for the CDA.

12. Owner of the house / premises cannot be absolved from the penal action by CDA, in case of any building violation. However the owner can initiate legal proceedings against his tenant for recovery of fine imposed by CDA and can also claim damages etc. for loss / inconvenience caused to him due to violation committed by the tenant.

13. It is well settled that *certiorari* is only available to quash a decision for an error of law. It will also be issued for correcting errors of jurisdiction when an inferior Court or a tribunal acts without jurisdiction or in excess of its jurisdiction, or fails to exercise its jurisdiction or where the Court or a tribunal acts illegally in exercise of its undoubted jurisdiction and it decides a matter in violation of the principle of natural justice. The High Court while issuing a writ of *certiorari* acts in exercise of supervisory and not appellate jurisdiction. The High Court in exercise of its writ jurisdiction will not review the findings of facts reached by the inferior Court or a tribunal. Reliance may be made to the following case laws:

- (i) In the case of *Owais Shams Durrani and others V. Vice-Chancellor, Bacha Khan University, Charsadda and another (2020 SCMR 1041)*, it is held by the Hon'ble Supreme Court that *"It is trite that where a citizen seeks relief in constitutional jurisdiction he must point to a right statutory or*

constitutional which vests in him and has been denied in violation of the law.”

(ii) In the case of “Amjad Khan V. Muhammad Irshad (Deceased) through LRs (2020 SCMR 2155)”, it is held by the Hon’ble Supreme Court that *“it is by now a settled principle of law that the High Courts must not exercise their constitutional jurisdiction in order to interfere with the discretion exercised by lower courts unless the same suffers from jurisdictional, factual or legal errors. In other words, such interference would be justified in cases where the impugned order has been passed without jurisdiction or is based on misreading or non-reading of evidence, or is not in accordance with the law. If none of these errors is present, the High Courts must not exercise their constitutional jurisdiction to interfere with the findings of lower courts merely because it reached a different conclusion as to the controversy than the latter. In this regard, reference can be made to a collective reading of Mst. Mobin Fatima V. Muhammad Yamin (PLD 2006 SC 214) and Nadira Shahzad V. Mubashir Ahmad (1995 SCMR 1419).”*

(iii) In the case of “President All Pakistan Women Association, Peshawar Cantt V. Muhammad Akbar Awan and others (2020 SCMR 260)”, it is held by the Hon’ble Supreme Court that *“It is settled law that when the Statute does not provide the right of appeal against certain orders, the same cannot be challenged by invoking the constitutional jurisdiction of the High Court in order to gain a similar objective. Where a Statute has expressly barred a remedy which is not available to a party under the Statute, it cannot be sought indirectly by resort to the constitutional jurisdiction of the High Court. The High Courts exercising constitutional jurisdiction must be fully cognizant and conscious of this Rule and strictly adhere to the same in the interest of advancing the policy of law and delivering expeditious justice in accordance with the law and the Constitution. Even otherwise, constitutional jurisdiction is equitable and discretionary in nature and should not be exercised to defeat or bypass the purpose of a validly enacted statutory provision.”*

(iv) In the case of “Jurist Foundation through Chairman V. Federal Government through Secretary, Ministry of Defence and others (PLD 2020 SC 1)”, it is held by the Hon’ble Supreme Court that *“Judicial review must, therefore, remain*

strictly judicial and in its exercise Judges must take care not to intrude upon the domain of the other branches of Government. Judicial restraint, in this perspective, is essential to the continuance of rule of law, and for the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law as laid down and applied by the Courts.”

(v) In the case of ***“Chief Executive MEPCO and others V. Muhammad Fazil and others (2019 SCMR 919)”***, it is held by the Hon’ble Supreme Court that ***“where the Court or the Tribunal has jurisdiction and it determines specific question of fact or even of law, unless patent legal defect or material irregularity is pointed out, such determination cannot ordinarily be interfered with by the High Court while exercising jurisdiction under Article 199 of the Constitution.”***

(vi) In the case of ***“Chairman, NAB V. Muhammad Usman and others (PLD 2018 SC 28)”***, it is held by the Hon’ble Supreme Court that ***“the powers of judicial review vested in High Court under Article 199 of the Constitution is no doubt a great weapon in the Judge’s hands however, the same shall not be exercised in a case where discretion is exercised by the subordinate court/Tribunal in a fair and just manner without violating or disregarding statutory provision of law, likely to occasion the failure of justice. Ordinarily such extraordinary jurisdiction shall not be exercised at random and in routine manner. The following case law is reproduced for the guidance of the learned Judges of the High Court for future course of action:***

(i) ***Brig. (Rtd.) Imtiaz Ahmed v. Government of Pakistan, through Secretary, Interior Division, Islamabad (1994 SCMR 2142)***

(ii) ***Shahnaz Begum v. The Hon’ble Judges of the High Court of Sindh and Balochistan (PLD 1971 SC 677)***

(iii) ***Malik Shaukat Ali Dogar v. Ghulam Qasim Khan Khakwani (PLD 1994 SC 281)”***

(vii) In the case of ***“Shajar Islam V. Muhammad Siddique and 2 others (PLD 2007 SC 45)”***, it is held by the Hon’ble Supreme Court that ***“the 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 the judicial review of the***

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.”

14. Learned counsel for the petitioner made no submission on the point as to how the concurrent orders passed by the Court of Deputy Commissioner, CDA dated 26.03.2014 and the Court of Deputy Commissioner, ICT exercising powers of Commissioner, CDA, Islamabad dated 29.09.2016 were the consequence of an error of law or without jurisdiction or in excess of jurisdiction.

15. In view of the above prospective, the instant writ petition has no merits and the same is hereby **dismissed**.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Announced in Open Court on **29.03.2021**.

JUDGE

Approved for reporting.