

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

W.P No.1732-2019

Mrs. Shamshad Butt

Versus

Deputy Commissioner, CDA, Islamabad and others.

Petitioner by: Sardar Shabbir Hussain, Advocates.

Respondents by: Ch. Kamil Hayat, Advocate for
respondents No.1 to 3.
Respondent No.4 Ex-parte

Date of Hearing: 09.06.2022.

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MOHSIN AKHTAR KAYANI J. Through this writ petition, the petitioner Mrs. Shamshad Butt has assailed the letter dated 30.10.2018, issued by the Estate Management Officer, CDA and order dated 02.04.2014 passed by Deputy Commissioner, CDA under section 49-C of the CDA Ordinance 1960 as well as clause 2.17.3 of Islamabad Sector Zoning Building Regulation 2005.

2. Brief facts referred in the instant petition are that the petitioner Mrs. Shamshad Butt has purchased House No. 47, Street No.56, Sector F-6/4 Islamabad through transfer letter dated 01.08.1985, thereafter leased out to National Rural Support Programme / respondent No.4, which is a Non-profit Organization, registered under Companies Ordinance, 1984 for residential purposes which is next to the House No. 46, 45 Agha Khan Road, Street No.56, Sector F-6/4 Islamabad, already under lease of respondent No.4 by another landlady Humaira Sheraz. The Deputy Commissioner CDA has imposed the penalty of Rs.500,000/-, vide order dated 02.04.2014 alongwith additional payment of fine of Rs.5000/- per day on the ground of non-

conforming use of the premises in terms of Section 49-C of the CDA Ordinance 1960 and finally the Estate Management Directorate CDA has issued letter dated 30.10.2018 by informing the petitioner at her Canadian residence that sum of Rs.28,80,357/- has been imposed on account of *fine and restoration charges* of the plot are still outstanding, which gives rise to filing of the instant writ petition.

3. Learned counsel for petitioner contends that the petitioner is a dual national being permanent resident at Canada and was never been served with a notice regarding initiation of any proceedings by CDA authorities; even the final show cause notice dated 13.05.2014 was posted on a fake address in the name of wrong person known as Mrs. Shad Begum; no report from Building Control Section, CDA is available on record to justify that the premises was used for non-conforming use; even otherwise petitioner could not be burdened with the act of tenant, though no action was taken by the CDA against the tenant for ejectment, if at all the building was used in non-conforming manner. The other houses occupied by the tenant were also under similar category, but no proceedings were taken against the said landlords. The actions taken by the respondent Authorities are in violation of CDA Ordinance 1960 as the Islamabad Residential Sectors Zoning (Building Control) Regulations 2005 are ultra vires to the parent law, even the recent SROs impliedly repeal the previous SRO in terms of Islamabad Sector Zoning Regulations. The respondent authorities have violated the principles of *audi alteram partem* as no right of hearing was afforded to the petitioner and was condemned unheard, as such the penalty imposed upon the petitioner and even the restoration charges are not legally justiciable from the record.

4. Conversely learned counsel for the CDA has opposed the maintainability of instant petition on the ground that the petitioner has

intentionally entered into lease agreement with the commercial organization. The subject plot was cancelled after issuing notices to the petitioner, which were not considered by the petitioner and as such, plot could only be restored subject to payment of charges after inverting the same from non-conforming to conforming-use. Besides, notices were issued and delivered to respondent No.4; however, no one appeared on their behalf, therefore, this court left with no option but to precede ex-parte.

5. Arguments heard record perused.

6. Perusal of record reveals that the petitioner being owner of House No.47, Street No.56, Sector F-6/4 Islamabad has leased out the same on 27.04.2006 to National Rural Support Programme (NRSP), located at House No.46, Street No.56, Agha Khan Road, Sector F-6/4 Islamabad against the monthly rent of Rs.230,000/- whereby, the said tenant has converted the house into an office without the consent of the petitioner / landlady. Due to the said non-conforming usage, proceedings have been initiated against the petitioner and consequently the Deputy Commissioner CDA, Islamabad has imposed fine of Rs.500,000/- in terms of clause 2.17.3 of Islamabad Sector Zoning Building Regulation, 2005 and further directed to evict the tenant from the said premises, whereafter, the conveyance deed / allotment letter will be cancelled. However, the action was culminated into final letter dated 30.08.2018, which conveyed imposition of fine of Rs.28,80,357/- as restoration charges of the said plot.

7. In order to proceed with the case, this Court has confronted the CDA authorities to demonstrate from their record as to whether any notice has been served upon the petitioner, who claims to be Canadian citizen, living in Ontario, Canada or any other notice which has ever been served upon the petitioner before taking the final action. The comments filed in this case are silent qua service of any notice, even the record is also silent qua the joining

of petitioner in any proceedings before the final action by the respondent authorities.

8. I have gone through the appended record, which reveals that at the time of execution of lease agreement dated 27.04.2006 by the petitioner / landlady with National Rural Support Programme (NRSP) qua the subject premises, she has mentioned her address as *House No.25-D, Officers Colony, Ghazi Road, Lahore* and similar address was referred as a permanent address on the CNIC of the petitioner alongwith the present address of Ontario, Canada, even the notice u/s 49-C of CDA Ordinance 1960 for non-conforming use issued by the Deputy Director-II (EM) East, CDA dated 15.04.2014 was transmitted on the leased premises as well as on the address i.e. **(K-46, Saddar Road Attock City)** which was the original address available on the record of the Estate Management Directorate at the time of transfer of subject plot in favor of petitioner vide allotment letter dated 01.08.1985. The second notice available on record was of 13.05.2014, which was issued on the similar address in the name of one lady **Mrs. Shad Begum** instead of Mrs. Shamshad Begum. All these aspects clearly established that the minimum requirement of service of notice has not been complied with, neither any ample proof has been placed on record by the CDA authorities, where any postal receipt or service receipt, would confirm the delivery of notice, especially when the petitioner is admittedly residing in Ontario, Canada as reflected from her passport appended with this case, which has not been denied by the CDA authorities through any counter evidence. Therefore, at this stage, this court has been guided with the principles set out in **1984 SCMR 993 (Mst. Amina v. Abdul Qadir and others)**, **2007 SCMR 1105 (Muhammad Bashir and others v. Abbas Ali Shah)**, **1979 CLC 732 [Lahore] (Ahmad Dar vs. Mian Abdul Majid)**, **2012 MLD 1487 (Muhammad Iqbal v. Sardar Khan)**, **2013 YLR 2132 (Sheikh**

Wajaht Ali v. Government of Khyber Pakhtunkhwa, through Secretary Industries), *AIR 2002 [SC] 3557 (Basant Singh and another v. Roman Catholic Mission)*, *2005 CLC 3 (Pakistan State Oil Company Limited v. Sikandar A. Karim)*, *2007 SCMR 1105 (Muhammad Bashir and others v. Abbas Ali Shah)*, *PLD 1991 [SC] 660 (W.A.P.D.A v. Saeed Baddar)*, *1986 MLD 396 (Girdhari Lal B. Bhattia v. Saeed Ahmad Kazi)*, whereby the following principles were high-lighted:

- i. *When any authority claims that notice has been served upon the consignee, proper approved registered address should be mentioned in the postal record.*
- ii. *Postal receipt may also be produced in order to prove the due communication of the letters / notices. The presumption of service is rebuttable if the other side deny such service on oath.*
- iii. *In case the service has been denied than onus is shifted upon the sender to produce the postman or to demonstrate form any record of these receipt that the subject notice was served upon the consignee.*
- iv. *Registration receipt showing correct address would be evidence of dispatch and delivery of notice or material.*
- v. *Postal receipt and acknowledgment on record indication dispatch and receipt of notice.*
- vi. *The signature appended on the acknowledgment receipt of notice will also be considered as the presumption of due service of notice.*
- vii. *Notice sent by registered post-AD and received back with endorsement “refused”, presumed to have been*

received by the addressee and considered refused by him with due knowledge.

viii. *Onus to prove service of notice constitutes to be on the party relying on such notice; unless there is other evidence to indicate that denial of service by addressee is against the record.*

ix. *U/S 27 of General Clauses Act 1897 the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*

By applying the above mentioned legal principles set out under the concept of section 27 of General Clauses Act, 1897 by different superior courts, the CDA authorities are not in position to justify that any valid notice has ever been served upon the petitioner on her known address, nor any postal receipt has been produced on record, neither any postman or a person has been produced to confirm that notice was served with due acknowledgment. Hence, the due requirement of Article 10-A of the Constitution of Pakistan 1973 or fair trial and due process has not been attended to, as a result whereof, the civil rights determined by the Deputy Commissioner CDA as well as by the Estate Management u/s 49-C of CDA Ordinance 1960 and regulations there under have been settled in violation of principle of *audi alteram partem*. The concept of due process of law has been enshrined in Article 10-A of the Constitution of Pakistan 1973, whereas, the said principle is based upon due right of hearing in terms of principles of natural justice where no right of hearing and opportunity of being heard was granted, the action is to be treated illegal as held in **PLD**

1964 [SC] 673 (Saiyyid Abdul A'la Maudoodi v. The Government of West Pakistan). Similarly the Lahore High Court in recent announcement reported as PLD 2021 [Lahore] 211)Muhammad Khalid Javed and Others Vs. Lahore Development Authority and others) wherein it was held that where law provides a mechanism for doing an act, taking an action or initiating certain measures then the same must be complied with as and when the law provided or where things are to be done in a particular manner, the same are to be done in that manner and if anything is done contrary or in deviation to that, the same shall be deemed to have not been done at all in terms of Article 10-A of the Constitution. The basic theme behind Article 10-A of the Constitution is to cover substantive procedural process, it could be termed as having been designed to secure justice as a living reality. Similarly the right to fair trial after due process was a bedrock of the rule of law and was closely linked with human rights protection, more particularly the rights to life, liberty and property as held in 2021 CLC 1841 [Lahore] (Muhammad Nawazish Ali v. Family Judge).

9. Now adverting towards the question of non-conforming use in terms of Section 49-C of the CDA Ordinance means that *if any building, structure, work or land in erected, constructed or used in contravention of the provisions of this Ordinance or of any rule, regulation or order made thereunder*, is the concept of non-Conforming use in general. Whereas, the particular concept of Non-Conforming use has also been high-lighted in terms of clause 2.17 of the Islamabad Residential Sector Zoning (Building Control) Regulations 2005 which is as under:-

- 2.17.1 *No land or building [or part of the building] shall be put to a non-conforming use.*
- 2.17.2 *Any building [or part of the 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-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 the 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 for 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.*

By going through the above referred provisions read with Section 49-C of the CDA Ordinance 1960 it appears that every building constructed within Islamabad residential sectors is to be used for the purpose mentioned in the allotment letter or under the regulations, whereas, the subject property was allotted for a residential purpose as defined in clause 1.2.121 of the regulations which defines 'Residential Building' means *a building authorized for residential occupancy by one or more families, but does not include hotels or lodging houses*; as such the concept of commercial use has not been referred in this definition, though, it is permissible to lease out the residential premises / house, for residential use, which itself is against the receiving of monthly rent, but for residential purpose and not a guest house, which is a commercial activity. At the same time the concept of commercial building has also been defined in clause 1.2.32 of the regulations means *a building erected on commercial plot allotted for shops/ offices with or*

without residential flats/apartments or any other commercial use. Hence, this court is of the view that the principal use of the said building / house is for a residential purpose and occupancy of different families, whereas, the action taken by the CDA authorities is of non-conforming use primarily with the allegation of establishment of an office, though, the petitioner has denied these allegations. In such scenario primary onus in terms of Article 117 of Qanun-e-Shahadat Order, 1984 has to be discharged by the CDA officials that a building which was authorized for residential use has been used for non-conforming manner, which may render the owner and occupant of building liable to penalty and eviction from the building and allotment and conveyance deed of plot may be cancelled under chapter 2, clause 2.1.4 of the Islamabad Residential Sectors Zoning (B.C) Regulations, 2005. However, before taking such an action certain duties have been attached to the Building Control Section to inspect the property and generate a report qua the use of such property contrary to the authorized usage to initiate the action *prima facie* on the charge that building was under use in violation of regulations and the purpose defined in its allotment letter.

10. This Court has confronted the respondents counsel to demonstrate from any record qua the use of building / house under non-conforming use through any report of Building Control Inspector, who visited the house and submitted any detail or evidence that the same was used for an office by the petitioner, but no such documentary evidence is available on the record. This aspect *prima facie* demonstrates that the action is not based upon any Field Inspector Report of Building Control Section CDA nor any such officer's name has been reflected in the parawise comments, even no report on behalf of the CDA has been filed to justify that CDA authorities have inspected the property in question on a particular date and time, nor any kind of evidence

was collected from the subject premises to issue notice of non-conforming use.

11. Learned counsel for CDA contends that the petitioner herself acknowledges in the lease agreement that building in question was leased out to the National Rural Support Programme (NRSP) which itself is a commercial entity and using the said building for commercial purposes, that might be true but as far as lease agreement is concerned, there is not a single acknowledgment by the petitioner that she extended permission to use the building for commercial purposes or for establishing an office, nor it could be demonstrated through any other document of National Rural Support Programme (NRSP), that subject premises is the office, though the notices appended in this case refer that occupants have opened / established an office in residential premises. In such scenario this court is of the view that before taking such action under the law, the Inspector of Building Control Section, CDA shall bring on record the following measures:-

- i. The Building Control Section through notified Inspector shall visit the premises and collect any incriminating material, i.e. office card, letter head, any correspondence in which the building address has been used for commercial purposes.*
- ii. The Building Inspector may prepare a concise report of visit / inspection of the residential building and record those particulars through which it could be prima facie established that building has been used for non-Conforming use.*
- iii. The Building Inspector may take photographs or a video evidence to establish the non-conforming use or may record any statement of the official / occupant of the building qua its usage.*

If the above referred evidence are not available as a minimum standard to take action for non-Conforming use before the Deputy

Commissioner CDA, then there is no need to issue notice to the other side in terms of section 49-C of CDA Ordinance 1960. The plain language of said provision of law casts duty upon the Deputy Commissioner, to satisfy himself before issuance of notice that minimum requirements have been demonstrated by the Building Control Section CDA, which is not the case in hand to the extent of petitioner, therefore, the only evidence which is available on record is the lease agreement of petitioner, which has not been filed by the respondents / CDA, hence, the primary onus to prove the commercial use of building / house as per the lease agreement has been shifted upon the respondents / CDA as per Article-122 of Qanun-e-Shahadat Ordinance 1984, which has not been discharged before passing of the impugned orders.

12. Concerning, the action against the owner of the premises who is not privy to the illegal acts of the tenant, rather it is the tenant who is using the subject premises in violation of lease agreement and CDA by laws, but no action was taken by the CDA authorities against the occupant / tenant, rather a premium has been given to such an illegal occupant by not sealing the premises, is another act whose burden has been imposed upon the landlord, like in this case.

13. It is not the case of petitioner landlady that she has leased out the premises on commercial basis rather any such Non-conforming use was the sole act of the lessee, though there is no direct evidence available on record and even the CDA authorities are not in position to demonstrate as to why they have not taken action against the subject premises by sealing the same by issuing the notice to the subject occupant, such a pick and choose exercise by the CDA authorities is in clear violation of principle of fairness.

14. This Court has attended the proposition in hand while considering the mandate of case law reported as **PLD 2022 [Islamabad] 22 (Raja Zahoore**

Ahmad Vs. Capital Development Authority) whereby, it was held that properties are subjected only to such use as is authorized by the regulations promulgated under the CDA Ordinance, 1960 which is a mandatory obligation of the authority, as such, this aspect primarily imposes a duty upon the allottee/the occupant to use the building or premises in accordance with the law i.e. CDA Ordinance, 1960 read with Islamabad Residential Sector Zoning (Building Control) Regulations-2005. Therefore, any use which did not conform with the classification made by CDA or as prescribed under the regulation which amount to non-conforming use within the concept provided in the regulation would render owner and occupant liable for action under the law, as held in **2017 MLD 627 [Islamabad] (Col. (R) Javed Agha Vs. Arshad Mahmud and four others)**. No doubt, the mess of non-conforming use has disrupted civic fiber in the city, manipulated master plan of capital, and infringed fundamental rights of inhabitants and posed serious threats and enhanced diminishing law and order situation as held in **2015 YLR 998 [Islamabad] (Javed Agha Vs. Arshad Mahmud and others)**.

15. This Court is of the view that majority of the properties were used illegally in a non-conforming manner by the owners / allottee or the occupants like tenants. In such scenario the landlord and tenant both are responsible for non-conforming use of the building / house in terms of Section 49-C of the CDA Ordinance, 1960, however, in case if the owner/ landlord is having knowledge qua the factum of non-conforming use, he shall take action under the law against the tenant at the first instance for eviction in terms of The Islamabad Rent Restriction Ordinance, 2001 by considering that the building can only be used for the purpose of living and not to run any commercial activity, which is violation of terms of agreement or against the law, is a ground of eviction in terms of Section 17 of The Islamabad Rent Restriction Ordinance, 2001 and residential building for non-

conforming use has been declared illegal and no premium can be given to a tenant to enjoy the same under the garb of so-called permission of the landlord if any as held in **2019 MLD 590 (Shuja Ahmed Vs. Additional District Judge (West), Islamabad)**. In case the tenant has already left the premises after non-conforming use of a residential house, the landlord / owner can proceed against such a tenant and may recover the damages if the landlord / allottee has been prosecuted in terms of Islamabad Residential Sector Zoning (Building Control) Regulations-2005 by the Deputy Commissioner and under the regulations, landlord and tenant both are held responsible for non-conforming use of the property. However, the owner can take a plea that he has not given his property for non-conforming use but such a plea required to be adjudicated and onus is upon the landlord / allottee, to demonstrate that he has absolved from any penal action in terms of Section 49-C of the ordinance, otherwise both are held liable for the penalties, but if the tenant/occupant had vacated the premises then only the owner was liable for the penalties as held in **2021 CLC 1014 [Islamabad] (Ghulam Ahmad Qureshi Vs. Commissioner CDA, Islamabad and others)**.

Similarly, where the landlord claims that he/she was not served with any notice on the residential address other than the premises which was under non conforming use or the allottee/landlord was out of country , in such eventuality the landlord/allottee has to provide the travelling record, document, passport etc. from where it could be ascertained that he/she was abroad at the time of passing of impugned orders, otherwise he /she would be liable as held in **(2017 CLC [Islamabad] 143, (Bashir Ahmed v. Deputy Commissioner Islamabad))**. In the present case, the petitioner/landlady, who claims to be a Canadian citizen was admittedly out of country and has placed her passport on record to demonstrate her plea, though the impugned orders were passed in absence of petitioner and her plea of out of country has not so

far been appreciated by any forum, which requires adjudication after affording proper opportunity of hearing under the law.

16. Learned counsel for the CDA has also raised a question that petitioner has not availed the remedy of appeal in terms of Section 36 of CDA Ordinance, 1960, against the order passed by Deputy Commissioner CDA under Section 49-C of CDA Ordinance, 1960, as a result whereof instant writ petition is not maintainable. No doubt, Section 36 of CDA Ordinance, 1960, provides a remedy of appeal and review to all those persons who are aggrieved from the order of Deputy Commissioner CDA, where fine/penalty has been imposed upon the petitioner for non-conforming use of any building but the question arises as to whether such remedy is equally efficacious or otherwise is a question depending upon the circumstances of each case, even there is no absolute bar in entertaining such a petition, which is qualified on certain principles of law, where there is a jurisdictional error, lack of authority or the order is *void ab-initio*, as held in 2016 PTD [Lahore] 358 (M.Z. International vs. The Assistant Commissioner Inland Revenue Audit-5). Similarly if the order passed by the court or tribunal suffers from want of jurisdiction and is void ab initio order, in such scenario, rule of available appeal can be dispensed with as held in 2004 SMCR 400 (Farzad Raza Naqvi Vs. Muhammad Din).

17. It is also settled law that where order or any action against the complainant was patently illegal, void and want of jurisdiction, any further recourse to alternative remedy might only be counter-productive and such mischief requires an immediate action to nip the same from bud by invoking the Article 199 of the Constitution, in such a matter existence of alternate remedy would not bar the exercise of constitutional jurisdiction by High Court as held in PLD 1990 [SC] 399 (Eduji Dinshaw Limited Vs. Income Tax Officer), therefore, the objection raised by the counsel for CDA is not

justiciable in the present circumstances, where petitioner was not given opportunity of hearing in proper manner, especially when no notice was ever served upon the petitioner, nor any evidence of non-conforming use was placed before Deputy Commissioner, CDA in shape of any report or other documentary evidence of direct nature, which could not be rebutted otherwise.

18. This Court has also observed that CDA Authorities took the action for sealing of the premises which were under continuous non conforming use. However, no such action was taken in the present case by the CDA despite having knowledge that the house in question was under non-conforming use as per stance of Building Control Section, CDA though it is their responsibility to proceed against occupant/tenant after giving him a notice, otherwise, adverse presumption has been generated against the CDA authorities in terms of Article 129(g) of Qanun-e-Shahadat Order, 1984. In cases where properties were sealed with its fixture and fittings same could be de-sealed for limited purposes for removal of those articles, furniture and fittings laying to be handed over to its lawful occupant as held in **2017 CLC [Islamabad] 150 (M/s Labels Franchise Vs. Capital Development Authority).**

19. The epitome of above discussion demonstrates the factual resume in favour of petitioner/landlady, who had no conscious knowledge qua the non-conforming use of the premises by the tenant/occupant, especially when she was out of country, which has prima facie been justified from the traveling itinerary demonstrated from the attached passport, in such scenario, the circumstances are entirely different, which could not be equated with the case of *Ghulam Ahmad Qureshi supra*, whereas one thing is clear, that action should have been taken against the tenant, who at the first instance, is occupying the premises and guilty of non-conforming use, which is the case put forward by

the CDA authority before this Court. Therefore, CDA authorities could not take a cover and plea that the owner should be prosecuted in the first instance, rather it is their legal obligation to take action against the first available person, whether he is landlord/ tenant, who is violating the regulations and By-laws of CDA, even no report of Inspector, Building Control Section, CDA has been placed on record.

20. In view of the above discussion, this Court comes to an irresistible conclusion that the CDA authorities including the Deputy Commissioner and Officers of Building Control Section are to follow certain important guidelines for future purpose while dealing with the cases of non-conforming use in Islamabad Capital Territory, which are as under:

- i. *The Building Control Inspector who visit the building / office / house, which was under non-conforming use has to submit a written report clearly stating therein the name, date, time when the building was visited as well as the reasons on the basis of which he reaches to the conclusion that building is under non-conforming use.*
- ii. *The report must contain the timeline of non-conforming use tentatively to assess the quantum of fine by the Deputy Commissioner, CDA till the removal of non-conforming use.*
- iii. *Any visiting card, sign board, pictures, video evidences, letter head correspondence, which could be made basis of opinion of non-conforming use of the building may also be made part of the report including but not limited to the statement of individual who are occupant in the building, if any.*
- iv. *The Deputy Commissioner CDA on the basis of such report may initiate the proceedings in terms of Section 49-C of CDA Ordinance, 1960 read with the relevant clauses of Islamabad Residential Sector Zoning (Building Control) Regulations- 2005, shall issue notice to the occupant/allottee/owner accordingly.*
- v. *The Deputy Commissioner after issuing notice to the occupant at the first instance, if comes to conclusion that building is continuously under non-conforming use and he has given due*

opportunity of hearing to the occupant, who whether joins the proceedings or otherwise, may pass an-interim order of sealing of the premises by all means without the final verdict.

- vi. *In case, the occupant undertakes to remove subject non-conforming use within reasonable time, the Deputy Commissioner may on the undertaking give such opportunity for removal of the non-conforming use for a limited period, which could be verified after the specified time line. In case, the occupant has not removed the property from non-conforming use, Deputy Commissioner may pass a final order of imposing penalty and sealing of the premises.*
- vii. *The Deputy Commissioner shall issue notice to the allottee alongwith the report of Building Control Inspector conveying him non-conforming use of the property.*
- viii. *The Deputy Commissioner shall ensure the proper service of notice to the occupant by way of Registered Post and also by Special Messenger and may even affix the notice upon the subject premises before taking the action.*
- ix. *The Deputy Commissioner shall take the report of Building Control Section, CDA and may put the same or confront to the occupant or the allottee for his input or rebuttal by way of affidavit and may also extend an opportunity to the occupant/landlord/allottee to rebut the same.*
- x. *The Estate Management Section of the CDA can only cancel the allotment or conveyance deed of such premises under non-conforming use, if the Deputy Commissioner reaches to the conclusion that the owner is guilty/liable for non-conforming use under the law and even persistently using the building in a similar manner, despite passing of the order.*
- xi. *The Estate Management Section, CDA shall independently issue a notice to the allottee before cancellation of allotment on the basis of order of the Deputy Commissioner if no plausible explanation has been rendered by the allottee within prescribed time referred in the notice.*
- xii. *In terms of clause 2.17.5 of Islamabad Sector Zoning Building Regulation 2005, the building under non conforming use may be sealed after expiry of 15 days of first notice issued by Building Control Directorate by Director Enforcement, CDA*

or any person empowered by the Authority in presence of Magistrate of CDA upon issuance of order for sealing of said premises by Director Control Building CDA.

xiii. The Deputy Commissioner, CDA while imposing fine upon the occupant shall pass speaking order justifying his penal action against the occupant/allottee.

21. While taking analogy from the above guidelines, the case of petitioner falls within the exceptional category, where neither opportunity of hearing was afforded to the petitioner nor any report of Building Control Section for non-conforming use has been placed on record and even no concrete evidence of non-conforming use has been demonstrated. In such scenario, the orders passed by Deputy Commissioner, CDA or by the Estate Management, CDA are to be treated in excess of jurisdiction and considered to be passed in violation of principle of natural justice. No doubt the High Court in exercise of remedial jurisdiction will not review the findings of the case rendered by the lower forum, whereas in this case the factual aspect has not been appreciated by the Deputy Commissioner as well as the CDA authorities under CDA By-laws, rather they violated the fundamental rights of petitioner and imposed a fine which has not been proved under the principle of due process of law and fair trial, rather the findings are based upon no evidence. Hence, the impugned orders could not be termed as fair rather passed in disregard to statutory provisions of law and resulted into complete failure of justice.

22. For what has been discussed above, instant writ petition is **ALLOWED** and both the orders passed by Deputy Commissioner, CDA, whereby fine has been imposed and order of Estate Management Officer qua the cancellation of allotment of plot are hereby **SET-ASIDE**, the proceedings before the Deputy Commissioner CDA are deemed to be pending, whereby the petitioner shall join the proceedings and may submit her detailed version

in writing with affidavit as well as with any other documentary evidence to justify her stance. The Deputy Commissioner CDA, shall extend the opportunity of hearing to the petitioner and decide the matter afresh while considering timeline submitted by the petitioner, when she was out of country as well as the Building Control Section, CDA reports if any or any other evidence under the law.

23. It is expected from the Deputy Commissioner CDA, to decide the matter within period of next four (04) months under intimation to this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 24.06.2022.

JUDGE

Approved for reporting

A.Waheed