

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P No.3178-2016

Abdul Jabbar Khan Bangash
vs.
Federation of Pakistan and another.

Petitioner by: Mohkam Bajwa and Mr. Haider Omer Hayat,
Advocates.

Respondents by: Mr. Usman Rasool Ghuman, AAG.
Ch. Kamil Hayat, Advocate for respondent
No.2.

Date of Hearing: 14.02.2023.

MOHSIN AKHTAR KAYANI, J: Through the instant writ petition,
the petitioner has prayed for the following relief:-

- i. childcare centers be declared as an activity that offer essential home based public service;*
- ii. the Respondents be directed to classify childcare centers as public service, within regulation 3 of the Land Disposal Regulations, and allot plots for childcare centers, within ICT, under the head of Community and Facilities Plots, and dispose them off accordingly;*
- iii. the Respondents be directed to authorize and permit childcare to be located in residential premises within the aforementioned zoning regulations;*
- iv. Home Occupation be declared to include the establishment, running and management of childcare centers;*

Any other and better relief that the honorable Court deems appropriate may also be granted.

2. Learned counsel for the petitioner contends that petitioner is aggrieved with the prohibition on the establishment of daycare center within the residential premises on the ground that it is a fundamental right to

establish such kind of business in the residential area, therefore, he prayed for issuance of writ to grant permission for establishment of childcare center to provide home based services and public service within Islamabad Capital Territory. He further contends that the childcare center is required within closest residential community and provision of Building Control Regulation, 2005, Islamabad Land Disposal Regulation, 2005, CDA Ordinance, 1960 as well as provisions of Sections 3(3) 3(4), 71 and 73 of the Islamabad Capital Territory Local Government Act, 2015 are to be declared ultra vires to the constitutional guarantees.

3. Conversely, respondents have not filed any comments in this case, despite elapse of seven (07) years, such conduct demonstrates that they are not interested to argue this case, even on the date fixed, they were not interested to argue the case, whereby they were directed to file para-wise their comments within two (02) days, but no such comments have been filed on record, therefore, this Court has left with no other option, but to proceed under the law.

4. Notices were also issued to learned Attorney General of Pakistan under Section XXVII-A CPC, whereby learned AAG in attendance has raised the question of maintainability on the ground that the prayer made in the instant writ petition falls within the policy domain of Municipal Corporation Islamabad under ICT Local Government Act, 2015.

5. Arguments heard and record perused.

6. Perusal of record reveals that petitioner is managing a childcare center under the name and style of "*Nigran Care*", a Company incorporated under the Companies Ordinance, 1984, which offers daytime childcare facilities to the residents of Islamabad Capital Territory and it has been claimed by the petitioner that it is neither operated by or connected to any school system or any Montessori, nor does it have any connection with other any business

establishment or professional office. The *Nigran Care* solely functions as a daytime childcare center, and offers working parents and employees with a safe, secure and hassle-free facility to meet their core childcare issues, but they have not been given permission to run the business.

7. The petitioner has also challenged the vires of Sections 3(3), 3(4), 71 and 73 of the Islamabad Capital Territory Local Government Act, 2015 to be declared illegal and unconstitutional for being against the spirit of Article 140A of the Constitution of Islamic Republic of Pakistan, 1973 as well as against the spirit of ICT Local Government Act, 2015 reflected in the preamble.

8. In order to resolve the issue, it is necessary to go through the Sections 3(3), 3(4), 71 and 73 of the Islamabad Capital Territory Local Government Act, 2015, which are as under:-

(3) The development, planning and overall maintenance of the Master plan within the specified area of Islamabad Capital Territory will continue to vest with Capital Development Authority and thus the overall Master Plan shall apply and no action by any authority, body or corporation shall be initiated in violation of the Capital Development Authority Ordinance, 1960 and the Zoning regulations duly approved by the Government. All powers to be exercised and rules to be enforced shall be subject to the planning framework already set in the aforementioned laws, rules and regulations.

(4) This legal framework shall without derogation to the existing laws and regulations of the Islamabad Capital Territory and Capital Development Authority and segments not covered by the prevalent law shall be covered by the respective local Government, as determined by the Government. Wherever there is a clash between the existing law and provisions of this Act, the existing law shall prevail unless clearly specified or repealed.

71. Functions of the Union Council.– (1) A Union Council shall, subject to the provisions of the Capital Development Authority Ordinance 1960, perform functions specified in the Second Schedule.

73. Functions of Metropolitan Corporation.– (1) The Metropolitan Corporation shall, subject to the provisions of Capital Development

Authority Ordinance 1960 and Islamabad Capital Territory Zoning Regulations 1992 perform functions mentioned in Third Schedule

9. While going through the said provisions of law, it appears that ICT Local Government Act, 2015 extracted major functions of Capital Development Authority and curtailed the powers of the CDA, which are now confined to the extent of Sections 11 and 12 of the CDA Ordinance, 1960, where Master Regulator CDA can only plan and prepare a scheme within the specified area of ICT. Similarly regulations framed under the CDA Ordinance have also been covered in terms of Section 3(4) of the ICT Local Government Act, 2015, where all prevalent laws were given complete protection unless there is clash between the existing law and provision of this Act, in such eventuality, the existing law shall prevail unless clearly specified or repealed.

10. No doubt the petitioner's case falls within the domain of Municipal Corporation, Islamabad in terms of ICT Local Government Act, 2015, in which MCI can perform its functions and powers provided in 3rd Schedule of the Act. Similarly, functions of the Union Council have been defined in Sections 71 of the Act also explained in 2nd Schedule, but surprisingly there is no specific provision or subject, which gives an extensive powers to the Union Councils or MCI or as the case may be to allow the childcare set up as an occupation to be registered within the residential area as Sections 71 and 73 of the Act are subject to the provisions of CDA Ordinance, 1960 as well as ICT Zoning Regulation, 1992, such aspect minimize and curtail the Authority of MCI, rather placed a limit upon the representative institution of public i.e. MCI not to perform those functions, which are within the domain of CDA.

11. This Court is mindful of the fact that legislative intent has to be considered on the plain reading of Sections 71 and 73 of the ICT Local Government Act, 2015, which was incorporated by the Legislature

intentionally to supervise the MCI under the umbrella of CDA in terms of CDA Ordinance, 1960, though transitory provision in terms of Chapter-XV of the Act provided the mechanism, where powers have been transmitted to Municipal Corporation including the financial powers in terms of Sections 127, 128, 129 within a specified timeline. Section 130 deals with the succession, where timeline of 180 days has been fixed to divide the rights, assets and liability of the Local Government and even the Government has been empowered to bring *“all bylaws, rules, regulations, notifications or any other legal instrument, issued under any law in force on the date of commencement of this Act, in conformity with this Act within a period of two years from the date of commencement of this Act”*. In terms of Sub-Section 3 of Section 130, all existing bye-laws, rules, regulations, notification or any other legal instrument shall, subject to this Act, continue in force, *so far as applicable and with the necessary adaptations until altered, repealed or amended by the Government”*. The Federal Government has also been extended with powers to amend the schedule in terms of Section 134 of the Act, such aspect reveals that ICT Building Zoning Regulation, 1992 and CDA Ordinance, 1960 are alive legal instruments, restrict the functionality of MCI, which is indeed against the spirit of Article 140A of the Constitution of Islamic Republic of Pakistan, 1973 that is a constitutional mandate to establish Local Government system and *devolve political, administrative and financial responsibility and authority to the elected representative of the Local Government”* however, if such autonomy has not been extended in the literal sense, it will defeat the very purpose of the Local Government and it has to be established to devolve these three major components i.e. political, administrative and financial responsibility and authority to the elected representatives of the Local Government; *“to promote good governance, effective delivery of services and transparent decision making through institutionalized participation of the people at*

local level” in this regard I have been guided by the principles set-out in *PLD 2021 Islamabad 144 (MCI Vs. Chairman, CDA)*.

12. While considering the arguments of the petitioner’s side the principle of interpretation expresses the application of literal rule, where the words and phrases used in the statute should be read keeping in view their plain meaning as held in *PLD 2012 SC 923 (Baz Muhammad Kakar Vs. Federation of Pakistan through Ministry of Law and Justice)*. It is also settled proposition of law that literal rule of interpretation of the Constitution and statutes was that the words and phrases used therein should be read keeping in view their plain meaning as held in *PLD 2012 SC 501 (Ghulam Haider Vs. Murad through Legal Representatives)*, therefore, the plain and unambiguous words must be expounded in their natural and ordinary sense as provided in Sections 71 and 73 as well as Section 3(3), 3(4) of the Local Government Act, 2015 as held *1998 SCMR 841 (Pakistan International Airlines Corporation, Karachi Vs. Wafaqi Mohtasib)*. No doubt Courts can interpret the provision of law, but cannot change or substitute said provision and also cannot go beyond the wisdom of law, therefore, while interpreting a statute, Courts are bound to follow intention of legislature and are prohibited to interpret law in a manner, contrary to the legislature as held in *PLD 2007 SC 447 (Muhammad Akhtar alias Hussain Vs The State)*.

13. While considering the above discussion, it is apparently clear that Local Government system established under ICT Local Government Act, 2015 is subservient to CDA Ordinance, 1960 and as such majority of the functions of CDA still holds the field and in order to resolve certain issues of powers matrix, the CDA versus Local Government system, it is necessary to transmit all the administrative, financial and political authorities to the representatives of the Local Government system, the transitory provisions as well as amendment in schedule, has to be considered by the Government,

who is empowered to amend any rules, regulations in terms of Section 134 of the ICT Local Government Act, 2015. This Court comes to an irresistible conclusion that the arguments rendered by the petitioner side where question of vires has been raised to the extent of ICT, Local Government Act, 2015, is not made out as all those provisos referred in the prayer clause of this petition are not contrary to the constitutional framework, even abstract constitutional review of some provisions are not permissible, especially, when no constitutional defect or fundamental rights have been violated in those provisions, therefore, the challenge thrown by the petitioner to the extent of sec 3 (3), 3(4), 71 and 73 of the ICT, Local Government Act, 2015 is not made out, rather only a proposed amendment in the schedule of ICT, Local Government Act, 2015, is required to acknowledge the daycare facility being a state obligation.

14. In order to deal with the issue of daycare centers, the Government of Pakistan has introduced Labour Policy, 2010, where Women Workers will benefit from the application of ILO Convention on Equal Remuneration, 1951 (No.100), ratified by Pakistan in 2001. Minimum and above-minimum wages will be ensured on the basis of equal pay for equal work, and equal pay for work of equal value, as between men and women, in accordance with Pakistan's obligations under ILO Conventions 100 and 111 concerned with equality and non-discrimination respectively. Women will also benefit from better information concerning their working conditions and arrangements in the informal economy, from improved maternity arrangements, codes of conduct relating to sexual harassment and, where possible, day care arrangements for their children. Similarly, the Government is also committed with providing women with equal opportunities for employment and will re-examine existing legislation to ensure that women are not denied access to suitable jobs that are arising due to Pakistan's changing labour markets.

15. While considering the above policy this Court is also obliged to appreciate the international standards provided in different conventions. The details of same are as under:

01. Convention on the Rights of the Child (CRC):

Adopted on 20th November, 1989.

Pakistan has ratified CRC on 12th November, 1990.

Article 18:

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

02. Universal Declaration of Human Rights (UDHR):

proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

Article 25:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment,

sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. *Motherhood and childhood are entitled to special care and assistance.* All children, whether born in or out of wedlock, shall enjoy the same social protection.

3. **International Covenant on Economics, Social and Cultural Rights (ICCPR):**

Adopted on 16th December, 1966, by General Assembly resolution 2200A (XXI)

Pakistan has ratified ICCPR on June 23, 2010.

Article 10:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. *Special protection should be accorded to mothers during a reasonable period before and after childbirth.* During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits

below which the paid employment of child labour should be prohibited and punishable by law.

4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):

Adopted on 18th of December, 1979, by United Nations General Assembly.

Pakistan has ratified CEDAW on 3rd December, 1996.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
 - (a) The right to work as an inalienable right of all human beings;
 - b. The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
 - c. The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
 - d. The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
 - e. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

- f. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
 - (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
 - b. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
 - c. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
 - d. To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

16. Now adverting towards need of the hour qua the establishment of child daycare center, which are essential for the working parents, who leave their children at the mercy of other family members or servants, who are not professionally trained to provide a care and to supervise the child. It is very difficult for the working mothers and even for fathers being a single parent to achieve his personal life goals for his betterment as well as for his family members while leaving the child at the mercy of others. In such scenario, the

global practices allow recognition of childcare centers provided by the State as well as in a joint venture with private entities through an institutionalized manner, where high quality childcare service contributes the peace of mind to the employees/parents. In present times, it is mandatory to establish the childcare centers in every vicinity as well as in every establishment to provide safeguard and to ensure the protection of family, mother and the child including the protection of marriage, which is the State responsibility, similarly State has to take such steps for full participation of women in all spheres of life, so that they may not be excluded or marginalized from all opportunities at national and regional level on the basis that they are working mothers.

17. It is also noted with great concern that state has to provide all facilities to working mothers or parents, who are not able to properly maintains their minor children due to non-availability of daycare facility for establishment of childcare center in different areas, establishment or institution due to the fact that plots have not been specified for childcare in Islamabad Land Disposal Regulation, 2005, despite the fact that those regulations have been made by the CDA in terms of the powers conferred under Section 51 read with Section 49 of the CDA ordinance, 1960 unless a land has been classified in Chapter II of classification of plots provided in the Islamabad Land Disposal Regulation, 2005. The status of daycare facility on any residential building as well as its related business activity could not be considered legally justified to run such facility by any individual, though on plain reading of Regulation 3(3) of the Islamabad Land Disposal Regulation, 2005, the daycare facility falls within the concept of community buildings like Educational Institution, Hospitals, Dispensaries, Maternity Homes etc., therefore, CDA being the custodian of any scheme under Sections 11 and 12 of the Ordinance is empowered to include the daycare facility/center in the Islamabad Land

Disposal Regulation, 2005 in accordance with their Board decisions by settling the criteria of such plot, if such plot has been provided by the CDA, thereafter, the next step should have been taken by the MCI in terms of powers conferred under Section 73, which deals with the functions of Metropolitan Corporation to recognize daycare service / facility / profession under ICT, Local Government Act, 2015, accordingly.

18. The above referred discussion lead to irresistible conclusion that Constitution of Islamic Republic of Pakistan, 1973, acknowledges the concept of promotion of social justice in terms of Article 37 (e), where the state is under obligation to make provisions for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment, therefore, while looking from different angle the state is under obligation to consider the Conventions on the Rights of Child (CRC), Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), whereby, all these conventions have been ratified by the state of Pakistan and in this context Article 37 (e) of Constitution of Islamic Republic of Pakistan, 1973, has to give effect in shape of separate legislation or in shape of policy as discussed in above paras, where Labour Policy, 2010, acknowledges the application of ILO conventions in which international labor standards provides a daycare center / childcare facility in every residential area, establishment, office, organization, company as well as in the judicial hierarchy including District Courts, High Courts, etc. where such facility has to be provided accordingly so that all working parents, especially, the rights of mother and the child be given protection.

19. In view of above, instant writ petition is **DISPOSED OF** with the observation that Federal Government shall take all necessary steps for establishment of the childcare facility in public and private institution within ICT.

20. The Capital Development Authority shall initiate a study on the growing needs for establishment of Daycare Center in ICT and thereafter shall submit their proposals before the CDA Board for inclusion of childcare in the classification of plots under Islamabad Land Disposal Regulation, 2005 and may also formulate the necessary regulations to deal with the facility in a proper manner.

21. The Metropolitan Corporation, Islamabad shall also devise a mechanism and study for childcare center facility in terms of Section 73 of the ICT Local Government Act, 2015 and may include such facility in the third schedule accordingly. The MCI shall also notify the required rules to regulate such facility within every residential area, establishment in ICT including but not limited to Government Offices, Private Companies, Courts, Chief Commissioner Offices, Schools, Factories etc.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE

RAMZAN

Approved for reporting.