

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI.
Suit No. 1634 of 2016

DATE: ORDER WITH SIGNATURE(S) OF JUDGE(S).

1. For Hearing of CMA No.10497/2016.
2. For orders on Nazir's Report dated 23.07.2016.

02.08.2016

Mr. Muhammad Zahid Khan, Advocate for the Plaintiffs.
Mr. Abdul Qadir Khan, Advocate for the Defendants.

Pursuant to the Court's order dated 25.07.2016, the counsel are present and after having exchanged documents with each other as well as having examined the comments of Defendant No.1 submit their readiness to proceed.

Opening his line of arguments, the learned counsel for the Plaintiff contended that the Plaintiff has constitutional and legal right to peaceful enjoyment of his residence and the intended use of the premises (physically attached to his boundary wall) for running a school by defendant No. 3 & 4 is not only contrary to the terms of the lease imposed by the Lesser (Government of Pakistan) to the later, as well as, the school intended to run on a commercial basis without having regard to the difficulties to be faced by the inhabitants of the vicinity would be source of nuisance that cannot be justified for any reason.

The learned counsel relied on the case reported as 1992 CLC 2540, where the Hon'ble Court in similar circumstances held that the operation of schools in the residential area not only causes nuisance as well as such establishments are harmful and aimed to cause loss to the property of the Plaintiff in question. The learned

counsel also placed before this Court an unreported judgment passed in Suit No.1353/2009, where the Court reached to a conclusion that in similar circumstance, establishing or commencing schools in a residential neighborhood is violation of law and rights of privacy of the Plaintiff and accordingly dismissed the injunction in favour of the Plaintiff.

The learned Counsel for the Defendants No.3 & 4 vehemently contested the above view and argued in favour of his clients and contended that the request present before this Court for the grant of injunction may be declined as the court has to consider the pre-requisite of such grant by examining Plaintiff's prima-facie case, balance of convenience as well as irreparable losses. The learned counsel submitted that right of enjoyment of property are subject to restriction which can only be imposed by the lessor and not by the land owner (the plaintiff). In support thereof the learned counsel cited the case reported as 1993 SCMR 1559.

The bone of contention of the learned counsel was that due to the changing commercial realities and in recent times, the nature of the neighborhood where the Plaintiff resides has changed from purely residential to commercial and semi-commercial. To support this view, the learned counsel submitted photographs of a number of commercial units operating in the neighborhood and the counsel contended that it is unfair that the defendants be restrained from operating school in those premises where the locality has drastically changed its character and land-use. The learned counsel submitted that it will cause irreparable loss to the Defendants, who have already advertised opening of the said school and a number of admissions have also taken place and at this stage people at large

would be burdened if an injunctive relief against opening of the school is granted by this Court. The counsel in support of his assertions relied upon PLD 2011 571, 1994 CLC 844 as well as 2011 CLC 1866, where per counsel, Courts rescued the schools already operating in the neighborhood and did not pass any order in favour of the neighbors who objected to the continued operation of those schools in their respective localities. The learned counsel also submitted that the schools are not totally commercial enterprises in nature and they are performing a much needed social responsibility of imparting education, therefore, Court is requested to take a lenient view of opening of a school in a residential community. The learned counsel submitted that balance has to be struck down between the constitutional rights of the owners of the property to their peaceful enjoyment thereof *viz-a-viz* the mushroom growth of commercial enterprises in the neighborhood which has not remained purely residential with the passage of time.

Heard the consul and perused the documents submitted by various parties. The fact remains that the land-use as envisaged and designated by the founding fathers and planners of the city in relation to the neighborhood in which plaintiff and the defendants reside is purely residential in nature. Consequently if a party who intends to change such a use to commercial or semi-commercial, may do so as to its own costs and consequences as long as such misuse is not challenged by the neighbors or any other whistle-blowers. Such change of land-use by mutually consenting private parties who may have specific reasons to let it happen, would definitely not be used against other neighbors who challenge the same and take a view that such change of land-use besides being a violation of the lease-hold rights is also calculated to cause nuisance

and would result in breach of privacy of the neighborhood and it will effect environment and right of life of the people living in that neighborhood. In such situations if aggrieved persons or other whistle-blowers take a legal course, Courts will always come forward to give protection to those whose legal and constitutional rights are effected by such misuse. In such circumstances, the onus shifts to the defendant who has to show that it has a prima-facie case, balance of convenience is in its favour as well it will suffer irreparable losses from any intervention of the Court. Such view has been upheld in the cases reported as 2013 MLD 1388, 1999 CLC 66 and 1996 PLD 442 where courts held that neighboring residents are entitlement to object and seek injunction against the intended nuisance to be caused by opening a school in residential area which per Court, is calculated to infringe the personal rights of the petitioners. Courts have also held that while right to property is a recognized right, yet such right should not be misused so as to harm any citizen and such right was always subject to reasonable restrictions imposed by law. In similar circumstances, courts reached to the conclusion that neither owner nor tenant be allowed to convert any residential property into that of commercial enterprise even by opening or establishing of a school therein and further held that plaintiff has in general a prima facie case to seek injunction against a threatened injury to its rights inasmuch a school was yet to be opened and established in its neighborhood and such act of opening and establishing of school in residential area does fall in the definition of private nuisance and persons living in the immediate neighborhood or even in vicinity thereof were entitled to enforce their right of quiet enjoyment of their properties by seeking to restrain somebody or anybody living in the same area for disturbing the peace and

tranquility thereof, by opening and establishing school in residential neighborhoods. In the given circumstances, merely relying on the altered character of the neighborhood, to my mind, one cannot, at the cost of neighbors be allowed to become a party to such illegality and cause, inter alia, irreparable loss to plaintiff's rights.

To me it is very clear that the Defendants have failed to convince this Court that such use of residential premises by way of opening of school thereon can go unchallenged by a court of law. I am, therefore, not impressed with assertions made by the counsel for the Defendants during the course of the arguments and in particular when I have completely distinguished each and every case-law cited by the learned counsel for the Defendants during the course of the arguments and pointed out the differences between facts and the legal rationale present in those cases, and the case in hand.

Last but not least, while having fully concluded the arguments, the counsel for the Defendants submitted that the Plaintiff has not filed any rejoinder, therefore, his counter shall be deemed to have been admitted by the Plaintiff. At this juncture, the learned counsel for the Defendants was cautioned that the instant application is heard today on the urgent motion of the Defendants only and in the last hearing, it was decided that the matter would be heard and documents be exchanged between the counsel before this hearing. While the counsel for the Plaintiff reserved his rights, he verbally denied the assertions of the learned counsel of the Defendants in toto. Further, as a last leg of his arguments, the learned counsel for the Defendants also submitted that schools are not declared as commercial use as per the Sindh Building Control Regulations. This view of the learned counsel does not hold any merit either because

even if for the sake of arguments such is the case, the Building Control Regulations will only consider schools being non-commercial entity from the point of view of building construction and this view will not in any way be deemed to deter the constitutional rights of the Plaintiff of his peaceful enjoyment of the property.

I, therefore, allow the injunction application and restrain the Defendants No.3 & 4 from settling or running the school in question at the residential piece of land bearing House No.31-B, Block-6, P.E.C.H.S., Karachi.

To come up on 18.08.2016.

Judge