

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1425 of 2016

Muhammad Ali Barry ----- Plaintiff

Versus

Muzaffar Ali Shah & Others ----- Defendants

- 1) For hearing of CMA No. 10231/2016.
- 2) For hearing of CMA No. 9453/2016.
- 3) For hearing of CMA No. 11088/2016.

Date of hearing: 25.01.2017.

Date of Order: 10.02.2017.

Plaintiff: Through Mr. Shaikh Jawaid Mir Advocate.

Defendant
No. 1 Through Mr. Taimur Ali Mirza Advocate.

Defendant
No. 2 Through Mr. Khawaja Shamsul Islam
Advocate.

ORDER**ORDERS ON CMA NO. 10231/2016 & 9453/2016.**

Muhammad Junaid Ghaffar, J. This is a Suit for Permanent Injunction and Damages whereby, the Plaintiff has challenged running of a School by Defendants No.1 and 2 on a residential premises. CMA 9453 of 2016 is an Application under Order 39 Rule 1 and 2 CPC filed by the Plaintiff, whereas, CMA 10231 of 2016 is an application filed by Defendant No.1 under Order 39 Rule 4 CPC for vacating / recalling of order dated 6.6.2016, whereby restraining orders were passed.

2. Precisely the facts as stated are that it came to the knowledge of the Plaintiff on or about 4.1.2016 that some renovation work is being carried out on Plot No. 308, Bahadurabad, Karachi ("Suit Plot") and thereafter, some signboard was also affixed which showed that a School is about to be run in the name and style of **VERITAS**

LEARNING SCHOOL. It is the case of the Plaintiff that they approached the Regulatory Authorities, including Sindh Building Control Authority (“SBCA”) and though initially some action was taken by the officials; but thereafter, the renovation work continued and the Plaintiff as well as other residents including SHEHRI filed a Constitution Petition bearing C.P. No. D-985/2016 against alleged illegal opening of the School. It is further stated that it came to the knowledge of the Plaintiff that Defendant No.1 also filed a Suit No. 396/2016 before this Court and thereafter, the Petition was withdrawn and instant Suit has been filed.

3. Learned Counsel for the Plaintiff has contended that admittedly the Suit plot is a residential plot and no commercial activity like running of School is permitted. He has further contended that no official permission for any conversion has been obtained, whereas, the running of School is causing nuisance and difficulty for the Plaintiff to reside in the same vicinity as the School is just across the plaintiffs house. In support of his contention he has relied upon *Ardeshir Cowasjee and 9 others V. Muhammad Naqi Nawab and 5 others (PLD 1993 Karachi 631)*, *Lahore Grammer School (Pvt.) Limited and another V. Mst. Hameeda Begum and another (PLD 1996 Lahore 442)*, *Brookes Pharmaceutical, Laboratories (Pakistan) Ltd., Karachi V. Karachi Building Control Authority (KBCA) and 5 others (2012 CLC 131)*, *Mrs. Nasreen Tariq V. Abdul Basit and 2 others (2013 MLD 1388)* and *Mrs. Farah Hamayun Shehzad Baloch V. Federation of Pakistan and 3 others (2014 CLC 1158)*.

4. On the other hand, learned Counsel for Defendant No.1 has contended that no commercial activity is intended to be carried on the Suit plot as imparting education is not a commercial activity. He has further contended that the School in question is for special children who do not have any opportunity to attend Schools and therefore, this aspect must be considered while deciding the injunction application. He has further submitted that it is for a good and just cause for special type of children and in fact is a Social Welfare project. He has submitted that balance of conveyance lies in favour of the children as they would be deprived from getting their right to education. Per learned Counsel the area in question is not purely a residential area anymore as a lot of commercial activity including Schools is going, on therefore, the Plaintiff cannot pick and choose. He has also referred to various letters issued by the neighbours who according to the learned Counsel have not objected and have rather consented for running of this School, as it has a welfare element. He has further submitted that in terms of Karachi Building and Town Planning Regulations, 2002, Defendants No. 1 and 2 have approached the Master Plan Department for conversion of this property; however, due to pendency of this litigation no final order has been passed. In support he has relied upon *Dr. Shahzad Alam and 2 others V. Beacon Light Academy and 5 others (2011 CLC 1866)*, *Sh. Muhammad Naseem and others V. Al-Murtaza Society and others*

(2003 CLC 627), Sindh Educational and Welfare Society V. Pakistan and others (1994 CLC 844).

5. Similarly, Counsel for Defendant No.2 in addition to adopting the arguments of Counsel for Defendant No.1 has contended that the Plaintiff has claimed nuisance which the Plaintiff must prove through evidence, and therefore, no injunction can be granted. He has further submitted that the aforesaid Petition was filed by at least 9 persons and after withdrawal it is only Plaintiff who has come before this Court which reflects malafide and vendetta on the part of the Plaintiff. He submits that the Defendants have also filed a Suit bearing No. 396/2016 for conversion and regularization of the Suit plot but at the behest of Plaintiff and due to pendency of these cases, the official regulators are not deciding their application. Learned Counsel has read out Sections 12 and 15 of the Easement Act and has contended that such right has to be specifically pleaded which the Plaintiff has failed, therefore, no case for an injunctive relief is made out. Per learned Counsel the Court must act as a Court of equity and considering the fact that this is no ordinary School but for special children, therefore, the balance of conveyance must yield in favour of Defendants and the children therefore, in junction application be dismissed.

6. While exercising his right of rebuttal, learned Counsel for Plaintiff has contended that first of all it is not a functional School and was under renovation when status quo order was passed, therefore, no prima facie case exists in favour of the Defendants. He has further contended that insofar as other commercial activity and running of School is concerned, two wrongs do not make a right and the inconvenience which is being caused to the Plaintiff and other residents is evident from the facts so pleaded, and therefore, the Defendants be permanently restrained from carrying out any such activity.

7. I have heard all the leaned Counsel and perused the record. Insofar as the facts as stated above are concerned, there do not appear to be any dispute to the effect that the Suit plot is a residential plot and for which an application has been filed by Defendants No. 1 and 2 for regularization and conversion enabling them to run a School. Though there is a dispute with regard to the fact that Suit plot and the Plaintiff's house are not in one Society and therefore, it is the case of the Defendants that Plaintiff cannot be aggrieved by running of School. However, this appears not to be a case whereby the Plaintiff can be non-suited on this ground, alone. The Defendants further case is that since the School being run is for special children, and therefore, this Court while deciding the injunction application must consider this fact as a Court of equity. Further, it is not in dispute that till today the Suit plot is a residential plot, though an application for conversion and regularization is pending, but for one reason or the other, including pendency of the litigation between the parties, is yet to be decided. The arguments that

since this is a School for special children and therefore, the Court must show some leniency or consideration while deciding the injunction application does not appear to be convincing. The Court has to decide the issue after considering the applicability of law as well as the facts and circumstances of the case. The Court cannot and must not pick and choose on its own. The element of inconvenience and the illegality in running of School on a residential plot cannot be ignored or kept aside. It is also important to observe that law i.e. Karachi Building & Town Planning Regulations 2002, (“KB&TPR 2002”) provides running of an educational institution on a residential premises under Regulation 18-4.2.8. However, the same requires an approval after a proper procedure which is yet to be followed in this case. Though the learned Counsel for Defendants No. 1 and 2 have placed on record the no objection letters of various other neighbors, but then again they may be of help while deciding the issue of conversion before the regulatory authorities; however, the same at the moment cannot be considered by the Court to refuse injunctive relief to the Plaintiff. The Plaintiff’s claim is that the Suit property is just opposite his house and running of School is a cause of inconvenience and nuisance. Though the Defendants have made an attempt to refute this allegation, however, since it is admitted that a School is being run or about to run, then the same cannot be ignored by the Court so lightly. The plaintiff has also placed reliance on Nazir’s report dated 27.04.2016 filed in petition No. D-985/2016, which apparently support the plaintiff’s assertions.

8. I have had the occasion of dealing with a case in respect of a School being run by an organization on a commercial property situated in DHA in the case of *The City Schools (Private) Limited v. The Federation of Pakistan & Others* (Suit No. 2108/2016) and while dismissing the injunction application vide order dated 5.12.2016 I had considered the implication of the benefits of running Schools and the right to education as a public service. The relevant observations are as under:-

“15. There is another aspect of the matter and time and again in such matters has been brought to the notice of the Courts that right to education is public service, whereas, such issues must always be examined and dealt with by considering the overall benefit to the Society. Perhaps there is no cavil to such proposition that running of Schools in any locality is normally useful and beneficial and if the inconvenience caused is minimal and can be absorbed without much hassle, then the benefit of permitting and running such Schools may be allowed to outweigh the burden and inconvenience, if any. I am also mindful of the fact that in this city we do not have much existing facility overall, and for Schools and educational institutions; there is great scarcity of space. This is unfortunate, but again this can hardly be a ground to allow running of Schools against basic and mandatory covenants of the lease of such plots. Such condonation by the Courts is impermissible and it is only the lessor who can permit such conversion according to the lease conditions and the applicable laws.”

9. It is again a settled proposition that two wrongs do not make a right and therefore, insofar as running School in other properties is concerned, the Defendants cannot take any benefit out of it. If any authority is needed one may refer to the case of *Ardeshir Cowasjee and 9 others v. Muhammad Naqi Nawab & 5 others (PLD 1999 Karachi 631)* and *Arif and others v. Jaffer Public School (2002 MLD 1410)*

10. The argument of both the learned Counsel to the effect that this case must be decided by considering the fact that School being run is for special children as a Social Welfare project yielding balance of convenience in their favor is concerned, I may observe that this sounds attractive and so also somewhat emotional, but Courts are not required to decide cases on the basis of emotions. The decisions are to be given on the basis of mandate of law. The Court is duty bound to apply the law, come what may, as sometimes the law may not permit something which ought to have been, but there is very the little the Court can do about it, for it is and should be emphatically the duty of the Court to apply it, but not rewrite what has been enacted by the law makers / competent authority. The Court must not reach a decision which it likes, but must try to reach a decision which law compels. And this is the way a Civil Court (like this Court) must work as no doubt the Court might reach to a decision it dislikes, but believes that the law demands it. This is the only way the Court can only be admired. The situation in hand though requires adopting law to changing circumstances, but then it is not for the Court to legislate, but for legislature to do so. The decision makers are required to adopt law as it is, but not as they wish to be.

11. Having said that again the law is not silent or without remedy in the current situation. It does provide in Regulation 18-4.2.8 of the KB&TPR 2002, that residential plot within a residential neighborhood can be allowed to be used for education provided that the plot faces minimum width of road 60 ft. and lawfully converted into an Amenity plot for education by the MPMGO as per prescribed procedure after inviting public objection from neighborhood. It appears that such request of defendants is already pending with defendant No.6, whereas, such application has been regretted by the Master Plan Department of SBCA vide its letter dated 22.3.2016 due to pending litigation between the parties through this Suit as well as Suit No.396 of 2016. In the circumstances it would be fair, just and in the interest of justice and equity that directions be issued to Master Plan Department (SBCA) to attend to the pending application of defendants, without being influenced by any order(s) of the Court either in this Suit or in Suit No.396 of 2016.

12. In view of hereinabove facts and circumstances of this case, the applications at serial No. 1 and 2 are disposed of by directing the Master Plan Department, Sindh Building Control Authority, before whom the application of Defendants No.1 and 2 for conversion and regularization of change of Land Use shall be deemed to pending and shall be decided within a period of 45 days from passing of this order in accordance with law, whereafter, the parties may seek their remedy as may be advised. Till then the interim order dated 6.6.2016 shall remain operative. Both the applications stand disposed with the above observations.

Dated: __.02.2017

J U D G E

ARSHAD/