IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 44 / 2016

Plaintiffs:	**Mrs. Rozina Ali & another through Mr. Ishrat Alvi along with Mr. Mubeen Lakho Advocates.**
Defendant No. 1 & 2:	**Karachi Metropolitan Corporation through Mr. Mehmood Sultan Khan Yousufi Advocate.**
Defendant No. 4:	**The Cantonment Executive Officer through Mr. Abdullah Munshi Advocate.**
Defendant No. 5:	**Tariq Hussain through Mr. Jamal Bukhari Advocate.**
Defendant No. 6:	**Cedar Private Limited through Mr. Haider Waheed alongwith Mr. Ahmed Masood Advocates.**

1) For hearing of CMA No. 250/2016.
2) For hearing of CMA No. 3405/2016.
3) For orders on Nazir report dated 10.4.2017.

SUIT No. 841 / 2016

Plaintiff:	**Cedar Private Limited through Mr. Haider Waheed alongwith Mr. Ahmed Masood Advocates.**
Defendant No. 1:	**Tariq Hussain through Mr. Jamal Bukhari Advocate.**
Defendant No. 2:	**The Cantonment Executive Officer through Mr. Abdullah Munshi Advocate.**

1) For hearing of CMA No. 5688/2016.
2) For hearing of CMA No. 16712/2017.
3) For hearing of CMA No. 16713/2017.

Date of hearing: 28.03.2018.
Date of order: 04.05.2018.

O R D E R

Muhammad Junaid Ghaffar, J. *Suit No.44/2016* has been filed by a resident of House No.12/1 Block 9, Clifton, Karachi, primarily against Defendant No.6 who is running an A-level School /College in the Suit premises bearing House No.F-11 Block 9, Clifton, Karachi. ***Suit No. 841/2016*** has been filed by the College (tenant) against the owner of the property (Landlord) as well as Clifton Cantonment Board, subsequent to filing of Suit No. 44/2016. In Suit No 44/2016 on 9.1.2016 an order was passed by this Court directing the parties to maintain status quo and subsequently, in Suit No.841/2016

on 8.4.2016 the notice issued by Defendant No.2 dated 5.4.2016 for shutting down the College was suspended. The pending applications in both these Suits have been heard together and are being decided through this common order. For ease of reference, the Plaintiff in Suit No.44/2016 would be hereinafter referred to as "**Plaintiff**", whereas, the Plaintiff in Suit No.841/2016 who is Defendant No.6 in Suit No. 44/2016 would be referred to as "**Defendant No.6**" for the purposes of both these Suits.

2. Briefly, the facts as stated are that Plaintiff is resident and owner of House No. F-12/1 Block 9, Clifton, Karachi and is aggrieved with the act and conduct of official Defendants as well as Defendants No. 5 and 6 for running a College in property bearing No. F-11 Block 9, Clifton, KDA Scheme No. 5, Karachi which is just adjacent to the Plaintiff's house. This according to the Plaintiff is without lawful authority and is a matter of inconvenience as well as nuisance. Learned Counsel for the Plaintiff has contended that this Suit was filed on 9.1.2016 and at the relevant time it was only the renovation work on the Suit premises which was going on, and upon inquiry, it came to the knowledge of the Plaintiff that some College is being opened. However, the Plaintiff was then unaware as to who will be running the College and therefore, it was only Defendant No.5, the owner of the property, who was arrayed as a Defendant. He has further contended that as soon as the construction/renovation started, a legal notice was issued on 26.3.2015 wherein, it was categorically stated that the property in question on the basis of the covenants of the Lease can only be used for residential purposes, and therefore, the Defendant No.5 was called upon to halt / desist and cease operations of any nature towards establishing and running of any School or College. Learned Counsel has also referred to Regulation 18-4.2.2 of the Karachi Building & Town Planning Regulations, 2002, which according to the learned Counsel, provides that a residential plot can only be allowed to be used for educational purposes provided the plot faces a road which has a minimum width of 60 feet which is not the case in this matter. Per learned Counsel, neither the property in question has been converted for any such purposes; nor in law could it be done so. According to the learned Counsel, subsequently, it transpired that Defendant No.5 has entered into a rental agreement with Defendant No.6 who were thereafter, arrayed as a Defendant and an amended title was also filed vide order dated 16.3.2017 and according to the learned Counsel, in the very agreement the owner has agreed to let out the said premises on rent to establish and run educational institution on commercial basis on the terms and conditions mentioned therein. This according to the learned Counsel could not have been done so as the law does not permit usage of a residential property for commercial purposes. As to causing inconvenience and nuisance, learned Counsel has contended that hundreds of students have been admitted after passing of interim order, whereas, this is a continuous cause of nuisance in the shape of use of loudspeaker, heavy traffic, unwanted people coming in and out in the area, and therefore, the Plaintiff has made out a prima facie case hence,

the ad-interim injunction granted be confirmed by directing Defendant No.5 & 6 to close the College in question, whereas, the application of Defendant No.6 in the connected Suit be dismissed.

3. On the other hand, learned counsel for Defendant No. 6 has contended that insofar as the objection regarding conversion of the property in question for commercial purposes is concerned, the same is misconceived inasmuch as it is only the usage of the property which has changed and not the status of it being residential. Learned Counsel has further contended that though the Lease of the property has been issued by KDA; but that is only concerned with Town Planning, whereas, in terms of Section 3 & 5 of the Cantonment Act, 1924, read with Notification dated 2.3.1983 for all municipal purposes the property falls within the limits of Cantonment Board Clifton; hence, the covenants of the Lease in question would not be relevant for deciding the present controversy. According to the leaned Counsel, it is the Cantonment Board Clifton Building Bye-laws, 2007 issued on 3.2.2007 which would be applicable and pursuant to Rule 125(7) a residential plot within a residential neighborhood can be allowed to be used for education purposes by the Board after inviting public objections from neighborhood. Therefore, according to the learned Counsel, no commercial conversion has been made and the property is still residential in nature; but it is only the usage which is of prime consideration and as per the byelaws itself, it can be used for educational purposes; hence, there is no illegality in running the institution by Defendant No.6. Learned Counsel has further contended that though he is not in possession; but there is some resolution of the Clifton Cantonment Board pursuant to Byelaw No.125(7), which permits such usage. He has further contended that there are at least 17 other Schools within the same vicinity, whereas, once the law permits such usage, then the Court must show grace and issue directions for grant of such permission, and even conversion. Per learned Counsel, it is the case of the Defendant No.6 that it was established on the Suit premises on 1.7.2014 and was admittedly in existence much prior to the passing of status quo order. He has further contended that it is a matter of evidence for the Plaintiff to prove that its right as an individual has been infringed and nuisance has been caused or not, and therefore, at the injunction stage, no such relief as prayed could be granted. Learned Counsel has further contended that the plaint does not specifically states the cause of nuisance and its detail(s) and therefore, it would be in the fitness of things that a Commissioner be appointed to inspect the entire area as it is only the Plaintiff's house which stands along as a residential house. Per learned Counsel at least 1300 students are attending the College since long, whereas, earlier no objections were raised and Defendant No.6 as a responsible institution is managing the timings of the classes and is not having any afternoon or night shifts, and therefore, balance of convenience lies in favour of Defendant No.6. He has further contended that proper traffic management is being done with the assistance of the concerned traffic police,

whereas, even otherwise, if directed, Defendant No.6 undertakes to ensure taking all further steps to redress the grievance of the Plaintiff, if any. As to the applicability of a recent decision passed by the Hon'ble Supreme Court reported as ***2018 SCMR 76 (Mst. Yawar Azhar Waheed through L.Rs. V. Khalid Hussain and others)*** and relied upon on behalf of Cantonment Board, learned Counsel has contended that the same does not apply to the facts of this case, as it is only in respect of a Scheme floated / initiated by the Cantonment Board itself, and according to the Judgment of Hon'ble Supreme Court, no commercial building can be raised and approved on a residential property, whereas, in this case the property in question is still residential and no conversion has been made nor any commercial activity is being carried on. Learned Counsel has also read out Section 179 and 181 of the Cantonment Act, 1924 and has contended that since this scheme was initially launched by KDA, hence, the restrictions in law of Cantonment are also to be applied in consideration of such fact only. He has also relied upon ***2011 CLC 1866 (Dr. Shahzad Alam and 2 others V. Beacon Light Academy and 5 others)*** which is an order passed by a learned Single Judge of this Court in respect of a School being run in a residential area, wherein, the injunctive relief was refused against the School. According to the learned Counsel, this reported case is a complete answer to the core issue in this matter, and the learned Single Judge has considered all such objections as are being raised in this case, as to whether, but not limited to, any nuisance, inconvenience, prima facie case, balance of convenience, irreparable loss, and finally, the most important issue of scarcity of suitable plots for establishing educational institution in the city of Karachi. In view of such facts, learned Counsel has prayed for dismissal of plaintiffs applications and granting the application of Defendant No.6.

4. Learned Counsel for Cantonment Board Clifton, the Defendant No.4 in Suit No. 44/2016 and for Defendant No.2 in Suit No. 44/2016 has contended that insofar as Suit No. 44/2016 is concerned, on 9.1.2016 an interim order was passed and parties were directed to maintain status quo; however, Defendant No.6 in its Suit No. 841/2016 also obtained an interim order dated 8.4.2016 whereby, notice issued by Cantonment Board in this context was suspended. But according to the learned Counsel, Defendant No.6 concealed material facts inasmuch neither the present Plaintiff was arrayed as a Defendant in its Suit, nor it was properly disclosed to the Court that already there is a status quo order against the Defendant No. 6. Learned Counsel has contended that the owner of the property in law has no right or justification to rent out the same for commercial purposes, whereas, Cantonment Board was, and is, acting in accordance with law against all such persons who are using their properties in violation of their bye-laws. Per learned Counsel insofar as bye-law 125(7) is concerned, neither any application has been made to the Cantonment Board, nor for that matter, could have been considered by the Board itself in view of an admitted objection by the next door neighbor who is already before this Court as a Plaintiff in Suit No. 44/2016. Per learned

Counsel bye-law 2(v) defines an amenity plot, which means a plot allocated exclusively for the purposes of amenity which includes education uses, whereas, bye-law 2(l) defines residential zone. Learned Counsel has finally submitted that since students are studying, therefore, Defendant No.6, while granting application of plaintiff for injunction be given sufficient time to vacate the premises so that no inconvenience is caused to the students. In support he has relied upon ***PLD 2004 SC 633 (Islamuddin and others V. Ghulam Muhammad and others), PLD 1976 SC 785 (Muhammad Ilyas Hussain V. Cantonment Board, Rawalpindi).***

5. Learned Counsel for Defendant No.5 in addition to adopting the arguments of the learned Counsel for defendant No.6, has relied upon ***2005 YLR 1895 (Messrs Shaheen Service Station V. City District Government, Karachi and others)*** and has contended that the Karachi Building & Town Planning Regulations, 2002 do not apply and it is only the Cantonment Byelaws 2007 which are relevant. He has further contended that an application for such conversion has already made, though he is not in possession of any such application nor it has been placed on record. Per learned Counsel the entire area is being used for commercial purposes, whereas, the Plaintiff itself is running a clinic from his home. He has also relied upon ***Dr. Shahzad Alam supra.***

6. While exercising the right of rebuttal learned Counsel for the Plaintiff has contended that the first legal notice was issued on 26.3.2015 and admittedly no such College was established and only some renovation work was being carried out; therefore, the contention that the College was already operating is misconceived. He has further contended that even a public notice was published in the newspapers on behalf of the Plaintiff on 9.1.2016 but the same was also ignored and in clear disobedience to this Court's order, the Defendant No.5 & 6 in connivance, have opened the school and are still continuing with the same which is also a contempt of Court.

7. I have heard all the learned Counsel and perused the record. Facts have already discussed in detail; however, for the sake of repetition, it may be observed that it is not in dispute that Defendant No. 6 is using the Suit premises for running a College. Defendant No.6 is the tenant of Defendant No.5 on the basis of a Tenancy Agreement dated 15.1.2015 which provides that "*whereas, the owner has agreed to let out said demised premises and the tenant have agreed to take the said demised premises purely on a rental basis to establish and run educational institution on commercial basis on the terms and conditions mentioned below*". The agreement of Defendant No.6 itself states that the Suit property has been acquired on rent for running the College i.e. the ***educational institution on commercial basis***. What more is needed to adjudicate that it is not being used for a commercial activity is unclear. The argument that it is only the usage of the premises for running an educational institution, which otherwise is permissible, is the moot question, does not appeals to this Court. A usage can't be

carried on without permissive covenants to that effect in the lease documents of a property. Once it is being used for any other purpose than permitted in the lease of the property, then it is immaterial as well as irrelevant to contend that it is only the question of usage, whereas, the property remains residential, and for such usage, no conversion is needed. This is totally absurd, unconvincing and an attempt of juggling of words as well. The Plaintiff is the next door neighbor of the Suit premises, and has come before this Court challenging the establishment and running of College in Suit premises which is admittedly a residential house. The precise case of the Plaintiff is that firstly no such commercial activity of running a College is permitted, whereas, even if it is permitted, then it is a case of inconvenience for the other residents. The learned Counsel for Defendant No.6 has made an effort and attempt to make a distinction between a commercial activity and usage. His case is that insofar as Defendant No.6 is concerned, they are in occupation of a residential premises which has not been converted into a commercial premises as no changes of whatsoever nature have been made to make the premises inhabitable for commercial activity. According to the learned Counsel, such usage of the premises for educational purposes is not a commercial activity, whereas, it is permitted under Bye-law 125(7) ibid. However, with utmost respect, I may observe that the same is misconceived. It is not in dispute that the College is being run on commercial basis which is clearly stated in the tenancy agreement. Even otherwise, it is not conceivable that a business is being run for imparting education and it is not a commercial activity per se. Though an element of rendering service (i.e. education) is involved, but rendering of education in this manner is purely commercial and business oriented. It is not the case of Defendant No.6 that they are a charitable organization; or for that matter any subsidized or free education is being imparted for the residents of the area and other students. Therefore, the contention that their usage is not of commercial activity, does not appeal to a prudent mind as all along it is purely a commercial venture which is being run to make profit(s).

8. As to the applicability of Karachi Building and Town Planning Regulations, 2002 or the Cantonment Bye-laws is concerned, it may be observed that again it is an admitted position that the Suit property has not been converted under either of these two laws for commercial purposes. It is and it remains a residential house. Neither the formalities and procedure, as provided under the KB&TPR, 2002 has been observed, nor any such procedure under the Cantonment Byelaws has been adhered to. This is notwithstanding the fact that whether such procedure of conversion is applicable on the Suit preemies or whether it otherwise qualifies for conversion or not. Much reliance was placed on Regulation 125(7) of the Cantonment Board Clifton Byelaws 2007 notified through Notification dated 3.2.2007 which provides "*that residential plot within a residential neighborhood can be allowed to be used for education purpose by the Board after inviting objections from neighborhood*". Firstly, it was conceded that no such

application was ever submitted before the Cantonment Board before starting operations of the College. Even if such application was made, there isn't any question of entertaining the same and inviting public objections, as the immediate neighbor is already before the Court and an objection is already in field. In view of such position, even otherwise, the Cantonment Board could not have granted such permission; therefore, reliance placed on this Byelaw is even otherwise, misconceived.

9. Secondly, the learned Counsel for Defendant No.6 has contended that it is a case of nuisance; therefore, this could only be proved once evidence is led and no injunction can be granted. Learned Counsel also referred to the Judgment in the case of ***Dr. Shahzad Alam supra*** wherein, a learned Single Judge of this Court in a very detailed manner has discussed the pros and cons of running a School within a residential area, and after coming to the conclusion that though the three ingredients of granting an injunction are present; but refused to grant any injunction against running of a School in a residential area. However, firstly, it may be observed that the said Judgment is not a binding precedent being delivered by a Single bench of this Court and is only persuasive. Even otherwise, an appeal bearing HCA No.118/2011 was preferred against this judgment and by consent an order was passed whereby, the School agreed to vacate the premises within certain period of time, therefore, the impetus and the effectiveness of these observations have somewhat diluted, not capable of being regarded as a binding precedent anymore. Having said that, the same learned Judge subsequently in Suit No.1358 of 2009 vide order dated 10.5.2012 himself refused to follow the same dictum on the ground that the facts of earlier case i.e. ***Dr. Shahzad Alam supra*** were entirely different as in that case the School was being already run for a considerable period of time. Hence, on this account also the case of ***Dr. Shahzad Alam supra*** is not a binding precedent for all times to come and must only be considered in a case of identical facts, however, again that would be subject to limitation as already discussed hereinabove. Secondly, it may be observed that for the present purposes, it is not a case of nuisance only; but so also of running a College by contravening the Regulations and the applicable law. It cannot be said that if a person is aggrieved by the act and conduct of an immediate neighbor who is admittedly contravening the statute or law, that first the neighbor must prove through evidence that such act is an act of nuisance, and only then a relief of injunction could be granted. This proposition may be correct in a case wherein, the immediate neighbor's act is permissible in law; but once the act complained of is admittedly outside the ambit of law, and is a case of nuisance, per-se, then perhaps, the aggrieved person must not be asked to, or required to, prove it through evidence at the trial necessarily. This in my view is an important aspect of the matter, which must not be lost sight of by the Court while dealing with this question of nuisance at the injunctive stage. It is settled law that in case of nuisance the jurisdiction of the Court to grant injunction is also in aid of the legal right, one has, for enjoyment

and protection of its property. And when the injury or act complained of is of substantial nature, (it need not further be discussed that running of a School next to one's house causes substantial inconvenience, in addition to various other issues), it definitely cannot be compensated adequately by granting damages. Similarly, if it is of permanent nature as to mischief being caused, and is a recurring grievance, then it must be stopped by way of an injunction. The act complained of in this matter is infringement of the plaintiff's lawful rights arising out of an act which itself is wrongful, and would lead to consequences flowing further from it. It is also to be kept in mind that for defining certain act as nuisance for the purposes of an injunctive relief, the overall attending circumstances are to be kept in mind. Merely for the argument that no detail specifics have been mentioned in the plaint, the Court would not be denying the relief of injunction, when on the face of it there is a case of clear violation of law. The attending circumstances cannot be ignored as suggested. Here, in this matter, it is not in dispute, rather conceded that a College is being run in a residential house, for which Defendant No.6 has no permission or conversion for such use, either from the Sindh Building Control Authority, Karachi Development Authority, or for that matter from the Cantonment Board. In fact it is the case of Defendant No. 6 as well as Defendant No. 5 that they intend to approach the Cantonment Board under Regulation 125(7). Therefore, the argument that a case of nuisance could only be made out after a full-fledged trial is perhaps not relevant for the present purpose.

10. The other question that running of School or College having more than 1300 students and giving education cannot be termed as a commercial activity has been answered by a learned Division Bench of this Court in the case of ***Hussain Bux Memon v. Karachi Building Control Authority (2015 YLR 2448)*** wherein the learned Division Bench had the occasion to deal with somewhat similar situation, wherein, Respondent No.4 (College of Accounting and Management Sciences) was running an Accounting cum Business College in violation of lease conditions which provided that "*the sub-lessee shall not without the previous consent of the lessor divert the plot to use other than those which it is intended as per sanctioned lay out plan*" and the stance of respondent No.4 was that *right to education was concomitant to fundamental rights, and business education such as ACCA, BBA, MBA etc. was specialized education and such activity by no stretch of imagination be termed as commercial activity.* However, the same was repelled by the learned Division Bench by observing that;

> "10. On merits, there appears to be no denial that the present use of the subject property by the respondent No.4 is not only in violation of the terms and conditions of the lease but also lacks approval from the building control authority, as the present use of the building by the respondent No.4 is in gross violation of the Karachi Building and Town Planning Regulations, 2002. **Mr. Akhund has laid much stress upon the importance of education and exemption of educational institution**

> **from the application of building and or Town Planning Laws. The importance of education in our society or in any society cannot be ignored and perhaps the legislature itself while realizing such importance has allowed the educational institutions to impart education in a residential area but has laid a condition that such change of use is permissible in only those residential areas where the width of the road is 60 feet or more.** We for the sake of convenience would reproduce the text of Karachi Building and Town Planning Regulation 18-4.2.8 which reads as follows:--
>
> "Residential plot within a residential neighborhood can be allowed to be used for Education provided the plot faces minimum width of road 60 ft. and lawfully converted into an Amenity plot for education by the (MPG) as per prescribed procedure after inviting public objections from neighborhood:"
>
> 11. The wisdom of the legislature to permit the operation of an educational institution in a residential area on a road which is not less than 60 feet of course appears to be well gauged, ensuring to minimize the disturbance which in the circumstances would be caused by an, educational institution if situated on less than 60 feet road."

11. The aforesaid finding squarely applies on all fours on the facts of this case and the argument of the learned Counsel for Defendant No.6 that providing education does not fall within the term "commercial activity". Therefore, the argument that imparting education is a public service and cannot be equated with commercial activity is misconceived and is hereby repelled.

12. The learned Counsel for Defendant No.6 also made a submission, that since more than 1300 students are already studying, whereas, there appears to be no restriction in law, (at least permitted so to say under Byelaw 127(7) ibid), therefore, the Court must show grace and look at the case sympathetically. This argument may appear to be attractive, but at the same time the Court must not remain oblivious of the law in field. Once a matter is before the Court, like the one in hand, it is to be decided by the Court after considering the applicability of law as well as the facts and circumstances of the case in hand. The Court cannot and must not pick and choose on its own. The element of inconvenience and the illegality in running a College on a residential plot, without due conversion or permission, cannot be ignored or kept aside. In the case of ***Muhammad Ali Barry v Muzaffar Ali Shah*** (**Order dated 10.2.2017 in Suit No.1425 of 2016-unrported**) I had the occasion to deal with a case of a resident who had challenged the running of a School for special children nearby his residence. The argument of the behalf of the School was that since it was for special children, the Court must show grace, concession as well as leniency while deciding the injunction application. Such argument was repelled at Para 10 by me in the following terms;

> 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 (sic) 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.** (Emphasis supplied)

13. The argument that various other Schools and Colleges are being run in the same vicinity is also fallacious and misconceived as again it is a settled proposition that two wrongs do not make a right and therefore, insofar as running of 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**)

14. I have also 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*** (**2018 CLC Note 4**) and while dismissing the injunction application 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**

> **<u>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."</u>**

15. The other argument of the learned Counsel for the Defendant No.6 (and this was in response to reliance on judgment of the Hon'ble Supreme Court by the Cantonment's Counsel in the case of ***Mrs. Yawar Azhar Waheed supra***) is that the same is not applicable to the present facts, and to that I may observe that for the present purpose, it is not the judgment of the Hon'ble Supreme Court which is a cause of action for the Plaintiff and so also for this Court to decide. Apparently, it seems that the facts of this case are peculiar in nature. The area i.e. Block No.8 & 9 of Clifton, Karachi, is part of KDA Scheme No.5, and originally the land was developed and leased out by KDA. Thereafter, pursuant to SRO 207(I)/83 dated 2.3.1983, issued in terms of sub-section(1) of Section 3 of the Cantonment Act, 1924 it has been declared by the Federal Government to be the Clifton Cantonment for the purposes of the said Act and of all other enactments for the time being in force. The area in question is not for the above reason an area or scheme launched or developed by the Cantonment itself; but has been handed over to the Cantonment. This would mean that not all the land within the cantonment area necessarily belongs to the Federal Government. May be for military purposes, the authorities may declare that certain lands are within a cantonment area, so that the owners of lands within that area should be bound to conform to the rules of the cantonment in the exercise of their right of ownership of the lands or houses situate within that area. For example, the owners would be bound to take such steps for the purpose of sanitary, other municipal issue, building byelaws etc. But the question would remain that whether in the given facts the Cantonment Board would be within its right to even accord a change in the lease of the land / plot on the basis of its byelaws i.e. conversion (all sorts) from the original covenants. This I leave it open, as for the present purposes even Cantonment Board has neither been approached for that nor any such arrangement has been approved. Therefore, to the that extent I am in agreement with the argument of the learned Counsel for Defendant No.6, that the ratio of the Supreme Court Judgment is to be seen in the context of the schemes and areas launched and initiated by the Cantonment Board itself and not by virtue of any Notification in terms of Section 3 ibid. Moreover, a learned Division Bench of this Court in the case reported

as ***Zeeshan Builders v Karachi Building Control Authority*** (**1992 MLD 2259**) has already held that if an area which has been developed by KDA and pursuant to a Notification in terms of Section 3 of the Cantonment Act, 1924, has been notified to be an area falling within the Cantonment, then the provisions of Sindh Building Control Ordinance, 1979, would not apply insofar as building regulations are concerned, but would be more specifically governed by the provisions of Cantonment Act, 1924, and its rules and regulations. However, as stated this is not the issue before me that as to whether only this judgment is to be applied or not. Here a resident has come before this Court and has pleaded that firstly there is no conversion of the property in question for its usage as a College, and secondly the act of running a College in a residential house, itself is a matter of inconvenience. In fact I am of the view that for implementation of law and obedience to it, there isn't any requirement of judgment for the Government Functionaries. Once Legislature has enacted certain law, they are bound to be followed. And that is all. Therefore, to conclude, I may observe that in this case there are various other grounds already discussed hereinabove, therefore it is not relevant that whether the judgment is to be followed or not by the Cantonment specially the directions contained in it.

16. The learned Counsel for No.6 has also placed on record his written arguments as well as statement dated 21.3.2018, wherein he has annexed copy of order dated 21.3.2018 passed C.P. No. 2225/2018 filed by Defendant No.6, whereby the Cantonment Board has been restrained from taking coercive action against Defendant No.6 pursuant to their notice of March, 2018 which was issued in furtherance of the judgment of the Hon'ble Supreme Court in the case of ***Mrs. Yawar Azhar Waheed supra***. While dictating the Judgment therefore, I had to summon the file of C.P. No. 2225/2018 and it appears that though in that matter the challenge is only of a public notice by Cantonment Board published in newspaper pursuant to the directions of the Hon'ble Supreme Court in the case as above; however, while challenging the same in the Memo of Petition the Defendant No.6 has failed to properly disclose the present proceedings, its pendency and passing of restraining orders for and against the parties. On further perusal, it appears that though copies of plaint and orders have been annexed with the Petition but there is no proper disclosure in the Memo of Petition regarding annexing such document as well as the details of the Suits filed by and against Defendant No.6. The Court has also not been clearly informed that a resident is already before this Court against running of the educational institution. Be that as it may, since I have myself observed that for the present purpose the applicability of the judgment of Hon'ble Supreme Court is not relevant, whereas, very recently, even otherwise, vide order dated 26.04.2018 passed in Human Rights Case No.17842 of 2018 the Hon'ble Supreme Court has been pleased to hold such order in abeyance. Such order and its holding in abeyance is not relevant for the present purposes, as this Court has never

issued any directions to the Cantonment Board pursuant to the said judgment of the Hon'ble Supreme Court, whereas, in this case a resident is before the Court and so also the College itself and their respective injunction applications are being decided on merits of their case without placing any reliance upon the said judgment as above.

17. Therefore, the upshot of the above discussion is that the plaintiff has made out a prima facie case, whereas, balance of convenience also lies in its favor and so also causing of irreparable loss; therefore, the application bearing **CMA No.250/2016** in Suit No.44/2016 under Order 39 Rules 1 & 2 CPC is hereby allowed by restraining Defendant Nos. 5 & 6 from running any School / College in the Suit premises. Whereas, application of Defendant No.6 bearing **CMA No. 5688/2016** under Order 39 Rule 1 & 2 CPC filed in Suit No.841/2016 is hereby dismissed, and as consequence thereof, **CMA 6712/2017** filed under Order 39 Rule (4) on behalf of defendant No.2 has become infructuous. All other applications are adjourned to a date in office. However, before parting I may observe that since College is being run on the Suit premises, and the session is almost at the end of the academic year insofar as A level students are concerned, therefore keeping in view the inconvenience which ultimately would be caused, defendant No.6 is granted an extension in time for implementation of the orders passed on the application of the plaintiff and is directed to stop running the college and search for alternate accommodation maximum by 30.6.2018, when most of the classes must have come to an end.

Dated: 04.05.2018

J U D G E

ARSHAD/