IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2108 of 2016

The City Schools (Private) Limited---------- Plaintiff

Versus

Federation of Pakistan & others---------- Defendants

Date of hearing:	**03.11.2016**
Date of Judgment:	**05.12.2016.**
Plaintiff:	**Through Mr. Rehman Aziz Malik, Advocate.**
DHA:	**Through Mr. Malik Altaf Javed, Advocate.**
Defendants No.6:	**Through Mr. Abdullah Munshi, Advocate.**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction and through listed application; the plaintiff seeks restraining orders against defendant No.2 to 5 **("DHA")** in respect of property bearing Plot No.59-C, Al-Murtaza Commercial Lane No.4, Khayaban-e-Roomi, admeasuring 200 Sq. Yds. situated at Phase-VIII, D.H.A, Karachi (Suit Property) on which the plaintiff is running an "A" Level School.

2. The precise facts as stated are that the plaintiff is a tenant in the Suit property and is running an "A" Level School in the name of **"City School"**, wherein, approximately 180 students are admitted and according to the plaintiff on 23.09.2016 Vigilance Team of

DHA entered into the Suit property without any prior notice and confiscated the generator and again on 24.09.2016, an attempt was made to seal the Suit property and thereafter instant Suit has been filed. It is the case of the plaintiff that though no notice has been issued to them, however, as per information gathered, the said defendants have an objection with regard to running of School in commercial premises.

3. Learned Counsel for the plaintiff has contended that prior to the plaintiff there was another "A" Level College being run in the name of **"CEDAR",** whereas, no objection was ever raised at that point of time by the said defendants. He has further contended that DHA does not enjoy any Building Regulations Power, whereas, no action can be initiated without serving a prior notice to that effect. Learned Counsel has referred to Pakistan Defence Housing Authority's Order of 1980 issued through the President's Order No.07 of 1980 and has referred to Sections 4, 9 and 23 of the said Order and has contended that DHA does not enjoy any such powers, whereby, they can issue Building Regulations as such powers are vested in defendant No.6 i.e. Clifton Cantonment Board. He has also referred to Building Control and Town Planning Regulations, 2011 issued by DHA and has read out Section 3(d), (u), (v) as well as 3(jj) and has contended that even otherwise under these regulations there is no restriction on running a School or College on a commercial premises. He has further contended that on the contrary, the Defence Housing Authority, Lahore Order 2002 specifically provides such powers under Sections 18 and 19 of that Order and therefore, it clearly reflects that insofar as DHA Karachi is concerned, neither any such regulations can be issued

nor otherwise they provide for taking such an action. Learned Counsel has also referred to Cantonment Board Clifton Building Bye-Laws 2007 issued through SRO dated 03.02.2007 and has read out several provisions of the said Bye-Laws to contend that it is defendant No.6, who has the power and authority to regulate such Building Bye-Laws; hence DHA has acted without any lawful authority. He has further contended that the "C" Lease issued for the Suit property does not prohibit any such use and therefore, the plaintiff is acting strictly in accordance with the terms and conditions of the Lease. He has further contended that there are at least four other Schools running within the DHA premises near to the plaintiff's School and no action has been taken against them, whereas, the plaintiff is being subjected to a discriminatory treatment even in respect of its other Schools just because the plaintiff has agitated against them through instant Suit. In support of his contention he has relied upon the cases reported as **2008 MLD 793** ***(Sibte-Mujtaba Kazmi v. Cantonment Board and 3 others***, **1994 CLC 844** ***(Sindh Education and Welfare Society v. Pakistan and others)***, **2004 CLC 1029** ***(Arif Majeed Malik and others v. Board of Governors Karachi***, **2004 CLC 89** ***(Mian Ameer Nasir v. Tahir Gujjar, Station House Officer and 3 others).***

4. On the other hand Learned Counsel for DHA has referred to "C" Lease issued to the owner of the Suit property and specially clause 5(b) and has contended that the Lessee has undertaken to comply with and observe all the rules and bye-laws of Clifton Cantonment Board and DHA, therefore, per learned Counsel the Lessee cannot resile from such categorical undertaking. He has also referred to the "A" Lease of the Suit property, which also

provides that construction shall be done in accordance with the Building Bye-Laws and the Rules laid down by DHA. Learned Counsel has further contended that the plaintiff is in fact not the Lessee/owner of the property in question and is only a tenant, whereas, the owner/lessee had earlier approached DHA for seeking certain permissions for altering and additions on the Suit premises to make it viable to run as a School and such request was regretted vide Letter dated 18.05.2016. Per Counsel, at the time of seeking such permission for alteration and addition, the lessee/owner had categorically undertaken that the Suit property will not be rented out for any School purposes. Per learned Counsel, the plaintiff cannot claim a better title than its owner/lessee and once the Lessee has undertaken not to use the Suit premises for School purposes, the plaintiff cannot come to this Court seeking something which the actual owner/Lessee has forgone in its favour. Learned Counsel has referred to regulations 3(d) and 40 and has contended that School has been categorized by the DHA Regulations as an amenity and therefore, it cannot be run in any commercial premises as is being done by the plaintiff. Learned Counsel has also referred to the Tenancy Agreement between the plaintiff and the owner of the property and has read out Clause-16, which provides that if the Lessee is restrained by any authority or agency from running the School in the demised premises, the Lessor will refund the un-utilized amount of rent and therefore, per learned Counsel this was already in knowledge of the plaintiff that action could be taken against them for using the premises as a School. Learned Counsel has further contended that insofar as the plaintiff's case is concerned it is not disclosed in the plaint nor

through its annexures, but the entire case has been set-up through affidavit-in-rejoinder and therefore the same not being part of the plaint cannot be looked into by this Court.

5. Similarly, learned Counsel for defendant No.6 (Clifton Cantonment Board) has contended that insofar as DHA Phase-VIII is concerned, the same has not been yet handed over to defendant No.6 for maintenance and otherwise, therefore, till such time it is handed over, DHA has to regulate the same. He has further submitted that no relief has been sought against them; therefore, they may be deleted from the array of the defendants. To assist the Court, learned Counsel has contended that once the owner of the property had categorically undertaken not to let out the Suit property for School purposes, then the plaintiff cannot have any better case than its owner. He has further contended that running of School in commercial premises is not permitted as it has already been categorized as an amenity and therefore, insofar as DHA is concerned, it can only run in an amenity area and not in commercial premises.

6. I have heard all the learned Counsel and perused the record. The facts, as stated appears to be that the plaintiff is a tenant in the Suit property and is admittedly running an "A" Level School, whereas, according to the plaintiff there are presently 180 students enrolled. The plaintiff's case is that it is entitled to run a School in commercial premises, as running of School is after all a commercial business. The second limb of the plaintiff's arguments is that DHA has no authority to supervise and manage the Building Control Regulations as it is only an Authority to develop the area, whereas, the said authority only lies with Clifton Cantonment

Board. Insofar as establishment of the DHA is concerned, the same was established through the President's Order No.07/1980 and it would be advantageous to refer to Articles 9 & 23 of the said Order, which reads as under:-

> **"9. Powers, duties and functions of Executive Board**.—(1) Subject to other provisions of this Order, the Executive Board may take such measures and exercise such powers as may be necessary for carrying out the purposes of this Order.
>
> (2) Without prejudice to the generality of the foregoing powers, the Executive Board may—
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> (i) Acquire any land in accordance with the law for the time being in force in the Province of Sindh.
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> (ii) Undertake any works in pursuance of any scheme or project;
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> (iii) Incur any expenditure;
>
> (iv) Procure plant, machinery, instruments and materials;
>
> (v) Impose and recover, alter, vary or enhance development charges, installments, cost of apartments, housing units of schemes and projects and transfer fees and other charges;
>
> (vi) Enter into and perform all such contracts on behalf of the Authority as it may consider necessary;
>
> (vii) Retain, lease, sell, exchange, rent or otherwise dispose of any land vested in the Authority;
>
> (viii) Cancel any housing unit in a planned housing project or scheme, either in default of payment of installments called, for or on violation of any terms and conditions for such project or scheme by allottees, transferees or lessees; and
>
> (ix) Do all such acts, deeds and things which may be necessary or expedient for the proper planning and development of the specified area.
>
> (3) No master plan, planning or development scheme shall be prepared by any local body or agency for the specified area without prior consultation with, and approval of, the Executive Board."

> "**23. Power to make regulations.**— The Executive Board may make such regulations not inconsistent with the provisions of this Order and the rules as it may consider necessary or expedient for the administration and management of the affairs of the Authority."

7. Perusal of the aforesaid Articles reflects that in terms of Article 9(vii), the Executive Board of DHA has been authorized for carrying out the purposes of the President Order and it can **retain lease, sell, exchange, rent or otherwise disposed of any land vested in the Authority**. Whereas, in terms of Article-23 the Executive Board is empowered to make regulations, which are not

inconsistent with the provisions of President's Order and the rules as it may consider necessary or expedient for the administration and management of the affairs of the Authority. The Authority (DHA) by virtue of Article 23 of the President Order No.7 of 1980 has issued the Building Control and Town Planning Regulations 2011 for DHA, wherein, Regulations 3(d)(u)(v) reads as under:-

> 3. **Definitions**. In these regulations, unless there is anything repugnant in the subject or context:-
> a. .....
> b. .....
> c. .....
>
> d. **Amenity Plot:** A plot allocated exclusively for the purpose of amenity uses, such as government offices, health, welfare, education, worship places, burial grounds, parking and recreational areas.
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> e. .....
> f. .....
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> u. **Commercial Building:** A building constructed for commercial use on a commercial plot and may have a combination of commercial and residential (apartments) units/floors. Also refer to general conditions of commercial buildings.
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> v. **Commercial Zone:** It includes the area for shops, show rooms, stores or godowns, warehouses, shopping centers, hotels and sites reserved for filling stations, etc.

8. Regulation 3(d) defines an amenity plot as a plot allocated exclusively for the purpose of amenity uses, such as government offices, health, welfare, ***education***, worship places, burial grounds, parking and recreational areas. Whereas, Regulation-3(u) defines a Commercial Building constructed for commercial use on a commercial plot and may have a combination of commercial and

residential apartments and it further provides that reference to general condition of commercial buildings may also be referred. Perusal of the aforesaid regulations reflects that insofar as the powers of the authority to lease and allot and so also to make regulations is concerned, it is very clearly provided under the President's Order of 1980, therefore, the objection of the learned Counsel for the plaintiff that insofar as DHA is concerned, it has no authority to issue any regulation(s) is misconceived and is hereby repelled.

9. Coming to the Regulations, it appears that Schools or educational institutions have been categorized as an amenity and not as a commercial activity. Even otherwise, the Schools being public service have always been known as and categorized as amenity insofar as the allotment of plot and construction thereon is concerned. It is not the commercial nature of business attached to running of a School, which is important to decide the present controversy, but the allocation and use of the plot and its nature. This in fact has been done for a very good reason as in any area the prices of an amenity plot as compared to a commercial plot is lesser in value, and moreover the developers of the area always categorize and allot amenity plots according to its Master Plan and its scheme while carrying out such development. It is also to be kept in mind that insofar as present dispute is concerned, it relates to Phase-VIII of DHA, which has already provided a separate area earmarked for School purposes and admittedly a number of Schools have been constructed in such area and are being run without any hindrance. Moreover, when Regulation 3(u) is examined and perused, it reflects that insofar as DHA is

concerned, a Commercial Building can also have combination of commercial and residential apartments together. It can be housed in one building i.e. a commercial activity as well as residential activity. Therefore, if any School is allowed to be run in a Commercial Building in DHA, it will definitely be amounting to permitting a School in a building, which can also be used for residential purposes. It is but settled by now that Schools may not be allowed to run in residential premises. Reliance in this regard may be placed on the case of ***Arif and others v. Jaffer Public School*** (**2002 MLD 1410**), ***Amjad Ikram v. Lahore Cantonment Co-operative Housing Society Limited*** (**PLD 2007 Lahore 485**) and ***Naz Shaukat Khan v. Mrs. Yasmeen R. Minhas and another*** (**1992 CLC 2540**). Insofar as DHA is concerned, they have planned Phase- VIII in a manner, wherein, the plots have been categorized in terms of the Regulations 2011 and Schools for such purposes have been categorized as an *amenity*, therefore permitting running of Schools in a commercial building (though not mandatorily having residential apartments) would be against the spirit and mandate of such regulations and cannot be permitted by this Court.

10. Coming to the lease document(s) in question i.e. the A and C leases, it appears that in both the lease documents it has been provided that "***the lessee shall comply with and observe all the rules and bye-laws of the CCB & DHA***" and "***the construction shall be done in accordance with the building Bye-laws and rules laid down by the Authority***". Both these covenants bind the lessee to observe the regulations issued by DHA, and such regulations have categorized education as amenity, therefore, the plaintiff or for that matter the lessee is prohibited from using the leased property for

any other purposes. This restrictive covenant is there in the lease document and apparently the School is being run in violation of such restriction. Since this is not a case of the residents or an aggrieved person who may have pleaded nuisance due to running of School in the Suit property as well as within the adjoining area, but I may say that presence of such element of nuisance even otherwise cannot be ruled out or rejected out rightly. After all accommodating more than 180 students who arrive at one point of time (mostly) and leaving at the same time (again mostly), car Parking issues, their assembly in and out of the Suit property, resultant traffic jams, discomfort and injury to others either residing and or working, is and would be a cause of nuisance. It may also be noted that DHA has, specially in Phase VIII, planned the entire area, keeping in mind the basic needs and requirements of the residents, and has earmarked residential, commercial and amenity areas (specially for Schools) and for such purposes has also framed the 2011 Regulations categorizing such area and plots. Therefore, apparently the plaintiff being tenant is using the Suit property in violation of the lease covenants.

11. A learned Division Bench of this Court in the case of ***Hussain Bux Memon v. Karachi Building Control Authority*** (**2015 YLR 2448**) 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.

12. It further appears that the plaintiff is a tenant in the Suit premises and for reasons best known neither the owner of the Suit property is a plaintiff before this Court, nor a defendant and therefore, the facts as stated by DHA that an undertaking was given to them by the owner while seeking permission for addition and alterations to the effect that the Suit premises will not be let out for School purposes has gone un-rebutted, and the plaintiff cannot deny such factual position on its own in this matter. It further appears that the Tenancy Agreement also caters to such an

eventuality that if the plaintiff is restrained from running the School on the Suit premises, they would be entitled for return of the un-utilized amount of rent. This draws an inference against the plaintiff and in favour of DHA to the effect that the plaintiff must have been informed by the owner of the Suit property of such consequences as otherwise normally no Tenancy Agreement caters to such a situation.

13. Insofar as objection of the learned Counsel for the plaintiff that it is for defendant No.6 to take action, if any, against the plaintiff and not DHA is concerned, it would suffice to observe that as stated by the Counsel for defendants No.6, Phase-VIII has not yet been handed over to them and they do not manage the affairs of Phase- VIII, therefore, this objection is also misconceived and is hereby repelled.

14. Coming to the alleged discriminatory treatment to the plaintiff with regard to permitting other Schools in the same vicinity is concerned when this matter was being reserved for orders, the learned Counsel for DHA was directed to subsequently file a statement to that effect and on 08.11.2016 and 17.11.2016, two separate statements have been filed, wherein, it is mentioned that notices have been issued to various owners of the premises, wherein allegedly Schools are being run and such notices have been annexed with the Statements as above, wherein DHA has directed them to stop School activity with immediate effect, therefore, this objection also fails and is hereby repelled. Even otherwise it would suffice to observe that not only two wrongs but even numerous wrongs plus one cannot make a right. If any authority is needed one may refer to the case of ***Ardeshir Cowasjee***

and 9 others v. Muhammad Naqi Nawab & 5 others (**PLD 1993 Karachi 631**) and ***Arif and Others (Supra)***.

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.

16. In view of hereinabove facts and circumstances of the case I am of the view that the plaintiff has failed to make out any prima facie case, nor balance of convenience lies in its favor and no irreparable loss would be caused for the reason that Suit property is being apparently used in violation of the lease covenants as agreed upon by the lessee / owner, whereas, lessee / owner has categorically undertaken not to let out the Suit property for running of School and notwithstanding this, it has been agreed

upon by the plaintiff that they would be entitled for refund of any un-utilized amount of rent, if any action is taken against them, therefore, listed application merits dismissal and is accordingly dismissed. However, before parting I may observe that since School is being run and the session is almost in the middle of the academic year insofar as A level students are concerned, keeping in view the inconvenience which ultimately would be caused, DHA is directed to provide sufficient time to the plaintiff to search for alternate accommodation till April / May 2017 when the classes come to an end.

Dated: 05.12.2016

JUDGE

Ayaz