ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1027 of 2015

DATE	ORDER WITH SIGNATURES OF JUDGE(S)

1. For hearing of CMA No.9415/2015 (U/O XXXIX Rule 1 & 2)
2. For hearing of CMA No.11205/2015 (U/O XXXIX Rule 4)
3. For hearing of CMA No.11206/2015 (U/O VII Rule 11)

Date of hearing:	31.03.2017
Plaintiff:	Through Mr. Muhammad Omer Soomro, alongwith Mr. Danish Naeer, Advocates
Defendant No.1:	Through Mr. Abdullah Munshi, Advocate

Zulfiqar Ahmad Khan, J:- This order will dispose of the above mentioned three CMAs, of which listed at Sr.1 and 2 are filed u/o 39 CPC, thus would be dealt with together. However, the 3rd application is filed by the Defendant No.1 u/o 7/Rule 11 CPC seeking rejection of the plaint and dismissal of the suit on the ground that the instant suit is barred on account of failure of the Plaintiff having filed the instant suit without providing the mandatory two months' notice under Section 273 of the Cantonments Act 1924 (the Act 1924). Since the latter application mandates priority, therefore, it will be discussed in the first part of this order.

CMA No. 11206/2015

As mentioned above, the very ground on the basis of which the instant application is filed, relates to Section 273 of the Act 1924, which is reproduced hereunder:-

> **273. Notice to be given suits.-** (1) No suits shall be instituted against any [Board] or against any member of a Board, or against any officer or servant of a [Board], in respect of any act done, or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the [Board], and, in the case of such member, officer or servant, unless notice in writing has also been delivered to him or left at his office or place of adobe, and unless such notice states explicitly

> the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left.
>
> (2) If the [Board], member, officer or servant has, before the suit is instituted, tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.
>
> (3) No suit, such as is described in sub-section (1) shall, unless it is an action for the recovery of immoveable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.
>
> (4) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the abject would be defeated by the giving of the notice or the postponement of the institution of the suit or proceeding.

As it could be seen, the above referred Section clearly bars institution of Suit against Board or any member thereof in respect of any act done or purported to have been done in pursuance of this Act or any by-law until the expiry of two months after the Notice in writing having been given or left at the office of the Board. Since the very cause of action on account of which the instant suit was filed, accrued when the Defendant No.1 sent Notices dated 03.06.2015, 04.06.2015 and 11.06.2015 (as reproduced on pages 43, 47 and 51) to the Plaintiff, the counsel for the Defendant No.1 submitted that until unless two months had passed from the said notices' dates, no suit could have been initiated. It was also pointed out that the instant suit was not filed taking benefit of Sub-Section 4 of Section 273, which provided a window where a suit could be instituted within the period of two months if the relief claimed through the said suit was injunctive and where the Plaintiff showed that the object would be defeated by the giving of the Notice or by the postponement of the institution of the suit or proceedings. The counsel referred to the prayer made in the instant suit, where through the first and second prayers, a

declaration is sought, and through the third prayer, permanent injunction is ought. The learned counsel accordingly contended that since the Plaintiff has sought declaration besides permanent injunction, therefore the suit is not maintainable and should be rejected under Order VII Rule 11 CPC. In support of his contention, he placed reliance on an Apex Court judgment rendered in the case of Muhammad Ilyas Hussain v/s. Cantonment Board Rawalpindi, reported as PLD 1976 SC 785, where a claim of declaration alongwith request for permanent injunction was held to be not maintainable since the exception contained in Sub-Section 4 was only in respect of suits where only the relief of injunction is sought.

To the contrary, in support of his contention, learned counsel for the Plaintiff referred to an Apex Court judgment reported as 2015 SCMR 1799, where the issue as to the notice issued under Section 273 was also discussed, however, during the course of the arguments, the said precedent was distinguished as having no factual similarities with the dispute at hand since in that case no notice was issued by the relevant Cantonment Board, thus Court rightly held that provision of Section 274 were not attracted, which is not the case at hand where notices have been issued to the Plaintiff.

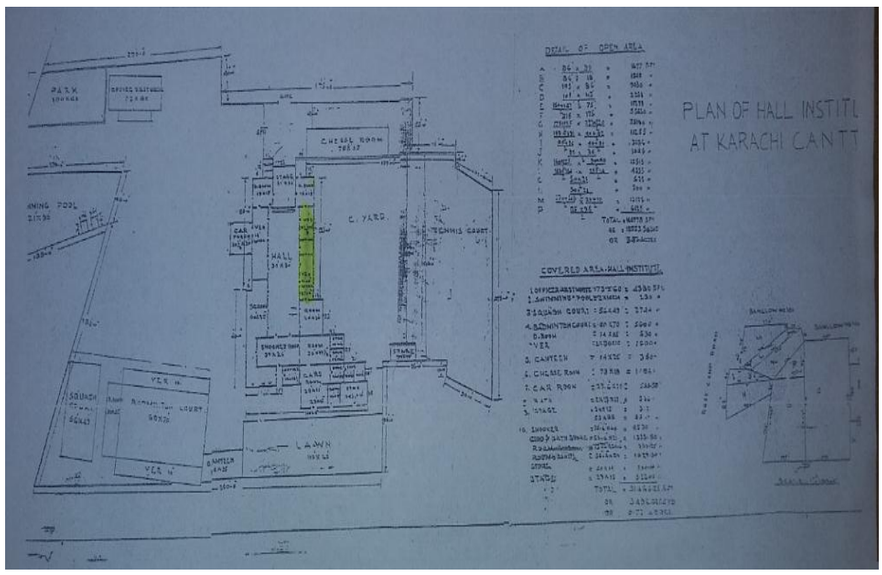
Learned counsel for the Plaintiff also relied on the above mentioned 1976 judgment where the Plaintiff upon having agreed to give up the relief for declaration, confined his suit to the relief of permanent injunction, as allowed under Sub-Section 4. To qualify for such relief, the learned counsel undertook to drop all other prayers, except to restrict the instant suit to prayer clause (c). He further undertook to file suitably amended prayers in due course. On these undertakings, where the Plaintiff had withdrawn

declaratory prayers and the only relief sought is injunctive, the aforementioned CMA filed by the Defendant No.1 is accordingly dismissed on account of the above amendments brought forward by the Plaintiff.

CMAs No. 9415 and & 11205 of 2015

Through order XXXIX Rule 1 & 2 application, the Plaintiff has sought suspension of operation of notices dated 03.06.2015, 04.06.2015 & 11.06.2015 issued by the Defendant No.1, while through an application filed under Order XXXIX Rule 4 CPC, the Defendant No.1 has sought order for setting-aside the earlier order of this Court dated 18.06.2015, where interim injunction was granted to the Plaintiff.

To address the controversy at hand, brief facts of the case have to be considered which are that the Plaintiff, a Pakistani company entered into an agreement dated 01.06.2001 with Pakistan Railways ("PR"), where per Recital-A, the PR had embarked upon a "new policy aimed commercial exploitation of its non-core business with the participation of parties from the private sector" and *inter alia* offered commercializing of its property known as "Hall Institute, Karachi" through public/private partnership. PR accepted bids of the Plaintiff for commercializing of the above referred property whereupon the said Agreement was entered into. The agreement itself defines the term "property" to mean "Hall Institute, Karachi, Pakistan Railways MeNail Road, near Racecourse Ground, Karachi Cantt" and fully describes it in Exhibit-A. While the Exhibit-A was not attached alongwith the present plaint, a copy thereof was presented in the Court when the matter was heard. Copy of the said exhibit is reproduced herewith, which as evident is extremely illegible and small-scaled:-



While the Agreement states that the Plaintiff (defined as "Shapes" in the said Agreement) was to have such rights in and to the property as are specifically set-forth in this Agreement, under Clause 3.5-A, Shapes was permitted to use the property solely as a health facility and for ancillary purposes, including a restaurant carrying health food too. Thus the said Agreement besides giving the said property solely as a health facility for ancillary purposes, also entitled Shapes open a restaurant carrying health food. While the Plaintiff claims that it inherited, as a part of the said property, a restaurant named Pompei, the Defendant No.1 contends that the said portion of the building was constructed additionally by the Plaintiff subsequent the date of the said Agreement, since health food restaurant was already present inside the health facility area, which caused the Defendant No.1 to issue the above mentioned notices, where through notice dated 03.06.2015, the Defendant No.1 alleged that the Plaintiff has constructed several unauthorized buildings within the premises and using those as commercial ventures including the said Pompei restaurant without prior permission of the Defendant No.1, which act, the notice alleges to be a clear violation of Section 85 of the Act 1924 as well as violative of CBC Buildings Bylaws No.124 and 125. In terms of

the said Notice, the Plaintiff was directed to immediately discontinue the commercial activities in the said premises and provide all title documents alongwith copies of the Agreement. Through second Notice dated 04.06.2015, it was alleged that the Restaurant namely Pompei being run within the said premises was without obtaining prior permission from the Defendant No.1, thereby that act constituted offence under Section 179 of the Act 1924. The said Notice also required the Plaintiff to stop commercial activities and remove/demolish the same forthwith, failing which the Plaintiff was threatened that action under Act 1924 will be taken and the unauthorized structure will be demolished at the Plaintiff's risks and costs. While the said Notice of 04.06.2015 was answered through Plaintiff's letter dated 08.06.2015, where it was alleged that the "main issue is subjudiced before Hon'ble High Court of Sindh in C.P. No.D-1572/2014, where interim stay was granted and the same was set to be still in operation", through the said reply, it was also contended that the premises is occupied by the Plaintiff under a long term agreement with PR, which being a Government Body is "exempt from any CBC, KMC or DHA type scrutiny". In the said reply, it was also mentioned that since the agreement permits commercialization with the permission of PR, therefore, Plaintiff does not require permission from any other agency as the services provided by the Plaintiff change from time to time to suit the business needs designed to provide better facilities to its customers. With regard to the building code violation, the reply suggested that if that is the case, the Defendant should take-up the matter with the property owner i.e. Pakistan Railways or the Government. Subsequent to that reply, third Notice was sent by the Defendant No.1, which is dated 11.06.2015, which refers to the earlier contentions made by the Defendant No.1, however, calls upon the Plaintiff to demolish or remove the unauthorized

construction, failing which the legal action under Act 1924 was threatened to be instituted against the Plaintiff by demolishing and removing of the unauthorized construction. It was subsequent to this Notice dated 11.06.2015, when the instant suit was filed on 18.06.2015, where, as mentioned earlier, this Court was pleased to grant interim relief by ordering that no coercive action shall be taken by the Defendant till the next date of hearing.

Mr. Omer Soomro, counsel for the Plaintiff while at one hand took benefit of Sub Section 4 of Section 273 and having agreed to amend prayer, however, by no unambiguous means denied that the Defendant No.1 had any authority to issue the impugned Notices or to take any action pursuant thereto as property belonged to Federal Government, which has only been given to the Plaintiff as a part of alliance with PR through the Agreement dated 01.06.2001. The thrust of Mr. Soomro's arguments was that no new construction was made, therefore, the notices are *void ab initio* and even if any new construction was made, Defendant No.1 had no right to regulate the same as the premises belonged to PR. In support of his contention, he referred to Schedule I-A of the Karachi Building and Town Planning Regulations 2002, where areas and land belonging to certain authorities including PR have been exempted from the operation of the Building Control laws within the jurisdiction of Karachi Building Control Authority. While Mr. Soomro admitted that the suit property does not fall within the jurisdiction of SBCA, however, he still adamantly emphasized that parallel be drawn with regards the Cantonment Board jurisdiction. When posed with the question about the presence of any such Schedule in the Act 1924 which could bar jurisdiction of the Cantonment Board over the lands falling under PR jurisdiction, the learned counsel admitted that there is no such schedule present in the Act 1924, however, a reference to Chapter 29 of Railway Works

Manual was made, which deals with buildings and structures other than bridges made by Railways.

By reading Paragraph 29.1 of the said Manual which deals with the right of erection of the buildings, the learned counsel contended that PR has absolute right to erect buildings on their own lands. Said Paragraph 29.1 is reproduced hereunder:-

> **29.1. Right of erection of buildings**
>
> Section 7 of the Indian Railways Act No. IX of 1890 (as adapted in Pakistan and the Buildings Governments Act No. IV of 1899 read in conjunction with Section 291 of the Cantonments Act No.II of 1924 provide for the right to erect buildings on their own land by railways without obtaining approval of the municipal or cantonment authorities in whose area the site may be situated. Municipal or local authorities may, however, be consulted, regarding water connections, sewerlines and sewage disposal and similar matters, where necessary.

A review of the above paragraph shows that when Section 7 of the Indian Railways Act 1890 (as adopted in Pakistan) and the Government Buildings Act 1899 are read together in conjunction with Section 291 of the Act 1924, these provide "for the right to erect buildings on their own land by Railways without obtaining approval of the Municipal or Cantonment Authorities in whose area the site may be situated". The role of the Municipal or Local Authorities as noted from the above paragraph is restricted to water connection, sewerlines, sewage disposal and similar acts. The learned counsel by placing reliance on those pages from Railways Manual contended that the Cantonment Board has no role and the Railways can alone erect buildings on its own land without obtaining approval from the Municipal or Cantonment Authorities in whose jurisdiction the said land may be situated.

While at the first glance, the paragraph seems to make the right-fit. However, while the said paragraph has no statutory powers when compared to the Act 1924 or Cantonment By-laws, however, to distinguish and fully understand the purpose and

intent of the said paragraph 29.1, it is essential that Section 7 of the Indian Railways Act, which I take the opportunity of reproducing hereunder, be also referred:-

> **7. Authority of [licensee] to execute all necessary works.** (1) Subject to the provision of this Act and, in the case of immovable property not belonging to the [licensee], to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, [and subject also, in the case of licensees, to the provisions of their license, a railway or the accommodation or other words connected therewith, and notwithstanding anything in any other enactment for the time being in force]:--
>
> a) Make or construct in, upon across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways, or any rivers, canals, brooks, streams or other water, or any drains water-pipes, gas-pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts bridges, roads, [lines, of railway], ways, passages, conducts, drains, piers, cuttings and fences as the [licensee] think proper;
>
> b) Alter the course of any rives, brooks, streams, or water courses for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter, as well, temporarily or permanently, the course of any rivers, brooks, streams or water courses or any roads, streets or ways, or raise or sink the level thereof, in order the more conveniently carry them over or under or by the side of the railway, as the [licensee] thinks proper;
>
> c) Make drains or conducts into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;
>
> d) Erect and construct such houses, Warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery, apparatus and other; works and conveniences as he [licensee] thinks proper;
>
> e) Alter, repairs or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead; and
>
> f) Subject to the terms of licence, do all other acts necessary for making, maintaining, altering or repairing and using the railway;
>
> [(2) The exercise of the powers conferred on a licensee by sub-section (1) shall be subject to the control of the Federal Government or, the Authority, as the case may be.

Now looking at the structure of the Government Buildings Act of 1899, which only comprises of four sections, of which the first provide for short title and extent; the second defines Municipal Authorities and in terms of Section 3, exemption are granted to certain "Government Buildings" from the municipal laws regulating the erection of the building within municipality. Section 3 of the Act 1899 being relevant is reproduced hereunder:-

> **3. Exemption of certain Government building from municipal laws to regulate the erection etc., of building within municipalities----**Nothing contained in any law or enactment for the time being in force to regulate the erection, re-erection, construction, alteration or maintenance of buildings within the limits of any municipality shall apply to any building used or required for the public service or for any public purpose, which is the property, or in the occupation, of (Subs. by A.O., 1937, for "the Govt.".) [The (Subs. by A.O., 1961, Art. 2, for "Crown" (with effect from the 23rd March, 1956)) [Government]], or which is to be erected on land which is the property, or in the occupation, of (Subs. by A.O., 1937, for "the Govt.".) [The (Subs. by A. O., 1961, Art. 2, for "Crown" (with effect from the 23rd March, 1956))[Government]]:---
>
> Provided that, where the erection, re-erection, construction or material structural alteration of any such buildings as aforesaid (not being a building connected with (The word "Imperial" omitted by A.O., 1949, Sch,)* defence, or a building the plan or construction of which ought, in the opinion of (Subs. by A.O., 1937, for "the Govt.".) [the Government concerned], to be treated as confidential or secret) is contemplated, reasonable notice of the proposed work shall be given to the municipal authority before it is commenced.

Section 4 of the Act 1899 provides a mechanism for filing objection or suggestions as to the erection of these Government buildings within the Municipalities and how such objections or suggestions would be dealt with. Full text of the said Section is reproduced in the following:-

> **4. Objections or suggestions as to erection etc., of certain Government building within municipalities how to be made and dealt with**----(1) In the case of any such building as is mentioned in the last preceding section (not being a building connected with (The word "Imperial" omitted by A.O., 1949, Sch,)* defence or a building the plan or construction of which ought, in the opinion of (Subs. by A.O., 1937, for "the Govt.".) [the Government concerned], to be tread as confidential or secret), the municipal authority, or any person authorized by it in this behalf, may, with the permission of the (Subs. ibid., for "L. G.".)[Provincial Government] previously obtained, but not otherwise, and

> subject to any restriction or conditions which may, by general or special order, be imposed by the (Subs. Ibid., for "L.G.".) [Provincial Government], inspect the land and building and all plans connected with its erection, re-erection, construction or material structural alteration, as the case may be, and may submit to the (Subs. ibid., for "L. G.".) [Provincial Government] a statement in writing of any objection or suggestions which such municipal authority may deem fit to make with reference to such erection, re-erection, and construction or material structural alteration.
>
> (2) Every objection or suggestion submitted as aforesaid shall be considered by the (Subs. ibid. for "L. G.".) [Provincial Government], which shall, after such investigation (if any) as it shall think advisable, pass orders thereon, and the building referred to therein shall be erected re-erected, constructed or altered, as the case may be, in accordance with such orders:---

Now at this juncture it is relevant to reproduce Section 291 of the Act 1924:-

> **"291. Application of Act IV of 1899**.—For the purposes of the Government Buildings Act, 1899, Cantonments and Boards shall be deemed to be Municipalities and Municipal Authorities respectively".

A combined reading of the relevant sections of 1899 and 1924 Acts with the background and intent and purpose of the 1890 Act makes it very clear that the said right of erection of building without obtaining approval of the Municipal or Cantonment Authority is solely available for the erection of "Government buildings" or for the laying or for the construction exclusively undertaken by Railways under Section 7 of the 1890 Act which by no stretch of imagination could extend to structure solely aimed for commercial purposes and being built or operated by a private entity (i.e. the Plaintiff) as well as the current property being the one where Railways had undoubtedly entered into an agreement for "commercial exploitation of Railways non-core business" giving permission to the Plaintiff to use the property solely as health facility and for ancillary purposes including a restaurant carrying health food, which are operated totally on commercial basis with nothing to do with Section 7 of 1890 Act, could fall within the four corners of Paragraph 29.1 of the Railway Manual.

Notwithstanding therewith the Government Buildings Act of 1899 having been repealed and the Act 1924 having amended by inserting Section 178-A by Act XXIV of Act 1936 requiring that no person shall erect or re-erect a building on any land in any Cantonment area, except with the previous sanction of the Board, nor otherwise than in accordance with the provision of this chapter or the Rules and Bylaws made under this Act relating to the erection or re-erection of the buildings, this does not leave any *iota* of doubt in my mind that the Defendant No.1 would not have jurisdiction to regulate erection or re-erection of buildings handed down by PR to the Plaintiff on commercial basis i.e. the property in question.

For the aforesaid reasons, I dismiss CMA No.9415/2015 filed under Order XXXIX Rule 1 & 2 CPC whereupon CMA No.11205/2015 filed under Order XXXIX Rule 4 CPC succeeds.

JUDGE

Barkat Ali/PA