

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 677 of 2015

**The Kathiawar Co-operative Housing Society
Ltd. and others ----- Plaintiffs**

Versus

Province of Sindh & others ----- Defendants

1. *For orders on CMA No.6596/2015.*
2. *For orders on CMA No.6597/2015.*
3. *For orders on CMA No.17320/2015.*

**Date of hearing: 20.10.2016, 02.11.2016 & 16.11.2016
& 29.11.2016**

Date of Order: 08.02.2017

**Plaintiff: Through Mr. Khawaja Shamsul Islam,
Advocate.**

Defendants No.3: Through Mr. Salahuddin Ahmed, Advocate.

**Defendants No.4: Through Mr. Arshad Tayeably, and Mr.
Shahzad Ashraf, Advocates.**

Defendant No.1. Through Ms. Kalpana Devi, AAG.

ORDER

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration, Direction, Cancellation and Injunction and through Application listed at Serial No.1; the plaintiff seeks a restraining order against defendant No.3 from creating any third party interest and not to part with possession of the Suit Plot bearing No.SNPA-34, Survey No.34-A, Survey Sheet No.35-P/1, admeasuring 13,822 sq. yds. situated in Kathiawar Cooperative Housing Society, Karachi (**Suit Plot**), whereas, through Application at Serial No.2, the plaintiffs have prayed for appointment of Plaintiff No.1 (Society) as Receiver of the Suit Plot. Application listed at Serial No.3 has been filed subsequently after filing of the Suit through which the plaintiffs seek suspension of operation of the alleged sale permission dated 5.5.2015 granted by defendant No.6 in respect of the Suit Plot.

2. Precisely, the facts of the case are that plaintiff No.1 is a Cooperative Society registered under Section 10 of the Cooperative Societies Act, 1925 since 25.02.1948 established for the benefit of “**Memon Community**”. Plaintiff No.2 is a Corporate Institution registered under the Cooperative Societies Act, 1925 being a Union and Central Organization of 25 different Cooperative Housing Societies including plaintiff No.1 as its members. It is further stated that plaintiff No.1 had allotted an amenity plot (**Suit Plot**) to one Mr. A.W. Adamjee vide Allotment Order dated 11.01.1967 specifically for establishment of a Girls High School, General Amenity and other Charitable purposes with terms and conditions to the effect that the Allottee shall not be entitled to assign, transfer, sell, mortgage, lease or let out the Suit Plot to any person without consent of Plaintiff No.1. It is further stated that thereafter the Suit Plot was transferred in the name of defendant No.3 where a School in the name of Lady Mariam Adamjee Girls School was established and was being run on the Suit Plot by defendant No.3 on an area of about 15%, out of the total area of the Suit Plot. Thereafter the Plaintiff No.2 executed a 99 years lease in favour of defendant No.3. It is the case of the plaintiffs that since the Allotment of the plot and the subsequent lease, the Defendant No.3 was firstly not able to utilize entire area of the plot as per the allotment terms, and secondly, the School in question was also not being run in a proper and efficient manner, and therefore time and again, the Plaintiff No.1 kept on approaching defendant No.3 in this regard. It is further stated that on 28.03.2013, Defendant No.3 approached Plaintiff No.1 expressing their desire to discuss the future use of the Suit Plot for expansion of educational activities and after several meetings, proposed that School be made Co-educational for boys and girls and they may be allowed to run the School on commercial terms with a special discount and subsidy to the area residents. Such proposal was not acceptable to Plaintiff No.1 and they informed that pursuant to the Allotment Order, the Suit Plot cannot be sold or otherwise used and or transferred in any manner. It is the case of the plaintiffs that subsequently on 20.04.2015 a Public Notice in daily “**DAWN**” was published, which reflected that defendant No.3 is selling the Suit Plot upon which immediately instant Suit was filed. Thereafter on 20.05.2015, Defendant No.4 filed an Application under Order 1 rule 10 CPC and was joined as a Defendant, whereafter, amended Plaint was also filed. It is the precise case of the Plaintiffs that since Defendant No.3 has violated the terms and conditions of the Allotment Order as well as the Lease, therefore, the Plaintiff No.1 is entitled to resume the plot by cancelling the Allotment and Lease.

3. Learned Counsel for the Plaintiffs has contended that the Suit Plot was allotted to the Predecessor-in-interest of defendant No.3 i.e. A.W. Adamjee as “*Gratis*” on no profit and no loss basis exclusively on the condition that he would run a Girls High School on the Suit Plot for the benefit of the Community members residing within the Plaintiff No1’s Society. Per Learned Counsel till the year 2000 no lease was executed in favour of Defendant No.3, whereas, the management of Defendant No.3 in collusion with the then Management Committee of Plaintiff No.2 got the Lease Deed dated 16.05.2000 executed, of which the Plaintiffs also seeks cancellation through instant Suit. Learned Counsel has contended that in no manner the conditions of the Allotment can be violated and that too without permission of Plaintiff No.1. Learned Counsel has further contended that the School was supposed to be exclusively meant for Girls, whereas, time and again Defendant No.3 has shown its intention to make it a Co-educational School, which again violates the Allotment Conditions and the mandate of Plaintiff No.1 (Society). Learned Counsel has further submitted that through present Sale/Assignment Agreement, the Defendant No.3 is selling the plot to Defendant No.4 on a very low price of Rs.400 Million, whereas, the land is worth much more than this and Defendant No.3 is making profits from an allotment made exclusively for charitable purposes, which is impermissible. Learned Counsel has referred to various documents on record including the Allotment Order dated 11.1.1967, Lease Deed dated 16.05.2000 and has contended that Defendant No.3 cannot sell the plot to any third party and since admittedly they are unable to run the School in a proficient manner, they are liable to return the plot to Plaintiff No.1 (Society). In support of his contention he has relied upon the cases reported as **PLJ 2004 SC 439** (*Subedar Manzoor Hussain (deceased) Through LRs. v. Mst. Mehmooda Begum (deceased through LRs., 2009 CLC 1199* (*Morris Tanvir v. Federation of Pakistan through Secretary Ministry of Defence, Islamabad and 2 others*), **2016 SCMR 101**, (*Province of Sindh through Chief Secretary and 8 others v. Syed Kabir Bokhari*) **2015 SCMR 1449** (*American International School System v. Mian Muhammad Ramzan and others*), **2008 SCMR 611** (*Mustafa Lakhani v. Pakistan Defence Officer Housing Authority, Karachi*), **2010 CLC 1879** (*Muhammad Sabir v. Maj. (Red.) Muhammad Khalid Naeem Cheema and others*), **PLD 2011 Karachi 204** (*Muhammad Islam and 5 others v. Messrs Real Builders through Shaikh Muhammad Sadiq and others*), **2015 SCMR 1428** (*Mehmood Khan and others v. Government of Balochistan and others*), **PLD 2010 Supreme Court 1058** (*Bahadur Yar Jang Cooperative Housing Society Ltd. v. Feroze S-hamsi and others*), **2015 YLR 550** (*Naseem-ul-Haq through Attorney and another v. Res Aftab Ali Lashari through Guardian ad-litem and 5 others*)

4. On the other hand, learned Counsel for Defendant No.3 has contended that in Law, there is no restriction on selling an Amenity Plot and has referred to Chapter 19-2.2.3 of the Karachi Building and Town Planning Regulations, 2002 to explain the various categories of Amenity Plots including for educational purposes. Per learned Counsel there is no restrictive covenant in the lease documents and therefore, the plot in question can be sold or otherwise disposed of, whereas, even the profit making activity is permissible and if such restriction is imposed the same would be in violation of Sections 10 and 11 of the Transfer of Property Act. Per learned Counsel, the plaintiff No.2 is the Lessor of the Suit Plot, which was done somewhere in 2000 and therefore, even otherwise, and without prejudice, no challenge can be entertained in respect of lease at such a belated stage. Learned Counsel has contended that it is settled law that an allotment condition cannot override the recitals of the Lease, whereas, the Lease itself provides taking permission from defendant No.6, which in this matter has already been granted and therefore, the plaintiffs have no case. Learned Counsel has further contended that without prejudice, the arrangement between defendants No.3 and 4 is only an assignment, whereby, the defendant No.4 with its expertise of managing Schools will take over the present School and the Suit Plot, and will raise a better and modern School for imparting quality education. Learned Counsel has also referred to Section 17, 49 and 50 of the Registration Act as well as Sections 54 of the Transfer of Property Act and has contended that after execution of the Lease Deed, the Allotment Order no more exists and it is only the lease document, which is to be interpreted in the present Suit. In support of his contention he has relied upon the cases reported as **2007 YLR 2183** (*Lahore Development Authority through Director General and another v. Malik Bashir Ahmed Advocate and 3 others*), **PLD 1966 West Pakistan Karachi 608** (*Ghulam Hussain Meherally v. Mst. Shirin Bai*), **2008 CLC 864** (*Mrs. Zainab Soahil v. City District Government, Karachi and 2 others*), **PLD 2004 Karachi 492** (*Messrs A.R. Builders (Pvt.) Ltd. v. Faisal Cantonment Board and 4 others*), **2001 SCMR 1992** (*Din Muhammad and another v. Subedar Muhammad Zaman*), **PLD 2007 SC 582** (*Zulfiqar and others v. Shahdat Khan*), **2013 MLD 287** (*Salman Mujahid v. Federation of Pakistan through Secretary Defence Rawalpindi and 5 others*) and **unreported Order dated 02.05.2016 passed by the Hon'ble Supreme Court in Civil Appeal No.85-K/2010** (*Morris Tanvir v. Federation of Pakistan through Secretary Ministry of Defence, Islamabad etc.*

5. Similarly, learned Counsel for Defendant No.4 in addition to adopting the arguments of learned Counsel for Defendant No.3, has contended that insofar as the present controversy and the objections raised on behalf of the Plaintiffs are concerned, they are to be determined only on the basis of the Covenants as mentioned in the lease documents. Per Learned Counsel the owner of the land in this case is defendant No.6, whereas, the Plaintiff No.2 is the Licensee of defendant No.6 and Plaintiff No.1 is a Sub-Licensee. Whereas, lease in question has been executed by Plaintiff No.2 and proper permission insofar as assignment arrangement between defendant No.3 and 4 is concerned has been given and approved by Defendant No.6. Per Learned Counsel the Allotment Order has no legal value after issuance of lease and it merges into the lease. Learned Counsel has also referred to a Statement made on behalf of Defendant No.4, wherein, they had agreed to give substantial discount and subsidy to the entire students presently studying in the School after taking over, but such offer has not been accepted. He has further submitted that insofar as Defendant No.4 is concerned the Suit Plot will only be used for the purpose of School and not otherwise, and therefore no lease condition is being violated.

6. While exercising his right of rebuttal, the learned Counsel for the Plaintiffs has referred to Section 107 of Transfer of Property Act and has further contended that insofar as the Lease Deed dated 16.05.2000 is concerned, the same as alleged, has been obtained fraudulently and therefore is void against which no limitation runs and Plaintiff No.2 in this matter has already prayed for its cancellation. He has further contended that once a document is alleged to be void then even otherwise, no specific plea of its cancellation is required to be made, whereas, an amended plaint has already been filed in this matter. He has further contended that insofar as Defendant No.4 is concerned a Learned Division Bench of this Court through Judgment dated 07.10.2016 passed in C.P No.D-5812/2015 and others has deprecated the concept of establishing branches and franchises of Schools as education, as a whole, has been commercialized, and therefore the purpose of amenity has been defeated.

7. Though various notices were issued to Defendant No.6, Federation of Pakistan and the Office of learned Additional Attorney General/DAG at Karachi, however, only on one date Mr. Saleemuddin A. Patoli, learned Standing Counsel affected appearance but thereafter he also failed to appear and assist the Court.

8. I have heard all the learned Counsel and perused the record. Insofar as the facts, as stated hereinabove are concerned, it appears that initially the plot in question was allotted to Mr. A.W. Adamjee vide Allotment Order dated 11.01.1967. It further appears that thereafter somewhere on 31.10.1971, the plot in question was transferred in the name **Adamjee Foundation (Defendant No.3)** by Plaintiff No.1 and subsequently, on 16.05.2000, the said plot was leased through Plaintiff No.2 in favour of Defendant No.3. As of now the defendant No.3 is transferring the Suit Plot as well as the School running thereon by way of an Assignment Deed dated 13.4.2015 and for the present purposes, the Plaintiffs are aggrieved by this arrangement between Defendants No.3 and 4. It is the Plaintiffs' precise case that this is impermissible in view of the Allotment Order as well as the Lease in question, whereas, the Amenity Plot cannot be sold even otherwise for any profit making activity. To have a better understanding of this case and to resolve the issue at hand, it would be relevant and advantageous to refer to the Conditions mentioned in the Allotment Order dated 11.01.1967 and the Lease Deed dated 16.05.2000. It is also of utmost importance to observe that the entire area in question including the Suit Plot was initially allotted by Defendant No.6 to Plaintiff No.2, which is a Union of more than 25 Cooperative Housing Societies and such arrangement was made between Plaintiff No.2 and Defendant No.6 through an Agreement dated 14.1.1954, wherein, there are certain conditions, which are also necessary to be considered. They all read as under:-

**THE KHATWIAR CO-OPERATIVE HOUSING SOCIETY
LTD.**

Hr. Bank House No.2 2nd Floor, Habib Square, Bunder Road Karachi.

ALLOTMENT ORDER

TERMS AND CONDITIONS

1. The plot shall be exclusively for residential purposes.
2. The allotment shall be cancelled if the allottee failed to pay further installments of Development charges and other sums payable to the Society as and when asked for.
3. No allottee shall be entitled to assign, transfer, sell, mortgage, lease or let the plot or any constructions thereon, to any person without the consent in writing of the Society. (Emphasis supplied)

Sub lease by Plaintiff No.2 in favor of Defendant No.3

Co-operative Housing Societies Union Ltd.

KARACHI

FORM P.A-I

This Sub-Lease made at Karachi the 16th day of May Two thousand.....
BETWEEN the Karachi Co-operative Housing Societies Union Ltd., registered under the Bombay Co-operative Societies Act, 1925 and having its registered office at Shaheed-e-Millat Road, Karachi, hereinafter called the "**Lessee**" (which term, where the context so admits shall include its successors, executors, administrators, representatives and assigns) of the first part AND Messers Adamjee Foundation through their authorized Representative Mr. Amin A. Sattar Ghazi, hereinafter called the "**Sub-Lessee**" (which term where the context so admits, shall include his successors, executors, administrators, representatives, and assigns) of the second part.

WHEREAS the **Lessee** was the 'Licensee' of all plots of land fully set forth and described in the Main Agreement executed and registered at No. 206 dated 14.1.1954 at pages 120 to 153 of Volume 170 of Book No. I Addl, BETWEEN The Governor General of Pakistan and the Lessee and has so far complied with certain terms and conditions of the said Main Agreement entitling him to a Lease of a portion of the plots mentioned as " Public Amenity" in the said Main Agreement.

In consideration of the afore-said, the Lessee has obtained a Lease of all the 'Public Amenity' Plots of land in the territorial Division of Karachi Co-operative Housing Union Ltd, Karachi, including plot Bearing Survey Sheet No.35 P/I, Survey Plot No. SNPA-34 measuring 13822 square yards attached with Survey No. 34-A of the Residential Area, Registration District and Sub-District of Karachi, as per dimensions and boundaries shown and delineated in Schedule I here-to annexed TO HOLD the said plots unto the said Lessee for a period of 99 years commencing from 1st January one thousand nine hundred and fifty four subject to the terms and conditions mentioned below AND whereas the Lessee at the meeting of its Board of Directors held on 1954 has resolved to allot the Sub-lessee the plot bearing No. SNPA-34 Survey No. 35P/1 in the layout plan of the entire Public Amenity Area' of the Society measuring 13822 square yards.

- 1.
- 2.
- 3.
- 4.

5. The Sub-Lessee shall have the power, subject to the conditions to sub-let, assign or otherwise transfer his rights in the said plot with or without buildings but all such transfers shall, in any case, be subject to the above conditions and to the obligations of observing and fulfilling the same; provided always that the liability of every transfer or under this Sub-Lease shall continue until a written notice of such transfer signed by the transfer and the transferee or their duly constituted agents has been served upon the Lessor and the Lessor's consent to such Sub-Leases, assignment or transfer has been obtained.

- 6.....

Sub-Licence by Plaintiff NO.2 to Plaintiff No.1
KARACHI CO-OPERATIVE HOUSING SOCITIES UNION LTD.
KARACHI

FORM-Z
Sub-Licence No.1.

THIS INDENTURE made this 9th day of June One thousand and Nine hundred and fifty five.....

WHEREAS the Governor-General of Pakistan (hereinafter referred to as the Landlord) has under an Agreement between the Landlord and the Licensee, dated 14.01.54 (hereinafter referred to as the Main Agreement) has authorized the Licensee to enter upon the land shown in the plan attached to the Main Agreement including the parcel of land referred to in the next succeeding paragraph hereinafter for the purpose of developing it and for the construction of buildings, subject to the terms and conditions contained in the Main Agreement.

AND WHEREAS the Licensee at a meeting of its Board of Directors held on 26.7.52 has resolved to allot to the Sub-Licencee No.1 the parcel of land bearing Survey No.34 and 34-A (Survey Sheet No.35P/1) in Layout Plan of the entire area measuring 56 Acres & 4310 Square yards, as per Schedule 'A' attached in Block Nos.7 and 8 of the Karachi Co-operative Housing Societies Union's land.

AND WHERAS under the provisions of the Main Agreement the Sub-Licencee No.1 is entitled to an agreement authorizing him to enter upon the said parcel of land for distributing the plots to the bonafide members (hereinafter referred to as Sub-Licencee No.2) and constructing buildings thereon.

NOW THIS INDENTURE WITNESSTH AS FOLLOWS:

That the Licensee does hereby authorize

(1) The Sub-Licencee No.1 shall within a period of three months from the date of execution of this Agreement, allot plots of land in the said parcel of land to bonafide members on its rolls (hereinafter called the Sub-Licencee No.2) subject to the terms and conditions of the Main Agreement and of the Agreement to be obtained from the Sub-Licencee No.2 in Form A appended with the Main Agreement.

(2)

(3)

(4)

Main Agreement between Defendant No.6 and Plaintiff No.2
GOVERNMENT OF PAKISTAN
MINISTRY OF HEALTH AND WORKS
(FOR KARACHI COOPRATIVE HOUSING SOCIETIES UNION LTD)

This Agreement made at Karachi the 14th day of January, 1954 between the Governor General of Pakistan hereinafter called "**the Landlord**" (which expression shall where the contexts so admits include his successor in office and assigns) of the one part and the Karachi Co-operative Housing Societies Union Limited, Karachi, being a Society registered under the Bombay Cooperative Societies Act, 1925 (VII of 1925), and having its registered office opposite the Karachi District Prison, Karachi-5, hereinafter called "**the Licensee**" (which expression shall where the contexts so admits include its successors, executors, administrators, representatives and assigns) of the other part.

WHEREAS the Landlord has agreed to permit and authorize the Licensee to enter upon the land hereinafter described for the purpose of developing it and constructing buildings thereon, in the manner and on the terms and conditions hereinafter appearing.

NOW THIS INDENTURE WITNESSTH that

1(a)
 2(1)
 3(1)
 4(a)
 5

6(a) After receiving the Approval of the Authority to the layout Plan the Licensee shall allot the plots in the manner following, namely:-

1. Plots reserved for residential purposes:-

The Licensee shall allot parcels of land severally to its members Co-operative Housing Societies (each one of whom is hereinafter called sub-Licensee No.1) in the manner approved by its Board of Directors and subject to the terms and conditions contained herein form Z appended hereto (which shall be deemed to be a part of this agreement), and authorize a Sub-Licensee No.1 to enter upon the parcels of land allotted to it for the purpose of making allotments of plots therein to its bonafide members and shall obtain the agreement of a Sub-Licensee No.1 in Form Z and transmit a copy thereof to the Authority.

A sub-Licensee No.1 shall allot plots to bonafide members on its roll in the manner approved by its Managing Committee and authorize the individual allottees (each one of whom is hereinafter called Sub-Licensee No.2) to enter upon the plot of land allotted to him for the purpose of constructing building subject to the terms and conditions contained herein and in Form A appended hereto (which shall be deemed to be a part of this Agreement).

A sub-Licensee No.1 shall obtain the agreement of a Sub-Licensee No.2 in Form A and transmit the same to the Licensee, who shall pass it on to the Authority and thereupon the rights and the liabilities under these presents regarding the construction of buildings on the sites so allotted shall, on and from the date of the execution of the agreement by the Sub-Licensee No.2 in Form A, devolve on sub-Licensee No.2, provided that this shall not in any manner affect

the liability of the Licensee and a Sub-Licensee No.1 in the matter of the execution of the Scheme.

It is hereby further agreed that on the due completion of the buildings in accordance with the terms and conditions contained herein, the **Sub-Licensee No.2 shall be entitled to a lease of the plot allotted to him for a period of 99 years in Form 'B'** appended hereto AND IT IS HEREBY FURTHER AGREED AND DECLARED that till such lease shall have been granted by the Landlord the Licensee and the Sub-Licensee No.1 and 2 shall have no right or interest in the said plots except that of bare of licensees. The Sub-Licensees No.1 & 2 shall not, except for the purpose of raising loans for construction of building thereon, from the House Building Finance Corporation or a Co-operative Society or Cooperative Bank, transfer any right or interest in the said area or, as the case may be, without the previous permission in the writing of the Landlord.

2. Plots reserved for commercial purposes:

Plots reserved for commercial purposes shall

3. Plots reserved for public amenities.

(a) The Licensee shall cause to be erected and completed in and upon the plots **reserved for public amenities the buildings**, the erection of which has been provided for in the scheme referred to in these presents and shall not without the **previous consent in writing of the Authority erect or suffer to be erected on any such plot or part thereof any building other than those required under the Scheme. On the due completion of the said buildings, the Licensee or Sub-Licensee No.1** (as the case may be) shall be entitled to the lease of the said plots on which those buildings stand **for a term of 99 years on such terms and conditions as may be laid down by the Authority.**

(b) Any plot which is or which may from time to time fall vacant or becomes in the opinion of the Authority available for disposal either due to a default of the Licensee, a sub-Licensee No.1 or 2 or a Lessee or by operation of law or otherwise shall be disposed of in accordance with the provisions of Sub-clause (a) of this clause.

(wherever required, the relevant part has been either highlighted or underlined)

9. Insofar as the condition stipulated in the Allotment Order is concerned it very clearly and specifically provides, that the plot shall be exclusively used for a Girls High School and the Allotment shall be cancelled and the Allottee shall not be entitled to assign, transfer, sell, mortgage, lease or let out the plot or any construction thereon to any person without the consent in writing of the Society. Insofar as the Plaintiffs' case is concerned, they heavily rely on this allotment condition and it is their case that the plot in question was allotted specifically at the request of predecessor-in-interest of Defendant No.3 and was given on actual cost basis by recovering only the development charges and expenses incurred by

them on the Suit Plot, whereas, on the other hand, the case of Defendants No.3 & 4 is that since subsequently, lease was executed, wherein, these conditions of the Allotment are not incorporated, therefore, no such restriction can now be placed by relying upon the Allotment Order. Insofar as the Lease Deed dated 16.05.2000 is concerned, the same refers to the Main Agreement executed on 14.01.1954 between the Governor General of Pakistan (Now Defendant No.6) and the Lessee i.e. Plaintiff No.2 and this forms a part of the Lease Deed dated 16.05.2000. Therefore, in arriving at a just and fair conclusion, while interpreting the Lease Deed in question, the Main Agreement is also to be considered. The Lease Deed provides that the Lessee i.e. Plaintiff No.2 has obtained a Lease of all the “*Public Amenity*” plots of land in the territorial division of Plaintiff No.2, including the Suit Plot, and further states that *TO HOLD the said plot unto, the said Lessee for a period of 99 years commencing from 1st January, 1954 subject to the terms and conditions mentioned below and whereas, the Lessee i.e. Plaintiff No.2 at the meeting of its Board of Directors held on 1954 has resolved to allot the Sub-Lessee the Suit Plot.* The aforesaid portion of the Lease Deed in question provides that apparently, the plot was allotted to Defendant No.3 by a Resolution in the Board Meeting of Plaintiff No.2 in 1954, whereas, no such Resolution or Allotment of the plot as stated in the Said Lease Deed has been placed on record either by the Plaintiffs or by the Defendants. Therefore, this is a question, which needs to be addressed and examined as on the one hand, the Plaintiffs have relied upon the Allotment Order of 1967, which Allotment has not been denied by Defendant No.3 and on the other, lease in question refers to another allotment made in the year 1954. It further appears that Defendants No.3 & 4 rest their case on Clause-5 of this Lease Deed, which provides and permits the Sub-Lessee to sublet, assign or otherwise transfer their rights in the Said Plot but all such transfer shall be subject to the above conditions and to the obligations of observing and fulfilling the same provided always that the liability of every transferor under this Sub-Lease shall continue until a written notice of such transfer signed by the Transferor and Transferee has been served upon the Lesser and the Lesser’s consent to such Sub Lease or transfer has been obtained. The Defendants claim that they have been given such permission by the lessor, therefore, this condition even otherwise stands fulfilled.

10. However, when the Main Agreement entered into between Government General of Pakistan (Landlord) and now Defendant No.6 and Plaintiff No.2 is examined, it appears that in the Agreement in Clause 2(1)(c), it is provided that Plaintiff No.2 shall have the area surveyed and prepare a Layout Plan showing

reservation of suitable plots or portions of land for public amenities, such as parks, playgrounds, Schools, dispensaries, hospitals etc. according to the standard that may be prescribed by the Landlord. The Suit Plot appears to be a result of such condition in the entire area and is one for educational purposes. The said Agreement further provides in clause-6 the method and manner for reserving the plots for the residential, commercial and public amenities. Insofar as residential plots are concerned the mechanism provided therein is that the Plaintiff No.2 is required to allot parcels of land severally to its members Societies (such as plaintiff No.1), which are to be called as Sub-Licensee No.1 and such allotment shall be to its bonafide members and the Sub-Licensee No.1 is required to execute an Agreement as provided in Form-Z. It further provides that the Sub-Licensee No.1 i.e. Society shall allot plots thereafter to its bonafide members, who shall be termed as Sub-Licensee No.2 and then they are required to execute an Agreement as provided in Form "A". It further provides that once the buildings are duly completed in accordance with the terms and conditions contained therein, the Sub-licensee No.2 i.e. the Allottee shall be entitled to a Lease of a Plot for a period of 99 years, as provided in Form "B".

11. When these conditions, as provided for Allotment and for proceeding further with the distribution of residential plots is examined in juxtaposition to the allotment of amenity plots, it appears that no such procedure is provided in respect of the amenity plots in Para-3 of Clause-6 (a) of this Agreement for such purposes. Agreement stipulates that the Licensee shall cause to be erected and completed in and upon the plots reserved for public amenities, the buildings, the erection of which has been provided for in the scheme referred to in these presents and shall not without the previous consent and writing of the Authority erect or suffer to be erected on any such plot or part thereon any building other than those required under the Scheme. It further provides that once the buildings are duly completed, the Licensee i.e. Plaintiff No.2 or Sub-Licensee No.1 i.e Plaintiff No.1, as the case may be, shall be entitled to the Lease of the said plots on which those buildings stand for a term of 99 years on such terms and conditions as may be laid down by the Authority. Here in this part of the Agreement it is very clearly and specifically provided exclusion for entitlement of a lease in favour Sub-Licensee No.2 i.e. the Allottee of the plot vis-à-vis the provision provided for in respect of the residential plots. When the aforesaid condition specifically provided for the plots for public amenities is examined threadbare, it appears to be very surprising as to how a Lease of an amenity plot has been executed in favour of an Allottee for which there is no provision in the Main Agreement entered into

between the then Governor General for Pakistan (Now Defendant No.6) and Plaintiff No.2. The Agreement stipulates that building is to be constructed on the amenity plot as per the original scheme of the entire area, and no other building can be erected and or constructed on such amenity plot, except as provided in the original scheme without permission of the Authority and it is only after such building has been completed or erected, the licensee (Plaintiff No.2) or Sub-licensee (Plaintiff No.1) would be entitled for a lease of 99 years.

12. The ownership of Plaintiff No.2 is dependent on the Main Agreement by virtue of which the entire area in question was devolved on Plaintiff No.2, whereafter the Plaintiff No.2 has allotted the area further to its members including Plaintiff No.1 through Sub-Licenses in Form-Z as provided under the Main Agreement. It is not understandable that as to how the lease of an amenity plot has been executed in favour of Defendant No.3 instead of Plaintiff No.1 directly. The scheme of Agreement apparently provides that for the plot in question it is only the Licensee i.e. Plaintiff No.2 or Sub-Licensee No.1 i.e Plaintiff No.1, who can be granted lease of the amenity plots for a period of 99 years.

13. Though there may be a question that if the lease was executed in favour of Licensee i.e. Plaintiff No.2, which is permissible under the Main Agreement and thereafter the said Plaintiff No.2 has executed the Sub-Lease in favour of Defendant No.3 then how come this objection be sustained. However, it must also be kept in mind that the recitals in the Sub-Lease do not corroborate with the allotment of the plot in question, firstly as it does not refer to Allotment of the Suit Plot in the year 1967. Moreover, it also appears to be an admitted position that Plaintiff No.2 entered into a Sub-License Agreement with Plaintiff No.1 on 09.06.1955 on the basis of a meeting of its Board of Director held on 26.07.1952 and allotted Plaintiff No.1 a piece of land bearing Survey No.34 & 34-A, (Survey Sheet No.35P/1) in the Layout Plan of the entire area measuring 56 Acres and 4310 Sq. Yds, as per Schedule "A" attached in Block Nos.7 and 8 of the of the Karachi Co-operative Housing Societies Union's Land which also includes the plot in question. If the entire area including the Suit Plot was allotted to Plaintiff No.1 by means of the aforesaid License as required under the Main Agreement, then how come the Sub-Lease has been executed on 16.05.2000 in favour of Defendant No.3, wherein, the disclosure regarding allotment of this land to Plaintiff No.1 as well as the Main allotment of the Plot in question has not been disclosed and further, only a reference to the allotment in the year 1954 has been made, which incidentally has not been placed on record by any of the parties.

14. There is another aspect of the matter, which also requires consideration by this Court as all along since the date of allotment of the plot and thereafter, it appears to be an understanding between Plaintiff No.1 and Defendant No.3 and its Predecessor-in-Interests that the allotment of the plot in question is for the betterment of the area residents including establishment exclusively of a Girls High School. Plaintiff No.1 is a Society of a particular Community; whereas, the predecessor-in-interest as well as Defendant No.3 also belongs to the same Community and the purpose and intent behind establishment of Defendant No.3 has all along been service to the Community. In this regard reference may be made to two Annexure relied in the plaint. First is the extract of Resolution No2 passed by the Managing Committee of Plaintiff No.1 at its meeting held on 31.8.1966 (Annex E/1-pg:103). It says that *the Managing Committee notes with pleasure the offer made by Mr. A.W. Adamjee at the Foundation Stone laying ceremony of the Society's Boys Secondary School on 21.8.1996, to construct and maintain a Girls High School in memory of his late wife Khatija Bai*. It further states that..... *offers Amenity Plot No.SNPA-34.... With the following stipulations...That the plot in question shall have to be utilized primarily for constructing and maintaining a Girls High School, General Amenities and other charitable purpose*. In reply to this a letter was written on behalf of Mr. A.W. Adamjee to Plaintiff No.1, (See Pg:111) stating that *"Kindly convey to the Members of the Managing Committee Mr. A.W. Adamjee's appreciation and gratitude for the offer of an amenity plot measuring approximately 14,000 Sq. yards No. SNPA-34 in Block "B" of the Society for the construction of a Girls High School in Adamjee Nagar"*. These documents are on record and have not been denied by defendant No.3. There cannot be any denial of the fact that Defendant No.3 was and is one of the Main and major contributors of public service for this Community and services of Adamjee Family and the Foundation are recognized since years starting from the time of creation of this Country. From the correspondence so placed on record by the plaintiffs, it appears that time and again this has been the Main reason of allotting the plot and so also monitoring the public services being offered by Defendant No.3 and its predecessor-in-interest. Perusal of all this correspondence clearly reflects that such intention is on part of both of them i.e. establishment of a Girls High School exclusively for the area residents and Community in particular. Time and again efforts have been made on behalf of Defendant No.3 to convert this Girls High School into a Co-education School. However, Plaintiff No.1 has resisted the same and no such permission has been granted. Notwithstanding all this, now suddenly Defendant No.3 has changed its stance by coming to the Court and saying that they need not require any such permission either for converting

the Girls High School into a Co-educational School, or for assigning it or transferring it to another private party for running the School on commercial basis. This stance of Defendant No.3 appears to be a summersault after a lapse of so many years during which such request was neither made, nor any such decision was taken by them, until Plaintiff No.1 refused and resisted such requests. Therefore, in all fairness it would not be appropriate at this stage of the proceeding to permit Defendant No.3 to violate the allotment conditions as well as the written and unwritten understanding between Plaintiff No.1 and Defendant No.3 so as to entirely change the complexion of such understanding. If this is permitted, then there will be nothing left in this Suit. It is to be kept in mind that the Plot was admittedly **allotted** and not **sold** or **auctioned** to Defendant No.3. The allotment was on cost to cost basis and the amount paid by Plaintiff No.1 to Plaintiff No.2 for the purposes of development charges was recovered and reimbursed from Defendant No.3 only to that extent and no profits or gains were made by Plaintiff No.1 in allotting the Suit Plot. This is of pivotal importance as the amenity plots are also auctioned and they fetch a good price once they are given to any prospective buyer through auction. The Plot in question was allotted and not sold or auctioned to Defendant No.3.

15. It may also be worth mentioning that a Society like Plaintiff No.1 allots land to its members after acquiring it from Government for the betterment and for having a peaceful and congenial atmosphere for living of its members. In this matter, for such purposes plaintiff No.1 has also earmarked certain amenity plots as per the original scheme of the entire area jointly with plaintiff No.2. Plaintiff No.1 has at least 7 plots for amenity purposes including plots for Schools, Hospitals, Mosques, and Play Grounds etc. The conditions attached to allotment of an amenity plot is a tool for safeguarding the interests and well-being of the residents of the Society enabling it to regulate the activities and utilization of land meaningfully as per the terms and conditions of allotment made to the Society. (See the main agreement dated 14.1.1954). The purpose of incorporating conditions in the allotment is to enable the Society to take appropriate actions in accordance with law for any breach of such conditions, if committed. If this is not, then every allottee would violate the conditions of allotment and would go scot free on the ground so raised on behalf of defendant No.3, that the lease does not incorporate the allotment conditions, hence no more valid. In my view this argument is misconceived and the attempt to interpret the lease without recourse to the allotment conditions is misconstrued as well. As noted, there is a specific purpose behind allotting the Suit plot to defendant No.3, and such fact is discernable from

the record so placed before the Court, and a tentative assessment leads me to believe that there was a specific purpose with which defendant No.3 had also consented. Now for any reason, defendant No.3 intends to alter or amend the said purpose, then at least the same cannot be achieved or attained without the consent and approval of Plaintiff No.1. If this is permitted on the ground that allotment no more exists, as pleaded, and it is only the lease / sub lease which is in field and does not put any fetters to that effect, then perhaps the entire purpose and intent of establishing a Society like plaintiff No.1 would be defeated / negated. Notwithstanding this I also do not see that such restriction is unreasonable as after all plaintiffs are required to abide by the conditions of the Main Agreement which requires them to maintain the amenity plots as per the original scheme of the area allotted to them.

16. The Hon'ble Supreme Court in the case reported as *Subedar Manzoor Husain through LRs Vs. Mst. Mehmooda Begum through LRs (PLJ 2004 Supreme Court 439)*, had the occasion to deal with a situation, wherein, a plot was allotted by Lahore Development Authority to one Ghulam Rasool followed by an agreement which contained certain restrictions with regard to transfer or lease of such land until fulfillment of certain requirements Thereafter on completion of formalities sale deed was also registered in his favour and subsequently he sold out the plot and ultimately the subsequent buyer came before the Hon'ble Supreme Court as in the Lower Court as well as before the Lahore High Court, the subsequent sale deed in their favour was declared as invalid. The precise question before the Hon'ble Supreme Court was that whether the original allottee on the strength of agreement of sale which contained a prohibitory clause not to transfer the property until completion of the sale agreement had lawfully transferred the title of the property to the subsequent buyer. The Hon'ble Supreme Court examined the aforesaid proposition in view of the provision of Section 6(h) read with Section 54 and 56 of the Transfer of Property Act and Section 23 of the Contract Act. The relevant observation of the Supreme Court is as under:

“..... Reading of both the provisions together expels a question with regard to entitlement of Ghulam Rasool to enter into the transaction of sale by means of registered sale-deed with Mst. Safia Begum knowing well that he himself was not owner of the property and merely on the basis of an agreement to sell in his favour, can be(sic) competently transfer absolute proprietary rights in favour of 3rd Party i.e. Mst. Safia Begum? To find out its answer reference may be made to important clauses of agreement to sell dated 20th August 1968 wherein Lahore Improvement Trust (now Lahore Development Authority) had placed a clog on him not to transfer the property unless sale was complete and such contract/agreement to sell would itself not create any interest in or

charge on such property as per Section 54 of the Transfer of Property Act. His entitlement on the basis of such agreement could be treated to be an intended transaction, conferring no rights of whatsoever nature upon him relating to proprietorship etc. and if, despite of it, he enters into a sale-deed with Mst. Safia Begum, it would be fictitious and fake because till then he had nothing in his possession to sell and as per the provisions of Section 6(h) his act of entering sale-deed with Mst. Safia Begum cannot be treated lawful under the provisions of Section 23 of the Contract Act which provides that 'a consideration or object of agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law'. Thus the sale-deed executed by Ghulam Rasool qua Mst. Safia Begum essentially defeats the provisions of Section 54 of the Transfer of Property Act, which manifests that on the basis of a contract of sale, no interest or charge will be created on the property. The outcome of this discussion is that sale-deed executed in favour of Mst. Safiq Begum from whom respondent Mst. Mehmooda Begum had purchased the property in dispute was invalid and she cannot base her entitlement over the property on it".

Though the context in which the aforesaid observation has been given is somewhat dissimilar viz a viz the present case, but the aforesaid conclusion of the Hon'ble Supreme Court leads to draw an inference that merely for the fact that even if a sale deed or for that matter a lease deed has been executed, the condition stipulated in the allotment of the plot is not abolished or bygone, and in fact impliedly gets merged into the subsequent title document i.e. lease, Sub-lease or Sale deed as the case may be.

17. In the case reported as *Mustafa Lakhani Vs. Pakistan Defence Officers Housing Authority, Karachi*, (**2008 SCMR 611**) the Hon'ble Supreme Court dealt with a situation, wherein, after allotment of plot and execution of lease by DHA, it transpired that the original allotment was illegal and fictitious and thereafter, the allotment as well as "A" lease was cancelled. Upon challenge the petitioner lost before the High Court of Sindh and the matter went before the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court was pleased to hold that since admittedly the allotment was found to be fake, the subsequent "A" lease cannot be held to be valid and such cancellation was upheld by the Hon'ble Supreme Court. This again draws inference that if the allotment is not proper or for that matter, the allotment puts some restrictions, the subsequent lease deed, if any, cannot be read in isolation viz-a-viz the allotment and it is preconditions.

18. In the case of *Funfair (Pvt.) Limited and another v. Karachi Development Authority & 2 others* (**PLD 2004 Karachi 170**), a learned Division Bench of this Court had the occasion to deal with a situation wherein, after allotment of an amenity plot and execution of lease in favor of the petitioner, the lease was cancelled as the allotment per se was illegal. Such cancellation of the allotment was challenged by the petitioner on the ground that it was illegal and without jurisdiction as the same was done without any show cause

notice and that after allotment a proper and valid lease had been executed and the terms contained therein would regulate the relations between the respondent No.1 (KDA) and petitioner and under the terms contained in the lease no unilateral cancellation of the allotment is envisaged. However the contention of the petitioner on this legal ground was not entertained by the Court in its writ jurisdiction and went on to observe as under:

A perusal of the above notes shows that the questions requiring consideration cannot be determined in the proceedings under Article 199 of the Constitution. We find force, in the contention of Ms. Rizwana Ismail, in this behalf. The facts are so chequered and complicated that it require examination of the entire record pertaining to the allotment and commercialization of the subject plot. First of all it has to be determined whether the subject plot was an amenity plot or not? The documents produced before us contain overwhelming material to infer that it appeared to be an amenity plot. However, for giving a conclusive finding the recording of evidence is necessary and thereafter on sifting of the evidence and scrutiny of the entire record, the point can be determined. After determination of this disputed question of fact, the other issues emanating therefrom and the law applicable can be considered and decided. Various noting's of the Director-General, KDA, the then Chief Secretary (who happens to be senior Minister in the Province at present) and Minister for Housing and Town Planning are indicative of the fact that the things were not done in the ordinary course. If after recording of evidence it is found that the subject plot was an amenity plot then it would require consideration whether a plot measuring 25000 square yards meant for development of a park could be allotted to an individual and commercial use thereof was warranted in law. It is not a case, in which right of-one individual is involved. The amenity plot for park is a public property and involves the rights of millions of citizens. The issue is to be considered on much wide plane and in the perspective of a broader horizon, keeping in view the public interest at large, as well as environmental issues. After determination of the status of the plot the question for consideration would be whether the State functionaries are also bound by the law of the land or they have free licence to deal with the public properties at their whims ignoring all the norms of public administration and the rule of law.

19. It is also a matter of fact, which has not been disputed seriously by the defendants, that after the assignment of plot to defendant No.4, it would no more be a School run by a Charitable Organization. The defendant No.4 is a group running Schools all over the country and by no figment of imagination, it is Charitable, rather it is a business empire, who runs Schools for profit making. The question, then arises is, whether an amenity plot allotted to a Charitable Institution to serve the community, can be sold out or assigned to a Non-Charitable Organization who intends to run School on commercial basis, notwithstanding the offer to subsidies certain portion of fee of students already studying. It is not that since defendant No.4 will also be running a School and therefore, there is no change in the use of the land which matters, but the way and in the manner, it has to be utilized is what matters. In this case, insofar as the allotment conditions are concerned they appear to be in conformity with the Main Agreement as well as the Sub-licence, and

therefore, neither they can be ignored nor it can be said that since a Sub-lease has been executed, they are no more applicable. It is of utmost importance to observe that plaintiff No.1 had allotted the Suit plot for a specific purpose, and that is, for the well-being of the community living in the Society. Such purpose has to continue and if defendant No.3 is permitted to sell or assign the Suit plot then definitely it will deprive the members of the Society and would also defeat the purpose for which such plot was allotted.

20. Insofar as the ground raised by the learned Counsel for defendant No.3, that at this belated stage the Plaintiff No.2 or for that matter even Plaintiff No.1 cannot challenge the lease deed which was executed in the year 2000, as such challenge being time barred is concerned, it would suffice to observe that at this stage of the proceedings, the question that whether the lease deed is void ab-nitio or voidable cannot be decided, as in the case of former, neither any limitation would run nor the Court is required to set it aside or cancel it, and if it is voidable. then the Court will need to deeply appreciate the evidence and so also the pros and cons of such a consequence, and then can set aside the transaction and such limitation would be governed by the Article applicable to such setting aside of the transaction (*See Abdul Majeed & 6 others v. Muhammad Subhan & 2 others-1999 SCMR 1245*). In short, at the injunctive stage, the plaintiffs ought not to be non-suited on this, as otherwise apparently they have made out a case for exercise of discretion insofar as grant of injunction is concerned.

21. In view of hereinabove facts and circumstances of this case and the allotment conditions as well as the contradictions in the Lease Deed relied upon by the Defendants vis-à-vis the Main Agreement and the Sub-License issued in favour of Plaintiff No.1, I am of the view that insofar as the Plaintiffs are concerned they have made out a prima facie case and balance of convenience also lies in their favour, whereas, irreparable loss would be caused to them if the injunctive relief is denied or refused. On the other hand, it will not cause any irreparable loss to Defendant No.3, whereas, no balance of convenience lies in their favour. In the circumstances, the applications listed at Serial No.1 & 3 are allowed as prayed, whereas, the Application listed at Serial No.2 does not merits consideration as through this Application, the Plaintiff No.1 seeks appointment of itself as a Receiver, which in the given circumstances, cannot be granted, therefore, the same is dismissed.

Dated: 08.02.2017

J U D G E