

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 831 / 2016

Plaintiff: Bay View High School (Pvt.) Limited
Through Mr. Shahzad Ashraf Advocate.

Defendant: Cantonment Board Clifton
Through Mr. Abdullah Munshi Advocate.

SUIT No. 832 / 2016

Plaintiff: Bay View High School (Pvt.) Limited
Through Mr. Shahzad Ashraf Advocate.

Defendant: Cantonment Board Clifton
Through Mr. Abdullah Munshi Advocate.

SUIT NO. 831 / 2016

- 1) For hearing of CMA No. 5502/2016.
- 2) For hearing of CMA No. 16718/2017.
- 3) For hearing of CMA No. 16719/2017.

SUIT NO. 832 / 2016

- 1) For hearing of CMA No. 16715/2017.
- 2) For hearing of CMA No. 16716/2017.
- 3) For hearing of CMA No. 5504/2016.

Date of hearing: 02.05.2018.

Date of order: 16.05.2018.

ORDER

Muhammad Junaid Ghaffar, J. Through these Suits the Plaintiffs have sought a Declaration for using the properties i.e. Plot bearing No. F-33, Block 9, KDA Scheme No.5, Clifton, Karachi (in Suit No. 831/2016) and Plot bearing No.2, Block 9, KDA Scheme No. 5, Clifton, Karachi (in Suit No. 832/2016) for educational purposes and have further impugned Notices both dated 05.04.2016 and through CMA Nos. 5502/2016 and

5504/2016 under Order 39 Rule 1 & 2 CPC seeks restraining order, whereas, through CMA No. 16718/2017 and CMA No. 16716/2017 Defendant seeks recalling / modification of order dated 07.04.2016 whereby, Defendant was restrained from implementing the impugned notice.

2. Learned Counsel for the Plaintiff has contended that Suit property in Suit No.831/2016 was purchased in the year 1992 which is being used for running an educational institution since 1994 without any impediment. Similarly the Suit property in Suit No.832/2016 was rented out to the plaintiff by Pakistan Federation of Business and Professional Women, Technical Training Centre Building in 2003, which has been constructed already on an amenity plot. Learned Counsel has submitted that in terms of Cantonment Board Clifton Building Byelaws, 2007 the Plaintiff wrote a letter dated 06.05.2014 for regularization of the use of the subject property for educational purposes in terms of Byelaws No. 125(7) but the same was not responded to. He has further contended that on 21.3.2016 a reminder was sent to the Defendant but again nothing happened at their end and suddenly the impugned Notice(s) dated 5.4.2016 was issued which is contrary to law. According to the learned Counsel similar letter dated 21.3.2016 was written in respect of the property in Suit No.832/2016, with a request not to disturb the peaceful usage of the said property as it was already on an amenity plot and can be used for educational purposes. Per learned Counsel, it is not a case wherein, any of the neighbors have objected to running of School; hence, these facts are distinguishable from other cases and the same has to be considered while dealing with the case of the Plaintiff. Per learned Counsel though the lease of the Suit property in question has been executed by KDA; but they have not initiated any

adverse action, whereas, now the area falls within the jurisdiction of the Cantonment Board; hence, they ought to have proceeded pursuant to the application of the Plaintiff instead of issuing the impugned Notice. According to the learned Counsel, this is not a case of nuisance being created, whereas, the properties in both Suits are being used since long for educational purposes, out of which one is already on an amenity plot, and therefore, the Plaintiff has made out a prima facie case for grant of permanent injunction. In support he has relied upon ***Cantonment Board through Executive Officer V. Secretary, Government of the Punjab and 2 others (1995 CLC 626) and Saeed Ahmed V. Cantonment Board, Malir Cantt. (2005 CLC 388).***

3. On the other hand, learned Counsel for the Defendant has relied upon the judgment of the Hon'ble Supreme Court reported as ***(Mst. Yawar Azhar Waheed (deceased) through L.Rs. V. Khalid Hussain and others (2018 SCMR 76)*** and submits that instant case has identical facts and therefore, no exception can be drawn to the Plaintiff's case. Learned Counsel further contended that though none of the neighbors have objected, but in view of the directions of the Hon'ble Supreme Court as contained in the aforesaid order, the Defendant is bound to act in accordance with law. He has further contended that the lease in question issued by KDA is restricted for residential purposes, whereas, the Defendant is only providing municipal administration of the area in question and is not the land owning agency, and therefore, conversion, if any, can only be granted by the lessor KDA. He has further contended that as per byelaws the Schools are excluded from the residential Zone, whereas, these byelaws would only apply to areas which are owned and developed by the Defendant. In support he has relied upon ***Muhammad Ilyas Hussain V. Cantonment Board***

Rawalpindi (PLD 1976 SC 785) and Riffat Masood V. Cantonment Board of Sialkot & others (2002 SCJ 663).

4. I have heard both the learned Counsel and perused the record. The Plaintiff's case is that the Suit premises in Suit No.831/2016 is owned by them pursuant to a Conveyance Deed dated 7.10.1997, whereas, the same is being used by them since 1994 for running a School on it. Similarly, property in Suit No.832/2016 has been rented out from an NGO, and is already on an amenity plot. It is being run since 2003. It is their case that none of the neighbors have ever objected to, on such School(s) being run on the Suit properties and therefore, their case is different in nature and while deciding the injunction application these peculiar facts must be kept in mind. To that extent, tentatively, at this stage of the proceedings, I am of the view that the contention of the Plaintiff's Counsel seems justified. It is not a case wherein, any of the aggrieved party / neighbor has come before the Court pleading nuisance in running such School within their neighborhood. It is the other way around wherein, the Plaintiff has impugned Notice issued by the Defendant which reads as under:-

"No. CBC/R.S./013
M/s Bay View School
F-33, Block-09

Dated the 05 April, 2016

**CLOSURE OF COMMERCIAL ACTIVITIES IN RESIDENTIAL AREA-
FINAL NOTICE**

Reference: Advertisement date: 18th Dec 2015 Daily Ummat, 19th Dec 2015 Dawn, Jang, Express.

It is intimated that despite issuance of various notices, verbal reminders & advertisements in the newspapers, you have failed to close commercial activities in residential area.

You are hereby finally directed to close the said activities within 03 (three) days of issuance of this notice.

In case of non-compliance of this final notice, your premises will be sealed at your own risk & cost.

Treat it final and without prejudice.

Sd/-
Executive Officer
Clifton Cantonment"

5. It is a matter of record that much prior to issuance of the impugned Notice, the Plaintiff vide its letter(s) dated 06.05.2014 and 21.3.2016, as well as reminder dated 21.03.2016 had approached the Defendant for regularization of land use of the subject property. Such fact is pleaded in Para 7 & 8 of the plaint which has been replied by the Defendant in the following manner:-

"REPLY TO PARAGRAPHS 7 & 8 OF THE PLAINT:

11. That the adverse allegations contained in paragraphs 7 & 8 of the plaint are denied. It is respectfully submit that the Plaintiff has omitted to disclose that the land-owning agency for the area in question is not Cantonment Board Clifton. The Suit is incompetent due to non-joinder and mis-joinder of necessary and proper parties. While the Defendant No. 1/ Cantonment Board Clifton has power, jurisdiction and authority under the provisions of the Cantonments Act, 1924 read with S.R.O. 207(I)/1983 read with Cantonment Board Clifton Building Bye-Laws, 2007 ("CBC (in Suit No. 831/2016) as well as Rules, Regulations, Bye-Laws, etc. made thereunder, it is respectfully submitted that only the land-owning agency of the area in question has authority for conversion from residential to commercial or amenity use, which has never been granted."

6. The aforesaid reply of the Defendant appears to be somewhat contradictory in nature, as on the one hand they have issued the impugned Notice on the ground that no School could be run in a residential property, and at the same time, it is their case that they are not competent or authorized to grant any conversion or otherwise in terms of the Cantonment Board Clifton Building Bye-laws, 2007. If that is the case, then perhaps, instead of issuing such notice, the Defendant ought to have communicated either to the Plaintiff to approach the relevant authority / lessor, or in the alternative, they could have forwarded the Plaintiff's case to the said authority / lessor. After all, Plaintiff cannot be left remediless, whereas, it appears to be an admitted position that School(s) are being run since 1994 and 2003, on the Suit premises. Moreover, the question that whether the area would be

managed and controlled by the Cantonment, or for that matter, any other concerned authority, it may be observed that the area i.e. Block No.9 of Clifton, Karachi, is part of KDA Scheme No. 5, and originally the land was developed and leased out by KDA. Thereafter, pursuant to SRO 207(I)/83 dated 2.3.1983, issued in terms of sub-section(1) of Section 3 of the Cantonment Act, 1924 it has been declared by the Federal Government to be the Clifton Cantonment for the purposes of the said Act and of all other enactments for the time being in force. The area in question is not for the above reason an area or scheme launched or developed by the Cantonment itself; but has been handed over to the Cantonment. This would mean that not all the land within the cantonment area necessarily belongs to the Federal Government. May be for military purposes, the authorities may declare that certain lands are within a cantonment area, so that the owners of lands within that area should be bound to conform to the rules of the cantonment in the exercise of their right of ownership of the lands or houses situate within that area. For example, the owners would be bound to take such steps for the purpose of sanitary, other municipal issue, building byelaws etc. But the question would remain that whether in the given facts the Cantonment Board would be within its right to even accord a change in the lease of the land / plot on the basis of its byelaws i.e. conversion (all sorts) from the original covenants. In these circumstances, since there is no objection either by the neighborhood nor for that matter by the lessor itself therefore, the Defendant would not be justified in refusing, at least deciding the case of the Plaintiff pursuant to its application filed in terms of Bye-laws No. 125(7) of the Plaintiff of the Clifton Cantonment Bye-laws 2007. At least they are obligated in law to pass a reasoned order or reject such application. And if not, then they must proceed as

provided in law, and to proceed further and accord approval, if otherwise, permissible in law. In the alternative they could have asked the Plaintiff to approach the concerned lessor, as even otherwise, there is a comprehensive procedure under the Karachi Building & Town Planning Regulations which also deals with conversion of land use including for educational purposes.

7. It may also be kept in mind that a learned Division Bench of this Court in the case reported as ***Zeeshan Builders v Karachi Building Control Authority (1992 MLD 2259)*** has already held that if an area which has been developed by KDA and pursuant to a Notification in terms of Section 3 of the Cantonment Act, 1924, has been notified to be an area falling within the Cantonment, then the provisions of Sindh Building Control Ordinance, 1979, would not apply insofar as building regulations are concerned, but would be more specifically governed by the provisions of Cantonment Act, 1924, and its rules and regulations.

8. Insofar as the reliance on the case of Hon'ble Supreme Court (**Mst. Yawar Azhar Waheed**) supra by the learned Counsel for defendant is concerned, it may be observed that vide order dated 26.04.2018 passed in Human Rights Case No.17842 of 2018, the Hon'ble Supreme Court has been pleased to hold such order in abeyance. Therefore, the Defendant cannot act any further purely on the basis of the directions as contained in the above order till such time the issue is finally decided.

9. In view of hereinabove facts and circumstances of this case and so also the peculiarity involved, wherein, none has come forward from amongst the neighbors to plead any nuisance, I am of the view that the application(s) of the Plaintiff can be disposed of by issuing certain directions. Accordingly, the Defendant is directed to proceed further for

deciding the application(s) of the plaintiff dated 6.5.2014 in respect of Suit No.831/2016 and 21.03.2016 in Suit No.832/2016, strictly in accordance with law, including but not limited to the procedure provided under Bye-law No. 125(7) ibid after due notice to the nearby residents and pass appropriate reasoned order(s) within 60 days from the date of this order. If the decision is against the plaintiff, then they should vacate the premises within 60 days from the date of such order. This grace period is provided to them to make alternate arrangements, and in view of the difficulty of students already enrolled.

10. With the above observations, **CMA No.5502/2016** and **CMA No.16718/2017** in Suit No.831/2016 and **CMA No.5504/2016** and **CMA No.16715/2017** in Suit No.832/2016 are disposed of, whereas, all other application in both Suits are adjourned to a date in office.

11. Applications stand disposed of in the above terms.

Dated: 16.05.2018

J U D G E

ARSHAD/