IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1808 of 2017
[CPLC Neighborhood Care & others v. Federation of Pakistan and others]

Dates of hearing	:	22-05-2018 & 28-05-2018.
Date of Decision	:	24-07-2018
Plaintiffs	:	CPLC – Neighborhood Care and 5 others through M/s. Ameen Mohammad Bandukda and Salman Ahmed Advocates.
Defendant No. 6:		Reads School and College through Mr. Muhammad Ali Lakhani, Advocate.
Defendants 10 to 16:		Muhammad Shafqat Ansari and 6 others through Mr. Ishrat Zahid Alvi, Advocate.

ORDER

ADNAN IQBAL CHAUDHRY J. –

1. The plaintiffs are residents of a residential neighborhood in Block 6, PECHS, Karachi, and they have challenged the opening/operation of a school in their immediate neighborhood on Plot No.42-N, Dr. Mehmood Hussain Road, Block-6, PECHS, Karachi (hereinafter 'the Suit Plot'). The school, named 'Reads School and College', is arrayed as the defendant No.6. The company that manages the school is 'Reads School and College PECHS Campus (Pvt.) Ltd.' The owner of the Suit Plot is said to be the defendant No.7 who is said to have let the Suit Plot to the defendant No.6. Initially, the defendant No.6 had been arrayed with no name (through its Administrator) as it was the case of the plaintiffs that the building on the Suit Plot is undergoing renovations, that the school has yet to commence operations and it's name has yet to be affixed on the building.

2. By an interim order dated 13.06.2017 passed on CMA No.9612/2017, this Court ordered that "*In the meanwhile the Defendants are restrained from use of the subject property i.e Plot No.42-N, Block-6,*

P.E.C.H.S, Karachi, for any other purpose other than of residential nature". Per the bailiff's report dated 25.07.2017, he had gone to the Suit Plot on 19.07.2017 to serve the defendants 6 and 7 with the restraining order but could not do so inasmuch as a contractor present at the Suit Plot informed the bailiff that the defendants 6 and 7 are not available. On 29-07-2017, having again not found the defendants 6 and 7 at the Suit Plot, the bailiff pasted the notice at the Suit Plot.

3. On 11.08.2017 the plaintiffs moved CMA No.11173/2017 for inspection of the Suit Plot, and CMA No.11174/2017, a contempt application against the Administrator of the school and the owner of the Suit Plot. These applications had been moved inasmuch as, after the restraining order dated 13.06.2017, a signboard bearing the name of the school had been affixed at the Suit Plot, which gave cause to the plaintiffs to apprehend that the school was about to start operations. The Suit Plot was inspected by a Commissioner on 12.08.2017 at 9:30 a.m. to reveal the aforesaid signboard and construction on-going inside the building.

4. On 18.08.2017, M/s Mehmood Habibullah and Kamran Alam Advocates filed vakalatnama for the defendant No.6 (the school) and sought time to file a reply. The said counsels gave an undertaking to the Court as follows: "*They however undertake that no commercial activity whatsoever shall take place in the subject residential plot*". By order dated 24.08.2017 the defendants were again directed to adhere to the restraining order dated 13.06.2017 in letter and spirit.

5. The counter-affidavit to the contempt application filed by the school's Administrator stated that he came to know of the restraining order dated 13.06.2017 on 15.08.2017 when the school reopened after summer vacations. The Administrator also verified a written statement on behalf of the school claiming that there were around 200 students studying thereat.

6. Given the fact that the restraining order dated 13.06.2017 was in the knowledge of the management of the defendant No.6 (the school) at least on 15.08.2017, and still in complete disregard of said order and their counsel's undertaking dated 18-08-2017, they persisted with the opening of the school, on 19-04-2018 a show-cause notice under Section 17 of the Contempt of Court Ordinance, 2003 was ordered to be issued to the management of the defendant No.6. They were also directed to file a copy of the admissions register of the school and were restrained from admitting further students in the school. The order dated 19-04-2018 was appealed by the defendant No.6 in HCA No.114/2018, wherein, by order dated 30-04-2018, the order dated 19-04-2018 passed by this Court was modified as follows:

> *"Learned counsel draws attention to para-10 of the impugned order in terms of which the Appellant No.1 has been restrained from admitting any further students in the School. Learned counsel explains that although this is the end of the academic year and "O" Level and "A" Level examinations are fast approaching, nonetheless students who have prepared for such examinations privately do come to the School for enrollment so that they can formally take the exams through the School. In respect of any such students, the School may till the next date entertain and process the application form if received but no final action or decision shall be taken on the same without the permission of the Court, and in particular the forms etc of any such students with regard to "O" Level or "A" Level examinations shall not be forwarded to the concerned foreign educational authorities (including the British Council) through the School.*
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> *Learned counsel expresses certain urgency in the matter set out in the last preceding para since such students, if any, may be placed in a limbo and that may affect their ability to sit for the "O" Level and/or "A" Level examinations. If by 09.05.2018 any such application is received by the School, the attention of the learned Single Judge may be drawn to such application (the particulars of which must be placed before the learned Single Judge under statement) for such orders as may be deemed appropriate, which may be made notwithstanding anything said herein above."*

7. On 09-05-2018, the directors of Reads School and College PECHS Campus (Pvt.) Ltd. and the Administrator of the school were

present in Court as alleged contemnors, and the explanation given by them was recorded in the order dated 09-05-2018 as follows:

> *"On being confronted with the show cause notice and certain queries, the aforesaid persons state as follows: that the Chief Executive of the Company is Mr. Khurram Hussain; that the School had started operations in August 2017 and it is not a case where the school was already in operation prior to August 2017; that they had come to know of the restraining order dated 13.06.2107 before the school started operations in August 2017; that they were advised that the said restraining order can be resisted on the ground that the running of a school does not amount to a commercial activity for which an undertaking had been given by their counsel on 18.08.2017, and it was on such advice that they started operations of the school".*

8. On 22-05-2018, the aforesaid alleged contemnors tendered an unconditional apology to the Court and undertook not to reopen the school after the summer break of 2018, which was to commence from 01-06-2018, until final orders are passed by this Court on CMA No.9612/2017. In that view of the matter, the show-cause notices for contempt of court were recalled and the injunction and ancillary applications were taken up for final hearing.

9. By CMA No.9612/2017 the plaintiffs seek a temporary injunction against the operation of the school (defendant No.6) near their residences. The injunction is pleaded on the grounds that the lease of the Suit Plot restricts its use to residential purposes only, whereas the intended use is for commercial purposes; that in opening the school the defendant No.6 has never followed the law/procedure prescribed for change of land use; that the operation of the school amidst the plaintiffs' residences will cause nuisance to them by way of traffic jams, overloading of civic amenities, noise and air pollution, street vendors etc. The submissions made by Mr. Ameen Bandukda, learned counsel for the plaintiffs, are incorporated below in the discussion of the plaintiffs' case.

10. The defense of the defendant No.6 is that more than 200 students are getting education in the school; that similar schools on

residential plots in residential neighborhoods are operating in the same area and all across Karachi; that the running of a school does not constitute a commercial activity and therefore there is no violation of the undertaking dated 18-08-2017; that no injunction can issue until the alleged nuisance is proved by evidence; and that the restrictive covenant contained in the lease of the Suit Plot can only be enforced by the lessor. On the same grounds the defendant No.6 has also moved CMA No.12945/2017 under Order XXXIX Rule 4 CPC for vacating the interim restraining order dated 13-06-2017. By CMA No.12946/2017, the defendant No.6 has also prayed for discharging the undertaking of its previous counsel recorded in the order dated 18-08-2017, though the affidavit to such application does not state a single reason in support of the application. The submissions of Mr. Muhammad Ali Lakhani, learned counsel for the defendant No.6, are incorporated below in the discussion of the case of the defendant No.6. Mr. Ishrat Zahid Alvi, learned counsel for the defendants 10 to 16, which defendants had joined the suit as parents of some of the students of the school, supported the case of the defendant No.6 and adopted the submissions of Mr. Muhammad Ali Lakhani Advocate.

11. It is not disputed that the plaintiffs have residences neighboring the Suit Plot. The nature of nuisance apprehended by the plaintiffs is categorically pleaded and detailed in para 7 of the plaint. Admittedly, the Suit Plot still remains classified as a residential plot and it has never been converted by law for education or commercial use. Though the lease of the Suit Plot is not on the record, but since the lessor of the Suit Plot and of the plaintiffs' plots is common, it was not disputed that the lease of the Suit Plot contains a restrictive covenant identical to the one contained in the lease on the record which reads:

> *"7. The said plot, and the buildings or erections built or to be built thereon shall be used for residential purposes only, and shall not be diverted to other use without the express consent in writing of the Lessor. For breach of this covenant the Lessor shall be entitled to forfeit the lease and to resume the plot."*

12. Under the Karachi Building & Town Planning Regulations, 2002 [KBTPR 2002], it is not that a residential plot in a residential neighborhood can never be used for education purposes, but that it can be so done after it is converted to an 'Amenity plot for education purpose', which in turn can be done provided the proposed conversion meets the conditions laid down in the said Regulations. The relevant Regulations of the KBTPR 2002 relating to change of land use, as amended by notification dated 11-10-2016 published in the Sindh Government Gazette on 17-11-2016, are:

> "18-4.2. **Change of land use of Residential plots**:
> 18-4.2.1. No residential plot shall be converted into any other use except with the approval of Master Plan Department, Sindh Building Control Authority after the recommendations of the Concerned Authority.
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> 18-4.2.2. Residential plot within a residential neighborhood can be allowed to be used for Education purpose provided the plot faces minimum width of road 60 ft. and lawfully converted into an Amenity plot for education purpose by the Master Plan Department, Sindh Building Control Authority as per prescribed procedure after inviting public objection from neighborhood.

(Note: by notification dated 28-08-2017, Regulation 18-4.2.2 KBTPR 2002 has been further amended also to allow for the conversion of a residential plot for health/clinic purposes, and it is added that for conversion for education and/or health purposes, the applicable FAR, number of floors and COS shall be governed by Regulation 25-5 KBTPR 2002)

> 2-7. **"Amenity Plot"** means a plot allocated exclusively for the purpose of amenity uses as define in Chapter 19 of these Regulations, such as Government uses in 19-2.2.1, Health and Welfare uses in 19-2.2.2, Education uses in 19-2.2.3, Assembly Uses in 19-2.2.4, Religious uses in 19-2.2.5, Parks and Play grounds in 19-2.2.7, Burial grounds in 19-2.2.8, Transportation right-of-way in 19-2.2.9, Parking in 19-2.2.10 and Recreational Areas in 19-2.2.12.
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> 19.2.2.3. Education uses: includes all land uses for nursery schools, kindergartens, primary schools, secondary schools, high schools, colleges, special colleges, technical colleges,

universities, research institutes, madressah, all such institutions related with education purposes including medical and fine arts institutes, including green and open spaces essential for the proper functioning of such institutions.

The ''prescribed procedure'' for change of land use referred to in Regulation 18-4.2.2. is set out in Regulation 18-5 of the KBTPR 2002 starting from an application in the prescribed form, followed *inter alia* by publications in newspapers inviting public objections to the proposed conversion, the hearing of such objections, verification of title of the property, the seeking of comments/approvals from the concerned Union Council/local Administration and lessor of the property, decision of the Master Plan Department on the application, and if need be of the Change of Land Use Committee, and the assessment of conversion fee.

13. It may be noted that before the amendment of the KBTPR 2002 by notification dated 11-10-2016 (published in the Gazette on 17-11-2016), the above mentioned Regulation 18-4.2.2 used to be numbered as Regulation 18-4.2.8 *albeit* the approving authority under that was the MPGO. By the said amendment, the entire procedure for change of land use was also revamped and brought under Regulation 18-5 KBTPR 2002. However, since both learned counsels remained unaware of the said amendment of 2016, their submissions referred to the KBTPR 2002 as it existed prior to the said amendment.

14. Mr. Ameen Bandukda, learned counsel for the plaintiffs had contended that the Suit Plot was not even eligible for conversion under Regulation 18-4.2.8 KBTPR 2002 (amended Regulation 18-4.2.2) because it faced a road no wider than 35 feet, whereas under the said Regulation only a plot facing a minimum of 60 feet wide road is eligible for conversion. In reply, Mr. Muhammad Ali Lakhani, learned counsel for the defendant No.6 first argued that though the subject of Town Planning was inserted in the Sindh Building Control Ordinance, 1979 by the Sindh Building Control Amendment Act,

2014, such subject reverted to Karachi Development Authority after the revival of the Karachi Development Authority Order, 1957 by the Karachi Development Authority (Revival and Amending) Act, 2016, and therefore the above mentioned Regulations in the KBTPR 2002 which relate to Town Planning, are not applicable. In other words, Mr. Lakhani implied that the above mentioned Regulations in the KBTPR 2002 have been impliedly repealed by the Karachi Development Authority (Revival and Amending) Act, 2016 read with the KDA Order 1957. But that is where he left such submission at. No attempt was made to show how the said Regulations in the KBTPR 2002 were inconsistent with the KDA Order, 1957. It is settled law that generally no repeal can be implied in the absence of an express repeal unless it can be established that the two statutes/provisions are inconsistent with each other and cannot co-exist. Cases on point are *Mumtaz Ali Khan Rajban v. Federation of Pakistan* (PLD 2001 SC 169), and *Zaheer Ahmed Chaudhry v. CDGK* (2006 YLR 2537). In any case, I do not see how that submission advanced the case of the defendant No.6 because even assuming for the sake of argument that the PECHS Block 6 is a Zonal Plan Scheme under Article 40 of the KDA Order, 1957, then under that Article too it is unlawful for any person to use land for any purpose other than that laid down in the Zonal Plan Scheme, unless on the application of the land owner and after a public hearing the KDA permits change in the use of the land. It is not the case of the defendant No.6 that it has applied to the KDA for change of the use of the Suit Plot. Mr. Lakhani also argued that the subject of Town Planning continued with the Local Government under the Sindh Local Government Act, 2013. But in making such submission he did not notice that the entries relating to Town Planning in Schedule-II of the Sindh Local Government Act, 2013, were omitted by the Sindh Local Government (Amendment) Act, 2013.

15. Mr. Muhammad Ali Lakhani, learned counsel for the defendant No.6 did not deny that the Suit Plot does not face a 60 feet wide road.

Regards that, his fall-back argument was that the description of 'Education Use' in Regulation 19-2.2.3 KBTPR 2002 did not restrict it's application to a plot facing a minimum of 60 feet wide road, and therefore Regulation 18-4.2.8 KBTPR 2002 (amended Regulation 18-4.2.2) was inconsistent with Regulation 19-2.2.3. Suffice it to say that Regulation 19-2.2.3 KBTPR 2002 only defines 'Education use', while Regulation 18-4.2.8 (amended Regulation 18-4.2.2) prescribed the conditions for conversion to Education use. Thus, there is no inconsistency. In any case, such argument was completely futile because it is not the case of the defendant No.6 that the Suit Plot had been denied conversion due to the conditions contained in the said Regulation 18-4.2.8 (amended Regulation 18-4.2.2), but it is their case that no conversion is required at all. Regulation 18-4.2.8 KBTPR 2002 (now Regulation 18-4.2.2) had come under discussion in the case of *Hussain Bux Memon v. KBCA* (2015 YLR 2448) where an educational institute running on a residential plot had been restrained by a learned Division Bench of this Court also on the ground of said Regulation.

16. Admittedly, the Suit Property has not been converted to an Amenity plot for education purpose under Regulation 18-4.2.2 read with Regulation 18-5 KBTPR 2002. Admittedly, it does not face a 60 feet wide road so as to qualify for conversion under Regulation 18-4.2.2. Therefore the use of the Suit Plot for education purpose without its conversion for such use, is an act prohibited by Regulation 18-4.2.1 KBTPR 2002 and is therefore unlawful.

17. In circumstances where the restrictive covenant in the lease of the Suit Plot (Clause 7 thereof) is also manifested in Regulation 18-4.2.1 KBTPR 2002, and which legislation is also for the benefit of the residents/the plaintiffs, the question whether the plaintiffs can also invoke the restrictive covenant contained in the lease of the Suit Plot, is not a moot point for the present.

18. Until the Suit Plot is converted to an amenity plot for education use under Regulation 18-4.2.2 KBTPR 2002, the plaintiffs retain the ground of nuisance to support their injunction application, which ground has been pleaded by them with particulars. In reply to the ground of nuisance, Mr. Muhammad Ali Lakhani, learned counsel for the defendant No.6 had contented (a) that the nuisance alleged requires proof, and until it is proved after recording evidence, no injunction can issue; (b) that there are other schools and commercial establishments in the area to which the plaintiffs have not taken issue; and (c) that in running a school the defendant No.6 was essentially performing a public service and such service should be allowed to continue because the inconvenience resulting from such service was outweighed by its public purpose.

Regards Mr. Lakhani's contention 'a' that the nuisance alleged requires evidence, suffice it to say that given the nature of the activity, i.e. the operation of a school near the residence of the plaintiffs, nuisance can safely be assumed for the purposes of a *prima facie* case. As regards contention 'b' that there are other schools operating on that very road, though that was rebutted by Mr. Ameen Bandukda Advocate by stating that none were in close proximity to the residence of the plaintiffs, the short answer to that contention is that two wrongs would not make a right. The said contentions 'a' and 'b' raised Mr. Lakhani have been answered in similar terms in a long line of rulings given by this Court, and to cite a few are the cases of *Naz Shaukat Khan v. Yasmeen R. Minhas* (1992 CLC 2540); *Ardeshir Cowasjee v. Muhammad Naqi Nawab* (PLD 1993 Karachi 631); *Arif v. Jaffar Public School* (2002 MLD 1410); and *City Schools v. Federation of Pakistan* (2018 CLC Note 4 Sindh).

19. As regards Mr. Lakhani's contention 'c' that the public service being performed by the defendant No.6 in running a school outweighed its inconvenience/nuisance, while that in my view may have been a consideration had the case come to turn on equity, it is no

answer to violation of statute (the KBTPR 2002). In fact, as observed by a leaned Division Bench of this Court in the case of *Hussain Bux Memon v. KBCA* (2015 YLR 2448), it was in recognition of the fact that schools on residential plots were providing a public service that needed legal cover, the legislature had introduced Regulation 18-4.2.8 (now Regulation 18-4.2.2) in the KBTPR 2002 to allow the conversion of residential plots to amenity plots for education purposes. In other words, the public service that the defendant No.6 claims to be providing is now regulated by Regulations 18-4.2.1, 18-4.2.2 and 18-5 of the KBTPR 2002.

The reliance placed by Mr. Lakhani on the case of *Dr. Shahzad Alam v. Beacon Light Academy* (2011 CLC 1866) in support of his contention 'c', is misplaced. In that case the school in question had been operating for many years with a large number of students, and it was that fact, as had been categorically noted by the learned single Judge, that had turned the case in favor of the school for refusing a temporary injunction at the preliminary stage of the suit. In the case at hand, the school had started operations on 15-8-2017 and that too in violation of an interim restraining order passed by this Court and in violation of an undertaking given to this Court. Mr. Lakhani's reliance on the unreported order dated 12-08-2003 passed in the case of *M. Zaheerul Hassan v. Lahore Grammer School* (C.P. No.D-2621/2003) is also of no help to the defendant No.6 as in that case the school was being opened on an amenity plot designated for such purpose and it was in that backdrop that the learned Division Bench in refusing writ observed that the larger public interest must override the individual inconvenience. Even then, since that matter was being dealt with in Constitutional Jurisdiction, it was observed that the petitioner was free to approach a civil court for his private rights.

20. For the foregoing reasons the plaintiffs have made out a case for the grant of a temporary injunction. The only thing now left to be

considered is whether the circumstances of the case require that the injunction be withheld for some time to afford students of the defendant No.6 to make alternate arrangements.

In its written statement the defendant No.6 stated *"more than 200 students are getting education in the institute"*. In the counter-affidavit to the contempt application it was stated that *"between order passed on 13-06-2017 and received upon me on 15-08-2017 while the school was already closed due to vacation"*. These statements tried to give the impression that the school was already in operation prior to the summer vacations of 2017. But subsequently the management of the school had admitted before the Court that the school on the Suit Plot was not in operation before 15-08-2017 (see order dated 09-05-2018 reproduced above). Therefore this is not a case of a long-standing school. The academic session for which the students were enrolled in 2017 has by now ended, and uptill 28-05-2018, when this matter was reserved for orders, no application was placed before this Court of any O-level or A-level student in terms of the order dated 30-4-2018 passed in H.C.A. No.114/2018. Therefore, this is not a case that requires the injunction to be delayed.

21. For the foregoing reasons, CMA No.9612/2017 moved by the plaintiffs under Order XXXIX Rules 1 and 2 CPC is allowed by restraining the defendants 6 and 7 from putting the Suit Plot to any other use except residential until final disposal of the suit, unless the Suit Plot is converted to any other use by the competent authority in accordance with law. Consequently, CMA No.12945/2017 under Order XXXIX Rule 4 CPC and CMA No.12946/2017 under section 151 CPC moved by the defendant No.6 stand dismissed.

JUDGE