

**IN THE HIGH COURT OF SINDH AT KARACHI**

**PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR**

**SUIT NO.1918 of 2015**

For Plaintiffs : Mr. Sarmad Hani, Advocate

For Defendant No.1 : Dr. Muhammad Aslam, Advocate  
alongwith Mr. Ishrat Ghazali, Advocate

For Defendant No.2/SBCA : Ms. Saba Siddiqui, Advocate

For Defendant No.5 : Mr. Asfandyar Kharal, Advocate  
Mr. Abdul Jalil Zubedi, AAG.

Date of hearing : 29.03.2016

Date of announcement : 20.05.2016.

**ORDER**

This order will dispose of application under Order 39 Rules 1 and 2 R/w Section 151 CPC (CMA No.14527/2015) filed by plaintiffs with prayer to :

*'...restrain the defendants No.4 & 5 from establishing and operating an educational institution and / or a commercial office on the said property.'*

2. The brief facts of the case are that plaintiffs, residents of Park Lane, Block-5, Clifton, KDA Scheme No.5 Karachi, challenged

alleged illegal conversion and utilization of Plot No.F47, Park Lane Block-5, Clifton, KDA Scheme No.5, Karachi, for its commercial purposes. Having given the details of status and object of establishment of defendant No.1 (KMC) and defendant No.2 (SCBCA), the plaintiffs pleaded that defendant No.4 is United States Educational Foundation in Pakistan, established in 1950 by governments of Pakistan and USA. Defendant No.4 is occupying said property; operating, running an educational institution and commercial office by name of Prometric Testing Center therein. The subject property was leased by KDA (now KMC) to defendant No.5 who then sub-leased / rented it out to defendant No.4. It is claimed by plaintiffs that around the turn of year use of subject property came to attention of plaintiffs who witnessed a sudden manifold increase in nuisance due to visit of a large number of students and staff to the said property and parking of their cars on Park Lane. Consequently, it became difficult for plaintiffs to access their houses because they only have access to their houses from Park Lane. On further inquiry plaintiffs learnt that defendants No.4 and 5 have established an educational institution and commercial office on the said property. They served a notice to defendants on 15.01.2015 informing them that suit property was a residential premises hence it could not be used for educational and commercial purposes; on no response two other notices were served. Plaintiffs pleading and referring to certain documents; rules; regulations; judgment passed in CP No.1704 of 2008 and lease, claimed the establishing of education institute in a residential plot as illegal, void and unlawful; use thereof as *nuisance* filed the instant suit.

3. The objections to such application were filed by the defendant No.5 denying existing of requisite ingredients for grant of injunction in favour of the plaintiffs; rejoinder to such objections was also filed by the plaintiffs.

4. Heard the respective parties and perused the record carefully.

5. Learned counsel for plaintiffs has argued that subject property is *undisputedly* a residential one; facing a road which is *only* 50 ft wide; same is in commercial use, which is violation of Regulation 18-4.2.1 and 18-4.2.8 hence prayed for allowing application and even went on saying to decree the suit. Reliance has been placed on the case of *Amir Ali v. Indus Entertainment (Pvt.) Ltd.* (2004 YLR 1576); *Brookes Pharmaceutical Laboratories v. KBCA* (2012 CLC 131); *Adershir Cowasjee v. Muhammad Naqi* (PLD 1993 Karachi 631); on point of *private nuisance* reliance was placed on the case laws reported as *Mrs. Nasreen Tariq v. Abdul Basit* (2013 MLD 1388), *Arif v. Jaffar Public School* (2002 MLD 1410), *Asghar Allauddin v. Lahore Lycium School* (1999 CLC 66); *Lahore Grammar School v. Hameeda Begum* (PLD 1996 Lah. 442), *Ardeshir Cowasjee v. Muhammad Naqi* (PLD 1993 Kar. 631) and *Naz Shaukat Khan v. Yasmin R. Minhas* (1992 CLC 2540).

6. On the other hand, learned counsel for the defendant No.4, attacked the maintainability of suit; denied to be engaged in any commercial activity; while referring the bilateral agreement between

governments of US and Pakistan claimed its object to promote mutual understanding between peoples of the two countries by a wider exchange of knowledge and professional talents. Insisted that shifting of defendant No.4 to any commercial area the defendant will have no option but to close down the office and ask the beneficiaries of its activities / grants to come to Islamabad or go to Dubai for the purpose as the defendant No.4 cannot compromise on the security issue. Reliance placed on cases reported as *Haji Allah Rakha v. Faisalabad Development Authority* (2003 SCMR 1756) and *Lawrance v. Coventry* (2014 SCMR 1069).

7. Learned counsel for defendant No.5 contended that the subject property was rented out to defendant No.4 for office-cum-Residence purpose as established by clause 3 of the Tenancy Agreement dated 01.03.2012, that no educational institution is established or commercial activities are being carried out in subject property, plaintiffs have concealed material facts of the case from this Court and have approached this Court with unclean hands. He has stressed that allowing instant application would tantamount granting main relief; that plaintiffs have no prima facie case, balance of convenience is not in their favour and there is no likelihood that they would suffer any irreparable loss in case their application is dismissed, which do merit dismissal.

8. Since, defendant No.4, has raised objection over the maintainability of the *lis*, hence judicial propriety demands that same

shall be answered *first*. Normally, one has absolute rights to use his / her property unless such use is:

- i) *within limitation of laws; and*
- ii) *not causing prejudice or harm to other (s), in particularly to neighbours or others likely to suffer from such lawful act (s) or omission;*

'Private rights' are not only to be protected by the 'public functionaries' but also by the *beneficiary* himself/herself. Let me add that *rights* and *obligations* are strongly *interlinked* with each other hence a balance has *always* to be maintained while demanding *rights* because a *legal right* even shall not earn a *license* to avoid the obligations which one has towards *others*. An owner does have absolute rights to enjoy his property but manner and use thereof shall not be at the cost of others. A *lawful act*, if causing prejudice and harm to rights of others, shall not leave *aggrieved* without a remedy but he may bring a *lis*.

"..... *Right of enjoyment of a property is **independent right** and if it is shown that the public functionaries act in a manner as it may encroach upon a private right which may also be invasion of a public right than individual whose rights are encroached may bring an action against such invasion*'. (PLD 2003 Kar. 477)

'As far as the objections of learned counsel for the defendants that plaintiff has no right which could be enforced. **In my humble opinion section 42 of the Specific Relief Act do give a right to institute a suit to any person who has (sic) Any right as to any property**". As discussed above, such right read with 'Right of Enjoyment of a property as postulated under section 54 of Specific Relief Act do give such right to a plaintiff who could establish that the right to view and exposure of his commercial establishment is of some beneficial interest to him. Right to life as has been expounded by the Hon'ble Supreme Court in Shela Zia's case reported in PLD 1994 SC 693 as approved in 'Costal Livina's case in 1999 SCMR 2882 that Right to Life is not merely a vegetative living .Likewise, right of property or right to carry on

*business on a property are also recognized under the Constitution, 1973. Such right to property is not be interpreted in a narrow sense but must be given a broader perspective and meaning more particularly in present commercial environment where every bit of a commercial premises or establishment has its due importance and pecuniary benefit. **Injunctive relief is also obtainable in case of invasion of civil right in the nature of Tort. A person seeking injunction must make out a case of actual or of threatened violation of its right.**' (PLD 2003 Kar. 477).*

*(Emphasis supplied)*

**Clifton & Defence TW Association Vs. President CCB**

**(PLD 2003 Karachi 495):**

*'What act constitute a public nuisance are not defined under the Code of Civil Procedure. Nuisance cannot be defined exactly and exhaustively, all definitions are merely illustrative, it is premise on large number of variables. Causes keep on adding with emergence of new and complex inter personal relationship between person to person and person to society. **Nuisance amounts to interference with the person's use or enjoyment of his property or any right appurtenant thereto, a tortious act.**'*

*An act at the same time can be both, public or private nuisance, public because it effects adversely many person or community at large and private in the sense that it also entails special damages or injury to private and individual right of one or few. **Where an act, complained of is both public and private nuisance, then any person effected by such wrong or nuisance may bring an action without permission of Advocate-General.**'*

*(Emphasis supplied)*

From the above, it is *quite* clear that to maintain a suit even on the ground of *easement right* the person has to show suffering from an independent act of other over his own property *even*. Since, the plaintiffs have *specifically* asserted infringement of their rights in result of use of the subject property by defendant No.4 hence the personal interest of the plaintiffs *is prima facie* involved. Thus, the above discussion and legal

position makes me to conclude that the suit of the plaintiff is sustainable in law.

9. Now, before going any further, I would add that question, involved in the *lis*, was never that of conversion of plot from '*residential to commercial*' which *position / fact* shall stand clear from a direct reference to relevant para from written statement of defendant (SBCA) which reads as:

'3) that the present owner / occupant has rented out the residential bungalow to defendant No.4 who has converted the residential bungalow in to commercial school, without any **approval from the concerned authority or the SBCA, as required under Regulations 18-4 of the KBTPR 2002.**'

The defendant No.4 has taken a *specific* stand denying use of subject property for commercial purpose but it did not deny its (*defendant No.4's*) object i.e '*giving /exchanging of knowledge & professional talents*'. At this point a direct reference to text of Karachi Building and Town Planning Regulation 18-4.2.8 is made which reads as follows:-

*'Residential plot within a residential neighbourhood can be allowed to be used for **Education** provided the plot faces minimum width of road 60 ft. and lawfully converted into an Amenity plot for education by the MPMGO as per prescribed procedure after inviting public objections from neighbourhood.'*

The *regulation* nowhere leaves any room for a plea of '*use of building for commercial or non-commercial*' **'education'** but speaks **'use for education'** which too where two *conditions* have been fulfilled i.e:

- i) *plot should face a road with minimum width of 60 ft.*
- ii) *there should be a lawful conversion of such plot into **'an amenity plot'**;*

hence the plea of the defendant No.4 that subject property is being used for 'exchanging/giving education' without any '**commercial purpose**' shall not advance the case of the *defendant No.4* nor shall it justify '*continuity of use of residential property for imparting education or exchange of skills and talents* because per Black's Law Dictionary the '**educational institution**' is:

*'A school, seminary, collage, university, or **other educational facility, though not necessarily a chartered institution.***

2. *As used in a zoning ordinance, all buildings and grounds necessary to accomplish the full scope of educational instructions, **including those things essential to mental, moral and physical development.***

Further, in the instant matter *undisputedly* both said conditions lack because neither the property in question faces a road with minimum width of 60 ft nor it (*subject matter*) was ever converted into an '*amenity*' lawfully.

10. I would further attend the *plea* of inconvenience of the defendant No.4 for which shall refer to the case law, relied by the defendant No.4 *itself* i.e *Haji Allah Rakha v. Faisalabad Development Authority & Ors.* (2003 SCMR 1756) wherein it is held that:

'18. We would have also remanded the case but since there was no dispute qua the width of the main entry/exit gate of the Arshad Cloth Market, as such, as already held, the functionaries of the F.D.A. have failed to exercise their public duty in an appropriate manner. The construction of these six shops would not only shorten the main entry/exit gate to a



considerable extent but would also cause, as already stated, tremendous difficulties to the market users/ goers when there are already about 400 shops. The interest of the auction -purchasers who succeeded in securing the allotment in their favour , cannot be given precedence over the rights of public at large. The general public would certainly suffer a lot if this illegal act of construction at the main entry / exit gate is not arrested at the very outset. This is in accord with the consistent policy of this Court that in a situation of competing interests of an individual with that of the public at large, the later shall be given preference.'

*(Emphasis supplied)*

In the instant matter, it is not the case of the defendant No.4 that there is any order for use of a *residential plot* for *education* purpose by any of the *competent* authorities hence '*inconvenience*' to defendant No.4 *itself* shall not prevail over the interests and rights of neighbouring people or those using such road else it shall amount to giving preference to interests of an individual with that of public at large.

However, the peculiar facts and above discussion compel me to go further that a *lis* where it is not *disputed*:

- i) *that the status of subject property to be 'residential one';*
- ii) *that the width of road, on which subject matter is located, is not 60 ft. wide;*
- iii) *that there is continuing of activities otherwise than residential;*
- iv) *that there is no lawful conversion of such residential plot into amenity;*

and such *lis*, escape from *objection* of maintainability then things should not be kept *hanging* which *otherwise* are clear in law or *already* decided by

High Court or Apex Court else the object and purpose of Articles 189 and 201 of the Constitution and even that of other relevant laws, regulations and rules may prejudice in name of pendency of *lis*. In the matters of violation of regulation referred above, the continuity of use *otherwise* than residential purpose was declared illegal in the case, specifically referred and relied in plain i.e CP No.D-1704 of 2008 wherein it was concluded that:-

*'Since the violation of Regulation 18-4.2.8 stands established and further .....therefore, we allow the petition as prayed, however keeping in view the inconvenience which ultimately would be caused to the students, we defer the implementation of our judgment till Summer Vacation so that the respondent No.4 may make alternate arrangements. In case, the Respondent No.4 continues the educational use of the subject property after 31.7.2015, the respondents would seal the premises and would ensure removal of unlawful construction.'*

Thus, I have no hesitation in concluding that *continuity* of *lis* shall serve no purpose particularly when in reference to order of this Court dated 19.01.2016, the defendant No.4 himself came forward with a stand, evident from a reproduction of the order dated 1<sup>st</sup> March, 2016 which is referred hereunder:-

*'In view of order dated 19.01.2016, learned counsel for the defendant No.4 intends to submit affidavit contending therein that the subject matter property would be vacated i.e an expiry of lease agreement of the suit premises. ....'*

Therefore, I have no hesitation in concluding that once violation of *regulation* is established the Court should not be reluctant in disposing of the suit if the reliefs, sought are only to extent of enforcement of such law

reaffirming the *already declared question of or principle of law* by Apex Court. Accordingly, the suit is hereby disposed of with direction that the defendant No.4 shall not use the premises after expiry of agreement period i.e. 12.03.2017 except for '*residential purpose*' only. In case of any violation or use of the subject matter for any other purpose *except* for '*residential one*' by defendant No.4 or *defendant No.5* even or any other person claiming under him shall require the authority to seal the subject property without any notice.

Let such decree be drawn.

Imran/PA

**J U D G E**