

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1056 of 2022

[Mrs. Zulekha & anotherv.....Province of Sindh & others]

Dates of Hearing : 11.08.2022 & 16.08.2022

Plaintiffs through : M/s. Khawaja Shams ul Islam, Ahmed Ali Hussain, Saif Suhail Younus, Syeda Falak Mutahir & Samil Malik Khan, Advocates.

Defendants through : Mr. Ghulam Akbar Lashari, Advocate for defendant No.3 a/w Mr. Muhammad Altaf, Advocate & Mr. Muhammad Usman Ahmed.

M/s. Amel Khan Kasi, Sameer Tayebaly & Marina Ali, Advocates for defendant No. 4 to 6.

ORDER

Zulfiqar Ahmad Khan, J:- *Lis* brought to this Court by the plaintiffs is that the defendant No. 4 to 6 in conjunction with each other have launched a college under the name & style of “They Royal Colosseum Institute for International Studies” in a residential premises bearing House No.D-29, Block-2, Clifton, Karachi (“**the said property**”) which act is allegedly illegal as the said property is built on a purely residential piece of land where no commercial activities are taking place streetwise, therefore, a mandatory injunction restraining the said defendants to stop such a commercial activity on the said property under the garb of an educational institution be granted. In this background, present order aims to decide the following two applications:-

(1) CMA No.10833/2022. The plaintiffs have filed this application under Order XXXIX Rule 1 & 2 CPC with prayer that defendant No.4 to 7 be restrained from carrying out any commercial activity on the subject property.

(2) CMA No.11142/2022. The defendant No.4 to 6 have moved this application under Order XXXIX Rule 4 CPC to evacuate the ad-interim order dated 21.07.2022.

2. Plaintiffs allege that they are inhabitants of House No.D-39, Block-2, Clifton, Karachi, residing over there for the last many years in tranquility, however, woke up to the rude reality sometime in the month of June 2022, that a College is being launched on the said Property located in the same street, and that preparations in this regard had commenced in order to start academic session in August 2022, considering that the College was being launched in their 40 feet wide street, the Plaintiffs fearing that such a busy, customer-infested outfit will fetch traffic congestions causing serious discomfort to the plaintiffs, denying their fundamental right of enjoyment of their property peacefully, this Court has been reached.

4. Defendant No. 4 to 6 filed counter affidavit to the subject injunction application (CMA No.10833/2022), whereas, plaintiffs filed counter affidavit to an application filed by the defendant No.4 to 6 for vacating the interim order dated 21.07.2022 (CMA No.11142/2022) too.

5. Mr. Khawaja Shams-ul-Islam, Advocated the case of the plaintiff with the assistance of Mr. Ahmed Ali Hussain, Advocate stating that the property upon which the Royal Colosseum Institute for International Studies (“College”) was being launched, as well as the area wherein the said property was situated, are purely residential in nature. Learned counsel draws Court’s attention to annexure P/3 which is the Master Plan of Clifton Block 2 issued by the Defendant No. 2 which shows that the said property and its adjoining

houses are all residential in nature and no commercial plots are visible in the neighborhood.

6. Mr. Amel Khan Kasi, Advocate set forth the stance of the defendant No.4 to 6. According to him, the plaintiffs belonged to a racketeering group bent upon putting the future of students at risk. He contended that owing to the interim injunctive order, operation of the College has been brought to a grinding halt. He next contended that the plaintiffs never lodged any complaint with the Building Control authorities for the redressal of their grievances, therefore, their claim is hit by the doctrine of acquiescence and estoppel. During the course of arguments, Mr. Kasi, placed on record a list of schools and other business activities being carried out in Block-2 Clifton, Karachi and complained that the plaintiffs never objected to traffic congestions, noise and nuisance caused by these commercial activities and have chosen to discriminately treat the College. He concluded by stating that owing to such ill motivated acts of the plaintiffs, college students are suffering being deprived of pursuing higher education to equip themselves with high quality education being provided by qualified professors, so that the interim injunction be vacated forthwith. So as to strengthen his arguments, Mr. Kasi placed reliance on the precedents reported as 2011 CLC 1866, 2020 CLD 505, AIR 2003 S.C. 578, AIR 1980 Gauhati 70 and 1997 PLC 57.

7. While exercising the right of rebuttal, Mr. Khawaja relied upon the age-old proposition that “two wrongs do not make one right”. To meet with the objection of being surrounded by a number of

commercial establishments spread in the same vicinity, Mr. Khawaja submitted that these wrongs do not make case of the defendant right and the usage of the said property as a commercial institution is in violation of the provisions of Karachi Building & Town Planning Regulations 2002, where he relied upon Rule 18-4.2.2 of the Karachi Building & Town Planning Regulations 2002 which proffers that a residential plot within a residential neighborhood can be allowed to be used for education purposes, provided that the said use has been so lawfully allowed by the Master Plan Department of Defendant No. 3. Rule 18-4.2.2 further proffers that the change of use of a residential plot is to be governed by the provisions of Rule 25-5.2 of the Karachi Building & Town Planning Regulations 2002 wherefrom it is crystal clear that a residential house can only be used for educational purposes if width of the road upon which such a residential plot is located is 100 ft wide and also, that the plot size is not less than 1500 square yards. However, in the present case, none of these two exceptions are available since the said property does neither face a 100 feet wide, nor its area is 1500 sq. yds or above. While summing up his submissions, learned counsel contended that when law requires doing of an act in a particular manner, then it must be done in that manner only and all other manners of doing such an act remain illegal. He placed his reliance on precedents reported in 2019 CLC 1081, 2018 SCMR 76, PLD 1993 Karachi 631, PLD 2010 Karachi 236 and 2002 MLD 1410.

8. Heard the arguments and perused the material on record. I would like to take up injunction application (CMA No.10833/2022) filed by the plaintiffs and the application (CMA No.11142/2022)

moved under Order XXXIX Rule 4 CPC by the defendant No.4 to 6 for vacating the injunctive order dated 21.07.2022 together to serve the interests of justice. Before proceeding any further, it is considered pertinent to reproduce the interim injunctive order dated 21.07.2022 hereunder:-

“Issue notices to the defendants and Advocate General Sindh. Defendants are directed to file counter affidavit to the injunction application within fifteen (15) working days’ time. Till the next date of hearing, the defendants No.4 to 7 are restrained from carrying out any commercial activity of running/operation of any school/college /educational institution for commercial purposes on the property subject matter of this suit.”

9. It is *sine qua non* as to whether the plaintiff in facts and circumstances of the case should or should not be granted an injunction and to consider this question, one has to go through the pros and cons of the case in the light of the old age golden rule of granting injunction which requires:

- (i) Prima facie existence of right in the plaintiff and its infringement by the defendants or the existence of a prima facie case in favour of the plaintiff;
- (ii) An irreparable loss, damages or injuries which may occur to the plaintiff if the injunction is not granted;
- (iii) The inconvenience which the plaintiff will undergo from withholding the injunction will be comparatively greater than that which is likely to arise from granting it or in other words the balance of inconvenience should be in favour of the plaintiff.

10. It is prescription of law that all above three essential ingredients must be present together for a favorable order and absence of any one of these ingredients does not warrant grant of

injunction. Court at this stage is to make a tentatively, assessment of the case for enabling itself to see whether these three requisites are met or not. Relief of injunction is known to be discretionary and it is to be granted following sound legal principles and *ex-debito justice*. The term "prima facie case" is not specifically defined in the Code of Civil Procedure but the consensus is that in order to satisfy about the existence of a prima facie case, the pleadings must contain facts constituting existence of right of the plaintiff and its infringement at the hands of the opposite party. Balance of convenience is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendant, if the injunction is granted. It is thus for the plaintiff to show that the inconvenience caused to it would be greater than that which may be caused to the defendant. Irreparable loss is held to mean to be the loss, which is incapable of being calculated on the yardstick of money.

11. While I have already enumerated above three ingredients of injunction while deciding CMA No.3006/2022 in Suit No.311/2022 (Atif Ahmed & another v. Securities and Exchange Commission of Pakistan & others) on 01.07.2022 but it has been reported by the I.T. Department of this Court that the said Order hasn't been reported hitherto, however, that Order is available at the website of this Court. The pertinent excerpt of that order is reproduced herein below:-

“An injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that he himself was not at fault. The phrase prima facie case in its plain

language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase 'prima facie' need not to be confused with 'prima facie title'. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. Ref: (C.M Row Law of Injunctions, Eighth Edition)".

12. Reverting to the merits of the case, during course of arguments, learned counsel for the plaintiffs cited Regulation 18-4.2.2 of Karachi Building & Town Planning Regulations, 2002 ("KBTR, 2002") which explicates that a residential plot within a residential neighborhood can be allowed to be used for educational purposes provided that the said use has been lawfully allowed by the Master Plan Department of Defendant No. 3 whilst calling for objections from inhabitants of the surrounding locality. It is considered illustrative to reproduce the relevant constituent of Regulation 18-4.2.2 of KBTR, 2002 which is delineated hereunder:-

"Residential plot within a residential neighborhood can be allowed to be used for Education/Health purpose provided the plot lawfully allowed for usage as education/health by the Master Plan Department, as per prescribed procedure after inviting public objection from neighborhood. The applicable Road width, FAR, No. of Floors and COS shall be governed by Section 25-5.2 of KB&TPR."

13. Per Regulation 25-5.2 of KBTR, 2002, residential accommodation can only be used for educational purposes if width of the road upon which the said residential accommodation is located is no less than 100 feet wide, as well as the said plot size must not be less than 1500 square yards. However, in the present case, none of these two exceptions apply since the said property does not face a 100 feet wide road and neither has not been converted to an amenity otherwise. Accordingly on this sole ground, the said property cannot be put to education purposes due to the road-width requirement. During the course of hearing, a query was raised to Mr. Kasi as to whether the said property faces a 100 feet wide road as required under Regulation 25-5.2 of KBTR, 2002, to which Mr. Kasi conceded that the road is less than 100 feet wide nor the defendant No.4 to 6 ever approached the Master Plan Department of defendant No.3 seeking necessary permission to run the subject College nor any objections were invited from the inhabitants of the surrounding locality whose rights were to be infringed owing to the traffic congestions, noise, nuisance and such other ancillaries, besides, Article 9 of the Constitution dealing with Fundamental Rights provides that no person shall be deprived of life or liberty save in accordance with law. The word “life” has been interpreted in the landmark cases reported as Adeel-ur-Rehman & others. V. Federation of Pakistan & others (2005 SCMR 1) & Ms. Shehla Zia v. WAPDA (PLD 1994 SC 693) as under:-

“The word “life” in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it.”

“It is the duty of the State to see that the life of a person is protected as to enable him to enjoy it within the prescribed limits of law. Pollution,

environmental degradation and impure food items also fall in the category of deprivation of life.”

13. If the defendant No.4 to 6 were eager to run the College, they must had to meet the requirement of statutory provisions enacted for the subject purposes. It is settled principle that prescriptions of statute are not mere technicalities as disregard thereof would render entire process into miscarriage of justice. The Apex Court in plethora of case laws went on to hold that when law requires doing of anything in a particular manner, then it must be done in that manner only and any other manners of doing such act could not be permitted.

14. Learned counsel for the defendant No.4 to 6 wanted to establish his claim on the basis that schools and other business activities are being carried out in Block-2 of Clifton, Karachi and that the plaintiffs never objected to those, or complained of traffic congestions, noise and nuisance in respect of those outfits. To meet with the said objection, it would be suffice to say that two wrongs do not make one right¹. The onus is upon the defendants to prove that in order to run the said college in a residential neighborhood, they have complied with all codal formalities envisaged under the statute which on the face of it unfurls that the defendants have not complied with the statutory prescriptions as far as building byelaws and Master Plan is concerned.

15. Whilst I have no disinclination in my mind to reckon that even where all the three ingredients for grant of temporary injunction are satisfied, the relief can be refused for other reasons but no extraordinary reasons have been introduced on record by the learned

¹ Per Anwar Zaheer Jamali.J in the case of Hasnat Ahmad Khan v. Institution Officer (2010 SCMR 354)

counsel for the defendant No.4 to 6 suggesting that the plaintiffs have obtained an unduly harsh and/or unworkable ad-interim order without showing justifiable reasons.

16. Indubitably, education being an indispensable and primary fundamental right is the course to be followed for accelerating learning as the attainment of knowledge, competence, values, moral beliefs and habits flow directly from “right to life” which is also the concomitant as to the fundamental rights enshrined in our Constitution where Article 25A has been inserted identifying education as one of the fundamental rights and it being a state responsibility to provide free and compulsory education to all children in such manner as may be determined by the law. In unison Article 37 embodied under the principle of policy explicates that state to also promote the education and economic interests of the backward classes or areas; remove illiteracy and provide free and compulsory secondary education within minimum possible period and make technical and professional education generally available and higher education equally accessible to all on the basis of merit. It is thus shimmering beyond any shadow of doubt that right of education is indispensably a fundamental right enshrined under the Constitution but it does not lead to or give rise to any particular right to the defendant No.4-6 to establish an institution in a residential house, whereas, prior permission from the Master Plan Department of defendant No.3 as well as objections of inhabitants of the surrounding area were not considered. Neither the Constitution nor any statute confer or vest any right in the defendant No.4-6 that they be given any special treatment allowing that to run a College (for

profit) in complete defiance/disregard to KBTR, 2002. Learned counsel for the defendant No.4-6 amid arguing the matter, placed his reliance on a precedents of 2011 CLC 1866 (Dr. Shahzad Alam & others v. Beacon Light Academy) wherein, this Court in a very detailed manner has discussed the pros and cons of running Schools within residential area, and after coming to the conclusion that though the three ingredients of granting an injunction were present, but still refused to grant the injunction, however, it may be observed that the said Judgment is not a binding precedent being delivered by a Single bench of this Court and could only be persuasive. Even otherwise, an appeal bearing HCA No.118/2011 (Dr. Shahzad Alam & others v. Beacon Light Academy) was preferred against that judgment and by consent, an order was passed whereby, the School agreed to vacate the premises within certain period of time, therefore, the impetus and the effectiveness of these observations have somewhat diluted, not capable of being regarded as a binding precedent. Whereas, the other precedents relied upon by Mr. Kasi including precedents of Indian jurisdiction are in relation to the property left by the predecessor in interest of the litigating parties which in the facts and circumstances of the cause at hand are entirely distinguishable.

17. The above discussion leads me to the conclusion that plaintiffs have made out a prima facie case, whereas, balance of convenience also lies in their favor and whereas the acts of the Defendant Nos.4-6 are calculated to cause plaintiffs irreparable loss, therefore, the application bearing C.M.A. No.10833 of 2022 moved under Order XXXIX Rules 1 and 2 C.P.C. is hereby allowed and interim order dated 21.07.2022 is confirmed. Whereas, CMA No.11142/2022 moved under

Order XXXIX Rule 4 CPC on behalf of defendant Nos.4 to 6 is hereby dismissed.

Karachi
Dated 13.09.2022

J U D G E

Aadil Arab