

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit 583 of 2023 : Mehreen Shoaib Baghpatee vs.  
Province of Sindh & Others

Suit 1716 of 2023 : Shoaib Khalid Tabba vs.  
Muhammad Ali Jauhar Memorial Co-  
Operative Housing Society

For the Plaintiff/s : Mr. Nabeel Kolachi, Advocate  
Mr. Muhammad Ilyas, Advocate  
Mr. Yahya Iqbal, Advocate

For the Defendants/s : Mr. Khalil Ahmed, Advocate  
Mr. Zulfiqar Ali, Advocate  
K.A. Vaswani, (Assistant Advocate General)

Date of hearing : 11.01.2024

Date of announcement : 11.01.2024

### ORDER

**Agha Faisal, J.** Briefly stated, Suit 583 of 2023 has been filed *essentially* seeking to preclude the residential house, being House number 10-D (D-10) Talib ul Maula Street 19 Off Tipu Sultan Road Muhammad Ali Jouhar Memorial Cooperative Housing Society Karachi (“House”), from being used for any purpose other than residential and specifically seeking a restraint for the same to be used as a school.

2. CMA 6378 of 2023 was preferred seeking a temporary injunction restraining the defendants from operating a school at the House or using the same for conducting any commercial activity. *Ad interim* orders were rendered on 27.04.2023, whereby it was ordered that no commercial and / or educational activity shall take place at the House till the next date. The order was extended from time to time until 09.10.2023, when the earlier restraining order was confirmed and the application was disposed of accordingly.

3. HCA 363 of 2023 was preferred *ostensibly*<sup>1</sup> assailing the orders dated 27.04.2023 and 09.10.2023 rendered in the present suit and on the first date of hearing, in the manifest absence of the other side, the appeal was disposed of in terms that the order dated 09.10.2023 is set aside and the matter was remanded back to be heard afresh.

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<sup>1</sup> As denoted in the order sheet dated 13.10.2023 in HCA 363 of 2023.

4. As consequence CMA 6378 of 2023 has been resuscitated and placed before this bench today. With the able assistance of all learned counsel present, this application shall be determined vide this order.

5. Per plaintiff's learned counsel, the House could not be utilized as a school in the relevant residential neighborhood and even a temporary sanction of such activity would render the relevant laws otiose as well as perpetuate a nuisance upon the residential neighborhood. Reliance was placed upon Regulations 18-4.2.2, 18-4.2.8, 18-5 and 25-5.2 of the Karachi Building and Town Planning Regulations 2002 ("2002 Regulations").

6. Learned counsel for the contesting defendant no. 5 submitted that the 2002 Regulations were inapplicable thereto, however, relied upon Regulation 19-2.2.3 thereof and Regulation 40 of the Karachi Building and Town Planning Regulations 1979 ("1979 Regulations") to articulate that there was no restraint upon running a school in any residential property.

Learned counsel for the defendant no. 2 (Muhammad Ali Jouhar Memorial Cooperative Housing Society) supported the case of the plaintiff and echoed the claim for placing a restraint upon utilizing the House for any educational / commercial purpose. Learned AAG also articulated that no commercial activity is permissible in a residential property.

7. Heard and perused. The first and final order dated 13.10.2023 rendered in HCA 363 of 2023 stipulates that the appeal was preferred against orders herein dated 27.04.2023 and 09.10.2023. Notwithstanding the fact that order dated 09.10.2023 was set aside in appeal, a similar fate appears not to have befallen the order dated 27.04.2023. Under such circumstances, there is nothing before the Court to suggest that notwithstanding the setting aside of the order dated 09.10.2023, the order dated 27.04.2023 did not remain in the field. Be that as it may, the final fate of the present application remains to be determined.

8. Plaintiff's learned counsel emphasized at the very onset that HCA 363 of 2023 was allowed on the very first date, in the absence of the plaintiff and to the manifest detriment of the plaintiff. It is seen that Order XLI CPC deals with appeals and contains explicit directives for adjudication including without limitation rules 30<sup>2</sup> and 31<sup>3</sup> therein. It is contended that even for outright

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<sup>2</sup> 30. The Appellate Court after hearing the parties or their pleaders and referring to any part of the proceedings whether on appeal or in the Court from whose decree the appeal is preferred to which reference maybe considered necessary, shall pronounce judgment in open Court,

dismissal of an appeal, the prescriptions of rule 11<sup>4</sup> are to be employed, however, in the present case the appeal was virtually allowed notwithstanding *inter alia* rule 12<sup>5</sup>. The Supreme Court has dwelled extensively in this regard in the *Pakistan Refinery case*<sup>6</sup>. Per plaintiff's learned counsel, this aspect of the matter has already been escalated before the Supreme Court. Even otherwise, the said issue emanates from the appellate judgment, therefore, there is nothing for this Court to attend to in such regard.

9. The title documents of the property are available on file and there is absolutely no suggestion that the House is anything but residential. Nothing has been placed on record to accord any regulatory sanction for the House to be used for any purpose other than residential. In so far as the 2002 Regulations are concerned, Regulation 18-4.2.2 prescribes a specific methodology if a residential property is to be employed for educational purposes. *Admittedly*, no such sanction is available. Regulation 18-4.8 contemplates nonresidential activity on a residential plot on a non-declared road over two hundred feet width. *Admittedly*, the House is not situated on a two hundred foot road and even otherwise no change of land use permission appears to have been accorded. Regulation 18-5 prescribes the entire procedure to be adopted for change of land use and there is no suggestion that the same has been availed or exhausted. Regulation 25-2.2 contemplates the ratios for considering educational activity on residential plots and the minimum requirement expressed is a fifty foot road width for a primary school. Notwithstanding that no permission for conversion has even been alleged before this Court, the title document of the House demonstrates that it's situated on a fifty foot road. As a consequence of the foregoing, this Court has found no reason to disagree with the plaintiff's contention that even a temporary sanction with respect to educational or commercial activity at the House would *inter alia* render the relevant law otiose.

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either at once or on some future day of which notice shall be given to the parties or their pleaders.

<sup>3</sup> The judgment of the Appellate Court shall be in writing and shall state a. the points for determination; b. the decision thereon; c. the reasons for the decision; and d. where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

<sup>4</sup> 11. - (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. (2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. (3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

<sup>5</sup> 12. - (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal. (2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent and the time necessary for the service of the notice of appeal so as to allow the respondent sufficient time to appear and answer the appeal on such day.

<sup>6</sup> Per *Ejaz Afzal Khan J* in *Pakistan Refinery vs. Barrett Hodgson & Others* reported as 2019 SCMR 1726.

10. The defendant's counsel argued that that 2002 Regulations were inapplicable thereto, however, contemporaneously sought to rely on Regulation 19-2.2.3 thereof. Respectfully, the two arguments are contradictory at best. Reliance was also placed on Regulation 40 of the 1979 Regulations. The two regulations simply make reference to the possibility of a residential property being put to educational use, however, there was no suggestion that any sanction in such regard was available with the contesting defendant.

11. This Court has also perused the order dated 09.10.2023 and records its *mutatis mutandis* concurrence therewith, in so far as the *pari materia* content pertaining to CMA 6378 of 2023 is concerned. The weightage given in the said order to the Undertaking of 27.05.2023 was not even attempted to be controverted by the defendant's counsel. The appellate order required this Court to consider the import of Regulation 19-2.2.3 of the 2002 Regulations and Regulation 40 of the 1979 Regulations and the same has been duly appreciated in the preceding paragraph and found to accord no benefit to the contesting defendant's case; in so far as determination of this application is concerned.

12. This Court is assisted with the Supreme Court judgment in *Mst. Yawar Azhar Waheed*<sup>7</sup>, the edicts of this Court in *Mrs. Rozina Ali*<sup>8</sup> and *CPLC Neighborhood Care*<sup>9</sup>, wherein the respective Courts deliberated *pari materia* facts and circumstances on the anvil of the law and concluded that injunctive relief was merited forthwith. The ratio is *prima facie* applicable squarely herein.

13. In conclusion, plaintiff's learned counsel has demonstrated a *prima facie* case, favorable balance of convenience and finally that irreparable harm would be caused unless the application is allowed, therefore a fit case for interim injunctive relief is set forth. Therefore, CMA 6378 of 2023 is allowed and the defendants are restrained from using the House, being House number 10-D (D-10) Talib ul Maula Street 19 Off Tipu Sultan Road Muhammad Ali Jouhar Memorial Cooperative Housing Society Karachi, and / or permitting the use thereof, for any purpose other than residential and restrained from using, and / or permitting the use thereof, the same for a school, until final disposal of the suit.

Judge

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<sup>7</sup> Per *Dost Muhammad Khan J* in *Mst. Yawar Azhar Waheed vs. Khalid Hussain* reported as 2018 SCMR 76.

<sup>8</sup> Per *Muhammad Junaid Ghaffar J* in *Mrs. Rozina Ali vs. KMC* reported as 2019 CLC 1081.

<sup>9</sup> Per *Adnan Iqbal Chaudhry J* in *CPLC Neighborhood Care vs. Federation of Pakistan* reported as 2019 YLR 911.