

IN THE HIGH COURT OF SINDH AT KARACHI

Suit 799 of 2018 : Ms. Ambreen Bashir & Others
vs. Province of Sindh & Others

For the Plaintiff/s : Mr. Arshad M. Tayebaly, Advocate
Mr. Omer Memon, Advocate
Mr. Aitzaz Manzoor Memon, Advocate

For the Defendants/s : Mr. Faisal Siddiqi, Advocate
Mr. Ali Azad Saleem, Advocate
Mr. Iqbal M. Khurram, Advocate
Mr. Kelash A. Veswani
Assistant Advocate General Sindh

Date/s of hearing : 28.02.2024.

Date of announcement : 28.02.2024

ORDER

Agha Faisal, J. The Lyceum School operates on a residential property, being Plot 78 Hatim Alvi Road Old Clifton Karachi ("Suit Property"). This suit essentially seeks the cessation of such illegal activity and CMA 6921 of 2018 seeks a restraint upon the defendants *inter alia* from utilizing the Suit Property from being used for any purpose other than residential and specifically seeking a restraint for the same to be used as a school; pending adjudication of the suit. This order endeavors to determine this application.

2. Briefly stated, the Suit property appears to have been conveyed vide Conveyance Deed dated 20th April 2006 and recital 2 thereof specifies that the property is residential in nature. The Sindh Building Control Authority, defendant no 2 herein, has filed its written statement explicating that the Suit property is residential and a commercial school is operating illegally.

Learned counsel for the contesting defendants 7 & 8 admits that the Suit Property is residential in nature and a commercial school is operating thereupon, however, articulates that no temporary restraint is merited *inter alia* since an application seeking regularization / conversion¹ has been preferred.

3. Mr. Arshad M. Tayebaly advocated that the Suit Property is admittedly being used for an illegal purpose and such illegality could not be afforded legal sanction, in the garb of denial of interim relief. It was argued that a commercial

¹ Per plaintiffs' counsel this application was preferred post institution of the suit in 2018, however, the contesting defendants' counsel insists that the same was preferred in 2005.

school with seven to eight hundred students is a grave nuisance, inconvenience and anathema to a residential locale.

Mr. Faisal Siddiqui articulated that while a *prima facie* case was undeniably set forth by the plaintiffs, however, the scales to the extent of balance of convenience and irreparable harm were tilted in favor of the contesting defendants. It was argued that the commercial school was operating at the Suit Property since long and the efflux of time, coupled with interests of third parties, entitled the private commercial school to continue to operate; at least until a decision upon their regularization application was rendered. Learned counsel insisted that the relief sought was barred by limitation / laches since the plaintiffs had not contested the matter prior to the institution hereof.

4. Heard and perused. The residential nature of the Suit Property; illegal commercial / school activity thereon; and the manifest absence of any lawful sanction in such regard are duly admitted. The question before this Court is whether, on the anvil of the law governing interlocutory injunctions, such activity can be sanctioned to subsist pending adjudication of the suit.

5. The Karachi Building and Town Planning Regulations 2002, including *inter alia* Regulations 18-4.2.2, 18-4.8, 18-5 and 25-2.2, are within the cognizance of this Court and the present utilization of the Suit Property is in *prima facie* derogation thereof. Prior to addressing any other aspect of this matter, it is observed that any order rendered herein perpetuating the violation of the aforesaid would render the very law otiose.

The determination of whether the contesting defendants applied for regularization / conversion in 2018 or 2005 perhaps requires evidence, however, there is no cavil to the fact that as of today no regularization, conversion and / or any form of sanction is available. Regularization, by definition, implies that there is a violation, in need of acquiesce, and in the present circumstances any perceived delay in consideration of the application could not be considered to be grant thereof. Even otherwise this Court is assisted with the order of the Supreme Court in *Abdul Karim*² wherein such *conversion* has been banned. The Court was pleased to hold as follows:

“DG shall take steps to have all such plots which were originally meant for residential purposes amenity plots and playgrounds to

² *Abdul Karim vs. Nasir Salim Beg & Others* reported as 2020 SCMR 111.

restore them to original position and remove all illegal and unlawful construction on such plots. There seem to be an epidemic in the city of marriage halls, shopping malls, petrol pumps/CNG stations and the houses are being allowed to be converted for these purposes. Besides, encroachments upon and change the use of amenity plots like playgrounds, parks and meant for other amenities. Henceforth, that is from today there is a complete ban on Master Plan Department of SBCA or any other authority of the City Government or Government of Sindh of allowing change in the use of land. No such change of use of land shall be permitted. Conversion of residential houses and amenity plots meant for parks, playgrounds and other amenities, their conversion shall not be allowed for commercial use that of marriage halls, markets, shopping malls, apartments, marquees, petrol pumps/CNG stations etc. This complete ban in cessation of conversion of residential plots, amenity plots like that of parks, play grounds and other amenities shall apply all across Karachi City including cantonment areas.”

6. The operation of commercial schools upon residential property has consistently been deprecated by the Supreme Court and *Yawar Azhar Waheed*³ is another such instance. The Court duly appreciated the harm occasioned to area residents and concluded *inter alia* that all private educational institutions in residential areas are to be removed. Excerpts from the judgment are reproduced herein below:

“13. It is shocking that Cantonment Board approved the erection of new building for commercial purposes i.e. to run a school with hundreds of children, thus, conveniently ignored the initial condition imposed by itself that the plot shall not be used for any other purpose except residential house. The sanction was accorded blind-foldedly through third degree tactics without the sanction of law...

17. The appellant purchased, the plot on the basis of the allotment order, issued to the original owner of the plot by the Cantonment Board and as stated above, there was a strict condition incorporated therein that the plot shall be used for erection of residential building thereon however, the purpose of use was in blatant violation of law was converted by the Board to commercial house, while approving the

³ Per *Dost Muhammad Khan J* in *Mst. Yawar Azhar Waheed vs. Khalid Hussain & Others* reported as 2018 SCMR 76.

building plan, the only motive behind it was to trample the law on the subject for money and financial benefits and for no other purpose.

18. The respondents' suit was fully justified because they are the residents of the same area situated at a little distance. If the school building is put into operation, hundreds of children would be brought in cars and other vehicles, for which there is no parking facility and even for the employees of the school, besides it would create massive pollution emitting carbon monoxide gas on daily basis. Drinking -water consumption would increase manifold which is at present not even sufficient to meet the requirements of the residents of the area. Sanitation condition would be worsen because hundreds of children would definitely create multiple problems like pollution, garbage etc. The security of the area would be compromised in view of the prevailing condition in the country and the lives of the residents would be at stake as well...

20. Copy of this judgment be sent to the Attorney General for Pakistan and Secretary Defence who shall ensure that all the private educational institutions i.e. schools, colleges, etc. constructed in the Cantonments and all the commercial buildings erected in residential areas of Cantonments throughout Pakistan shall be removed gradually, having been constructed in violation of the law and rules as well as by-laws and the master plan and their original shape be restored.”

7. The import of efflux of time, coupled with third party interests, was articulated in defense of perpetuating *admittedly* unsanctioned activity at the Suit Property. The effect and weightage of such a defense may be appraised in evidence, however, in the context of determination of this interlocutory application the same could not be employed to affix a seal of judicial approval to holding the pertinent governing building and town planning laws in abeyance.

8. Even though the hearing today was to extent of the application under surveillance, Mr. Faisal Siddiqui raised the issue of limitation and laches in the contesting defendants' defense. It was articulated that such objections are the subject matter of CMA 7406 of 2018, being an application seeking rejection of plaint per Order VII rule 11 CPC. This application remains on file yet in a juxtaposed stance CMA 11800 of 2018 has also been preferred by the

contesting defendants seeking for the dispute, agitated vide the suit, to be referred, by consent of the parties, for mediation. *Prima facie* the first application seeks to aver that this Court's dominion over the *lis* is barred by law, however, the latter requires the very exercise of such jurisdiction. It is the considered view of this Court that these applications are to be considered on their own merit at the earliest.

9. The present determination is to the extent of an interlocutory application and the essential aspect to consider is whether the integral requirements for grant of injunction, pending adjudication of the suit, are satisfied. In *pari materia* circumstances this Court has deliberated and concluded, in *Ardeshir Cowasjee*⁴, *Jaffar Public School*⁵, *Mrs. Rozina Ali*⁶ *CPLC Neighborhood Care*⁷ and *Mehreen Shoaib Baghpatee*⁸, that injunctive relief was merited forthwith. The ratio illumined is squarely applicable herein.

10. In view hereof and in *mutatis mutandis* application of the authority cited supra, it is observed that the plaintiffs' learned counsel has demonstrated a *prima facie* case, favorable balance of convenience and finally that irreparable harm would continue unless the application is allowed, hence, a fit case for interim injunctive relief is set forth. Therefore, CMA 6921 of 2018 is allowed and the defendants are restrained from using the Suit Property, being Plot 78 Hatim Alvi Road Old Clifton 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.

11. Adjourned to 8th March 2024 for consideration of CMA 7406 of 2018 and CMA 11800 of 2018.

Judge

⁴ Per G H Malik J in *Ardeshir Cowasjee & Others vs. Muhammad Naqi Nawab & Others* reported as PLD 1993 631.

⁵ Per Anwar Zaheer Jamali J in *Arif & Another vs. Jaffar Public School & Others* reported as 2002 MLD 1410.

⁶ Per Muhammad Junaid Ghaffar J in *Mrs. Rozina Ali vs. KMC* reported as 2019 CLC 1081.

⁷ Per Adnan Iqbal Chaudhry J in *CPLC Neighborhood Care vs. Federation of Pakistan* reported as 2019 YLR 911.

⁸ Order dated 11.01.2024 in Suit 583 of 2023 – *Mehreen Shoaib Baghpatee vs. Province of Sindh & Others*.