

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 746 of 2024

Muhammad Arshad and Others

Vs.

Federation of Pakistan & Others

1. For hearing of CMA No.10263/2024.
2. For hearing of CMA No.10311/2024.
3. For hearing of CMA No.10312/2024.
4. For hearing of CMA No.10313/2024.
5. For hearing of CMA No.10199/2024.
6. For orders on Nazir's Report dated 25.7.2024.

Plaintiffs : Through Ms. Rizwana Ismail. Advocate.

Defendant No.1 : Through Ms. Rabia Khalid, Assistant Attorney
General for Pakistan.

Defendant No.2 : Nemo.

Defendant No.3 & 11 : Through Mr. Irshad Ahmed Shaikh, A.A.G., Sindh
along with Qurban Ali Bhutto, Deputy Director,
Directorate of Inspection Registration of Private
Schools, Sindh.

Defendant No.4 : Through Mr. Dhani Bux Lashari, Advocate

Defendant No.5 : Through Mr. Khurram Ghayas, Advocate.

Defendant No.6 & 7 : Through Mr. Muhammad Jibran Nasir, Advocate.

Defendant No.8 : Through Mr. Faisal Siddiqui, Advocate assisted by
Mr. Saad Fayyaz, Advocate.

Defendants No.9 & 10 : Nemo.

Date of hearing : 30 July 2024 and 02 August 2024.

ORDER

MOHAMMAD ABDUR RAHMAN, J. This order will decide three applications bearing CMA No. 10199 of 2024 that has been maintained under Order XXXIX Rules 1 & 2 read with Section 151 of the Code of Civil Procedure, 1908, CMA No. 10263 of 2024 being an application under Section 151 of the Code of Civil Procedure, 1908, and CMA No. 10312 of 2024, being an application under Order

XL Rule 1 of the Code of Civil Procedure, 1908 each of which have been maintained by the Plaintiffs.

2. The dispute in the suit is regarding the usage of Plot No.43/16-A, Pakistan Employees Cooperative Housing Society Limited, Karachi, admeasuring 1221 square yards (hereinafter referred to as the "Said Property") that is owned by the Defendants No. 6 and 7 and who have leased out the Said Property to the Defendant No.8. It is not in dispute that the Said Property has been leased by the Federation of Pakistan through the Secretary Ministry of Housing and Works to the Defendants No. 6 and 7 for residential use only and which is being put to the use of a School by the Defendant No.8.

3. The Plaintiffs are residents of Block-6 Pakistan Employees Cooperative Housing Society Limited Karachi and who are aggrieved by the Defendant No.8 utilising the Said Property as a school. Ms. Rizwana Ismail, has entered appearance on behalf of the Plaintiffs and has contended that the Said Property having been leased by the Federation of Pakistan through the Secretary Ministry of Housing and Works to the Defendants No. 6 and 7 for residential purposes and cannot be put to the use of a school as the same would violate the terms of the lease and would also violate the Master Plan developed for the area. She contended that on account of the Said Property being put to a use other than envisaged in the lease and in the master plan, the planning of the area would be disrupted and which would place undue stress on the infrastructure of the area and in summary will create a nuisance for the residents. She relied on three unreported judgements authored by my learned brothers Agha Faisal, J. in Suit 799 of 2018 entitled **Ms. Ambreen Bashir and others vs. Province of Sindh and others**, Muhammad Adnan Chaudhry, J. in Suit - 3324 of 2021 entitled **M/s. Metro International School (Pvt.) Ltd & Others versus The Sindh Building Control Authority & Others** and in each of which injunctions were granted by this Court to restrain the use of the residential plot for the purpose of a school.

4. Ex-parte ad-interim orders were originally passed by me on 18 July 2024 and on which date it was directed that:

" ... *Issue notice to the defendants as well as D.A.G. and Advocate General Sindh for 25.07.2024 on which date the Chief Executive of defendant No.8 shall be present in person along with concerned Director of SBCA. In the meanwhile the Defendant No.4, Defendant No.5 and Defendant No.5a are directed to ensure that the said property is not put to use of a school and is only used for residential purposes.*"

5. It seems that as against that ex-parte ad interim order dated 18 July 2024 an appeal was preferred by the Defendant No. 8 bearing HCA No. 255 of 2024

and in which Mr. Ahmed Masood, Advocate had appeared and an ad-interim order was passed on 22 July 2024 wherein it was stated that:

“ ... *Let notices be issued to the Respondents as well as A.G. Sindh for 21.08.2024 when CP No.3209/2024 filed by Cedar Pvt. Ltd. is also listed on the same date. In the meanwhile, until the next date of hearing, the impugned Order dated 18.07.2024 in Suit No.746/2024 is suspended to the extent that the Respondents shall not disturb the peaceful possession of the Impugned Plot by Cedar Pvt. Ltd., which may as an exception (and not to be treated as a precedent) provisionally, utilize the impugned Plot for the purpose of a Summer School to complete its 2024 Summer School Session so as to not to disturb the students currently enrolled for and attending such summer school until the said July 2024 summer semester stands concluded. It is clarified that the Appellant has no objection to the appointment of the Nazir in terms of his assignment as set out in the impugned Order dated 18.07.2024.*”

This Court was also made aware of the proceedings in C.P. No.D-3209 of 2024 and which had earlier been preferred by the Defendant No.8 as against a notice issued by Sindh Building Control Authority alleging that construction was been raised on the Said Property illegally and which notice was stayed by a Division Bench of this Court and wherein on 28 June 2002 it was ordered that:

“ ... *no coercive action shall be taken against the petitioner until his application dated 22.02.2024 filed with the Master Plan Department seeking approval for using the property for education purpose is decided in accordance with law after giving him opportunity of being heard.*”

6. The matter was listed before this Court on 25 July 2024 when Mr. Rehan Kiyani, Advocate who is a partner of Mr. Ahmed Masood, Advocate had entered appearance on behalf of the Defendant No.8 and whereafter time was granted on 29 July 2024 for the Master Plan Department to file its response. On 29 July 2024 Mr. Rehan Kiyani, Advocate again appeared and the matter was heard at some length where after a direction was given to implead the Directorate of Inspection & Registration of Private Schools as the Defendant No.11 and who was also directed be present on the next date of hearing. Mr. Rehan Kiyani, Advocate was thereafter superseded by Mr. Faisal Siddiqui, Advocate who has represented the Defendant No.8 thereafter.

7. Mr. Faisal Siddiqui in his submissions candidly conceded that the lease of the Said Property was residential and that a school not being an activity that could be considered as residential in nature did not come within the purview of the permitted use of the Said Property. He, however, contended that a license has been issued by the Defendant No.11 authorising the Defendant No.8 to utilise the Said Property for the establishment of a Campus of the Defendant No. 8. He further contended that, after obtaining a license from Defendant No.11, the Defendant No. 8 has commenced its enrollment process and on the basis of which it had advertised and secured the enrollment of students each of whom have paid the requisite admission fee and are since hoping to commence classes from the new school term after summer vacations. He contends that while the Defendant

No.8 is imparting education for profit it is not a “fly by night” operation and provides education in a professional manner and keeping in mind the social circumstances of the city where public education is compromised, attempts to fill a void to provide an adequate service to such students. He further contended that on account of the scarcity of amenity plots for schools the Defendant No. 8 has no other option but to resort to locating itself within a residential plot as any commercial plot would never be put to such use by the owner of such a plot who would inevitably construct a multistoried building thereon to maximise their financial gain. He contends, without justifying such the illegality that is being perpetuated, that there were to the best of his knowledge at least 34 schools operating in the area and while the Defendant No.8 is desperate to continue this enterprise on a plot meant for an amenity school as there are no such plots available, they have been constrained as a last resort to use a residential plot for this purpose.

8. Mr. Faisal Siddiqui next raised an objection to the jurisdiction of this Court to hear and pass any order in respect of the operation of the school contending that in the pendency of an interim order, that has been passed by a Division Bench of this Court in C.P. No.D-3209 of 2024 maintained by the Defendant No. 8 in respect of a notice that had been issued by the Sindh Building Control Authority, any order that was passed stopping the usage of the plot for a school would in effect run contrary to that order. He then very reasonably and practically pleaded before this Court that the experience that has been gained from such litigation almost inevitably leads to the Courts granting the School a period of time to relocate the branch to a different location and where after undertakings are given that such a use of the property would not be permitted. He very reasonably contended that while a restraining order could be passed restraining the Said Property from being used for a purpose other than residential, such a direction may be kept in abeyance for a period of three (03) years which will give the Defendant No.8 adequate time to find an alternative property to house this branch of the school. He conceded that while the same would necessarily be prima facie illegal however on the issue of balance of convenience, keeping in mind the vast number of schools operating in this area and also that even previously as the Said Property was being used to house an embassy, it cannot be said that simply because the Defendant No. 8 are now operating a school thereon, the Plaintiffs are inconvenienced as they are equally inconvenienced by all other schools. He concluded by saying that irreparable loss would be suffered by the school to its reputation if the injunction was granted. He concluded by relying on Article 25 A of the Constitution of the Islamic Republic of Pakistan, 1973 and wherein it is mandated that it is the responsibility of the State to “provide free and compulsory education to all childfree of the age of five to sixteen years in such manner as may be determined by law” and contended that such a status being given to such a right would parallel with the Plaintiffs rights under Article 9 of the Constitution of

the Islamic Republic of Pakistan, 1973. In support of his contentions he relied on the decision reported as **Al-Tamash Medical Society Vs. Dr. Anwar Ye Bin Ju and 9 Others**,¹ **Syed Yousaf Husain Shirazi Vs. Pakistan Defence Officers' Housing Authority and 2 Others**,² **Dr. Abdul Wahab Vs. Sameena Maqsood and Others**,³ **Messrs Independent Media Corporation (Pvt.) Ltd. Vs. Shoaib Ahmed Sheikh and 9 Others**,⁴ **Managing Director Sngpl and 4 Others Vs. Messrs Neelab Cng Filling Station**,⁵ **Mst. Roshan Bano and 5 Others Vs. Pakistan Defence Officers Housing Authority and 7 Others**,⁶ **Rana Imran And Another Vs. Fahad Noor Khana 2 Others**,⁷ **United Bank Limited And Others Vs. Ahsan Akhtar and Others**,⁸ and **Islamic Republic Of Pakistan And Others Vs. Muhammad Zaman Khan and Others**⁹ each of which identified the prescriptions for the granting of interim injunctive relief by this Court.

9. Mr. Muhammad Jibrán Nasir entered appearance on behalf of the Defendant No.6 and the Defendant No. 7, who are the owners of the Said Property, and has admitted that the Said Property has been leased to the Defendant No. 6 and the Defendant No. 7 for residential purpose. He contended that the Said Property was previously used as an embassy without any objection of the Plaintiffs and as there are numerous other schools operating in the area it cannot be said the Plaintiffs are only aggrieved by the Defendant No.8 operation of the school. He candidly conceded that the decision on the part of the Defendant No. 6 and the Defendant No. 7 to rent out the Said Property to the School was on account of a higher rent being received by the Defendant No. 6 and the Defendant No. 7 and also that no application had been maintained by the Defendant No. 6 and the Defendant No. 7 before the Sindh Master Plan Department seeking to convert the Said Property from residential to that of an amenity plot meant for a school but sought the concession that he may be permitted to make such an application to the Sindh Master Plan Department during the pendency of this litigation. He relied on an order of this court reported as **Dr. Shahzad Alam and 2 others vs. Beacon Light Academy and 5 others**¹⁰ in which injunctive relief in similar circumstances was declined.

10. Mr. Khurram Ghayas entered appearance on behalf of the Sindh Master Plan Department and stated that as of date no application for conversion of the Said Property has been received by the Defendant No. 8 to convert the usage of the

¹ 2017 MLD 785

² 2010 MLD1267

³ 2014 MLD 1086

⁴ 2015 CLD 1419

⁵ PLD 2014 Peshawar 218

⁶ PLD 2016 Sindh 445

⁷ 2011 CLC 933

⁸ 1998 SCMR 68

⁹ 1997 SCMR 1508

¹⁰ 2011 CLC 1868

Said Property to that of a school. He stated that under Regulation 18-4.2.2 read with Regulation 25-5.2 of the Karachi Building and Town Planning Regulations, 2002 the Said Property cannot be converted for the use of the school as a restriction exists in the latter regulation whereby such applications cannot be entertained where the plot was not on either a 40 foot wide road or not on a 2000 square yards sized plot. As the Said Property was not a 2000 square yard sized plot and not located on such a road, even if an application was received by the Master Plan Department the same could not be allowed on account of the restriction existing in the law.

11. Mr. Dhani Bux Lashari, who appeared on behalf of the Sindh Building Control Authority, stated that when illegal construction had commenced on the Said Property they had issued a notice to the owners of the Said Property and which had been suspended by a Division Bench of this Court in C.P. No.D-3209 of 2024 and therefore they are at present unable to take any action thereon.

12. The Defendant No.11 being the Directorate of Inspection & Registration of Private Schools came forward and stated that they have issued a license to the Defendant No.8 to operate a school on the Said Property. They also acknowledged that they were not aware that the Said Property could not be put to use of school and candidly conceded that they have never examined this aspect while granting such license or renewal of licenses to private schools operating in the Province of Sindh.

13. I have heard Ms. Rizwana Ismail, Mr. Faisal Siddiqui, Mr. Muhammad Jibran Nasir, Mr. Khurram Ghayas and Mr. Dhani Bux Lashari and have perused the record.

14. The city of Karachi, is the largest city in Pakistan and being a center of economic activity attracts hundreds of people who migrate to this city seeking better opportunities for themselves and their families. One of the basic necessities for a person who is seeking such an opportunity, to improve their standard of life, is to seek education for themselves or where they are not as fortunate, to seek education to be imparted to their children. Regrettably, the standard of education that is provided by the Government does not meet the mark and which creates a vacuum which is filled by entrepreneurs who invest in establishing schools to cater to such a demand for profit. Naturally, these schools require adequate land to house their enterprise and which, keeping in mind that most amenity plots that are planned and designated for a school are either accommodating Government Schools or are already allotted to other schools or are encroached, creates an acute shortage of properties to accommodate such enterprises.

15. Human nature being human nature, **the entrepreneur is therefore compelled to take a risk** of establishing his enterprise in a property that is not designated for such a purpose and which is inevitably a residential property that was to be used for a bungalow, as any plot which can be put to a commercial use is utilized for the construction of a mutli-storeyed building. The location of such an enterprise on such properties, started occurring in the early 1980's and which most residents of such areas initially turned a blind eye towards, keeping in mind that the number of students attending such institutions was not large enough to cause a nuisance. However, over the years such enterprises now accommodate hundreds of students and which puts a huge strain on the infrastructure of an area which clearly was not planned for such an activity thereby causing a nuisance. This situation creates an impasse as between the residents of an area and the School and which residents have purchased their properties on the basis of a town plan developed by the Government and which clearly did not make provision for such activities on residential properties. Having already failed to provide adequate public education, the Government fails for a second time by not providing adequate properties to cater to such a demand and which could be achieved by re-planning the city through urban renewals¹¹ so as to bridge this gap.

16. Instead of performing their obligations to re-plan the area, the officials of the Government also look at this situation as an opportunity to gain personal benefit and more often than not overlook such illegality against the receipt of illicit payment often financed by the higher rent received by the owner or by the profits made by the school, leaving the residents of the area to fend for themselves and who often threaten litigation to enforce their rights. The threat of litigation against the school at times induces the regulator to send a notice to the school and which is inevitably impugned before the Court and on occasion is suspended and under cover of which the school continues to operate. The resident of the area at this time are faced with four choices:

- (i) do nothing;
- (ii) to enter costly litigation and contest the litigation initiated by the school;
- (iii) to institute their own litigation as against the regulator to compel the regulator to enforce the right to live in their neighborhood in accordance with their scheme; or

¹¹ See **Abdul Razzak vs. Karachi Building Control Authority and others** PLD 1994 SC 512

- (iv) to give in to such a demand created by society by relocating to another area, renting out their own properties rather than to continue to reside in an area which slowly descends into an uninhabitable area checkered with commercial activities.

When litigation is instituted before a Court, keeping in mind the socio-economic realities of a child's education being disrupted, compassion is forwarded as an excuse to justify this illegality and the financial benefits received by the owners of the school and the illicit payments made to government officials disappear into the background. **To summarise, the regulator through it's inaction creates an environment where an illegality is perpetuated and which when brought before this Court is justified on the grounds of compassion and which if conceded to by this Court will permit nearly all to benefit financially provided that they choose to partake in such an illegality.** I have no doubt whatsoever that this suit is just one more of a large number of litigations that have been instituted in this court on the same issue.¹²

17. It is admitted before this Court that the Said Property is one that has been planned for residential use. A school, being a commercial enterprise can be housed on a commercial plot or on an amenity plot meant for a school and therefore cannot therefore be established on the Said Property without it being converted. Mr. Khurram Ghayas who entered appearance on behalf of the Sindh Master Plan Department, within whose jurisdiction the right to regulate such usage of a property lies, has stated that no application for conversion has as of yet been received by them from the owner of the Said Property. This is reinforced by the fact that the application that has been brought onto the record by the Defendant No. 8 has in fact been maintained by the School, who as a tenant has no such right to maintain such an application and which as per the endorsement on the application has been received by the Sindh Building Control Authority and not the Master Plan Department. However, the issue as to whether or not this application has been received and by whom becomes academic when one considers

¹² See Sindh Educational and Welfare Society versus Pakistan and others 1994 CLC 844; Prof. Doctor Asghar alla-ud-din and 3 others versus Lahore Lycium School, Multan through Principal and 2 others 1999 CLC 66; Arif and another versus Jaffar Public School through Principal/Administrator and 8 others 2002 M L D 1410; Amjad Ikram Versus Lahore Cantt. Cooperative housing society, ltd. (Now D.H.A.) Lahore Cantt. through Secretary and another 2003 Y L R 339; Imran Raza Shaikh and 5 others versus Mst. Zarina Gul and 4 others 2003 Y L R 943; S. Abid Ali and 3 others Versus Syed Inayat Ali and 5 others 2010 C L C 1633 ; Dr. Shahzad Alam and 2 others Versus Beacon Light Academy and 5 others; 2011 C L C 1866; Mrs. Nasreen Tariq Versus Abdul Basit and 2 others 2013 M L D 1388; Mst. Nighat Rizwan Versus Federation of Pakistan through Secretary, Ministry of Defence and 10 others 2016 C L C 1719; Messrs Labels Franchise trough Mrs. Amna Badar Afzal and 2 others Versus Capital Development Authority through Chairman and 2 others 2017 C L C 150; The City Schools (Private) Limited through Regional Director Versus Federation of Pakistan through Secretary, Ministry of Defence, Islamabad and 5 others 2018 C L C Note 4; Mst. Yawar Azhar Waheed (deceased) through LRs. Versus Khalid Hussain and others 2018 S C M R 76; and Ardeshir Cowasjee vs. Muhammad Naqi Nawab PLD 1993 Karachi 631

Regulation 18-4.2.2 and Regulation 25-5.2 of the Karachi Building and Town Planning Regulations, 2002 which read as hereinafter:

“ ... 18-4.2.2 Residential plot within a residential neighbourhood can be allowed to be used for Education/Health purpose provided the plot lawfully allowed for usage as education/health by Master Plan Department, as per prescribed procedure after inviting public objection from neighborhood. The applicable Road width, FA, No. of Floor and COS shall be governed by Section 25-5.2 of K B & TPR...

25-5. ...

Note (1) For high education institute, university duly chartered by Govt. of Sindh and recognized by Higher Education Commission (HEC). Govt. of Pakistan the FAR shall be 1:6 and some FAR shall be applicable for Education Institutes/Universities and Hospitals only on plot size 2000 Sq. Yds (1680.67 m²) meant for education/health/commercial purpose only”

Admittedly the Said Property is one which is less than 2000 square yards in size and hence cannot be converted into a plot for education purposes. Keeping in mind the number of campuses that the Defendant No. 8 has and the previous litigation that it has been involved in, I have no doubt that the Defendant No. 8 was fully aware of these rules and even if it wasn't, ignorance of the law cannot justify an illegality. Prima facie, the Said Property cannot be put to the use that the Defendant No. 6, the Defendant No.7 and the Defendant No. 8 wish to put the Said Property to.

18. The conduct of the Defendant No. 8, on the basis of the documents on record also do not bode well for it. When originally a notice was received by the Defendant No. 8 from the Sindh Building Control Authority alleging an illegality in not obtaining permission prior to making some refurbishments to the structure that existed on the Said Property, it was met by initiating CP No. D-3209 of 2024 and in which on 28 June 2002 the Defendant No. 8 *inter alia* pleaded as hereinafter:

“ ... 4. It is submitted that given that the Cedar School is not in session currently on account of summer holidays, the Petitioner decided to undertake renovations at the Subject Property, as is the norm, for the up-keep of the Subject Property and to enhance the facilities for providing broader range of activities in the school. It is further submitted that as the Petitioner started the renovations at the Subject Property, the Petitioner was served with Nonce dated 7.6.24 (Impugned Notice No. 1') of the Respondent No. 2. The Respondent No I in the Impugned Notice stated that the Petitioner has raised unauthorized construction on the Subject Property and the same is liable to be removed with 03 days from the receipt of the Impugned Notice....”

The position taken in CP No. D-3209 of 2024 is prima facie at a divergence from the contentions that were maintained by the Defendant No. 8 in HCA No. 255 of 2024 that was preferred as against the ex-parte ad interim order dated 18 July 2024 passed in this Suit wherein in Paragraph 14 (a) it was contended that:

“ ... in actual fact the School was already established and summer courses have been initiated in the month of July 2024”

I must admit that I am unable to reconcile the pleadings as presented by the Defendant No. 8 in these two different proceedings. While in CP No. D-3209 of 2024 it is contended that the school was not in session and was to commence after summer vacations, in HCA No. 255 of 2024 it was stated that the School was already established in July 2024. However, as these pleadings are not being relied on by the Mr. Faisal Siddiqui and who has candidly conceded on behalf of the Defendant No. 8 that the usage of the Said Property is being put to an illegal use and has instead pleaded that the Defendant No. 8 may be put on terms in respect of their usage of the Said Property I do not need to delve any further on these pleadings.

19. Regarding Mr. Faisal Siddiqui next contention that CP No. D-3209 of 2024 is sub judice before a concurrent jurisdiction of this Court, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, and as the Court has taken cognisance of this issue in its order dated 28 June 2024, I should not exercise my jurisdiction to entertain these applications as to do so would in effect amend that order. I must admit that I do find myself convinced by such an argument. The prayer maintained by the Defendant No. 8 in CP No. D-3209 of 2024 reads as hereinunder:

“ ...

PRAYER

- A. *Declare that the Impugned Notices are illegal, void, without jurisdiction and unconstitutional*
- B. *Set aside the Impugned Notices being illegal, void, without jurisdiction and unconstitutional.*
- C. *Suspend the operation of the Impugned Notice No. 1 being illegal, void, without jurisdiction and unconstitutional;*
- D. *Permanently restrain the Respondent No. 2 from giving effect to the Impugned Notice No.1:*
- E. *Restrain the Respondents or any and all other persons acting through or under them, from causing harassment of the Petitioner and from interfering in the operations of school being operated at the Subject Property and employees of the Petitioner,*
- F. *Direct the Respondent No. 5 and its officers to provide security/protection to the Petitioner and employees of the Petitioner, against illegal actions of the Respondents*
- G. *To grant any additional or better reliefs which this Honourable Court may find just and appropriate in the circumstances of the case.”*

The Interim order passed by a Division Bench of this Court on 28 June 2024 in CP No. D-3209 of 2024 does suspend the notice of the Sindh Building Control Authority and takes cognisance of the illegal use that the Said Property is being put to. In an unreported judgment that I authored entitled **Muhammad**

Naeemuddin & others Vs. Province of Sindh & others bearing CP No. D-452 of 2024 before the Sukkur Bench of this Court I had opined on the issue as to how this court should exercise its jurisdiction where concurrent jurisdictions of this Court are invoked and in which I had held as hereinunder:

“ ... 15. *The Supreme Court of Pakistan has in the decision reported as **Water and Sanitation Agency, Lahore through M.D. vs. Lottee Akhtar Beverages (Pvt.) Ltd. Lahore and others**¹³ opined that where two Courts each have concurrent jurisdiction and one court has assumed jurisdiction of an issue, propriety would demand that the second court should not have invoked its jurisdiction. In this matter the Supreme Court of Pakistan had taken suo moto notice of an issue under Sub-Article (3) of Article 184 of the Constitution. A petition was moved before the Lahore High Court, Lahore in its Constitutional Jurisdiction on the same issue and in which orders were passed which in effect negated orders passed by the Supreme Court of Pakistan. While acknowledging that the jurisdiction of the Supreme Court of Pakistan under Sub-Article (3) of Article 184 of the Constitution and the Constitutional Jurisdiction of the High Court were concurrent it was held that:*

“ ... 2. *The LDA notification dated 18.01.2019 levies a water tariff in the purported compliance of the directions contained in our order dated 06.12.2018. The private respondents are aggrieved by the tariff charged under the LDA notification. **However, instead of bringing their objections before the Implementation Bench, the respondents chose to file a Writ Petitions before the learned Lahore High Court to express their misgivings. By the impugned order dated 28.02.2019 the learned High Court suspended the LDA notification. We consider that any flaws or deficiencies in the steps taken by the Provincial Governments for the enforcement of this Court's directions are to be highlighted in the proceedings of SMC No.26 of 2018 before the Implementation Bench of this Court. By entertaining and adjudicating such a challenge to the LDA notification, the learned High Court has surprisingly and to our disappointment assumed jurisdiction over a lis that is sub judice before this Court. Such course of action clearly offends the settled norms of judicial propriety and comity, which is disapproved.***”

16. *As per the order of the Supreme Court of Pakistan where a court has assumed jurisdiction of a lis and passed an order and which lis remains sub-judice before that Court, another Court, even if it had concurrent jurisdiction should not invoke its jurisdiction over such a matter and should instead direct the person instituting such a lis to approach the Court who passed that order to redress whatever grievance they may have. We note however that whether or not such a rule would apply irrelevant as to the judicial hierarchy of a Court has not been addressed by the Supreme Court in their decision. We however are of the opinion that under the principles of Judicial Propriety and Comity, where a court has assumed jurisdiction over an issue and has passed an order which is impacting a person who chooses to invoke the same cause before another court having concurrent jurisdiction, the course of action that should be adopted by the Court is to direct the litigant to seek his relief by seeking to become a party in those proceedings and to seek modification of the order or by filing an appeal as against that order to set the order aside and not to indirectly circumvent the order by seeking contradictory relief from a Court which is higher in the judicial hierarchy.”*

While in that matter the Constitutional jurisdiction of this Court was being invoked to in effect modify an order passed by a learned Single Judge of this Court exercising jurisdiction on the original side of this Court, I see no reason to state that in the inverse situation i.e. where a Division Bench of this Court has exercised its jurisdiction under Article 199 of the Constitution of the Islamic Republic of

¹³ 2019 SCMR 1146

Pakistan, 1973 I exercising my jurisdiction under Section 9 of the Code of Civil Procedure, 1908 should on the principles of judicial propriety and comity also stay my hand. I therefore am inclined to accept Mr. Faisal Siddiqui contentions and direct that until a final decision is made in CP No. D-3209 of 2024 I should not traverse on the jurisdiction of the Division Bench of this Court on this issue. Needless to say, the Plaintiffs are at liberty to maintain applications in those proceedings to set aside such orders, if they so deem appropriate or to approach this Court if the issue is not finally decided in that Petition.

20. While the Division Bench of this Court has assumed jurisdiction over the issue of the usage of the plot in CP No. D-3209 of 2024 viz a viz the Sindh Building Control Authority and the Master Plan Department, there remains one issue that still needs to be resolved and which issue is not included in the *lis* before that Court and which relates to the license issued by the Defendant No. 11 to the Defendant No. 8 to operate a campus of its school on the Said Property.

21. The Defendant No. 8 is under the provisions of Section 4 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 (hereinafter referred to as the Ordinance, 2001) obliged to make an application to obtain a license for the Defendant No. 11 i.e. the Directorate of Inspection and Registration of Private Schools before opening or operating any branch of its School. The Defendant No. 11 on an application so made, under Section 6 of the Ordinance, 2001 grants such a license to an applicant for a period of years in consonance with the provisions of the Ordinance, 2001 and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005. The license so given is subject to renewal after the expiry of that period. The question that begs to be asked is as to whether, while issuing a license to operate a school, the Directorate of Inspection and Registration of Private Schools is obliged to take cognizance of other laws, rules and regulations made by the Federal Government, Provincial Government and statutory bodies and while doing so to ensure that the terms of that license do not directly or indirectly violate those laws, rules and regulations.

22. Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 states as herein under:

“ ... 4. *Right of individuals to be dealt with in accordance with law, etc.*

(1) *To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan.*

(2) *In particular –*

- (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
- (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
- (c) no person shall be compelled to do that which the law does not required him to do.”

Sub-Article (1) of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 has been equated to the right to a citizen of this country to demand that he is treated in accordance the “due process of law.”¹⁴ Such a right also devolves on the Plaintiffs who are on the touchstone of Article 4 therefore entitled to the “protection of law” and to be “treated in accordance with law”. The right of the Plaintiffs to enjoy living in a developed area in accordance with a town planning scheme of the area has been recognised by a single judge of this Court in the decision reported as **Ardeshir Cowasjee vs. Muhammad Naqi Nawab**¹⁵ wherein in very similar circumstances a school was being established on a residential property and wherein it was held that:

“ ... In this connection, Mr. Naimur Rehman refers to a passage in Mulla's *The Transfer of Property Act (Seventh Edition)* at page 181; and on the cases of *Torbay Hotel Limited v. Jenkins and Lawley* ((1940) 2 Ch. 225); *Newman v. Real Estate Debenture Corporation Ltd. and Flower Decorations Ltd.* ((1940) 1 AER 1-31); *Re Dolphin's Conveyance, Birmingham Corporation v. Boden and others* (1970) 2 AER 664); *Brunner and another v. Greenslade* ((1970) 3 AER 833); *Coovedi Ludha v. Bhimji Girdhar* ILR 6 Bom. 528); *Mr. Farogh Nasim, on the other hand, relies on Syed Hussain Ali v. Ahmad Bux*' (1992 MLD 2000); *Naseer Ahmed v. Hafiz Muhammad Ahmed* (1984 CLC W) and the unreported case of *Muhammad Iqbal v. Mst. Saeeda Bano in Civil Appeal No.698-K of 1990* (1993 SCMR 1559) decided by the Supreme Court.

The principle upon which a covenantor might claim benefit of a restrictive covenant against another covenantor was laid down 'in the case of *Elliston v. Reacher* ((1908) 2 Ch. 374). It was there held that in order to. be able to enforce a restrictive covenant-

..... it must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs Land defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendees object in imposing the restrictions must in general be gathered from all the circumstances of the case including in particular the nature of the restrictions. If a general observance of the restrictions

¹⁴ See **New Jubilee Insurance Company Ltd., Karachi vs National Bank of Pakistan, Karachi** PLD 1999 SC 1126 and **Aftab Shahban Mirani vs. President of Pakistan and others** 1998 SCMR 1863

¹⁵ PLD 1993 Karachi 631

is in fact calculated to enhance the values of the several lots offered for We, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point."

Elliston v. Reacher was a case of building scheme but the principle laid down therein was held in *Torbay Hotel Limited v. Jenkins and Lawley* to apply to a case where there was no "building scheme" in the ordinary sense because the owners of the land there were not dealing with vacant land and parceling out plots for sale but had adopted a scheme for alienating, from time to time, portions of land under a systematic policy involving the imposition on those portions a regular system of covenants intended to endure for the benefit inter se of all persons who from time to time became owners of portions of the estate. It was observed, at page 240 of the report-

"where an owner of land deals with his own land on the footing of imposing restrictive obligations on the use of the various portions of it as and when he alienates them for the common benefit of himself (so far as he retains any of the land) and of the various purchasers inter se, a Court of equity will give effect to this common intention, notwithstanding the absence of mutual covenants, provided that the intention that there should be mutual obligation is sufficiently established."

In *Newman v. Real Estate Debenture Corporation Ltd. and Flower Decorations Ltd.*, the above principle was extended to a block of flats. Stamp, J. in the case of *Re: Dolphin's Conveyance* came to the conclusion, upon analysis of various authorities, that:

"There is not a dichotomy between the cases where effect has been given to the common intention inferred from the existence of the concomitants of a building scheme and those where effect has been given to the intention evidenced by the existence of a deed of covenant. Each class of case, in my judgment, depends on a wider principle. Here the equity, in my judgment, arises not by the effect of an implication derived from the existence of the four points specified by Parker, J. (in *Elliston v. Reacher*, supra) or by the implication derived from the existence of a deed of mutual covenant, but by the existence of the common interest and the common intention actually expressed in the conveyances themselves."

In *Brunner and another v. Greenslade*, it was held that where there was a head scheme of development relating to an original plot of land, any sub-purchasers would be bound inter se by the covenants of that head scheme even though they had entered into no covenants with the sub-vendor or with each other, what bound them inter se being an equity independent of any contractual obligation, arising from the circumstances of the existence of the head scheme, the process of division into sub-plots and the disposal of those plots.

Now, in the present case there is no doubt that the plaintiffs and the defendants Nos.1 and 2 derive their titles from a common vendor, viz. K.M.C. and that the defendant No.3 derives his title from the defendants Nos.1 and 2. It also appears that K.M.C. being the owner of the entire area, had divided it into plots and disposed of it to various persons subject to the restrictive covenant that the plots so disposed of shall be used for of all the plots sold. The restrictive covenant is apparently calculated to enhance the value of the plots in the area by restricting the use thereof to residential purposes only. It would, therefore, to quote the words of Lord Parker in *Elliston v. Reacher*, "an easy inference" that the vendors intended the restriction to be for the benefit of all the plots. That being so, a further inference would appear to follow, namely, that it was the common intention of the purchasers from K.M.C. that the restrictive covenants subject to which they purchased the plots were to enure for the benefit of all other plots sold by K.M.C. in the area in question under a scheme of development. Such an intention may, in fact, be presumed unless the contrary is shown. Megarry, J. observed in the case of *Brunner v Greenslade* (supra)-

"Assuming that the requirements of a scheme exist, there is then the question of intention. Will the equity apply as between the purchasers of sub-plots only if a positive intention to this effect is established, as *Preston and Newsom's*

Restrictive Covenants seems to suggest, or will it apply unless a contrary intention appears? The true view is, I think, the latter."

In view of the foregoing, it appears, prima facie, that the property in question is subject to the restrictive covenant to use it for residential purposes D only and the plaintiffs are, in equity and quite apart from contract, entitled to the benefit of that covenant."

If one is to replace the references made to the KMC, in the abovementioned order, with the Federation of Pakistan, Ministry of Housing Works, there is in principle no difference between that case and the case of the Plaintiffs in this *lis*. The right being enforced is to ensure that an area is developed and maintained according to a "building scheme" or "town planning scheme" and which having been established, prima facie the license that is issued by the Directorate of Inspection and Registration of Private Schools under Section 6 of the Ordinance, 2001 permitting the branch of the school to be established on the Said Property would violate that right and therefore cause the Plaintiffs to be treated other than in accordance with law. **In addition**, I would think that while the Directorate of Inspection and Registration of Private Schools has the requisite jurisdiction and discretion to issue the license on terms in accordance with its enabling statute and rules made thereunder, it would be mandated to ensure, when issuing or renewing such a license, that any other law made by the Federal Government, Provincial Government and Statutory Bodies are not violated as to do otherwise would be an incorrect exercise of its discretion and would to my mind be an arbitrary act as the Directorate of Inspection and Registration of Private Schools, more so than an ordinary citizen must not be ignorant of the law when it exercises its authority. Hence, by issuing a license to the Defendant No. 8 to operate a school on the Said Property the Directorate of Inspection and Registration of Private Schools has indirectly permitted the Defendant No. 8 to use a residential property for operating a school without **first** securing the conversion of the Said Property as required under the provisions of Regulation 18-4.2.2 and Regulation 25-5.2 of the Karachi Building and Town Planning Regulations, 2002 and which act would prima facie be an arbitrary act and which, not being sub judice before any court, can be impugned by the Plaintiffs independently of the *lis* in in CP No. D-3209 of 2024 in this suit.

23. A prima facie case having been established, what remains to be considered is whether on the grounds of balance of convenience and irreparable loss, an injunction should or should not be granted. I must admit that I found the arguments of Mr. Faisal Siddiqui, to put the Defendant No. 8 on terms to be a very reasonable and practical argument. Such directions would in effect end this litigation and give closure and clarity to all concerned. I also have regard for the academic reputation of the Defendant No. 8 and the services that it does provide to the citizens of Karachi in circumstances as I have clarified in this order. However, under the law, the basis of which I am mandated to decide such applications is not on the

threshold of reasonableness and practicality but rather on the basis of the legality of the rights of the parties. In this regard, the rights of the Plaintiffs as clarified hereinabove are entrenched in law. The rights of the Defendant No. 6, the Defendant No. 7 and the Defendant No. 8 are clearly not. I therefore cannot see how any balance of convenience can be found in favour of a party who violates the law and which clearly must be found in favour of the Plaintiffs who admittedly are seeking to enforce their legally recognised rights. Additionally, in respect of the irreparable loss that will be suffered by the Defendant No. 8 by any injunction being granted to the business of the Defendant No. 8, this was clearly part of the risk that it undertook when considering such a venture and which is self induced. Finally, I cannot but state, that the entire circumstances that exist in this city, which has caused so much angst amongst various citizens who reside here, is solely attributed to the environment that is created by the various government functionaries who instead of creating an enabling environment for the citizens of this city to thrive, instead prefer to create an environment to entice greed. While I am convinced that the Plaintiff is entitled to injunctive relief, I would add that if such injunctive relief was refused or an order was passed which put the Defendant No. 8 on terms it would to my mind in effect lead to this Court to validating such an environment as created by the regulatory bodies and which I believe that this Court should refuse, failing which the cycle of illegality will not end.

24. For the foregoing reasons the CMA No. 10199 of 2024 is allowed and the relief prayed for therein is moulded by giving directions to the Defendant No. 11 to forthwith suspend the license granted by it to the Defendant No. 8 for operating a school on the Said Property as prima facie the license has been issued arbitrarily by ignoring Regulation 18-4.2.2 and Regulation 25-5.2 of the Karachi Building and Town Planning Regulations, 2002 and with further directions to the Defendant No. 11 to ensure that until the final decision the Defendant No. 8 does not commence its operations of a school on the Said Property. CMA No. 10263 of 2024 and CMA No. 10312 of 2024 are correspondingly disposed of on account of such an order as having served their purpose.

J U D G E

Karachi;
Dated 10 August 2024.

Nasir P.S.