

2005 C L C 424

[Karachi]

Before S. Ali Aslam Jafri, J

SINDH INSTITUTE OF UROLOGY AND TRANSPLANTATION and others---Plaintiffs

Versus

NESTLE MILKPAK LIMITED and others---Defendants

Suit No.567 and C.Ms. Nos.3717 and 5343 of 2004, decided on 30th November, 2004.

(a) Easements Act (V of 1882)---

----S. 7, Illus. (g)---Civil Procedure Code (V of 1908), O.XXXIX, R.1---Exclusive right to enjoy---Injunction, grant of---Landowner has a right to collect and dispose of within his own limits all water under the land which does not fall in a defined channel but such right is not unfettered---Natural resources of the earth, including the air, water, land, flora and fauna especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate and Court, while dealing with the equitable relief of injunction, should keep this in view.

(b) Public Trust, doctrine of---

----Scope---Natural resources like air, sea, waters, and forests are like Public Trust---Such resources being a gift of nature, should be made freely available to every one irrespective of the status---" Doctrine of Public Trust" as developed during the days of ancient Roman Empire, enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes---Even under the Islamic law certain water resources are to be protected from misuse and over exploitation.

Principle 2 of Stockholm Declaration, 1972 and Environmental Dimensions of Islam by M. IZZI DIEN at p.37 ref.

(c) Islamic Jurisprudence---

----Public Trust, doctrine of---Scope.

(d) Easements Act (V of 1882)---

----S. 7, illus. (g)---Civil Procedure Code (V of 1908), O.XXXIX, R.1---Plaintiff's land was earmarked for Education City---Defendant, a multinational company, elected to set up a water bottling plant close to the city by tapping into and making free use of sub-soil water aquifer lying underneath the Education City area---Plaintiffs had sought declaration and prayed that pending the disposal of suit the defendant be restrained from raising any construction with a view to set up and operate a bottled water factory in the area known for Education City as the same was contrary to educational and health use, for which such land could be used--Validity---Held, prima facie case for grant of injunction had been made

out in favour of the plaintiffs; balance of convenience also appeared to be in their favour because once the process of extracting the water in such a huge quantity was allowed to operate, each day, each hour, and each minute water deposits in the aquifer would demolish rapidly and shall, adversely affect the rights of plaintiffs to use the underground water according to their genuine needs which shall cause an irreparable loss to them---High Court confirmed the' injunction granted to plaintiffs till the decision of the suit and in the meantime, the defendant was restrained from initiating any commercial/industrial activities including setting of a bottling plant in the area.

State of Tamilnadu v. Hind Stone 1981(2) SC 205; M.C. Mehta v. Kamal Nath (1997) 1 Supreme Court Cases 388; National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419 (Supreme Court of California), Marks v. Whitney 6 CA-1. 3d 231 (Supreme Court of California); Ardeshir Cowasjee v. Province of Sindh 2004 SBLR Sindh 763; Shehri v. Province of Sindh 2001 YLR 1139; Gaved v. Marlyn 34 LJCP 352; Gul Haider v. Asat PLD 1978 Pesh. 157; Anjum Irfan v. Lahore Development Authority PLD 2002 Lah. 555; Asrabullah v. Kiamatullah AIR 1937 Cal. 245; Karathigundi Keshava Bhatta v. Sunnanguli Krishna Bhatta AIR (33) 1946 Mad. 334; Principle 2 of Stockholm Declaration, 1972 para.13 and Environmental Dimensions of Islam by M. IZZI DIEN p.337 ref.

Qazi Faez Isa for Plaintiffs.

Wasim Sajjad, Ali Wasim Sajjad and Arshad Tayebally for Defendant No. 1.

Abbas Ali, A.A.-G., Sindh for Defendants Nos.2 to 4.

Defendant No.5: Called absent.

Dates of hearing: 19th August, 7th, 8th September, 6th, 7th and 25th October, 2004.

ORDER

By this order I propose to dispose of C.M.A. No.3717 of 2004 under Order XXXIX, rules 1 and 2 read with section 151, C.R.C filed on behalf of the plaintiffs praying therein that pending the disposal of the suit the defendant No. 1 be restrained from raising any construction with a view to set up and operate a bottled-water factory in Deh Chuhar area of Karachi, known as "Education City" as the same is contrary to educational and health use, for which such land can be used. The other application is C.M.A. No.5343 of 2004 filed on behalf of the defendant No.1 under Order XXXIX, rule 4 read with section 151, C.P.C, for vacation of stay order, dated 24-5-2004 through which defendant No.1 has been restrained from initiating any commercial/industrial activity including set-up of a bottling-plant in the area. In support of both these applications affidavits have been filed by the respective parties, which have been controverted through counter-affidavits and rejoinders. Since the out-come of both these applications shall be same, hence both are being disposed of by this single order.

2. The facts as disclosed in the plaint appear to be that plaintiff No. 1 is a statutory organization established under the Sindh Institute of Urology and Transplantation Ordinance, 1990 providing free comprehensive and modern medical care in kidney diseases and transplantation to the patients predominantly from the rural and poorer urban strata. It is also performing educational activities aimed at educating the training doctors, nurses, technicians etc. Plaintiff No.2 is a recognized and established charitable foundation incorporated under section 42 of the Companies Ordinance, 1984, running a teaching hospital in Pakistan which is at par with some of the most prestigious institutions abroad. Plaintiff No.3, is a University established under The Agha Khan University Order, 1983 and has been a

pioneer in Pakistan to bring quality education which is at par with what some of the best international universities have to offer. Plaintiff No.4 was established as a University known as SZABIST in the year 1995 under a Provincial Statute. It is a center of excellence in the field of science and technology offering, Ph.D. courses and providing excellent higher education to the people of Pakistan.

3. It is the case of the plaintiffs that being induced by the representations made by the Province of Sindh/defendant No.2 and its functionaries that the land contiguously in Deh Chuhar area of Karachi was going to be designated for exclusive use of health and educational purposes and named as "Education City", the plaintiffs invested huge amount of their money and acquired large portion of the land in the said area. The area acquired by plaintiff No. 1 is 100 acres, by plaintiff No. 2 is 653 acres, by plaintiff No.4 is 300 acres, apart from other institutions rendering services in the field of Health and Education, such as Sindh Madressat-ul-Islam Board's for Quaid-e-Azam Public School 200 acres, Newports Institute of Communication and Economics 20 acres, Sir Syed University of Engineering and Technology 200 acres, Shaukat Khanum Memorial Cancer Hospital. Research Centre 20 acres and Ziauddin Medical University 25 acres.

4. The plaintiffs claim to have been informed by defendants Nos.2 and 3 that the said land earmarked for Education City would not be permitted to be used for any purpose other than the stated amenities of health or, education which induced the plaintiffs to invest in the "Education City". Some of the plaintiffs were leased out land by defendants Nos.2 and 3 on specific condition that they would invest a minimum of United States fifty million dollars and in fact the institutions have invested considerable amount in acquiring the land. Plaintiffs Nos.2 and 3 have arranged United States \$200 million .for investment in the proposed educational Faculty of Arts and Sciences sought to be set-up in the Education City. It is stated that the Governor of Sindh as well as City Nazim fully supported and promoted the idea of Education City and affirmed that collaboration between all stake-holders and City Government is very important. Such public declaration was made by Governor of Sindh in the year 1999. Photo copies of the minutes of the meeting held in. the auspices of defendant No.5 on 25-11-2002, 7-1-2003, 20-3-2003, 2-7-2003 and 29-1-2004 have been filed as Annexure "B-1" to "H-5". In order to ensure the integrity of the Education City and, to ensure that no one buys land in the Education City area under any mistake or misapprehension, the defendant No.5 issued Office Order, dated 17-2-2003 ordering that "henceforth no transaction, regarding the Sale of the land, Renewal of the lease, Conversion, Exchange and transfer shall be allowed" in Deh Chuhar. Photocopy has been annexed and marked as "E".

5. The plaintiffs have further stated that defendant No.1 is the Pakistan chapter of the multinational Nestle, it has a major and possibly an overwhelming majority share in the bottled water industry in Pakistan: It is the largest packager of milk in Pakistan and in order to increase its profitability in its water business elected to set-up a water bottling plant close to Karachi City by tapping into and making free use of sub-soil water aquifer lying underneath the Education City area in order to make huge profit. Defendant No. 1 has acquired 20 acres of land in the Education City area, though such acquisition is legally defective and does not vest any right in defendant No. 1. It had applied for and was allotted a comparatively small area of 20 acres of land in Na-class No. 108, Deh Chuhar for industrial/commercial purposes under section 10(1) of the Colonization of Government Lands Act, 1912, vide letter dated 25-10-2003 after bye-passing Industries Department. A 99 years lease has been granted to defendant No.1 out of Na-class No.108, however, the said number was changed from Na-class No.108 to Na-class No.106 and such corrigendum has been issued illegally and unauthorizedly with mala fide intentions by defendant No.3/Secretary, Land Utilization Department, Government of Sindh. In fact this piece of 20 acres has been carved out of the land measuring 300 acres out of Na-class No. 106 of Deh Chuhar already granted to plaintiff No.4 and the defendant No. 1 cannot claim any right in Na-class Survey No. 106.

6. The construction and setting-up of the plant has been objected on various grounds including that it is in violation of section 12 of Pakistan Environmental Protection Act, 1997 and free use of sub-soil water aquifer in huge quantity by defendant No. 1 can cause serious prejudice to the availability of water for use of plaintiffs and other institutions to be set-up in the area. Exploitation of natural resources for financial gain by defendant No. 1 by tapping into the aquifer through tube-wells and draining out the same is environmentally degrading the non-sustainable use of a natural resource as by its own showing defendant No. 1 was attracted to the area on account of availability of sub-soil aquifer and its commercial exploitation. The second objection is that defendant No. 1 has not obtained requisite permission under the Canal and Drainage Act, 1873, inter alia, under sections 16 and 20 thereof. It is further contended that defendant No. 1 has started raising construction on the land without seeking prior approval of K.B.C.A. and the, construction being illegal can be sealed and demolished under section 7-A of the S.B.G.D. Ordinance. The set-up of a factory in the area would prove to be a complete nuisance to the education and health institutions as it will create traffic jams and accidents are bound to happen whereas good education and health require a quiet, peaceful and serene atmosphere. It would be a harbinger for other industrial units and factories and Education City would effectively be converted into another industrialized zone. The whole Education City area would become polluted, over crowded, dangerous and dirty area. It is lastly urged that the institutions would not have made any investments in the Education City area if they knew that the land therein would be allowed to be put to industrial or commercial use. It has therefore, been prayed that it be declared that defendant No. 1 have no right, title or interest in Na-Class No. 106, Deh Chuhar Karachi. A direction has been sought against defendant No. 1 to vacate possession of 20 acres of land in Na-Class No. 106 Deh Chuhar Karachi. Cancellation of such agreement dated 12-11-2003 and all other title documents has also been prayed. A further declaration has been sought that defendant No. 1 cannot build, construct or set-up an industrial unit or factory in Deh Chuhar area and should be restrained for doing so. Another declaration has been sought that the land in Education City area in Deh Chuhar Karachi can only be allotted for education and or health services in accordance with the statement of conditions and applicable law and rules. A further direction has been sought against defendants Nos.2, 3 and 4 not to allot any land in Deh Chuhar or Education City area of Karachi for other than education or health purposes.

7. In their written statement as well as counter-affidavits to the application under Order XXXIX, rules 1 and 21 C. P.C. defendant No. 1 has disputed the claim of the plaintiffs and pleaded that suit is bad of misjoinder of parties as plaintiffs Nos.3 and 4 have no cause of action because plaintiff No.3 does not own any land in the area while land allotted to plaintiff No.4 stands cancelled under section 3 of the Sindh Urban, State Land (Cancellation, Allotment; Conversion and Exchange) Ordinance, 2000. Furthermore, suit cannot proceed in view of the provision of section 10 and Order XI, C.P.C. as the matter in issue in this suit was also an issue of C.P. No.D-1419 of 2003 pending before this Court which was filed on behalf of plaintiff No.4 and in which defendant No. 1/Nestle was, a respondent. Locus standi of the plaintiffs to file this suit has also been called in question. It has been pleaded that the suit is based on false, frivolous, vexatious allegations and has been filed to harass and pressurize the answering defendant, therefore, it is liable to be dismissed with special costs under section 35(A), C.P.C. On merits it is denied that the plaintiffs were induced by defendant No.2/Province of Sindh or its functionaries that the land situated in Deh Chuhar area of Karachi was going to be designated for the, exclusive use of health and educational purposes. The factum of setting-up of "Education City" as claimed by the plaintiffs has been vehemently denied as no such project was approved by the Sindh Government at any stage. It is stated that on the contrary in early 2001 the Development Council for Industrial Revival of Sindh, headed by the then Sindh Governor, Muhammad Mian Soomro, approached Nestle for several times to make investment in Sindh Province as a result of which investment worth millions of Dollars has been made and Mr. Shams Lakha who is the Chief Executive of the Agha Khan Hospital was a Member of said Council. So for allotment of land in favour of plaintiff No.4 (SZABIST) is concerned, it has already been cancelled. It is further stated that there is no record to indicate that any such decision had been ever taken by the

Province of Sindh or the Secretary (LU) Department to establish "Education City", and no such notification has been issued for the said purpose, as no such project was ever approved and it appears to be merely a wish and desire of the plaintiffs which did not materialize. Mere suggestion from certain quarters or the City District Government who is not owner of the land is not sufficient. It has been vehemently urged that there is no record that the then Governor, of Sindh Mr. Moinuddin Haider or subsequent Governor Mr. Muhammad Mian Soomro or the present Governor Dr. Ishrat-ul-Ebad ever took any decision for creation of so-called Education City nor they had jurisdiction to do so Even otherwise any such decision will not effect the rights of Nestle. It is further stated that land allotted to the plaintiffs is lying vacant and no construction exists on the same. The proposal for establishment of so-called Education City made by defendant No.5/City District Government Karachi on 17-2-2003 was just a proposal which was never materialized. Provincial Government being the owner of the land alone is competent to take any such decision. It is further stated that the concerned District Officer Revenue has clarified the position of City District Government in respect of land allotted to Nestle vide letter dated 27-5-2004 when the matter regarding the lay-out plan measuring twenty acres of land allotted to Nestle was forwarded to him. His observation has been reproduced which is as follows:--

"You are requested to please go ahead as there is no ban on the industrial unit, i.e. Nestle, which has already been approved by the Government. The decision, already taken vide minutes No.DCO/CDGK/2003-209 dated 2-7-2003 shall not apply to this unit. "

8. It is stated that Nestle installed its factory and bottling project in pursuance of the permission granted by the Government of Sindh vide letter, dated 25-10-2003 as modified by letter dated 29-10-2003 which clearly stated that land was being allotted for industrial/commercial purposes. The defendant No. 1 stated the cost of the project as US\$ ten million and the activity has to provide pure and clean water not only to the people of Karachi but to the people of others areas of Pakistan as well. So far the correction in Na-Class number is concerned, it is stated that such correction was legally and validly made by the Secretary (LU) Department vide corrigendum dated 19-11-2003 and the original lease deed in favour of Nestle was also amended to reflect the correct Na-Class number on 1-7-2004. It is further stated that the interest of plaintiff No.4 in the land has been fully protected by an order dated 10-3-2003 passed by a Division Bench of this Court in No.D-1419 of 2003 filed by plaintiff No.4 (SZABIS.T) wherein it has been observed that, "all learned counsel, therefore, agree that land in Na-Class No. 106 be properly surveyed and an area of 300 acres may be tentatively identified for the purpose of giving effect to the allotment order in favour of petitioner". Demarcation of land by the Survey Department was also ordered. It is further stated that in fact allotment was being made in un-surveyed land and it was not possible for the petitioner/plaintiff No.4 to claim a right in a specific piece of land but they could only claim a right to be allotted a certain amount of land in certain area, as observed by the Honourable Division Bench in the above-referred C.P. No.D-1419 of 2003, hence the right of plaintiff No.4, has been settled by the Court in the said petition and their right over the piece of the land 'in occupation of the defendant No. 1 was not recognized as the factory was completed before 24-5-2003. Defendant No. 1 has claimed to obtain approval from the authority under SBCO, 1979 and no violation of Pakistan Environmental Protection Act, 1997 has been made. It is denied that Canal and Drainage Act, 1873 applies to the factory constructed by defendant No. 1. It is also defined that use of land by Nestle would be a nuisance to the institutions or students or patients who in any case do not exist at present. In fact the factory installed will meet the highest environmental standards as will be evident from the report annexed with the written statement. It has been denied that number of trucks which will be involved in carriage to and from the plant will be in such a number as to adversely affect the traffic. According to a study made by said defendant, over 4,000 trucks already pass that link road in a day, whereas the number of trucks of Nestle will be only 25-30 per day. It is denied that any pollution will be caused by the factory.

9. Written statement has also been filed by the Environmental Protection Agency /defendant No.4 stating

therein that Nestle Green. Water Factory producing bottled water neither falls under Schedule-I (category of list of projects requiring IEE) nor. Schedule-II (category of projects requiring EIA) of Pakistan Environment Protection Agency; Review of Initial Environmental Examination and Environment Impact Assessment Regulation, 2000 framed under the Pakistan Environment Protection Act, 1997. Likewise the project also does not fall in the category titled "Other projects requiring IEE or EIA" as it is not likely to cause any adverse environment effects. As such EPA's approval is not required under PEPA, 1997, It is further stated that in fact case of defendant No. 1 does not attract any action by defendant No.4 as such no action was taken as there was no violation of any of Regulations, 2000 or PEPA, 1997. It is also stated that there is no cause of action against defendant No.4 and suit is liable to, be dismissed against the said defendant.

10. Affidavits and counter-affidavits as well as rejoinders have filed on behalf of the plaintiffs and defendant No. 1 reiterating the stand taken by them in support of their respective contentions.

11. In support of his plea for grant of temporary injunction till the disposal of the suit, Mr. Qazi Faiz Isa learned counsel for the plaintiffs has argued on the same lines and elaborated various pleas taken in the plaint. His first contention is that the piece of land which has been granted illegally to defendant No. 1 after issuing a corrigendum in respect of Na-Class No. 106 for setting up an industrial unit, is part and parcel of the land allotted/earmarked for Education City and could not be granted for any other purpose. In this connection learned counsel has referred to the decisions taken in(?) the Provincial Cabinet meetings of the Sindh, held on 24-4-2001 and 6-10-2001 under .the Chairmanship of the Governor of Sindh. Decision on Item No.(3) of Agenda No.6 taken in Cabinet meeting dated 16-10-2001, is reproduced hereinafter:--

"Link road area between National and Super Highway will be declared Education and Health City. Land on Link Road will only be allotted to Education and Health Sector Institutions and allied amenities like a bus terminal, hotels, and petrol pumps."

12. Learned counsel has further argued that the industrial unit if allowed to function it shall be a hazard to the environment and the peaceful atmosphere of a locality which has been earmarked only for setting-up educational institutions and health services. There will be constant nuisance and traffic problem in the area as the material produce by the defendant No.1 shall be transported through trucks. It shall be a danger to the students, teaching faculty and the patients. Learned counsel has further argued that in view of the reports from the concerned authorities/experts constant drawing of underground water in a huge quantity for the purpose of cleaning and bottling shall adversely affect the rights of the plaintiffs. The whole of the aquifer will become disturbed as a result of drawing of water in such a huge quantity for a commercial use by defendant No.1 and it will deprive the plaintiffs of their future needs. Learned counsel has further argued that as a result of the process of separating the salt and other ingredients from the water before bottling it, a huge quantity of refuse shall adversely affect the entire locality and the lands belonging to the plaintiffs and other in the adjoining areas will be adversely affected. The water table shall go down in the area due to constant drawing of water through tube-wells in such a huge quantity. Learned counsel has placed on record during his arguments an affidavit of Al-Kazim Mansoor, Chief Executive of Soilmat engineers, a multi-dimensional firm which amongst other things conducts soil investigation; piling and pile load tests, who has stated that he has carried out Hydrogeological and Geotechnical Investigations for design of various water scheme He has further stated that to have, read and analyze the document entitled "Nestle' Milkpak Ltd. Karachi Environment impact stud\ NEMS B3-4", a document filed by Nestle Milkpak Ltd. which is not an environmental impact study and after seeing such document 11, has stated that the said document show that Nestle plant shall extract water from two tube-wells in the quantity of 148 Imperial gallons per minute or 306 million liters per year as total yearly extraction and out of the extracted water process proposes to bottle for sale 228 million liters per year. The water is proposed

to be extracted from an aquifer situated under an arid land, where there is very little rainfall. In order to preserve the integrity and the longevity of an aquifer it is essential that sustainable use thereof is made, or not to extract more than the "safe-yield". In terms of use of water resources "a balance must exist between the amount of water entering and leaving the system". Safe-yield as defined in the attainment and maintenance of a long-term balance between the amount of ground water withdrawn (pumped) annually and the annual amount of recharge. Safe yield is a management concept that allows water users to pump only the amount of ground water that is replenished naturally through precipitation and surface water seepage. He has opined that drawing of large quantity of water by a party, the environmental cost is borne by others who have lands in the area or who may be entitled to use the water of the aquifer. According to him, by extracting the water as proposed by Nestle shall tantamount squandering a natural treasure trove. A water which is not owned by anyone person or entity. Learned counsel has referred to a judgment from the High Court of Kerala India) delivered by K. Balakrishnan Nair, J. in Writ Petition No. 3492 of 2003(G) to show that petition filed by Perumattay Grama Panchayat against State of Kerala and Hindustan Coca-Cola Beverages Private Limited and others was allowed justifying the cancellation of the licence of Coca-Cola Company in view of excessive exploitation of ground water by the said Company resulting in acute drinking water scarcity in Perumattay Panchayat and nearby places. In a very detailed judgment after examining the point as to whether decision of the Panchayat that Company should not be permitted to extract ground water was legal it has been held as under :--

"Ground water is a national wealth and it belongs to the entire society. It is a nectar, sustaining life on earth. Without water, the earth would be a desert. At present, there is no law governing the control or use of ground water, submits the learned Senior Counsel for the 2nd respondent. The Kerala Ground Water (Control and Regulation) Act, 2002 has not so far been enforced. Therefore, the senior counsel submits, the 2nd respondent is free to extract any amount of ground water, which is available underground in the Land owned by it. As a good neighbour, it may have a moral obligation not to make excessive use of ground water, so as to affect the persons in the neighbourhood, it is submitted. Legally there are no fetters on the right of the 2nd respondent to extract ground water, it is pointed out. The Rule of law saves every action of the individual, which is not expressly prohibited by law, it is contended.

Therefore, unfettered right is claimed to extract ground water."

13. Principle 2 of Stockholm Declaration, 1972 has been referred which reads as follows:-

"The natural resources of the earth, including the air, water, land, flora and fauna especially representative, samples of natural eco-systems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

14. A reference has also been made to an observation from the Supreme Court of India in the case of State of Tamilnadu v. Hind Stone 1981 (2) SC 205 at p.212 which is reproduced as follows:--

"(6) Rivers, forests, minerals and such other, resources constitute a nation's natural wealth. These resources are not to be frittered away and exhausted by anyone generatopm. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of nation in the best possible way. It is in the interest of mankind. It is in the interest of the nation. "

15. A view was taken by the Court in the said report that the resources like air, sea water, forests stand covered under the doctrine of public trust and are to be protected. It has, therefore, been held that State as a trustee is, under a legal duty to protect the natural resources. The resources meant for public use cannot be converted into private ownership. Thus, it was held that the underground water belongs to public and

the State has got a duty to protect ground water against excess exploitation and the inaction of the State in this regard will tantamount to infringement of the right to life of the people guaranteed under Article 21 of the Constitution of India i.e. Article 9 of the Constitution of Pakistan. The learned Judge after examining the case, issued following directions:--

- "(1) The 2nd respondent shall stop drawing-ground water for its use after one month from today.
- (2) The Panchayat and the State shall ensure that the 2nd respondent does not extract any ground water after the said time limit. This time is granted to enable the 2nd respondent to find out-alternate sources of water.
- (3) The Panchayat shall renew the licence and shall not interfere with the functioning of the Company on the grounds mentioned in Exh.P.4 if it is not extracting ground water and is depending for its water needs on other sources.
- (4) The Panchayat shall, with the assistance of the Ground Water Department, find out the quantity of water that a landowner with 34 acres of land would extract for his domestic and agricultural purposes. At the time of hearing, the learned counsel for the Panchayat raised a serious objection to the direction of the Government to conduct the study through the Ground Water Department and other official agencies. The complaint of the learned counsel was that the reports of such agencies lack credibility. People look upon these reports with suspicion. It is unfortunate that we have to make arrangements for "guarding the guards". I think, the media can take that role. The Ground Water Department shall hold the inspection with notice to the Panchayat and the 2nd respondent. It shall publish the details of the instruments used and divulge to the parties, the scientific principles based on which they work. The reading and data collected shall be furnished to, both sides. The media shall be permitted to watch the inspection. The 2nd respondent shall permit the accredited media person to accompany the officials of the Ground Water Department and the Panchayat. Though their presence may be inconvenient or irritating to some, it will sub serve public interest. Transparency will lend credence to the reports. Sunlight is the best disinfectant.
- (5) The 2nd respondent shall be permitted only to draw that much quantity of water ascertained as per direction No.4 above and that too, form open dug wells in a transparent manner, subject to inspection and monitoring by the Panchayat and the Ground Water Department.
- (6) The arrangement for drawing water and its monitoring should be done in a transparent manner with access to the Panchayat and the media.
- (7) The Panchayat shall ensure that all other wells including the bore-wells of the 2nd respondent are closed down after one month. Exh.P.3 order of the Panchayat and Exh.P.6 order of the Government are modified to the above extent."

16. In support of his plea for grant of interim injunction, learned counsel has further placed reliance on the following cases:--

- (1) M.C. Mehta v. Kamal Nath (1997) 1 Supreme Court Cases 388, (2) National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419 (Supreme Court of California), (3) Marks v. Whitney 6 CA-1. 3d 231 (Supreme Court of California). (4) Ardeshir Cowasjee v. Province of Sindh 2004 SBLR Sindh 763, (5) Shehri v. Province of Sindh 2001 YLR 1139, (6) Gaved v. Marlyn 34 LJCP 352, (7) Gul Haider v. Asat PLD 1978 Pesh. 157, (8) Anjum Irfan v. Lahore Development Authority PLD 2002 Lah. 555, (9) Asrabullah v. Kiamatullah AIR 1937 Cal. 245.

17. Learned counsel has, therefore, vehemently urged that interim order already operating be confirmed so as to remain operative till the decision of the suit and the application filed by defendant No. 1 for vacating the same be rejected being devoid of any force.

18. Mr. Wasim Sajjad learned counsel for defendant No. 1 has disputed and controverted the stand taken by the plaintiff that the land in question is a part of the so-called Education City. Learned counsel has argued that there is no such official document or decision of any competent authority on record to show that the Government has decided to set-up Education City for the purpose as claimed by the plaintiffs. According to learned counsel some statements given by the City Nazim or some other functionary of the Provincial Government are not sufficient to hold or even presume that the land in-question has been earmarked only for the purpose as claimed by the plaintiff. Learned counsel has further argued that in order to attract foreign exchange and to encourage industrial activity defendant No. 1 has been leased out the land in question as per rules and law. The mistake in the initial lease orders and other documents in respect of Na-Class number of the land has been duly corrected by the competent authority. Learned counsel has further argued that the line of arguments taken on behalf of the plaintiff is hypothetical as neither environment shall be affected adversely nor any traffic hazards will be created. Apprehension that water table will go down' and aquifer will be adversely affected is also without any substance. Aquifer will not be adversely affected due to natural process as a result whereof further water shall be accumulated in place of the water drawn by the defendant No. 1. Furthermore, the water is to be drawn by defendant No. 1 from a much deeper place. There are various layers/reservoirs of water at various levels under the land in question. The first layer is available at a depth of about 40 feet which shall not be sued by the defendant who has sunk his tube-wells at a depth of 600 to 700 feet and the water available at the depth of 40 feet can be used by the plaintiffs or any other owner of the land. Learned counsel has referred to the counter-affidavit filed by Dr. Jean-Lug Bonjour, Senior Hydro-geologist for Nestle waters to refute the contents of the affidavit filed by applicant Kazim Mansoor on behalf of the plaintiffs. He has stated that ground water found at deeper levels planned for use by Nestle is brackish and unfit for human consumption in its natural state. The plant installed by Nestle will be converting such water into one, which is fit for human consumption. This way Nestle will be fulfilling the drinking water needs of the people of Karachi. Refuting the contention of learned counsel for the plaintiffs that the defendant has no right to take out/draw the water in such a huge quantity, learned counsel for defendant No. 1 has referred to the said counter-affidavit wherein it is stated that continuous extraction of water for over a period of six months before construction was started, indicated no fall in the water table, hence allegations are without any substance. Learned counsel has further referred to illustration (g) to section 7 of the Easement Act to show that every owner of a land has exclusive right to enjoy and dispose of immovable property and all products thereof subject to any law for the time being in force, and there is no such law prohibiting an owner of land from using the subsoil water in any quantity he needs. For ready reference section 7 of Easement Act and illustration (g) is reproduced hereinafter:--

"7. Easements are restrictions of one or other of the following rights (namely):---

- (a) The exclusive right of every owner of immovable property (subject to any law for the time in force) to enjoy and dispose of the same and all products thereof and accessions thereto.
- (b) The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the rights above referred to:

- (a)

- (b)
- (c)
- (d)
- (e)
- (f)

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(h)

(i) "

19. Reliance has also been placed on a case from Indian jurisdiction reported as Karathigundi Keshava Bhatta v. Sunnanguli Krishna Bhatta AIR (33) 1946 Mad. 334 where a rule has been laid down with reference to section 7 of Easement Act, which is reproduced as under:--

"The general rule that a landowner has a natural right to divert or appropriate within his own land, without regard to his neighbour, water percolating or flowing in undefined channels must be taken with this reservation, that if he cannot effect such diversion or appropriation without appropriating water from a stream flowing in a defined channel, he may not do so at all."

20. Learned counsel has further argued that land belongs to the Province of Sindh which has granted/leased out the same to defendant No.1 under a valid lease, which is still intact. Construction whatever, has been raised in accordance with law after, obtaining necessary permission from K.B.C.A. such certificate from K.B.C.A. dated 21-7-2004 has been placed on record as Annexure "F". Learned counsel has further argued that the water taken out from the aquifer will ultimately be used by the people of Pakistan and more particularly people of Karachi who are already in need of pure hygienic potable water. With reference to the case-law from Indian jurisdiction in Coca-Cola's case (supra), learned counsel has argued that it is distinguishable as due to drawing of the water by Coca-Cola Company in huge quantity the table of the water in the wells in the vicinity which was the source of drinking and cultivation had gone down which is not the position with relation to case in hand. Learned counsel has, therefore, prayed for dismissal of the application for grant of injunction so that the defendant who have set-up their project after investing huge amount and have been suffering irreparably could start functioning. It has been further argued that under the above stated factual and legal aspects of the matter, there is neither a prima facie case nor balance of convenience in favour of the plaintiffs and no irreparable loss will be caused to the plaintiffs if injunction as prayed is refused, on the contrary the defendant No. 1 shall suffer irreparable loss if the application filed by the plaintiff is granted.

21. I have heard the learned counsel for the parties and perused the relevant material placed on record with their able assistance. Case-law cited at the Bar has also been taken into consideration. Various documents placed on record viz. the decision taken in Sindh Cabinet meeting held on October 16, 2001 which was chaired by Governor of Sindh clearly shows that "Link road area between National and Super Highway will be declared Education and Health City. Land on Link Road will only be allotted to

Educational and Health Sector Institutions and allied amenities like a bus terminal, hotels, and petrol pumps". The minutes of inaugural meeting of Economic Development Council held on March 31, 2001 which, too, was presided by Governor of Sindh shows that Mr. Moinuddin Haider had also suggested that the area under Sindh Madrasah SZABIST and new land of Agha Khan University be declared as Education City. Apart from various news item which appeared in a section of National Press, minutes of the meeting of Karachi City District Government under the Chairmanship of City Nazim also show that on January 29, 2004 the progress of development of Education City at the link road was reviewed. Again there is an order, dated 17-2-2003 of the District Officer Revenue City District Government, Karachi which shows that a ban was imposed on transactions regarding sale of land, Renewal of the lease, Conversion, Exchange and Transfer of the land in Deh Chuhar of Gadap Town, in view of proposal for establishment of Education City. It appears that thereafter on 25-10-2003, 99 years lease for industrial/commercial purpose in respect of 20 acres of N.C. 108 Deh Chuhar, Karachi was approved by the Secretary to Government of Sindh (LU) Department Karachi. The Na-Class number was subsequently changed showing the grant out of Na-Class No.106. It further transpires that plaintiffs through this suit are resisting the setting-up and functioning of defendant No. 1 mainly on the ground that it will adversely affect the environment required for an area earmarked for an Educational City and there will be traffic jam and hazards. Mainly it is being objected on the ground that huge quantity of the underground water will be extracted by defendant No. 1 in this arid area and such excessive withdrawal of water without being recharge shall make the area completely dry and the plaintiffs who have to set up their institutions relating to services in the field of health and education shall be without water.

22. The grounds urged on behalf of the plaintiffs have been refuted on behalf of the defendant No. 1 as well as defendants Nos.2 to 4 on the ground that there is no official declaration earmarking the area in question as Education City and there will be no adverse effect on the environment. Furthermore, plenty of water is available at the level from where the defendant No. 1 will extract water for bottling purpose and its supply all over the country. Indeed, there is no notification specifying the boundaries of the Education City but the various decisions taken by the Sindh Cabinet and City District Government cannot be ignored. It has come on record that the defendant No. 1 shall extract water from two tube-wells in the quantity of 148 imperial gallon per minute or 306 million liters per year for the sale of 228 million liters of water. There appears to be force in the contentions of the learned counsel for the plaintiffs that in view of the various reports which have come on record that water proposed to be extracted from an aquifer which is situated under an arid land having very little rain fall, prima facie would make the said deposit dry soon after in the absence of a recharge as it is necessary that a balance must exist with the amount of water entering and leaving the system. Indeed, as per illustration (g) to section 7 of the Easement Act, 1882, the owner of a land has a right to collect and dispose of within his own limits all water under the land which does not fall in a defined channel but this right is not unfettered. Even in the case of *Karathigundi Keshava Bhatta v. Sunnanguli Krishan Bhatta* (supra), cited by Mr. Wasim Sajjad learned counsel for defendant No. 1, it has been held as under:--

"This rule based on the two decisions referred to above applies in this country as well and the lower Courts were justified in holding that as the pond 'Y' had the effect of tapping the water flowing in the channel, it is an actionable wrong that must be prevented by the issue of a mandatory injunction."

23. No civilized society shall permit the unfettered exploitation of its, natural resources by anyone particularly in respect of the water which is a necessity of the life. Ground water is a national wealth and belongs to entire society. It is a Nectar, sustaining life on earth and without water, the earth would be desert, I find myself in agreement with Principle to Stockholm Declaration, 1972 as reproduced above in para. 13 of this order that the natural resources of the earth, including the air, water, land, flora and fauna especially representative samples of natural eco-systems, must be safeguarded for the benefit of present

and future generations through careful planning or management, as appropriate. At this stage, I may quote a Kashmiri's saying translated in English which is written in bold letters at the entrance gate of a section relating to environment, in Disneyland Orlando, Florida, USA which says "We have not inherited this land from our forefathers, we owe it to our children". The future needs of our children are of prime importance and the Courts of law while dealing with the equitable relief of injunction should keep the same in view.

24. It is well-settled that natural resources like air, sea-, waters, and forests are like Public Trust. The said resources being a gift of nature, they should be made freely available to every one irrespective of the status. "Doctrine, of Public Trust" as developed during the days of ancient Roman Empire, enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. Even under the Islamic law certain water resources are to be protected from misuse and over exploitation. (Reference can be made to a discussion at page 37 of the book "Environmental Dimensions of Islam" by M. IZZI DIEN.

25. As a result of discussion made above, I find that a prima facie case for grant of injunction has been made out in favour of the plaintiffs. Balance of convenience also appears to be in their favour because once the process of extracting the water in such a huge quantity is allowed to operate, each day, each hour, and each minute water deposits in the aquifer would diminish rapidly and shall adversely affect the rights of plaintiffs to use the underground water according to their genuine needs which shall amount to an irreparable loss to them. Resultantly, C.M.A. No.3717 of 2004 is granted and the interim order dated 24-5-2004 as extended from time to time is hereby confirmed till decision of this suit.

In the meantime, the defendant No.1 is restrained from initiating any commercial/industrial activities, including setting up of a bottling plant in the area. Consequently, C.M.A. No.5343 of 2004 filed on behalf of defendant No. 1 is dismissed.

M.B.A./S-87/K

Order accordingly.