

## IN THE HIGH COURT OF SINDH, KARACHI

C.P.D-5220 OF 2016

**PRESENT:****MR. JUSTICE SYED HASAN AZHAR RIZVI.  
MR. JUSTICE ARSHAD HUSSAIN KHAN.*****Works Cooperative Housing Society Vs. Government of Sindh & others***

Petitioner: Works Cooperative Housing Society  
through Syed Irtaza Hussain Zaidi, Advocate

Respondent No.3: Saeed Ali Zai  
through Mr. Taha Ali Zai, Advocate

Date of Hearing & Short order: 06.04.2018.

**JUDGMENT**

**ARSHAD HUSSAIN KHAN, J.** The petitioner through instant constitutional petition has sought following declaration:-

*(1) That the respondent No.3 being not a member of the Petitioner-Society either under the bye-laws nor in terms of 17-B and all arbitration proceedings, orders and judgments passed are coram-non-judis not binding on the Petitioner-Society, with other related relief as this Hon'ble Court may deem fit and the facts and circumstances of the case.*

*(2) Costs of the petition.*

2. Brief facts leading to the filing of instant petition as stated therein are that the petitioner is Cooperative Housing Society and its business is being conducted in terms of the bye-laws framed and registered under the Societies Act. Respondent No.3 (Saeed Ali Zai) was allotted a plot viz. residential Plot No.D-57/A, Block 9, KDA, Scheme No.24, Karachi [subject plot]. However, when the Petitioner-Society failed to handover the possession of the subject plot, respondent No.3 filed arbitration proceedings being ABN Case No. 62 of 2008 under Section 54 of the Cooperative

Societies Act, 1925, before respondent No.2 (Registrar Cooperative Societies). Subsequently, the nominee of respondent No.2 passed award in favour of respondent No.3. The petitioner challenged the said award before respondent No.2, the Registrar's Cooperative Societies Sindh, Karachi, in appeal No. 01 of 2009, and the said appeal was dismissed, thereafter the petitioner preferred revision bearing No. SO(T) (25) of 2009 before the Minister for environment & Coastal Development Department Government of Sindh, Karachi, however the said revision was also dismissed on 09.06.2016. The petitioner, thereafter, preferred present constitutional petition challenging all above orders being *Coram non judice* not binding on the Petitioner-Society on the ground that the claim of respondent No.3 in the subject plot was based on the transfer of interest in the subject plot being member of society under Section 17-B of the Act to which he was not entitled, both under the bye-laws of the society and Section 17-B of the Act and he was not admitted as member of the society at any point of time, thus was not entitled to invoke arbitration proceedings.

3. Upon notice of the present case, only respondent No.3 came forward and contested the matter and filed reply /para-wise comments to the memo of petition while supporting the orders impugned in the present proceedings, raised preliminary legal objections regarding maintainability of the petition. It has been stated that the petitioner had not only accepted respondent No.3 as a member forty-two (42) years ago but also allotted him a plot based on the same upon completion of all requisite formalities, and this fact has also been confirmed by the petitioner in its various pleadings filed before the various fora wherein all factual issues have been addressed. It has also been stated that the petitioner raised issue of membership of e respondent No.3, first time in the present petition which issue, being vehemently disputed by respondent No.3, is a factual dispute and cannot be

decided in the writ jurisdiction of this Court. Respondent No.3 in his reply also disputed that the membership of the Petitioner-Society is restricted only to the employees of the Works Division Government of Pakistan and its attached departments and their relations. It has been stated that at the time of establishment of Petition-Society, the membership of the petitioner may have been restricted on the above basis but subsequently, a large number of persons became members by virtue of acquiring shares or properties from previous members. It is also stated that the entire case reflects the poor state of the affairs of the petitioner, which has not maintained its records properly and its mismanagement not only questioning the status of membership of the respondent No.3 but also of Ms. Perveen Ashraf, [predecessor in interest of respondent No.3] after 42 years, that too in the constitution jurisdiction of this Court, which is untenable in law and petition is liable to be dismissed with punitive cost with further direction to the Petitioner-Society to comply with the orders and the respondent No.2 may be directed to implement/execute the certificate dated 16.6.2016.

4. Learned counsel for the petitioner during the course of his arguments has contended that respondent No.3, at no point in time, was the Employee of the Works Division, Government of Pakistan or its attached departments or their relation and as such was not eligible for membership either under bye-laws of the society and therefore could not invoke the arbitration proceedings under Section 54 of the Act, 1925 and even under Section 17-B of the Society Act. Further contended that by now it is settled law that no person(s) can be enrolled as a member of a Cooperative Society unless he is eligible either under the bye-law 7 of the Society or under Section 17-B of the Act claiming transfer of interest or immovable property in the society, as held by the Honourable Supreme Court and the High Court in its pronouncement. Learned counsel further contended that recently

the question of enrollment of membership in the society either originally or under Section 17-B came up before the Honourable Supreme Court and the High Court and it has been conclusively held that a person not eligible for membership of the society either under the bye-laws or under Section 17-B cannot be enrolled as member of the society. Learned counsel lastly argued that in view of the law settled by the Honourable Supreme Court as well this court, respondent No.3 was neither eligible for membership nor could be enrolled as a member and as such cannot not invoke arbitration proceedings under Section 54 of the Act and thus, all proceedings, orders passed are *coram non judice*, hence not sustainable in law and liable to be set aside. The petitioner is entitled to the grant of present petition as prayed. Learned counsel in support of his stance in the case has relied upon the following case law:

- (i) ***PLD 2010 SC 1058 BAHADUR YAR JANG COOPERATIVE HOUSING SOCIETY LTD. v. FEROZE SHAMSI and others.***
- (ii) ***PLD 2005 Karachi 188 MUSTAFA LAKHANI v. PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY KARACHI.***
- (iii) ***PLD 1959 (W.P) Karachi 497 AZIZUDDIN AHMED v. AZIZ AHMAD and others.***
- (iv) ***2017 CLC 1683 SHABBIR ALIBHAI and another v. PAKISTAN EMPLOYEES' CO-OPERATIVE HOUSING SOCIETY through Secretary and 2 others.***

5. Conversely, learned counsel for respondent No.3 while reiterating the contents of his reply/comments has contended that the petitioner at no point in time either in the arbitration proceedings or the proceedings before the Registrar or the proceedings before the Minister, ever denied respondent No.3`s status as a member. On the contrary, petitioner having accepted respondent No.3 as its member has been corresponding/dealing with him for the last 42 years. Had the petitioner not been the member he would not have been dealt with by the petitioner as its member and had not been addressed letters. Further contended that why the petitioner was not informed that he was not a

member of the Petitioner-Society at any time during these 42 years including during the pendency of the various earlier legal proceedings. It is further contended that the entire case of the Petitioner-Society has been with respect to its contention that the subject plot, allotted to respondent No.3, not existed. However, since the Registrar`s Nominee held that an alternate plot should be allotted or the respondent No.3 be compensated at current market price, the Petitioner-Society has now raised this untenable issue regarding membership status for the first time. It is also contended that the conduct of the Petitioner-Society is evident from its actions as it has sought to deprive respondent No.3 of his legitimate rights in relation to the subject plot duly allotted to him. Learned counsel further contended that pursuant to the said allotment vested rights have accrued in favour of respondent No.3. It is also argued that the question whether respondent No.3 was/is a member of society is question of fact and requires evidence and such exercise cannot be gone into writ jurisdiction of this court. It is also argued that in view of factual and legal position the Petitioner-Society is not entitled to any of the reliefs as prayed and the petition is liable to be dismissed with compensatory cost. Learned counsel in support of his stance has relied upon the following case law:

- (i) **PLD 2003 SC 430** Mst. AMINA BIBI v. MUDASSAR AZIZ
- (ii) **1985 CLC 311** YAQOOB SULEMAN MAYET v. DEPUTY REGISTRAR COOPERATIVE SOCIETIES and 2 others
- (iii) **1989 MLD 2880** PAKISTAN EMPLOYEES COOPERATIVE HOUSING SOCIETY LIMITED V. SECRETARY TO GOVERNMENT OF SIND and 3 others.
- (iv) **PLD 1969 Karachi 474** The PAKISTAN EMPLOYEE CO-OPERATIVE HOUSING SOCIETY Ltd., KARACHI v. Mst. ANWAR SULTANA and others.
- (v) **2011 YLR 246** CITIZEN COOPERATIVE HOUSING SOCIETY LTD. Through Chairman v. AGHA TAJ MUHAMMAD ACADEMY through present Secretary and 2 others.

- (vi) PLD 1975 Karachi 373 Haji NOOR MUHAMMAD and others v. KARACHI DEVELOPMENT AUTHORITY and 2 others.

6. We have heard learned counsel for the parties and with their able assistance perused the available record as well as the case law cited at the bar. From the perusal of the record, it appears that respondent No.3 had filed arbitration case under section 54 of Cooperative Societies Act bearing ABN No.62 of 2008 with the following prayers:

- I. To declare that the plaintiff is lawful allottee of plot No. D-57/A, Block 9, Gulshan-e-Iqbal, Karachi in the defendant society and entitled for possession thereof
- II. That in the alternative and without prejudice to I above in the event said plot is not appearing in the approved lay out plan the defendant society being responsible for the lapse, should allot alternate plot in lieu of the plot earlier allotted of the same size in the same locality viz the category- "D" (one thousand sq. Yards.)
- III. Restrain the defendant society from allotting any plot to member/person entitled unless the plaintiff is given/allotted alternate plot in lieu of non-existing plot.
- IV. Any other better relief which this Hon'able court may deem fit and proper.
- V. Cost."

[Underlining is to add emphasis]

The present petitioner (defendant in the said case) in his para-wise reply to the above ABN case though admitted the stance of respondent No.3 in respect of his membership as well as allotment of order of subject plot, yet shown its inability to handover the possession the subject plot as the same was not existent in the approved Master Plan. For the sake of ready reference para Nos.1 and 6 of para-wise comments filed by present petitioner in the above ABN case are reproduced as under:

- "Para No: 1. The contents of this para are not denied to the extent of membership of the plaintiff and issuance of Allotment Order of plot No: D-57/A, Block 9, Gulshan-e- Iqbal Karachi while the payment of required dues is denied in Toto. From the perusal of record of the society, it is

noted that there is no entry available regarding payment of any kind of dues of the society by the plaintiff including Admission Fee, Share Transfer Fees, Cost of Land and development Charges etc. The Plaintiff should put strict proof of the same.

It is a matter of record that the allotment Order of plot was issued to the plaintiff by the then management of the society in the year 1974 without payment of a single penny. The plaintiff in his application dated 09.05.1989 (copy enclosed as annex-A) himself admitted that the dues of the plot were paid by him vide Cheque dated 14-02-1979 which confirms that the allotment was issued without any payment.

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.....

Para No: 6 (I) It is submitted that the plot No: D-57/A does not exist in the approved Master Plan. The then management of the society had issued allotment order of this plot without realizing any cost of plot. It is not understood as to how the allotment of plot which actually does not exist was issued. Therefor the allotment order issued by the then management or duplicate allotment order issued by then administrator for plot not in existence tantamount to mis-use of powers, hence the pray under this clause is liable to rejected.

Para No.6 (II) The request of plaintiff is uncalled for in view of the submission under preceding paragraph.

Para No.6 (III) Since there is no plot available for allotment with the defendant No.1 the prayer of the plaintiff is uncalled for.”

[Underlining is to add emphasis]

The Nominee of the Registrar Cooperative Societies after hearing the parties passed the award on 31.10.2008 and thereafter his reasons for award recorded on 31.12.2008. Relevant portion of the award, for the sake of ready reference, is reproduced as under:

“From the facts it is clear that the then management of the defendant society had issued allotment order of Plot

No.D-57/A, Block-9, Gulshan-e-Iqbal, Karachi, to plaintiff Saeed Ali Zai in the year 1974. The present management of the society claim that the said plot does not exist in the Master Plan of the society and the previous management had allotted the plot to plaintiff, without realizing full dues from him. However, taking consideration of the fact that allotment order of the plot in question was issued by the then management of the society through its then Secretary (Mr. A.A.K. Naz), the defendant society is legally bound to honour its commitment undertaken by it. The issue of plot being non-existent in the approved Master Plan is the mistake/lapse on the part of the society and not that of plaintiff, as such he cannot be made to suffer for that reason. Therefore, the defendant society is directed to allot plaintiff the first available plot of the same size/value which is or becomes available in future by way of cancellation or for any other reason. Alternately the defendant society shall compensate the plaintiff, adequately at the present market value of the plot in question.”

The present petitioner challenged the said Award before the Registrar Cooperative Societies, Sindh, in Appeal No.01 of 2009 who after hearing parties dismissed the appeal, vide its order dated 11.11.2009. relevant portion of the order is reproduced as under:-

“I have heard all the contesting parties and perused the record. The appellant society at nowhere denied that the plot in question was not allotted and share was not transferred to the respondent No.1. The transfer form, application for membership and the allotment order dated 27-3-1974 clearly establish that the plot in question was allotted to the respondent No.1 who also made payment of Rs.5000/- to the appellant society through cheque No.679213 dated 14-2-1979 drawn on UBL Bandar Road Karachi. It is also observed from the perusal of letter dated 8 April 1990 addressed to the respondent No.1 by the appellant society that the papers of the plot in question were taken by some of his friend namely Mr. Arif Qureshi Advocate. On receiving the said letter the respondent No.1 sent letter dated 17-4-1990 to the secretary of the appellant society in which it was contended that the above said person was not authorized to receive the papers on his behalf and further requested issue the another papers to him. From the thorough and detail perusal I have reached at this conclusion that the dispute among the appellant society and the respondent No.1 is only for the area/size of the plot No.D-57/A in Block-9 situated in appellant society and it is not denied that the aforesaid plot was not allotted and share



was not transferred to the respondent No.1 and it is admitted by the appellant society that the respondent No.1 is an old member of the appellant society. The fact which has not been denied it would be termed as admitted. Therefore, in the light of above discussion and from the perusal of record I am of the view that the respondent No.1 is clearly entitled for the plot in question therefore I dismiss the present appeal and maintain the award dated 31-12-2008 with no order to cost.”

[Underlining is to add emphasis]

The petitioner after having aggrieved by the above order preferred Revision Application bearing No. SO (T) 6 (25) of 2009 under section 64-A of the Cooperative Societies Act of 1925 before the provincial Government, Cooperation Department, Government of Sindh, Karachi. The said Revision application was also dismissed by the worthy minister for Environment & Coastal Development Department, Government of Sindh, Karachi, vide its order dated 09.06.2016. For the sake of ready reference relevant portion of the said order is reproduced as under:-

“Now turning to the contention that the Plot D-57 A never existed in the master plan. Quite apart from the other failures by the Applicant Society viz. production of documents, importantly, it did not advise the Respondent No.1 of this issue from 1974 to 2006 i.e. for over 32 years. Hence, this is a failure by the Society and the Respondent No.1 cannot be made to suffer on account of the same as held in the Award and in the Impugned Order. Vested rights have accrued to the Respondent No.1 which cannot be disturbed due to the failures by the Society/its management. The position in this regard is settled with reference to the legal principle of “estoppel” and also the doctrine of “indoor management.”

During the proceedings of the case, the Applicant Society was directed to produce the approved lay-out plan before me but the Applicant Society miserably failed to produce the original approved lay-out plan by the KDA. The Applicant Society showed its inability to get the plan and in other words they don't have any proof that they possess any approved lay-out of the Society, which is not a normal situation and the Registrar, Cooperative Societies is hereby directed to issue show cause to the Society and call an explanation in this respect.

In view of above and after perusal of the material placed before me I am inclined to agree with the Impugned Order passed by the Registrar Cooperative Societies (and the Award of the Nominee) and do not find any justification to disturb the same which are hereby upheld and the Applicant Society is hereby directed to implement the same.”

[Underlining is to add emphasis]

7. From perusal of the record, it appears that the petitioner filed the present petition challenging the above orders being *corum non judice and as such* not binding upon the Petitioner-Society on the ground that respondent No.3 was/is not a member of the Petitioner-Society either under the Bye-Laws of the Society nor in terms of 17-B of Cooperative Society Act 1925.

8. From the record, it transpires that the petitioner raised question of membership of the respondent No.3 first time in the present petition. The petitioner never raised this question either before the arbitration proceedings or before the appellate forum and/or before the worthy Minister in revisionary forum. Furthermore, none of the documents available on the record, show that the petitioner ever raised objection in respect of membership of respondent No.3. Conversely, the petitioner admitted and acknowledged respondent No.3 as its member in the arbitration proceedings and not only this the petitioner also admitted that subject plot was allotted to respondent No.3. The petitioner's stance, in the present petition, with respect to the status of respondent No.3 that he is not a member of Petitioner-Society, that too after exhausting all the remedies available to them and specially when the executing court issue notice to the Petitioner-Society for execution of the orders, impugned in the present proceedings, is absolutely a new plea, contrary to stance taken earlier by the petitioner and as such the same appears to be an afterthought. It seems that the petitioner has failed to plead or raise objections in respect of membership of respondent No.3 from the very inception of the case, i.e. before the arbitration

proceedings, hence, Petitioner-Society is precluded by law to agitate the same at this stage in constitutional petition as it is also settled law that no litigant can be allowed to take point/plea related to facts which was not taken before the lower forums, cannot be raised before this Court. New point involving investigation of facts cannot be taken up at this stage that, too, in constitutional petition. It is established principle of law that party cannot be permitted to raise contention involving inquiry into the facts in writ jurisdiction of this court. Had the petitioner raised afore noted plea before arbitration proceedings that would have been answered by respondent No.3 in his reply explaining his position whether he is a member of the Petitioner-Society or not. Moreover, ordinarily a person whilst invoking the constitutional jurisdiction of this Court cannot be allowed to raise a completely new point for the first time. Reference may be made to the cases reported as PAKCOM LIMITED and others v. FEDERATION OF PAKISTAN and others (PLD 2011 SC 44), Mst. ROSHAN AKHTAR v. MUHAMMAD BOOTA and 4 others (2000 SCMR 1845) and Messrs BAKSH TEXTILE MILLS LTD. v. PAKISTAN and others (1982 SCMR 497).

9. Furthermore, the question whether respondent No.3 could be a member of the Petitioner-Society may be a question of law but the question whether respondent No.3 was or was not a member of the Petitioner-Society is certainly a question of fact, requires to be decided through evidence and ought to have been raised at the very first instance, that is, before the arbitration proceedings. Reliance in the regard is placed to the case of Mst. AMINA BIBI v. MUDASSAR AZIZ (PLD 2003 SC 430). Furthermore, Controverted questions of fact, adjudication on which is possible only after obtaining all types of evidence in power and possession of parties can be determined only by the courts having plenary jurisdiction in matter. Reliance can be

placed on the case of ANJUMAN FRUIT ARHTIAN and others v. DEPUTY COMMISSIONER, FAISALABAD and others (2011 SCMR 279).

10. It is now a well settled that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this Court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this Court has to comprehend what illegality or irregularity and/or violation of law has been committed by the courts below which caused miscarriage of justice. Reference may be placed to the case of Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259).

11. Reverting to the case in hand, it is an admitted position that the plea of the petitioner that respondent No.3 was not a member of the Petitioner-Society has been raised first time that, too, in the present constitutional petition. Such stances of the petitioner

vehemently opposed being incorrect and contrary to the stance taken by the petitioner before the forums below orders whereof are impugned in the present proceedings, wherein respondent No.3 was admitted and acknowledged as the member of the society by the petitioner. This being so, in view of the discussion in the preceding paras, the question whether respondent No.3 was or was not a member of the society is a disputed question of fact, requires to be resolved through evidence, which exercise cannot be gone into writ jurisdiction of this court. Furthermore, learned counsel for the Petitioner could not point out any error and/or any illegality, infirmity or jurisdictional error in the impugned judgment, which could warrant interference by this court in extra ordinary jurisdiction of High Court.

12. The case laws cited by learned counsel for the petitioner have been perused and considered with due care and caution but are found distinguishable from the facts of the present case and hence the same are not applicable to the present case.

13. In the circumstances, the upshot of the above discussion is that the present petition is devoid of merit and as such the same is liable to be dismissed.

Foregoing are the reasons for our short order dated 06.04.2018, whereby the petition along with listed application was dismissed with no order as to cost.

Judge  
Judge

Karachi  
Dated: 03.05.2018