

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Adnan-ul-Karim Memon
Mr. Justice Adnan Iqbal Chaudhry

C.P No. D- 4391 of 2018

Zaheeruddin Mujahid.....Petitioner

V/s

Province of Sindh & others.....Respondents

Date of hearing: **09.11.2018**

Petitioner present in person.

Mr. Rizwan Ahmed Siddiqui Advocate,
Mr. Muneer-ur-Rehman Advocate and
Mr. Anwar Ahmed Qureshi, Advocates for Respondent No.4.
Mr. Khurram Rashid, Advocate for K-Electric.
Mr. Ali Safdar Depar, AAG a/w Ms. Naheed Akhter, State Counsel.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- Through the captioned
Constitution Petition, Petitioner has sought the following relief(s):-

- I. **Direct the respondent No.2 to conduct inquiry under section 43(1) of the Cooperative Societies Act, 1925 in the interest of members/public at large and fix the responsibility of all the fraudulent acts, forgeries and illegalities against the responsible persons as already pointed out by the respondent No.3 in his reports/letters i.e. Annexure B & C respectively.**
- II. **Direct the respondent No.2 to conduct the forensic audit of respondent No.4 in compliance with the directions contained in the orders dated 17.2.2017 passed by the Honorable Supreme Court in Civil Petition No.1331 of 2017 for the housing Societies.**
- III. **Declare that the petitioner has the right of enjoying basic amenities and denial thereof by anyone is against his constitutional rights.**
- IV. **Direct the respondent No.4 to issue transfer order in respect of plot No.405 of Sector 24/A KBACHS Society, in the name of petitioner.**
- V. **Direct the respondent No.4 to issue transfer orders instead of issuing fresh Mutations in the names of transferees.**

- VI. Declare that after receiving full and final development charges in respect of respective plots from the members and additionally on assurance upon increasing price of plots from Rs.70,000/- to Rs.130,000/-, demand of any additional amount against basic utilities is illegal, ab-initio and without justification.**
- VII. Direct the Nazir to appoint Commissioner or administrator to auction the Commercial plots of Sector 24/A, KBACHS, generate the funds, develop the society and provide basic utilities of Gas, Electricity & Water to the members of the Society in accordance with their contractual obligations.**
- VIII. Appoint any retired judge of this Hon'ble Court as Administrator of the Society.**
- IX. Declare that the petitioner is a customer of K-Electric and act of respondent No.8 for demand of NOC from the petitioner at the behest of respondent No.4 is absolutely illegal, ab-initio, unjustified and corm-non-judice.**
- X. Direct the respondent No.8 to issue necessary challans to the petitioner and upon receiving paid challan install electricity at the residence of petitioner at house No.405, Sector 24/A, KBACHS, Scheme 33, Karachi.**

2. Basically, the Petitioner has claimed his Membership in Karachi Bar Association Cooperative Housing Society (KBACHS) on the basis of ownership of Plot No.405, Sector 24/A. Petitioner has submitted that KBACHS is involved in gross illegalities and misuse of powers and funds of the society, and prayed for directions to the Registrar of Cooperative Societies, Government of Sindh to hold an inquiry under Section 43 (1) of the Cooperative Societies Act, 1925 into the affairs of the KBACHS on the following charges:-

i) KBACHS has increased the transfer fee from Rs.50,000/- to Rs.80,000/- on account of transfer fee from non-Advocates, since last 8 months and has created a new method of corruption under the garb of so called Agreement/Memorandum of Understanding (MoU) with the Respondent No.8, whereby the members are forced to pay an additional amount of Rs.50,000/-.

ii). KBACHS failed to furnish the details of cancelled plots and new allotments to the Respondent No.2;

iii) KBACHS was/is involved in corrupt practices with regard to selling of legitimate plots of deceased members in collusion of other members of the Society.

iv). KBACHS is constructing boundary wall on park measuring about 2 acres in sector 24/A without calling any tender.

Petitioner has submitted that the members/residents of Sector 24/A received bills from K-Electric, except the Petitioner, for

consuming electricity through "HOOK/KUNDA". Thereafter he rushed to the office of the Respondent No.8 and on 14.05.2018, upon providing a registered sale deed and copy of CNIC, electricity bill was issued to him in the sum of Rs.45,000/- which was paid on the same date. Petitioner has submitted that on 28.5.2018 the Respondent No.8 refused to receive the application along with pay order of Rs.50,000/- and demanded to bring NOC from KBACHS on the pretext of so called Memorandum of Understanding (MoU) signed between K-Electric and the KBACHS. He has further added that KBACHS has refused to issue NOC to the Petitioner with malafide intention. Petitioner being aggrieved by and dissatisfied with the aforesaid actions of the Respondents has filed the instant petition on 04.06.2018.

3. Petitioner, who is present in person, has submitted that his proprietary rights are protected under Article 23 and 24 of the Constitution by virtue of being a member of KBACHS; that failure of the Respondent No.2 to conduct an inquiry under Section 43 (1) of the Cooperative Society Act 1925 proves that he has misused his official position, which is based on malafide intention to protect the beneficiaries of the KBACHS. In support of his contention he relied upon the photocopy of the layout plan of KBACHS and argued that there is no encroachment made by him and further relied upon the report of the Assistant Registrar Co-operative Society-(IV), Karachi; that Petitioner paid the official fee to become a member of the society by virtue of being a plot owner, but the Respondent-Society neglected to issue membership to him in violation of their bye-laws; that holding of an inquiry into the affairs of the society under Section 43(1) of Cooperative Housing Society Act 1925 is the responsibility of the Respondent No.2 under the law in case of a complaint; that Petitioner cannot be

deprived to become a member of the society by virtue of his ownership of plot in the society; that the Respondent-K-Electric is in league with the Respondent-society and causing hardship to the Petitioner by sending bills on exorbitant rates at the behest of the Respondent-Society to create ground to relinquish the society membership. He in support of his above contentions has placed reliance on the cases of ***Muhammad Khalid v. National Accountability Bureau (2017 SCMR 1340) & Abdul Raheem Ziaratwal and another v. Federation of Pakistan and others (2014 SCMR 873)***. He lastly prayed for allowing the instant petition.

4. Mr. Rizwan Ahmed Siddiqui, representing the Respondent-Society primarily raised the question of maintainability of the instant petition and argued that the Petitioner has no locus-standi to claim membership of the Respondent-Society; that previously the Petitioner was a member of the Society by virtue of having a Plot in his name as he is/was also doing the business as an Estate Agent who is also an Advocate; that the Petitioner had purchased the Plot No.405 in Sector 24-A of the Society in his own name by concealment of facts that he was already member of the Society having a Plot No.212, Sector 25-A in his own name; that as per Byelaws no member of the society is entitled to purchase second Plot in his own name; that Petitioner had gifted the aforesaid plot to his son namely Muhammad Zafar Zaheer; that the Petitioner encroached the society land/Street of about 67 Sq. yards and also has broken the boundary wall of the Respondent-society and installed one gate and has thus violated the terms and conditions of the Lease; that the matter was placed before the Managing Committee of the Respondent No.4, which constituted a Sub-Committee to probe

into the matter, which committee submitted its report on 14.11.2015. An excerpt of the same is as reproduced hereunder:

“The team of three members of KBACHS revealed that at the South side of the House No.405, there is 10 feet wide open space in breach touching the boundary wall of KBACHS. Up to 60 feet in length upon entrance gate of the Society. The owner of Plot No.405 has encroached upon entrance gate of the Society. The owner of Plot No.405 has encroached upon the 10 feet wide space which includes the outside boundary wall of the Society and raised construction thereon. There are two gates in the house. One is big gate of 12 feet in which 10 feet space of KBACHS land has been encroached and the other small gate is one of the lands of the owner of plot concerned.”

He has further submitted that the Committee of the Respondent-Society had taken the following steps:-

“Report of Sub-Committee regarding extra land occupied by Z.U. Mujahid (Plot No.405/24.A) was deeply discussed by the Managing Committee. It has been decided to allot the extra land to all the allottees in qua towards the boundary wall by executing Agenda Lease on payment of the cost of extra land Rs.10,000/- per Sq. yard. General Secretary will inform decision to the allottees accordingly and issued the Letter of intimation. Report of Sub-Committee kept on record.”

Learned counsel has further argued that legal notices were issued to the Petitioner for the payment of charges but he did not pay the same till date; that Petitioner being ex-Treasurer for two years i.e. 2011 & 2012 had never attempted to move an application to the K-Electric for getting the electric connection however has indulged in blackmailing the allottees and purchased a number of Plots in his own name/relatives and juniors and is working as an Estate Agent. He further submitted that a number of Plots purchased by the Petitioner which were sold and transferred subsequently were Benami.

He next submitted that the Petitioner has occupied the aforesaid plot and has dugout/broken 20 feet Road and further encroached upon, illegally and unlawfully on a commercial Plot No.1, which is the property of the Respondent-Society; that the

Respondent No.3 conducted an inquiry into the affairs of the society and nothing was found against the Respondent-Society, as alleged by the Petitioner; that the Assistant Registrar of the Cooperative Societies, Government of Sindh who visited the Site of the Plot No.405, found encroachment thereon and dismissed the claim of the Petitioner; that the Managing Committee of the Society has decided on 29.9.2017 to increase the Transfer Fee for Non-Advocates Rs.80,000/- and Advocates/Inheritance Rs.10,000/- to meet the expenses of the Society; that the Petitioner is not paying any sum for the maintenance of the society; that the Managing Committee has fixed Rs.1,30,000/- for cost of Land for internal development charges, which also has not been paid by him. He stated that the society made serious efforts and provided basic amenities i.e. water as well as electricity in Sector 24-A, and the allottees have to pay Rs.50, 000/- as lowest share of the charges and all the allottees have agreed for installation of electricity meter except the Petitioner. He further added that there was no need to call any tender of contractor to save the funds of the society; that the Respondent-Society issued N.O.C for Mutation of the plot, therefore, the K-Electric department accepted the case of new connection accordingly; that the Respondent-Society has spent huge amount to get electric connection from K-Electric and signed Memorandum of understanding; that as per agreement, N.O.C. of the Respondent-Society is necessary to get new connection by the member of the Society; that due to encroachment made by the Petitioner, the Managing Committee refused to issue the Mutation Order of the Petitioner's Plot and directed the Petitioner to remove the structure from the street as well as Gate and vacate commercial Plot No.1 of the Society. In support of his contention, learned counsel has placed reliance on the case of ***Muhammad Haroon Usman vs. Rizwan Cooperative Housing Society***

(1991 CLC 1917). He lastly prayed for dismissal of the instant petition.

5. Mr. Khurram Rashid, learned counsel for K-Electric has argued that all agreed to energize the society in the year 2016 and ID No.903404086 for a load of 4269 KW was allotted to the Society. The Respondent No.4 was asked to deposit a bank guarantee in the sum of PKR 71,205,655, being 62% of PKR 114,847,830 together with self-financing undertaking and agreement, but when these were not provided, K. Electric cancelled the aforesaid ID; that the Respondent-Society filed Civil Suit No.558 of 2017 before the 1st Senior Civil Judge Malir, Karachi which was disposed of on 08.08.2018 on the basis of MoU between the parties; that the Respondent No.4 was required to pay PKR 73 million and the share money is to be divided amongst 500 plots which comes to PKR 146,000 of which a sum of PKR 96,000 x 80=PKR 7,680,000 was paid by the Respondent No.4 at the time of signing of MoU and the remaining PKR 50,000/00 is payable by each unit after completion of formalities and issuance of No Objection Certification (NOC) by the Respondent No.4. According to him the Petitioner is required to obtain NOC before getting a meter; that Petitioner is getting electricity through a hook connection for which a fixed sum on the predetermined formula of K-Electric is being charged from him; that the bills are being issued as per the connected load of 07 kilo watts as on 29.5.2018 a survey was conducted by the K. Electric at the Petitioner's house; that K-Electric has acted all along in line with their legal and contractual obligations; that the Petitioner has an alternate remedy under Section 24 of the Electricity Act 1910 which caters for such disputes to be referred to the Electric Inspectors. He lastly prayed for dismissal of the instant petition.

6. Mr. Ali Safdar Depar, learned Assistant Advocate General as well as Mst. Naheed Akhtar State counsel have supported the arguments advanced by the Respondent-Society.

7. We have heard the arguments of the parties at length and with their assistance have perused the entire material available on record and the decisions relied upon by them.

8. To commence, we would address the question of the jurisdiction of this Court with regard to maintainability of the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

9. We are cognizant of the fact that this Court, while exercising power under Article 199 of the Constitution, which is discretionary in nature, is not a Court of Appeals, more so, when alternative remedy is available under a particular statute and when the Act and the Rules provide for other measures and when the discretionary powers of this Court under Article 199 of the Constitution remains intact.

10. We have noticed that in the present proceedings, the rights of the parties are purely of a private character; therefore no mandamus can be issued. We have also noted that the management of the Society is purely a private corporate body with no public duty and a writ of mandamus would not lie against the Respondent-Society. The Respondent-Society is a Co-operative Society constituted on agreement between members, thereof, who had agreed to abide by the Provisions of the Co-operative Societies Act and the Rules framed thereunder or the Byelaws framed by the Society. The society is undisputedly not a department of the State and is also not a creature of any statute but merely governed by a

statute. We may observe here that this Court can only interfere in the matter, if it is established that a mandatory Provision of a statute has been violated. It is further observed that before a party can complain of infringement of his fundamental right to hold a property he must establish that he has the title to that property and if his title itself is in dispute and is the subject-matter of adjudication in proceedings legally constituted, he cannot put forward any claim based on the title until as a result of that enquiry he is able to establish his title. It is only thereafter that the question whether the rights relating to that property have been improperly or illegally infringed could arise. The dispute so noted by this Court essentially related to the claims and counter claims of the private parties in relation to the allotment and encroachment issues which in our view is an internal matter between them and is not open to be dealt with in a writ petition.

11. We have noticed that the contesting parties in the present proceedings have leveled allegations and counter allegations against each other, an excerpt of the allegations of the parties are as under:-

Allegations of the Petitioner against KBACHS.

1. The Management of the Society has been charging following dues and charges from the members of the society without any approval taken from Annual General Body Meeting which is un-justified because the managing Committee of the society is not empowered to impose dues and charges on the member without the approval of Annual General Body Meeting.

<i>Lease</i>	<i>50,000/-</i>
<i>Ground Rent</i>	<i>9,600/-</i>
<i>Demarcation</i>	<i>5,000/-</i>
<i>Water connection</i>	<i>5,000/-</i>

2. Phase of Land existed at Sector 24 Scheme No. 33 Karachi is consisted on 444 residential plots beside commercial plots there is outstanding amount of Rs. 1.2 Million towards water & conservancy for past period of more than ten years.

3. the decision for disposal of commercial plots of Sector 24-A KDA Scheme No.33 Karachi was taken in the special meeting of managing committee held on 30.01.2011 under the Chairmanship of Mr. Uzair Muhammad Khan and three member committee on Mr. Abdul Rashid (Chairman) 2) Rana Abdul Qayum Anjum 3) Muhammad Arif at the rate of Rs. 10,000/- per Sq. yds. Thereafter another Special meeting of managing Committee of the society was held on 18.02.2011 under the Chairmanship of Mr. Uzair Muhammad Khan wherein, the Chairmanship of Mr. Uzair Muhammad Khan wherein, the Chairman invited Mr. Aijaz Hussain Malik informed the members that he and other signatory members of the requisition are not satisfied with numbering of four commercial land approved from the

Board of Revenue and that 1600 Sq. yds Commercial Land was not located in this Sector by Board of Revenue. He demanded for cancellation of auction Mr. M.A. Qadri seconded and Mr. Farooq also consented the view Mr. Muhammad Shafiq replied the objections raised by Mr. Aijaz Hussain Malik and said that that this commercial land was allocated by the master Plan Department in 1996 and proved his view from the record of the society and also read over the relevant notification which were self-explanatory. Wherein, it is clear that the commercial land is to be disposed off through public auction. He further clarified that Board of Revenue has no concern with the allocation of commercial plots. Secretary explained to the member that this commercial Land was allocated two pieces in all the Sectors and we got it numbered from the Cooperation Department, KBCA according to their Byelaws and they have divided 1600 Sq. yds land in four plots each of 400 Sq. yds and other piece of commercial land on the back side is divided in 46 plots mostly 150 Sq. yds each and corner plots are as per situation arise more or less. The matter was finally decided that auction should take place on the same date and time.

4. In the meeting of Managing Committee of the society was held on 10.08.2011 under the Chairmanship of Mr. Uzair Muhammad Khan wherein, Mr. Muhammad Shafiq proposed the date for next Election for the year 2011-2012 as on 17.09.2011 some other members proposed 24.09.2011. After discussion the date of election as 17.09.2011 was approved for the election of year 2011-2012. The agenda for the appointment of election commissioner was discussed and different names were proposed and discussed Mr. Muhammad Shafiq proposed the name of Senior Advocate Syed Shamshad Ali as Election Commissioner which was unanimously approved.

5. In the meeting of Managing Committee of the society was held on 13.07.2012 under the Chairmanship of Mr. Abdul Rashid wherein, the matter of missing files of the plots fraudulently transfer of plots and proposed action was discussed it was agreed that those plots allotted fraudulently/ falsely to anybody else the Show Cause Notice will be issued against those person and what so ever the Byelaws of the society permitted to take action accordingly.

6. there is no engineer in the society.

7. There is no maintenance of Park of Sector 24/A of the society.

8. There is poor security system in the society.

9. The sewerage line is also of 9 inches which is insufficient for 444 plot beside commercial plots.

10. there is no pursuance for gas connection.

11. The residents through their own efforts pursuing electricity took previous Secretary Mr. Malik Aijaz to KE office for submission of application after preparing agreement by themselves, later on succeeded in getting I.D No. 903-404-086, on the contrary, the society is convincing residents through their agents to contribute amount for electricity instead of generating the funds by auctioning commercial plots.

12. The Management of the Society has awarded contracts without tenders to their favorites mainly construction of mosque where embezzlement of 4 Million was detected, fixing gate of Sector 24/A demarcation of Sector 25?A increasing height of back wall Sector 24/A was awarded, Payment of Rs. 400,000/- to Mr. Bilgrami, Sector 25/A was given for Bakra Mandi which resulted choking of sewerage lines and destroyed demarcations.

13. A complaint/application against Afzal Shafiq Ahmed, Mashhood Ahmed Ex. General Secretary and their companions was moved before the Registrar, Cooperative Societies Sindh for misappropriation of funds, misuse of powers, cheating and forgery in respect of Karachi Bar Association Cooperative Housing Society Ltd, Karachi. The same reference was referred to mr. Muhammad Akhtar Shad Registrar's Nominee vide letter No. DDO/ABN/Cooperative/264/2012 dated 30.05.2012 for proceedings. The Registrar's Nominee proceeded the subject matter and passed an Award dated 21.10.2012 wherein, he concluded the above named respondents have involved in embezzlement of account misappropriation of the society funds/ amount the present funds/ amount the present forum have no jurisdiction to proceed with

criminal case. The complainant/ applicant/ aggrieved person are at liberty to file the case as per law before the proper forum having jurisdiction.

14. *the society was maintaining a Bank Account No. 1986-3 at National bank of Pakistan, city Court Branch Karachi and there are numbers of cash transactions of huge payment and another presently sitting member Mr. Uzair Khan is also one of the signatory of two bearer cheque from the said account issued in the name of Ghazala Barlas amounting to Rs. 1,90,000/- each and as matter of record this amount was also embezzled.*

15. *Mr. Malik Aijaz deducted income tax form payment of contractor M/s Usman & Company for Construction of Boundary wall of Sector 25/A against Rs. 79,00,000/- but no amount was paid to income tax Department.*

16. *Plot No. 55, Sector 25/A was fraudulent transferred to Mr. Hanif Kashmiri.*

17. *The Hon: Secretary of the society is also fully involved in the frauds as he is one of the marginal witness to the sale agreement executed in the year 2005. On the stamp paper issued in 2005 with a deceased Advocate Mr. Akram Cheema who was already expired in 1995 in an incident of firing at Super Market liaquatabad Karachi and his plot No. 235 Sector 24?A was fraudulently transferred on the basis of said agreement by the previous Hon: Secretary Mr. Aijaz Ahmed and subsequently got leased in spite of this fraud no suit for cancellation of lease of said plot has been filed though a requisition was also made but the same was turned down by one of the sitting member Mr. Malik Aijaz when he was Secretary.”*

Counter allegations of KBACHS

That the Petitioner is indulged in blackmailing the allottees and purchased the numbers of Plots in his own name/relatives and juniors and working just like Estate Agent, the number of Plots purchased and sold and transferred the same in Benami transaction. The details are as under:-

- “ i) Plot bearing No. 51, Sector 25-A (Junior)***
- ii) Plot bearing No. 13, Sector 25-A (Wife)***
- iii) Plot bearing No. 212, Sector 25-A (Petitioner's son)***
- iv) Plot bearing No. 23, Sector 25-A (Junior)***
- v) Plot bearing No. 207, Sector 25-A (friend)***
- vi) Plot bearing No. 87, Sector 25-A (friend)***
- vii)Plot bearing No. 36, Sector 24-A (G.P.A))***
- viii)Plot bearing No. 296, Sector 24-A (Petitioner)***
- ix) Plot bearing No. 214, Sector 24-A (Petitioner)***
- x) Plot bearing No. 260, Sector 24-A (Cousin)***
- xi) Plot bearing No. 54, Sector 27-A (G.P.A)***
- xii) Plot bearing No. 405, Sector 24-A (Petitioner)***
- xiii)Plot bearing No. 406, Sector 24-A (G.P.A)***

12. The Petitioner has pointed out that the Respondent-Society has conceded in the pleadings that if the Petitioner is willing to remove the encroachment structure from the society land, the Respondent-Society is ready and willing to transfer the said plot in the name of the Petitioner. In rebuttal Mr. Muneer-ur-Rehman, learned counsel for the Respondent-Society has argued that the Petitioner has alternative remedy available under Section 54 of the Cooperative Society Act 1925, which he has failed to avail and has directly filed the instant petition as the alleged dispute is touching the business of a society. He further added that so far as inquiry is concerned that

can only be done under Section 43(1) of the Cooperative Society Act 1925 on the application of a majority of the committee of the society. In support of his contention he relied upon the letter dated 20.06.2017 of the Deputy Registrar Cooperative Society, Karachi and argued that the Inquiry Order dated 13.02.2017 for appointment of inquiry of KBACHS has already been withdrawn / cancelled. Be that as it may, in our view, any Cooperative Society cannot, for extraneous reasons, refuse membership to eligible persons and denial of membership must be based upon cogent material and not on whims and fancies.

13. We, on the basis of contentions of the parties and on the basis of the material produced before us have reached to the conclusion that we cannot determine the veracity of these documents placed on record by both the parties as these are disputed questions of facts between the private parties, which cannot be adjudicated by this Court while exercising Constitutional Jurisdiction without recording evidences therefore this Court cannot give sanctity to the allegations and counter allegations and leave it for the Competent Authority to determine the genuineness or otherwise of the allegations/documents, if the parties refer the matter to them for adjudication. Therefore on the aforesaid plea the Constitutional Petition cannot be maintained without recording evidence of the parties. Since no order of the Government functionary has been called into question in the present proceedings, therefore at this juncture, we cannot issue writ of mandamus in the present matter. The Petitioner is unable to show that the Government Authorities have failed to perform their duties imposed by the statute.

14. This Court, on the issue of internal affairs of the society, seeks guidance from the latest pronouncement of the Judgment of

the Hon'ble Supreme Court in the case of Muhammad Khalid v. National Accountability Bureau (2017 SCMR 1340), which has provided guiding principle on the aforesaid issue.

15. In the light of the dicta laid down by the Hon'ble Supreme Court in the case of Government of Punjab supra, which is already in the field, therefore no further order is required from this Court.

16. In view of the above facts and circumstances of the case, the instant Petition is found to be not maintainable, which is accordingly dismissed along with the listed application(s).

JUDGE

JUDGE

Karachi
Dated: - 26.11.2018.