

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-1888 of 1997

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Zafar Ahmed Rajput

Dates of hearing: 03.02.2016 and 11.02.2016.

Petitioners: Shabbir Alibhai & another through Mr. Abid Shahid Zuberi, Advocate.

Respondent No.1: Pakistan Employees Cooperative Housing Society through Mr. Irtaza Hussain Zaidi, Advocate.

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Respondent No.2: Government of Sindh through the Secretary, Ministry of Food and Cooperatives. None appeared on their behalf.

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Respondent No.3: Ministry of Housing and Works, Central Secretariat, Islamabad, through Mr. Asim Mansoor, Deputy Attorney General for Pakistan.

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J U D G M E N T

IRFAN SAADAT KHAN, J. The instant Constitution petition has been filed with the following prayer:-

- A. *Declaration that the bye-laws 7, 8 and 12-A are violative of Section 17-B of the Cooperative Societies Act 1925 and further ultra vires the Constitutional rights of the petitioners.*
- B. *Prohibit the respondent No.1 from holding the Annual General Meeting scheduled to be held on 19-10-1997 and or any further Annual General Meeting and or approving any resolution in respect of financial matters without the induction of the petitioners as members.*

- C. *Direct the respondent No.1 to induct the petitioners as members of the respondent No.1 with full voting rights.*
- D. *Suspend the impugned bye-laws No.7, 8 and 12-A of the Society imposing illegal clog on the right of membership.*
- E. *Such better relief/(s) as this Hon'ble Court deems fit in the circumstances of the case.*
- F. *Cost of the petition.*

2. Briefly stated, the facts of the case are that the petitioners are the residents of the Pakistan Employees Cooperative Housing Society (P.E.C.H.S.), the respondent No.1, (hereinafter referred to as **"the Society"**). They applied to the Society for becoming its member but they were refused on the ground that they do not qualify for the membership of the Society under its Bye-Laws No. 7, 8 and 12-A , so also they can have no right to vote since they do not fall under the definition of "member". It is against this refusal that the present petition has been filed.

3. Mr. Abid Shahid Zuberi Advocate has appeared on behalf of the petitioners and submitted that having purchased their respective immovable properties, the petitioners are residing in the Society since 1990s but neither they are being given its membership, nor even allowed to take part in its administrative affair on the ground that since they are not employees in Pakistan Government, hence they are not entitled for the membership of the Society in view of the Bye-Laws No. 7, 8 and 12-A , which act of the respondent No.1 according to the learned counsel is discriminatory. The learned counsel has further submitted that by filing the instant petition the petitioners have specifically challenged Bye-Law No. 7 of the Society

being violative of Section 17-B of the Co-operative Society Act, 1925 (hereinafter "**the Act of 1925**") and ultra vires the constitutional rights of the petitioners, guaranteed under Articles 4 and 25 of the Constitution of Islamic Republic of Pakistan, 1973, as a discriminatory treatment has been made with the petitioners, hence, this petition may be allowed and the petitioners may be given full rights as that of other members of the Society, who are employees in Government of Pakistan.

4. Mr. Zuberi has also contended that the respondent No.1 has accepted the ownership of the petitioners with regard to their respective properties in the Society and have issued the transfer orders in their names, as such, impliedly they have admitted the petitioners' entitlement to become members of the Society and; hence, their refusal to make them members of the Society is illegal. He added that the assertion of the respondent No.1 that the membership is restricted only to the employees of the government of Pakistan is also uncalled for since when transfer orders have been issued by the respondent No.1 in respect of petitioners' properties, the petitioners ought to have been accepted as members and; therefore, the action of the respondent No.1 is not in accordance with the principle of equal treatment. Mr. Zuberi has also submitted that since the petitioners are owners of their respective properties in the Society, they cannot be deprived from taking part in the affairs and management of the Society; hence, the respondent No.1 was under obligation to induct the petitioners as members of the Society

with full voting rights. In support of his arguments, Mr. Zuberi has placed reliance on the following decisions:

1. *I.A. Sharwani and others Vs. Government of Pakistan through Secretary, Finance Division, Islamabad and others (1991 SCMR 1041)*
2. *Pakistan International Airlines Corporation through Chairman and others Vs. Samina Masood and others (PLD 2005 SC 831)*
3. *Shahid Rahim Vs. Board of Trustees of Karachi through Chairman, Karachi and another (2015 PLC (C.S.) 1235)*
4. *M.Q.M. and others Vs. Province of Sindh and others (2014 CLC 335)*
5. *Baz Muhammad Kakar and others Vs. Federation of Pakistan through Ministry of Law and Justice and others (PLD 2012 SC 923)*
6. *Dr. Mobashir Hassan and others Vs. Federation of Pakistan and others (PLD 2010 SC 265)*
7. *Secretary Economic Affair Division, Islamabad and others Vs. Anwarul Haq Ahmed and others (2013 SCMR 1687)*
8. *Defence Housing Authority Lahore Vs. Messrs Builders and Developers (Pvt.) Ltd. and another (2015 SCMR 1799)*

5. Mr. Irtaza Hussain Zaidi Advocate, representing the respondent No.1, has vehemently refuted the arguments advanced by Mr. Zuberi and maintained that it is the mandate of the respondent No.1 to refuse the request of the ineligible persons for the membership of the Society, as only the persons having the qualifications provided under the Bye-Laws of the Society, could become a member of the Society and since admittedly the petitioners do not fulfill the requirements, they cannot become members of the Society though they can purchase a property and reside in the Society. He has further maintained that there is no bar on the members to sell out their properties, however, the persons

purchasing the property, if do not possess the qualification to become a member of the Society, are not entitled to become a member. Hence, according to the learned counsel, no discriminatory treatment has been meted out by the respondent No.1 with the petitioners. The learned counsel also maintained that the petitioners have not given any evidence showing a person, who does not possess the qualification to become a member of the Society, has been made a member of the Society. He added that had the petitioners pleaded their case on the ground that some other persons who do not qualify to become members of the Society have been made member; while the request of the petitioners to become a member have been declined by the respondent No. 1 then there could be a situation of discriminatory treatment, but it is not the case of the petitioners that they had been discriminated in any way that some other persons who do not have the required qualification to become a member had been made a member and petitioners have been declined/refused. He has also maintained that the decisions relied upon by the learned counsel for the petitioners are distinguishable to the facts of the present petition, since in all those cases the petitioners were found to be discriminated on the basis of "equal among the equal principle" but the present case is that of different classification based on the principle of intelligible differentia. In support of his contentions, the Mr. Zaidi has placed reliance on the following decisions:

- 1) *Allah Yar Vs. General Manager, Railways Headquarters, Lahore and another (2001 SCMR 256)*

- 2) *Dr. Tariq Nawaz and another Vs. Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan, Islamabad and another (2000 SCMR 1956)*
- 3) *Mst. Attiyya Bibi Khan and others Vs. Federation of Pakistan through Secretary of Education (Ministry of Education), Civil Secretariat, Islamabad and others (2001 SCMR 1161)*
- 4) *Abdul Baqi and others Vs. Muhammad Akram and others (PLD 2003 SC 163)*
- 5) *Asim Qureshi, Chief Editor, Haftroza Roshan, Gujranwala Vs. Farooq Ahmad Khan Leghari, President, Islamic Republic of Pakistan and another (PLD 1999 Lahore 76)*
- 6) *Flying Cement Co. Ltd. and others Vs. Government of Pakistan through Secretary, Ministry of Water and Power and others (PLD 2015 Lahore 146)*

6. Mr. Asim Mansoor, Deputy Attorney General for Pakistan, representing the respondent No.3, has adopted the arguments of Mr. Irtaza Hussain Zaidi and stated that a non-member cannot be given the status of a full member.

7. We have heard all the learned counsel at considerable length and have perused the record and the decisions relied upon by them.

8. Before proceeding any further we deem it appropriate to reproduce herein below the relevant Bye-Laws of the Society, Section 17-B of the Co-operative Societies Act, 1925 and Rule 4 of the Co-operative Societies Rules, 1927.

Bye-Laws NO. 7 and 12-A of the Society:

7. All persons who have signed the application for registration are original members. Other members shall be elected by the Committee provided that all members shall be employees of Pakistan Government. Two adverse votes are sufficient to exclude an applicant. Every person shall pay Rs.5/- on applying for admission.

In cases where the application is refused the entrance fee shall be returned.

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12-A. *Any person who has succeeded to or obtained any property in the area of the Society from a member of the Society by sale, mortgage or otherwise or who has purchased Commercial plots from the Society; shall even though he may not be a member of the Society bind himself to be amenable to the bye-laws of the Society and the rules made thereunder.*

Section 17-B of the Co-operative Societies Act, 1925.

17-B. Transfer of interest in a Housing Society.--A member of a cooperative housing society or a society dealing in housing, development shall cease to be member of the society in case all his interests in the immovable property in the society are transferred in favour of any other person by sale, inheritance, gift or otherwise, and the person acquiring such interests shall subject to rules be admitted as a member:

Provided that where more than one person acquires the interests, one of such persons with actual consent, failing which the person older in age shall be admitted as a member having right to vote while other persons will be the members without such right:

Provided further that where a minor or a mentally disabled person, acquires the interests, the natural or legal guardian of the minor or, as the case may be, the person bound to maintain the disabled persons shall be admitted as a member and such membership shall stand transferred to the minor as soon as he acquires majority or to the disabled person as soon as his disability is removed.

Rule 4 of the Co-operative Societies Rules, 1927.

4. Matters in respect of which a society shall or may

make bye-laws. (1)The matters in respect of which every society shall make bye-laws are the following:---

(a) the name and address of the society and its branches, the tribe, class, caste or occupation of its members if the membership is proposed to be so restricted, and the area for which it is to be registered ;

(b)

(c)

(d)

(e)

(f)

(g)

(Underline ours for emphasis)

9. It may be examined that under Bye-Law No.7 only the employees of Pakistan Government are eligible to be the members of the Society. Hence, membership of the Society is restricted to the employees of Pakistan Government in terms of Rule 4 of the Co-operative Societies Rules, 1927 (ibid). It may also be examined that Section 17-B of the Act provides that a member of a cooperative housing society shall cease to be member of the society in case his interest to the immovable property in society are transferred in favour of any other person by sale, inheritance, gift or otherwise and “the person acquiring such interest shall subject to rules be admitted as a member”. Meaning thereby that the said transfer shall be subject to rules and if under the rules, the membership of the society is not restricted, the person acquiring the interest could become a member of the Society, but in case the membership is restricted under the rules, as in the present case it is, the interest could be transferred in

favour of person/purchaser so far the immovable property is concerned, but he would not become a member of the Society.

10. In the instant petition it is an admitted position that the petitioners are not the employees of the Government of Pakistan, hence they have not been granted membership of the Society, as the membership of the Society is restricted to the persons/ owners of the immovable properties in the Society, who are in the employment of Government of Pakistan. The Hon'ble Supreme Court of Pakistan in the case of Bahadur Yar Jang Cooperative Housing Society Ltd. Vs. Feroze Shamsi and others (PLD 2010 SC 1058), while dealing with the matter on identical issue, has observed as under:

12. It appears that Their Lordships in the High Court gathered an impression that admission of a person as a Member as envisaged by the above reproduced provisions of section 17-B necessarily meant an absolute membership with all rights and privileges attaching thereto. It appears to have escaped the notice of the High Court that the said admission to membership, had been made, by the above-noticed provisions itself, "Subject to Rules" meaning thereby that the said Act of 1925 had itself made the grant of membership in question, subservient to the rules.

13. The word "Member" also stands defined by section 3(c) of the said Act which definition reads as under:--

"Member" includes a person joining in the application for the registration of a society or a person admitted to membership after registration in accordance with the Rules and By-laws applicable to such society." (Emphasis and underlining has been supplied).

14. It would again be noticed that even the said definition does not envisage a "Member" to be an absolute or an un-qualified Member with full rights and privileges but makes the said membership subject not only to the rules but even to the bye-laws of the concerned society. The "Rules" as per section 3(g) of the Act mean the rules made under the Act namely, the Co-operative Societies Rules of 1927.

15. A bare perusal of the provisions of the said section 17-B which make the membership subject to the rules and of the definition of the word "member", would demonstrate that the present is one of those situations where the Act itself has bestowed

precedence on the "Rules" framed under the Act and upon the "Bye-laws", in the matter of admitting persons to the membership of a co-operative society. The reason is not far to find because the philosophy culminating in the Co-operative Societies Act of 1925 was to encourage people to voluntarily come together for attainment of common economic and social interests and for achieving better, standards of living on self-help basis and on basis of mutual assistance. It had, therefore, been left to the discretion of the persons, so joining hands for the said object, to decide the kind of persons that they would like to join hands with so that the common interests could be better achieved. It was perhaps for the same reason that unlike some other laws, the above-mentioned Rules of 1927 acknowledge restricting and limiting of membership on the basis of tribes, castes and occupations etc. because homogeneity of educational, professional and social background was considered as factors aiding cooperation whereas heterogeneity could impede the same. It would, therefore, be perfectly lawful for lawyers, for instance, to get together to form a co-operative society for any permissible purpose and to refuse membership thereof to any person not belonging to the above said occupation or to grant only restricted or qualified membership to them. Relevant part of the provisions of Rule-4 of the above-mentioned Co-operative Societies Rules of 1927, may be reproduced hereunder for ready reference in support of the above conclusions drawn by us.

4. Matters in respect of which a society shall or may make byelaws.--(1) The matters in respect of which every society shall make bye-laws are the following:-

(a) The name and address of the society and its branches, the Tribe, Class, Caste or Occupation of its members if the Membership is proposed to be restricted and the area for which it is to be registered;

(b) the object of the society, the purposes to which its funds are applicable, the terms of admission of members, and their rights and liabilities....." (Emphasis and underlining has been supplied)

17. Since, as has been noticed above, the provisions of section 17-B and those of section 3(c) of the Act of 1925 had themselves made grant of membership by a Co-operative Society, subject to the Rules framed under the said Act and also to bye-laws framed by the concerned Society which do envisage conferment of restricted membership, therefore, neither the said relevant Rule nor the said bye-law in question could be said to be ultra vires of the Act. The High Court of Sindh, we say with respect, was therefore, in error in holding that the conferment of qualified membership on a person owning immovable property in a Society, was invalid.

11. The observations of the Hon'ble Supreme Court in the above referred judgment, in our view, is the complete answer in respect of the issue agitated in this petition.

12. We are not persuaded to agree with the contention that the Bye-Laws 7, 8 and 12-A of the Society are violative of Section 17-B of the Co-operative Society Act, 1925 and ultra vires the constitutional rights of the petitioners, guaranteed under Articles 4 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. The pivotal question which needs determination is whether the Bye-Laws of the Society are arbitrary and discriminatory which has been put in the operation in such a manner so as to violate guarantees contained in Article 4 and 25 of the Constitution and denied the equal protection of law. In our considered view the Bye-Laws under reference are neither arbitrary nor discriminatory for the reason that "the equality should not be in terms of mathematical calculation and exactness". It must be amongst the equals. The equality has to be between the persons who are placed in the same set of circumstances. The phrase "equal protection of law" envisaged in Article 25 of the Constitution means that no person or class of the persons would be denied the same protection of law, which is enjoyed by person or other class of persons in like circumstances in respect of their life, liberty or property. Persons similarly situated or in similar circumstances are to be treated in the same manner. It is now well-settled that "the concept of equality before the law does not involve the idea of absolute equality among human being which a physical impossibility". Article 25 of the Constitution guarantees a similarity

of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform. It means that among equals the law should be equal and should be equally administered and that like should be treated alike. We are benefited in this regard by the case of Dr. Tariq Nawaz and another Vs. Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan, Islamabad and another, (2000 SCMR 1956).

13. Here at this juncture the question arises as to whether the petitioners can be placed in the same set of circumstances, vis-à-vis those who are members of the Society pursuant to the Bye-Laws of the Society. The answer would certainly be in negative for the simple reason that the petitioners are not the employees of the Government of Pakistan and thus, could not avail the status of the member of the Society as contained in the Bye-Laws of the Society. The case laws relied upon by the learned counsel for the petitioners are thus found to be quite distinguishable.

14. We, therefore, in the light of what has been stated above do not find any merit in the instant petition and dismiss the same alongwith the listed application.

JUDGE

JUDGE

Karachi:
Dated: