

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Before: Nadeem Akhtar &
Mohammad Abdur Rahman, JJ,

C.P. No.D-5404 of 2022

Haroon Mehmood Tai & Others

Vs.

Province of Sindh & Others

1. For orders on Misc No.12983/2023 (Stay) :
2. For hearing of Misc No.3036/2023 (U/O. I R.10 CPC) :
3. For hearing of Misc No.23090/2022 (Stay) :
4. For hearing of Misc No.23091/2022 (Inspection) :
5. For hearing of Misc No.23092/2022 (Inspection) :
6. For hearing of main case.

Petitioner : Through Mr. Ghulam Shabbir Shah,
Advocate

Respondents No.1 & 2 : Through Mr. Miran Muhammad Shah,
Additional Advocate General

Respondents No.3 : Through Mr. Faisal Siddiqui, Advocate

Respondent No.4, 6, 8,
9 &12 : Through Ms. Rizwana Ismail, Advocate

Date of hearing : 17 January 2024

ORDER

MOHAMMAD ABDUR RAHMAN,J: This Petition has been maintained under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, by the Petitioners impugning clauses (a) to (d) of Bye-Law 7 of the Works Cooperative Housing Society Limited (hereinafter referred to as the "Society") and which they contend are inconsistent with Section 23 of the Sindh Cooperative Housing Society Act, 2020 (hereinafter referred to as the "2020 Act") and which they also contend violate the fundamental rights of the Petitioner under Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan, 1973.

2. The Society was established under provisions of the Cooperative Societies Act, 1925 (hereinafter referred to as the "1925 Act") by the employees of the Works Division, Government of Pakistan and is, as is reflected in its name, a "Housing Society". The membership of the society is restricted and which is reflected in clauses (a) to (d) of Bye-Law 7 of the Society and which read as under:

- " ...
- (a) Employees of the Works Division. Government of Pakistan and its attached Department and their relations.
 - (b) Retired personnel's of the Works Division.
 - (c) Widow or orphans of the deceased employees of the Works Division Two adverse votes of Directors 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.
 - (d) 17-B. TRANSFER OF INTERESTS 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 interest 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 interest shall subject to rules be admitted as a member.

If ----- that where more than one person acquire the interests, one of such person with ----- consent, failing which the person older in age shall be admitted as 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 interest, the natural or legal guardian of the minor or as the case may be the person bound to maintain the disable person shall be admitted as a member and such membership shall stand transferred to the minor as soon as he acquires majority or to the disable person as soon as his disability is removed.

3. The Petitioners are all owners of plots located within the Society but are not being permitted, by the management of the Society, to become

members of Society on the contention that the Petitioners do not, as per the Bye-Laws of the Society, fall within any of the categories of membership of the Society. The Petitioners contend that they are aggrieved as despite owning properties in an area that is managed by the Society they are excluded from participating in the management of the Society.

4. Mr. Ghulam Shabbir Shah has entered appearance on behalf of for the Petitioners and has contended that the restrictions as contained in clauses (a) to (d) of Bye-Law 7 of the Society offend Section 23 of the 1925 Act and also violate the Fundamental rights of the Petitioner's as guaranteed under Articles 23, 24 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. In this regard, he has relied upon the provisions of Sections 23 and 24 of the 2020 Act and which parallel section 19 and 17A of the 1925 Act and which are, for the sake of reference, reproduced in a table herein below for ease of reference:

Sections 23 and 24 of the Sindh Co-operative Societies Act, 2020	Sections 17 and 17A Co-operative Societies Act, 1925
<p>23. Restrictions on transfer of share or interest.</p> <p>(1) The transfer or charge of the share or interest of a member in the capital of a society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.</p> <p>(2) A member shall not transfer any share held by him or his interest in the capital or property of any society or any part thereof unless-</p> <p>(a) he has held such share or interest for not less than one year; and</p> <p>(b) the transfer or charge, is made to the society or to a member of the society or to a person whose application for membership has been accepted by the society.</p>	<p>19. Restrictions on transfer of share or interest.—</p> <p>(1) The transfer or charge of the share or interest of a member in the capital of a society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.</p> <p>(2) A member shall not transfer any share held by him or his interest in the capital or property of any society or any part thereof unless—</p> <p>(a) he has held such share or interest for not less than one year; and</p> <p>(b) the transfer or charge is made to the society or to a member of the society or to a person whose application for membership has been accepted by the society.</p>

<p>24. Transfer of interest in a housing society.</p> <p>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 immoveable 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:</p> <p>Provided that where more than one person acquire the interests, one of such persons with mutual consent, failing which the person older in age shall be admitted as member having right to vote which other persons will be the members without such right:</p>	<p>17-B. Transfer of interest in a Housing Society.</p> <p>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 interest 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 interest shall subject to rules be admitted as a member.</p> <p>Provided that where more than one person acquire 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</p> <p>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</p>
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5. Mr. Ghulam Shabbir Shah very properly conceded that the provisions of 1925 Act had come to interpreted in two decisions, the first being of the Honourable Supreme Court of Pakistan reported as **Bahadur Yar Jang Cooperative Housing Society vs. Feroz Shamsi & others**¹ wherein while considering the same issue in the context of the provisions of the 1925 Act it was held as under:

“ ... 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

¹ PLD 2010 SC 1058

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 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 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 ..." ...

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.

The Second decision was of a Learned Division Bench of this Court reported as **Shabbir Ali Bhai & another vs. Pakistan Employees Cooperative Housing Society through Secretary and 2 others**² and in which the Bye-laws of the Society contained restrictions regarding membership on the basis of a person having to be an employee of the Government of Pakistan and wherein after quoting the aforementioned judgment it was held that:-

“ ... 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 Societies 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 Articles 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 v. Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan, Islamabad and another*, (2000 SCMR 1956).”

Mr. Ghulam Shabbir Shah asked this Court to distinguish these decisions by relying on another decision of a learned Division Bench of this Court reported as **Citizen Cooperative Housing Society Limited Vs. Agha Taj Muhammad Academy & others**³ in which it was held that where a person

² 2017 CLC 1683

³ 2011 YLR 246

acquired a property he had a right to become a member of a Society in terms of Section 17 B of the 1925 Act.

6. His main contention was that each of these decisions interpreted section 17B of the 1925 Act which paralleled with Section 24 of the 2020 Act but in none of these judgments was the provisions of Section 23 of the 2020 Act considered. While refereeing to clause-(b) of Sub-Section (2) of Section 23 of 2020 Act, he contended that a restriction has been imposed in this clause whereby a member can only be compelled to transfer any share held by him or his interest in capital or the property in any society to a person who is either a member of the Society or to a person whose application for membership has been accepted by the Society. He contended that such a restriction in fact means that only persons who are members of the Society can acquire a property and as he has admittedly acquired the said property, he therefore, automatically has a right to become a member of the Society. He relied upon the decisions of the Honourable Supreme Court of Pakistan reported as **Sindh High Court Bar Association vs. Federation of Pakistan**,⁴ **Sh. Muhammad Rafique Goreja and Others Vs. Islamic Republic of Pakistan and Others**,⁵ and **Chaudhary Parvez Ilahi Vs. Deputy Speaker Provincial Assembly Punjab & Others**⁶ a decision of the Learned Lahore High Court reported as **Ahmed Textile (Pvt.) Ltd. Vs. Mst. Saddiqan Bibi & Others**⁷ and various judgments of the Supreme Court of India reported as **Municipal Corporation of Delhi Vs. Gurnam Kaur**,⁸ **S. Shanmugavel Nadar Vs. State of Tamil Nadu & Others**⁹ and **State of UP & others Vs. Synthetic and Chemical Ltd.**¹⁰ which all forwarded the proposition that where a judgement is sub-silentio on a point of law that decision would be binding only to the extent that it decided a point of law and not otherwise and on this basis he contended that this Court could the interpretation of the rights of the Petitioner in the context of Section 23 of the 202 Act.

7. Mr. Faisal Siddiqui entered appearance on behalf of the Society and while contending that the petition was premature as the applications for membership have not even been maintained by the Petitioners, however candidly conceded that as per restrictions contained in clauses (a) to (d) of Bye-Law 7 of the Bye-laws of the Society the Petitioners' application for membership, even if made, would not be successful. He

⁴ PLD 2009 SC 879

⁵ 2006 SCMR 1317

⁶ PLD 2023 SC 539

⁷ 2006 PLC 656

⁸ AIR 1989 SC 38

⁹ AIR 2002 SC 3484

¹⁰ (1991) 4 SCC 139

contended that when the Petitioners purchased each of their properties, they each have signed undertakings which reads as under:

“This transfer does not entitle to claim membership of the Society as I do not meet requisites of membership according to the provisions of the bye-laws.”

and which would act an estoppel from them maintaining a right to become members of the Society.

8. He clarified that as per clauses (a) (b) and (c) of Bye-Law No.7 of the Society’s Bye-Laws only three categories of persons could acquire membership of the Society namely:

(a) employees of the Works Division, Government of Pakistan and its attached Department and their relations;

(b) retired personnel’s of the Works Division;

(c) widow or orphans of the deceased employees of the Works Division.

In addition, under clause (d) of Bye-Law No.7 the membership of the Society could only be transferred in favour of the purchaser by sale, inheritance, gift or otherwise and such purchaser/transferee shall be admitted as a member **subject to Rules** i.e. as above.

9. With reference to the rules he referred to Rule 5 of Sindh Cooperative Housing Society Rules, 2020 (hereinafter referred to as the “2020 Rules”) and which parallel with Rule 4 of the Cooperative Society Rules, 1927 Rules and which states as under:

“ ... 5. Matters in respect of which a society shall or may make 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;
...”

He contended that the provisions of both the Sections 24 of the 2020 Act and Section 17B of the 1925 Act are identical and which specify that the membership of the Society will be “subject to Rules” and which rules as

per sub Sub-rule (a) to Rule 5 of the 2020 Rules allow restrictions to be made on the basis of a “class”. He therefore, argued that the decisions in the cases of **Bahadur Yar Jang Cooperative Housing Society vs. Feroz Shamsi & others**¹¹ and **Shabbir Ali Bhai & another vs. Pakistan Employees Cooperative Housing Society through Secretary and 2 others**¹² clearly apply and are binding on this Court. He distinguished the judgments reported as **Citizen Cooperative Housing Society Limited Vs. Agha Taj Muhammad Academy & others** and stated that the issue that had been raised was not an issue as germane to the controversy in that petition and that should not be considered authoritative on this point. He contended that all the grounds raised in this Petition have been considered and decided and in fact by referring to Section 23 of the 2020 Act, an attempt is being made to hold that these decision are in fact *per incurium*. He further contended that no challenge was made to either specifically to clause (a) to (d) of Bye-Law 7 of the Society’s Byelaws or to Sub-rule (a) to Rule 5 of the 2020 Rules and thus if any arguments were being made they were beyond the pleadings. .

10. Ms Rizwana Ismail entered appearance on behalf of the Respondent No. 4,6,8,9 and 12 and adopted the argumetns of Mr. Faisal Siddiqui.

11. We have heard Mr. Shabbir Ali Shah and Mr. Faisal Siddiqui and have perused the record.

12. The expression “Society” comes to be defined in subsection (m) of Section 2 of the 2020 Act and which reads as under:

“ ... *Section 2 (m) ‘Society’ means a society registered or deemed to be registered under this Act.*”

The generic Society as defined hereinabove is subdivided into different categories as identified in clauses-1 to 5 of Sub-Section (p) of Section 2 of the 2020 Act and which read as hereinunder:

“ ... *2(p) (1) “resource society” means a society formed with the object of obtaining for its members the credit, goods or services required by them;*

¹¹ *op cit.*

¹² *op cit.*

(2) "producers' society" means a society formed with the object of producing and disposing of goods as the collective property of its members and includes a society formed with the object of the collective disposal of the labour of the members of such society;

(3) "consumers society" means a society formed with the object of obtaining and distributing goods to or of performing services for its members, as well as to other consumers and of dividing among its members and customers in a proportion prescribed by the rules or by the bye-laws of such society, the profits accruing from such supply and distribution;

(4) "housing society" means a society formed with the object of providing its members with dwelling houses on conditions to be determined by its by-laws;

(5) "general society" means a society not falling under any of the four classes above-mentioned.

The Registrar shall classify all societies under one or other, of the above heads and his decision shall be final.

A Society formed with the object of facilitating the operations of any one of the above classes of societies shall be classified as a society of that class.

A list of all such societies, so classified on 31st December shall be published annually in the month of January in the official Gazette."

As is apparent the 2020 Act creates a distinction between each of the different types of Societies. This is reinforced by the fact that Sub-Section (p) of Section 2 of the 2020 Act has specifically directed the Registrar of Societies to classify a Society as one of the particular "heads" as identified therein. If one is to therefore read Section 23 of the 2020 Act, that provision clearly regulates the transfer of shares or interests in the capital of a society in respect of Societies in general. Section 24 of the 2020 Act on the other hand regulates the transfer of an interest in an immovable property in respect of a particular class of society i.e. a "Housing Society". On a point of interpretation, it would therefore seem that a special provision in the form of Section 24 of 2020 Act has been enacted by the legislature in respect of Housing Societies and applying the maxim "*Generalia Specialibus non derogant*" we are of the opinion that the provisions of Section 23 therefore cannot regulate the transfer of an interest or a right to membership of a Housing Society on the basis and which must be regulated solely by the provisions of Section 24 of the 2020 Act.¹³

¹³ See *Amir Akber Khan vs. National Accountability Bureau* PLD 2020 Karachi 440

12. As Section 24 of the 2020 Act prescribes that a person “acquiring such interests shall subject to rules, be admitted as a member” and as Sub-Rule (a) to Rule 5 of the 2020 Rules clearly allow for a restriction to be made on the basis of a “class” we are inclined to hold that an interpretation of the provisions has already been made and upheld in the decision of the Honourable Supreme Court of Pakistan reported as **Bahadur Yar Jang Cooperative Housing Society vs. Feroz Shamsi & others**¹⁴ and by a Learned Division Bench of this Court reported as **Shabbir Ali Bhai & another vs. Pakistan Employees Cooperative Housing Society through Secretary and 2 others**¹⁵ and which we are bound to follow. As such, the question as to whether a restriction in Bye-laws of Society would be ultra vires of the provisions of Section 17 B of the 1925 Act, which section parallels with Section 24 of the 2020 Act, having been decided in those matters we are inclined to hold that the restriction imposed in clauses (a) (b) (c) and (d) of Bye-Law No.7 of the Society are in no manner ultra vires of the provisions of the 2020 Act and the 2020 Rules made thereunder. Similarly, as the issue of the right to impose such restrictions in the decision reported as **Shabbir Ali Bhai & another vs. Pakistan Employees Cooperative Housing Society through Secretary and 2 others**¹⁶ was found not to violate Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 we are also inclined to hold that the restrictions as contained in clauses (a) (b) (c) and (d) of Bye-Law No.7 of the Society do not discriminate against the Petitioners.

13. Regarding the provisions of Article 23 and 24 of the Constitution of the Islamic Republic of Pakistan 1973 we do not see how a person being excluded from managing a Society can be considered as being deprived from exercising their right to “acquire, hold or dispose” of their property so as to violate Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973 or how the exclusion of the Petitioners from the management of the Society can amount to them being “compulsorily deprived” of their property. Clauses (a) (b) (c) and (d) of Bye-Law No.7 of the Society neither mention nor restrict nor impose any conditions of a nature so as to affect such rights and therefore we are inclined to hold that they are in consonance with those Articles of the Constitution of the Islamic Republic of Pakistan, 1973.

¹⁴ *op cit.*

¹⁵ *op cit.*

¹⁶ *op cit.*

14. For the foregoing reasons, we are of the opinion that clauses (a) (b) (c) and (d) of Bye-Law No.7 of the Society are in consonance with the provisions of the 2020 Act and the 2020 Rules thereunder and which do not violate Articles 23, 24 and 25 of the Constitution of the Islamic Republic of Pakistan 1973. The Petition is therefore dismissed, along with all listed applications with no order as to costs.

JUDGE

JUDGE

ANNOUNCED BY

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