

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-1317 of 2014

[Farida Azam Ali vs. Province of Sindh and others]

Present:

Mr. Justice Irfan Saadat Khan and

Mr. Justice Muhammad Faisal Kamal Alam

Date of hearing : 31.08.2021

Petitioner
[Farida Azam Ali] : Represented by Mr. Rajender
Kumar, Advocate.

Respondent No.4
*[P & T Cooperative Societies
Sindh]* : Represented by Mr. Ch. Khalid
Rahim Arain, Advocate.

Respondents No.1 to 3
*[Province of Sindh, Minister
for Cooperative Societies,
Government of Sindh and
Registrar Cooperative Societies
Sindh, respectively]* : Represented by Mr. Miran
Muhammad Shah, Additional
Advocate General Sindh.
: Nemo for Respondents No.5
and 6.

Law under discussion: (1) The Constitution of the Islamic
Republic of Pakistan, 1973.
{the ‘Constitution’}
(2) The Cooperative Societies
Act, 1925.
(3) The Cooperative Societies
Rules, 1927.

DECISION

Muhammad Faisal Kamal Alam, J: The Petitioner has called in
question the Order dated 17.12.2012 (*the ‘Impugned Order’*) passed by

Respondent No.2 (*Minister, For Law & Parliamentary Affairs, Government of Sindh*), whereby the order dated 22.04.2009 passed by Respondent No.3 (*the Registrar Cooperative Societies Sindh*) as well as Award dated 13.06.2005, passed by the Nominee of the Registrar, were set-aside and the case was remanded to Respondent No.3 (*the Registrar Cooperative Societies Sindh*), with direction to appoint some other suitable Nominee, who after a *de novo* trial give an Award.

2. Relevant facts for deciding this Petition are that Petitioner was allotted a Plot No.C-170, admeasuring 400 Square Yards by Respondent No.4 (*P&T Cooperative Housing Society Ltd*)- **‘the Society’** vide an Allotment Order No.805 dated 22.03.1968, but was subsequently cancelled on account of alleged nonpayment of dues as demanded by said Respondent Society, which was subsequently challenged in the departmental proceeding, as envisaged in the Cooperative Societies Act, 1925 and Rules framed thereunder (*the ‘Relevant Law’ and ‘Rules’*).

3. Mr. Rajender Kumar, learned Advocate for Petitioner has stated that ample opportunity was provided to Respondent Society but it deliberately did not contest the Arbitration Case No.27 of 2005, so also observed in the Award (*at page-51 of the file*). Further contended that in Appeal preferred by present Respondent No.6 (*Ilyas Masih*), who is subsequent allottee of the subject Plot, although the said Respondent Society entered appearance by filing Vakalatnama but did not prefer an independent Appeal to question the Award, if at all it was aggrieved of the same. He has referred to Vakalatnama in favour of Lahooti and Quadri Advocates & Legal Consultants, bearing Stamp of Honorary Secretary of Respondent Society (*at page-97 of the Court file*). After decision in Appeal, whereby Respondents Society was directed to compensate the present Petitioner by allotting an alternate Plot while

observing that since lease has been executed in favour of present Respondent No.6, therefore, it would be unjust to dispossess him. It is argued that when this decision was not implemented, present Petitioner filed an Application for issuance of an execution certificate in terms of Section 59 of the above referred Relevant Law. In the intervening period Respondent Society preferred a time barred Appeal / Revision under Sections 64 and 64-A of the Relevant Law before the Respondent No.2, accompanied by an Application under Rule 32 of the Cooperative Societies Rules, 1927 [the relevant Rules], requesting for suspension of the earlier orders. Finally, the said Revision was decided by way of the Impugned Order. Learned counsel has stated that if no appeal was filed by Respondent Society against the main Award, then it cannot directly file a proceeding before the Respondent No.2, which is also barred by Limitation as the decision in Appeal is of 22.04.2009, whereas, the Revision was filed on 17-10-2009, that is, after six months. He has cited following case law to augment his arguments that revisional power under Section 64-A of the above Relevant Law is mainly administrative in nature and cannot be invoked to set-aside a proceeding relating to Arbitration and that of an Appeal, which is to be executed as a decree of a Civil Court.

- i. **PLD 1966 (W.P.) Karachi 177**
[*Sheikh Haider vs. Registrar, Co-operative Societies, Karachi and others*]-**Haider case.**
- ii. **2017 YLR 1816 [Sindh]**
[*Abdul Haq vs. Thakumal and 4 others*]-**Abdul Haq case.**
- iii. **2017 SCMR 1131**
[*Defence Housing Authority (DHA) Lahore vs. Secretary Cooperative Department Government of Punjab and others.*]-**DHA case.**

4. Mr. Ch. Khalid Rahim Arain, learned counsel for Respondent No.4 has controverted the arguments of Petitioner's counsel by stating

that Respondent Society was never given proper notice in the Arbitration and the Appeal proceedings, hence, Respondent Society could not contest those proceedings, which illegality in fact has been cured by Respondent No.2 through the Impugned Order. Contends that on the contrary, Petitioner despite notice did not contest the proceeding before the Respondent No.2 and the present Petition is hit by laches, which is filed after a delay of fifteen months, as the Impugned Order is of 17.12.2012, whereas, the present Petition was filed on 14-3-2014. Learned Advocate has argued while making a reference to another C.P. No.D-4156 of 2011 preferred by same Petitioner, wherein the latter had requested that the Revision proceeding before Respondent No.2 may be decided expeditiously, hence, the Petitioner cannot take a contrary stance in the present Petition about being unaware of the proceeding [before the Respondent No.2]. It is argued that the Award itself is void *ab-initio*, because it has given a finding that lease in favour of private Respondent No.6 (Iqbal Masih) be cancelled, which cannot be done in a proceeding of the nature but only through a proper judicial proceeding. He has relied upon the following case law_

- i. **1990 CLC 1693 [Peshawar]**
[Muhammad Naseem Khan vs. Government of N.-P.F.P. through Secretary, Department of Cooperative, Peshawar and 24 others]-Naseem Khan case.
- ii- **2017 YLR 1816 [Sindh]**
[Abdul Haq vs. Thakumal and 4 others]-Abdul Haq case (also relied upon by counsel for the Petitioner).

5. Learned Additional Advocate General Sindh has controverted the contentions of Petitioner's Advocate and supported the impugned order and states that power under Section 64-A has been properly exercised by Respondent No.2 and the said provision (*Section 64-A*) is not confined only to rectify the administrative acts of Officers but it enables the

Respondents No.1 and 2 to exercise an overall supervisory jurisdiction for ensuring that affairs of societies and Regulator/Government Officials is properly performed. In support of his arguments, he has cited the reported decision of this Court_

2011 YLR 246 {Karachi}

[Citizen Cooperative Housing Society Ltd., through Chairman vs. Agha Taj Muhammad Academy through present Secretary and 2 others]-Citizen Cooperative Housing Society case.

6. Arguments heard and record perused.

7. Learned counsel for Petitioner and learned AAG have also submitted their respective Written Arguments along with the above case law.

8. It is necessary to clarify that to the facts of present case, the erstwhile statute, viz. the Cooperative Societies Act, 1925, is applicable, where under, an Award was passed by the Registrar's Nominee under Section 54 was challenged in the appeal by Respondent No.6; which was subsequently questioned by the Respondent Society under Section 64 read with Section 64-A of the Relevant Law. Section 64 of the Relevant Law provides an appeal against order, decision or sanction given by the Registrar (Respondent No.3) under Sections 10, 16, 45, 46, 50, 50-A, 54 and Sub-Section 3 of Section 54-A, to the Provincial Government within two months from the date of communication of the order; *whereas*, Section 64-A is judicially interpreted as a revisional power. Since already an Appeal under Section 56 read with Section 64 was preferred by private Respondent No.6, before the Registrar, therefore, the proceeding filed by Respondent Society before the Respondent No.2, cannot be treated as an Appeal and Revision both, because, *firstly*, the above Section 64 does not provide a second appeal from the appellate order passed under Section 56; and, *secondly*, the Respondent No.2

while handing down the Impugned Order itself has treated the proceeding as revision, viz. Revision Application No.SO(T)6(21)/09. Whether Section 64-A is applicable in the present circumstances, is to be decided in this Petition, in view of the relevant case law, cited by learned Advocates for Petitioner and Respondents.

9. In the '*Objections / Parawise Comments*' filed on behalf of the Respondent Society, it is mentioned that after the impugned order, another Award was passed in ABN Case No.40 of 2013, which is not challenged. The said Respondent Society has not filed any record of the subsequent arbitration proceeding as stated above; whereas, present record of this Petition does not contain any document or Award (as alleged), nor learned Advocate representing Respondent No.4 [Society], could explain this new aspect satisfactorily, hence, the above contention has no force.

10. The issue of laches though relates to the maintainability of this Petition, but in the present case, it is dependent on the finding on the exercise of power by Respondent No.2, while passing the impugned Order, hence, first it is necessary to determine that whether the proceeding filed before the Respondent No.2, by Respondent Society was *coram judice* and within the framework of Relevant Law.

11. The Revision was filed by Respondent Society directly under Section 64-A of the Relevant Law before the Respondent No.2 on 17.10.2009 (*at page-99 of the Court file*), whereas, order in appeal was passed on 22.04.2009, that is, after six months from passing of appeal. Since no decision was given for a considerable period, present Petitioner filed C.P. No.D-4156 of 2011, which was disposed of by consent on 24.08.2012 directing the competent authority to dispose of the appeal, if

any, pending against the order dated 22.04.2009 within a period of two months while deciding the maintainability as well. It would be advantageous to reproduce the order passed in the above Constitutional Petition by learned Division Bench of this Court_

“By consent, the Petition is disposed of directing the competent authority to dispose of the Appeal, if any, pending against the order dated 22.04.2009 in this matter, within a period of two months through a speaking order strictly on merits and in accordance with law, keeping in view the objection of the Petitioner that the Appeal itself is not maintainable.”

12. Gist of the case law cited by the Petitioner’s Advocate in respect of scope of Section 64-A of the Relevant Law is, that the power mentioned therein has a limited range of applicability, primarily to scrutinize the administrative or departmental inquiry of the authorities, who are functioning under the Relevant Law and Rules and the same cannot be applied or invoked for inference in the decisions passed in the arbitration proceeding and appeal. It is held by the Hon’ble Supreme Court in the *DHA case (supra)* that_

“...Section 64-A of the Act has limited scope. The power under this Section is vested in the Secretary to the Provincial Government and the Registrar to call for and securitize the record of an enquiry or proceeding pending before any Officer subordinate to them. Power under this Section could not be extended to cover the proceeding, which relate to Arbitration and or Award given by the Arbitrators Committee constituted in terms of section 54 of the Act, as the Arbitrators are not subordinate either to Secretary Co-operatives or to the Registrar.”

13. Learned Additional Advocate General has relied upon decision of Division Bench of this Court given in *Citizen Cooperative Society case-2011 YLR 246 Karachi*, wherein it is held that Section 64-A empowers the Provincial Government to keep a vigil over the acts of Society and official and the phrase “*if in any case*” mentioned in the above provision, covers all sorts of cases, including the arbitration proceeding.

14. Crux of the case law as relied upon by learned counsel for Respondent Society is, that a lease cannot be cancelled in the arbitration proceeding under Section 54 of the Relevant Law, except by adopting due process, *inter alia*, through judicial proceeding; the word “*proceeding*” as mentioned in the above provision [Section 64A] is a comprehensive term to be given wider meaning and therefore, power and authority as mentioned in Section 64-A will also be applicable to the arbitration and appellate proceedings; discretionary relief under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, cannot be extended to present Petitioner, who was negligent in invoking the writ jurisdiction after fifteen months from the date of the Impugned Order and the case is hit by the rule of laches.

15. The stance of Petitioner that Respondent Society though made appearance in the above Appellate Proceeding but did not contest the same, has not been disputed during hearing and in the Objections / Parawise Comments of Respondent No.4-Society. Undisputedly, said Respondent 4 [Society] was impleaded in the Arbitration Proceeding so also the Appellate. Therefore, if the original order / Award passed in the Arbitration Proceeding was not challenged by the Respondent Society, then the same cannot be questioned by filing a Revision under Section 64-A of the Relevant Law. The reported case of *Abdul Haq (supra)* handed down by the learned Division Bench of this Court, specifically

has dealt with this factual and legal aspect of the matter in its paragraphs- 37 to 40, by holding, that since respondent No.1 (of the reported case) was a party to the arbitration proceeding and did not prefer an Appeal but has directly filed a revision proceeding under Section 64-A and a favorable order passed in said proceeding, was illegal and *coram non judice* because the finding mentioned in the award had attained finality. *Secondly*, the two cited decisions relied upon by learned Advocate for Respondent Society and AAG (as mentioned above), are distinguishable. The *first case* of *Naseem Khan*, delivered by learned Peshawar High Court primarily relates to the dispute arising from the election of directors of a Cooperative Society and although the learned Peshawar High Court has mentioned the above *Haider case* (of this Court) but did not disagree with the same but only distinguished it. Thus, with due deference, the decision of another High Court in these circumstances, is not binding on the learned Division Bench of this Court, under the principle of precedent, so also envisaged in Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973, when on a similar law point a decision of another Division Bench of this Court is still in the field.

The second reported Judgment given in the *Citizen Cooperative matter (ibid)* by the learned Division Bench of this Court, is distinguishable and with utmost respect not binding on this Bench; for the reasons; *firstly*, while passing the above said decision, the above reported Judgment of *Haider case* was not before the learned Bench, that gave judgment in Citizen Co-operative case; *secondly*, applying the principle of *stare decisis*, the subsequent decision of *Abdul Haq case (ibid)* of this Court, facts whereof are somewhat similar to the facts of the present Petition, which followed the rule laid down

in *Haider case* and subsequently by the Hon'ble Supreme Court in *DHA case (ibid)* with regard to the import and scope of Section 64-A, has a binding force and is to be followed in the present Petition.

16. Adverting to the arguments of counsel of Respondent Society about cancellation of lease; to this extent we endorse the arguments of counsel of Respondent Society, that lease could not have been cancelled in the arbitration proceeding, but that finding has lost its significance and does not lend any support to the case of Respondent Society, because it has been overturned in the decision given in Appeal No.31 of 2005 (as mentioned above), *inter alia*, by keeping intact the leasehold rights of private Respondent No.6 and directing Respondent Society to give an alternate plot to the Petitioner. However, the finding given in the arbitration proceeding about illegal cancellation of above plot of Petitioner was maintained in the appeal, as observed above and has attained finality, which could not have been interfered with in the above purported revisional jurisdiction exercised by the Respondent No.2.

17. The conclusion of the above discussion is that since proceedings of Arbitration and Appellate forum under the Relevant Law and the Rules, are to be enforced as a decree of Civil Court, hence, the same cannot be overturned or interfered with by exercising administrative revisional jurisdiction, as mentioned in Section 64-A by the Provincial Government. The above proceeding filed by Respondent Society before the Respondent No.2, should not have been entertained by the said Respondent No.2, therefore, invoking of revisional jurisdiction, *inter alia*, in terms of Section 64-A, was void

ab-initio. Consequently, proceeding, viz. 'Revision Application No. SO(T)6(21)/2009' and the Impugned Order passed therein by Respondent No.2 is '*coram non judice*' and nullity in the eyes of law and is hereby quashed.

18. With regard to the contention of learned Advocate for Respondent Society, that Petitioner herself was agitating that the above revisional proceeding be decided expeditiously and the same now cannot be questioned by the said Petitioner, is misconceived in nature, for the simple reason, that by mere requesting for an expeditious decision of a case, cannot change the settled principle that consent of parties cannot confer a jurisdiction upon a Court, functionary or authority, which otherwise is not available under a law.

19. The other objections of Respondent Society, that the present Petition is hit by doctrine of *laches*, does not carry much weight, as the specific defence of Petitioner's counsel, that she settled abroad and also given a Special Power of Attorney, bearing attestation of Pakistan Mission at Los Angeles (*the United States of America*) available in record, which fact has not been seriously contested, shows that Petitioner was not negligent in pursuing her rights and interests in respect of the above Plot. *Secondly*, after the two decisions in arbitration and the appeal, substantial proprietary right and interest have accrued in Petitioner's favour, which is a continuous right and cannot be strangled as claimed by Respondents. *Thirdly* and *most importantly*, after the above findings about Section 64-A and the proceeding before Respondent No.2 and setting aside of the Impugned Order in the present Judgment, the plea about laches has even otherwise become meaningless. The Hon'ble Supreme Court in the decision of *Bahadur Khan and others versus*

Federation of Pakistan – 2017 SCMR 2066, while answering the objections on laches, has held, that principle of laches cannot be overemphasized when issue of recurring rights are involved. In the said Judgment, the delay was condoned in instituting the litigation.

20. The upshot of the above discussion is that this Petition in the above terms, is accepted, however, there shall no order as to cost.

JUDGE

JUDGE

Dated 17.09.2021
M.Javid.P.A.