

*Before Sh. Riaz Ahmad Raja Afrasiab Iaan, Munir A. Shaikh, TanvirAhmed IKhan and Malik Muhammad Qayyum, JJ*

NATIONAL INDUSTRIAL COOPERATIVE CREDIT CORPORATION LTD. and another--Petitioners

versus

PROVINCE OF PUNJAB/GOVERNMENT OF PUNJAB, through Secretary, Cooperative Department and another--Respondents

Writ Petition No.4607 of 1992, decided on 25th May, 1992.

**(a) Constitution of Pakistan (1973)-**

--- Art. 199 --- Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992), Preamble --- Constitutional petition --- Petitioners seeking permission to amend the petitions so as to pray that a writ in the nature of quo warranto be issued --- High Court, keeping in view the challenge thrown to the Ordinance and its various provisions, in circumstances, allowed the petitioners to incorporate the amendment.

**(b) Pakistan commissions Of Inquiry Act (VI OF 1956)---**

m-S. 6 --- Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992), Preamble --- Constitution of Pakistan (1973), Art.4 --- Statement before an Inquiry Commission made by a person in the course of giving evidence highlighting mismanagement of the affairs of a Cooperative Society, could not furnish adequate basis to the Government to promulgate Ordinance

declaring Cooperative Societies, as undesirable --- Adverse finding by the Commission would not absolve the Provincial Governor or thus Provincial Legislature to depart from the law and the Constitutional Divisions- Report of the Commission could not be considered as a legal or proper substitute for the strict compliance of the principles of natural justice and law --- Commission, thus, 'could not clothe any Authority or confer or enable or authorise any Authority whatsoever to make any law or to pass any such order in derogation, of the law and the Constitution and act in disregard to the principles of natural justice,

**(c) Natural justice, principles of--**

---Even though, a piece of legislation does not contain the provision for the compliance of natural justice, the same have to be read into it unless the statute itself by implication or otherwise dispenses with such compliance.

**(d) Constitution of Pakistan (1973)-**

--Art. 4 --- Any invasion upon the rights of citizens by any body, no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country.

Ghulain Zamin v. A.B.- Khondkar PLD 1965 Dacca 156 ref.

**(e) Constitution of Pakistan (1973)"**

--- Arts. 4, 18, 24 & 25 --- Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992), Preamble --- Provincial Governor while promulgating the Ordinance also assumed and exercised judicial powers which he could not have done under the scheme of the Constitution.

**(f) Constitution of Pakistan (1973)-**

-!---Art. 2A --- After the incorporation of Objectives Resolution in the Constitution as Art.2A and same having become enforceable by the Courts ratio of judgment delivered by the Supreme Court of Pakistan in Fauji Foundation case reported as PLD 1983 SC 457, loses its significance. Fauji Foundation's case pLD 1983 SC 457 ref.

**(g) Interpretation of Constitution-**

--- Constitution should receive a liberal interpretation in favour of the citizen, especially with respect to those provisions which were designed to safeguard the Fundamental Rights.

Jabindra Kishore's case PLD 1957 SC 9 ref.

#### **(h) Constitution of Pakistan (1973)--**

--- Art. 2A --- Independence of judiciary --- Three organs of State i.e. executive, legislature and judiciary cannot make inroad on or transgress the sphere of others --- Taking of adverse action against any person or body on the basis of its misdeeds, if any, was nothing but exercise of judicial power and in exercise of such power, it had to be seen whether care to comply with law and opportunity of being heard as a principle of natural justice was provided before taking any adverse action --- Concept of independence of judiciary as guaranteed and enforceable under the Constitution would not authorise the legislature or the Provincial Governor to enunciate a legislative judgment through a piece of legislation --- Judicial power could-not be exercised by the Legislature and every adverse action must precede by a finding of a Tribunal and any action in its derogation would amount to legislative judgment which was not permissible by law.

The independence of judiciary is, a most sacred pillar on which the edifice as a safeguard against every type of injustices, i.e. social, political and economic has to stand and no inroad into the fundamental rights guaranteed to a person including the equality of status, and of opportunity before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and association can be made by the executive. However, subject to law and public morality on the basis of reasonable classification, the Legislature can regulate the exercise of such rights guaranteed in the Constitution but in the light of the independence of judiciary, having been secured, guaranteed and being essential part of the ground norm, the same is enforceable.

In this view of the matter, the, scheme of tracheotomy of power as envisaged under the Constitution, into three organs of the State i.e. executive, legislature and judiciary gains importance and, therefore, none of these organs can make inroad or transgress the sphere of others. Thus, taking of adverse action against any person or body on the basis of its misdeeds, if any, is nothing but exercise of judicial power. In exercise of such power, it has to be seen whether care to comply with law and opportunity of being heard as a principle of natural justice was provided before taking any adverse action. The concept of independence of judiciary as guaranteed and enforceable under the Constitution would not authorise the legislature or the Provincial Governor to enunciate a legislative judgment through a piece of legislation.

The judicial power cannot be exercised by the legislature and every adverse action must precede by a finding of a tribunal and any action in its derogation would amount to legislative judgment which is not permissible by law.

Naseer Ahmad Khan v. Province of West Pakistan PLD 1980 Lah.

684; Government of Sindh and another v. Sharaf Faridi 1990 SCMR 91; Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan PLD 1989 Kar. 404; Bihari Lal v. **Ranicharan** AIR 1957 Madh. Pra. 165; Smt. Indira Nehru Gandhi v. Shri Raj Narain AIR 1975 SC 2299; Piare Dusadh and others v. Emperor AIR 1944 FC 1; (1951) 83 Cwlr 261; Shell Company of Australia v. Federal Commissioner of Taxation 1931 AC 275; Labour Relations Board v. John East Iron Works 1949 AC 134 and Constitutional Law of India by H.M. Seervai Vol. 11 ref.

#### **M Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)-**

--- Preamble --- Constitution of Pakistan (1973), Art. 91, 22A--a-s-Punjab Undesirable Cooperative Societies (Dissolution) Ordinance, I enactment without legislative competence and it was a bill of attainder being one of 'pains and penalties' --- High Court suggested amendments in the Ordinance so as to make same workable and intra vires of the Constitution.

<sup>v</sup>  
Federation of Pakistan v. The General Public PLD 1988 St: 645 ref,

#### **(j) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)-**

--- Preamble, Ss. 4 & 12 and Sched.-Constitution of Pakistan (1973), Art. 17-- Reasonable classification and restriction --- No yardstick been laid down in the Ordinance to hold a society undesirable, arbitrary powers emerged from the Ordinance, particularly by virtue of Ss. 4, 12 read with Sched. to the Ordinance whereby 102 Cooperative Societies enumerated in Schedule stood dissolved.

The enjoyment of every right is subject to reasonable classification and restrictions as contained in Article 17. No classification has been mentioned and no yardstick or criterion has been laid down in the Punjab Undesirable Co-operative Societies (Dissolution) Ordinance, 1992 to hold a society undesirable, therefore, arbitrary powers emerge from the

Ordinance, particularly, by virtue of sections 4 and 12 read with Schedule to the Ordinance, whereby, 102 Cooperative Societies enumerated in the Schedule stand dissolved. The framer of the Ordinance also did not visualise the agony of the depositors, although, certain Cooperative Societies by submitting a report of its funds, undertook to make repayments to its depositors as their assets were more than their liabilities.

**(k) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)--**

--- Preamble --- Constitution of Pakistan (1973), Art.14 --- Acquiring the properties and assets of the Societies and then to vest the same in the Registrar was nothing but the exercise of despotic and arbitrary power.

Acquiring the properties and assets of the Societies and then to vest the same in the Registrar is nothing but the exercise of despotic and arbitrary power. The provision ought to have been to see as to whether such property could be made to vest without a proper enquiry as to the nature of its ownership.

**(1) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)--**

--- Preamble --- Constitution of Pakistan (1973), Art. 2A --- Ordinance by usurping judicial power was passed and framed to declare 102 Cooperative Societies as. undesirable which was a function exclusively resting upon the exercise of the judicial power rather than the legislative power.

Syed Sharifuddin Pirzada v. Federation of Pakistan PLD 1973 Kar. 132; Sher Khan v. Regional Transport Authority and 4 others PLD 1985 Kar. 614; Tulsipur Sugar Co. v. Notified Area AIR 1980 SC 882 and Fauji Foundation's. 'case PLD 1983 SC 457 distinguished.

**(in) Constitution of Pakistan (1973)-**

--- Art. 2A & Chap. I of Part II --- Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992), Preamble --- Cooperative Society can complain of the violation of the fundamental rights after the introduction of Art.2A in the Constitution of Pakistan (1973).

State Trading Corporation v. The Commercial Tax Officer AIR 1963 SC 1811; Indo-China Steam Navigation v. Justice Singh AIR 1964 SC 1140; Rustam Cavasjee Cooper v. Union of India AIR 1970 SC 564; Bennett Coleman & Co. v. Union of India AIR 1973 SC 106; AIR 1974 SC 1300; Godhra Electricity Co. v. State of Gujarat AIR 1975 SC 32; Members of the National Assembly's case PLD 1989 FSC 9 and Federation of Pakistan v., Public-at-Large PLD 1991 SC 459 ref,

**(n) Constitution of Pakistan (1973)-**

--- Arts. 2A & 199 --- No clog or fetter could be placed on the powers conferred on upon High Court under Art. 199 of the Constitution of Pakistan to examine any act on the touchstone of Art. 2A and High Court had the power to examine the validity of any act or law and to declare it unconstitutional if repugnant to Islam.

**(o) Constitution of Pakistan (1973)-**

any matter in the Federal List which has been given in Sched. IV of Constitution.

**(p) Constitution of Pakistan (1973)-**

--- Arts. 142, 90, 97 & 137 --- Punjab Undesirable Cooperative Society (Dissolution) Ordinance (XX of 1992), Preamble --- Appointment of a Judge the Supreme Court as Cooperative Judge under the Ordinance unconstitutional and beyond the legislative competence of the Provision Governor.

**(q) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance of 1992)--**

--- S.22 --- Constitution of Pakistan (1973), Chap. 2, [Arts.176 to 191 Part I & Sched. IV, Item 55 of the Federal Legislative List --- Provision of S.22 of Ordinance. providing an appeal before the Supreme Court of Pakistan violative of the Constitution for the matter pertained to the conferment jurisdiction of the Supreme Court and was beyond the legislative competence of the Provincial Governor or the legislature.

**(r), Punjab Undesirable Cooperative Societies (Dissolution) Ordinance of 1992)--**

--- Ss. 4, 12, 13 & Sched.-Constitution of Pakistan (1973), Art. 2A & Chap [Arts. 8 to 281 Part II --- Provisions of SsA, 12 & 13 of the Ordinance read w the Sched. to the Ordinance amount to legislative judgment by usurping judicial power and therefore, are violative of the Fundamental Rights Article 2A of the Constitution of Pakistan (1973).

The provisions of sections 4,12 and 13 of the Punjab Undesirable operative Societies (Dissolution) Ordinance, 1992 read with the Schedule the Ordinance amount to legislative judgment by usurping the judicial power and, therefore, are violative of the fundamental rights and Article 2A of Constitution and thus cannot be saved being unconstitutional, illegal violative of the principles of natural justice.

(s) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance of 1992)--

--- S. 15 --- Constitution of Pakistan- (1973), Art.199---Society formed members of the same family which had never dealt with the banking business and no deposit was taken and only a house was purchased by it, could not be declared as undesirable and to treat same as such was also without lawful authority and jurisdiction.

(Sh. Riaz Ahmad, J)

**(t) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)\_**

--- S. 15 --- Constitution of Pakistan (1973), Art.199 --- Transaction undertaken by the Society on the face of it requiring scrutiny could not be declared as undesirable.

**(u) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)--**

----- S. 15---Constitution of Pakistan (1973), Art.199 --- No business was transacted by the Society and it was not a financial institution but was a housing society which purchased only one property and an enquiry had been conducted into its affairs under S.43, Cooperative Societies Act, 1925 wherein it had been found that the Society had no liability and the members belonged to the same family --- Such Society could not be treated as undesirable and treating such Society as undesirable was without lawful authority and jurisdiction.

**(v) Punjab Undesirable Cooperative Societies (Dissolution) Ordinance (XX of 1992)--**

--- Preamble- --Constitution of Pakistan (1973), Art. 2A --- High Court while declaring certain provisions of the Ordinance as violative of the Constitution of Pakistan (1973) and action of declaring 102 Cooperative Societies as undesirable under the Ordinance as without lawful authority and jurisdiction, directed that competent authority should give priority to introduce a mechanism whereby agony of the depositors came to an end and easy procedure was laid down for safeguarding the claims of such depositors and suggested measures which could be taken in that behalf.

Sharifuddin Pirzada and Raja Muhammad Akram for Petitioners.

Khalid M. Ishaq, Ch. Muhammad Farooq, Dy. Attorney-General, Maqbool Elahi Malik, A.-G. assisted by Irfan Qadir, A. A.-G. and M. M. Baig for Respondents.

Dates of hearing: 14th, 15th, 20th, 21st, 22nd, 23rd and 24th June,

## JUDGMENT

SH. RIAZ AHMAD, -J.---The uproar with respect to the financial debacle of the finance companies in the country and in particular about Taj Company had not yet subsided when the glamour about the financial scandal in the Cooperative Societies came to earth. Obviously, such news of scandals harassed the small depositors, and there was a run of the small depositors upon the Cooperative Societies to withdraw their money. The situation was so worsened that the Government had to intervene, and particularly, the factum of seeking loans by the industrialists tycoons of this country led the Federal Government to constitute a Commission headed by a Judge of the Supreme Court and two Judges of the High Court to examine the management, and working etc. of the Cooperative Societies in Punjab.

The Commission was constituted under the Pakistan Commissions of Enquiry Act, 1956 (VI of 1956) and precisely following was the charter of the Commission:---

"(a) to identify and determine the extent of assets and liabilities of each cooperative finance society or corporation;

(b) to ascertain and determine the extent of outstanding liabilities of the defaulters together with their full names and particulars as well as properties and assets of such defaulters.

(c) to examine and determine the illegalities in the establishment of each defaulting society or corporation;

(d) to ascertain and identify the irregularities, illegalities, if any, committed in respect of receipt, disbursement, return of funds by any such society or corporation or its officials including Directors, Managers or employees and to fix responsibility;

(e) to enquire into, identify and fix the responsibility of the regulating agencies, authorities, or bodies required or authorised by law to supervise and control the working of such societies and corporations and recommend measures to be taken against their officials or employees who neglected or avoided to perform their duties and functions diligently and honestly-, to identify the ultimate beneficiaries or persons, where funds and the assets of the society or corporations have been diverted and trace out particulars of any properties and assets acquired with such funds;

(g) to suggest measures to be taken for repayment of the amounts or dues of the depositors or compensation, as the case may be, or to the members of such societies or corporations and for these purposes---

(i) ascertain the properties and assets of such societies and corporations including their Directors, members and identify the assets to which the same have been illegally converted;

(ii) ascertain and register all claims outstanding against the societies and corporations;

(iii) ascertain the mode and manner of repayment and satisfaction of the outstanding claims and also to recommend appropriate measures to be taken for recovering loans from the defaulters and for winding up the societies, and corporations wherever need be;

(iv) recommend measures to meet shortfall, if any, through recovery from the properties of the Directors, sponsors and other officials of such societies and corporations and to propose legislative measures if necessary, and

(v) recommend and take such other measures as may be necessary to fix responsibility on all relevant quarters and repay all genuine claims."

The Commission after making a thorough probe -and after recording the statements of certain individuals made recommendations but while doing so being cognizant of their limits, the following observations were made by the Commission-

"The matter of ascertainment of the properties and assets of the Corporations as well as of their Directors, Officers and members cannot possibly be resolved by the Commission and it had neither the means, nor sufficient time, nor even perhaps the authority to give a binding determination after admitting evidence of the parties for and against the respective versions. The proceedings being inquisitorial rather than adversary and life span of the Commission being of a few weeks, any attempt to find the answer in the circumstances and the legal position obtaining in the matter, would have been impossible."

It is further pertinent to mention that the Commission examined the affairs of 20 big societies and hearing was afforded to at least 127 societies. The commission also went in depth to examine the nature of the business carried out by the Cooperative Societies/Corporations and observed illegalities in the establishment of the societies and also irregularities and illegalities in the receipt, disbursement and return of funds and also in the purchase and sale of real estates by the Corporations/Societies and also commented upon the role of the regulatory bodies such as Federal Cooperative bank, state Bank of Pakistan, Federal and Provincial Governments and the Cooperative department. Eventually, on page 209 to 212 of the report, the Commission also examined as to whether it was necessary to wind up these companies and 'thus proposed legislation in this behalf. It is not necessary at this stage to go into the details of the report, but suffice it would be to mention that the Commission made the observations with regard to the winding up of the Corporations/Societies. The relevant recommendation of the Commission are reproduced hereunder:-

#### "Features of new Legislation:

The winding up as such is necessary and new law providing for winding up of these corporations will have to be made by the Parliament, which inter alia may provide for

(i) the winding up of the Cooperative finance corporations registered under the Cooperative Societies Act, 1925 and were conducting banking business;

determination of the liabilities;

prosecution of the office-bearers of the societies and other persons accused of misappropriation, embezzlement of its funds and assets, violation of law of banking and other laws. The accused should be tried by a Special Court presided over by a Judge, in service, not below the rank of Sessions Judge. An officer of the State Bank well versed in book keeping, should

assist the prosecutor and be also associated with the investigating agency. In consequence of trial if the accused or any person on his behalf is found to be in possession of assets disproportionate to his known sources and which he fails to account for (burden to prove that the property is lawfully owned by him should be placed on the accused) upon conviction be forfeited in favour of the society for the benefit of the depositors/members. Provisions may also be made in the law that while determining as to whether or not the assets in possession of the accused persons are disproportionate to his known sources, the Court shall take into consideration his income-tax assessment record including his wealth statement filed under the Income Tax laws. The Court should have the power to summon income-tax record notwithstanding anything to the contrary contained in the Income-tax Ordinance, 1979.

The **societies will be called "defaulting societies" which would mean a society registered under any of the Cooperative laws and has accepted or is accepting for the purpose of lending or investment, deposits of money from the public payable on demand or otherwise and withdraw able by cheque, draft, order or otherwise.**

2. The law should provide that every defaulting society existing immediately before the commencement of the proposed enactment on its commencement, shall cease to function notwithstanding anything to the contrary in the Banking Companies Ordinance, 1962, the Cooperative Societies Act, 1925 or any other law for the time being in force and shall be wound up in the manner provided in the proposed enactment. List of defaulting societies should be added as a schedule to the Act.

3. Vesting in preservation of assets and deposits of cash etc-, with the Board and also surrender of assets to it. For reference see section 5 of Act X of 1958.

4. Conferment of power to proceed against any concealed property or the property which has been obtained or procured by using or diverting the funds of the defaulting society.

5. A provision regarding informer and payment of compensation to him in cash up to 15% of the value of the hidden assets, if information is proved to be correct, be incorporated in the new Act.

6. A provision for settlement of objections against the rejection or non verification of the claim. The verified claims be made assignable.

7. The law should also provide for the settlement of objections of the third parties relating to the property/assets claimed by the society/Admn. Board.

8. The law should further confer necessary powers on the Board to retrieve the loans due and make payments of the verified claims.

9. Appropriate provision barring the taking of plea of limitation in the in matter of recovery of assets and loans should also be provided.

Any person -or office-bearer of the society nominated on the Board who on being required to give any information or produce any document or render assistance fails to do so without reasonable cause, after giving him an opportunity of hearing may be detained in the civil prison by the Judge (Companies)/Cooperative Societies on the representation of the Board or on his own motion for such period as may be specified under the new dispensation.

#### Constitution of Board of Liquidators of the Big Societies:--

For the purposes of achieving the objects of law, tackling the problems likely to arise in the winding up process and to deal with allied matters, a Board of Management/Liquidation for each corporation having liability of 15 crores or above and similar Boards for a group of societies as considered appropriate may be constituted by the Government. The Boards should consist of the following:---

- (1) An officer in service not below Grade 19. Chairman
- (2) Registrar Cooperative Societies or his nominee Member
- (3), A Chartered Accountant in service in Member DFIS/Bank.
- (4) An Advocate having more than 10 years standing Member (to be nominated by the Company Judge).

- (5) A representative of the depositors to be elected in Member (work the manner provided hereinafter. Working in honorary. capacity).
- (6) An office-bearer of the society who is not accused Associate of commission of an offence relating to its Member. business. To be nominated by the Government.

The officers nominated to the Board shall be on deputation and paid by their respective departments, while the Advocate shall receive such Monthly remuneration as fixed by the Company Judge.

The Managing Director/Chairman/President/Director/Office-bearer of the society including the office-bearer nominated to the Board shall be bound in law to attend to the work of the Board, provide necessary information and also to render such assistance as is necessary for realising and safeguarding the assets and interest of the- society.

#### Selection of the Members from Depositor:--

A list of depositors of each district shall be prepared on the basis of the verified claims. These depositors will elect among themselves a committee comprising three depositors for the purposes of rendering assistance to the Board for collecting necessary evidence, material, unearthing the concealed property of the society, identifying and locating its assets, which might have been purchased Benami or through diversion of funds and any other illegalities or irregularities committed by its management and the staff. The election of three members of the Committees will be conducted under the supervision of the District Magistrate. The members of the District Committee of each corporation will elect one of them to represent them on the Board and for such election a meeting will be called by the Chairman of the Board.

#### Functions of the Board-

- (i) The Board of liquidation shall determine the assets and liabilities of the corporation and that of its office-bearers.

Shall verify the claims, if need be, dispose of objections against the acceptance or rejection of claim filed by the depositor and may also entertain the claim, in case reasonable cause is shown for not filing the same earlier and also if directed by the Company Judge.

- (iii) Determine any complaint as to unauthorised adjustment of the deposit, SMR or any such deposit certificates or instrument.

- (iv) Determination of assets and liabilities would include the power to unearth, hidden or concealed properties/property which actually and really belongs to the corporation due to use of its funds but appearing in the name of some other person."

A careful consideration of the report of the Commission reveals .that all the Cooperative Societies/Corporations were indulging into illegal banking business and that is why, the Commission lamented upon the conduct of the regulatory bodies referred to above.

On the receipt of this report, the Governor of the Punjab then promulgated Ordinance No. XX of 1992 called as the Punjab Undesirable Cooperative Societies (Dissolution) Ordinance, 1992. The aim of the Ordinance was to prohibit the carrying on the business as financial institutions by Cooperative Societies and to provide for matters ancillary thereto.

The salient features of this Ordinance were that an "undesirable Cooperative Society" as defined in section 20) to be a Cooperative Society registered under the Act and by whatever name called to which section 4 applied or which was specified in the schedule.

Section 4 of the Ordinance provided as under:---

#### Reeistration of certain Cooperative Societies prohibited:--

- (1) No cooperative society formed with the object of accepting deposits from its members or public for the purposes of lending, investment or allowing withdrawals in any manner shall after the commencement of this Ordinance be registered under the Act.
- (2) Any registration made in contravention of subsection (1) shall be void.

Adverting to 'the schedule, it contained list of 102 Cooperative Societies which by operation of law were termed as undesirable.

Under section 12 of the Ordinance, the existing undesirable Cooperative Societies by operation of law were ceased to function. Precisely section 12 reads as under:--

"An undesirable cooperative society specified in the schedule on the commencement of this Ordinance and in case of subsequent inclusion of the Schedule of an undesirable Cooperative Society on the date of such inclusion, shall cease to function and all its properties, assets, securities, deposits and bank accounts shall vest in the Registrar and shall **remain** so vested till such time they stand vested in the Liquidator.

Under section 13 of the Ordinance, the winding up of an undesirable cooperative society has been provided and it is laid down that; as soon as may be after the commencement of this Ordinance, the Registrar shall make a petition to the Cooperatives Judge for winding up of at! undesirable cooperative society who shall thereupon make an order for its winding up and appointment of a Cooperatives Board as Liquidator.

Before proceeding further it is necessary to mention that the Ordinance also established a Cooperatives Board and the Government was empowered to establish as many Cooperatives Boards as it deemed necessary The Board was to be a body corporate having perpetual succession and a common seal with powers subject to the provisions of this Ordinance to enter into contracts and to acquire, hold and dispose of property both movable and immovable and shall by its name sue and be sued. The Board was to consist of a Chairman and at least two members to be appointed by the Government and their terms and conditions of service were to be prescribed by the Government.

It is also necessary to mention that the Ordinance also provided for the appointment of Cooperative Judge and under section 2(d) of the Ordinance, a Cooperative Judge means a Judge of the Supreme Court of Pakistan nominated by the Chief Justice of Pakistan or a Judge of the Lahore High Court qualified for appointment as Judge of the Supreme Court of Pakistan nominated by the Chief Justice of Pakistan after consultation with the Chief Justice of the High Court. The powers of the Cooperative Judge were specified in section 7 of the Ordinance. Under section 11, any person aggrieved by an act or decision of a Cooperative Board can apply to the Cooperative Judge who was empowered to confirm, reverse, or modify the act or decision complained against and to make such an order as was just in the circumstances of the case.

Under section 22, an appeal was maintainable against the final order of the Cooperative Judge before the Supreme Court of Pakistan within 30 days of the passing of the order by. the Cooperative Judge. Under section 25, the Government was empowered to remove any difficulty for giving effect to the provisions of this Ordinance and under section 26 of the Ordinance, the Government can by notification amend the schedule so as to add any entry thereto or modify or Omit any entry therein.

Since the Ordinance came into force at once, and by its operation, the Cooperative Societies mentioned in the schedule became undesirable and ceased to function on the promulgation of this Ordinance, therefore, the following Cooperative Societies or their office-bearers invoked the Constitutional jurisdiction of this Court-

- (1) W.P. 4699-92. Sh, Manzoor Elahi Paracha etc. v. Province of Punjab etc.
- (2) W.P. 4607/92. National Industrial Credit Corporation etc. v. Province of Punjab etc.
- (3) W.P. 4653-92. Hamad Ra7a etc. v. Province of Punjab etc.
- (4) W.P. 4759-92. Zu1fiqar Ahmad Awan v. Province of Punjab etc,
- (5) W.P. 4933-92. Muhammad Abdullah v. Province of Punjab etc
- (6) W.P. 5419-92. Pashan Cooperative etc. v. Province of Punjab et
- (7) W.P. 5542-92. Premier Industrial Development Corporation etc. v. Province of Punjab.
- (8) W.P. 4858-92 Muhammad Ranizan v. Registrar, Cooperative Societies



etc.

(9) W.P. 5272-92. Tariq Mahmood v. Province of Punjab etc.

(10) W.P. 5361-92. Syed Iqbal Hussain Rizvi v. Registrar, Cooperative Societies etc.

(11) W.P. 5353-92. Faisal Dilawar Khan v. Government of Punjab etc.

(12) W.P. 4608-92. National Industrial Finance Corporation etc. v. Province of Punjab.

In these petitions, the validity, and the constitutionality and legality of the Ordinance was challenged. Since the determination of the questions raised involved the interpretation of the Constitution and other relevant laws, therefore, on the reference made by the Division Bench of this Court, a Full Bench of this Court was constituted for hearing these petitions.

On the first day of hearing by the Full Bench, Mr. Sharifuddin Pirzada appearing for the petitioners in Writ Petitions Nos. 4607 and 4699 of 1992 sought permission to amend the petitions so as to pray that a writ in the nature of a writ of quo warranto be issued against the Cooperative Judge. Considering the challenge thrown to the Ordinance and its various provisions, we allowed the incorporation of the aforesaid amendment.

Mr. Sharifuddin Pirzada while arguing the petitions contended that by virtue of the operation of the ordinance, the properties of the petitioners have been acquired, their funds have been frozen and then function as corporation/societies was brought to an end. It was argued that provisions of the Ordinance were violative of the principles of natural justice, in as much as, no notice was given to the petitioners as well as to 102 companies in the schedule to show cause as to why the action detrimental in the nature preferred to above be not taken against them. Precisely, it was argued that before declaring 102 societies as undesirable, it was incumbent to have resorted to the proceedings in the nature of judicial review so as to declare them as undesirable. Since no such enquiry was conducted, therefore, the legislature by transgressing its limits set out by the Constitution has assumed not only legislative function but also the function of the judicial review upon itself. It was next contended that the acquisition without compensation was violative of the fundamental rights as enshrined in the Constitution. It was further contended that the provisions of the Ordinance offended Articles 2, 2A, 4, 14, 18, 24, 25 and 17 of the Constitution of Islamic Republic of Pakistan. It was also contended that the acquisition of the property without compensation to be determined in accordance with the market value was illegal and was against the dictum and the judgment delivered in *Federation of Pakistan v. General Public* PLD 1988 SC 645.

The next limb of the argument was that the legislation through Ordinance by the Governor of Punjab was against the recommendations of the Commission, inasmuch as, the Commission had recommended the legislation by the Parliament because these cooperative societies/corporations were indulging into the illegal business of banking and, therefore, it was a subject covered by Item 31 of the Fourth Schedule of the Constitution of the Islamic Republic of Pakistan. It was also contended that declaration of the petitioner and 102 companies as undesirable in the schedule amounted to legislative judgment which was not permissible under the Constitution and law.

The provision as to the appointment of a Judge of the Supreme Court of Pakistan as Cooperative Judge was bitterly criticized and it was argued that the Provincial Governor who had the same limits to legislate as a Provincial assembly, had transgressed his powers to legislate on a federal subject. It was argued that Article 175 of the Constitution provided the establishment of the Supreme Court of Pakistan having original jurisdiction under Article 184 to consider questions of public importance with reference to the enforcement of any of the fundamental rights and its appellate jurisdiction has been defined under Article 185 and its advisory jurisdiction under Article 186 of the Constitution of Islamic Republic of Pakistan. It was thus contended that reading Articles 175, 184, 185, 186 with Item 55 of the Fourth Schedule would clearly show that it was only the Federal Government, which could legislate about the jurisdiction of the Supreme Court and also about the enlargement of the jurisdiction of the Supreme Court and the conferring thereon all supplemental powers. It was then contended that the provision in the Ordinance enabling the appointment of a Judge of the Supreme Court as Cooperative Judge to be nominated by the Chief Justice of Pakistan by a Province was unconstitutional because if such course of action was allowed then Provinces would be free to legislate about the jurisdiction to be exercised by a Judge of the Supreme Court **which was** against the scheme of the Constitution. The argument was further elaborated by placing reliance upon Articles 212 and 212-B of the Constitution. It was argued that under Article 212, the appropriate Legislature can by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of the matters relating to the terms and conditions of persons **who are** or have been in the service of Pakistan, including disciplinary matters **and with** regard to the matters relating to the claims arising from tortious acts of Government, or any person in the service of Pakistan or of

any local or other authority empowered by law to levy any tax and also in relation to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

The attention of this Court was also drawn to the provision of Article 212(2) & (3) under which, the appeal from the judgment, decree or order or sentence of an Administrative Court or Tribunal was only competent before the Supreme Court. It was thus contended that the Provincial Legislature established Service Tribunal for their provinces and the order of such Tribunal is appealable to the Supreme Court not by virtue of the Provincial Legislation but by virtue of the Constitution itself. Similarly, it was argued that under Article 212-13, the Special Courts for trial of heinous offences were established by the Federal Government which was the only authority to constitute as many Special Courts as it considered necessary and the appeal against the order of the Special Court was competent before a Supreme Appellate Court which is chaired by a Judge of the Supreme Court of Pakistan and two Judges of the High Court. It was, thus, contended that in view of the scheme of the Constitution and particularly Items 31 and 55 of the Fourth Schedule to the Constitution read with the provisions referred to above, it leaves no room to doubt that 'through an Ordinance to be promulgated by a Provincial Governor, no provision can be made for the appointment of a Judge of the Supreme Court to act as a Cooperative Judge because it was only the Federal Government which had such powers to be exercised through Federal Legislation or constitutional provision and not otherwise.

Mr. Sharifuddin Pirzada has forcefully argued that the Ordinance is ultra vires of the Provincial Governor and it was a bill of pains and penalties and in fact amounted to exercise of judicial powers as through a legislative judgment, 102 corporations/societies were declared undesirable. It was also argued that the ordinance was violative of, Article 2-A of the Constitution i.e. the Objectives Resolution which was made part of the Constitution and was enforceable. Similarly, it was also violative of Article 4, under which, a person was given inalienable right to be dealt with in accordance with law and to enjoy the protection of law and to be treated in accordance with law, wherever he may be and in particular, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law and no person could be prevented from or be hindered in doing that which was not prohibited by law and no person could be compelled to do that which the law does not require him to do. It was contended that as held by the Supreme Court of Pakistan, Article 4 was replica of the concept of due process of law as envisaged by the American Constitution. It was also argued that to declare the companies/cooperative societies as undesirable, the dignity of man as guaranteed by Article 14 has been violated and fundamental rights under Article 18 were also violated, inasmuch as, the freedom of trade had been guaranteed. The violation of Article 24 was also complained and it was argued that the property rights had been protected and no person could be deprived otherwise than in accordance with law and the acquisition of property without compensation ordinance was repugnant to aforesaid Article 25 was also offended, inasmuch as, the schedule to the Ordinance was arbitrary exercise of powers and equality of citizens was thus ruined as protected by Article 25 and it was blatantly violated. It was next argued length that no criterion or yardstick has been provided on the touch stone which a society or corporation could have been declared as undesirable. learned counsel also contended that the Ordinance was drafted in haste that is why, although, in the definition clause, the Commission has defined but it has no nexus with the other provisions of this Ordinance.

Our attention was also drawn to the fact that on a number of places the Ordinance, the term.. "Act" had been used which shows lack of applied mind and the uncalled for haste to take action determination as to the interest of the petitioner and 102 corporation as provided in the schedule Ordinance according to the learned counsel, also violated the basic concept of Islam and various decisions of the Shariat Court. It was also argued that commission has described the societies as defaulting societies and undesirable societies and, therefore, the recommendations of the Commission have also been set at naught. It was also contended that the impugned Ordinance is privileging opposed to legislation which is not only arbitrary but 'despotic too being opposed to the rule of law.

With reference to the bill of pains and penalties it was vehemently argued by the learned counsel that by operation of the Ordinance, for has taken place, the corporations have been deprived of their valuable right and such course of action should have preceded by judicial finding. According to the learned counsel, the scheme of our Constitution, 1973, clearly postulated the trichotomy of powers in the form of legislature, executive and judicial organs of the State and under the theory of the separation of powers, no organ could transgress the limits of others.

At this stage, Mr. Pirzada was reminded of the dictum of the Supreme Court of Pakistan in the case reported as Fauji Foundation etc. v. Sham Rehman PLD 1983 SC 457, in which, the theory of watertight compartment the organs of the State was dilated upon and the learned counsel has very distinguished the Fauji Foundation case and stated that at the time where said case was decided, Article 2A i.e. Objectives Resolution was not part of Constitution and MMEactives resolution also safeguards the independent of the judiciary and, therefore, in this view of the matter, the case of Foundation and its dictum had no relevance at all. In this behalf, Mr. Pir further argued that the Supreme Court had itself made a departure from judgment delivered by Fauji Foundation case in another case decided by said august Court reported as Benazir Bhutto v. Federation of Pakistan another PLD 1988 SC 416. **It was, therefore, argued that the judicial PC cannot be taken**

away by the Legislature and hence any\_ adverse action Must and this role cannot be assumed - learned counsel in this behalf cited a judgment from the Australian jurisdiction reported as 1951 Vol. 83 CCLR page 261. In the aforesaid judgment, the dissolution of the Communist Party by the Legislature was declared illegal being arbitrary and despotic exercise of powers by the Legislature. The learned counsel also drew the attention of this Court to another judgment reported as 1908 CLR 350 and 1931 (Appeal Cases) page 1434. It was also argued with reference to the judgment of the Indian Supreme Court reported as AIR 1975 SC 2299 *Smt. Indira Nehru Gandhi v. Shri Raj Narain* that judicial power cannot be taken away. The other cases cited in support of this contention were **AIR 1957 (MP) 165 Behari Lal v. Ram Charan** and AIR 1950 SC 188 *The Bharat Bank Ltd. v. the Employees of the Bharat Bank Ltd.* etc. Similarly, it was also laid down in the judgment reported as AIR 1944 FC 1-(618) that judicial powers cannot be exercised by the Legislature. In addition thereto, 1990 SCMR page 91 *Government of Sindh v. Sharaf Faridi and 3 others* was also cited to elaborate the aforesaid concept, and the same view was also taken in PLD 1989 Kar. 404 *Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan*. In this behalf a passage from the book titled "the Constitution of the United States of America, Analysis and Interpretation" prepared by the Congressional Research Service Library of Congress 1973 was also cited. The relevant paragraph appears at page 365 and the title is Bills of Attainder which is reproduced below ----- "Bills of attainder ... are *such* special acts of the Legislature, as inflict capital punishments upon persons supposed to be guilty of high offences such as treason and felony without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. In *such* cases, the Legislature assumes judicial magistracy pronouncing upon the guilt of the party without any of the common forms and guards of trial and satisfying itself with proofs, when such proofs are within its reach whether they are conformable to the rules of evidence or not. In short, in all such cases, the Legislature exercises the Highest power of sovereignty and what may be properly deemed an irresponsible despotic discretion being governed solely by what it deems political necessity or expediency and too after under the influence of unreasonable fears or unfounded suspicions."

Adverting to the violation of Article 18, the judgments reported as PLD 1958 SC 41 *M/s. East and West Steamship Company v. Pakistan*, PLD 1975 SC 667 *Government of Pakistan v. Zamir Ahmad Khan* and PLD 1958 Lahore 887 *The Progress of Pakistan Ltd. v. Registrar, Joint Stock Companies etc.* On the violation of Article 24, a judgment from the Indian Supreme Court reported as AIR 1954 SC 119 *Dawrkadas Shrinivas v. The Sholapur Spinning and Weaving Company Ltd.* and others was cited and AIR 1970 SC 564 *Banking Cases* was also cited. On the violation of equality clause *Jabindra Kishores* case reported as PLD 1957 SC 9, *Zain Noorani's* case PLD 1957 SC 46, PLD 1957 SC 157 *Waris Meah v. The State etc.* PLD 1975 SC 506 *Brig. Rtd. F.B. Ali and Another v. The State* and **Benazir Bhutto's** case reported as PLD 1988 SC 416 were cited. Mr. S.M. Zafar, Senior Advocate on behalf of the petitioners in Write Petitions Nos. 4759 and 5419 of 1992 argued that no test has been laid down in the Ordinance to distinguish between desirable and undesirable ion 12(1) is an example of societies/Corporations, and the provision of sea naked exercise of arbitrary and unabridged powers have been conferred upon). the Registrar to pick and choose any Society from the list of 102 Societies mentioned in the schedule of the Ordinance for making a Reference against it before the Cooperative Judge for winding it up. It was also contended that the, Cooperative Judge was left with no other option but to order the winding up on a Society or Corporation 'A' against which the Reference was made by then Registrar, and 'no guideline was provided for the Cooperative Judge to proceed-4 n, the matter, and therefore, the Ordinance was a bad piece of legislation. It was next contended by the learned counsel that the Ordinance was violative; the equality clause as provided under Article 25 of the Constitution. '116 provision of section 26 of the Ordinance was brought under severe criticism and it was argued that the Government has been given arbitrary powers to include or exclude any society or corporation from the schedule and therefore, it was despotic piece of legislation. Like, Mr. Sharifuddin Pirzada, Mr. S.M. Zafar -intended that through a legislative judgment the petitioners represent by him alongwith the other societies or corporations as specified in the schedule have been arbitrarily declared as undesirable and the legislation was a piece of excessive delegation of powers. Mr. S.M. Zafar drew the attention of this Court to the provision of section 305 of the Companies Ordinance in which-.1 the guideline for the winding up of a company has been given and according to the said provision, a company may be wound up if its assets were not equal to discharge the liability or if the company was unable to pay its debts. It was, therefore contended that in the absence of any such criterion as laid down the Companies Ordinance, the principles of natural justice have been violated, Raja Muhammad Akram, Advocate, also addressed this Court and argued that the Ordinance was violative of Articles 4 and 25 of the Constitution and the Cooperative Societies Act, 1925 was all embracing piece of legislation to control the working of the Cooperative Societies and contains the provision of winding up, liquidation and audit etc. And thus to make the departure from x the said Act was discriminatory in' nature. It was also Argued that National a Industrial Finance Corporation, one of the petitioners before us, was in a position to return the amount to the depositors and for that purpose a Committee was constituted by this Court to supervise the return of money to the depositors but the operation of the aforesaid order was stayed the Supreme Court. It was thus contended that there was no-justification or basis to declare are his client as undesirable, because it was in a position to meet its liabilities Similarly, the other petitioners also contended that they were in a Position to meet their liabilities.

In Writ Petition No.5353 of 1992, it was argued that the society had no deposit with it and 17 close relations were its **members and they had only** purchased a house,, and hence it could not have been declared undesirable. 'Similarly in Writ Petition No.4858 of 1992, it was contended that the society had no liability; audit was also conducted and everything was found in order and, therefore, it cannot be treated -as undesirable. In Writ Petition No. 4653 of 1992, it was argued that the society was only a Benamidar and reconveyance. had been drafted and signed by the respondent No3 but before the deed could be registered, the operation of the society was stayed by virtue of the, Ordinance which was illegal.

Syed Iftikhar Shah, Advocate, also attacked the Ordinance by contending that the jurisdiction of the Supreme Court had been curtailed through the provincial legislation which was not permissible by the Ordinance and in fact, the constitutional jurisdiction of this court under Article 199(2) had also been abridged and, therefore, section 16 of the Ordinance is ultra vires. Similarly, the exclusive jurisdiction conferred on the Cooperative Judge by virtue of section- 17 of the Ordinance has placed limitation on the exercise of jurisdiction by the High Court and the Supreme Court and, therefore, it was ultra vires.

Mr. Najaf, Advocate, appearing in Writ petition No' 5381 of 1992 contended that the society has 17 members and no business of financial nature has been carried out and it was a housing society and it purchased only one property. It was also contended that under section 43 of the Cooperative Societies Act, 1925, an enquiry had been conducted and no liability on the society was found. In fact, the member of that society belonged to the same family and thus the inclusion of the petitioner in the list of 102 societies noted in the schedule was debility and, unlawful <sup>46</sup> no opportunity of hearing was provided to the petitioner.

In Writ Petitions Nos. 4933 and 4699 of 1992 'Mailk Muhammad Nawaz, Advocate, agitated that the society in these writ petitions had funds in excess of its liability and are in a position to repay to its depositors and at present, it 'has 8 crores of rupees in cash lying with it while out of 93 crores, 54 crores have already been paid by the societies.

While admitting these petitions, considering the of that questions involving the interpretation of the Constitution, we had issued notice to the Attorney-General for Pakistan but he did not appear and in his place, the Deputy Attorney-General Ch. Muhammad Farooq entered appearance.

The learned Deputy Attorney-General contended that the inclusion of the societies in the schedule does not make them ipso facto undesirable. It was contended by him that more than 45000 Cooperative Societies were working in the Province and after careful application of mind, 102 societies were chosen to be included in the schedule and therefore, the societies still have a right to contend before the Cooperative Judge that they are not undesirable and, if that societies satisfy the learned judge their names can be or derived to be excluded from the list. The Deputy Attorney-General further argued that the impugned Ordinance was promulgated on the basis of report of High-powered Commission appointed by the Federal Government and its recommendations had been implemented. It was further contended that section 11 provides a remedy before the Cooperative Judge and against his order, an appeal was maintainable in the Supreme Court and, therefore, the Ordinance was not violative of the principles of natural justice, Ch. Muhammad Farooq also, argued that the Governor was competent to legislate and promulgate this Ordinance, inasmuch as under item 31 of the Fourth Schedule, only provinces had the exclusive power to legislate, with regard to the Cooperative Societies. It was next contended that if by virtue of legislation the entire class of persons is affected then in such like cases, the principles of natural justice are not required to be met with. In this behalf, reliance, was placed on a judgment reported as Syed Sharifuddin Peerzada v. Federation of Pakistan etc. PLD 1973 Kar 131 It was then argued that the Ordinance affected a class generally and, therefore, those affected cannot complain about the violation of the principles of natural justice. Reliance was also placed on another judgment reported as, Sher Khan v. R.T.A. and 4 others (PLD 1985 Kar. 614). The learned Deputy Attorney-General also argued that the vires of an Ordinance **cannot be** challenged on the basis of the violation of the principles of natural justice and in this behalf reliance was placed upon AIR 1980 SC-882 The Tulsipur Sugar Co. Ltd v. the Notified Area Committee and 1983 SCMR 785 Muhammad Siddique v. Market Committee, Tandlianwala.

The learned Deputy Attorney-General also argued that the enforcement of fundamental rights is available to a citizen only and not to a legal or juristic person as the petitioners were and, therefore, such legal person can not complain about the violation of natural justice. It was next contended that under Article 4 of the Constitution the word "citizen" has been mentioned similar as to that of Articles 17 and 18 and the citizens stand on different footing than a legal person. To support his argument, the learned Deputy Attorney-General placed reliance upon Government of Pakistan etc., v. Zamir Ahmad Khan (PLD 1975 SC 667) and State Trading Corporation of India v. The Commercial Tax Officer and others AIR-1963 SC 1811.

The learned Deputy Attorney-General while addressing the alleged repugnancy of the Ordinance to the concept and norm of justice as enshrined in Islam by virtue of the enforceability of Article 2A, contended that Article 203-G was a

complete answer and only a Shariat Court has the exclusive jurisdiction to deal with such matters and resort cannot be had to the invocation of "Article 199 of the Constitution of Islamic Republic of Pakistan.

The learned Deputy Attorney-General while placing reliance upon Union Sugar Mills' case (PLD 1977 SC 397) and Fauji Foundation case reported as PLD 1983 SC 457 argued that trichotomy of power as dilated upon by the Supreme Court of Pakistan in Zia ur Rehman's case (PLD 1973 SC 49) is not to be strictly enforced, inasmuch as, relying upon the cases referred to above, the Supreme Court had made a departure by advancing the theory of "water-tight compartment" and therefore, it was irrelevant to argue that Legislature has not such power to legislate and to declare 102 societies as undesirable.

The learned Deputy Attorney General further contended that the appointment of a Judge of the Supreme Court as Cooperative Judge by virtue of the provision of the impugned Ordinance was intra vires of the Constitution because the code of conduct as issued by the Supreme Judicial Council for a Judge of the High Court and Supreme Court is similar. It was also argued that wisdom of Legislature cannot be questioned as held in *M/s. Amin Soap Factory v. Government of Pakistan* PLD 1976 SC 277. The learned Deputy Attorney-General also referred to the cases reported as *Mebreen Zaib un Nisa v. Land Commissioner, Multan* PLD 1975 SC 397, *Inarn ur Rehman v. Federation of Pakistan* 1992 SCMR 563 and *Shri Ram Krishna Dalmia etc. v. Shri Justice S.R. Tendolkar and others* AIR 1958 SC 538 and lastly, the learned Deputy Attorney-General argued that the Constitutional jurisdiction of this Court being discretionary should not be exercised in favour of the petitioners because of their involvement in the financial scandals.

Mr. Khalid M. Ishaque, Senior Advocate was engaged by the Provincial Government to place its viewpoint before this Court. At the very outset, Mr. Khalid M. Ishaque candidly argued that he and his client do not subscribe to the interpretation placed by the learned Deputy Attorney-General upon sections 4 and 12 of the Ordinance because the finality of the question of

desirability or undesirability of a Society or Corporation has been taken care of by the Legislature and therefore the inclusion of the Society in the Schedule of the Ordinance was final and it was not open to the Cooperative Judge or any other authority to hold otherwise. Mr. Khalid M. Ishaq thus commented at length upon the recent financial scandal in the country which deprived poor

widows and orphans of their money lying with the societies necessitating the Federal Government to intervene and to appoint a Commission headed by a Judge of the Supreme Court and two Judges of the High Court to make a probe into the working and management of such societies. Alongwith the written statement filed by the provincial Government, writ petition of Mr. Abdul Majid, petitioner in Writ Petition No. 6607 of 1992 running into more than 30 pages was also attached. Mr. Khalid M. Ishaq took pains to take us, through the aforesaid statement and thus placing reliance upon the statement of Mr. Abdul N-lajid, it was argued that the aforesaid society and its sister societies were involved in huge financial irregularities and had not accounted for the funds and thus, it was vehemently argued that thus Ordinance was promulgated on the basis of the Commission's Report and since the Cooperative Societies was a Provincial subject, therefore, the Province had the authority to legislate on the subject. It was also contended that the requirements of the principles of natural justice have been complied with, inasmuch as, hearing was given to 102 societies by the Commission as specified in the schedule. It was next contended that the Commission's Report was source of inspiration to promulgate the impugned legislation and out of respect, it should not be struck down because with strict compliance of Article 3 of the Constitution prohibiting the exploitation, the Ordinance was brought into force. It was further argued that no right is absolute and reasonable restrictions can be imposed and special laws can be made touching the fundamental rights contained in the Constitution. It was also argued that Article 18 envisages lawful trade and not a trade as was being carried on by the petitioners/societies. By placing reliance upon *Dalmia's case* reported as AIR 1958 SC 538, it was argued that no absolute right exists or vests in a person and the acquisition of property by operation of the Ordinance was done law full and since no absolute right with respect to the property vests in any person., therefore, there has been no violation of fundamental rights. It was next contended that it was a policy matter and to implement the same, the impugned Ordinance was promulgated and none has a vested right to be heard before action complained of was taken. In this behalf, the reliance was also placed upon the judgment reported as *H.S.S.K. Niyami v. Union of India* AIR 1990 SC 2128.

It was also contended that since the petitioner/societies will be heard by the Cooperative Board or the cooperative judge they had also right of appeal before the supreme court fore opportunity of indirect hearing has been provided to the petitioners/societies and once such opportunity of indirect hearing has been provided, therefore, on the basis of the judgment reported as (1972) 3 AER 1019-1026, it would amount to sufficient opportunity of hearing.

The learned counsel also placed reliance upon the majority view as enunciated by the Indian Supreme Court in the judgment reported as *Joseph Kuruvilla Vellukunne v. Reserve Bank of India* AIR 1962 SC 1371. It was further argued that recently, the Supreme Court of Pakistan has entered the arena of litigation for the public welfare under Article 184(3), therefore, the appointment of a judge of the Supreme Court as a Cooperative Judge in the Ordinance is one of the repercussions of such public welfare litigation and, therefore, the same cannot be questioned. It was contended that since it

was a beneficial legislation which would bring money disputes to an end, therefore, the Province had selected a Judge of the Supreme Court to act as persona designata and such an appointment does not have the effect of creating a new jurisdiction.

On the question of repugnancy of the Ordinance to Article 2A of the Constitution, Mr. Khalid M. Ishaq argued that in fact the provision of Article 2-A required the review of the judgment delivered by the Supreme Court of Pakistan in Fauji Foundation case. In fact, the learned counsel frankly conceded that the entire complexion has been changed by virtue of incorporation of Article 2A into the Constitution making Objectives Resolution enforceable and, therefore, the judgment delivered by the Supreme Court in Fauji Foundation case is not strictly applicable.

Mr. Maqbool Elahi Malik, the learned Advocate-General, Punjab also argued and supplemented the arguments advanced by Mr. Khalid M. Ishaq. The learned Advocate-General contended that the law can be made touching the fundamental rights on the basis of the reasonable classification and in this case the selection of 102 Societies and to treat them as undesirable was based upon reasonable classification because the Commission had found them as defaulting Societies. It was also contended that a number of hearings were afforded to 137 Societies but only 102 Societies found involved in the commission of illegalities.

We have heard the learned counsel at length, and have gone deeply into this debacle. We cannot help but to observe unpardonable criminal negligence and inefficiency on the part of the Regulatory Bodies. The first and the foremost question which stares into one's face, is had the provisions of the Cooperative Societies Act become redundant, nugatory and inoperative ?The

-obvious answer is "No". in our country, we are slowly and gradually destroying every Institution inch by inch. Similar is the position of the State Bank of Pakistan; it is Banker of the Banks, and it is regrettable to note that the State Bank also remained a silent spectator over the illegal banking business not only carried by Cooperative Societies but also by the Finance Companies in the past which have had the opportunity to pilfer the huge amount of the poor depositors. The Provincial Government has got a full-fledged Cooperative Department and the Registrar is a statutory functionary and also performs functions under the Act. Fortunately or unfortunately both these functionaries did not care to watch the affairs of the Societies.

The Cooperative Societies Ad, 1925 exhaustively deals with the Registration .Rights and liabilities of members, Duties of the Societies, Privileges of Societies, Property and Funds of Societies including the Restrictions on loans, Restrictions on borrowing and also Restrictions on other transactions with non-members. It also deals with the Investment of funds, Restrictions on dividend. The Act also provides for the Inspection of Affairs by the Registrar. Under section 44-B, the Registrar can also exercise **power** under section 50-A in the course of an inquiry or inspection. **Chapter VIII** deals with the Liquidation and Arbitration.

We are not prepared to believe **that these functionaries did SO know** what was happening under their nose. Similarly, under the Banking Companies Ordinance provisions have been made enabling the Governor State Bank **to take** such action which is necessary *to* check the illegal banking business the banking company Ordinance is -also- an exhaustive Act and the Page should be scan 487 illegal, banking amounts to an offence and for. that, a person could be prosecuted after affording an opportunity of hearing by a person no less than the Governor of the State Bank of Pakistan. As it is usual, in our affairs, it is deplorable that no timely action was taken. The Commission appointed by the Federal Government to look into the affairs of the Cooperative Societies has also lamented upon this aspect of the case and we subscribe to the views expressed by the Commission on the subject.

The next crucial question falling for determination is whether on the enforcement of the impugned Ordinance, the power of the judicial review has been assumed by the legislature and particularly *by virtue of section 4 and the schedule to the ordinance*, whereby, 102 Cooperative Societies with one stroke of pen have been declared to be undesirable. In this behalf, we will have to examine the arguments advanced by Mr. Khalid M. . Ishaq, Advocate, that the impugned Ordinance is based upon the finding of the Commission and also on the basis of the statement of Ch. Abdul Majid of National Industrial finance Corporation recorded by the Commission. We were taken through the statement of Ch. Abdul Majid; but question is; what is the legal efficacy of such statement. The answer to this question is provided in section 6 of the Pakistan Commissions of Inquiry Act, 1956 under which it was constituted, which reads as under:--

"Statements made by persons to the Commission.--- No statement made by a person in the course of giving evidence before the Commission shall subject him to or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement--

- (a) is made in reply to a question which he is required by the Commission to answer; or
- (b) is relevant to the subject-matter of inquiry."

In this view of the matter, we are of the view that such statement of Ch. Abdul Majid of National Industrial Finance Corporation could not have furnished any basis to the Provincial Government to promulgate an Ordinance. The law-maker ought to have taken note of the aforesaid legal position and thus, we are persuaded to hold that such statement could not provide an adequate basis to promulgate an Ordinance. Such statement could at the most highlight the mismanagement of the affairs. Similarly, those Cooperative Societies which were heard by the Commission and were treated as defaulting societies could not have empowered the Provincial Governor to promulgate an Ordinance without complying with the other prerequisites for framing such laws. In nutshell, the adverse finding by the Commission would not absolve the Provincial Governor or the Provincial Legislature to depart from the law and the Constitutional provisions. The Commission was cognizant of this fact and 'that is why, the Commission laid down the necessity to legislation for the winding up of these societies. Unfortunately, the recommendations of the Commission were also not looked into, particularly, **with** regard to the provision of a special tribunal headed by a Sessions Judge to try the offenders. Furthermore, guidance could have been taken from the provision of the Cooperative Societies Act or the Companies Ordinance providing for elaborate procedure to proceed with the winding up of that company, The report of the Commission could not have compelled the Provincial Governor to frame at, Ordinance in a haste, particularly, when the High Court had taken care of the situation, and a Division Bench of this Court had constituted a Committee to arrange for the distribution of funds to the depositors. We may further clarify that a propaganda came to light that although the Government was desirous to arrange for the distribution of funds but the Courts were standing in its way. We would unhesitatingly affirm and declare that no such intention could be attributed to the Courts which ' had taken all the possible measures to grant relief to the depositors. In this context, we sent for the original file from the Law Department with regard to the circumstances, in which, the Ordinance was promulgated. The Ordinance as framed was not approved by the Law Department and the Secretary to the Provincial Law Department opined that the Ordinance was ultra vires of the Constitution and Government or Cooperative Department insisted that the Ordinance was intra vires and, therefore, under the rule of business, instead of making reference to the Cabinet, the opinion of the Advocate-General was sought. Although it is a privileged communication but the learned Advocate-General, Punjab, agreed with the Cooperative Department and thus, the Ordinance was promulgated. At this juncture, as already discussed by us above, that as to how, are destroying institution, the act of promulgate Ordinance also seems to be an attempt to hoodwink the Chief Executive of the Province with regard to the misdeeds of those officials who were at the helm of affairs in the Cooperative Department.

It was conceded before us that the promulgation of the impugned Ordinance was necessitated by the report of the Commission of Inquiry. it is obvious that the nature of the proceedings conducted by the Commission were inquisitorial in nature; it had highlighted upon its terms of reference and had also made recommendations. The Commission had itself observed that the matter of ascertainment of the properties and assets of the Cooperative Societies as well as that of their Directors, **Officers and Members could not** possibility be , unsolved by the Commission and it had neither, **the** means nor tune nor the authority to give, a binding determination after admitting evidence of the party, for and against their respective version, the proceedings being inquisitorial rather than adversary. We would unhesitatingly observe that findings arrived at by the Commission would not clothe any authority, or confer D or enable or authorize any authority whatsoever to make any law or to pass any such order in derogation of the law and the Constitution. On the other hand, the report of the Commission would have put the Authorities including Legislature at guard to proceed strictly in accordance with law to follow or to adopt its recommendations. Furthermore, such finding by the Commission cannot permit any Legislature or the Provincial Governor as the case may be to act in disregard to the principles of natural justice and the law on the subject.

It is now established and enshrined principle of our jurisprudence that even though, a piece of Legislation does not contain the provision for the compliance of natural justice, the same have to be read into it unless the statute itself by implication or otherwise dispenses with such compliance. The I report of the Commission cannot be considered as a legal or proper substitute 1 for the strict compliance of the principles of natural justice and law and, 11 therefore, the argument that in a way, indirectly, the societies have been heard F by the Commission is fallacious. In this behalf, the salutary principle contained in Article 4 of the Constitution cannot be lost sight of; which reads as under:--

#### "Article 4. Right of individual

..--(I) To enjoy the protection of law and to be treated -in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.

(2) In particular ---

- (a) no action detrimental to the life, liberty, body, reputation, property of any person shall be taken except in accordance with law;
- (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

This Article was subject of interpretation by the Dacca High Court following observations were made by that august Court in the case reported as Ghulam Zamin v. A.B. Khondkar P L D 1965 Dacca 156-

"The argument advanced on behalf of the respondents presupposes that a vague, indefinite and wide power has been vested in the executive to invade upon the proprietary rights of citizens and that such invasion cannot be subjected to judicial scrutiny if it is claimed that it is a merely executive order. This is not the position in law. Any invasion upon the rights of citizens by anybody, no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country.

20.' The aforesaid principle is embodied in Article 2 of our present Constitution. The said Article 2 is a codification of the ever-growing and elastic concept of "due course of law" as conceived in the American Constitution and is now embedded in our Constitution as a doctrine which cannot be altered by the ordinary machinery of legislation. It is only a **Constitutional amendment which can effect an** alteration in the said provisions. We shall revert to it hereafter."

Similarly, in this context, it will also be advantageous to reproduce the equality clause contained in Article 25 of the Constitution as well as Articles 24 and 18 of the Constitution.

"Article 18. Freedom of trade, business or profession.-- Subject to such qualifications, if any, -as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business, provided that nothing in this Article shall prevent--(a) the regulation- of any trade or profession by a licensing system; or

(b) the regulation of trade, commerce or industry in the interest of free competition therein; or

(c) the carrying on by the Federal Government or a Provincial Government, or by a Corporation controlled by any such Government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons.

Article 24. Protection of property rights.--(1) No person shall be compulsorily deprived of his property save in accordance with law.

No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law, which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

(3) Nothing in this Article shall affect the validity of--

(a) any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or

(b) any law permitting the taking over of any property which has been acquired by or come into the possession of any person by any unfair means, or in any manner contrary to law-, or

(c) any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be, evacuee property under any law or

(d) any law providing for the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or

(e) any law providing for the acquisition of any class of property for the purposes of--

(i) providing education and medical aid to all or any specified class of citizens; or



„(ii) providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or

(iii) providing maintenance to those who on account of unemployment, sickness, infirmity or old age are unable to maintain themselves; or

(f) any existing law or any law made in pursuance of Article 253.

(4) The -adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any Court.

Article 25. Equality of citizens.--(1) All citizens are equal before law and are entitled to equal protection of law.

(1) There shall no discrimination on the basis of sex alone.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

The precis is , in the light of the Articles reproduced above is weather the impugned Ordinance is *ex facie* discriminatory and if you , what is the criterion of yard stick on- -'the -basis- of which 102 societies **specified** -.,in,- the schedule have been held to be undesirable. Unfortunately, the Ordinance is silent on this issue. In this view of the matter, we can legitimately hold that the Provincial Governor while promulgating the Ordinance also assumed and exercised judicial **power** which he could not have done under the scheme of, Constitution.

It was frankly conceded before us by Mr. Khalid M. Ishaq that after the incorporation of Objectives Resolution in the Constitution as Article 2A and same having become enforceable by the Courts, the ratio of the judgment delivered by the Supreme Court of Pakistan in Fauji Foundation case P L D 1983 SC 457 loses its significance and to understand the scope of the argument it will be advantageous to reproduce relevant portion of Article 2A Of the Constitution which reads as under:--

"Preamble.-- Whereas sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;

And whereas it is the will of the people Of Pakistan to establish an order---

Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice and freedom Of thought, expression, belief, faith, worship and association subject to law and public morality.

Wherein the independence of judiciary shall be fully secured.

The rule for the interpretation of the Constitution as laid down by the Supreme Court in Jabindra Kishore's \_case PLD 1957 SC 9 is that it is a fundamental canon Reconstruction -that a Constitution should receive **Llitsr-41** especially with respect to those provisions which were designed to safeguard the fundamental rights.

The independence Of judiciary is, thus, a most sacred pillar on which the edifice as a safeguard against every type Of injustices, i.e. social, political and economic has to stand and no inroad into the fundamental rights guaranteed to a citizen including the equality of status, and of opportunity before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and association can be made by the executive. However, as it is well-established that subject to law and public morality on the basis Of reasonable classification, the Legislature can regulate the exercise of such rights guaranteed in the Constitution but in the light of the independence Of judiciary, having been secured, guaranteed and being essential part Of our grund norm, the same is enforceable.

in this view of the matter, the scheme Of trichotomy of power as envisaged under the Constitution, into three organs Of the State i.e. executive, legislature and judiciary gains importance and, therefore, none of these organs can make inroad or transgress the sphere of others. Thus, taking of adverse action against any person or body on the basis of its misdeeds, if any, is nothing but exercise Of judicial power. In exercise of such power, it has to be seen whether care to comply with law and opportunity Of being heard as a principle of natural justice was provided before taking any adverse action. The concept of independence of judiciary as guaranteed and enforceable under our Constitution would not

authorise the legislature or the Provincial Governor to enunciate a legislative judgment through a piece of legislation. in this behalf, a reference to the pronouncement of this Court reported as *Naseer Ahmad Khan v. Province of West Pakistan* P L D 1980 Lah. 684 would be useful. In the aforesaid case, a piece of legislation with regard to the acquisition of land was subject to the determination of this Court. While considering the scope of the function of each organ of the State, this Court observed as follows:--

"But the fact that Court can look into the contents of the preamble does not necessarily mean that in all events, it can either start an enquiry or an inquest that the facts stated therein are not correct. It is for the Legislature to see the facts as it finds and proceed on their basis. It is its judgment of the facts and the situation requiring legislation. The Courts do not sit as Appellate Authority of facts over the legislature. Both the institutions are separate and independent in their own sphere it is only where the Constitution permits one or the other to pass judgment or overrule the other, otherwise, each functions within the domain."

observed that act of Legislature confiscating or It was further acquiring property of a named individual held would not enter into the idea of law. After the pronouncement of the Supreme Court in *Fauji Foundation case* PLD 1983 SC 457, the august Court in the judgment reported as *Government of Sindh and another v. Sharaf Faridi* 1990 SCMR 91 again upheld the majesty of the Constitution by holding that usurpation of the judicial power was unknown to our Constitution. Similar view was adopted earlier by the Sindh High Court in the judgment reported as *Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan* PLD 1989 Kar. 404. On this

question, the judgments of Indian Jurisprudence are also available and with convenience, one can cite *Bihari Lai v. Ramcharan* AIR 1957 (MP) 165, in which the term judicial -power has been dilated upon. Similarly in another judgment reported as *Sint. Indira Nehru Gandhi v. Shri Raj Narain* AIR 1975 SC 2299, it was laid down that the judicial power cannot be taken away. The Federal Court of India also followed this view in judgment reported as *Piare Dusadh and others v. Emperor* AIR 1944 FC I and it was held that the judicial power cannot be exercised by the legislature. The latest view of the Supreme Court as enunciated in *Government of Sindh and another v. Sharaf Faridi and 3 others* 1990 SCMR 91 is departure from the ratio of the judgment of *Fauji Foundation case* PLD 1983 SC 457, inasmuch as, at the time of the decision in the latter case, the Article 2A of the Constitution had not been made enforceable. Mr. Sharifuddin Pirzada while making brilliant exposition of this concept placed reliance upon a judgment of Australian High Court whereby the law as to the dissolution of Communist Party was struck down; reported in 1951 Vol. 83 CWLR 261.

On the question of judicial power, the Judicial Committee of the Privy Council also upheld the supremacy of the said concept in the two judgments reported as *Shell Company of Australia v. Federal Commissioner of Taxation* 1931 Appeal Cases 275 and *Labour Relations Board v. John East Iron Works* 1949 Appeal Cases page 134.

Mr. H.M. Seervai in his commentary upon Constitutional Law of India in Vol. II discussed the concept of judiciary; he had gone to the extent of laying down that adverse action 'must precede by a finding of the tribunal and if such power is exercised by the legislature, it would be Ultra vires of the Constitution.

In nutshell, we hold that trichotomy of power into three organs of the State namely legislature, judiciary and executive in our Constitution lays down the most splendid system on the basis of which, a country is to be run and with the introduction of Article 2A, the Objectives Resolution having become enforceable, the ratio of the judgment in *Fauji Foundation case* P L D 1983 SC 457 would not help the opposite side and therefore we hold that the judicial power cannot be - exercised by **the legislature and** every adverse action must precede by a finding of a tribunal and any action in its derogation would amount to legislative judgment which is not permissible by law.

Mr. Sharifuddin Pirzada also argued that the Ordinance was privilege and an enactment without legislative competence, is to be struck down. It was also rightly contended by him that it was a bill of attainder being one of pains and penalties. Mr. Sharifuddin Pirzada next contended that the impugned Ordinance was repugnant to the Injunctions of Islam. Our attention was drawn to the judgment of Shariat Appellate Bench of the Supreme Court reported as *Federation of Pakistan v. The General Public* PLD 1988 SC 645. Undoubtedly, this is most illuminating judgment touching the fundamental issues and highlighting the Majesty of Islam. It was observed by my Lord the Chief Justice of Pakistan Mr. Justice Muhammad Afzal Zullah that "Limitation human rights must be subordinated to the most fundamental of all the human rights in the Islam the one which cannot at all be abridged by any limitation namely right to justice. While dealing with the Security of Pakistan act, certain amendments were suggested by the said august Court so as the legislation may conform to the Injunctions of Islam.

In the judgment of Shariat Appellate Bench of the Supreme Court referred to above, it was also laid down that right of hearing was acknowledged in Islam and the application of this principle would depend upon the circumstances and the situation vis-a-vis the law, each case and in the context of the particular action. As we have already observed that the report of the Commission, the source on the basis of which, the impugned Ordinance was made, was not a judgment but

was an enquiry confined to the terms of Reference and, therefore, in the light of its recommendations, the law could be made and it had to conform with the Injunctions of Islam, Constitution and the fundamental principles enshrined in our jurisprudence and, therefore, such legislative judgment declaring 102 societies undesirable enumerated in the schedule to the Ordinance cannot be upheld. The declaration of these Cooperative Societies as "undesirable" without a criterion or yardstick in the Ordinance itself amounts to usurpation of the judicial power by the legislature and such adverse action must have preceded by a finding in exercise of the judicial power and the report of the Commission in the light of its own observation cannot be equated with the judgment. However, following the judgment of the Shariat Appellate Bench of the Supreme Court reported as Federation of Pakistan v. The General Public PLD 1988 SC 645, we would further suggest amendment in the impugned Ordinance so as to make it workable and intra vires of the Constitution.

It would have been in the fitness of things if the Ordinance making authority would have provided a definition of "Undesirable societies" and to have also laid down a yardstick or criterion to hold it so as provided under the Cooperative Societies Act, 1925. It would have been further advantageous for the Legislature to have left it to the Court concerned to determine whether a particular cooperative society falls within the jurisdiction of the aforesaid definition or not. It would have been appropriate if alongwith this, the Court was also given the power to consider the question of the winding up of such society or not.

On the basis of Article 17 of the Constitution, it was also argued that the impugned legislation is void being repugnant to the fundamental rights as guaranteed by the said Article. In this behalf, by making a reference to the judgment reported as Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57, the learned counsel for the petitioner Mr. Sharifuddin Pirzada submits that the argument as to the repugnancy of amendment in the Political Parties Act being ultra vires. was repelled but the latest view on the subject is contained in the judgment delivered by the Supreme Court reported as Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 146. In this case, the amendment incorporated in the Political Parties Act by virtue of section 6 empowering Federal Government to dissolve a party and to forfeit its funds by merely issuing a Notification in the Gazette was held to be violative of the fundamental rights. It was thus argued that similar is the situation arising from the impugned Ordinance because by virtue of the operation of the Ordinance all the scheduled Cooperative Societies stood dissolved and their properties, assets stood vested in the Registrar and, therefore, the Ordinance is repugnant to the fundamental rights guaranteed by Article 17 of the Constitution and it should be declared to be void. In this behalf, we will hold that the enjoyment of every right is subject to reasonable classification and restrictions as contained in the Article itself. Unfortunately, in the impugned Ordinance, no classification has been mentioned and as observed earlier, no yardstick or criterion has been laid down to hold a society undesirable, therefore, we are of the view that arbitrary powers emerge from the Ordinance, particularly, by virtue of sections 4 and 12 read **with Schedule** to the Ordinance, whereby, 102 Cooperative Societies enumerated in the Schedule stand dissolved. The frame of the Ordinance also did not visualise the agony of the depositors, although, certain Cooperative Societies before us, by submitting a report of its funds, undertook to make repayments to its depositors as it was contended by them that their assets were more than their liabilities.

Adverting to the repugnancy of the Ordinance with Article 14 of the Constitution, we are of the view that acquiring the properties and assets of the Societies and then to vest the same in the Registrar is nothing but the exercise of despotic and arbitrary power. The provision ought to have been made to see as to whether such property could be made to vest without a proper enquiry as to the nature of its ownership.

The learned Deputy Attorney-General by placing reliance upon two judgments reported as Syed Sharifuddin Pirzada v. Federation of Pakistan PLD 1973 Kar. 132 and Sher Khan v. Regional Transport Authority and 4 others PLD 1995 Kar. 614 argued that where generally or through a general order, whole class of persons is affected then in the said event, the principle of natural justice would not be attracted. It was also argued that if adverse orders are passed against large number of persons then an aggrieved person cannot successfully argue that the legislation was bad being violative of the principles of natural justice. The Deputy Attorney -General next contended by placing reliance upon the judgment from Indian jurisprudence reported as Tulsipur Sugar Co. v. Notified Area AIR 1980 SC 882 and Siddique v. Market Committee 1983 SCMR 785 to the effect that the vires of the Ordinance cannot be challenged being violative of the principles of natural justice. The learned Deputy Attorney-General also placed reliance upon the Fauji Foundation case reported as PLD 1983 SC 457.

We have, carefully considered and gone through these judgments but with utmost respect, we are unable to agree with the principles laid down in the aforesaid judgments because they do not relate to the legislative judgments as has been done by virtue of this Ordinance. Furthermore, at the time when these cases were decided, Article 2A was not available as enforceable clause in

the Constitution. as already held by us, we would reiterate that the impugned Ordinance by usurping judicial power was passed and framed to declare 102 societies as undesirable which was a function exclusively resting upon the exercise of the judicial power rather than the legislative power.

As to the contention raised by the learned Deputy Attorney-General that the petitioners/Cooperative Societies registered under the Cooperative Societies Act, 1925, not being citizens, cannot **complain of the violation of the** fundamental rights; the learned Deputy Attorney-General relied upon Government of Pakistan v. Zamir Ahmad Khan PLD 1975 SC 667, Government of Pakistan v. Akhlaque Hussain PLD 1965 SC 527 and a judgment from Indian jurisprudence reported as State Trading Corpn. v. Commercial Tax Officer Alk 1963 SC 1811. In this behalf, we noticed that Article 4 of the Constitution lays down the right of the citizens to enjoy the protection of law and to be treated in accordance with law. Under Articles 9 and 10 the word "Person" has been used. Articles 11, 12, 13 and 14 also highlight the right of the "persons". Articles 15, 16, 17, 18, 19 and 20 lay emphasis on the right of citizens. Articles 21, 22 and 24 use the expression of "person" whereas Articles 23 and 25 use the express of "citizen". Articles 26 and 27 again guarantee the right to citizens. We have carefully considered this aspect and Mr. Khalid M. Ishaq frankly conceded that after the introduction of Article 2A in the Constitution, it cannot be argued that a Cooperative Society H cannot complain the violation of the fundamental rights. Mr. Sharifuddin Pirzada argued that at on point of time, the Indian Supreme Court also held the same view but the said concept underwent a change. Our attention was drawn to two judgments of the Indian Supreme Court reported as State Trading Corporation v. The Commercial Tax Officer AIR 1963 SC 1811 and Indo-China Steam Navigation v. Jasjit Singh AIR 1964 SC 1140 and also in the judgment of the Bank Nationalization case reported as Rustam Cavasjee Cooper v. Union of Inida AIR '1970 SC 564. Similarly, we were also taken through the judgment ' t of the Indian Supreme Court reported as Bennett Coleman & Co. v. Union of India AIR 1973 SC 106. In all these judgments, it was held that a Corporation was competent to invoke the Constitutional jurisdiction of the Court to enforce fundamental rights. In another judgment reported as AIR 1974 SC 1300, it was held that although, a Corporation cannot file a writ petition but the validity of an impugned legislation can be examined.

Similarly, in another judgment of the Indian Supreme Court reported as Godhra Electricity Co. v. State of Gujarat AIR 1975 SC 32, it was laid down that a Corporation was competent to file a writ petition and similar is the view of Mr. H.M. Seervai, an author on the Indian Constitution. In this behalf, in our jurisprudence, sight cannot be lost of the provision of Article 2A of the Constitution and also a judgment of the Federal Court reported as The Members of the National Assembly PLD 1989 FSC 9 and Federation of Pakistan v. Public-at-Large PLD 1991 SC 459. In both the judgments, the concept of equality in Islam was considered and was held that it was wider in Islam as compared to, other jurisprudence. In this context, reference can also be made to the enforcement of Shariah Act X of 1991 under which interpretation of laws in regard to the fundamental concepts of Islam as envisaged by Islam are to be adopted, therefore, we repel the arguments raised by the learned Deputy Attorney-General.

It was also half-heartedly attempted to contend that after the insertion of Chapter 3-A in the Constitution and in the light of Article 203-G and after the establishment of Shariah Courts, Article 2-A' cannot' be enforced under Article 199 of the Constitution of Islamic Republic of Pakistan. The argument I is devoid of force because as already observed that the grund norm, the S Objectives Resolution having become enforceable in the Constitution, no clog or fetter can be on the powers conferred upon this Court under Article 199 of the Constitution to examine any act on the touchstone of Article 2A. There is no clog or fetter nor it can be placed upon the powers of this Court to examine the validity of any act or law and to declare it unconstitutional if repugnant to Islam. Hence we are not impressed with this argument.

Now we will advert to the powers of Provincial Legislature or Governor to deal with or to legislate upon a Federal subject. The crucial question is whether the Provincial Legislature or the Governor in exercise of his power to promulgate an Ordinance can legislate with respect to the Judge of the Supreme Court of Pakistan or to assign him any function under a provincial law. To examine this aspect, we have to take into account various provisions of the Constitution. The Judicature is contained in Constitution under Part VII, Chapters 1 and 2. Article 177 dealing with the appointment of the Judge of the Supreme Court reads as under:--

"The Chief Justice of Pakistan shall be appointed by the .President and each of the other Judges shall be appointed by the President after consultation with the Chief Justice.-

Article 180 about the appointment of Acting Chief Justice reads as

Acting Chief Justice.--- At any time when ---

(a) the office of Chief Justice of Pakistan is vacant; or

(b) the Chief Justice of Pakistan is absent or is unable to perform the functions of his office due to any other cause, the President shall appoint (the most senior of the other Judges of the Supreme Court) to act as Chief Justice of Pakistan.

Under Article 181 Acting Judges and under Article 182, ad hoc Judges of the Supreme Court can be appointed. Under Article 184, the original jurisdiction of the Supreme Court has been defined and it reads as under:--

(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

Explanation .--In this clause, "Governments", means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

Similarly, the appellate jurisdiction of Supreme Court has been defined under Article 185. Under Article 186, the advisory jurisdiction has been conferred upon the Supreme Court of Pakistan on a reference made to it by the President of Pakistan on a question of law of public importance. Under Article 186-A, the Supreme Court can in the interest of justice transfer any case from one High Court to another High Court. Chapter III deals with the High Courts.

Article 70 of the Constitution contains the legislative procedure and reads as under:--

Introduction -and passing of Bills.--- (1) A bill with respect to any matter in the Federal Legislative List or in the Concurrent Legislative List may originate in either House and shall, if it is passed by the House in which it originated, be transmitted to the other House; and if the Bill is passed without amendment by the other House also, it shall be presented to the President for assent.

(2) If a Bill transmitted to a House under clause (1) is rejected or is not passed within ninety days of its receipt or is passed with amendment, the Bill, at the request of the House in which it originated shall be considered in a joint sitting.

(3) If a request is made under clause (2), the President shall summon a joint sitting, and, if the Bill is passed in the joint sitting with or without amendment by the votes of the majority of the total membership of the two Houses, it shall be presented to the President for assent. .

In this Article and the succeeding provisions of the Constitution "Federal Legislative List" and "Concurrent Legislative List" mean respectively the Federal Legislative List and the Concurrent Legislative List in the Fourth Schedule).

The Distribution of Legislative Powers finds mention under Articles 141 to Articles 143 of the Constitution and reads as under- .

141. Extent of Federal and Provincial Laws.- Subject to the Constitution Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan and the Provincial Assembly may make laws for the Province or any part thereof.

142. Subject-matter of Federal and Provincial Laws.- Subject to the Constitution:

(a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;

(b) Majlis-e-Shoora (Parliament) and a Provincial Assembly also shall have power to make laws with respect to any matter in the Concurrent Legislative List;

(c) A provincial Assembly shall and Majlis-e-Shoora (Parliament) shall not have power to make laws with respect to any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List; and

(d) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to matters not enumerated in either of the lists for such areas in the Federation as are not included in any Province.

143. Inconsistency between Federal and Provincial Laws.--If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent Legislative List, then the Act of Majlis-e-Shoora (Parliament) whether passed before or after the Act of the Provincial Assembly, or as

the case may be, the existing law shall prevail, and the Act of the Provincial Assembly shall to the extent of the repugnancy, be void. It is thus obvious under the scheme of the Constitution that Parliament has the exclusive power to make laws with respect to any matter in the Federal Legislative List. The Federal Legislative List has been given in Schedule IV of the Constitution. \_

In -the light of the above-referred provisions of the Constitution read with Item 55 of the Federal Legislative List, it is obvious that with regard to the enlargement of the jurisdiction of the Supreme Court and conferring thereon of any supplemental power falls within the exclusive domain of the Parliament. The Provincial Legislature has no power that so ever deal with or to legislate with any matter in the Federal Legislative List. In this context, the Constitution of Pakistan jealously guards the power of the Federal Government and the Provincial Government, and neither of them can make inroad into the domain of the other. In this behalf, it will be advantageous to refer to Articles 90 and 97 of the Constitution of Islamic Republic of Pakistan. Under the former 'Article, the exercise of the executive authority of the federation shall not be deemed to transfer to the resident any functions conferred by any existing law on the Government of any Province or other authority, nor it shall prevent the Parliament from conferring by law functions authorities other than the President. Similarly, under the latter Article, i.e. 97, the executive authority of the federation shall extend to the matters with respect to which the Parliament has power to make laws including exercise of rights, authority and jurisdiction and under proviso to Article 97, the executive authority of the federation shall not, save as expressly provided in the Constitution or in any law made by the parliament extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws. The executive authority of the Province has been defined in Article 137;-- Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws; The proviso to Article 137 of the Constitution reads as under:--

"Provided that in any matter with respect to which both Parliament and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the' Constitution or by law made by the Parliament upon the Federal Government or authorities thereof."

In the light of these provisions, it is crystal clear that the Provincial Legislature or the Governor cannot legislate or deal with any of the subjects to be dealt with or to be legislated upon by the Federal Government. In this behalf, therefore, we have no hesitation to hold that the appointment of a Judge of the Supreme Court as Cooperative Judge under the Ordinance is unconstitutional and beyond the legislative competence of the Provincial Governor. Similarly, the provision of section 22 of the Ordinance providing for an appeal before the Supreme Court of Pakistan against the final order of a Cooperative Judge is also violative of the Constitution because the matter pertains to the conferment of jurisdiction of the Supreme Court or in other words, the enlargement of such jurisdiction, as envisaged by the Supreme Court of Pakistan. In this behalf, a reference to the provisions of Articles 212 and 212-B would be relevant and it is thus obvious that only by way of the Constitutional provisions, an appeal to the Supreme Court was provided. No such jurisdiction can be conferred or enlarged with reference to the Supreme Court of Pakistan in view of the legislative incompetence of the Provincial Legislature in the light of Item 55 of the Federal Legislative List as contained in Schedule IV of the Constitution.

It is also interesting to note that under section 12 of the Ordinance; existing Undesirable Cooperative Societies would cease to function and under section 13 winding up of Undesirable Cooperative Societies is provided for. Under section 13; as soon as after the commencement of the Ordinance, if the Registrar makes a petition to the Cooperative Judge for winding up of Undesirable Society, the Cooperative Judge as argued by Mr. Khalid M. Ishaque, Advocate is left with no discretion but to pass an order thereof for its winding up and the appointment of a Cooperative Board as Liquidator. Under section 13(2), interim order can be passed by the Cooperative Judge appointing a Board as a Liquidator without notice to the society and under section 22, an appeal lies before the Supreme Court against the order of a Cooperative Judge. The reading of the Ordinance is very strange; the cooperative Judge has nothing to do under the Ordinance but to pass an order appointing a Cooperative Board as a Liquidator. As far as the Cooperative Board is concerned, the same has to be appointed by the Provincial Government. In this context we are of the view that the appointment of a Cooperative Judge under the scheme of the Ordinance is nothing but a decorative appointment and the real power again lies with the bureaucratic set-up which as observed earlier is responsible for all this financial debacle. The upshot of the above discussion is that the provisions of sections 4, 12 and 13 of the Ordinance read with the Schedule to the Ordinance amounts to legislative judgment by usurping the judicial power and, therefore, are violative of the fundamental rights and Article 2A of the Constitution and thus cannot be saved being unconstitutional illegal and violative of the principles of natural justice. Similarly, the appointment of a Judge of the Supreme Court as a Cooperative Judge and conferring appellate jurisdiction on the Supreme Court are also beyond the legislative competence of the Provincial Governor or X the Legislature. In this view of the matter, we allow these petitions and hold that the action taken under the Ordinance against 102 Cooperative Societies mentioned in the schedule is without lawful authority and jurisdiction.

In this behalf, we will be failing in our. duty, if we do not direct the competent authority to give priority and to introduce such a mechanism whereby agony of the depositors comes to an end and easy procedure is laid down for satisfying the claims of such depositors. In this behalf, the appointment of a Committee by this Court is a food for thought for the

competent authority because in this way neither the Cooperative Society nor the bureaucratic set-up as created by the Ordinance would be in a position to deal with the assets and the unclaimed finds in a manner otherwise than in accordance with law. The competent authority shall also consider the offers of these societies, the financial position of which, permits the payments to the depositors and for the satisfaction of the claims of the depositors without the intervention of the third party. No code or system or procedure can be rendered ineffective provided the same is implemented diligently and honestly. The appointment of the Cooperative Board and its composition is also against the recommendations of the Commission, inasmuch as, again wide powers have been conferred upon the Governor to pick and choose which may further aggravate the situation rather than to remedy the same.

Adverting to the Writ Petition No.5353 of 1992 Faisal Dilawar Khan v. Government of Punjab etc. it was argued that 17 members of the same family have formed themselves into a cooperative society and the society never dealt with the banking business and no deposit was taken and only a house was purchased. Obviously when there is no liability, this society cannot be declared as undesirable and to treat it as such is also without lawful authority and jurisdiction. Similar is the position in Writ Petition No.4858 of 1992 filed by Muhammad Ramzan against Registrar, Cooperative Societies. While arguing Writ Petition No.4653 of 1992, Hamid Riaz v. Province of Punjab it was submitted that it was not a society but it was only a Benamidar and the property was purchased on its name and reconveyance had been drafted and signed by the respondent No.3 and in fact only six properties were purchased. Obviously the transaction on the face of it requires scrutiny and it cannot be declared as undesirable. Similar is the position with respect to Writ Petition No.5361 of 1992, Syed Iqbal Hussain Rizvi v. Registrar, Cooperative Societies etc. and it was argued that 17 members constituted the society and no business was transacted and it was not a financial institution but was a housing society and purchased only one property and an enquiry had been conducted into its affair under section 43 of the Cooperative Societies Act and it was found that it had no liability and the members belonged to the same family and, therefore, such society cannot be treated as undesirable. We are inclined to agree with the arguments advanced by the learned counsel and, therefore, treating the society as undesirable is also declared to be without lawful authority and jurisdiction.

Before parting with this judgment, we want to bring on the record that Sharifuddin Pirzada rendered most valuable assistance to this Court for exposition of law and facts brilliantly, We at u also thankful to Mr. Kiialid M. Ishaq, Mi. S.M. Zatar, Mr. Maqbool Elahi Malik, Advocate-General, Punjab and Ch. Muhammad Farooq, Deputy Attorney-General for Pakistan for tho pains taken by them in assisting us to resolve the controversy,  
M.B.A./B-29/1, - Petition allowed.

