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reclusion temporal maximum as the maximum period, and shall INDEMNIFY the heirs of Tortillano Suplaag in the amount of fifty thousand (₱50,000.00) pesos. Costs against accused-appellant.

SO ORDERED.

Melo, Francisco, and *Panganiban, JJ.,* concur.

Narvasa, C.J. (Chairman), on leave.

SECOND DIVISION

[G.R. No. 108905. October 23, 1997]

GRACE CHRISTIAN HIGH SCHOOL, *petitioner, vs.* **THE COURT OF APPEALS, GRACE VILLAGE ASSOCIATION, INC., ALEJANDRO G. BELTRAN, and ERNESTO L. GO,** *respondents.*

SYNOPSIS

Petitioner Grace Christian High School is an educational institution at the Grace Village in Quezon City while private respondent Grace Village Association, Inc., is an organization of lot and/or building owners, lessees and residents at Grace Village. On December 20, 1975, a committee of the board of directors of the Association prepared a draft of an amendment to the 1968 by-laws of the Association providing, among others, that "GRACE CHRISTIAN HIGH SCHOOL representative is a permanent Director of the ASSOCIATION," but the draft was never presented to the general membership for approval. Nevertheless, from 1975 to 1990, petitioner was given a permanent seat in the board of directors of the Association. However, on February 13, 1990, the Association's committee

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on election informed the principal of the school that all directors should be elected by members of the Association and that making the School representative as a permanent director of the Association should be reexamined. The School then brought suit to compel the board of directors of the Association to recognize its right to a permanent seat in the board.

The Corporation Law requires members of the boards of directors of corporations to be elected. The provision in question is contrary to law. The fact that for several years it has not been questioned but, on the contrary, appears to have been implemented by the members of the association, cannot forestall a later challenge to its validity. Nor can petitioner claim a vested right to sit in the board on the basis of "practice."

SYLLABUS

COMMERCIAL LAW; CORPORATION CODE; BOARD OF DIRECTORS; REQUIRED TO BE ELECTED; VIOLATION THEREOF FOR A LONG PERIOD CONSIDERED MERE TOLERANCE, CANNOT BE ACQUIESCED.— Sections 28 and 29 of the Corporation Law require members of the boards of directors of corporations to be elected. The board of directors of corporations must be elected from among the stockholders or members. There may be corporations in which there are unelected members in the board but it is clear that in the examples cited by petitioner the unelected members sit as *ex officio* members, *i.e.*, by virtue of and for as long as they hold a particular office. But in the case of petitioner, there is no reason at all for its representative to be given a seat in the board. Nor does petitioner claim a right to such seat by virtue of an office held. In fact it was not given such seat in the beginning. It was only in 1975 that a proposed amendment to the by-laws sought to give it one. Since the provision in question is contrary to law, the fact that for fifteen years it has not been questioned or challenged but, on the contrary, appears to have been implemented by the members of the association cannot forestall a later challenge to its validity. Neither can it attain validity through acquiescence because, if it is contrary to law, it is beyond the power of the members of the association to waive its invalidity. For that matter the members of the association may have formally adopted the provision in question, but their action

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would be of no avail because no provision of the by-laws can be adopted if it is contrary to law. It is probable that, in allowing petitioner's representative to sit on the board, the members of the association were not aware that this was contrary to law. It should be noted that they did not actually implement the provision in question except perhaps insofar as it increased the number of directors from 11 to 15, but certainly not the allowance of petitioner's representative as an unelected member of the board of directors. It is more accurate to say that the members merely tolerated petitioner's representative and tolerance cannot be considered ratification. Nor can petitioner claim a vested right to sit in the board on the basis of "practice." Practice, no matter how long continued, cannot give rise to any vested right if it is contrary to law. Even less tenable is petitioner's claim that its right is "coterminus with the existence of the association."

APPEARANCES OF COUNSEL

Padilla Law Office for petitioner.
Racela, Manguera & Fabie for private respondents.

D E C I S I O N

MENDOZA, *J.*:

The question for decision in this case is the right of petitioner's representative to sit in the board of directors of respondent Grace Village Association, Inc. as a permanent member thereof. For fifteen years — from 1975 until 1989 — petitioner's representative had been recognized as a "permanent director" of the association. But on February 13, 1990, petitioner received notice from the association's committee on election that the latter was "reexamining" (actually, reconsidering) the right of petitioner's representative to continue as an unelected member of the board. As the board denied petitioner's request to be allowed representation without election, petitioner brought an action for mandamus in the Home Insurance and Guaranty Corporation. Its action was dismissed by the hearing officer whose decision was subsequently affirmed by the appeals board. Petitioner appealed to the Court of Appeals, which in turn upheld

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the decision of the HIGC's appeals board. Hence this petition for review based on the following contentions:

1. The Petitioner herein has already acquired a vested right to a permanent seat in the Board of Directors of Grace Village Association;

2. The amended By-laws of the Association drafted and promulgated by a Committee on December 20, 1975 is valid and binding; and

3. The Practice of tolerating the automatic inclusion of petitioner as a permanent member of the Board of Directors of the Association without the benefit of election is allowed under the law.[1]

Briefly stated, the facts are as follows:

Petitioner Grace Christian High School is an educational institution offering preparatory, kindergarten and secondary courses at the Grace Village in Quezon City. Private respondent Grace Village Association, Inc., on the other hand, is an organization of lot and/or building owners, lessees and residents at Grace Village, while private respondents Alejandro G. Beltran and Ernesto L. Go were its president and chairman of the committee on election, respectively, in 1990, when this suit was brought.

As adopted in 1968, the by-laws of the association provided in Article IV, as follows:

The annual meeting of the members of the Association shall be held on the first Sunday of January in each calendar year at the principal office of the Association at 2:00 P.M. where they shall elect by plurality vote and by secret balloting, the Board of Directors, composed of eleven (11) members to serve for one (1) year until their successors are duly elected and have qualified.[2]

It appears, that on December 20, 1975, a committee of the board of directors prepared a draft of an amendment to the by-laws, reading as follows:[3]

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[1] *Rollo*, p. 12.

[2] *Id.*, p. 47.

[3] *Id.*, p. 136.

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VI. *ANNUAL MEETING*

The Annual Meeting of the members of the Association shall be held on the *second Thursday* of January of each year. Each *Charter or Associate* Member of the Association is entitled to vote. He shall be entitled to as many votes as he has acquired thru his monthly membership *fees only* computed on a ratio of *TEN (₱10.00) PESOS* for one vote.

The *Charter and Associate Members* shall elect the Directors of the Association. The candidates receiving the *first fourteen (14)* highest number of votes shall be declared and proclaimed elected until their successors are elected and qualified. *GRACE CHRISTIAN HIGH SCHOOL representative is a permanent Director of the ASSOCIATION.*

This draft was never presented to the general membership for approval. Nevertheless, from 1975, after it was presumably submitted to the board, up to 1990, petitioner was given a permanent seat in the board of directors of the association. On February 13, 1990, the association's committee on election in a letter informed James Tan, principal of the school, that "it was the sentiment that all directors should be elected by members of the association" because "to make a person or entity a permanent Director would deprive the right of voters to vote for fifteen (15) members of the Board," and "it is undemocratic for a person or entity to hold office in perpetuity."[4] For this reason, Tan was told that "the proposal to make the Grace Christian High School representative as a permanent director of the association, although previously tolerated in the past elections should be reexamined." Following this advice, notices were sent to the members of the association that the provision on election of directors of the 1968 by-laws of the association would be observed.

Petitioner requested the chairman of the election committee to change the notice of election by following the procedure in previous elections, claiming that the notice issued for the 1990 elections ran "counter to the practice in previous years" and was "in violation of the by-laws (of 1975)" and "unlawfully

[4] *Id.*, p. 9.

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deprive[d] Grace Christian High School of its vested right [to] a permanent seat in the board."[5]

As the association denied its request, the school brought suit for mandamus in the Home Insurance and Guaranty Corporation to compel the board of directors of the association to recognize its right to a permanent seat in the board. Petitioner based its claim on the following portion of the proposed amendment which, it contended, had become part of the by-laws of the association as Article VI, paragraph 2, thereof:

> The *Charter and Associate Members* shall elect the Directors of the Association. The candidates receiving the *first fourteen (14)* highest number of votes shall be declared and proclaimed elected until their successors are elected and qualified. *GRACE CHRISTIAN HIGH SCHOOL representative is a permanent Director of the ASSOCIATION.*

It appears that the opinion of the Securities and Exchange Commission on the validity of this provision was sought by the association and that in reply to the query, the SEC rendered an opinion to the effect that the practice of allowing unelected members in the board was contrary to the existing by-laws of the association and to §92 of the Corporation Code (B.P. Blg. 68).

Private respondent association cited the SEC opinion in its answer. Additionally, the association contended that the basis of the petition for mandamus was merely "a proposed by-laws which has not yet been approved by competent authority nor registered with the SEC or HIGC." It argued that "the by-laws which was registered with the SEC on January 16, 1969 should be the prevailing by-laws of the association and not the proposed amended by-laws."[6]

In reply, petitioner maintained that the "amended by-laws is valid and binding" and that the association was estopped from questioning the by-laws.[7]

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[5] *Ibid.*

[6] *Id.*, p. 149.

[7] *Ibid.*

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A preliminary conference was held on March 29, 1990 but nothing substantial was agreed upon. The parties merely agreed that the board of directors of the association should meet on April 17, 1990 and April 24, 1990 for the purpose of discussing the amendment of the by-laws and a possible amicable settlement of the case. A meeting was held on April 17, 1990, but the parties failed to reach an agreement. Instead, the board adopted a resolution declaring the 1975 provision null and void for lack of approval by members of the association and the 1968 by-laws to be effective.

On June 20, 1990, the hearing officer of the HIGC rendered a decision dismissing petitioner's action. The hearing officer held that the amended by-laws, upon which petitioner based its claim, "[was] merely a proposed by-laws which, although implemented in the past, had not yet been ratified by the members of the association nor approved by competent authority"; that, on the contrary, in the meeting held on April 17, 1990, the directors of the association declared "the proposed by-law dated December 20, 1975 prepared by the committee on by-laws . . . null and void" and the by-laws of December 17, 1968 as the "prevailing by-laws under which the association is to operate until such time that the proposed amendments to the by-laws are approved and ratified by a majority of the members of the association and duly filed and approved by the pertinent government agency." The hearing officer rejected petitioner's contention that it had acquired a vested right to a permanent seat in the board of directors. He held that past practice in election of directors could not give rise to a vested right and that departure from such practice was justified because it deprived members of association of their right to elect or to be voted in office, not to say that "allowing the automatic inclusion of a member representative of petitioner as permanent director [was] contrary to law and the registered by-laws of respondent association."[8]

The appeals board of the HIGC affirmed the decision of the hearing officer in its resolution dated September 13, 1990. It

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[8] *Id.*, pp. 148-154.

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cited the opinion of the SEC based on §92 of the Corporation Code which reads:

> §92. *Election and term of trustees.* — Unless otherwise provided in the articles of incorporation or the by-laws, the board of trustees of non-stock corporations, which may be more than fifteen (15) in number as may be fixed in their articles of incorporation or by-laws, shall, as soon as organized, so classify themselves that the term of office of one-third (1/3) of the number shall expire every year; and subsequent elections of trustees comprising one-third (1/3) of the board of trustees shall be held annually and trustees so elected shall have a term of three (3) years. Trustees thereafter elected to fill vacancies occurring before the expiration of a particular term shall hold office only for the unexpired period.

The HIGC appeals board denied claims that the school "[was] being deprived of its right to be a member of the Board of Directors of respondent association," because the fact was that "it may nominate as many representatives to the Association's Board as it may deem appropriate." It said that "what is merely being upheld is the act of the incumbent directors of the Board of correcting a long standing practice which is not anchored upon any legal basis."[9]

Petitioner appealed to the Court of Appeals but petitioner again lost as the appellate court on February 9, 1993, affirmed the decision of the HIGC. The Court of Appeals held that there was no valid amendment of the association's by-laws because of failure to comply with the requirement of its existing by-laws, prescribing the affirmative vote of the majority of the members of the association at a regular or special meeting called for the adoption of amendment to the by-laws. Article XIX of the by-laws provides:[10]

> The members of the Association by an affirmative vote of the majority at any regular or special meeting called for the purpose, may alter, amend, change or adopt any new by-laws.

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[9] *Id.*, pp. 155-157.

[10] *Id.*, p. 49.

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This provision of the by-laws actually implements §22 of the Corporation Law (Act No. 1459) which provides:

> §22. The owners of a majority of the subscribed capital stock, or a majority of the members if there be no capital stock, may, at a regular or special meeting duly called for the purpose, amend or repeal any by-law or adopt new by-laws. The owners of two-thirds of the subscribed capital stock, or two-thirds of the members if there be no capital stock, may delegate to the board of directors the power to amend or repeal any by-law or to adopt new by-laws: *Provided, however*, That any power delegated to the board of directors to amend or repeal any by-law or adopt new by-laws shall be considered as revoked whenever a majority of the stockholders or of the members of the corporation shall so vote at a regular or special meeting. *And provided, further*, That the Director of the Bureau of Commerce and Industry shall not hereafter file an amendment to the by-laws of any bank, banking institution or building and loan association, unless accompanied by certificate of the Bank Commissioner to the effect that such amendments are in accordance with law.

The proposed amendment to the by-laws was never approved by the majority of the members of the association as required by these provisions of the law and by-laws. But petitioner contends that the members of the committee which prepared the proposed amendment were duly authorized to do so and that because the members of the association thereafter implemented the provision for fifteen years, the proposed amendment for all intents and purposes should be considered to have been ratified by them. Petitioner contends:[11]

> Considering, therefore, that the "agents" or committee were duly authorized to draft the amended by-laws and the acts done by the "agents" were in accordance with such authority, the acts of the "agents" from the very beginning were lawful and binding on the homeowners (the principals) *per se* without need of any ratification or adoption. The more has the amended by-laws become binding on the homeowners when the homeowners followed and implemented the provisions of the amended by-laws. This is not merely tantamount to tacit ratification of the acts done by duly authorized "agents" but express approval

[11] *Id.*, pp. 24-25.

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and confirmation of what the "agents" did pursuant to the authority granted to them.

Corollarily, petitioner claims that it has acquired a vested right to a permanent seat in the board. Says petitioner:

> The right of the petitioner to an automatic membership in the board of the Association was granted by the members of the Association themselves and this grant has been implemented by members of the board themselves all through the years. Outside the present membership of the board, not a single member of the Association has registered any desire to remove the right of herein petitioner to an automatic membership in the board. If there is anybody who has the right to take away such right of the petitioner, it would be the individual members of the Association through a referendum and not the present board some of the members of which are motivated by personal interest.

Petitioner disputes the ruling that the provision in question, giving petitioner's representative a permanent seat in the board of the association, is contrary to law. Petitioner claims that that is not so because there is really no provision of law prohibiting unelected members of boards of directors of corporations. Referring to §92 of the present Corporation Code, petitioner says:

> It is clear that the above provision of the Corporation Code only provides for the manner of election of the members of the board of trustees of non-stock corporations which may be more than fifteen in number and which manner of election is even subject to what is provided in the articles of incorporation or by-laws of the association thus showing that the above provisions [are] not even mandatory.
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> Even a careful perusal of the above provision of the Corporation Code would not show that it prohibits a non-stock corporation or association from granting one of its members a permanent seat in its board of directors or trustees. If there is no such legal prohibition then it is allowable provided it is so provided in the Articles of Incorporation or in the by-laws as in the instant case.
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> If fact, the truth is that this is allowed and is being practiced by some corporations duly organized and existing under the laws of the Philippines.

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One example is the Pius XII Catholic Center, Inc. Under the by-laws of this corporation, that whoever is the Archbishop of Manila is considered a member of the board of trustees without benefit of election. And not only that. He also automatically sits as the Chairman of the Board of Trustees, again without need of any election.

Another concrete example is the Cardinal Santos Memorial Hospital, Inc. It is also provided in the by-laws of this corporation that whoever is the Archbishop of Manila is considered a member of the board of trustees year after year without benefit of any election and he also sits automatically as the Chairman of the Board of Trustees.

It is actually §§28 and 29 of the Corporation Law — not §92 of the present law or §29 of the former one — which require members of the boards of directors of corporations to be elected. These provisions read:

§28. Unless otherwise provided in this Act, the corporate powers of all corporations formed under this Act shall be exercised, all business conducted and all property of such corporations controlled and held by a board of not less than five nor more than eleven directors to be elected from among the holders of stock or, where there is no stock, from the members of the corporation: Provided, however, That in corporations, other than banks, in which the United States has or may have a vested interest, pursuant to the powers granted or delegated by the Trading with the Enemy Act, as amended, and similar Acts of Congress of the United States relating to the same subject, or by Executive Order No. 9095 of the President of the United States, as heretofore or hereafter amended, or both, the directors need not be elected from among the holders of the stock, or, where there is no stock from the members of the corporation. (italics added)

§29. At the meeting for the adoption of the original by-laws, or at such subsequent meeting as may be then determined, directors shall be elected to hold their offices for one year and until their successors are elected and qualified. Thereafter the *directors of the corporation shall be elected annually by the stockholders if it be a stock corporation or by the members if it be a nonstock corporation, and if no provision is made in the by-laws for the time of election the same shall be held on the first Tuesday after the first Monday in January.* Unless otherwise provided in the by-laws, two weeks' notice of the election of directors must be given by publication in some newspaper of general circulation devoted to the publication of general

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news at the place where the principal office of the corporation is established or located, and by written notice deposited in the post-office, postage pre-paid, addressed to each stockholder, or, if there be no stockholders, then to each member, at his last known place of residence. If there be no newspaper published at the place where the principal office of the corporation is established or located, a notice of the election of directors shall be posted for a period of three weeks immediately preceding the election in at least three public places, in the place where the principal office of the corporation is established or located. (Italics added)

The present Corporation Code (B.P. Blg. 68), which took effect on May 1, 1980,[12] similarly provides:

§23. *The Board of Directors or Trustees.* — Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees *to be elected* from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year and until their successors are elected and qualified. (Italics added)

These provisions of the former and present corporation law leave no room for doubt as to their meaning: the board of directors of corporations must be elected from among the stockholders or members. There may be corporations in which there are unelected members in the board but it is clear that in the examples cited by petitioner the unelected members sit as *ex officio* members, *i.e.,* by virtue of and for as long as they hold a particular office. But in the case of petitioner, there is no reason at all for its representative to be given a seat in the board. Nor does petitioner claim a right to such seat by virtue of an office held. In fact it was not given such seat in the beginning. It was only in 1975 that a proposed amendment to the by-laws sought to give it one.

Since the provision in question is contrary to law, the fact that for fifteen years it has not been questioned or challenged

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[12] Section 148, Batas Pambansa Bilang 68.

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but, on the contrary, appears to have been implemented by the members of the association cannot forestall a later challenge to its validity. Neither can it attain validity through acquiescence because, if it is contrary to law, it is beyond the power of the members of the association to waive its invalidity. For that matter the members of the association may have formally adopted the provision in question, but their action would be of no avail because no provision of the by-laws can be adopted if it is contrary to law.[13]

It is probable that, in allowing petitioner's representative to sit on the board, the members of the association were not aware that this was contrary to law. It should be noted that they did not actually implement the provision in question except perhaps insofar as it increased the number of directors from 11 to 15, but certainly not the allowance of petitioner's representative as an unelected member of the board of directors. It is more accurate to say that the members merely tolerated petitioner s representative and tolerance cannot be considered ratification.

Nor can petitioner claim a vested right to sit in the board on the basis of "practice." Practice, no matter how long continued, cannot give rise to any vested right if it is contrary to law. Even less tenable is petitioner's claim that its right is "coterminus with the existence of the association."[14]

Finally, petitioner questions the authority of the SEC to render an opinion on the validity of the provision in question. It contends that jurisdiction over this case is exclusively vested in the HIGC.

But this case was not decided by the SEC but by the HIGC. The HIGC merely cited as authority for its ruling the opinion of the SEC chairman. The HIGC could have cited any other authority for the view that under the law members of the board of directors of a corporation must be elected and it would be none the worse for doing so.

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[13] *Viuda de Baretto v. La Previsora Filipina,* 59 Phil. Reports 212 (1933); *Fleischer v. Botica Nolasco.,* 47 Phil. Reports 583 (1925).

[14] Petition, p. 23, *Rollo,* p. 29.

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WHEREFORE, the decision of the Court of Appeals is AFFIRMED.

SO ORDERED.

Puno (Acting Chairman) and Torres, Jr., JJ., concur.

Regalado (Chairman), J., on leave.

SECOND DIVISION

[G.R. No. 111155. October 23, 1997]

COSMOS BOTTLING CORPORATION, *petitioner, vs.* **NATIONAL LABOR RELATIONS COMMISSION, NATIONAL FEDERATION OF LABOR UNION and PEPITO M. DE LA CRUZ**, *respondents.*

SYNOPSIS

Pepito de la Cruz was dismissed by Cosmos Bottling Corporation (Cosmos) for serious misconduct and loss of trust and confidence. Cosmos offered customers, who purchased a specified minimum number of softdrink, so-called "trade deals" consisting of free softdrink. In the course of the promotion, however, Cosmos received reports that some of its salesmen had not been giving free softdrink to entitled customers but had been selling the softdrink and keeping the proceeds for themselves. One of those investigated was private respondent Pepito de la Cruz. Dela Cruz, however challenged his dismissal, claiming that it had been made without due process. The Labor Arbiter found de la Cruz to have been dismissed for cause and accordingly dismissed his complaint. On appeal, however, the NLRC set aside the Labor Arbiter's decision and ordered the reinstatement of De la Cruz to his former position, although denying his claim for backwages. Hence, this petition for *certiorari* by Cosmos. The NLRC filed a comment, in which it