
(2023) 10 CAL CK 0050
In the Calcutta High Court
Case No : W.P.A. No. 15463 Of 2023

Deepak Agarwal

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 12-10-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
West Bengal Apartment Ownership Rules, 1974 — Rule 3, 4
West Bengal Apartment Ownership Act, 1972 — Section 10A, 10B, 16B, 16B(2)

Citation : (2023) 10 CAL CK 0050

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Arnab Das, Amritam Mandal, Akansha Yadav, Shipra Naskar, Suman Ghosh, Soumen Chatterjee, Sabyasachi Chowdhury, Suddhasatva Banerjee, Rajarshi Dutta, Ashique Mondal, Proteek Debnath

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner is a flat owner and a Board Manager of the Diamond City West Apartment Owners' Association, which is a residential complex registered under the West Bengal Apartment Ownership Act, 1972 (hereinafter referred to as, "the 1972 Act").
2. A short question involved in the present writ petition is whether the Competent Authority (CA) under the said Act was duty-bound to look into the complaints lodged by the petitioner in respect of the functioning of the said Association.
3. Learned counsel for the petitioner places reliance on Section 16B of the 1972 Act and submits that under the said provision, the CA is bound to look into the said irregularities. It is urged that the petitioner has raised the issues of irregular and illegal functioning of the Association before the Association itself, but to no

effect. It is argued that there are hundreds of e-mails and Whatsapp messages by the members of the Association ventilating their grievances to the respondent-Authorities. However, since the respondent no.2 to 11 are in the helm of affairs, they have suppressed such allegations. The respondent no.3 being the President of the Association, it is argued, will never record such grievances as an agenda in any of the Annual General Meetings (AGMs) or Special General Meetings (SGMs) of the Association.

4. It is argued that when the petitioner raised the grievances, marked as Annexure P-10 collectively, no Grievance Redressal Committee was functional in the Association as two of the members of the said Committee became the Board Managers and they had resigned from the Committee. Post-filing of the writ petition, the Committee was refurbished by inducting members selected by the respondent nos. 2 to 11.

5. The complaints lodged by the petitioner, it is argued, are serious in nature and involve siphoning of lakhs of rupees from the public funds and the petitioner apprehends manipulation of accounts once the evidence is handed over to the respondent nos. 2 to 11, who are themselves involved in the scam.

6. Learned counsel for the petitioner argues that the provision of Bye-Law 16(4) of the West Bengal Apartment Ownership Bye-Laws, 2022 (for short, "the 2022 Bye-Laws") is not mandatory. In terms of Bye-Laws 16(5) and 16(6), the Committee, upon enquiry, will submit their report to the Board which will be conveyed by the Board to the Committee and the complainant. In view of the nature of the allegations, such a procedure would be meaningless.

7. Although there are total 1137 car parking spaces in the residential housing society, in the deed of declaration filed under Rule 4 of the West Bengal Apartment Ownership Rules, 1974 (in brief, "the 1974 Rules"), only 375 car parking spaces have been shown. Such mismatch needs amendment, for which no steps have been taken by the respondent nos. 2 to 11.

8. Learned counsel for the petitioners contends that, contrary to the submission of respondent nos. 2 to 11, the present disputes are not barred by the Specific Relief Act. In the pending civil suit, the Association has not sought any declaration with respect to the deed of declaration.

9. Learned counsel for the respondent no.1/CA argues that the 1972 Act has not conferred any powers akin to the Civil Court on the CA.

10. It is argued that the disputes raised herein are beyond the jurisdiction of the CA to decide, since the CA cannot, under the 1972 Act, adjudicate any disputed fact. The CA cannot act as an adjudicator or a quasi-judicial authority and such powers lie with a Civil Court.

11. Learned counsel argues that provisions equivalent to a Civil Court regarding enquiry, such as discovery, summoning and enforcing attendants of persons, issuing commissions, etc., are not conferred upon the CA under the statute.

12. Learned counsel for the CA next argues that the 1972 Act has not conferred any statutory right on any member or manager or office bearers of an association to file a petition before the CA under the said Act for adjudication of any matter.

13. There is no provision in the said Act to bar the jurisdiction of Civil Courts, which also indicates that the CA does not have any power akin to a Civil Court.

14. In terms of Section 16B(2) of the 1972 Act, the CA may act only upon receipt of the copy of complaints passed through a resolution substantiated by a majority of members by dealing with issues like violation of any statutory compliance or maintenance of the Bye-Laws in connection with the association. Hence, it is argued that the writ petition ought to be dismissed.

15. Learned counsel for the respondent nos. 2 to 11 submits that the writ petition purports to canvass private disputes under the cloak of representations to the CA to invoke Article 226 of the Constitution of India. However, there has not been any violation of any provision of statute to attract Article 226.

16. In the event the petitioner is seriously interested in raising any issue, an SGM of the Association is to be requisitioned by 1/3rd members of the Association in terms of the Bye-Law 6(2) and the statute mandates the convening of the SGM within 15 days of receipt of the same.

17. The statute, however, does not recognise an individual making allegations against the Board to the CA.

18. The issues raised in the complaints to the CA by the petitioner were never raised either in the AGM or SGM of the Association.

19. The trigger to invoke the provisions of Section 16B can only arise when an issue has been raised before the CA as per procedure envisaged in the Act and not otherwise.

20. All decisions under the Act are keeping in mind the interest of the Association of the apartment owners and have to be necessarily taken by the majority of the owners or all the owners as the case may be. Section 16B of the 1972 Act provides specific instances where the CA can intervene either to give decision or to supersede the Board of Managers.

21. It is argued that amendment to Form A in terms of Rule 3 of the 1974 Rules cannot be made except by an application by all the owners or majority of the owners in a case such as the present one. Thus, the grievance of the petitioner that an amendment ought to be made to the declaration under Form A is misconceived.

22. In any event, the amendment sought by the petitioner to the Form A on the pretext of 375 car parking spaces being mentioned instead of sanction plan of 1137 is misconceived, it is argued. The spaces originally allotted at the time of sale to the owners, when Form A was filed, have been reflected in a description

of the limited common area and facilities. The said Form A also describes the common areas and facilities in relation to the 996 apartments.

23. Under the heading "Other Common Areas", visitors' car parking spaces are also included. Therefore, other than car parking spaces earmarked for the 996 apartments, the rest are visitors' car parking spaces. If the total covered and uncovered sanctioned car parking spaces are assumed to be 1137 as per allegation made by the petitioner in the letter dated March 9, 2023, then also around 141 car parking spaces are visitors' car parking spaces. If such visitors' car parking spaces and other portions of the common area have been illegally dealt with by the promoters, the same is a subject-matter of the civil suit filed by the Association against the promoters.

24. It is alleged that the learned advocate for the petitioner and his wife are defendant nos. 5 and 6 in the suit. In an Order dated May 2, 2023 passed by a Division Bench, it has been recorded that it needs to be ascertained whether the promoters have any right to sell car parking spaces over which a claim is now being made on the amended sanction plan and after the Association is formed and a declaration filed by the Association.

25. Form A, once filed, being a registered document, can only be amended under the circumstances mentioned in Rule 4 of the Rules of 1974.

26. Learned counsel next argues that for the CA to exercise control and supersession powers, the allegation has to be in relation to failure to perform the functions under the Act or Bye-Laws by the Board and that the same is detrimental to the interest of the Association. The issue of being detrimental to the interest of the apartment owners can be decided only by way of an agenda duly raised in a meeting either convened as an AGM or an SGM in terms of the Bye-Laws 5 and 6 of the 2022 Bye-Laws.

27. Assuming but not admitting that the allegations of the petitioner are correct, those have to be first raised in the meeting of the Association (either Annual or Special) and then passed by the majority of members present and voting for the same to be binding on the Board and the members.

28. Any individual cannot be allowed to raise issues before the CA in relation to the working of a board without raising the same in the Association in any meeting. It is argued that the writ petition has been filed to vent vested private interest under the cloak of invoking of jurisdiction of the CA.

29. Upon hearing learned counsel for the parties and a perusal of the written notes of arguments, at the outset, the attempt of both parties to drag into the dispute and name of the learned advocates of each other is deprecated.

30. Just as it is unnecessary for the purpose of the arguments for the respondent nos. 2 to 11 to mention that the learned advocate for the petitioner and his wife are parties to the pending civil suit, to personally attack learned counsel for the respondent nos. 2 to 11 in the written notes of arguments by the petitioner by

naming counsel was entirely unwarranted and unnecessary for the disposal of the writ petition. More discretion is expected from learned counsel for the parties when they draft/settle written notes of arguments and pleadings as well as advance arguments.

31. Insofar as the merits of the case are concerned, this Court is not called upon to deal with the pending issues in the civil suit by the Association against the promoter on merits.

32. Irrespective of whether there are common areas in the allegations made by the petitioner against the Association and the Association, in turn, against the promoter in the suit, the limited scope of adjudication in the present writ petition is the ambit of enquiry and legal action by the Competent Authority (CA).

33. The powers of the CA under the 1972 Act are limited.

34. Under Section 10A, a declaration or an instrument is to be submitted before the CA and to be dealt by him. In fact, under Section 10B, the State Government may call for and examine the records of any proceeding before the CA or the Appellate Authority.

35. However, the power of the CA under Section 16B, inserted by Section 7 of the Amendment Act of 1996, is much wider in scope. Sub-section (1) thereof provides that if the Association of Apartment Owners, having right to be exercised by the Manager or the Board of Managers, fails to perform its functions under the Act or the Bye-Laws, the CA may give it such directions as it considers fit.

36. Sub-section (2) of Section 16B provides that if the CA is of the opinion that the function of the Manager or Board of Manager is detrimental to the interest of the Association or of the apartment owners or is against public interest, the CA may give a notice to the Manager or Board of Manager to show cause. If the reply is not satisfactory, the CA may go so far as to remove the Manager or supersede the Board of Managers and appoint any member from amongst members of the concerned Association or any employee of the State Government or any other person as administrator to perform the functions of the Manager or Board of Manager; however, for a period not exceeding six months, extendable for a further period not exceeding six months at a time, the aggregate of which shall not exceed three years.

37. Sub-section (1) does not provide whether the powers of the CA can be exercised suo motu or require a prior application. It merely prescribes that the CA may give directions to the Manager or Board of Managers if they fail to perform their functions under the Act or Bye-Laws.

38. The expression "under this Act" or the "Bye-Laws", is wide in ambit and covers all the functions done by the Manager or Board of Managers, since all such functions are done under the Authority of the Act and the Bye-Laws.

39. The expression, notably, is not “violates the provisions of the Act or Bye-Laws” but “fails to perform its functions under the Act or Bye-Laws”.

40. Under sub-section (2) of Section 16B, there are two layers of operation by the CA. The first is the formation of an opinion by the CA that the function of the Manager or Board is detrimental to the interest of the Association or the apartment owners. The said opinion can be formed either by itself or on an application by any person whosoever, since there is no restriction in that regard. It is noteworthy that the stimulus for such action by the CA may not necessarily be something which is detrimental to the interest of the Association or the owners themselves but also against “public interest”.

41. Thus, it would be contrary to the intention of the Legislature, as emanating from the said provisions, to restrict the genesis of action by the CA merely to complaints made by the Association itself or the majority or all of the owners.

42. The power of the CA under the said provision is to remove the Manager, supersede the Board of Managers and appoint any member not only from the members of the Association but any employee of the State Government or “any other person” as administrator to perform the functions of the Manager or Board of Managers as the case may be, which may continue up to three years, six months at a time.

43. Since the trigger of action by the Competent Authority under Section 16B(2) is the functioning detrimental to the interest of the Association or the apartment owners or against public interest as a whole, it is not the mandate of the statute that such power shall be exercised by the CA only on the complaint of an Association, for the simple reason that if the Manager or Board of Managers of an Association themselves are the architects of the misappropriation/wrong doing, the Association may not be readily willing to bring such grievances to the fore, as the heads of the Association might very well be involved in the wrong-doing.

44. In any event, Section 16B (2) contemplates that the CA may swing into action if there is detriment to the apartment owners and not only the Association itself, as well as against public interest. Thus, any of the apartment owners may very well point out such irregularities to the CA. In fact, there is nothing in the statute also to prevent any third-party/member of the public, interested in the functioning of the Association in any manner or even otherwise, to bring such alleged irregularities in functioning of the Board or the Manager to the notice of the CA.

45. The CA, first, has to form an opinion, upon necessary preliminary enquiry, for the purpose of initiating the show-cause notice contemplated under sub-section (2) of Section 16B to the Manager or the Board.

46. In the present case, the nature of the allegations pertains to defalcation of money and abuse of powers of the Association, including certain instances of abuse of powers by the Board. Since the top brass of the Association, as per the

allegations, are themselves responsible for such alleged wrong-doings, it can never be left on the Association to take a decision on such count through an AGM or SGM and/or forward such grievances to the CA.

47. The mere coincidence of some of the allegations in the complaints of the petitioner and the subject-matter of the suit is not a bar to the CA to look into the matter at all.

48. In fact, the scope of the suit between the Association represented by its portfolio holders and the promoter primarily does not in any manner debar the CA from looking into the allegations regarding functioning of the Board raised by one of its members, in whatever capacity.

49. It is surprising that the CA has pre-judged the issue and formed an opinion, even prior to looking into the allegations, arguing that it does not have authority to look into the matter.

50. It was sought to be insinuated by the CA during its argument, that it would be flooded with such complaints if individual members of Associations are allowed to make complaints to it.

51. However, such an argument is absurd, since it is one of the major functions of the CA under Section 16B of the Act, in fact one of its most crucial functions, to look into such allegations and take appropriate steps if necessary. Otherwise, the CA would be as good as defunct, acting as a mere post-office for receiving Form A applications and checking whether the said applications are in form and contain correct information.

52. Such argument from the CA, in unison with the respondent nos. 2 to 11, rather reflects a pre-determined mind than an open attitude befitting a statutory authority.

53. In any event, in the absence of any such embargo in the statute, the argument of the respondents that an individual member's complaints cannot be entertained by the CA unless the Association forwards the same upon taking a resolution in an AGM or SGM, is not tenable in the eye of law.

54. Hence, it is the incumbent duty of the respondent no.1/Competent Authority to make a preliminary enquiry into the complaints lodged by the petitioner and form an opinion under Section 16B (2) of the 1972 Act for the purpose of deciding whether any show-cause notice is required to be issued to the Manager or the Board of Managers of the concerned Association.

55. The arguments of amendment of Form A being maintainable only at the behest of all the members or the majority of the members need not be gone into, since the errors in the Form A are pointed out by the petitioner only as one of the grounds for the complaints of irregularity in functioning of the Board of Members of the Association. The petitioner has not sought for an amendment of the Association but points out that such amendment, although necessary, has

not been sought by the Association itself or the majority members.

56. Insofar as the reference to Bye-Laws 5 and 6 of the 2022 Bye-Laws is concerned, those merely provide for Annual General Meetings and Special General Meetings of the Association and the mode in which they are to be called and held.

57. Nothing in the Bye-Laws can traverse beyond the scope of the parent Act of 1972. In any event, the agenda or subject-matter of the AGM or SGM could not and have not been stipulated in the Bye-Laws. Thus, the reference thereto is unacceptable in the present context.

58. Moreover, it is doubtful as to why the respondents are vehemently opposing the CA looking into the complaints lodged by the petitioner.

59. Even if the CA was to be burdened by such consideration, it is not the lookout of the respondent nos. 2 to 11. Moreover, the opposition of the respondent nos. 2 to 11 prior to even any show cause notice being issued by the CA and/or action being taken pursuant to such show cause, is premature and hereby turned down.

60. In view of the above discussions, WPA No. 15463 of 2023 is allowed, thereby directing the respondent no.1/Competent Authority under the 1972 Act to look into the complaints of the petitioner as to the alleged irregularities and malfunctioning of the Association and its Board of Managers with regard to the Diamond City West Apartment Owners' Association pertaining to the residential complex of Diamond City West and to hold a preliminary enquiry for the purpose of forming an opinion under Section 16B (2) of the 1972 Act to ascertain whether there was any necessity to issue a show cause to the Manager/Board of Managers of the said Association as contemplated under the said provision of law. Such exercise shall be completed by the respondent no.1 within a fortnight from date.

61. The outcome thereof shall be communicated in writing to the writ petitioner. In the event the CA is of the opinion that there are prima facie indications/evidence of any irregularity, the CA shall issue a show-cause notice within the contemplation of Section 16B (2) of the 1972 Act and take necessary steps following due process of law pursuant thereto.

62. There will be no order as to costs.

63. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.