
(2022) 07 CAL CK 0103

In the Calcutta High Court

Case No : MAT No. 711, 717 Of 2020, CAN 1 Of 2020

South City Apartment Owners? Association & Ors.

APPELLANT

Vs

Siddhartha Mitra & Ors.

RESPONDENT

Date of Decision : 28-07-2022

Acts Referred:

Citation : (2022) 07 CAL CK 0103

Hon'ble Judges : Prakash Shrivastava, CJ;Rajarshi Bharadwaj, J

Bench : Division Bench

Advocate : Bikash Ranjan Bhattacharyya, Srijib Chakraborty, Bimalendu Das, Shomrita Das, Shomrita Das, Shomrik Das, Probal Kr. Mukherjee, Arnab Mukherjee, Partha Pratim Roy, Ayan Banerjee, Debjani Sengupta

Judgement

Prakash Shrivastava, CJ

1. This order will govern the disposal of MAT 711 of 2020 and MAT 717 of 2020 as similar issue is involved in both the appeals between the same parties.

2. In MAT 711 of 2020, order of the learned Single Judge dated 08.10.2020 is under challenge whereby learned Single Judge in respect of the election of respondent housing complex namely, South City has held that the voting in electing Members of the Board in Annual General Meeting shall be by show of hands and not by hybrid mode i.e. both by manual and electronic voting. In MAT 717 of 2020, order of the learned single Judge dated 07.08.2020 is under challenge at the instance of the South City Apartment Owners' Association whereby learned Single Judge has not accepted the prayer to hold the AGM on virtual platform.

3. Having heard the learned Counsel for the parties and on perusal of the record, it is noticed that the main dispute in these appeals is in respect of holding of meeting and conduct of election of Board of Managers of South City Apartment Owners' Association by secret ballot or by hybrid mode i.e. secret ballot by the persons physically present as also online voting.

4. Earlier West Bengal Apartment Ownership Bye-laws, 1974 were in force. The South City Apartment Owners' Association had its own Rules by the name of South City Apartment Owners' Association Rules and in Rule 12.9 thereof it was provided that both manual and electronic voting will be allowed and in 12.10 it was provided that voting will be by secret ballot. During the pendency of the present dispute the competent authority with the approval of the Government of State of West Bengal in exercise of power conferred by the West Bengal Ownership Act, 1972 has framed the new bye-laws namely, West Bengal Apartment Ownership Bye-laws, 2022. These bye-laws have been notified on 6th of April, 2022 and by these bye-laws the earlier prevailing bye-laws have been superseded. The bye-law 8 of the bye-laws of 2022 relates to election of Managers of the Boards and provides as under:

"8. Election of Managers of the Board.– (1) Within fifteen days of formation of an Association under clause (2) of bye-law 3, the apartment owner presiding over the general meeting referred to in the said clause shall serve notice upon each member of such Association fixing therein the date (not before seven days from the date of issue of such notice) on which and the time and place at which a Special General Meeting shall be held for deciding the detail manner in which and the date on which the election of the Managers of the Board be held.

(2) The election shall be held by secret ballot in accordance with the detail manner decided under clause (1) of this bye-law.

(3) The service of the notice referred to in clause (1) shall be effected by personal service or through letter sent by registered post or through e-mail or any other electronic mode.

(4) After the Managers of the Board are elected as aforesaid, the Board shall, within ten days of the date of election of its Managers, hold its first meeting and elect its President who shall be the Chief Executive Officer of the Association. The other office-bearers of the Association shall also be elected in that meeting. The President shall forthwith forward the names of the President and that of the other office-bearers and Managers of the Board in Form-3 to the Competent Authority for his record.

(5) The tenure of the Board shall be three years. However, the tenure of the first Board may be less than three years and its tenure shall be till the third calendar month of May during its tenure.

(6) All subsequent elections of the Managers of the Board shall be held in the manner as decided under clause (1) of this bye-law or in any other manner as will be decided by the Association in a subsequent general meeting. All subsequent election of Managers of the Board shall be conducted in the month of May.

(7) The President of the subsequent Board shall forthwith forward the names of the President and that of the other office-bearers and Managers of the Board in

Form-3 to the Competent Authority for his record.”

5. A perusal of the above bye-law indicates that first elections of Managers of the Board after formation of Association are to be held by secret ballot in accordance with the detailed manner decided under clause (1) of bye-law 8. Clause (1) provides for the Special General Meeting after the formation of the association and further provides that the said meeting will be held for deciding the detail manner in which and the date on which the election of Managers of the Board will be held. Bye-law 1 cannot be applied in the present case because South City Apartment Owners’ Association was formed long back much prior to coming into force of bye-laws of 2022. Therefore, the detail manner of holding the election by secret ballot as provided in bye-law 8.2 cannot be decided now in respect of the appellant association under bye-law 8.1. Applicability of bye-law 8(6) relating to subsequent elections of Managers of Board in this case has been disputed on the ground of non-applicability of bye-law 8(1) itself. Earlier bye-laws have already been superseded by the bye-law of 2022. Learned counsel for the parties do not dispute that on coming into force of bye-laws of 2022 an anomalous situation has arisen because new bye-laws are silent in respect of manner of holding election of Managers of Board of old Associations either by secret ballot, physical mode or by hybrid mode. It is worth noting that bye-laws of 2022 cannot be given a go-bye because under bye-law 37 these bye-laws are mandatory and breach thereof attracts punishment. Hence, now the parties are required to approach the competent authority under bye-law 39 of 2022 as reads under:

“39. Power to remove difficulties. – (1) If any difficulty arises in giving effect to the provisions of these bye-laws, the Competent Authority may, by guideline, make such provisions not inconsistent with the provisions of these bye-laws as may appear to the Competent Authority necessary for removing the difficulty.”

6. Therefore, the appeal is disposed of by setting aside the orders of learned Single Judge and permitting the parties to approach the competent authority under bye-law 39 of bye-laws of 2022. It is also worth noting that both the contesting parties in these appeals are in favour of holding expeditious election, hence we direct that in case if the parties approach the competent authority under bye-law 39, then appropriate decision in accordance with law will be taken by the competent authority expeditiously.