

08.10.2020.  
Supplementary list Item no. 4.  
Court No.5  
ap

**W.P.A. No. 7793 of 2020  
(Through Video Conference)**

**Siddhartha Mitra & Anr.  
Versus  
The State of West Bengal & Ors.**

Mr. Probal Kumar Mukherjee, ld. Sr. Advocate,  
Mr. Arnab Mukherjee.

...For the petitioners.

Mr. Sabyasachi Choudhury, ld. Sr. Advocate,  
Mr. Rajarshi Dutta,  
Mr. Bimalendu Das.

...For the respondent nos.5 to 8.

The present controversy in this writ petition relates to election of Managers of the Board of a Housing Complex, namely, South City in the city of Calcutta.

The present Managers of the Apartment Owners Association wanted the election of Managers to be held on coming 10<sup>th</sup> and 11<sup>th</sup> October, 2020 both by electronic mode and physically following the South City Apartment Owners Association Rules.

The petitioners have challenged the said decision of conducting the election of Managers of the Board for the year 2020-2023 through e-mail/electronic voting at the Annual General Meeting or adjourned Annual General Meeting scheduled on 10<sup>th</sup> October, 2020 or on any other date.

The main contentions of the petitioners are that the West Bengal Apartment Ownership Bye-Laws,

1974 framed under Sub-section (1) of Section 13 of West Bengal Apartment Ownership Act, 1972 speaks about the business of the Annual General Meeting of an Association to Clause 4(4) of the said Bye-Laws. Clause 4(4)(d) of the said Bye-Laws lays down that to elect Managers of the Board from among the apartment owners to fill up vacancies will be a business of an Annual General Meeting.

Clauses 4(9)(a) and 4(9)(b) of the said West Bengal Apartment Ownership Bye-Laws, 1974 are as follows:

*“(9)(a) All questions which may come up before any general meeting shall be decided by a majority of the members present and voting, and in the event of equality of votes, the President or, in his absence, the member presiding shall have and exercise a second or casting vote. Voting shall be by show of hands. Every decision shall be taken in the form of resolution and decision of the general meeting shall be binding on the Board and all members of the association.*

*(b) Votes shall be cast in person.”*

From the Bye-Laws of 1974 it is found that voting shall be by show of hands.

It is already noted that electing Managers of the Board shall be a business of the Annual General Meeting.

Therefore, it is clear that in any Annual General Meeting for electing Managers of the Board, the voting shall be by show of hands.

The learned Advocate appearing on behalf of the petitioners submits that South City Apartment Owners' Association Rules 12.9 is clearly against the said Bye-Laws framed under the West Bengal Apartment Ownership Act, 1972 and in the said South City Apartment Owners' Association Rules in paragraph 3 under the heading "applicable laws", it is, inter alia, stated that in case of any conflict between that Rule on one hand and the Act or the Bye-Laws on the other, the provisions of the Act and/or the Bye-Laws shall prevail over the provisions of those Rules. Thus, according to the petitioners, there cannot be any election of Managers by a hybrid manner i.e. by manual and electronic voting as has been laid down in paragraph 12.9.

The respondents have stated that in all of the last elections of Managers, paragraph 12.9 which provides for both electronic and manual voting of the South City Apartment Owners' Association Rules was followed and in such election, one of the petitioners also participated and was defeated.

The learned Advocate appearing on behalf of the respondent nos.5, 6 and 7 has tried to differentiate between an Annual General Meeting and a meeting for election of Managers through any other mode. It is also the contention of the respondent nos.5, 6 and 7 that another application was filed earlier in 2017 which has

challenged the South City Apartment Owners' Association Rules and the same is pending and therefore, with the same relief the present writ application cannot be moved for the principles of res judicata.

In course of hearing, Counsel for the respondent nos.5, 6 and 7 has placed one letter issued by the Department of Housing, Government of West Bengal dated 27<sup>th</sup> March, 2019 in respect of another Housing Complex wherefrom it appears that the Government allowed them to elect the Managers of the Board by secret ballot in such manner as may be decided in the Special General Meeting.

In the present case, no such decision of any Special General Meeting for electing the Managers of the Board by secret ballot has been placed before me and the more important is the statutory Bye-Laws of 1974 cannot be violated.

The learned Advocate appearing on behalf of the petitioners have drawn my attention to one writ application filed by South City Apartment Owners' Association bearing W.P. No. 6066 (W) of 2020 which has been decided by this Court on 7<sup>th</sup> August, 2020 holding that no relief could be granted to the writ petitioners for a direction to conduct Annual General Meeting on virtual platform mode and to complete the election process of the Board of Management for the

year 2020-2023 in respect of the residential complex. This order is annexed at pages 62 and 63 of the present writ application.

After hearing the parties and perusing the Rules, Bye-Laws etc., I am of the view that there is no question of holding election by a hybrid mode i.e. both by manual and electronic voting. It must be by show of hands following West Bengal Apartment Ownership Bye-Laws, 1974 which has been framed under the West Bengal Apartment Ownership Act, 1972. If any election is held in the mode and manner as given in South City Apartment Owners' Association Rules, the same shall be void and will be of no effect.

Regarding the question of res judicata, I am not agreeable with the respondent nos.5, 6 and 7 as in this writ application, the writ petitioners have not pressed any point against the South City Apartment Owners' Association Rules except saying that the said Rules has not been certified as yet by the appropriate authority.

However, the matter has been disputed seriously by the respondents as because the Housing Complex is being run according to the South City Apartment Owners' Association Rules for a considerable period of time and not only that, the petitioners are also following the said Rules.

Thus, rejection of the instant writ application on the ground of res judicata as another writ application is pending challenging the South City Apartment Owners' Association Rules is not accepted by me.

The election for the Managers of the Board shall have to be held in terms of Bye-Laws 4(9) of the West Bengal Apartment Ownership Bye-Laws, 1974.

With these observations, the instant writ application is partially allowed on the question of manner of voting as has been made in prayer (a) of this writ application.

Two supplementary affidavits have been filed by the petitioners which are kept on record, copy thereof have been served upon the learned Advocate-on-record of the respondent nos.5, 6 and 7 in Court today which he has accepted.

There will be no order as to costs.

**LATER**

After delivery of the judgment and order, the learned Senior Advocate, Mr. Sabyasachi Choudhury, has prayed for a stay of operation of this order, which is considered and rejected.

All parties are directed to act on a server copy of this order on usual undertakings.

**(Abhijit Gangopadhyay, J.)**

