

15.03.2022
SL No.4
Court No.8
(gc)

FMA 79 of 2022
With
CAN 1 of 2021
With
CAN 3 of 2022
With
CAN 4 of 2022
With
CAN 5 of 2022

EGV Association of Apartment Owners
Vs.
Krishnokoli Dasgupta & Anr.

(Via Video Conference)

Mr. Sabyasachi Chowdhury,
Mr. Rajarshi Dutta,
Mr. R. Krishna Mondal,
.....for the Appellant.
Mr. Anirban Ray, Ld. G.P.,
Mr. Mohit Gupta,
Mr. M.K. Roy,
...for the applicants in
CAN 4 of 2022 and
CAN 5 of 2022.
Mr. Jayanta Kumar Mitra, Sr. Adv.,
Mr. Jishnu Chowdhury,
Mr. A. Basu,
Mr. A. Chakraborty,
.....for the Owners Association.
Mr. Surajit Nath Mitra, Sr. Adv.,
Mr. Suddhasatwa Banerjee,
Ms. Aritra Chakraborty,
...for the Respondent No.1.
Mr. Abhrajit Mitra, Sr. Adv.,
Mr. Satadeep Bhattacharyya,
Mr. Saptarshi Datta,
...for the Respondent No.2/Developer.
Mr. Debasish Ghosh,
....for the Competent Authority.

The appeal and the connected applications are taken up together and disposed of by this common order.

The dispute is with regard to the management and control of EGV Association of Apartment Owners. The

appellant claims to be the elected members of the said Association.

The Elita Garden Vista Project (in short “EGV Project”) was sanctioned by the Newtown Kolkata Development Authority (in short “NKDA”) in September, 2007 having 15 towers. Record reveals that the project initially was started by Magus Bengal Developers Pvt. Ltd., who continued to remain as sole promoter of the said project until 12th August, 2007 and thereafter the project Keppel Magus Pvt. Ltd. continued as the promoter till 1st August, 2014. The said company changed its name to Elita Garden Vista Project Pvt. Ltd. with effect from 2nd August, 2014. In 2012, Keppel Magus Pvt. Ltd. filed FORM 2A under the West Bengal Apartment Ownership Act, 1972 and became the sole owner under Section 2 of the said Act. Thereafter, the promoter wanted to modify the building plan to build another tower and obtained another sanctioned plan from the NKDA. However by then, many flats were sold and the buyers had acquired substantial interest in the common areas.

The Management and control of the property in question remain undisputedly with the promoter still June, 2017. Thereafter two rival groups were claiming to be the authorized representatives of the flat owners association. Significantly, the group represented by Mr. J. K. Mitra Senior Advocate consists of the representative of

the new promoters with no participation of any of the flat owners.

The appellant submits that due to large number of flat owners a meeting was convened on 4th June, 2017 when it was decided that an election shall be held on 9th July, 2017 of the Board of managers of the association. Accordingly notices were issued on 5th June, 2017. Later, Ms. Krishnokoli Dasgupta, respondent No.1 filed a title suit being T.S. No.894 of 2017 before the VIth Bench of City Civil Court and obtained an order of injunction on 6th July, 2017 restraining the parties from giving effect to the notice dated 5th June, 2017. The said order of injunction continued for almost three years. In the meantime, the promoters filed an application for modification of the building plan that had resulted in a writ petition being filed by some of the owners of the flats being WP 15903 (W) of 2018. The West Bengal Housing Department appears to have refused to amend the declaration in Form A on 11th April, 2018 on the ground that the said modified sanctioned plan might effect the common areas which could not be done without the written consent of the flat owners. The appellant claims that after the expiry of the period of three years, a fresh election was conducted on 28th July, 2020 in which the majority of the flat owners elected the present office bearers and by reason of the fact that the appellant represents the majority of the flat

owners, they are solely entitled to represent the flat owners in all proceedings and to maintain the property.

Meanwhile, the respondent No.1 filed an application for amendment of the plaint due to subsequent events and the said amendment was allowed on 27th July, 2021. The defendant Nos.1 and 2 in T.S. No. 894 of 2017 did not object to the said amendment. The defendant No.1 in T.S. No.894 of 2017 is the promoter and the defendant 2 are persons claiming to be the office bearers of the flat owners whose locus has been questioned by the present appellant. It appears from record that the person in management of the Association between 2017 and 2020 were representatives of the promoters which possibly is not sanctioned by the provisions of the West Bengal Apartment Ownership Act, 1972. We wonder on what basis the Competent Authority had approved the Bye-laws which recognizes the Board of manager solely being represented by the promoters and its group and is against the provisions of the West Bengal Apartment Ownership Act, 1972 read with the Bye-laws. However, as the case may be, there are two rival groups claiming control over the said Association.

Mr. Sabyasachi Chowdhury, learned Counsel appearing on behalf of the appellant submits that Krishnakoli Dasgupta, respondent No.1, ostensibly made a prayer for amendment and a fresh election, whereas the real purpose was to support the promoters who have

surreptitiously taken control over the Board and there is a serious apprehension that the rival group is going to mismanage the funds so far collected for maintenance. It is submitted that the occupancy certificate was issued on 21st May, 2021, and accordingly the collection of funds for maintenance from the flat owners was unauthorized in view of the latest pronouncement of the Hon'ble Supreme Court in ***Samruddhi Co-operative Housing Society Ltd. Vs. Mumbai Mahalaxmi Construction Pvt. Ltd.*** reported in **2022 SCC Online SC 35**. It is submitted that the completion certificate has not yet been issued by the competent authority.

Mr. Jayanta Kumar Mitra, learned Senior Counsel representing the Association formed in the year 2013 submits that the promoters have all throughout maintained the property and a detailed account of maintenance charges are available. There was no allegation until this appeal was filed regarding the functioning of the said promoters. It has been acknowledge by all the flat owners that the promoters are maintaining the property including the common area and all the flat owners have contributed towards the maintenance charges. It is submitted that the present appellant is not authorized to represent the flat owners. Moreover, the constitution of the Board at the behest of the appellant was illegal. They have surreptitiously constituted the board by holding a meeting on 28th June,

2017 which they could not have done in view of their notice dated 5th June, 2017. The present office bearers of the appellant were apprehending an action against them and created document to show that a meeting was held on 28th June, 2017 to circumvent the order passed by the City Civil Court on 6th July, 2017. Mr. Mitra however, submits that his client wants a free and fair election so that after the election is over, the management could be handed over to a duly elected body.

Mr. Surajit Nath Mitra, learned Senior Counsel representing the respondent No.1 has agreed with Mr. Jayanta Kumar Mitra, learned Senior Counsel that a free and fair election is necessary and the order of the learned Trial Judge should be upheld.

Mr. Abhrajit Mitra, learned Senior Counsel representing the respondent No.2 in this appeal has submitted that the Bye-laws recognizes that each of the flat owners would have the right to participate in the election and it may not be fair if the flat owners of the 8th tower are deprived of participating in the said election.

After hearing the learned Counsel for the parties, it is clear that all the parties want a free and fair election. The record reveals that the promoters or their representatives were controlling the said Association and if we accept Mr. Jayanta Kumar Mitra's submission, they are still in control of the said Association. Mr. Mitra has specifically referred to Paragraph 10 of CAN 3 of 2022 to show that

Elita Garden Vista Project Pvt. Ltd. are not opposed to convening of a free and fair election by the learned Special Officer so that each flat owner can elect their own representatives to manage the affairs of the defendant No.2.

However, the office bearers referred in Paragraph 10 are the representatives of the promoters which is not permissible in view of the provision of the West Bengal Apartment Ownership Act, 1972. At the same time, one cannot overlook the fact that there is no material on record to show that Mr. Sabyasachi Chowdhury's client has conducted a free and fair election. Admittedly, there are more than thousand flat owners and it is claimed that only twenty persons participated in the said election. A free and fair election is necessary for the benefit of the flat owners.

The problem would not end there as after the election is over there may be a possibility of a dispute with regard to the corpus presently under the control of the promoter and it may be necessary to appoint a Commissioner for settlement of accounts if any dispute arises at the time of handing over of the control and management of the said Association to a newly elected body. While we accept the finding of the learned Trial Judge that there should be a free and fair election, however, we are of the view that under the facts and circumstances of the case, the Special Officer appointed by the learned Trial Court with the aid of

the Competent Authority shall hold the election. The Special Officer in consultation with the Competent Authority shall prepare an electoral roll and decide on the mode of voting. The flat owners of the newly constructed tower, however, should not be included in the electoral list in view of the pending litigation. All costs, charges and expenses including the remuneration of the Special Officer shall be borne by the respondent/defendant No.1. We request the Special Officer to conclude the election process within two months from the date of communication of this order. The impugned order is modified to the aforesaid extent.

In deciding the eligibility of a voter, non-payment of maintenance charge shall not be considered to be a disqualification.

With the aforesaid observation, the appeal being FMA 79 of 2022 and the applications being CAN 1 of 2021, CAN 3 of 2022, CAN 4 of 2022 and CAN 5 of 2022 stand disposed of.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)