

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 19177 of 2021

IA No. CAN 1 of 2022

CAN 2 of 2022

CAN 3 of 2022

**Kendriya Vihar II, Apartment Owners Association @ Kendriya
Vihar II**

Vs.

State of West Bengal & Ors.

For the petitioner : Mr. Kallol Basu,
Ms. Malabika Saha,
Mr. Samik Sarkar
Mr. Rudraksha Chattopadhyay
..... advocates

For the respondent
nos. 8-11,13,14,
16-19,22-29 : Mr. Srijib Chakraborty,
Mr. Syamantak Banerjee,
Ms. Ballari Banerjee advocates

For the respondent
nos. 7,12,15,20 and 30 : Mr. Devajyoti Barman,
Mr. Sudhir Kumar Sengupta,
Ms. Sanjukta Basu Mallick
..... advocates

For the State :Mr. Samrat Sen,Assistant Additional
Advocate General

For Respondent No. 6 : Mr. Satyendra Agarwal advocate

Heard on : 16.08.2022

Judgment on : 18.08.2022

Hiranmay Bhattacharyya, J.:-

1. This writ petition has been filed praying for issuance of a mandamus to quash and set aside the order dated November 12, 2021 passed by the competent authority under the West Bengal Apartment Ownership Act, 1972, (for short “the Act”).
2. The petitioner claims to have received a letter dated December 10, 2020 issued by the competent authority annexing the complaint of some of the members of the registered association regarding the functioning of the Board of Managers with a direction to the petitioner to hear the complaints and redress their grievances in accordance with law. Pursuant thereto the writ petitioner submitted a copy of the hearing report dated January 21, 2021 to the competent authority clarifying the entire situation regarding the allegation made by the complainants. The Board of Managers stopped the essential services to the members who have defaulted in making payment of the monthly maintenance charges. The competent authorities, according to the petitioner, without considering the action taken report, the hearing report and without granting any opportunity of hearing to the Board of Managers directed the petitioner to resume all services including security

and reception services to the defaulters which compelled the writ petitioner to file the instant writ petition.

3. Mr. Basu, the learned advocate appearing for the petitioner submitted that first online application was made in the name of “Kendriya Vihar II, Apartment Owners’ Association, Kolkata” but the Registration Certificate was issued mentioning the name of the association as “Kendriya Vihar II” thereby deleting the words “Apartment Owners’ Association” therefrom. He further submitted that the private respondents have defaulted in payment of monthly maintenance charges for which the services including security and reception service to the defaulter members were withdrawn. He referred to the schedule of arrear of maintenance charges in respect of the private respondent no. 7 to 30 starting from the period 1st April, 2017 till 20th February 2022 and submitted that a huge amount is lying outstanding on account of monthly maintenance charges on account of the said private respondent for which it is not possible for the registered association to extend such services to the said defaulters.. He further submitted that the Competent Authority while passing the order impugned herein did not afford an opportunity of oral hearing to the petitioner. The order impugned, according to Mr. Basu, also does not disclose any reasons in support of the ultimate conclusion and the hearing report as well as the action taken report submitted by the writ petitioner was not

taken into consideration by the competent authority while passing the impugned order. Thus, according to Mr. Basu, there has been a gross violation of the principles of natural justice and this court while exercising the powers of judicial review can interfere with the order passed by the Competent Authority as the documents relied upon by the petitioner were not taken into consideration by the competent authority while passing the order impugned.

4. Mr. Basu further submitted that the selection of October 20, 2019 as the relevant date for preparing the budgets and accounts of the association and for realization of the maintenance charges from the members of the association and selection of such relevant date by the competent authority in the impugned order is without any basis. He also submitted that a direction may be passed to correct the name of the registered association in the Registration Certificate.
5. Mr. Chakraborty learned advocate appearing for the respondent nos. 8-11,13,14,16-19,22-29 challenges the maintainability of the instant writ petition in as much as the writ petitioner was described as Kendriya Vihar II Apartment Owners' Association @ Kendriya Vihar II, when a registered association cannot be known by two different names and hence the writ petition is not maintainable. He submitted that the private respondents cannot be said to be defaulters in payment of monthly maintenance charges in as much as the

account payee cheques in the name of the registered association on account of monthly maintenance charges have not been encashed for reasons best known to the President of the association. He further submitted that the President of the registered association was directed to explain before the competent authority in writing with regard to the issues framed by the competent authority but such opportunity was not availed by him. He further submitted that the competent authority after taking into consideration the contentions of the respective parties as well as the documents submitted by them passed the order impugned in this writ petition which is a reasoned decision and also that the principles of natural justice cannot be said to have been violated in the instant case.

6. Mr. Barman learned advocate appearing for the respondent nos. 7, 12, 15, 20 and 30 submitted that the writ petitioner cannot claim maintenance charges from the members which has already become time barred. He further submitted that the tenure of the President has expired in the meantime and as such he has no *locus standi* to proceed with the instant writ petition. He also adopted the argument of Mr. Chakraborty with regard to the maintainability of the instant writ petition.
7. Mr. Sen learned Senior Counsel appearing for the State by referring to chapter V of the West Bengal Apartment Ownership Bye Laws, 1974 (for short “the Bye Laws”)

contended that there is no provision under the said Bye Laws for automatic suspension of the essential service on account of non-payment of monthly maintenance charges. He further submitted that the competent authority is empowered under Section 16B of the Act to give the Manager or the Board of Managers such directions as the authority considers fit in case they failed to perform the functions under the Act or the Byelaws framed thereunder. He submitted that the Competent Authority received an e-mail from the learned advocate of the petitioner wherein it was stated that the explanation sought for by the competent authority by the order dated July 17, 2021 was clarified in details in paragraph 38 of the writ petition being WPA No. 12406 of 2021. Mr. Sen submitted that the competent authority considered the contentions of the petitioner as contained in paragraph 38 of the said writ petition while passing the order impugned and the writ petitioner thus cannot contend that any prejudice has been caused to him for not affording an opportunity to oral hearing. Mr. Sen placed reliance upon a decision of the Hon'ble Supreme Court of India in the case of *Sarvepalli Ramaiah (dead) as per legal representatives and ors. vs. District Collector, Chittoor District and ors.* reported at (2019) 4 SCC 500 with regard to the scope of interference under Article 226 against administrative decisions.

8. Heard the learned advocates for the parties and perused the materials placed.
9. The registered apartment owners' association represented by its President has filed this writ petition. The very fact that the President of the association has incorporated the words "Kendriya Vihar II Apartment Owners' Association" in the course title of the writ petition in addition to the name of the association appearing in the Registration Certificate is only for the purpose of pursuing their claim for rectification of the Registration Certificate. It also does not appear from the records that the association is represented by a person who is not its President.
10. This Court is thus, of the considered view that the writ petition cannot be said to be not maintainable only for inclusion of the aforesaid additional words in the cause title.
11. Record reveals that the Competent Authority received complaints against the functioning of the Board of Managers of the registered association. Upon receipt of the said complaints the Competent Authority passed an order dated 17.07.2021 directing the President of the registered association to explain within the specified time limit in writing on the following points-

“

(1) *why is the association using a name (**Kendriya Vihar II Apartment Owners' Association**) other than the registered name of the Association being “**Kendriya Vihar II**”?*

(2) *why the accounts of another entity, being **Kendriya Vihar II Apartment Owners' Association** is merged with the accounts of the registered association being “**Kendriya Vihar II**” which was formed and registered in the month of October 2019?*

(3) *why has the association not opened a bank account after its formation and registration in October 2019?*

(4) *why is the association unlawfully using the bank account of another entity?*

(5) *why is the association demanding money for a period prior to its formation from the members of **Kendriya Vihar II** when it is not a successor of any registered or unregistered association and no rights and obligations of any entity have been transferred to it by way of succession?*

(6) *why has the association framed its own purported byelaws when no such power of framing bye-laws has been conferred to it by the West Bengal Apartment Ownership Act?”*

12. By the said order the President of the said association was also directed to take necessary steps to resume immediately all services including security and reception service for the alleged defaulter members of NMC which are withdrawn as an interim measure.

13. The interim order dated July 17, 2021 passed by the competent authority was challenged by the writ petitioner in WPA No. 12406 of 2021 and a co-ordinate bench of this court by an order dated August 12, 2021 dismissed the said writ

petition as the court found no reasons to interfere with the said interim order. Being aggrieved, against the aforesaid order, petitioner preferred an appeal being MAT 909 of 2021. The Hon'ble Division Bench by an order dated October 7, 2021 directed the competent authority to positively file the report, be it interim or final before the next date of hearing. When the appeal was taken up for consideration on November 16, 2021, the Competent Authority placed before the Hon'ble Division Bench the final order dated November 12, 2021 and the Hon'ble Division Bench by an order dated November 16, 2021 disposed of the appeal upon observing that the petitioner can challenge the final report if he is aggrieved with the same.

14. Thereafter, the instant writ petition has been filed challenging the final order dated November 12, 2021 passed by the Competent Authority.

15. This Court finds that the Competent Authority took into consideration the contention of the writ petitioner as against the six issues referred to hereinbefore and passed the order dated November 12, 2021 giving elaborate reasons mentioning the relevant provisions of the Act and the Byelaws framed thereunder. It was specifically mentioned in the said order that one, Tapas Karmakar while filling up the online form for registration of the association stated its name as "Kendriya Vihar II" and the system fetched the said name from the online application and accordingly issued a registration certificate. It

was further mentioned therein that the President or any other managers of the association never took any initiative to correct the registered name of the association. The said authority returned a factual finding that the President and the association and all other managers have been running the association in the name of “Kendriya Vihar II Ownership Association” under a wrong belief that the registration under the Act was in the said name. The Competent Authority further held that the Form A was accepted on 09.09.2021 and the meeting of the apartment owners under clause 2 of Bye Laws 3 was held on 20.10.2019 to form an association under the Act and accordingly they formed an association. It was further held that the association was formed on October 20, 2019 in a meeting of the apartment owners. On the basis of such factual finding, the Competent Authority directed preparation of budget and accounts and realization of maintenance charges from the members with effect from October 20, 2019 i.e., the date when the association was formed. The budget and accounts of a registered association has to be prepared with effect from the date of formation of the association. A registered association also has the power to realise maintenance charges from the date of its formation.

16. At this juncture it would be relevant to note that this writ petition was filed on November 30, 2021. Record reveals that one Shri Goutam Mukherjee, Vice President of Kendriya Vihar II

by a prayer dated 20.01.2022 requested the authority to change its name from Kendriya Vihar II to “Kendriya Vihar II Apartment Owners’ Association” stating that during the association formation meeting dated 20.10.2019, the name of the association was decided by the members as Kendriya Vihar II Apartment Owners Association.

17. It would appear from the order dated 12.04.2022 that the President of the association did not submit any copy of such resolution of the meeting dated 20.10.2019 in spite of being specifically directed by the Competent Authority to do so. The Competent Authority, therefore, rejected the prayer for change of name of the registered association. Since the copy of the aforesaid resolution which is the basis of the claim for change of name was not produced before the Competent Authority and such issue has been decided by the authority and is not under challenge cannot be reopened in this writ petition.

18. Therefore, this court is unable to accept the submission of Mr. Basu that the selection of the relevant date as October 20, 2019 is without any basis as it has been admitted by the Vice President of the association, who made a request for change of name, that the association was formed on that date.

19. It is evident from the materials on record that the learned advocate of the petitioner by an e-mail specifically stated that the issues raised by the Competent Authority while passing the

interim order dated July 17, 2021 was explained and clarified in paragraph 38 of the writ petition being WPA 12406 of 2021. This Court after going through the impugned order found such contentions were taken into consideration by the Competent Authority. Therefore, the petitioner cannot be said to have been prejudiced in any way for not affording an opportunity of oral hearing to the petitioner.

20. For the aforesaid reasons, this court is of the considered view that the principles of natural justice has not been violated in the instant case.

21. The Competent Authority assigned cogent reasons in support of the ultimate conclusion. The Act empowers the said authority to pass directions upon the Manager or the Board of Managers of the registered association in case they have failed to perform their duties under the Act and the Byelaws and such power can be traced in Section 16B of the said Act. Therefore, the Competent Authority was within its jurisdiction to pass the directions contained in the impugned order.

22. The Hon'ble Supreme Court in *Sarvepalli Ramaiah* (supra) laid down the scope of interference under Article 226 of the Constitution of India against a decision of an administrative authority. The Hon'ble Supreme Court held thus-

“40. Administrative decisions are subject to judicial review under Article 226 of the Constitution, only on grounds of

perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. Except on these grounds administrative decisions are not interfered with, in exercise of the extraordinary power of judicial review.

41. In this case, the impugned decision, taken pursuant to orders of Court, was based on some materials. It cannot be said to be perverse, to warrant interference in exercise of the High Court's extraordinary power of judicial review. A decision is vitiated by irrationality if the decision is so outrageous, that it is in defiance of all logic; when no person acting reasonably could possibly have taken the decision, having regard to the materials on record. The decision in this case is not irrational.

42. A decision may sometimes be set aside and quashed under Article 226 on the ground of illegality. This is when there is an apparent error of law on the face of the decision, which goes to the root of the decision and/or in other words an apparent error, but for which the decision would have been otherwise.

43. Judicial review under Article 226 is directed, not against the decision, but the decision-making process. Of course, a patent illegality and/or error apparent on the face of the decision, which goes to the root of the decision, may vitiate the decision-making process. In this case there is no such patent illegality or apparent error. In exercise of power under Article 226, the Court does not sit in appeal over the decision impugned, nor does it adjudicate hotly disputed questions of fact."

21. The Hon'ble Supreme Court held that the judicial review under Article 226 is directed not against the decision but against the decision making process. The writ petitioner failed to point out any patent, illegality and/or error apparent on the face of the decision

which goes to the root of the decision thereby vitiating the decision making process. The impugned order was passed on the basis of materials produced by the parties. The contentions of the petitioner as specifically stated in paragraph 38 of the earlier writ petition were also considered by the Competent Authority while passing the impugned decision. The same also do not suffer from perversity warranting interference in exercise of the power of judicial review. The decision of the competent authority is not also vitiated by any irrationality. The same cannot be said to be without jurisdiction as observed hereinbefore.

22. For the reasons as aforesaid this court holds that the order passed by the competent authority on November 12, 2021 does not call for any interference by this Court in exercise of the powers of judicial review. Accordingly, the writ petition being WPA 19177 of 2021 stands dismissed without, however, any order as to costs. The connected applications stand disposed of.

23. Urgent photostat certified copy of this judgment be given to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)