

ORDER SHEET

WPO/2237/2022

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

ALOK KUMAR MITRA AND ANR
VS
DEBASISH GHOSE AND ORS

BEFORE:

The Hon'ble JUSTICE KRISHNA RAO

Date : 30th May, 2022

(Vacation Bench)

Appearance:

Mr. Soumya Mazumdar, Adv.

Mr. Malay Kr. Seal, Adv.

...for the petitioners

Mr. Kallol Basu, Adv.

Mr. Dibakar Bhattacharya, Adv.

Mr. Saumik Sarkar, Adv.

Mr. Aditya Mondal, Adv.

...for the respondent no.3

Mr. Arindam Mandal, Adv.

...for the State

The Court: Affidavit of service filed by the petitioner be kept with the record.

This writ petition is filed against an order passed by the competent authority, Government of West Bengal, Housing Department, Law & Statutory Cell, Kolkata vide No. HO-23012(11)/10/2021-APARTT CELL-Dept. of HO 21/05/2022. The Annual General Meeting was held on 24th April, 2022 wherein a procedure for conducting elections of the Association was discussed. After the Annual General Meeting dated 24th

April, 2022, a notice of election was issued on 9th May, 2022 by fixing the time table for voting as follows:-

“3. The time-table (as per Indian Standard Time) for voting is as follows:

I. Casting of electronic ballots on-line: 10 AM on Wednesday, May 25, 2022 to 8 PM on Friday, May 27, 2022

II. Casting of physical ballots [To be held in the Activity Room of Tower 10] : 2 PM to 8 PM on Friday, May 27, 2022.”

Before issuance of the notice of election, the members of the Association has raised objection on 2nd May, 2022 and on receipt of the objection raised by the members of the Association, the competent authority had issued notice to the society and the society had participated in the said proceeding. After hearing the parties, the competent authority had passed the impugned order on 21.05.2022 which is as follows:-

“Hence, the purported Bye-laws namely **ULAOA Bye-laws** is a non est document in the eye of law and it has no legal sanction or authority or force for any purpose whatsoever.

During the pendency of the examination of the written reply dated 15.05.2022 this authority was moved by some members of the Association, namely, **Smt. Chandrima Karmakar, Smt. Arunima De, Sri Subir Basak, Smt. Nandita Ghosh, Sri Joydev Sengupta** through email stating that they were in receipt of an email from the official email id of the Association on **20 May 2022** in which there were two attachments regarding **(1) Board of Managers (BoM) election guideline, and (2) BoM election ballot**. They shared those two attachments to this authority and requested this authority to take immediate actions to stop the election which is

going to be held in contravention to clause (2) of bye-law 8 of the Bye-laws, 2022 which mandates that the election of the managers shall be held by the secret ballot.

This authority perused the copy of BoM Election Voting Guideline and the copy of BoM election ballot as mentioned herein above.

The heading of the ballot is reproduced below :-

“Upohar Luxury Apartment Owners’ Association (ULAOA) ballot for Election of the Board of Members.

Tower__ __ Apartment __ __ __ __ Name & Signature-

Option 1 – If you opt for this then pick and choose any 48 candidates out of 96. You can’t use any other option”.

On bare perusal of the ballot, it is evident that one has to write her/his Tower No. Apartment No. and put her/his name and signature on the ballot paper itself while exercising her/his franchise in the election of managers. This very exercise is more than sufficient to disclose who voted whom. Thus the ballot becomes open ballot instead of secret ballot. The basic tenet of election of managers of an Association is secrecy of voting. This is done for the interest of the Association and the members as well. The Bye-law 8 reads :-

“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.”*

Therefore, the proposed procedure of election of managers of the **Upohar Luxury Apartment Owners' Association** for the period 2022-2025 is in violation of the West Bengal Apartment Ownership Bye-laws, 2022.

In view of the facts narrated and legal provisions discussed hereinabove this authority is of the opinion that the Board or Managers of Upohar Luxury Apartment Owners' Association has failed to perform its functions lawfully under the West Bengal Apartment Ownership Act, 1972 and the West Bengal Apartment Ownership Bye-laws, 2022.

Now therefore, this authority in exercise of the powers conferred to it under sub-section (1) of section 16B of the said Act directs the **President** of the Upohar Luxury Apartment Owners' Association to immediately convene a general meeting in accordance with law so that the members of the Association can decide the detail manner in which and the date on which the election of the managers of the board be held in accordance with bye-law 8 of the Bye-laws, 2022. He is further directed to withdraw immediately the notice/notices issued by the Association regarding holding the election of the managers for the period 2022-2025."

Counsel for the petitioner submits that the society has fixed the date of election in accordance with law but the competent authority without considering the decision taken in the Annual General Meeting and the notice of election had passed the impugned order. Counsel for the petitioner prays for stay of operation of the impugned order dated 21st May, 2022 and also prays for allowing the petitioner to complete the election process in terms of the election notice dated 9th May, 2022.

Counsel for the respondent no.3 submits that as the society had initiated election process by violating the provisions of the bye-laws as in the bye-laws, there is no provision for conducting elections through e-ballot. Counsel for the respondent no.3 has drawn the attention to Clause 8(1) of the by-laws which reads as follows:-

“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.”

Counsel for the respondent no.3 has also handed over the copy of the letter dated 28th May, 2022 sent by the President of the Association wherein it is mentioned that in terms of the order passed by the competent authority, the schedule of voting which is scheduled to be held between 25th May, 2022 to 27th May, 2022 stands cancelled and in the said letter it was further informed that a new programme of the election will be intimated very soon. Counsel for the respondent no.3 further submits that as the petitioner Association has acted upon the order passed by the competent authority by cancelling the schedule of voting and also going to fix a new programme for election, as such no order can be passed in the instant writ petition.

Heard learned Counsel for the parties.

It is found that the Association by way of Annual General Meeting has taken a decision for conducting election and subsequently thereafter schedule for the election was fixed. The private respondents, being the members of the Association, have made their objection and accordingly the competent authority after hearing the parties has held that the Association has not taken proper steps for conducting election in accordance with the bye-laws and directed the Association to conduct the election in accordance with law. As per Clause 8(1) of the bye-laws, within fifteen days of formation of an Association under clause (2) of bye-law 3, the apartment owner presiding over of 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 and shall place the same in the Special General Meeting which shall be held for deciding the detail manner in which the date on which the election of the Managers of the Board will be held.

In the instant case, in the Annual General Meeting a decision is taken and notice of election was issued by fixing the date of voting but the same was not placed before the Special General Meeting and as such from the record itself it reveals that the Association has not complied with the provisions as provided under law. Secondly, the Association has acted upon the order passed by the competent authority by cancelling the schedule of voting which was scheduled to be held on 25th May, 2022

to 27th May, 2022 and has also given an understanding to the members that a programme of election will be fixed as early as possible.

In view of the above, this Court is of the view that the writ petition filed by the petitioner is misconceived and no order can be passed.

WPO/2237/2022 is dismissed.

(KRISHNA RAO, J.)

R.Bhar/SP