

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 2269 of 2023

South City Apartment Owners' Association & Anr.

vs.

The State of West Bengal & Ors.

With

W.P.A 2334 of 2023

Patita Paban Bishwal & Ors.

vs.

The State of West Bengal & Ors.

For the petitioners in WPA 2269 of 2023 : Mr. Kishore Dutta, Sr. Adv.
Mr. Srijib Chakroborty, Adv.
Mr. Bimalendu Das, Adv.
Ms. Shomrita Das, Adv.
Mr. Shomrik Das, Adv.

For the petitioners in WPA 2334 of 2023 : Mr. Jishnu Chowdhury, Sr. Adv.
Mr. Aritra Basu, Adv.
Ms. Ujjaini Chatterjee, Adv.
Mr. Aditya Mondal, Adv.

For the State : Mr. Debasish Ghosh, Adv.

Ms. Debapriya Chatterjee, Adv.

For the respondent no. 3 : Mr. Rohit Das, Adv.
Mr. Kishwar Rahman, Adv.
Mr. Indradip Das, Adv.
Mr. Preetom Majumdar.

Last Heard on : 02.02.2023.

Delivered on : 08.02.2023.

Moushumi Bhattacharya, J.

1. The petitioners are an Association of apartment owners of South City Housing Complex, the President of the Association and residents of the building complex. The petitioners seek quashing of an order passed by the Competent Authority, under the provisions of the West Bengal Apartment Ownership Act, 1972 on 25.1.2023 whereby the Competent Authority directed the petitioners to conduct the election of the Managers of the Association only through manual voting. The petitioners were also directed to complete the process of election of the Managers and form a new Board of Managers within 5.2.2023. The private respondent no. 3 is a resident of South City Apartment Complex on whose complaint the Competent Authority passed the impugned order.

2. The basis of challenge to the impugned order of the Competent Authority is on certain undisputed facts which would appear from the impugned order itself. These are as follows.

3. The tenure of the existing Board of Managers of the Association of the building complex was to end on 31.5.2020. The election of the Managers however could not be held within the statutory time period due to the Covid-19 pandemic. The President of the Association/petitioner no. 2 therefore announced the elections on 17.12.2022 and 18.12.2022 in hybrid mode i.e. through physical as well as online mode. The Competent Authority, acting on certain complaints received from members of the Association, directed the President of the Association to immediately convene a Special General Meeting of the Association for deciding the manner of election of the Managers of the Board and to conduct the election in accordance with the manner decided by the members in the Special General Meeting. The election of the Managers of the new Board was thereafter extended to 30.1.2023. The Special General Meeting was held on 8.1.2023 in compliance with the direction of the Authority and the members were given two options in respect of the manner of election. The first option was a combination of online and manual voting and the second option was only for manual voting.

4. Of the total number of 341 votes polled, 197 voted for hybrid while 144 for only manual voting. The online voting was decided to be done through the CDSL Platform.

5. The private respondent no. 3 complained to the Authority by a mail dated 11.0.1.2023 against the decision taken in the Special General Meeting alleging that online voting was contrary to the West Bengal Apartment Ownership Bye-laws, 2022.

6. The Authority came to the conclusion that the election must preserve the condition of secret ballot. The Authority further concluded that online voting through the CDSL platform would be inconsistent with Bye-law 8 and hence directed the President of the Association to conduct the election of the Managers of the Association only through manual voting. The time for forming a new Board of Managers was extended till 5.2.2023 and the new Board was to take charge by 6.2.2023. The petitioners approached the Court on 30.1.2023 for urgent relief.

7. The contention of the petitioners, through learned counsel, is that the election of the Board of Managers through the CDSL Platform would not dilute the secrecy contemplated in Bye-law 8 in any manner whatsoever. Counsel also relies on the decision of the majority of the members taken at the Special General Meeting for a hybrid method of election. Counsel further urges the practical difficulties in conducting the election through manual voting where 40% of the residents of the complex are NRIs and living outside the State.

8. Learned counsel appearing for the Competent Authority proposes that the election be held by way of postal ballot and disagrees with the arguments with regard to the efficacy of the CDSL Platform.

9. Learned counsel appearing for the private respondent no. 3 submits that the condition of secrecy in holding election is a statutory requirement under the West Bengal Apartment Ownership Bye-laws, 2022 and that the CDSL platform would compromise on the secrecy which is required to be

maintained in the election. Counsel urges that manual voting is the only preferred mode for the election.

10. There are several reasons for holding that the impugned order dated 25.1.2023 passed by the Competent Authority is liable to be quashed.

11. Foremost among those reasons is the construction given by the Authority to Bye-law 8(2) of the West Bengal Apartment Ownership Bye-laws, 2022. The said Bye-law provides for election to be held by secret ballot in accordance with the detailed manner decided under Bye-law 8(1). Bye-law 8(1) stipulates that the apartment owner presiding over the General Meeting shall serve notice upon each member of the Association within 15 days of formation of an Association under Bye-law 3(2) specifying the date, on and from the 7th day from the date of issue of the notice, and the time and place of the Special General Meeting for deciding the manner and the date for holding the election of the Managers of the Board. Therefore, the only requirement in Bye-law 8(2) is for holding the election by secret ballot i.e for the purpose of maintaining secrecy. Significantly, Bye-law 8(2) gives precedence to the decision taken at the Special General Meeting on the mode in which the election is to be held. There is nothing in Bye-law 8(2) to suggest that the election shall only be held by manual voting as has been decided by the Authority in the impugned decision.

12. Second, Bye-law 8(2) provides that mode/manner of holding elections shall be decided in the Special General Meeting. The Special General Meeting held in this case resulted in a majority of 197 members voting in favour of a hybrid mode as against 144 votes in favour of manual voting. It

was also decided in the Special General Meeting that a certificate could be obtained from CDSL confirming the secrecy of votes. Hence, the impugned decision of the Competent Authority to direct the conduct of the election only by manual voting is straightaway contrary to Bye-law 8(2). Further, the impugned order does not record any objection or subjective satisfaction for the Authority to conclude that election through the CDSL Platform would compromise on the secrecy requirement under Bye-law 8(2). This is all the more significant since the Authority had by an earlier decision dated 2.12.2022 directed the Association to decide on the manner of election in a Special General Meeting.

13. The perceived doubt as to the secrecy which can be maintained on the CDSL Platform is not corroborated by any reason or material produced by the Authority itself in other litigations where the Authority was represented including in WPA 7426 of 2022 and WPO 2237 of 2022. The orders passed in those matters, which form part of records, show that the Authority agreed to voting being held on CDSL Platform. The situation of loss of faith on the CDSL Platform is hence unexplained.

14. The practical side of the matter is equally relevant. Admittedly, 40% of the residents of the South City Complex are NRIs or live outside the city/State. Hence, it is inconceivable that in this day and age when a large part of the global business is being carried on through virtual platforms, the residents of the Apartment Complex who live outside the State are being asked to come to Kolkata only to vote in the election for the Board of Managers. There is absolutely no reason to suspect the secrecy credentials

of the CDSL Platform and even if it is assumed that there may be a slip-up from somewhere, the Association can always call upon CDSL to provide details of how it intends to maintain the secrecy of election. This alone cannot be a ground to keep the elections in abeyance particularly when the tenure of the present Board ended on 24.5.2020. Bye-law 8(1) mandates that a Special General Meeting be held within 15 days of the formation of an Association for deciding the manner of holding the election of the Managers of the Board. The Association has been fixed with the responsibility of taking the steps prescribed under Bye-law 8(1).

15. This Court fails to understand the basis and the reason (or the lack of it) for the Competent Authority to direct that the election of the Board shall be held only by manual voting and by no other method. The impugned decision is not only against the particular Bye-law which the Authority has itself relied on but is also against all considerations of practicality. The contention of the Authority that the elections may be held by postal ballot is also untenable and would lead to an unnecessary waste of resources.

16. WPA 2269 of 2023 and WPA 2334 of 2023 are accordingly allowed and disposed of by quashing the impugned decision of the Competent Authority dated 25.01.2023. The petitioners shall conduct the election of the Board of Managers of the Apartment building in terms of the decision taken in the Special General Meeting held on 8.01.2023 that is by hybrid mode. The entire exercise shall be done in strict compliance with The West Bengal Apartment Ownership Act, 1972 and the Rules and Bye-laws framed thereunder.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)