

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.24556 of 2023

**EGV Association of Apartment Owners and another
Vs.
Competent Authority and others**

For the petitioners	:	Mr. Sabyasachi Chowdhury Mr. Rajarshi Dutta Mr. Soorjya Ganguly Ms. Pooja Chakraborty Ms. Arti Bhattacharyya
For the WBMC	:	Mr. Anirban Ray Mr. Biswabrata Basu Mallick Ms. Mrinalini Majumder
For the respondent no.3	:	Mr. Abhrajit Mitra Mr. Arindam Banerjee Mr. Satadeep Bhattacharyya Mr. Saptarshi Datta Mr. Samriddha Sen Ms. Srinjita Ghosh Mr. Pourush Kanti Pal Mr. Debdut Hore
For the respondent nos.4-29	:	Mr. Jishnu Saha, Mr. Ishaan Saha, Mr. Aniket Chaudhury
Hearing concluded on	:	01.12.2023
Judgment on	:	08.12.2023

Sabyasachi Bhattacharyya, J:-

1. The present dispute pertains to one Elita Garden Vista (EGV) apartment. Initially, 15 towers were erected in the said apartment

complex which were numbered serially but for 8. Subsequently, the 16th tower came up, which is known as Tower-8 (in short, “T-8”).

- 2.** In the initial Form-A declaration submitted by the owners of the first 15 towers, the said owners were described to be the apartment owners who were also members of the petitioner no.1-Association which was thus formed and registered.
- 3.** Subsequently, after T-8 came up, the private respondents purchased flats of the same, but their names were not included in the Form-A declaration.
- 4.** The respondent-Developer sought to make amendment to the said Form-A which was turned down by the Competent Authority (in brief, “CA”) under the West Bengal Apartment Ownership Act, 1972 (for short, “the 1972 Act”).
- 5.** A suit was filed by the private respondents/owners of T-8 in which an order was passed in connection with an application for appointment of a Special Officer for holding elections. The matter came up in appeal before a Division Bench of this Court.
- 6.** The Division Bench, by its first order dated March 15, 2022, expressed its opinion that the Special Officer appointed by the Trial Court with the aid of the CA shall hold the election. The Special Officer in consultation with the CA shall prepare an electoral roll and decide on the mode of voting. It was, however, mentioned that the flat owners of the newly constructed tower (T-8) should not be included in the electoral list in view of the pending litigation.

7. The said order was challenged in the Supreme Court which by an order dated April 13, 2022 disposed of the Special Leave Petition by granting liberty to the petitioners therein, that is, the private respondents/ T-8 tower owners to move this Court for vacating or modification of the order impugned insofar as it relates to the flat purchasers of T-8.
8. Thereafter the matter was again moved before the Division Bench of this Court which by its second order dated March 17, 2023 deleted the observation that the flat owners of the newly constructed tower should not be included in the electoral list in view of the pending litigation. While doing so, the Division Bench observed that whether the applicants can be considered as “owners” within the meaning of Section 3(ia) of the 1972 Act was not considered when the Division Bench decided the appeal and that the point was never urged nor argued. The Division Bench further observed that it was not necessary for it in the said proceeding to decide if by reason of such deed the applicants would be entitled to participate in the election. It was observed by the Division Bench also that it appears that the CA is in seisin over the matter.
9. Meanwhile, the Association of the other towers than T-8 moved a writ petition bearing WPA No. 15903 of 2018 challenging the revised sanction plan pursuant to which T-8 was built.
10. The said writ petition was ultimately disposed of *vide* order dated October 18, 2023 where the learned Single Judge observed, *inter alia*, that the Newtown Kolkata Development Authority (NKDA) has to act

within the four corners of the NKDA Act, 2007 which creates it and it cannot enforce the provisions of any other law, apparently referring to the 1972 Act. Thus, it was observed that the Chairman of NKDA was to consider the representations of the petitioners insofar as it relates to alleged violation of guidelines of NBC and/or the 2009 Rules with regard to distance restrictions in the light of the said observations made thereinbefore and to decide the said issue by passing a reasoned order.

- 11.** The learned Single Judge also held that while granting sanction to the building plan, NKDA has to see whether the plan is in accordance with the Rules under the 2007 Act and that the NKDA has no power to adjudicate the right of the parties to a deed of conveyance while granting sanction to a plan.
- 12.** The Special Officer, who had been directed by the Division Bench to prepare the electoral rolls and hold the election in consultation with the CA, gave an interim report on September 19, 2023 and referred the matter back to the CA to take a decision with regard to the impending issue as to whether the T-8 owners would be permitted to participate in the elections of the apartment and advise the Special Officer accordingly.
- 13.** The CA, by the impugned communication dated September 27, 2023, observed that every flat owner is a member of the Association as per the provisions of the 1972 Act; therefore, in the present case, the election is to be conducted with 1511 flat owners of EGV.

- 14.** The writ petition has been preferred by the Association of owners of the other 15 flat owners than T-8. Learned senior counsel argues that the CA acted palpably without jurisdiction in holding that all 1511 flat owners, including the T-8 owners, were eligible to vote for the Association.
- 15.** It is argued that reading Sections 2 and 3 of the 1972 Act in conjunction, the T-8 flat purchasers were not 'owners' eligible to vote. As per Section 2, the 1972 Act shall apply to every property as described therein by duly executing and registering a declaration setting out the particulars referred to in Section 10.
- 16.** Section 3 defines 'property' in Clause (k) and 'owner' in Clause (ia). Section 10 gives the particulars which are to be given in the declaration, including the names of the owners and the nature of interest of the owner or owners in the property. Since the T-8 owners do not find mention in the declaration given under Section 10, it is contended that the 1972 Act, as per Section 2 thereof, does not apply to T-8 and its owners. Hence, the observation of the CA in the impugned communication regarding all flat owners including T-8 owners being eligible to participate is palpably bad in law.
- 17.** Learned senior counsel points out to the second Division Bench order where it was observed that the CA is in seisin of the issue whether T-8 flat purchasers fall under 'owners' within the contemplation of the 1972 Act. Thus, it was incumbent upon the CA to give an opportunity of hearing to the petitioners and to decide on the issue upon giving

reasons in accordance with law, which has not been done in the cryptic one-liner in the impugned communication.

- 18.** Learned senior counsel argues further that the communication of the CA tantamounts to an order without hearing the petitioner and is absolutely cryptic.
- 19.** The petitioners point out that the learned Single Judge while deciding the issue of legality of the revised sanction plan in construction of T-8 did not decide the present issue at all.
- 20.** Learned counsel for the respondent/developer argues that the writ petition is premature and not maintainable. No right was decided by the impugned communication, it is contended. Learned senior counsel submits that the said communication is not justiciable, since it was merely in the nature of an opinion. By harping on the language used by the Division Bench on both the occasions, it is argued that the contemplation thereof was for the Special Officer, in “consultation with” the CA, to prepare the electoral roll. Such consultation is beyond the scope of judicial review. To support such contention, learned senior counsel cites *(2009) 8 SCC 273 [Mahesh Chandra Gupta Vs. Union of India and others]*.
- 21.** Learned senior counsel for the respondents/ T-8 owners argues that as per Bye-Law 3(1)(a) of the West Bengal Apartment Ownership Bye-Laws, 2022 (in brief, “the 2022 Bye-Laws”), each apartment owner of the property is a member of the Association. Clause (b) Bye-Law 3(i) provides that when an apartment owner transfers his apartment, the transferee immediately becomes a member of the said Association in

place of the transferor. Learned senior counsel argues that, thus, the said respondents, that is, the owners of the T-8 flats automatically became owners within the meaning of the Act and are thus, eligible to participate in the elections for the formation of the Association.

- 22.** It is next argued that disqualifications for being managers are stipulated in Bye-Law 11, which is not applicable to the present case.
- 23.** Sections 10A and 10B of the 1972, it is argued, are the only provisions empowering the CA. Under those provisions, no power has been conferred on the CA to adjudicate as to who are the owners within the contemplation of the Act eligible to elect in the Association elections. After accepting Form-A, unless the same is validly amended, the CA does not have any jurisdiction to decide the issues as raised herein. It is argued that the Division Bench direction to the Special Officer was merely to consult with the CA and there was no scope of any decision by the CA. Thus, the CA did not make any adjudication while making the impugned communication.
- 24.** The learned Single Judge, it is submitted, in WPA No. 15903 of 2018, turned down the objection of the petitioners regarding the legality of the revised plan and the validity of the T-8 construction was upheld. Thus, upon the said adjudication, the T-8 flat purchasers' ownership has been vindicated.
- 25.** Learned counsel appearing for the CA argues that Bye-Law 3(i)(a) speaks about "owner". The CA has accordingly made the impugned communication by holding that every flat owner is a member of the Association as per the provision of the 1972 Act. That apart, it is

argued that the CA does not have any power of adjudication apart from those conferred by Section 10A and Section 10B of the 1972 Act which is limited to acceptance or rejection of Form-A and its amendment.

- 26.** The case presents certain interesting facets. It has to be ascertained first whether the learned Single Judge in WPA No. 15903 of 2018 decided the issue presently at hand since, if such adjudication has already been made, there is limited or no scope of re-deciding the issue by the CA or by this Court.
- 27.** A perusal of the said order dated October 18, 2023 shows that the challenge was made by the owners of the other towers, who are members of the present petitioner no.1-Association, against the revised sanction plan dated August 20, 2015 which according to them was in contravention of the provisions of the 1972 Act. The also sought demolition of structures erected in terms thereof, meaning thereby primarily T-8.
- 28.** While deciding the issue, the learned Single Judge observed that the learned Senior Advocate for the petitioner in course of his arguments could not point out any provision in the 2007 Act restricting the power of the promoter to make any alteration in plans, specifications and other particulars after execution and registration of deeds of conveyances in favour of the apartment owners. In the absence thereof, the court was of the considered view that the provisions contained in 1972 Act prohibiting the alteration of the percentage of undivided interest of each apartment owner in the common areas and

facilities as specified in Form-A declaration cannot prevail upon the provisions of the 2007 Act. The Court accordingly held that the provisions of the 1972 Act do not have any consequences on the right of the promoter to obtain revised plan. Therefore, the issue of taking consent of the apartment owners while submitting the application for revised plan does not arise in the case at hand. The NKDA, it was held, is to act within the four corners of the statute which creates it, that is the NKDA Act, 2007 and also that it cannot enforce the provisions of any other law. In such context, the learned Single Judge went on to observe that the Chairman of NKDA was to consider the representations of the writ petitioner.

- 29.** Thus, the subject-matter of the said writ petition was the revised sanction plan for constructing T-8. The Court, while deciding the writ petition, categorically observed that the sanction of the revised plan was not governed by the provisions of the 1972 Act. The NKDA was bound by the 2007 Act and could not be affected by the provisions of the 1972 Act in that respect.
- 30.** Hence, the learned Single Judge clearly demarcated the provinces of the two statutes. The issue at hand which pertains to the rights of the T-8 owners to vote, emanating from the 1972 Act, could not thus be said to have been decided by the learned Single Judge in the order dated October 18, 2023 passed in WPA No. 15903 of 2018.
- 31.** Let us now scrutinize the relevant portions of the Division Bench orders to ascertain its intention insofar as the role of the CA is concerned. In the first order dated March 15, 2022, the Division

Bench found that the Special Officer appointed by the learned Trial Court with the aid of the Competent Authority shall hold the election and the Special Officer in consultation with the CA shall prepare an electoral roll and decide on the mode of voting. The said findings were never disturbed in its subsequent orders.

- 32.** In the second order of the Division Bench dated March 17, 2023, after the Supreme Court granted liberty to apply for modification of its earlier order, the Division Bench held that whether the applicants (T-8 owners) can be considered as 'owners' within the meaning of Section 3(ia) of the 1972 Act was not considered when it decided the appeal, having not been urged or argued. It was not necessary for the Division Bench in the said proceeding to decide if by reason of such title deeds they would be entitled to participate in the election. The parties, it was observed, have already disclosed proceedings before the CA with regard to objections concerning Form-A and Form-B, which was held not to be the subject-matter of the suit or a matter that was urged before the Division Bench.
- 33.** The Division Bench further found that the orders relied upon by the Association that were passed in the pending writ application would not show that the T-8 owners were debarred from exercising their rights under their respective deeds of purchase nor the issue as to whether they would be considered as owners under the 1972 Act was gone into and decided. Hence, the Division Bench clearly washed off its hands on the issue of whether the T-8 owners are owners within the 1972 Act and are entitled to elect. Having observed so, the

Division Bench added that “it appears” that the CA is in seisin over the matter. Although the observations of the Division Bench could not confer jurisdiction on the CA which it does not otherwise have in law, it is clear from the orders of the Division Bench that it had not decided the issue and had left it open to be decided by the CA, which was perceived by the Division Bench to be in seisin over the matter.

- 34.** A perusal of Sections 10A and 10B shows that the CA has the limited power of deciding on the acceptance of any declaration referred to in Section 2 or amendment thereto under Section 4(3).
- 35.** Section 10A lays down a procedure for the same. Section 10B on the other hand provides for the State Government to call for and examine the records of any proceeding before the CA. Thus, the only conferment of power under the Act of 1972 on the CA is under Section 10A.
- 36.** In the present case, the CA has not been called upon to accept or reject any declaration or amendment thereto. The developers’ attempt to have an amendment to the declaration has been foiled by the CA on the ground that since the majority of the then owners of the flats had presented the declaration in Form-A, the developer alone could not have the same amended. It was a technical rejection, but a rejection all the same. Hence, as of today, the Form-A declaration which was submitted by the present writ petitioners stands in the records. The CA does not, as such, have power under Section 10A to decide the issue whether the flat owners of the newly constructed tower are owners within the 1972 Act or eligible to vote. However, the intention

of the Division Bench has to be construed from the language used by it. The respondents are correct in submitting that the Division Bench had not directed any adjudication but had merely directed the Special Officer to hold the election with the aid of the CA and to prepare an electoral roll and decide the mode of voting in consultation with the CA. However, such perceived 'consultation' as directed by the Division Bench was imbued with the observation of the Division Bench itself that, in its perception, the CA was in seisin over the issue as to whether the T-8 owners would be considered as owners under the 1972 Act and were eligible to vote.

- 37.** Seen in such perspective, the opinion of the CA, upon 'consultation' by the Special Officer, acquires much more weight than a mere stray observation or advice. The entire voting rights of the T-8 owners hinges around such observation, since, after the Division Bench directed the Special Officer to consult with the CA and the Special Officer having categorically solicited the decision and advice of the CA on the said issue, the preparation of the electoral roll became dependent exclusively on the opinion of the CA.
- 38.** Hence, although the CA does not have powers of adjudication under Section 10A of the 1972 Act in that regard, the role of the CA in giving such advice dated September 27, 2023, as per the direction of the Division Bench, acquired the colour of a *prima facie* adjudication of the rights of the T-8 owners. As such, the argument of the developers that the said observation is not justiciable cannot be accepted.

- 39.** The context of *Mahesh Chandra Gupta (supra)* cited by the developer is distinct and different from the present case. The said judgment was rendered in the context of Article 217 of the Constitution of India. In sub-article (1) of Article 217, it is provided that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal “after consultation” with the Chief Justice of India. The Supreme Court, in such backdrop, held that there is a vital difference between judicial review and merit review. ‘Consultation’ as envisaged in Article 217 forms part of the procedure to test the fitness of a person to be appointed a High Court Judge. Once there is consultation, the content of the consultation is beyond the scope of judicial review, though lack of effective consultation could fall within the scope of judicial review. It was also observed that the aspect of suitability which was involved in ascertaining eligibility fell outside the purview of judicial review.
- 40.** The subjective element in suitability and the context of the said judgment are entirely different from the present case. As discussed above, here the element of consultation as contemplated by the Division Bench is not merely subjective but conclusively decides the issue of eligibility of the T-8 tower owners to vote. Hence, the impugned decision of the CA as embodied in its communication dated September 27, 2023 is not only justiciable but amenable to judicial review under Article 226 of the Constitution of India.

41. Thus, this Court has to assess the legality of the said opinion of the CA independently, since none of the Courts, either the Division Bench or the learned Single Judge, has decided the said issue.
42. For ascertaining such aspect of the matter, we are to look into Section 2 of the 1972 Act first. The sub-text of the said provision clearly provides that the 1972 Act shall apply to a property as defined therein only if the sole or majority owners or all the owners submit to the jurisdiction of the Act by duly executing and registering a declaration setting out the particulars referred to in Section 10.
43. Section 10 speaks of the declaration referred to in Section 2 and lays down the contents of the same which includes the name of the owner, nature of interest of the owner or owners, description of each apartment, etc.
44. The West Bengal Apartment Ownership Rules, 1974 provides for the modalities of submission of Form-A declaration and its amendment. Rule 3 speaks about the declaration under Section 2 by the sole owner or all the owners or majority of the owners as the case may be. Rule 4 provides the circumstances of amendment of such a declaration. Rule 5 indicates that the amendment is to be at the instance of such sole owner or all the owners or majority of the owners, etc. The term “such” refers to the owner/owners who had submitted the Form-A declaration originally in the first place. In the present case, the other 15 tower owners than T-8 had presented the declaration Form-A and it can be amended only at their behest. Undisputedly, till date, there

has been no amendment to the Form-A and the Form-A declaration originally submitted still subsists.

- 45.** It is also admitted that in the said original Form-A declaration, there was no mention of T-8 itself, let alone the names of the purchasers of the flats in it. Hence, reading Section 2 in conjunction with Section 10 of the 1972 Act, T-8 and its owners having not been mentioned in the Section 10 declaration, the 1972 Act itself does not apply to it within the contemplation of Section 2 of the said Act.
- 46.** The segregation of T-8 from the other towers in this regard is validated by Section 3(a) which defines “apartment” as part of a property having a direct exit to a road, etc. Section 3(ia) defines “owner” in relation to any property or part thereof or apartment. Thus, the ownership is in relation to ‘property’ as defined in Clause (k) of Section 3 which property has to come within the fold of Section 2, that is, in respect of which a Section 10 declaration has been made.
- 47.** Hence, we find that the T-8 owners have never become “owners” within the contemplation of the 1972 Act, since T-8 does not find mention in the Form-A declaration made in respect of the concerned apartment.
- 48.** Thus, the finding of the CA in the impugned decision/communication dated September 27, 2023 that every flat owner is a member of the Association as per the 1972 Act and that election is to be conducted with 1511 flat owners (including the T-8 owners) is perverse, being contrary to the records, and palpably arbitrary. Hence, the said decision cannot stand judicial scrutiny and ought to be set aside.

- 49.** In such view of the matter, WPA No. 24556 of 2023 is allowed on contest, thereby setting aside the impugned communication dated September 27, 2023 and directing the CA to re-consider its opinion/advice in the light of the observations made above and to issue a fresh advice to the learned Special Officer for him to proceed with the preparation of the electoral roll and with the process of election itself. Such fresh advice shall be issued by the CA within a fortnight from the date of communication of this order to the CA (respondent no.1 herein).
- 50.** There will be no order as to costs.
- 51.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)