

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

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 8243 of 2024

**Md. Shamim Alam
Vs
The State of West Bengal and others**

For the petitioner	:	Ms. Debjani Sengupta, Ms. Poulami Chakraborty,
For the State	:	Mr. Biswabrata Basu Mallick,, Ms. Ashmita Chakraborty
For the respondent no.4:		Mr. Ujjal Roy, Ms. Debina Mitra, Ms. Koyel Bag Ms. Shahina Haque
For the respondent no.7:		Mr. Ritzu Ghosal, Mr. Sayantan Chatterjee, Mr. Anirban Ghose
Hearing concluded on	:	15.05.2024
Judgment on	:	22.05.2024

Sabyasachi Bhattacharyya, J:-

1. The matter relates to the Siddha Town Rajarhat Residents' Association which was formed in respect of a housing complex under the West Bengal Apartment Ownership Act, 1972 (hereinafter referred to as, "the 1972 Act") and the West Bengal Apartment Ownership Bye-Laws, 1974 (for short, "the Bye-Laws").
2. The said housing complex is comprised of several blocks, one of which is called Magnolia, which is the epicenter of the present dispute.

3. An election was duly declared by the Presiding Officer of the Election Commission (EC) duly formed for conducting the first election, at the behest of the Ad Hoc Committee which was in charge of affairs after the formation of the Association. The modalities of the election were stipulated in the Election Notice dated March 3, 2024.
4. The election took place on March 10, 2024 but was tainted by controversy. Several residents, including the respondent no. 7, had raised objection in respect of the nomination of the petitioner. After the votes were cast, a furore arose regarding the petitioner having written an e-mail to the EC. In the said email, the petitioner had requested the EC to visit the flat of one Veena Singh, a resident of the Magnolia Block, on the ground of her inability to walk to the election area and to take her vote by homeballot. When the EC members later went there, Veena Singh refused to cast her vote and also wrote to the EC to indicate that she had not granted any authority to the petitioner to make such request and did not want to be a part of the election process. The said stand was reiterated in writing subsequently by her husband as well.
5. As a fallout of the arguments, the Presiding Officer alleged that the election process went on till well into the midnight and that he and the other members of the Committee were heckled by the respondent no. 7 and certain other residents. As a result, the Presiding Officer and almost all the EC members subsequently resigned. However, at the behest of one of the purported elected members, the election

results were communicated to the Competent Authority (CA) who declared the elections valid as well as published the results.

6. In the entire process, the ballot box and home ballot box containing the votes cast by the residents of the Magnolia Block were kept sealed and were not counted for the purpose of declaring the election results.
7. The petitioner challenges the said election and declaration of results and argues that either the entire election process is to be scrapped or the votes cast by the residents of Magnolia ought to be counted and the results declared afresh.
8. Learned counsel appearing for the petitioner contends that there is no provision in the 1972 Act and the Bye-Laws to cancel a nomination after the election is conducted.
9. It is argued that Clause 3(2) of the Bye-Laws provides for making one apartment owner as Presiding Officer regarding formation of an Association of apartment owners and Clause 8 casts a duty upon the Presiding Officer to hold the election for Managers of the Board and complete the process of election, which was duly complied with in the present case. Out of the 29 Blocks and 1386 apartment owners involved, a large chunk residing in the Magnolia Block were overlooked. Thus, the formation of the Board of Members, who in turn elected the officer bearers, itself is vitiated due to non-counting of the Magnolia votes.
10. Learned counsel argues that the Bye-Laws came into force as per Section 13(1) of the 1972 Act and have statutory force. The flouting the said provisions, it is argued, is *de hors* the law.

- 11.** Insofar as Veena Singh is concerned, it is argued that in the year 2022 as well, she had requested the petitioner to have her vote collected by home ballot and the petitioner had written a similar e-mail to the EC which was given effect to. Thus, the petitioner, this time also, made a similar request. In any event, it was for the EC to decide on such request and in the event the voter did not choose to so vote, not to take her ballot by such mode. Further, since Veena Singh did not vote at all, no prejudice could have affected the election process.
- 12.** Learned counsel for the Presiding Officer argues that the vote was sought to be disrupted by respondent no. 7 and certain other members of the Association, for which he and the other EC members had to resign. It is argued that the provisions of the 1972 Act and Bye-Laws were strictly complied with in conducting the elections, apart from the respondent no. 7 creating a ruckus.
- 13.** Learned counsel appearing for the respondent no. 7, who led the protest against the petitioner, argues that the writ petition is not maintainable against a private association. The present Association is merely registered under the 1972 Act and does not discharge any public function. Hence, it is contended that no public law element is involved and the Association does not come with Article 12 of the Constitution of India, not being the State or a functionary of the State. In such context, learned counsel cites a Division Bench judgment of this Court in *Secretary, Alipore Bar Association Vs. Subir Sengupta and others*, reported at (2024) 7 SCC 728.

14. The factual controversy which has arisen in the present case, it is argued further, gives rise to disputed questions of fact; hence, the writ court ought not to interfere.
15. Learned counsel for respondent no. 7, in support of such contention, cites *Joshi Technologies International Inc. v. Union of India and others*, reported at (2015) 7 SCC 728 and *State of M.P. and others v. M.V. Vyavsaaya & Co.*, reported at (1997) 1 SCC 156.
16. Learned counsel next relies on the communications of Mrs. Veena Singh by letter dated March 10, 2024 and her husband Raman Singh in such context and argues that the said Veena Singh and her husband ought to have been impleaded in the present writ petition. It is further pointed out that Veena Singh is only 46 years old and perfectly mobile. Hence, the request of the petitioner to have her vote by home ballot was *de hors* the election rules.
17. It is argued that the Presiding Officer realized his fault upon being pointed out and cancelled the entire ballot box used for home collection of votes, thus vindicating the stand of the respondent no. 7.
18. The election results were declared as per the Register of Election on March 13, 2024, by one of the EC members Mr. Subhadip Mukherjee with proper reasoning. Thus, the writ petition filed on March 18, 2024 was an afterthought and ought to be dismissed.
19. The respondent no. 7 also alleges that the Presiding Officer (respondent no. 4) was hand-in-glove with the petitioner. The respondent no. 7, having been declared an uncontested winner in view of the petitioner's candidature being cancelled, argues that the

election results were declared in due course of law and ought to be sustained.

20. Learned counsel for the respondent no. 4/Presiding Officer adds that the present election is not governed by Article 329 of the Constitution of India, which is in respect of elections to the Legislature and/or the Parliament and operates in furtherance of the separation of powers contemplated in the Constitution. A statutory election guided by a statute derives authority on a subordinate footing and is not premised on Constitutional powers. In such context, learned counsel cites *Federal Bank Ltd. v. Sagar Thomas and others*, reported at(2003) 10 SCC 733, where it was held that a person or a body under liability to discharge any function under any statute to compel it to perform such a statutory function comes within the purview of Article 226 of the Constitution of India.
21. Upon hearing learned counsel, certain factual aspects are required to be considered first. The Election Notice was issued March 3, 2024, declaring March 10, 2024 as the date of the election. The petitioner wrote an e-mail to the EC on March 6, 2022 requesting the EC to collect Veena Singh's vote from her home, since she has severe sinus. On March 10, 2023, the day of the election, Veena Singh wrote to the EC stating that neither she nor her husband were interested in the election process or to be a part of the election and that she had not requested/ authorized the petitioner to send any e-mail on her behalf. Her husband also wrote an e-mail on the same date denying any such request being made by Veena Singh.

- 22.** The Presiding Officer, in his report dated March 18, 2024, clearly stated that he had resigned on March 11, 2024. He also stated that the respondent no. 7, with a mob, heckled him. The Presiding Officer further stated that respondent no. 7 had admitted in her e-mail dated March 11, 2024 that Veena Singh had wrote the denial at the behest of the respondent no. 7.
- 23.** The Presiding Officer also stated that the vote of Veena Singh had not been collected and as such could not vitiate the election process. Lastly, the Presiding Officer wrote that the ballot box and home collection ballot box of Magnolia Block have been kept sealed in a strong-room with the Facility Manager and was never opened.
- 24.** It is also found that on February 5, 2024, much before the election process began, certain allegations were made against the petitioner and the Presiding Officer, signed by three residents.
- 25.** The Presiding Officer and the majority of members of the EC had tendered their resignations immediately after the election, all of which are found in the affidavit-in-opposition of the respondent no. 7 herself.
- 26.** The admitted position is that the Board was formed without taking into account the votes cast by the residents of the Magnolia Block. The said Board elected its office bearers, which decision was accepted by the CA.
- 27.** The first question which arises is whether the writ petition is maintainable. The respondent no. 7 has cited the Division Bench judgment of this Court in *Secretary, Alipore Bar Association (supra)*. However, the Alipore Bar Association is governed by its own Bye-Laws

and is not a statutory body, nor do its Bye-Laws have statutory force. As opposed thereto, the present Association is formed under the Bye-Laws of 1974 which have statutory sanction, being framed under Section 13 of the 1972 Act. Section 13(2), Clauses (a) and (c) confer Rule-making power with regard to the manner in which the Association of apartment owners is to be formed, the election of a Board of Managers from among the apartment owners and also the election of a President who shall preside over the meetings of the Board and of the Association.

- 28.** Thus, the Bye-Laws framed under Section 13 have a statutory flavour and force.
- 29.** Interestingly, Section 2 of the 1972 Act provides that the Act shall apply to every property as described therein and the sole owner or all the owners or majority of the owners of every such property shall submit the same within the period prescribed to the provisions of the Act by duly executing and registering a declaration setting out the particulars referred to in Section 10 thereof. Hence, the Scheme of the Act, as reflected in a conjoint reading of Sections 2 and 10, is that it is optional for a residential complex to submit themselves to the provisions of the Act. However, once such option is exercised, as in the present case, the rigours of the Act and the Bye-Laws apply fully to the Association and its functions, thus, subjecting it to the provisions of the Act.
- 30.** The election of such an Association, among other things, is directly governed by the provisions of the 1972 Act and the Bye-Laws. Under

Section 16B of the Act, the CA has the power and the prerogative to give such directions as it considers necessary if the Association fails to perform its functions under the Act or the Bye-Laws or if the functions of the Manager or the Board of Managers are detrimental to the interest of the Association and against the public interest.

- 31.** Read together, Section 16B and the provisions of the Act and the Bye-Laws regarding election, clearly show that the Association has to act not only in its own interest but also in the public interest. In the event the functioning, including election of the Association, is against public interest, the CA has power to interfere under Section 16B, in particular sub-section (2), of the 1972 Act. Thus, the election process in respect of an Association which has subjected itself to the 1972 Act and the corresponding Bye-Laws partakes the flavour of a public activity, hence involving a public law element.
- 32.** It is well-settled that the writ jurisdiction can be invoked when a legal right of a citizen is infringed by a public authority and/or a statutory body or a public authority has failed to perform its statutory duties. Every member of an association has a legal right to participate in the election process, while on the other hand the association and its functionaries have a public duty to discharge in respect of the election process, in consonance with the provisions of election as enumerated in the 1972 Act and the Bye-Laws. As such, the public law element which is required for a writ court to interfere is fully available in the present case. Hence, the ratio of *Alipore Bar Association (Supra)* is not attracted to the present case.

- 33.** Rather, the ratio laid down in *Federal Bank Ltd. (supra)*, cited by respondent no. 4 is apt in the context. It was held by the Supreme Court, *inter alia*, that a writ petition under Article 226 of the Constitution may be maintainable against not only the State or an instrumentality or agency of the State but a private body discharging public duty or positive obligation of public nature and also a person or a body under liability to discharge any function under any statute, in order to compel it to perform such a statutory function.
- 34.** That is precisely the case in the instant writ petition.
- 35.** Insofar as the ratio laid down in *M.V. Vyavsayya (supra)* is concerned, it was only held there that the writ jurisdiction is not an appellate power to enable the court to enter into merits of the decision. However, it was reiterated therein that the writ jurisdiction can be invoked if the impugned action is not in accordance with the procedure prescribed by law and/or natural justice which in the present circumstances is applicable.
- 36.** No debated and disputed questions of facts are involved in the instant case. The basic facts leading to the writ petition are all admitted, as discussed above. Hence, the writ court ought not to shirk its duty to ascertain whether the statutory functions of the Association and the CA were discharged properly.
- 37.** In *Joshi Technologies (supra)*, cited by the respondent no. 7, it was held that Article 226 confers plenary power, but is not to be exercised where there are very serious disputed questions of fact of complex nature which require oral evidence for determination. Here, the facts

required to adjudicate the issues involved are not even disputed, let alone being complex, requiring oral evidence for determination. There is no alternative mode of settlement and, as discussed above, there are allegations of failure on the part of the CA and the Association to discharge their statutory functions, which justify the invocation of the writ jurisdiction.

- 38.** Thus, this Court is of the opinion that the present writ petition is very much maintainable in the facts of the case.
- 39.** Importantly, the petitioner is justified in arguing that there is no provision within the four corners of the statute or the Bye-Laws framed thereunder to cancel the nomination of a candidate after the election is conducted.
- 40.** Clause 3(2) of the Bye-Laws provides the modalities of the election process. The said sub-clause mandates participation of the apartment owners of each property, owned by four or more apartment owners, in the election process.
- 41.** Clause 11(1) of the Bye-Laws stipulates that the President, Secretary, Treasurer and such other Officer as may be necessary shall be elected by the Board from amongst the Managers of the Board at the first meeting of each Board.
- 42.** Thus, as per the Scheme of the Act and the Bye-Laws, all the apartment owners are entitled to vote for selecting their managers who, together, form a Board which in turn elects the portfolio holders and office bearers including the President, Secretary and Treasurer. In the present case, a large chunk of the apartment owners residing in

the Magnolia Block, although they participated in the election process, were deprived of representation in the Board of Managers, thus vitiating the said election process insofar as the exclusion of the Magnolia residents is concerned. As a corollary thereof, the election of the office bearers of and by the incomplete Board is also *de hors* the provisions of the law, since the Board itself was incompetent to so elect, being *devoid* of representation of one of the Block residents.

43. The ground which created such a hullabaloo was the innocuous request by the petitioner to the EC to have the vote of Veena Singh, a resident of Magnolia, to be collected from her residence.
44. To ascertain the scope of such request, the Election Notice is required to be looked into. The said notice has been annexed both to the writ petition and the opposition of respondent no. 7.
45. Clause 3(iii) thereof provides that no online or other modes of voting are allowed except for those more than 80 years old and completely unable to walk to the election area, in which case, if he/she wants to cast vote may contact the facility office by March 08, 2024 and accordingly the EC members would visit their flat personally and take the vote in a closed envelope. The EC also has the right to deny his/her vote if on the spot it is found that he/she is healthy and able to walk.
46. Thus, three layers of scrutiny are involved in respect of home ballots:
 - i) irrespective of who makes a request, the EC is to decide on such request;
 - ii) the concerned voter has a right to refuse to so vote; and

iii) the EC has the power to deny the vote if on the spot it is found that he/she is healthy and able to walk.

- 47.** Hence, it is not the petitioner's request which was sacrosanct but irrespective of the request and the maker of the request, it is the EC which has to take a final call thereon.
- 48.** In the present case, the EC decided to go to Veena's residence. However, Veena refused to cast her vote, which ended the matter at that. The prerogative rested with the EC whether to act on the request and even if its members went to collect the vote from the home of Veena, to deny the vote if she was found to be healthy and able to walk. Thus, the decision all along lay with the EC and the mere fact that the petitioner, a third party, had requested such home collection could not be a determinant in the election process in any manner whatsoever.
- 49.** Moreover, while scrutinizing the trees we cannot lose sight of the forest, since Veena did not cast her vote at all, thereby negating any scope of foul play in the matter.
- 50.** The respondent no. 7 has also failed to substantiate as to how the mere request of a resident of the Housing Complex for somebody else's vote to be collected from her home could have a bearing in the election process or vitiate the same. There is no specific bar to one resident requesting the vote of another to be collected from home and the decision lies entirely with the EC whether or not to act on the same and if so, whether to accept the vote at all.

- 51.** There is no specific bar contained in either the election notice or any rule to a third-party resident making such a request. Hence, nothing important hinges on the said request by the petitioner and the ruckus created by the respondent no. 7 and certain other members over such a trivial issue was entirely beside the point.
- 52.** Apparently, three members had previously made certain allegations against the petitioner some time before the election, which is an admitted position in the present case. The respondent no. 7 has also admitted in her e-mail dated March 11, 2024 that Veena had written a specific denial regarding any request having been made by her to the petitioner at the behest of respondent no. 7. Thus, the active involvement of respondent no. 7 and certain other members who had an axe to grind against the petitioner in the denial being protracted out of proportion cannot be entirely ruled out.
- 53.** Be that as it may, since it transpires that the innocuous request by the petitioner could not have a bearing on the election process, particularly since the voter concerned chose not to cast her vote at all or to be a part of the election process, the said request could not have been a germane ground for shutting out the votes cast by the Magnolia residents altogether in arriving at the election results.
- 54.** No *mala fides* can be attributed to the petitioner in asking the EC for the vote of Veena to be taken by home ballot, since on a previous occasion in 2022, a similar exercise took place as Veena had requested to vote from her home and the petitioner forwarded her request to the EC.

- 55.** The surrounding circumstances cannot be lost sight of. The Presiding Officer and the vast majority of the EC members resigned on the date of the election and/or the very next date alleging utter pandemonium and disruption of the election by the respondent no. 7 and her supporters.
- 56.** The serious allegation of collusion between the petitioner and the EC members and/or the Presiding Officer has not been proved by the respondent no. 7 in any manner whatsoever.
- 57.** Hence, it is clear from the materials on record that the exclusion of the Magnolia votes in the counting process for arriving at the election results of the concerned Association was palpably illegal and *de hors* the law. Such exclusion, thus, vitiates the entire process of election of Board of Managers and consequently, the election of its office bearers by the said incomplete Board.
- 58.** Accordingly, WPA No. 8243 of 2024 is allowed on contest, thereby setting aside the results of the election dated March 10, 2024 held for the Siddha Town Rajarhat Residents' Association of Apartment Owners and all consequential actions taken in pursuance thereof.
- 59.** The EC which conducted the elections shall re-count the results of the election by including the votes cast by the residents of the Magnolia Block, in respect of both the regular ballot box and the home collection ballot box (since the disputed voter Veena Singh did not vote at all). For such limited purpose, the resignation of the EC including its Presiding Officer shall stand suspended till the process of counting

and the declaration of the results and the communication of the same to the Competent Authority is over.

- 60.** The said Committee members including the Presiding Officer shall, for the limited purpose as indicated above, act as an ad hoc body appointed by the Court to complete the said elections.
- 61.** Upon such re-counting being done, the said ad hoc body comprised of the Presiding Officer and the members of the Election Commission shall declare the results and duly communicate the same to the CA who, in turn, shall do the needful in terms of the 1972 Act and the Bye-Laws to give the stamp of validity to the same.
- 62.** It is expected that the entire process shall be concluded within June 30, 2024.
- 63.** There will be no order as to costs.
- 64.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)