

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

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 73 of 2024

Erna Johanna Bose and others

Vs.

The State of West Bengal and others

For the petitioners : Mr. Ratnanko Banerjee, Sr. Adv.,
Mr. Sayantan Chatterjee, Adv.,
Mr. Rajdeep Mantha, Adv.,
Mr. Ratnesh Kr. Rai, Adv.,
Ms. Vipra Garg, Adv.,
Ms. Sakshi Kejriwal, Adv.

For the
Respondent nos. 3 & 4 : Mr. Sakya Sen, Adv.,
Mr. Sabyasachi Sen, Adv.

For the
Respondent nos. 5 to 14 : Mr. Rahul Karmakar, Adv.,
Mr. Deobrat Upadhyay, Adv.,
Ms. Munmun Mazumder, Adv.

For the State : Mr. Anand Farmania, Adv.,
Mr. Indumouli Banerjee, Adv.

Hearing concluded on : 19.03.2024

Judgment on : 02.04.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioners are some of the flat owners in an apartment complex at 22, Sarat Bose Road, Kolkata – 700 020. The challenge in the present writ petition is directed against the registration of an Association of Owners in respect of the said apartment under the West Bengal Apartment Ownership Act, 1972 (hereinafter referred to as “the 1972 Act”).

2. The first ground of challenge is that no notice was given to the petitioners under Section 10A (2) of the 1972 Act before accepting the declaration given by the private respondents for registration of the said Association. It is argued that the under the contemplation of the said provision, notice must be issued to the parties concerned before passing any order on the declaration, which was flouted in the present case.
3. Learned counsel for the respondents cite *C. Bright v. District Collector and others*, reported at (2021) 2 SCC 392 for the contention that the writ petition is not maintainable in view of availability of equally efficacious alternative remedy by way of a challenge as contemplated under Section 10A(3) of the 1972 Act.
4. To controvert such argument, learned senior counsel for the petitioner argues that there being palpable violation of the provisions of the statute and in view of the arbitrary action on the part of the Competent Authority, the writ petition is very much maintainable. The principles of natural justice have been violated as well, it is argued.
5. Learned senior counsel contends that the application/declaration for bringing the Association within the fold of the Act was also patently time-barred, since the Completion Certification in respect of the building was issued in the year 2011, whereas the respondents filed the application/declaration only in 2024. Rule 2A of the West Bengal Apartment Ownership Rules, 1974 (for short, “the 1974 Rules”)

stipulates three years as the limitation period for doing so. Thus, the very exercise was time-barred.

6. It is next argued that the person acting as Competent Authority did not have jurisdiction to do so. In such respect, learned senior counsel places reliance on a Notification dated July 25, 2016 appointing one Debasis Ghosh as the Competent Authority. *Vide* notification dated December 27, 2017, one Smt. Sheuli Banerjee was appointed to the post of Joint Secretary, Housing Department, and not as Competent Authority under the 1972 Act. Even subsequently, on April 30, 2021, the said DebasisGhosh acted as the Competent Authority under the 1972 Act and issued a Circular which is also annexed to the affidavit-in-reply of the petitioners. However, the impugned order accepting the declaration was passed by the said Smt. Sheuli Banerjee.
7. On merits, several discrepancies are sought to be pointed out by the petitioners. First, it is argued that within the contemplation of Section 2, read with Section 10A of the 1972 Act, the sole owner or the majority of owners are to apply for registration. In the present case, one Mukulesh solely applied, as evident from the application annexed at page 76 of the writ petition, although admittedly there are several owners. Although a Power of Attorney has been sought to be relied on by the said Mukulesh, the same is not reflected in the Form A declaration.
8. It is argued that if there are several members, the majority have to apply.

9. The affidavit in support of the declaration was dated January 8, 2024 whereas the order accepting FormA was dated December 26, 2023, that is, preceding the date of the affidavit. Thus, the entire exercise is irregular on such count as well.
10. Learned counsel appearing for the respondent nos. 3 and 4 contends that the notice under Rule 3A of the 1974 Rules is to be given to the applicant himself and not to any other person. The scope of the said notice was to give an opportunity to the applicant to furnish proper document and information. As such, there is no illegality on such score. Learned senior counsel also cites *C. Bright (supra)* to argue that the writ petition ought not to be entertained in view of availability of equally efficacious remedy by way of a challenge under Section 10A(3) of the Act.
11. Learned senior counsel places reliance on the Power of Attorney executed in favour of the applicant Mukulesh, which has been annexed to the affidavit affirmed by Mukulesh, to represent six out of the ten owners of the flats in the apartment. Hence, the requirement of the application to be filed by majority flat owners is fully satisfied, it is contended.
12. Heard learned counsel.
13. There are three primary components to the challenge. The first is that no notice under Section 10A was given to the petitioners, the second is time-bar the third is lack of jurisdiction of the Competent Authority. That apart, certain factual discrepancies have also been argued by the petitioners.

- 14.** Section 10A(2) of the 1972 Act, in no uncertain terms, contemplates that the Competent Authority, on receipt of a declaration, shall issue a notice to the “parties concerned” and after holding such enquiry, if any, as it may consider necessary for the purpose, examine the declaration to ascertain whether the subject property comes within the purview of the Act and the declaration is in order.
- 15.** Thereafter, under Clause (b) of sub-section (2), the Competent Authority is to pass an order in writing giving reasons for accepting or rejecting the declaration.
- 16.** The respondents have argued that in view of the limited scope of ascertainment in the enquiry contemplated, a notice to the applicant would suffice. However, the said argument is as absurd as contending that the summons of a suit is to be served on the plaintiff himself and not on the defendants.
- 17.** It is well-settled that each word in a statute is to be given some meaning. Redundance in use of words by the Legislature is to be abhorred. The conscious use of the term “parties concerned” instead of “applicant” clearly shows that all parties who are concerned in any manner by the declaration being accepted, meaning thereby interested parties, are to be given notice of the proceeding. It is quite clear that the other residents/owners of the concerned apartment may have inputs to provide or objections to the version of the applicant regarding even the ascertainment contemplated in Section 10A(2)(a).
- 18.** Whether the property concerned comes within the purview of the Act or the declaration is in order inasmuch as all components of the

declaration are true and reflect the actual state of affairs are required to be ascertained, which exercise cannot be fruitful unless an opportunity is given to all residents and interested parties to point out if there are any discrepancies in the statement of purported facts made in the declaration.

19. Hence, even for the limited enquiry as to whether the property comes within the purview of the Act or the declaration or instrument is in order, a meaningful right of hearing has to be given to all the other flat owners as well, unless the application is made jointly by all such owners. Hence, the contention of the respondents that the notice is meant only for the applicant is absurd and contrary to the law. Thus, non-service of notice on the petitioners and other owners itself vitiates the entire process culminating in accepting the declaration and directing registration in terms thereof.
20. In the unreported judgment of this Court in *WPA No. 25143 of 2023 [M/s Fortune Park Housing Project Limited and another Vs. State of West Bengal and others]*, cited by the petitioner, the same question arose for consideration, where it was held that such an interpretation as projected by the respondents is absurd and notice has to be issued on all the concerned parties.
21. Secondly, Rule 2A of the 1974 Rules uses the expression “shall” to qualify the requirement of submission of the property. Such date commences from the Completion Certificate being issued by the Competent Authority which, in the present case, admittedly happened in the year 2011.

22. Rule 2A is not in derogation of the parent statute but in furtherance of Section 2 of the 1972 Act. Section 2 provides that the Act shall apply to every property having residential units or both residential and commercial units and the sole owner or all the owners or majority of the owners of every such property shall submit the same *within such period as may be prescribed* by duly executing and registering a declaration setting out the particulars referred to in Section 10.
23. Thus, the period within which the declaration has to be made and registered is to be, in terms of Section 2, as per prescription. Section 3(j) defines “prescribed” to mean “prescribed by Rules made under the Act”. Thus, the 1974 Rules, in Rule 2A, embody the limitation period which is applicable to any application under Section 2.
24. The respondents have sought to argue, by placing reliance on the Preamble of the Act, that the intention of the Legislature is to include apartments within the fold of the Act and not to exclude the same.
25. It is further argued that the statute does not provide any consequence of delay beyond three years and there is no negative language used.
26. However, such arguments are *de hors* the provisions of the Act and the Rules themselves.
27. Both Section 2 and Rule 2A of the 1972 Act and the 1974 Rules respectively use the expression “shall”. Mere omission to stipulate a consequence for non-adherence to the limitation period does not alter the mandatory character on such provisions. The argument on the Preamble of the Act is vague, since the Preamble merely states that

the Act is to provide for the ownership of an individual apartment and to make such apartment heritable and transferable property.

- 28.** Assuming that the provisions of the Act are not invoked in case of a particular apartment, the general law as applicable to properties and apartments shall very well be applicable. The law leaves no void on such aspect of the matter.
- 29.** In fact, Section 2 leaves no manner of doubt as it has conferred the discretion on the apartment owners themselves to choose whether to subject themselves to the provisions of the Act or not. The very stipulation that the Act shall apply only to properties regarding which the owners submit the declaration as stipulated in Section 2, by necessary implication, also confers the option on the apartment owners not to make such declaration, thereby preferring to remain outside the purview of the Act.
- 30.** The option cannot be an open-ended window, left open forever. A sufficiently reasonable time of three years from issuance of the Completion Certificate has been given by Rule 2A for the apartment owners to seek registration by submission of a declaration. Having not done so for the inordinately long period of 13 years from 2011, when the Completion Certification was issued, till 2024, when the declaration was made, it is *ex facie* evident that the declaration sought by the private respondents is time-barred. Thus, the acceptance of such time-barred declaration and direction to register the same is also vitiated on such count.

- 31.** Insofar as the competence of the Competent Authority is concerned, the petitioners are also justified on such score. The position which is evident from the annexures to the affidavit-in-reply is that even as late as on April 30, 2021, one Debasis Ghosh acted as Competent Authority and issued a Circular in such capacity. The appointment of Debasis Ghosh under Clause (9) of Section 3 of the 1972 Act on July 25, 2016 *vide* notification no. 723-H2/6A-17/2006 (Pt.) of even date, which is annexed as Annexure-A to the affidavit-in-reply of the petitioners, is also clearly established. Nothing has been produced from the end of the respondents to dislodge such palpable evidence that Debasis Ghosh was all along operating as the Competent Authority. In fact, the Notification dated December 27, 2017 appointing Smt. Sheuli Banerjee, the person who acted as Competent Authority in the present case, in some other post than the Competent Authority under the 1972 Act, is not disputed as well.
- 32.** Hence, the author of the impugned decision, accepting the declaration and directing the same to be registered, namely one Smt. Sheuli Banerjee, acted without jurisdiction and authority in taking such decision in the capacity of Competent Authority under the 1972 Act, which vitiates such action and renders the same null and void.
- 33.** Lastly, Section 10A read with Section 2 of the 1972 Act contemplates three categories of persons eligible to make the declaration-in-question. If there is only one owner, the sole owner shall apply. On the other hand, all the owners, if there are several, may also apply. The question of “majority of owners” applying comes only when there

are more than one owner of the property and all of them do not choose to make the declaration together. In such cases, the law contemplates that the majority of owners have to make the application. The application annexed to the pleadings shows only one Mukulesh having made the same. Although in his affidavit, Mukulesh contends that he is the Power of Attorney holder of the majority owners, that is, six in number, it is not reflected in the application/declaration that the application is being on behalf of all of them. Hence, the application/declaration itself is palpably vitiated in law.

- 34.** Moreover, the respondents could not dispel the obvious discrepancy in the order accepting FormA being passed on December 26, 2023, even before the affidavit necessarily to accompany the declaration being affirmed subsequently on January 8, 2024.
- 35.** Thus, on all the above counts, the impugned acceptance of the declaration given by the private respondents in respect of the apartment at 22, Sarat Bose Road, Kolkata – 700 020 and the consequential direction to register the same, being *de hors* the law and time-barred, ought to be set aside.
- 36.** Thus, WPO No. 73 of 2024 is allowed on contest, thereby setting aside the order accepting the declaration submitted allegedly on behalf of the private respondents purportedly under Section 10A of the 1972 Act and all consequential action taken pursuant thereto. The order accepting the declaration and subsequent registration or other action, if any taken consequent thereto, are hereby set aside and quashed.
- 37.** There will be no order as to costs.

- 38.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)