

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

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 1755 of 2023

**Ram Kumar Jha
VS
The State Of West Bengal and Others**

For the petitioner	:	Mr. Krishnaraj Thaker, Adv. Mr. Soumavo Mukherjee, Adv. Mr. Indranil Munshi, Adv. Mr. Vinayak Chaubey, Adv. Ms. Vedika Bhotika, Adv. Mr. Subhankar Chatterjee, Adv.
For the State	:	Mr. Somnath Ganguli, AGP. Mr. Sukalpa Seal, Adv.
For the respondent nos.3, 4 & 5 :		Mr. Biswaroop Bhattacharya, Adv. Mr. Raja Saha, Adv. Ms. Sharmistha Ghosh, Adv. Mr. Amit Ghosh, Adv. Mr. Subhrojyoti Mookherjee, Adv
Hearing concluded on	:	17.01.2024
Judgment on	:	30.01.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner claims to be a Vice-President of a Board of Managers (BOM) of a Society registered under the West Bengal Apartment Ownership Act, 1972 (hereinafter referred to as, "the 1972 Act") being the Kolkata Uniworld City Apartment Owners' Association. The present challenge has been preferred against an Order dated October 17, 2023 whereby the Competent Authority (CA) under the said Act, purportedly in exercise of its powers under Section 16B of the 1972

Act, removed the BOM, and superseded them forthwith, appointing an Administrator to perform the functions of the BOM for three months. Prior to such removal, a Show-cause Notice was issued by the CA on October 10, 2023 to the erstwhile President of the Association. Learned counsel for the petitioner argues that the Show-cause Notice dated October 10, 2023 mentions as its basis a complaint petition dated October 9, 2023 from an “aggrieved resident” residing in the Uniworld City Horizon-3, 1801, described as a member of the Association. The said complaint was, in terms of the language of the show-cause, the sole trigger for the Show-Cause Notice. However, it is pointed out that under Section 3(ia) of the 1972 Act, an “owner” under the Act has to be an owner in relation to any property or part or apartment. The complainant, one Dr. Praveen Kumar, being merely a tenant in respect of an apartment and not its owner, did not qualify as a member. Thus, the premise of the Show-Cause Notice was bad.

2. It is next argued that the CA took a contradictory stand subsequently by observing in its impugned Order dated October 17, 2023 that the complaint petition had been made not only by Dr. Praveen Kumar but also by one Surya Narayan Bhattacharya, thereby deviating from the statement made in the Show-cause Notice itself that there was a sole complainant.
3. It is next contended that the Show-cause Notice was issued to the personal e-mail ID of one Partha Pratim Chatterjee, the erstwhile President of the Association. However, the President had resigned on October 7, 2023 and had intimated about such resignation by an e-

mail dated October 9, 2023 to the CA. In fact, the outgoing President had clearly nominated in his e-mail dated October 12, 2023 two persons namely one Mr. Vikas Kumar and one Mr. Akshay Prakash, as having accepted the responsibility of discharging their respective duties post the resignation of the President and had urged the CA to communicate with the said persons. However, despite being communicated about the resignation on October 9, 2023, the Show-cause Notice was issued to the personal e-mail of the resigned President on the very next day, that is, October 10, 2023. Even in the affidavit-in-opposition affirmed in connection with the present writ petition, the CA has admitted the same.

4. It is further argued that although it was mentioned in the Show-cause Notice that a copy of the complaint petition was annexed thereto, actually no such complaint was served or attached to the show-cause. Despite the non-service being pointed out by the erstwhile President, no copy of the complaint was ever produced by the CA either before this Court or served upon anybody.
5. In fact, at the time of argument, learned counsel for the State/CA admits that no copy of the complaint was ever attached to the Show-cause Notice, although erroneously mentioned in the show cause to have been annexed thereto.
6. Learned counsel for the petitioner argues that the CA could have served the Show-cause Notice on the existing five members or the two members nominated by the outgoing President and/or on the present petitioner who is the Vice-President of the Association.

7. Although the petitioner resigned from his post as Vice-President by an e-mail communication dated October 11, 2023 to the CA, requesting the same to be accepted with effect from October 7, 2023, as on October 10, 2023, when the Show-cause Notice was issued, the petitioner was still a Vice-President.
8. Moreover, the resignation of the petitioner was never accepted by the CA and on October 14, 2023, that is, before passing the impugned Order on October 17, 2023, the petitioner had already withdrawn his resignation. Hence, non-service of Show-cause Notice on the concerned parties vitiates the same.
9. Learned counsel next argues that the impugned order is bad on several scores. In the said order, the CA refers to several complaints filed at different points of time, none of which were ever served on the petitioner or the Board Members. More importantly, the said complaints were never referred to in the Show-cause Notice itself. Thus, such complaints could not be a ground for passing the impugned Order.
10. The CA, in the impugned order, has cited the dearth of members in the BOM as one of the grounds for removal of the Board. At best, it could be argued that Clause 7(2) of the West Bengal Apartment Ownership Bye-Laws, 2022 (for short, “the 2022 Bye-Laws”) was contravened, since the said Clause provides that the number of Managers of a Board shall be equal to one-third of the number of the apartment owners of the property concerned but in no case it shall be less than three or more than forty-eight. Initially there were about 45

members out of whom about 40 had resigned due to the ruckus created by some of the members. Yet, the same could not have been a ground for removal of the entire Board, since under Clause 10(b) of the Bye-Laws, in case of any casual vacancy in the office of any Manager by resignation, the same shall be filled up through a Special Election for such purpose. Instead of directing the same, the CA removed the Board altogether, which is *de hors* the law.

11. Again, the CA cites the interest of proper functioning of the Association to supersede the existing Board without discussing any material basis for doing so or advertent to any complaint and/or citing any reason for arriving at the said conclusion, thus rendering the finding perverse.
12. That apart, the subsequent complaints mentioned to by the CA were beyond the show-cause and no opportunity was given to the petitioner or the Board Members to controvert the same.
13. Learned counsel cites *Chintalapati Srinivasa Raju Vs. Securities and Exchange Board of India* reported at (2018) 7 SCC 443 for the proposition that no judgment or order can be passed beyond the Show-cause Notice.
14. Learned counsel next cites *Khem Chand Vs. Union of India and others*, reported at AIR 1958 SC 300, where the Supreme Court held that the reasonable opportunity envisaged by the provision under consideration there includes an opportunity to deny the guilt and establish the innocence of the accused and to make a representation as to why the proposed punishment should not be inflicted.

15. Learned counsel for the CA candidly submits that no copy of the complaint petition was given with the show-cause notice. However, it is submitted that in view of the fact that the Board Members were reduced to only five upon mass resignation being tendered by around 40 members of the Board and all the office bearers, in the interest of proper functioning of the Association, the impugned Order was passed.
16. Learned counsel appearing for the respondent nos. 3 to 5, who had lodged independent complaints which had been relegated to the CA by this Court on a previous occasion, argues that another writ petition has been filed against the dismissal of the petitioner's complaints by the CA upon such reference. It is argued that the said writ petition ought to be decided first.
17. That apart, learned counsel for the respondent nos. 3 to 5 hits at the *locus standi* of the writ petitioner who had tendered resignation. It is contended that borrowing from Service Jurisprudence, the resignation ought to have been construed to be final the moment it was tendered, since there was no further provision in law for acceptance of the same by any authority. Hence, the petitioner having resigned as a Vice-President, cannot maintain the present writ petition.
18. It is further argued that in view of the rampant resignations by almost all the Board Members, no option was left for proper administration of the Association and the Society for the CA but to remove the Board and appoint an Administrator, directing election to be held.

19. Upon hearing learned counsel for the parties, the issue of *locus standi* is taken up first, since it hits at the root of the writ petition.
20. The petitioner tendered his resignation on October 11, 2023. Thus, on the date of issuance of the Show-cause Notice, that is, October 10, 2023 a notice should have been given to the petitioner in the capacity of Vice President, who was still functioning, since the President had already tendered his resignation.
21. The petitioner Ram Kumar Jha was acting in the capacity of Vice-President of the Association at the relevant point of time. Clause 13(1)(a) of the Bye-Laws, 2022 stipulates who are the office bearers. As per the said provision, the Vice President of an Association is included within the said office bearers, who are to be elected by and from the Managers of the Board.
22. Clause 13(2)(b) provides that the President, Secretary or any other elected officer may resign from his office any time by a notice to the Board addressed to the President or the Vice-President if the President resigns. On receipt of the notice the Board shall as early as possible at a meeting consider the matter and on the resignation being accepted, shall forthwith elect another officer amongst the Managers of the Board in place of the one who has resigned.
23. Thus, on the date of tendering his resignation that is October 11, 2023, the petitioner was a Vice-President and thus, an office bearer within the contemplation of Clause 13. Hence, the resignation of such office bearer could not be complete unless the matter was considered

at a meeting of the Board and the resignation formally accepted under Clause 13(2)(b) of the 2022 Bye-Laws.

- 24.** In any event, the petitioner had tendered the resignation to the CA but the same had never been accepted. On October 14, 2023, the offer to resign was withdrawn by the petitioner. Thus, there was no formal resignation at any point of time by the petitioner at all. Hence, the petitioner has the right to maintain the writ petition in the capacity of a Vice-President of the Association.
- 25.** Even otherwise, the petitioner is admittedly a resident and apartment owner in the concerned Apartments. Thus, the petitioner definitely has a right as resident and a member of the Society to have a say in proper administration of the Society. Such interest of the petitioner is direct even in such capacity. Hence, the petitioner has the *locus standi* to maintain the present writ petition from every perspective.
- 26.** Coming to the other issues, the petitioner is justified in arguing that the Show-cause Notice was vitiated on several scores. First, it proceeded on the premise that there was a complaint by a member, whereas the complainant was not a 'member' under the Act. More importantly, the Show-cause Notice was served at the personal e-mail ID of the President who had already tendered his resignation on October 7, 2023 and had informed the same to the CA himself on October 9, 2023, prior to the issuance of the Show-cause Notice.
- 27.** Even after the issuance of the Show-cause Notice, the President informed the CA on October 12, 2023 that two other members had

taken up the duties of the President in his absence, naming them specifically. They were never served with any show cause notice.

28. That apart, there were at least five existing members, even apart from the petitioner, who was the Vice-President, none of whom were ever served with the said Show-cause Notice. Hence, no proper opportunity of hearing was given at all to the existing Board to set up a defence against the allegations made against them.
29. Thus, the principle of *Khem Chand (supra)* is squarely applicable as the Board never had an opportunity to deny the allegations made against it or make any representation opposing the penal measures contemplated.
30. The Show-cause Notice is also vitiated on other serious grounds. It is well-settled that any show-cause notice has to mandatorily contain the specific particulars of the offences which are alleged against the recipient of the show-cause. Whereas the only premise of the show-cause was a copy of a complaint petition which was claimed to have been enclosed, it has been admitted by the CA that the said complaint petition was never actually enclosed with the writ petition or served on the petitioner. The Show-cause Notice contains no specific allegation of offence as such, apart from those mentioned in the complaint petition.
31. Next coming to the impugned Order dated October 17, 2023, the same is also vitiated on numerous grounds. First, the several purported complaints, *inter alia* dated October 10, 2023 and October 13, 2023 mentioned in the said Order were beyond the statements in the show-

cause notice. Not only were they never mentioned in the show-cause, the particulars of the same were not discussed in the impugned Order, nor were copies of the complaints ever served on the Board.

- 32.** Thus, the Board did not have any opportunity to deal with those.
- 33.** The CA, in the impugned Order, mentions that a number of other BOM members have sent their resignation and the present BOM has become “kaput, nonfunctional and ineffective”. It defeats logic as to how, merely due to resignations, an entire Board becomes nonfunctional or ineffective. As rightly argued by the petitioner, Clause 10(b) of the 2022 Bye-Laws, specifically provides for the Board to take steps to hold Special Election in case of any casual vacancy by resignation or death. In the present case, without affording any breathing space to the Board to undertake such process, the Show-cause Notice and the impugned order were issued. Moreover, the reduction of the number of Managers of a Board below the stipulated quorum as provided in Clause 7(2) of the 2022 Bye-Laws is not a valid ground for removal of the Board altogether under Section 16B of the 1972 Act.
- 34.** Section 16B(2), which has been resorted to by the CA, envisages the functioning of the BOM to be detrimental to the interest of the Association or against public interest, none of which has been established or reflected in the impugned Order. Although the CA has made a bald statement that the removal/supersession of the present Board is in the interest of the proper functioning of the Association under the Act and the Bye-Laws and it is imperative to supersede the

existing BOM for such reason, the said statement is not supported by any reason whatsoever, nor any material or evidence has been adverted to or discussed by the CA in coming to such a serious conclusion. Even the particulars of the complaints have not been discussed while arriving at such conclusion.

- 35.** Thus, the conclusion is palpably perverse.
- 36.** Even the allegation of a tussle between the security personnel and a tenant of one of the apartments cannot *ipso facto* lead to such an irregularity in the general functioning of the Association that it would culminate in the supersession of the Board of Managers altogether without giving the Board an opportunity of hearing or presenting its case.
- 37.** In such view of the matter, the impugned Order dated October 17, 2023 as well as the Show-cause Notice dated October 10, 2023 leading to the same, being vitiated in law and beyond jurisdiction and authority of the CA, are required to be set aside.
- 38.** Hence, WPO No. 1755 of 2023 is allowed on contest, thereby setting aside the impugned order of the CA dated October 17, 2023 along with the Show-cause Notice/Order dated October 10, 2023 leading to the same, both of which are hereby quashed. The Board of Managers prevailing immediately prior to the impugned Order dated October 17, 2023 is, thus, revived. The Administrator appointed in the interregnum is hereby removed.
- 39.** There will be no order as to costs.

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

(Sabyasachi Bhattacharyya, J.)

Later

It must be recorded after the passing of the judgment that learned Counsel appearing for respondent Nos. 3,4 & 5 had sought to use a supplementary affidavit bringing to the Court's notice that the number of members of the Board of Managers has now been reduced to two. However, since the hearing of the matter had been concluded on January 17, 2024 and it was ordered on that date that the judgement would be delivered today, that is, January 30, 2024, the attempt of the respondent Nos. 3,4 & 5 to file such supplementary affidavit was refused, since the attempt was made only yesterday, much after the conclusion of the hearing.

Further, a prayer for stay of operation of the above judgement and order is made by learned Counsel for respondent Nos. 3,4 & 5, which is objected to by learned Counsel for the writ petitioner. Since there are arguable issues involved, the operation of the above order is stayed till February 16, 2024.

Let this order be treated as part of the judgment.

(Sabyasachi Bhattacharyya, J.)