

Court No. - 27

Case :- WRIT - C No. - 17986 of 2015

Petitioner :- Manish Kansal And Another

Respondent :- State Of U.P. And 8 Ors.

Counsel for Petitioner :- J.J. Munir

Counsel for Respondent :- C.S.C.,A.K. Malviya

Connected with

Case :- WRIT - C No. - 16090 of 2015

Petitioner :- Manendra Kumar And 4 Ors.

Respondent :- State Of U.P. And 2 Ors.

Counsel for Petitioner :- A.K. Malviya

Counsel for Respondent :- C.S.C.,Shobha Lal

Hon'ble Mrs. Sunita Agarwal,J.

As the controversy in both the writ petition are same, they were heard together and are being decided by the common judgment.

Heard Sri J.J. Munir, learned counsel for the petitioners and Sri A.K. Malviya, learned counsel for the respondents and for the petitioner in the **Writ Petition No. 16090 of 2015**.

By means of the Writ Petition No. 16090 of 2015 (Mahendra Kumar & Others Vs. State of U.P. and Another), the petitioner prayed for quashing of the order dated 11.3.2015 passed by the Additional City Magistrate/Election Officer, Gaur Homes Resident Welfare Association, E-Block Govind Puram, District Ghaziabad in staying the election of the Association namely Gaur Homes Resident Welfare Association on the ground that the final voter list has not

been received by him.

Brief facts giving rise to the present writ petition are that Gaur Homes Resident Welfare Association (hereinafter referred to as the "Association") is a registered society under the Societies Registration Act, 1860.

Earlier, a dispute was raised with regard to the election of the society and the matter was decided by the Prescribed Authority vide order dated 27.10.2014. The elections were set aside and the direction was given to the Deputy Registrar, Firms Societies & Chits, Meerut Division, Meerut to conduct elections under his supervision. The order passed by the Prescribed Authority dated 27.10.2014 was challenged in writ petition which is stated to be pending before this Court.

Pursuant to the directions of the Prescribed Authority, proceedings for fresh election had commenced and 15.3.2015 was the date fixed for election. In a meeting of the General Body of the Association held on 18.2.2015, the date of election and the election schedule was finalised and was notified to the members of the association on 25.2.2015. A tentative list of 485 members was sent to the City Magistrate and was received in his office on 4.3.2015.

The contention of the petitioner is that certain persons belonging to rival group made a complaint to the Election Officer/Additional City Magistrate challenging the voter list and he had stayed the election proceedings in the midst on the ground that the final voter list has not been received by him. The contention is that once the election process had commenced, the Additional City Magistrate has no power to interdict the process. He being the Election Officer was only authorised to supervise the election and in case of any dispute, he ought to have referred the matter to the Prescribed Authority. Even the names of the complainants have not

been disclosed in the order and moreover, any objection to the election can only be decided in an election petition to be filed after the election is over. It is well settled that the election process cannot be interdicted in between.

In the connected Writ Petition No. 17986 of 2015, the reliefs prayed by another group of members is for mandamus directing respondent/Election Officer to conduct elections of the Board of Management of the Association on the directions of the Prescribed Authority strictly in accordance with the provisions of the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 (hereinafter referred to as the 'Act'), the U.P. Apartment (Promotion of Construction Ownership and Maintenance) Rules, 2011 (hereinafter referred to as the 'Rules') and Model Bye-Laws framed by the State Government under Section 14(6) of the Apartment Act, 2010 and notified on 16.11.2011.

In support of the above referred prayer, the contention of the petitioner is that the proceedings of General Body of the Association held on 18.2.2015 is faulty as the voting rule formulated in the meeting dated 18.2.2015 is contrary to the provisions of the Apartment Act, 2010 and the rules framed thereunder.

As per the resolution dated 18.2.2015, the voting rule is "one vote per flat" which excludes spouse and the children of the apartment owner who have a right to vote as per the Act. As the electoral roll was defective, the Additional City Magistrate/Election Officer has rightly stayed the election proceedings as soon as he came to know about this defect. The direction is to prepare a fresh electoral roll strictly in accordance with the Apartment Act, 2010 and the Rules. The relief sought in Writ Petition No. 16090 of 2015 is misconceived.

The question before this Court is as to whether the electoral roll on the basis of which the elections were scheduled on 15.3.2015 was prepared as per the Apartment Act, 2010. Further question would be with regard to the powers of Election Officer to stay the election proceedings.

Sri A.K. Malviya, learned counsel for respondent nos. 5 to 9 has raised dispute regarding maintainability of Writ Petition No. 17986 of 2015 for the relief sought therein.

Contention is that once the election process is set in motion even this Court has no jurisdiction to entertain any dispute in exercise of powers under Article 226 of the Constitution of India.

Reliance has been placed upon **Election Commission of India through Secretary Vs. Ashok Kumar and other** reported in **2000 (8) SCC 216**. On the maintainability of the Writ Petition No. 17986 of 2015, the contention of learned counsel for respondent nos. 5 to 9 is that any interference by this Court would have the effect of obstructing or protracting the election process.

The decision taken by the concerned authority during the course of election is not open to judicial review except on the ground of mala fide or arbitrary exercise of power. There is no allegation of mala fides and hence no case for intervention of High Court during progress of election is made out. The Election Officer has committed a grave error of law in staying the election process on the ground that electoral roll has not been prepared in terms of the Apartment Act, 2010.

In reply, Sri J.J. Munir, learned counsel for the petitioner in Writ Petition No. 17986 of 2015 submits that the election proceedings had commenced with the preparation of the electoral roll in the meeting held on 18.2.2015. The voting rule "one flat one vote" is contrary to the Apartment Act, 2010 and the rules made

thereunder. Incorrect or illegal preparation of electoral roll goes to the very root of the matter. No election held on the basis of incorrect/illegal electoral roll can be upheld.

What is under challenge in the present case is not the election of a particular candidate rather the validity of the entire election as electoral roll is null & void.

The contention that any interference by this Court or the directions given by the Election Officer in his order dated 11.3.2015 would stall or retard the election is misconceived inasmuch as the very foundation of the election namely the electoral roll is illegal and the election on its basis cannot proceed.

To substantiate this submission, reliance has been placed upon **Bar Council of Delhi and another vs. Surjeet Singh and others** reported in **AIR 1980 Supreme Court 1612**.

Before deciding the dispute raised regarding maintainability of Writ Petition No. 17986 of 2015, it would be apt to go through the scheme of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010, the Rules, 2011 and Model Bye-Laws, 2011 framed thereunder.

Section 3(d), (e) and (f) of the Apartment Act, 2010 provides for the definition of "apartment owner", "association of apartment owners", and "board" which are as under :-

(d) "apartment owner" means the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of the land on which the building containing such apartment has been constructed, where the lease of such land is for a period

of thirty years or more;

(e) "association of apartment owners" means all the owners of the apartments therein, acting as a group in accordance with bye-laws'

(f) "board" means the Board of Management of an Association of Apartment Owners elected by its members under the bye-laws;

Section 12 (1) (f):- **Contents of Declaration** :- (1) The declaration shall be submitted by a promoter in the office of the competent authority in respect of a building constructed after the commencement of this Act in such form, within such period and in such manner as may be prescribed and shall contain full and true particulars of the following, namely:-

(f) value of the property and of each apartment, and the percentage of undivided interest in the common areas and the facilities appertaining to each apartment and its owner for all purposes, including voting;"

Rule 3 of Rules, 2011 is quoted below:-

3. Form of Declaration (sub section-1 of section 12).-

The declaration shall be submitted by a promoter under sub-section (1) of section 12 in Form 'A' which shall be submitted by the promoter within a period of 12 months from the date of approval of the plans. Where the building has been constructed or is under construction prior to the commencement of these rules, the declaration shall be submitted within 90 days from the date of such commencement.

Form 'A' is the form of declaration as provided under Rule 3 which contains Annexure 'B' (Details of Apartments):-

Note: *The percentage of undivided share in the land is calculated on the basis of the covered area of the apartment in relation to the total covered area of the apartments, being the aggregate of Column No. 4.*

Place: ***Signature of declarant with designation and seal***

Date:

Chapter-II Clause 8 of the Model bye-laws is as under:-

8. Voting:- *Voting shall be on percentage basis, and the percentage of the vote to which the owner is entitled is the percentage assigned to the Dwelling unit or units in the Declaration.*

Clause 8 as contained in Chapter-II of Model bye-laws provides for voting rights of an owner of the Apartment.

A careful reading of these provisions makes it imperative that for election of the Board of Management of the condominium the voting rule is the percentage basis. The percentage of the votes to which an apartment owner is entitled, is the percentage assigned to the dwelling unit or units in the declaration [(as per Section 12(1) (f), Rule 3, Form 'A', (Annexure 'B'))].

Rule 12(f) provides that the declaration which shall be submitted by a promoter in the office of the competent authority in respect of a building must contain the value of the property of each apartment, the percentage of undivided interest in the common area and the facilities including voting.

Rule 3 which is referable to rule 12 (1) says that the declaration shall be submitted by the promoter in Form "A" which is the Form of Declaration. Annexure 'B' to Form "A" gives the details of the apartment which also includes proportionate representation of the apartment owners for voting purpose in the meeting of the association of apartment owners.

Clause 8 is specific in saying that the voting shall be on percentage basis and the percentage of vote to which an apartment owner is entitled is the percentage assigned to the dwelling unit in the Form of Declaration.

Section 3(d) defines apartment owner means a person or persons owning an apartment and undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment.

Thus, the voting rule decided in the meeting of General Body of the Association held on 18.2.2015 of "one flat one vote" is not in conformity with the provisions of the rules and the Model bye-laws which provides for a vote carrying a percentage value worked out in accordance with the Rules.

Further contention of Sri J.J. Munir, learned counsel for the petitioner in Writ Petition No. 17986 of 2015 also finds support from the directions given by this Court in **Writ Petition No. 33826 of 2012 (M/s. Designarch Infrastructure Pvt. Ltd. & another Vs. Chairman, Ghaziabad Development Authority & Others)** with the connected writ petition.

Relevant paragraphs 65 (3), (5), (6), (7), (10), (11), (12) and (13) are quoted as under:-

***"Para 65 - (3)** The apartment owner under Section 3 (d) will not only the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments with an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of the land on which the building containing such apartment has been constructed, where the lease of such land is for a period*

of thirty years or more; it includes the spouse and children of the apartment owner and a lawful tenant of the allottee/owner of the allotment, which will also include officer or employee of the company/ firm or association, which owns an apartment under a valid allotment letter and its tenant. It will also include a person holding valid power of attorney of the allottee/ owner of the apartment, where it is owned individually, jointly or in the case of a company/ firm/ society and occupied without any right of occupation either as family member, tenant, employee or person holding power of attorney will not be included in the definition of apartment owner.

(5) *Each of the chapters namely Chapter-II Duties and Liabilities of Promoters; Chapter III Right and Obligations of Apartment Owners; Chapter IV Ownership, Heritability and Transferability of Apartment; Chapter V Declaration of Building and Deed of Apartment; Chapter VI Association of Apartment Owners and Bye-laws for the Registration of the Affairs of such Association; Chapter VII Common Profits, Common Expenses and Other Matters, are independent and that the rights and liabilities under these chapters can be enforced independently unless these are essentially depending upon rights and liabilities in other chapters subject to Chapter VIII 'Miscellaneous' with the ultimate control of the State Government of which directions have to be carried out by the competent authority as defined in Rule 2 (c) of the Rules, 2011.*

(6) *Chapter V Declaration of Building and Deed of Apartment, carries within it the content, which fulfils the*

primary objective of the Act. The declaration under Section 12 falling in the said chapter, with which the complete information as provided in Form-A under Rule 3 of the Rules of 2011 with Annexure-A to F and Schedule A, must be enclosed as mandated by Section 13 with the deed of transfer, is mandatory for handing over possession of any apartment constructed after the commencement of the Act and also to get such transfer deed registered under the provisions of the Registration Act, 1908.

(7) *Under Section 5 (1) of the U.P. Apartment Act, 2010 every person to whom any apartment is sold or transferred by the promoter shall subject to other provisions of the Act be entitled to exclusive ownership and possession of the apartment so sold or otherwise transferred. He is under sub-section (2) entitled to the exclusive ownership and possession of apartment and shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the deed of apartment and such percentage shall be computed by taking, as a basis, the area of the apartment in relation to the aggregate area of all apartments of the building. Such percentage of undivided interest under sub-section (3) (a) in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners and approval of the competent authority, and which shall not be separated from the apartment to which it pertains. It shall be deemed to be conveyed or encumbered with apartment, even though such interest is not expressly mentioned in the conveyance or other instrument. The*

common areas and facilities under sub-section (4) can not be transferred and will remain undivided with the apartment. These can not be partitioned or subject to any division and will be enjoyed by the apartment owner under sub-section (5), without hindrance or encroaching upon the lawful rights of the other apartment owners.

(10) *The 'competent authority' within the meaning of Rule 2 (c) as defined will include Vice Chairman of the Development Authority in whose notified development area the building is situate or the Collector of the district, where no such development authority exists. In case of the Industrial Development Authority the competent authority shall be the Chief Executive Officer of the Industrial Development Authority. For the purposes of discharging functions and duties and resolving the disputes the competent authority will be entitled to delegate its powers to an officer not below the rank of Joint Secretary including Legal Advisor of the authority and any Sub Divisional Magistrate of the district in case of a district. The competent authority shall set up mediation and conciliation centres in each authority, or the district, which will resolve to mediate the disputes at the first instance between the disputing parties.*

(11) *Any dispute raised before the competent authority shall be decided by the competent authority or delegatee as provided above or his delgatee as provided above, to be decided by the officer notified by the State Government under Section 27 (2) and (3) of the Act, before it is brought before the Court of law.*

(12) *The competent authority will also be entitled to*

verify the contents of the declaration under Section 12 of the U.P. Apartment Act, 2010 and to decide any question, which may arise out of such declaration.

(13) *The model byelaws as notified on 16.11.2011 under sub-section (6) of Section 14 of the U.P. Apartment Act, 2010, if not approved and appended to the application for registration, made prior to the enforcement of the Act shall be adopted in the first meeting of the association of apartment owners and will be registered by the Registrar. Any amendment in the model bye-laws will be made in accordance with the Bye Law 58 of the Model Byelaws to be approved by the owners representing at least 2/3rd of the total number of units in the building with the prior approval of the competent authority and will thereafter be registered by the Registrar of Societies without insisting upon complying with the provisions of any other Act including Societies Registration Act as amended in the State of U.P. No alteration in the declaration given by the promoter under Section 12 shall be permitted except in accordance with the Act and for which the approval of the development authority or regulating authority in which such property is situate will be necessary and thereafter with the approval of the association of apartment owners by resolution passed by the apartment owners in which vote of promoter shall not be counted. The development authority or regulating authority may in such case demand a NOC from the apartment owners before allowing any alteration in the building plans as a condition for granting approval.*

After interpretation and clarification of the provisions of the U.P. Apartment Act 2010, the Rules, 2011 and the Model Bye-Laws

2011, it was directed that in view of the provisions of Rule 3 of the Apartment Rules 2011, the declaration will be submitted under sub-section (1) of Section 12 in Form "A" appended to the Rule with its Annexures 'A' to 'F' in Schedule 'A', by all the promoters in the State of U.P. who have completed or partly completed constructions of the buildings with more than three allotted or occupied apartments, with the competent authority within one month from the date of approval of the plans.

The apartment owners who have not formed the Association, have been directed to form an Association and get it registered by adopting the Model Bye-Laws as notified by the State Government on 16.11.2011.

Further direction was given to call a meeting of the Association within reasonable time and in case the dispute is not resolved in the meeting, the apartment owners and the promoters may make a complaint to the competent authority who will decide the dispute as per the procedure provided in the Act.

In paragraph 65 (3), it was observed that the apartment owner under Section 3 (d) will not only be the person owning the apartment, it includes the spouse and children of the apartment owner and lawful tenant. It will also include a person holding valid power of attorney of the allottee/owner of the apartment. The declaration under Section 12 falling in the Chapter V, providing complete information in Form-A under Rule 3 of the Rules of 2011 with Annexure 'A' to 'F' in Schedule 'A', must be enclosed with the deed of transfer, and is mandatory for handing over possession of any apartment constructed after the commencement of the Act and also to get such transfer deed registered under the provisions of the Registration Act, 1908.

Rule 2(c) defines the "Competent Authority" as under:-.

“Rule 2(c):- “Competent Authority” means the Vice-Chairman of the Development Authority in whose development area the building is situated or the Collector of the district where no such Development Authority exists.”

The competent authority within the meaning of Rule 2(c) has been designed as Vice Chairman of the Development Authority in whose notified development area the building is situated.

The competent authority is empowered to verify the contents of the declaration under Section 12 of the Apartment Act, 2010 and to decide any question which may arise out of such declaration. No alteration in the declaration given by the promoter under Section 12 is permitted except in accordance with the Act and with the approval of the competent authority of the development area in which the property is situated. The promoters are under obligation to submit the declaration under Section 12(1) in the prescribed format with the competent authority within one month from the date of approval of the plans of a building which is completed or partially completed with the construction of more than three allotted or occupied allotments.

As per the mandate of the Division Bench of this Court, every promoter of the apartment is under obligation to submit the declaration containing percentage of proportionate representation for voting purpose decided in the meeting of the association of apartment owners. The voters are not only the apartment owners but may be spouse or children and votes are to be computed on the percentage assigned to the dwelling unit or units in the declaration.

The General Body of the association did not consider these provisions and in the meeting held on 18.2.2015 has wrongly decided the voting rule of “one flat one vote” which is in direct violation of the directions given by this Court in paragraph 65 (3) of

the judgment in **M/s Designarch Infrastructure Pvt. Ltd** (supra).

Sri A.K. Malviya, learned counsel for respondent nos. 5 to 9 could not dispute the above proposition and could not point out anything otherwise.

His only submission is that once the election process is set in motion, no authority or Court of law has jurisdiction to interfere in between. All the issues will be raised in the election petition to be filed after the election is over and be decided.

The said argument of Sri A.K. Malviya, learned counsel for respondent nos. 5 to 9 are not convincing inasmuch as the question before this Court is not of any infirmity pointed out during the course of election process. In fact, the grievances raised before this Court is a challenge to the whole election. The nature and intensity of the error committed in the preparation of the electoral roll is such that no election on its basis can proceed or be allowed to stand. Illegal preparation of electoral roll goes to the very root of the election and such an infirmity cannot be ignored.

This view taken by the Court finds support from the judgment of the Apex Court in **Bar Council of Delhi and another** (supra) wherein it was found that the electoral roll prepared on the basis of an invalid provisions would result in vitiating the entire election and the writ petition for setting aside the election of the Bar Council of Delhi was held maintainable.

Even in paragraph '35' of the pronouncement of Apex Court in **Election Commission of India** (supra) relied upon by Sri A.K. Malviya, it was observed that the grievances raised before the High Court, were not fully capable of being taken care of at the trial of the election petition to be filed after the declaration of the results and so the bar of Article 329 (b) would not be attracted. The

principal enunciated is that if the Court's intervention sought for has the effect of interrupting, extracting or protracting the election proceedings then the judicial remedy should be postponed till after the completion of such proceedings. However, the orders issued by the election commission is open to judicial review on the ground of mala fide or arbitrary exercise of power. It was held therein on the facts of the said case that the intervention of the High Court during the progress of election process was not required, however, there is no absolute exclusion of the jurisdiction of the High Court under Article 226 of the Constitution of India.

Apply these principles to the facts of the instant case, where there cannot be a dispute about the voting by proportionate representation of each apartment owner, the voters are to be recounted according to Section 12 (f), Rule 3 read with Annexure "B" to Form "A" of the Rules and Clause 8 of the Model Bye-Laws, as the rights of representation of others as recognised under the Act, and the Rules and the Model Bye-Laws framed thereunder cannot be taken away, the voting rule of "one flat one vote" is in complete violation of the mandate of the legal provisions. The voter list placed before the Election Officer prepared pursuant to the resolution dated 18.2.2015 cannot be allowed to stand and on that basis the elections of the association cannot be held. The Election Officer having found the voter list defective has rightly stayed the election process with the direction that the final voter list as per the Apartment Act, 2010 be made available so as to complete the election process. The Election Officer was fully authorised to look into the correctness of the voter list before proceeding with the election.

No interference is required in the order passed by the Election Officer dated 11.3.2015.

Resultantly, both the writ petitions are being **disposed of** with the following directions:-

- (1) The electoral roll shall be prepared strictly in accordance with Section 12(1)(f), Rule 3, Form "A" read with Annexure "B" appended to Rule 3 and Bye-Laws 8 of the Model Bye-Laws notified on 16.11.2011, in a meeting of the Association.
- (2) While preparing the voter list, the declaration of the promoter submitted to the competent authority under Section 12(1)(f) shall be taken note of which contains full particular of the representation of the apartment owners for voting purpose.
- (3) For the preparation of the election schedule, a meeting of the General Body of the association be called for and information be given to the Election Officer immediately, thereafter. The voter list prepared in accordance with the provision of the Act, the Rules and the Model Bye-Laws keeping in mind the directions of the Court in **M/s Designarch Infrastructure Pvt. Ltd.** (supra) shall be placed before the Election Officer preferably within a period of one month from the date of the order.
- (4) The Election Officer is directed to proceed for holding election immediately thereafter without questioning the validity of the voter list prepared on the basis of declaration of the promoter and conclude the election process without any interruption.
- (5) In case, the declaration of the promoter under sub-section (1) of Section 12 is not available in the office of the association, the aggrieved party may approach the competent authority who shall examine the records and issue a copy of

the declaration, if any, submitted by the promoter.

- (6) In case, the Form of Declaration has not been submitted by the promoter under sub section (1) of Section 12 in Form "A" as provided under Rule 3, the competent authority shall issue a notice to the promoter and association of the apartment owners of the building and after giving opportunity of being heard to the objectors shall decide the dispute of proportionate representation of the apartment owners for voting purpose.
- (7) An expeditious decision in accordance with law shall be taken by the competent authority, in case, the dispute is referred to it preferably within the period of two months from the date of filing of the application before it by any of the parties.
- (8) The competent authority shall first make an attempt to decide the matter with the help of mediation and conciliation process and thereafter shall pass a reasoned order after hearing the parties concerned.

The endeavour of the authorities should be to get the dispute resolved and complete the election process as early as possible.

No unnecessary adjournments would allowed by the competent authority to any of the parties.

Order Date :- 29.5.2015

B.K.

(Sunita Agarwal, J.)