

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

W.P.A. No. 25143 of 2023

M/s. Fortune Park Housing
Projects Limited & Anr.

Vs.

State of West Bengal & Ors.

Mr. Rajdeep Mantha,
Mr. Niladri Khanra,
Mr. Mainak Biswas

...for the petitioners

Mr. Anirban Ray,
Mr. Sk. Md. Galib,
Mr. Abu Siddique Mallik

...for the State

Mr. Ayan Banerjee,
Ms. Sarmila Das

...for the respondent no. 3

1. The petitioners are the developers in respect of an apartment, which is comprised of several towers.
2. The towers were constructed phase-wise, it is submitted. The grievance of the petitioners is that without prior notice to the petitioners under Section 10A(2)(a) of the West Bengal Apartment Ownership Act, 1972, Form-A was accepted and the Association was registered.
3. It is submitted that the present petitioners have several grievances against such registration, since the declaration and Form-A deviate from the factual

scenario in the said apartment on several major aspects.

4. Learned counsel for the respondent-Association submits that the writ petition is not maintainable in view of availability of equally efficacious alternative remedy in the form of an appeal under Section 10A (3) of the 1972 Act.

5. Such point, however, is controverted by learned counsel for the petitioners by arguing that in the present case, there has been no order of rejection as contemplated in the said sub-section to permit the petitioners to prefer an appeal.

6. Learned counsel appearing for the respondent-Association further submits that whereas the apartment was built in the year 2016, the petitioners/developers were deliberately delaying the matter of registration of the Association to commercially exploit the property.

7. It is submitted that the present application is also factually incorrect insofar as the Association, upon furnishing proper details, obtained the registration of the same.

8. Learned counsel for the Competent Authority controverts the submissions of the petitioners as well. It is argued by placing reliance on Section 2 of the 1972 Act that the Act applies 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 to the provisions of the Act.

9. It is submitted that the Association duly submitted under the provisions of Section 2 read with Section 10 of the 1972 Act and, as such, the said chapter cannot be reopened.

10. Learned counsel also seeks to submit that under the contemplation of sub-section (2)(a) of Section 10A, notice is to be issued to the “parties concerned”, which refers to the applicants who presented the Form-A/declaration. Read in conjunction with sub-section (1) of Section 10A, the same is the only plausible construction possible.

11. It is argued that the enquiry contemplated in sub-section (1) of Section 10A is in the nature of a civil enquiry, which having been done in the present case, the remedy of the petitioners, at best, would be to seek an amendment of the declaration.

12. Learned counsel also places reliance on Rules 4 and 5 of the West Bengal Apartment Ownership Rules, 1974 in such context.

13. In reply, learned counsel for the petitioners adds that Rule 5 of the said Rules envisages that an

amendment has to be sought by the applicants who made the declaration in the first place. By placing reliance on the language of sub-rule (1) of Rule 5, learned counsel for the petitioners reiterates such submission.

14. Upon a perusal of the materials on record, it transpires that there is nothing on record or apparent from the submissions of the parties to indicate that any notice was given to the petitioners/developers at any point of time under Section 10A(2)(a) of the 1972 Act.

15. Insofar as the submission of the Competent Authority is concerned to the effect that the parties concerned contemplated in sub-section (2)(a) only speak about the applicants themselves, the same would be an absurd interpretation and cannot be accepted. It would be somewhat like issuing a summons to the plaintiff himself.

16. Obviously, within the contemplation of the enquiry, as envisaged in Section 10A(1), read in conjunction with the notice under Section 10A(2)(a), the notice has to be issued not to the applicant alone (as is evident from the language of the said provisions itself) but to the *parties concerned*.

17. The said expression is immediately suffixed by the phrase “after holding such enquiry...”. Hence, it is

clear that all parties who are affected by such registration or acceptance of the declaration and the Form-A are required to be given notice prior to deciding on the same. In the present case, since such notice has not been given to the petitioners, the petitioners are justified in arguing that the acceptance of the declaration and Form-A and registration of the Association itself is perverse.

18. Insofar as the argument as to non-maintainability of the writ petition is concerned, the same also does not hold water, since Section 10A(3), as rightly contended by learned counsel for the petitioners, envisages a situation where a person is aggrieved by an order of rejection under sub-section (2), that is, when the Competent Authority refuses to accept the declaration or register the Association.

19. In the present case, the converse happened, for which the petitioners are not entitled to prefer any appeal.

20. Also, as correctly submitted by the petitioners, Rule 5 of the 1974 Rules makes it clear that “such sole owner”, which refers to the expression “sole owner” used in the preceding part of sub-rule (1) of Rule 5, refers to the sole owner only in cases where a sole owner presented the declaration, as envisaged in the said Act and Rules.

21. In the present case, the majority of the owners, for the purpose of forming the Association, had made the initial application/declaration due to which the present writ petitioners, in the capacity of sole owners, do not have a right to reopen the issue by seeking an amendment.

22. Lastly, although the expression “amended” was used in a stray manner in the representation of the petitioners, the crux of the dispute raised by the petitioners was that the petitioners were never given any notice before the declaration was accepted and the Association registered.

23. Although the petitioners seek to raise certain other salient issues regarding the declaration itself, the writ court is not the forum to go into such issues. In any event, in view of the above circumstances, the acceptance of the declaration and the registration of the Association are vitiated and ought to be set aside.

24. Accordingly, W.P.A. No. 25143 of 2023 is allowed on contest, thereby setting aside the decision of the Competent Authority to accept the declaration and Form-A submitted by the respondent-Association as well as the registration of the Association consequent thereto. The Competent Authority shall revisit the issue by re-deciding on the Form-A and declaration submitted by the respondent-Association

by giving a prior notice to all concerned, including the present petitioners.

25. Upon such notice being adequately given, an opportunity of representation and hearing shall be given to all concerned, including the petitioners, and a fresh decision in that regard shall be taken by the Competent Authority.

26. In view of the anxiety of the respondent-association in the matter of delay and apprehended commercial exploitation of the property, it is expected that the Competent Authority shall complete the entire exercise of re-deciding as expeditiously as possible, positively within eight weeks from this date.

27. Since no affidavits have been called for, it is deemed that none of the allegations made by the parties against each other are admitted.

28. There will be no order as to costs.

29. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)