

(2009) 06 MAD CK 0112

In the Madras High Court

Case No : Writ Petition No. 5351 of 2009 and M.P. No. 1 of 2009

Cosmo Towers Owners' Association

APPELLANT

Vs

Chennai Metropolitan Water Supply and Sewerage Board and
Dr. Chitra Pandian

RESPONDENT

Date of Decision : 18-06-2009

Acts Referred:

Chennai Metropolitan Water Supply and Sewerage Board Act, 1978 — Section 42, 49, 49(1)
Constitution of India, 1950 — Article 21
Tamil Nadu Apartment Ownership Act, 1994 — Section 6
Tamil Nadu Societies Registration Act, 1975 — Section 12, 20, 23, 25, 3

Citation : (2009) 4 LW 348 : (2009) 5 MLJ 491

Hon'ble Judges : N. Paul Vasanthakumar, J

Bench : Single Bench

Advocate : N. Nagu Sah, for the Appellant; V. Manoharan, for R1 and R2, G. RM. Palaniappan, for R3 and P. Anbarasan, for R4, for the Respondent

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, J.—The prayer in this writ petition is to issue a Writ of Mandamus forbearing the water and sewerage connections

to the flat building known as ""Cosmo Towers"" at premises No. 11/11A, New No. 22, Dr. Thomas Road, T. Nagar, Chennai-17 under the pretext

of non-payment of arrears of water and sewerage tax and water charges payable by the third and 4th respondents in respect of their respective

flats.

2. The case of the petitioner Association is that the members of the petitioner Association had purchased various flats in the residential flat building

known as ""Cosmo Towers"" at Premises No. 11/11A, New No. 22, Dr. Thomas Road, T. Nagar, Chennai - 17, promoted by M/s. Nair Fincon

Limited, now called as M/s.Cosmo Foundations Limited, represented by its Director, the third respondent herein. The Association is having 30

members registered under the Tamil Nadu Societies Registration Act, 1975 with Registration No. 102 of 2002. According to the petitioner, the

third respondent made illegal constructions and some of the flats are retained by him for commercial purpose, though the flats were promoted for

the construction of residential flats. The petitioner Association filed a suit in O.S. No. 1576 of 2002 before the XI Assistant City Civil Court,

Chennai, against the third respondent and prayed for various reliefs including the relief of demolition of the illegal construction and for permanent

injunction restraining the use of any flat for commercial purpose.

3. According to the petitioner, the said suit was decreed and the third respondent challenged the said judgment and decree by filing appeal in A.S.

No. 141 of 2006, which is now pending on the file of the V Additional City Civil Court, Chennai. The fourth respondent is the owner of flat No.

11/1 and it is averred in the affidavit that the said flat is used for commercial purpose i.e. for running a clinic, which is in contravention of the bye

laws of the Association. The members of the petitioner Association while purchasing the flats had paid separate deposits for water and sewerage

connections to respondents 1 and 2 through their promoter and each of their respective flats have been assessed to water and sewerage tax and

water charges. All the members of the petitioner Association had fully paid their respective water and sewerage tax and water charges payable

upto 31.3.2009 to the first respondent, as such there is no arrears of any tax and charges. According to the petitioner, officials of respondents 1

and 2 are threatening the petitioner Association that they are going to disconnect the water and sewerage connections for the entire apartments on

the ground that respondents 3 and 4 are in arrears of water and sewerage tax and water charges in respect of their flats. The third and fourth

respondents are not the members of the petitioner Association and they are disqualified from becoming its members due to their commercial

activities carried in contravention of the bye laws of the petitioner Association and if respondents 3 and 4 are not paying the tax and charges,

respondents 1 and 2 cannot disconnect the water supply and sewerage connections to the entire apartments. On the above said pleadings, the

above writ petition is filed for issuing a mandamus forbearing the respondents 1 and 2 from in any way interfering and disconnecting the water and sewerage connections to the "Cosmo Towers".

4. The petitioner Association also filed an additional affidavit dated 11.6.2009 by stating that the fourth respondent resides only at premises

bearing Door No. 16/3, Lakshmi Colony North Crescent Road, T.Nagar, Chennai-17 and she is not residing in Flat No. A1 of "Cosmo Towers

and the said flat No. A1 is used for running her clinic, which is a commercial activity. It is also stated that the third respondent, who had promoted

the apartment, is carrying on commercial activities in the flats retained by him, by running various businesses.

5. The fourth respondent has filed a counter affidavit by stating that she is residing at No. 11/1, "Cosmo Towers", Dr. Thomas Road, T.Nagar,

Chennai- 600 017 and the said flat was purchased on 3.11.2003 by a registered Sale Deed bearing Document No. 2522/2003 and as such, she is

having undivided interest in the common areas and facilities provided to the apartment in the building as per Section 6 of the Tamil Nadu

Apartment Ownership Act, 1994. The fourth respondent is using the said apartment for residential purpose and for about two hours, she used to

consult poor patients from the said area and no consulting fee is collected for such medical consultation and the fourth respondent is having a

separate clinic with lab facilities at No. 9/5, North Road, West CIT Nagar under the name and style of Shri Hospital.

6. It is specifically stated in the counter affidavit that only one room in the flat is used for free consultation for two hours and as such the building is

not used for commercial purpose at all. The petitioner Association objected the fourth respondent in giving free consultation and also disconnected

the water supply to the fourth respondent's apartment on 1.12.2003. The fourth respondent lodged a police complaint on 7.12.2003 and after

investigation, the police officials warned the petitioner Association and advised not to interfere with the fourth respondent's peaceful possession

and the enjoyment of the apartment. According to the fourth respondent, she is willing to become a member of the petitioner Association and pay

the maintenance charges for using the common facilities and the petitioner Association refused to admit the fourth respondent as a member of the

Association, which is contrary to the provisions of the Tamil Nadu Apartment Ownership Act, 1994. The fourth respondent is being harassed,

since the water supply was disconnected, the fourth respondent sent a letter to the Metro Water Board to restore the supply to her apartment. The

Area Engineer, Metro Water also wrote a letter to the petitioner Association to restore the water supply to the fourth respondent's flat. However,

the disconnected water supply is not restored till date.

7. The fourth respondent also stated in the counter affidavit that she never refused to pay the maintenance charges/water charges and there is no

building violation in so far as the fourth respondent's apartment is concerned and the suit filed by the petitioner Association, the fourth respondent

is not a party and the fourth respondent having not doing any commercial activity, she has not violated any of the bye laws. It is further stated in the

counter affidavit that the fourth respondent has paid the arrears of the water supply and sewerage fee and charges and there is no default on her

part, but till date, the water supply connection is not restored by the petitioner Association to the fourth respondent's residential flat, whereby right

to get the water is denied by the petitioner Association.

8. It is also stated in the counter affidavit that the Chennai Metropolitan Water Supply and Sewerage Act, 1978 empowers the authority viz.,

respondents 1 and 2 to disconnect the water supply to the building, if the arrears of one of the flat owner in an apartment is not paid, the petitioner

Association can pay the arrears of water charges and recover the same from the flat owner, who had failed to pay the same. Stating the above said

facts, the fourth respondent prayed for dismissal of the above writ petition.

9. The learned Counsel for the petitioner Association submitted that respondents 3 and 4 are using their flats for commercial purposes and

therefore, they are not admitted as members of the petitioner Association and the bye law provides the denial of membership, because they are

carrying on commercial activities in their residential premises. The learned Counsel for the petitioner Association also submitted that respondents 3

and 4 cannot compel the petitioner Association to admit them as members and by not paying the water and sewerage tax and charges by

respondents 3 and 4, respondents 1 and 2 are attempting to disconnect the water supply connection to the entire apartment and the same is illegal

and therefore, the writ petition is filed with the above said prayer forbearing the respondents 1 and 2 from interfering/disconnecting the water

supply to the entire ""Cosmo Towers"".

10. The learned Counsel for respondents 1 and 2 submitted that if any one of the flat owner committed default, the sewerage and water supply

connection to a flat can be disconnected and this Court also in W.P. No. 11461 of 2003, dated 14.7.2005, upheld the power of respondents 1

and 2 to disconnect the sewerage connections, if any one of the flat owner committed default.

11. The learned Counsel for the fourth respondent submitted that the fourth respondent being the owner of the residential flat viz., Flat No. 11/1,

Cosmo Towers"" purchased through a registered Sale Deed in document No. 2522/2003, dated 3.11.2003 is entitled to enjoy the facilities of

common area provided to the apartment and the petitioner Association is bound to admit the fourth respondent as a member of the Association

and denial of admission as a member of the petitioner Association is in violation of the Tamil Nadu Apartment Ownership Act, 1994, Rules and the

By-Laws. The disconnection of water supply is deprivation of her fundamental right guaranteed under Article 21 of the Constitution of India, which

guarantees right to livelihood, which includes getting water for her livelihood.

12. The learned Counsel further submitted that the building is used only as a residential premises and no commercial activity is carried on except

doing consultation as a Doctor for two hours without collecting any charges from the poor people and the fourth respondent is having a clinic at

Door No. 9/5, North Road, West CIT Nagar and therefore, the fourth respondent need not conduct the clinic in the residential flat and the gas

connection given to the fourth respondent on 9.12.2003 is produced as a proof of residence.

13. From the above stated pleadings, the points arise for consideration in this case are;

i) Whether the petitioner Association can deny admission of respondent 3 and 4 as members of the petitioner Association even though they are

having ownership of apartments in the very same ""Cosmo Towers""?

ii) Whether the petitioner Association is vested with a right to disconnect the water supply to the fourth respondent's apartment?

iii) Whether the writ petition is maintainable against respondents 1 and 2 on non payment of water and sewerage tax and charges by any of the flat owner in "Cosmo Towers"?

Issue No. 1:- Whether the petitioner Association can deny admission of respondent 3 and 4 as members of the petitioner Association even though they are having ownership of apartments in the very same "Cosmo Towers"?

14. It is the case of the petitioner Association as well as the respondents 3 and 4 that respondents 3 and 4 are having ownership flats in "Cosmo

Towers" situated in premises No. 11/1, "Cosmo Towers", Dr. Thomas Road, T.Nagar, Chennai- 600 017. The respondents 3 and 4, being

owners of their respective flats, have got a right over the common area since they are having undivided share in the apartment premises.

15. The contention of the petitioner Association is that the third respondent is using his flat for commercial purpose and the fourth respondent is

using her flat as a clinic and doing commercial activity and therefore, they are not admitted as members of the petitioner Association and

consequently, the petitioner Association has disconnected the water supply given to the flats owned by respondents 3 and 4. The fourth

respondent has stated her willingness to be admitted as a member of the petitioner Association and expressed her willingness to pay the

maintenance charges and also paid the metro water and sewerage tax and charges. But, no such willingness is expressed by the third respondent

before this Court. The fourth respondent also stated that she is not running clinic in the flat as she is having a separate clinic at No. 9/5, North

Road, West CIT Nagar in the name and style of "Shri Hospital" and in the "Cosmo Towers" flat, she used to consult the poor patients for about

two hours in a single room free of cost and the same cannot be treated as a commercial activity and the fourth respondent is residing in the said flat.

16. The rights and liabilities of flat owners in an apartment is governed under the Tamil Nadu Apartment Ownership Act, 1994 (in short "the Act")

which came into force on and from 7.4.1997. The said Act covers all the apartments constructed, whether before or after the commencement of

the Act which contains five or more apartments or three or more floors and constructed in accordance with the planning permission duly

sanctioned by the appropriate authority.

17. Apartment owner is defined u/s 3(c) of the Act, which reads as follows:

apartment owner"" means the person or persons owning an apartment and an undivided interest in the common areas and facilities or the limited

common areas and facilities in the percentage specified in the Deed of Apartment and includes an outright purchaser or a hire purchase allottee of

such apartment and undivided interest.

18. The Association of the apartment owners is also defined u/s 3(d) of the Act.

""Common area and facilities are defined u/s 3(h) of the Act, which

includes water supply, sewerage and drainage connections and the installations of central services such as power, light, gas, hot and cold water,

heating, refrigeration, air-conditioning and incinerating [3(h)(5)].

19. Section 5 of the Act deals with the ownership of apartments, which states that each apartment owner shall be entitled to the exclusive

ownership and possession of his apartment in accordance with the Deed of Apartment executed and registered in accordance with the provisions

of the Act.

20. The Common areas and facilities are entitled to be used as a common area by all apartment owners in accordance with the purpose for which

they are intended without hindering or encroaching upon the lawful rights of the other apartment owners. Every apartment owner shall comply

strictly with the bye-laws and with the covenants, conditions and restrictions set forth in the Deed of Apartment in relation to his apartment. If there

is a breach of bye-laws, action may be initiated against such apartment owner to recover sums due, for damages or injunctive relief or both

maintainable by the society or the Association of Apartment Owners or, in a proper case by the aggrieved apartment owner.

21. Chapter IV of the Act deals with the society or association of apartment owners, its bye-laws and functions.

22. Section 12 of the Act mandates the formation of an association or society which shall be registered either under the Tamil Nadu Co-operative

Societies Act, 1983 or under the Tamil Nadu Societies Registration Act, 1975 with an object to maintain all common areas and facilities and to

provide such amenities as may be necessary in the common interest of all the apartment owners and to do such other things which are considered

incidental or conducive to the attainment of the objects specified in the bye-laws.

As per Section 13, bye-laws shall be framed and filed before the competent authority and model buy-laws are also mentioned in the annexure to the Tamil Nadu Apartment Ownership Rules, 1997.

23. The Members of the Association is also explained in Clause 5 of the Model By-Law, which reads as follows:

5. Members of Association.- (1) All persons who have purchased apartments and executed a deed of apartment, shall automatically be the

members of the Association and will pay the entrance fee of one-rupee. Each apartment owner shall receive a copy of the by-laws on payment of

one rupee.

(2) Upon the sale, bequest or transfer of apartment, the purchaser of the apartment or the grantee or legatee or the transferee shall automatically

become the member of the Association and shall be admitted as member on payment of the entrance fee of one rupee.

From the above narrated provisions, it is evident that the society/association has to be formed for the benefit of all the apartment owners and every

owner is entitled to become a member automatically and entitled to enjoy all common facilities. The metro water and sewerage connection is given

in common to the apartments as per the Chennai Metropolitan Water Supply and Sewerage Act, 1978 and it is a common benefit given to all

apartment owners.

24. The object of enacting the Tamil Nadu Apartment Ownership Act, Rules and Model By-law for the formation and maintenance of apartments

is to promote harmony among the owners of apartments and share the common facilities without any hindrance to others. The petitioner

Association is also created and registered under the statutory provision and therefore, it is bound to follow all the provisions of the said Act, Rules

and Model By-Laws.

25. Section 23 of the Act clearly states that the Act is to be binding on apartment owners, tenants etc., which reads as follows:

23. Act to be binding on apartment owners, tenants, etc.- (1) All apartment owners, tenants of such owners, employees of apartment owners or

tenants, or any other person who may, in any manner, use the property or any part thereof to which this Act applies, shall be subject to the

provision of this Act and the bye-laws and the rules made thereunder.

(2) All agreements, decisions and determinations lawfully made by the society or the Association of Apartment owners, as the case may be, in

accordance with the provisions of this Act or the bye-laws shall be deemed to be binding on all apartment owners.

26. Section 25 of the Act further states that the Act is to override other laws, which reads as follows:

25. Act to override other laws.- (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any

other law for the time being in force or any custom, usage or agreement or decree or order of a court, tribunal or other authority.

(2) Save as otherwise provided in Sub-section (1), the provisions of this Act, shall be in addition to, and not in derogation of, any other law for the

time being in force.

27. From the above referred sections, particularly Sections 23 and 25 of the Act, it is beyond doubt that the Tamil Nadu Apartment Ownership

Act, 1994, is binding on the petitioner and all flat owners. The By-Law framed by the petitioner Association can operate only subject to the

provisions of the Act, Rules and the Model By-Laws.

28. The contention of the learned Counsel for the petitioner is that the by-laws of the petitioner Association gives discretion to the association to

permit or not to permit any apartment owner to become a member, cannot be accepted as the same is contrary to the Act, Rules and model by-

laws and in view of the fact that only one society/association can be formed for an apartment and every apartment owner automatically becomes a

member of that Society/association. Thus, the action of the petitioner Association in not permitting the respondents 3 and 4 to become members,

who are also apartment owners of ""Cosmo Towers"" is illegal and it is a statutory violation.

Issue No. 2 : Whether the petitioner Association is vested with a right to disconnect the water supply to the fourth respondent's apartment?

29. The fourth respondent being the owner of her flat is entitled to get the water supply which is supplied through the common water supply

connection to the apartment by the metro water. The petitioner Association can only demand maintenance charges for supplying the water within

the premises after it is drawn and collected in a common tank. The action of the

petitioner Association in disconnecting the water supply to the fourth respondent's flat is also illegal as it is an interference in enjoying the common facility. The fourth respondent is willing to pay the maintenance charges as a member of the petitioner Association. The fourth respondent also paid the metro water and sewerage tax and charges and therefore, there is no justification to deny water supply to the fourth respondent by the petitioner Association.

30. In so far as the third respondent is concerned, he is also bound to pay the water supply and drainage fee and water supply charges to the metro water. If the third respondent is not paying the same, common water supply connection being given as per the Chennai Metropolitan Water Supply and Sewerage Act, 1978, it is open to the petitioner to pay the same and demand from the third respondent. If the third respondent is not paying the same, it is open to the petitioner Association to act in accordance with law, which is also provided u/s 20 of the Act. Section 20 of the

Act reads as follows:

20. Common expenses to be charged on property.- All sums assessed by the society or the Association of Apartment owners as the share of the common expenses chargeable to any apartment shall, subject to the prior claim, if any, -

(i) of the Government in respect of land revenue or any money recoverable as land revenue,

(ii) of any municipality or other local authority in respect of tax or other assessment, and

(iii) of the mortgage, in respect of all sums unpaid, constitute a charge on such apartment.

31. On an analysis of the Act and Rules, I am of the firm view that the petitioner is not entitled to disconnect the water supply given to the fourth respondent or to the third respondent and it can only take steps to recover the amount payable to the metro water from the third and fourth respondents, if the same is not paid by them.

Issue No. 3:- Whether the writ petition is maintainable against respondents 1 and 2 on non payment of water and sewerage tax and charges by any of the flat owner in "Cosmo Towers"?

32. Section 42 of the Chennai Metropolitan Water Supply and Sewerage Act,

1978 deals with water supply system. Section 49 deals with power to cut off water supply. Section 49(1)(i) states that if the owner or occupier fails to pay within due time any money due to the Board under this Act, or any regulation or other instruments made thereunder, the water supply can be cut off. The respondents 1 and 2 having vested with statutory right to cut off water supply.

33. The petitioner Association is not entitled to file the writ petition praying for mandamus forbearing the respondents 1 and 2 from interfering or disconnecting the water and sewerage connection given to ""Cosmo Towers"". The prayer sought for in the writ petition is contrary to the above statutory provisions and the same is not at all maintainable. It is made clear that this order shall not be construed as approving the violation of any rule by the respondents 3 and 4 and if there is any statutory violation/Building Rules, it is open to the petitioner to agitate its rights in the pending matter as well as before the appropriate authority or forum.

There is no merits in the writ petition and the same is dismissed with the above observation. No costs. Connected miscellaneous petition is also dismissed.