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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 19-04-2023

ORDERS PRONOUCNED ON : 25-05-2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

WP No.27155 of 2016
And
WMP Nos.23325 of 2016 and 23601 of 2022

Ankur Grand Owners Association,
252/254, E.V.R.Periyar High Road,
Kilpauk,
Chennai-600 010 Represented by its
Hon. Secretary Mr.Hiren Botadra. ... Petitioner

Vs.

1.The District Registrar (Admin),
In the Cadre of Assistant I.G. of Registration,
Chennai Central,
Chennai-600 014.

2.State of Tamil Nadu,
Represented by its Secretary,
Registration Department,
Fort St. George,
Chennai-600 009.

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3.The Registrar of Societies,
E.V.R.Periyar High Road,
Kilpauk,
Chennai-600 010.

4.Roshini Kiran Kumar Davey,
Represented by its Power Agent,
Kirankumar Davey,
4-B, Rainbow Orchid,
24, Barnaby Road,
Kilpauk,
Chennai-600 010.

5.Ashish P.Davey

6.The Inspector of Police (Crime),
G-3 Police Station,
Kilpauk,
Chennai-10. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, calling for the records of the first respondent passed in No.3629/D2/2016 dated 24.06.2016 and quash the same.

For Petitioner : Mr.T.Mohan,
Senior Counsel for
Mr.V.Balaji.

For Respondents-1 to 3
and 6 : Mr.S.Ravichandran,
Additional Government Pleader.

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For Respondent-4 : Mr.N.Subramaniyan for
Mr.D.Raghu

For Respondent-5 : Not Ready in Notice

O R D E R

The writ on hand has been instituted challenging the order passed by the first respondent in proceedings dated 24.06.2016.

PETITIONER'S CASE:

2. The petitioner is Ankur Grand Owners Association, registered under the Tamil Nadu Societies Registration Act, 1975. The petitioner-Association is the Flat Owners Association and the Bye-Laws of the Association was registered before the Competent Authority under the Tamil Nadu Societies Registration Act, 1975. In the year 2009, the Apartment Builder Constructed the building consisting of 60 apartments at Door No.252 and 254, EVR Periyar High Road, Kilpauk, Chennai-600 010. The Corpus Fund was collected at the rate of Rs.25 per square feet from all the 60 flat owners and the said amount was handed over to the petitioner-Association by the builder after registration of the petitioner-Association.

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3. On 09.05.2010, the Committee members of the petitioner-Association passed a resolution enhancing Corpus Fund from Rs.25 per sq.ft., to Rs.40 per sq.ft. The Resolution was approved by the General Body to enhance the Corpus Fund from Rs.40 per sq.ft., to Rs.50 per sq.ft or.1% of the sale value of the flat, whichever is higher. The said Resolution was passed by the General Body on 19.09.2011.

4. The fourth respondent purchased Flat No.33 on 04.04.2013 from Smt.Indhu Bala and paid a Transfer Fee amount of Rs.1,47,800/- to the petitioner-Association.

5. The fifth respondent purchased Flat No.43 in the year 2015 from the owner of Smt.Indhu Bala of Ankur Apartments. When the petitioner-Association demanded the Transfer Fee amount, the said Smt.Indhu Bala informed to the petitioner-Association that the fifth respondent agreed to pay the said amount to the petitioner-Association. However, the fifth respondent did not pay the said Transfer Fee amount to the petitioner-Association and he filed a civil suit in OS No.4081 of 2015

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and subsequently the suit was dismissed for non-prosecution. The fifth respondent did not pay the Transfer Fee amount and other two members of the petitioner-Association did not pay the maintenance amounts to the petitioner-Association. The defaulters names were put on the Notice Board of the petitioner-Association.

6. The fourth respondent sent representation to the respondents 2 and 3 claiming to declare that Clause-8 of the Bye-Laws as null and void and sought for a direction to refund the Transfer Fee collected from the fourth respondent. In the year 2016, the petitioner filed the Bank Accounts of the petitioner-Association before the second respondent. The fourth respondent thereafter filed WP No.5449 of 2016 and the High Court has issued a direction to the respondents 2 and 3 to consider and dispose of the representation dated 16.12.2015.

7. The first respondent-District Registrar (Administration) passed the impugned order declaring that Clause-8 of the Bye-Laws of the petitioner-Association is null and void and further direction was issued to the petitioner-Association to refund the Transfer Fee amount to the fourth

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respondent. Thus the petitioner-Association is constrained to move the present writ petition.

8. The learned Senior Counsel appearing on behalf of the writ petitioner-Association contended that the first respondent has no jurisdiction to pass the impugned order. The third respondent-Registrar of Societies has no jurisdiction to forward the representation of the fourth respondent dated 16.12.2015 to the first respondent contrary to the orders passed by this Court in WP No.5449 of 2016. The first respondent failed to follow the principles of natural justice and no sufficient opportunity was given to the petitioner-Association to put forth their submissions before passing the impugned order. Thus the order impugned passed by the first respondent dated 24.06.2016 is to be set aside. When an identical issue was pending before the Civil Forum between the parties, the first respondent ought not to have passed the impugned order.

9. The learned Senior Counsel appearing on behalf of the petitioner-Association reiterated that as per Section 13 of the Tamil Nadu Apartment Ownership Act, 1994, it is required that the Society shall submit

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amendments to the Competent Authority, who has no power to reject the registration of the amendments. The said procedure had been complied with by the petitioner-Association.

10. As per Sections 14 and 25 of the Tamil Nadu Apartment Ownership Act, 1994, its provisions shall prevail over the Tamil Nadu Registration of Societies Act, 1975. In this regard, Section 13 of the Tamil Nadu Apartment Ownership Act, 1994 Sub-Section (1), states that the Administration of every property shall be governed by the Bye-Laws, a true copy of which shall be filed with the Competent Authority. Therefore, the Tamil Nadu Apartment Ownership Act, 1994 will have an overriding effect to the Tamil Nadu Societies Registration Act, 1975.

11. In the present case, the Bye-Laws have already been submitted before the Competent Authority by the petitioner-Association. Thus the first respondent has no jurisdiction to nullify the said Bye-Laws nor reject the approval. The question of approval would not arise at all under the provisions of the Tami Nadu Apartment Ownership Act, 1994. Section 25 of the Tamil Nadu Apartment Ownership Act, stipulates that the

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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 in force and therefore, the Act has an overriding effect. Thus under Section 13(1) of the Apartment Ownership Act, the amendments filed by the petitioner-Association in the Office of the Registrar would be sufficient for compliance of law and the Registrar is bound to accept the amendment without any enquiry or discretion and that becomes final. Thus the entire order of the first respondent is per incuriam and bad in law.

12. The learned Senior Counsel appearing on behalf of the petitioner-Association reiterated that the Special Enactment will prevail over the General Law and therefore, the first respondent failed to apply the legal dictum *Generalia Specialibus Non Derogant*.

13. The first respondent failed to distinguish that the charging Clause for levy of Transfer Fee etc., is Clause 20 and not Clause 8 of the Bye-Laws of the petitioner-Association. Both the Clauses 20 and 8 of the Bye-Laws are there from inception and had already been approved, while

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registering the petitioner-Association. Clause-8 is only a Machinery Clause relating to the rates at which the Transfer Fee etc., will be charged. The transfer fee was collected from all the original owners at the rate of Rs.25 per sq. ft., then it was raised to Rs.40 per sq.ft. Therefore, the reasoning of the first respondent that there is no mention of the word 'Transfer Fee' is irrelevant. Such Transfer Fee is being collected and utilized as Corpus Fund for the maintenance of the building and therefore the said Transfer Fee cannot be held as illegal.

14. There is no prohibition in the Law against charging of Transfer Fee. The choice of levying and nomenclature to be used is left to the petitioner-Association and its General Body and therefore, the first respondent has exercised his power excessively, which is in violation of the provisions of law. The Corpus Fund is no way different from collecting the monthly maintenance charges, as Corpus Fund is also used for the maintenance of the building of the petitioner-Association. The attempt of the first respondent for distinguishing them without differentiating them is unfair and not warranted. Thus the directions issued by the first respondent to refund the Transfer Fee is untenable.

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15. The petitioner-Association states that the amount remitted by the fourth respondent towards Transfer Fee was utililsed for the objects of the petitioner-Association and therefore it could not be refunded. The petitioner-Association is one of the best Association and maintaining the flat to the satisfaction of its members.

16. The learned Senior Counsel for the petitioner-Association drew the attention of this Court that the first respondent has no authority to conduct an enquiry under Section 36 of the Tamil Nadu Societies Registration Act, 1975. Under Section 12 of the Tamil Nadu Societies Registration Act, 1975, a registered society may, by special resolution, amend the provisions of its memorandum relating to the memorandum of objects of the registered society so far as may be required and as far as the amendments are concerned, the petitioner-Association has submitted the same to the first respondent-District Registrar (Administration) as required under the Apartment Ownership Act and the said submission would be sufficient for the purpose of implementing the amendment by the petitioner-Association.

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17. With reference to Section 36 of the Tamil Nadu Societies Registration Act, 1975, the learned Senior Counsel appearing on behalf of the petitioner-Association states that sub-section (1) contemplates that the Registrar may, of his own motion or on the application of a majority of the members of the Committee of a registered society or on the application of not less than one-third of the members of that registered society, or, if so moved by the District Collector, hold, or direct some person authorized by the Registrar by order in writing in this behalf to hold, an inquiry, into the constitution, working and financial condition of that registered society.

18. In the present case, the representation was sent by the fourth respondent in his individual capacity and therefore, under Section 36 of the Societies Registration Act, the first respondent has no jurisdiction to conduct an enquiry and consequently the impugned order, per se, is non-est in law.

FOURTH RESPONDENT'S CASE:

19. The fourth respondent states that the petitioner-Association was formed on 01.05.2009. The Bye-Law amendment was registered under

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the Tamil Nadu Societies Registration Act, 1975. In the original Bye-Laws, there is no Clause for Transfer Fee. The original Bye-Laws therefore, did not mandate the flat owner/buyer to pay any amount at the time of selling the flat. Thus the petitioner-Association have falsely stated that from the date of inception of the petitioner-Association, the Transfer Fee has been charged to the owners of the flat.

20. The Extraordinary General Body Meeting was held on 09.05.2010 without complying with the mandatory requirements, the period of notice i.e., 21 days under the Registration Act. On 09.05.2010, Clause-8-A in the Bye-Laws was introduced for the first time by amending the Rules, thereby mandating to collect a sum calculated at Rs.40 per sq.ft., of the super built up area of the flat to be transferred or such higher sums the Executive Committee may determine from time to time. The required Quorum of 1/3rd of its members as per the Bye-Laws were not present, but only 19 persons signed the alleged illegal amendments. Thus the amendments are void ab initio and has no force in the eye of law. The amendment was effected to extort money from the buyers of the flat.

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21. The Executive Committee on 09.09.2011, enhanced the Transfer Fee from Rs.40 per sq.ft., to Rs.50 per sq.ft. or 1% of the sale consideration, while selling the flat, whichever is higher.

22. The fourth respondent purchased the flat No.33 on 04.04.2013. The fourth respondent was forced to pay a sum of Rs.57,800/-, Rs.70,000/- and Rs.20,000/- respectively by coercing and threatening him, failing which he will not be considered as a member and cannot use the common facilities.

23. On 28.10.2013, the Secretary of the petitioner-Association sent the amendments to the first respondent to be taken on record. The fourth respondent made a representation on 16.12.2015 to the Government of Tamil Nadu against the collection of Transfer Fee by the petitioner-Association. Since no action was taken, the petitioner filed WP No.5449 of 2016 and this Court directed the Government to consider and dispose of the representation. Thereafter the first respondent had undertaken the process of enquiry and the writ petitioner-Association filed its written submission before the first respondent. The first respondent after adjudication passed an

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order stating that the amendment is not in consonance with the provisions of the Statutes and directed the petitioner-Association to refund the Transfer Fee collected from the fourth respondent. Thereafter, the petitioner Association restrained the fourth respondent to enter into his premises, who in turn made a complaint before the Inspector of Police, G-3 Kilpauk Police Station and thereafter, the fourth respondent was permitted to enter into the premises. Despite the complaint made to the police, the members of the Managing Committee usurped petitioner-Association's money of Rs.1,47,800/- for their own use illegally, which is an offence of criminal breach of trust. The fourth respondent again filed WP No.8033 of 2017 and thereafter the petitioner-Association permitted the 4th respondent to enter into the premises. The civil suit filed by the fifth respondent in OS No.4081 of 2015 was dismissed for default. The fourth respondent has nothing to do with the said suit, as he has initiated independent action through the Government and its Authorities.

24. The learned counsel for the fourth respondent mainly contended that right to property is the constitutional right under Article 300-A of the Constitution of India, no person can be deprived of his right to

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property except by due process of law. Depriving a person from enjoying his property in the absence of his consent is a crime. The Bye-Laws or the provisions should be fair and reasonable and shall not be contradictory.

25. Charging an amount on a seller or purchaser, while transferring the property is patently a tax akin to stamp duty, which cannot be imposed otherwise without the Authority of Law as mandated under Article 265 of the Constitution of India. Therefore, the demand of 'Transfer Fee' by the petitioner-Association is illegal and amounting to crime.

26. The original Bye-Laws of the petitioner-Association does not contain any provisions or stipulates for charges alleged as 'Transfer Fee'. Amendments made enabling to collect the Transfer Fee without Quorum of 1/3rd members i.e., 20 members, but only 19 members were present, is void ab initio. Statutory 21 days notice for convening Annual General Meeting was not given. The alleged amendments were not even filed and registered nor approved by the the Competent Authority under Section 12 of the Societies Registration Act, 1975. These amendments have no force in the eye of law and should be ignored and the fourth respondent rightly ignored

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the amendments by stating that it is not in accordance with the provisions of the Act and directed the petitioner to refund the Transfer Fee collected from the fourth respondent. The intervention of the first respondent has been rightly made and thus the writ petition is to be rejected.

FIRST RESPONDENT'S REPLY:

27. The learned Additional Government Pleader appearing on behalf of the first respondent relying on the counter-affidavit of the first respondent, made a submission that the petitioner-Association has been registered with the first respondent with Serial No.232 of 2009 under the Societies Registration Act, 1975 and Apartment Ownership Act, 1994. The petitioner-Association has filed its Annual Returns as of now upto the year 2017-2018 and has also filed the Bye-Laws amendments in the year 2014. As per the Bye-Laws filed by the petitioner-Association and approved at the time of registration in the year 2009, the Executive Committee is to be elected once in two years and for the maintenance of the building quarterly subscription is collected from the members and late payment penalty is charged on the defaulters on payment of subscription charges. The petitioner-Association vide its letter dated 21.04.2014, enclosed the relevant

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papers pertaining to the amendment of few Bye-Laws and the said amendments were filed before the first respondent's office on 06.02.2014 and the same is pending with the first respondent for registration/approval. The Bye-Law amendment reads as under:-

> *"Clause 8. Corpus Fund:*
>
> *(a) "The Society shall collect (prior to Registration) from every new owner on the purchase of a flat from 19.09.2011 transfer fee to be charged towards Corpus Fund collections on sale of a flat shall be increased to Rs.50/- per square feet of the super built up area of the flat or 1% of the consideration as per the registered document, whichever is higher. If this transfer fee is not paid before the registration date, fee payable will be 25% higher than the above normal fee. Further the rates and rules applicable on the date of payment will be applicable, if it is not paid before registration. Similarly, transfer fee on the sale of a covered parking area, will be Rs.10,000/- . The Executive Committee may determine from time to time the higher quantum of such transfer fee towards the Corpus Fund of the Association. After this payment alone, the no due certificate will be issued for the legal sale of flat.*

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(b) The Society shall collect Rs.0.75 per sq.ft., per month or such other sums as decided by the Executive Committee from time to time towards Corpus Fund Contribution.

(c) The Secretary can draw amounts from this Reserve Fund for major maintenance, unforeseen/emergency expenditure and such expenses shall be collected from members to replenish the Reserve Fund in the proportion of area owned by them. This issue should be ratified by the General Body at its next meeting."

28. Bye-Laws amendments filed by the petitioner-Association has not been approved by the first respondent's Office, since the amendments are not in consonance with the Apartment Ownership Act, 1994 and the Rules 1997. Another Bye-Law amendment of Clause 20 read as under:-

"Clause 20 : Transfer

(a) In the case of transfers of his flat by sale, assignment by act of parties or by operation of the law, over and above paying towards the Corpus Fund as per Clause 8 of these Bye-Laws, the member should intimate the same to the

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Secretary of the Society in writing generally 3 months in advance. His name from the membership will be deleted only after he settles all the arrears of subscription charges and other dues, if any. The new owner should insist for 'No Due Certificate' of the Society from the Transferor. The new owner of the flat will be enrolled on payment of Rs.2,000/- or such other fees determined from time to time by the EC as transfer fee for change in membership. The Estate of a deceased member shall be liable for the debt to the Society as they existed on the date of his death. Similarly, the new member (purchaser/nominee) shall also be liable for the debt to the Society.

(b) The transferor shall provide the Secretary the name and full details of the purchaser declaration from him that he would abide by the Rules and Regulations of the Society.

(c) The Corpus Fund amount collected as per Clause 8 from a member shall not be refunded under any circumstances."

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29. The above Bye-Laws amendment filed by the petitioner-Association also has not been approved by the first respondent's Office, since these amendments are not in consonance with the Apartment Ownership Act, 1994 and the Rules 1997.

30. The learned Additional Government Pleader appearing on behalf of the respondents 1 to 3 and 6 contended that under Section 12(2) of the Tamil Nadu Societies Registration Act, 1975, a registered Society may, by Special Resolution, amend its Bye-Laws. Under Section 12(3) of the Act, an amendment of the memorandum or the Bye-Laws shall be registered and on such registration shall take effect from the date of passing of such Special Resolution. Under Section 12 (4), if the Registrar is satisfied that any amendment of the memorandum or the Bye-Laws is not contrary to the provisions of the Registration of Societies Act or the Rules made thereunder, he may register the amendment.

31. Therefore, it is crystal clear that no amendment could be brought into effect, unless and otherwise the same has been registered by the Registrar. While-so the action of the petitioner-Association as stated by

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the petitioner-Association in having demanded and collected the so called 'Transfer Fee' from the fourth and fifth respondents and the averments against the fifth respondent regarding the non-payment of 'Transfer Fee' based on an unregistered/unapproved amendment is contrary to the Act and is not legal in the eye of law.

32. Under Section 22 of the Tamil Nadu Apartment Ownership Act, 1994, where any apartment has been sold or transferred, the purchaser or the transferee shall be jointly and severally liable with the vendor or the transferor for all unpaid assignments against the latter towards his share or the common expenses upto the time of sale or transfer without prejudice to the purchaser's or transferee's right to recover from the vendor or transferor, the amount, if any paid by the purchaser or transferee therefor. Any such purchaser or transferee shall be entitled to a statement from the petitioner-Association.

33. There is no specific statutory provision that enables an Association to levy and collect 'Transfer Fee' from the purchasers of pre-owned flats. As per this Act, common expenses are to be meted out by

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collection of charges from members in proportionate manner. There is no scope vide this Act, to levy and collect the transfer fee from the purchasers of pre-owned flats, that too when the vendors, who have already been subjected to payment of 'Corpus Fund', which is sure to have an 'overhead' effect on the purchase amount of the purchaser of the pre-owned flat. Moreover, the object and aims of any such petitioner-Association, as defined in the relevant portions of the above Act, is mainly for the maintenance of common area and not to control or regulate any transfer of ownership. Any Transfer Fee so levied on purchasers of pre-owned flats by the petitioner-Association on the pretext of creating 'Corpus Fund' is sheer discrimination among other 'equal' owners and is contrary to the Act and if it is allowed, then an Association which is supposed to 'maintain the common area' would assume the power of deciding those questions, which is beyond its scope, power and jurisdiction. Thus the contention of the petitioner-Association regarding the payment of 'Transfer Fee' by the purchasers of pre-owned flats on the pretext of creating a 'Corpus Fund' through the amendment of Bye-Laws is not maintainable under law. The civil suit in O.S.No.4081 of 2015 filed by the fifth respondent was disposed of on 13.11.2018 due to non-prosecution. Therefore, the order impugned

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has been passed in consonance with the provisions of the Statutes and the Rules. Thus, the present writ petition is to be rejected.

DISCUSSIONS:

34. It is not in dispute that the petitioner-Association is registered under the Tamil Nadu Societies Registration Act and they have presented Bye-Laws, including the amended Bye-Laws before the Competent Authority under the Tamil Nadu Apartment Ownership Act, 1994. Therefore, their registration goes along with the Tamil Nadu Societies Registration Act, 1975 and under the Apartment Ownership Act, 1994. Let us first consider the provisions of the Tamil Nadu Societies Registration Act, 1975.

35. With reference to the dispute raised in the present writ petition, it is relevant to consider Section 12 of the Societies Registration Act, which enumerates regarding the amendment of Memorandum and Bye-Laws which reads as under:-

"12. Amendment of memorandum and Bye-Laws.--

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(1) A registered society may, by special resolution. amend the provisions of its memorandum relating to the of memorandum objects of the registered society so far as may be required to enable it—

(a) to carry on the administration of the registered society more economically or more efficiently ; or

(b) to attain its main purpose by new or improved means ; or

(c) to amalgamate with any other registered society ; or

(d) to divide itself into two or more societies.

(2) A registered society may, by special resolution, amend its Bye-Laws.

(3) An amendment of the memorandum or the bylaws shall be registered and on such registration shall take effect from the date of the passing of such special resolution.

(4) If the Registrar is satisfied that any amendment of the memorandum or the Bye-Laws is not contrary to the provisions of this Act, or the rules made thereunder, he may register the amendment. When the Registrar registers an

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amendment of the memorandum or the Bye-Laws, he shall issue to the registered society a copy of the amendment Certified by him, which shall be conclusive evidence that the amendment has been duly registered."

36. The Special Resolution has been defined under Section 2(j) of the Societies Registration Act, which reads as under:-

"(j) "Special Resolution" means a resolution passed by a majority of not less than three-fourths of such members of a registered society entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which a notice of not less than such period aS may be prescribed, specifying the intention to propose the resolution as a special resolution, has been duly given:

Provided that, if all the members entitled to vote at any such meeting so agree, a resolution may be passed as a special resolution at a meeting of which a notice of less than the period prescribed under this clause has been given."

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37. In the context of the above provisions, the registered society is at liberty to amend the provisions of its memorandum and while doing so, Special Resolution is to be passed in consonance with the provisions of Section 2(j) of the Societies Registration Act, 1975. Thus the Special Resolution must comply with the requirements as contemplated under Section 2(j) of the Societies Registration Act, 1975. Again Section 12(4) of the Societies Registration Act, 1975, contemplates that, if the Registrar is satisfied that any amendment of the memorandum or the Bye-Laws is not contrary to the provisions of the Societies Registration Act, 1975 or the Rules made thereunder, he shall register the amendment. Therefore, it is mandatory under Section 12(4) of the Societies Registration Act, that the Registrar must satisfy himself with the amendment proposed through the Special Resolution passed by the Society registered and such amendment of the memorandum or the Bye-Laws are not contrary to the provisions of the Societies Registration Act or the Rules made thereunder. Only on satisfaction of Section 12(4) of the Act, the Registrar has to register the amendments. Once it is registered, the Registrar shall issue to the Society, a copy of the amendment certified by him, which shall be a conclusive evidence that the amendments are duly registered/replaced.

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38. Thus, the requirements for amending the Bye-Laws of the Society are:-

(1) The special Resolution in compliance with Section 2(j) of the Act, is to be presented by the registered society.

(2) Such amendments shall be presented before the Registrar.

(3) The Registrar on receipt must scrutinise and satisfy himself with the amendment of memorandum or the Bye-Laws are not contrary to the provisions of Societies Registration Act or the Rules made thereunder.

(4) Thereafter, the Registrar may register the amendments.

39. After registering the amendment, the Registrar shall issue the certified copy of the amendments to the registered Society. The certified copy of the registered amendments shall be the conclusive evidence that the amendments have been duly registered.

40. In the absence of compliance of the requirements under Section 12 of the Societies Registration Act, no amendment by a Society can be held as legal. In other words, the Bye-Laws originally registered for

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getting the certificate of registration if needs to be amended, then the mandatory procedures contemplated under Section 12 of the Tamil Nadu Registration of Societies Act, must be complied with. For understanding of the procedures in a coherent manner under Section 6 for the purpose of registration of Societies, memorandum of Bye-Laws etc., are to be filed before the Registrar. After satisfying with the application for registration along with the memorandum of Bye-Laws etc., the Registrar is empowered to register the Society and issue certificate of registration under Section 10 of the Societies Registration Act. Once the Society is registered and the memorandum of Bye-Laws are approved along with the registration, all amendments thereafter made through Special Resolution under Section 2(j) of the Societies Registration Act, must be registered and approved by the Registrar under Section 12 of the Societies Registration Act by complying with the mandatory requirements contemplated.

41. Rule 14 of the Tamil Nadu Societies Registration Rules,1978 provides procedures to be adopted for submission of an application for registration of amendment of memorandum and Bye-Laws. Thus the Rule provides procedure for submission of an application and

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Section 12 of the Act contemplates procedures to be followed for registering and approval of the amendment.

42. Yet another argument advanced on behalf of the writ petitioner is that under Section 36 of the Societies Registration Act, the Registrar has no power to conduct an enquiry into the affairs of the registered Society, unless an application of the majority of the members of the Committee of the registered Society or an application of not less than 1/3rd members of that registered Society is submitted.

43. The learned Senior Counsel for the petitioner relied on the judgment of this Court in the case of **Mohan Sharma vs. The District Registrar (Administration) [2009 (4) CTC 562]**, wherein in paragraphs-11 and 12, the following observations are made:-

> *"11. As rightly pointed out by the learned Senior Counsel appearing for the petitioner, except Section 36 as found in Chapter IV of the Act, nowhere the power is given to the Registrar to exercise his right to hold an enquiry into constitution, working and financial condition of*

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the society. It would be useful to extract Section 36 of the Act which is extracted here under:

> *"36. Power of Registrar to inquire into the affairs of registered society.— (i) The Registrar, may, of his own motion or on the Application of a majority of the members of the committee of a registered society or on the Application of not less than one-third of the members of that registered society, or, if so moved by the District Collector hold or direct some person authorised by the Registrar by order in writing in this behalf to hold, an inquiry, into the constitution, working and financial condition of that registered society".*

Hence, the contention raised on the side of the third respondent that the impugned order does not relate to Section 36 of the Act may not be correct. Learned counsel appearing for the third respondent is unable to point out any other provision under the Act, which empowers the Registrar to go into the constitution, working and financial condition of the registered society.

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Hence, I am of the considered opinion that the Registrar while passing the impugned order, had exercised his power under Section 36 of the Act.

12. Then, the next question arises for consideration is whether the Registrar has exercised his power rightly under Section 36 of the Act as contemplated thereon. A reading of Section 36 (1) of the Act makes it very clear that the Registrar—

(i) on his own motion; or

(ii) on the Application of a majority of the members of the committee of a registered society; or

(iii) on Application of not less than one third of the members of the registered Society; or

(iv) if it is so moved by the District Collector, can hold the enquiry into the constitution, working and financial condition of the registered Society. In the case on hand, except the Application made by the third respondent on 10.12.2007 which finds a place in the reference column in the impugned order, no other members of the committee or members of the society seems to have requested the Registrar of the society to consider the grievance expressed thereon. When

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the provision is very clear that the Registrar shall act of his own motion or on the majority of the members of the Committee of the registered Society or not less than one-third of the members registered Society, the Registrar ought not to have acted on mere representation made by the third respondent alone. This point is, thus held in favour of the petitioner."

44. In respect of the abovesaid judgment, Section 36(1) of the Act has been interpreted by this Court elaborately. In the said judgment, this Court has not considered the scope of the first phrase under Section 36(1) of the Act, i.e., where the **"Registrar may, of his own motion"**. Since the Court has not considered the interpretation and scope of the said phrase under Section 36(1) of the Act, the said judgment is of no avail to the petitioner-Association.

45. In the case of **Bharatiya Bhavan Cooperative Housing Society Ltd and Others vs. Krishna H.Bajaj and Others [MANU/MH/0108/2010]**, the learned Single Judge of High Court of Bombay in its order dated 17.02.2010 passed in WP No.1094 of 2004,

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wherein in paragraph-51, it has been observed as follows:-

> *51.It is upon this evidence that the Respondent seeks to prove coercion practiced upon her. The aforesaid oral and documentary evidence, if appreciated show that there was no coercion practiced upon the Respondent. The Respondent entered into the contract of her free will. She paid the amounts to the Society under an incorrect misleading description. She knew that she was required to pay nothing other than "transfer fees", the expression used since her initial agreement dated 30th March 1992. Knowledge of the fact that the transfer fees was illegal and could not have been paid as such must, therefore, be imputed upon her. That knowledge is reflected from the very inception when she signed the agreement dated 30th March, 1992 under legal advise and in the presence of her Solicitor. The meetings held between the parties show deliberation and thought. The presence of her attorneys rule out coercion. The Resolution of 9th February 1986 shows the Society's practice. Her letter dated 8th July 1992 annexing all the required documents could not have been written under detention. It does not even show any*

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prejudice caused to her; in fact it caused immediate transfer of the shares and premises to her and gave her the status of a member, which she would have otherwise to fight for. The requirements of coercion as defined in Section 15 of the Contract Act are far from being satisfied."

46. As far as the abovesaid judgment is concerned, this Court is of the considered opinion that the Tamil Nadu Cooperative Societies Registration Act, 1983 and the Tamil Nadu Apartment Ownership Act, 1994, being State Legislations are to be considered independently and the said judgment of the Bombay High Court cannot be relied upon for the purpose of interpreting the provisions of the State enactments applicable to the State of Tamil Nadu. Further, the facts are not similar.

47. In the present case, the fourth respondent sent a representation to the Government, which was forwarded to the first respondent-Registrar (Administration) for conducting an enquiry, who in turn conducted an enquiry by affording an opportunity to the parties and passed the impugned orders.

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48. Section 36(1) of the Societies Registration Act, 1975, contemplates that the Registrar may, of his own motion, or on the application of majority of the members of the Committee of a registered Society or on the application of not less than 1/3rd of the members, conduct an enquiry. The very intention of the Legislation portrays that the Registrar may of his own motion conduct an enquiry, which provides an explicit indication that the Registrar either on information from any person or on written complaint from a person may of his own motion, conduct an enquiry into the affairs of a registered Society. Such a power has been conferred on the Registrar under the Act. The Registrar with an objective to provide an opportunity to the individuals to vindicate their grievances or if the Registrar receives any information from any person regarding any irregularity, or illegality into the affairs of a Society registered shall conduct an enquiry. Thus, the scope of power conferred on the Registrar under Section 36(1) cannot be restricted with reference to the Second Clause contemplated under sub section (1) to Section 36. The First Clause that the "Registrar may of his own motion" would be sufficient enough to receive information from any person for conducting an enquiry into the affairs of the Society either in oral form or in a written form or otherwise.

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49. In the present case, the fourth respondent sent a complaint to the Government and the Government is empowered to direct the Competent Authorities to conduct an enquiry in the manner contemplated under the Statute. Further the fourth respondent filed the written petition and this Court directed the Government to consider the representation and pass orders. The Government considered and thought fit that the allegations set out in the representation required an enquiry and accordingly forwarded the representation to the first respondent / competent authority for conducting an enquiry.

50. The directions issued by the High Court to consider the compliant submitted before the Government would not preclude the competent authority from conducting the Statutory Enquiry contemplated under Section 36 of the Act. Any person sending a complaint to the higher authority or to a wrong authority may not be a ground to reject the complaint itself. Such authority, who receives the complaint / representations shall forward the same to the competent authority for conducting an appropriate enquiry and to take decision. No citizen shall be

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deprived of his/her right to redress their grievances in the manner known to law. Thus, sending a complaint to the Higher Authority / Government, who in turn referred the compliant to the competent authority under the Statutes cannot be considered as a ground for the purpose of setting aside the order impugned in the present writ petition.

51. Therefore, the contentions raised on behalf of the petitioner that the first respondent has no jurisdiction is untenable and the first respondent passed the impugned order, well within his powers under Section 36 of the Societies Registration Act.

52. The scope of the Tamil Nadu Apartment Ownership Act, 1994 needs to be considered, since the petitioner has raised a ground that no approval from the Registrar is required in respect of the amendment carried out by the petitioner-Association. Communicating the copy of the amendment to the Registrar would be sufficient enough for implementation of the same.

53. Section 3(k) of the Apartment Ownership Act, defines

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"Competent Authority" as under:-

> *"(1) in relation to the society registered under the Tamil Nadu Co-operative Societies Act, 1983 (Tamil Nadu Act 30 of 1983), the Regional Deputy Registrar of Cooperative Societies (Housing) having jurisdiction over the area; or*
>
> *(2) in relation to the society registered under the Tamil Nadu Societies Registration Act, 1975 (Tamil Nadu Act 27 of 1975), the Registrar as defined in clause (i) of Section 2 of that Act;*
>
> *(3) in relation to the Association of Apartment owners- (a) the Regional Deputy Registrar of Co-operative Societies (Housing) having jurisdiction over the area; or (b) the Registrar as defined in clause (i) of Section 2 of the Tamil Nadu Societies Registration Ac, 1975 (Tamil Nadu Act 27 of 1975), having jurisdiction over the area. with whom the Bye-Laws of the Association of Apartment owners have been filed under this Act."*

54. The above definition would clarify that the Competent Authority under the Tamil Nadu Apartments Ownership Act, 1994 is the Registrar under the Tamil Nadu Societies Registration Act, in relation to the

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Societies registered under the Societies Registration Act. Thus the Registrar under the Societies Registration Act, is the Competent Authority contemplated under the Apartments Ownership Act, 1994.

55. Section 3(m) defines “Deed of Apartment”. Deed of Apartment means “a Deed of Apartment executed in pursuance of Section 5”. Section 3 (r) denotes that “Society” means the Society registered under the Tamil Nadu Cooperative Societies Act.

56. Section 5 of the Apartment Ownership Act, stipulates 'ownership of apartments' 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 Apartment Ownership Act, 1994.

57. Section 10 of the Apartment Ownership Act. provides the 'Contents of the Deed of Apartment'. Chapter IV of the Apartment Ownership Act, deals with 'Society or Association of apartment owners, its Bye-Laws and functions'.

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58. Section 12 contemplates "as soon as the Deeds of Apartments are executed and registered under Sections 5 and 11 of the Act, but not later than the three months from the date of such registration, the apartment owners shall form a Society either registered under the Tamil Nadu Cooperative Societies Act, 1983 or under the Tamil Nadu Societies Registration Act, 1975 or an association of apartment owners, with the object to maintain all common areas and facilities and the limited common areas and facilities, to provide such amenities as may be necessary in the common interest of all the apartment owners.

59. Section 12 stipulates that on execution of registered deed under Section 5 and 11 of the Act, the apartment owners shall form a Society, which is to be registered under the Tamil Nadu Societies Registration Act or under the Tamil Nadu Cooperative Societies Act or an Association of Apartment owners. Since the petitioner-Association has been registered under the Societies Registration Act, the provisions of the said Act is to be complied with.

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60. Section 13 of the Act speaks about the 'Bye-Laws'. Sub section (1) defines “the administration of every property shall be governed by the Bye-Laws, a true copy of which shall be filed with the Competent Authority. No amendment of the Bye-Laws shall be valid unless a copy thereof is duly filed with the Competent Authority. Amendment of the Bye-Laws shall take effect from the date, if any, specified in the amendment”.

61. Relying on the above Section 13 of the Apartment Ownership Act, the petitioner-Association has contended that it is sufficient if the amendments of Bye-Laws are filed with the Competent Authority.

62. In the present case, the “Competent Authority” is the Registrar under the Tamil Nadu Societies Registration Act and under Section 3(k) of the Apartment Ownership Act. It is contended that no such registration or approval is contemplated under the Apartment Ownership Act and therefore, the registration and approval insisted upon in the impugned order by the first respondent is in violation of Section 13 of the Apartment Ownership Act. Thus the amendments of Bye-Laws of the petitioner-Association is valid.

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63. Section 25 of the Apartment Ownership Act, 1994 states that "provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force". Thus, if a Society registered under the Societies Registration Act, proposed to amend its Bye-Laws, then it has to comply with the mandatory procedures as contemplated under Section 12 of the Societies Registration Act. Thereafter, the amended Bye-Law needs to be presented before the competent authority under the Apartment Ownership Act. No society can be allowed to take a dual stand that they will register its Bye-Laws under the Societies Registration Act, which is approved and for amendment they will only present the document before the competent authority under the Apartment Ownership Act. If such dual stand is permitted, it will create an anomalous situation. Only after the approval from the competent authorities, the amendment needs to be effected, and not otherwise. Admittedly, the writ petitioner / Association is a Registered society under the Societies Registration Act, 1975 and also registered under the Apartment Ownership Act, 1994.

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64. Pertinently, Section 3(k)(2) of the Act defines "Competent Authority" as the Registrar under the Tamil Nadu Societies Registration Act. Thus, Section 13 of the Apartment Ownership Act, cannot be read in isolation and no Association which is registered as Society can claim that no registration and approval is required under seal of the Competent Authority under Section 12 of the Societies Registration Act, 1975.

65. Section 13 of the Apartment Ownership Act, stipulates that the said Bye-Laws must be filed before the Competent Authority. However, the Competent Authority in the present case is the Registrar under the Societies Registration Act, 1975. When the Competent Authority is the Registrar under the Societies Registration Act, 1975, then he has to register and approve the amendment of Bye-Laws under Section 12 of the Societies Registration Act, 1975 for the purpose of giving effect. Therefore, Section 13 of the Act, is the procedure contemplated for filing the Bye-Laws before the Competent Authorities and the amendment requires to be approved by the Competent Authority as defined under Section 3(k) of the Apartment Ownership Act.

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66. In the present case, the learned counsel for the fourth respondent has raised a ground that the petitioner-Association has not fulfilled the conditions stipulated under Section 10 of the Apartment Ownership Act. Section 10 of the Act enumerates that the contents of Deed of Apartment must be registered. Sub Section (2) of Section 10 denotes a copy of the each of the Deed of Apartment shall be filed with the Competent Authority. The Deed of Apartment is defined under Section 3(m) of the Apartment Ownership Act, which means a Deed of Apartments executed in pursuance of Section 5.

67. The Competent Authority as defined under the Societies Registration Act and the Apartment Ownership Act, is the Registrar. Thus, the ground of repugnancy raised on behalf of the petitioner is untenable. A Society registered under the Societies Registration Act, if subsequently, filed the papers in accordance with the Apartment Ownership Act, it becomes mandatory that the original Bye-Laws approved by the competent authority at the time of inception of the society under the Societies Registration Act, must approve the subsequent amendments, if any proposed by the Society. It is not in dispute that the Bye-Laws filed at the

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time of inception of petitioner-Association was registered and approved by the Registrar, while so, subsequent amendment cannot be effected, unless it is registered and approved in the manner contemplated under the Statutes. After registration it is to be presented before the competent authority under the Apartment Ownership Act, as defined under Section 3(k) of the Act.

68. Mere filing of the amendment by an Apartment Ownership Association, if considered as valid amendment, then the purpose and object of the Apartment Ownership Act will be defeated. It will lead to anarchy. The Apartment Owners Association can make many number of amendments at their whims and fancies and simply file it before the Registrar and implement the same, which will be detrimental to the interest of the Apartment Owners and may be in conflict with laws. The basic right of the owners and occupants of the Apartment owners are also to be taken care of by the competent authority as well as by the Courts. If such procedures for implementing amendments to the Bye-Laws are permitted, there is a possibility that the basic rights of the apartment owners are in peril. The basic right of apartment owners to use his/her own flat and the common amenities and other incidental rights are to be protected. There cannot be

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any room for exploitation by the Association or its office bearers. There is a possibility of taking upper hand in the matter of maintaining the apartments. Unguided power to an apartment owners association is not intended under the provisions of the Apartment Ownership Act. Thus, the very argument made by the petitioner that mere presentation of amendment before the competent authority under the Apartment Ownership Act would be sufficient, deserves no merit consideration, as it will lead to anarchy and there is a possibility of abuse and misuse by the apartments owners associations. Thus, an amendment is to be approved properly by the competent authority. Its validity is to be tested with reference to the basic rights and the provisions of the Statutes. Such an inherent power vested with the competent authorities even under the Apartments ownership Act cannot be taken away. The competent authority under the Apartments Ownership Act has powers to scrutinise the validity of the amendment. The Act never intended to provide any unguided power to the apartment owner's Association to create its Bye-Laws or amend the same at their choice. Any such amendment must be in conformity with the basic rights of the apartment owners and in consonance with the provisions of the Statutes and Rules in force. Thus, the competent authority under the Apartment

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Ownership Act is empowered to reject the amendments if it is illegal, opposed to public policy, in violative of basic rights of apartment owners, or unconstitutional. The inherent power conferred under the Act is to protect the public interest.

69. Right to Property is a Constitutional Right under Article 300-A of the Constitution of India. No person shall be deprived of his property saved by the Authority of Law. Such property right is to be protected by the competent authorities and in the event of any infringement at the instance of the Apartment Owners Association, then the competent authorities are empowered to deal with the situation and initiate appropriate actions. It is the duty of the public authority to ensure that the property rights conferred to the Apartment owners are protected and the very purpose and object of the Apartments Ownership Act is to ensure that the rights of individual owners of the apartments are protected in the manner known to law and in consonance with the Constitutional Rights. In the event of failure in complying with the rules of the Apartments Owners Association or in paying the maintenance charges, abuse or otherwise are to be dealt with by the association by following the procedures as contemplated under Law.

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Maintenance charges shall be recovered by following the due process of law. However, no office bearers or members of the Apartments Owners Association shall take the law in their own hands nor use any illegal force or deprive the basic right of the owners to live in an apartment by occupying their flat. Any such illegal prevention by any office bearers of the association is an offence under the Criminal Law. Thus, non payment of maintenance charges is a ground to initiate action to recover the same, but coercive or forcible action leads to criminality. Prescription of excess charges or levying transfer fee on transfer of flat are impermissible and the purpose and object of the association is not to develop its funds, but to maintain the flats. Collection of excess amount and keeping as a corpus fund would also lead to unnecessary complications in apartments. Few members in the association may not be in a position to pay such huge amount unnecessarily, which has not been utilised for regular maintenance of the flat. Thus, the transfer fee collected by the petitioner-Association, which is akin to that of the character of Statutory charges, at no circumstances be permitted and such collection is undoubtedly interfering with the right to property of a flat owner. The condition to pay transfer fee, if implemented would undoubtedly result in infringement of right to

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property and therefore, transfer fee on transfer of flat is akin to that of the statutory liability and the apartments owners association cannot have such power to collect transfer fee, while transferring the flat by the owner of the apartment to any other person.

70. Pertinently, the promoter / builder of the flats recovered the corpus fund from the original buyer. In the event of collecting the "Transfer Fee" by the petitioner-Association on every resale of the flat would result in multiple collection of corpus fund. On every resale of flat, if the transfer fee is collected, the same would result not only in discrimination, but also result in multiple collection of corpus fund on every resale or transfer of property. Thus, collection of transfer fee is akin to that of the Statutory charges, which is impermissible as far as the petitioner-Association is concerned.

71. In the present case, the 4th respondent was prevented by the office bearers of the Association and the 4th respondent filed a Police complaint. The agony underwent by the 4th respondent, who is also an owner of an apartment, no doubt, was an infringement of his right to property and to that extent, the petitioner-Association has committed an

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illegality. In the absence of any Statutory provision, the flat owner's association, which is a society cannot levy and collect the transfer fee on the purchasers of pre-owned flats. Under the provisions of the apartments ownership Act, common expenses are to be met out by collecting the same from the members/occupiers of the flat proportionately for maintaining the apartment. Under the guise of maintenance charges, the Apartment Owners Association cannot collect the transfer fee, while transferring the flat to any other person. The Apartment Owners Association is not a profit making association and the limited purpose of the association and the Bye-Laws registered would indicate that the maintenance charges are to be collected to maintain the flat and for peaceful living of the owners and occupiers of the flats. Any maintenance amount is to be collected proportionately from the owners / occupiers. When the Statute does not contemplate any such levy or collection of transfer fee from the purchaser of the pre-owned flats, the petitioner-Association is not empowered to collect such transfer fee by amending its Bye-Laws and therefore, the amendments to that effect is violative of the very purpose and object of the society under the provisions of the Statutes.

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72. Regarding purchase or transfer of flat between two persons are concerned, the Apartment Owners Association has no role to play. It is the property right conferred on the owner to sell or transfer his flat to any person. Such basic right cannot be interfered with by the Apartment Owners Association. The Owners Association cannot physically or otherwise prevent any owner to deal with his own property. Any flat owner is empowered to Sell, Settle, Gift, Will or Transfer his/her/their property in the manner known to law. It is a Constitutional Right, which cannot be infringed at the instance of the Apartments Owners Association. Once the flats are transferred, the Association can claim only maintenance charges for the purpose of maintaining the flat and to extend the common facilities provided. Charging transfer fee of Rs.40 or Rs.50 per Sq.ft. or 1% of the sale value is absolutely not contemplated under the Act and such collections are undoubtedly illegal and impermissible.

CONCLUSION:

73. In view of the facts and circumstances, the order impugned passed by the 1st respondent is in consonance with the provisions of the Act and Rules in force and there is no infirmity or perversity as such. Coercive

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action by the flat owners association or its office bearers against any member, at no circumstances be allowed and such illegal activities are liable for prosecution under the Criminal law. The mutual respect and understanding in a community living is of paramount importance. Any member committing an irregularity is actionable only in the manner known to law and by following the procedures.

74. Accordingly, the transfer fee collected from the 4th respondent is directed to be refunded within a period of four (4) weeks from the dated of receipt of a copy of this order.

75. Thus, the Writ Petition is devoid of merits and stands dismissed. However, there shall be no order as to costs. Consequently, the connected Miscellaneous Petitions are also dismissed.

25-05-2023

Index : Yes
Internet: Yes
Speaking order
Neutral Citation : Yes
Svn/Jeni

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To

1.The District Registrar (Admin),
In the Cadre of Assistant I.G. of Registration,
Chennai Central,
Chennai-600 014.

2.State of Tamil Nadu,
Represented by its Secretary,
Registration Department,
Fort St. George,
Chennai-600 009.

3.The Registrar of Societies,
E.V.R.Periyar High Road,
Kilpauk,
Chennai-600 010.

4.The Inspector of Police (Crime),
G-3 Police Station,
Kilpauk,
Chennai-10.

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S.M.SUBRAMANIAM, J.

Svn/Jeni

Pre-Delivery Order in WP 27155 of 2016

25-05-2023

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