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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 4012 OF 2017**

Rajaram Baban Konde

.....Petitioner

V/s.

Prashant Rohidas Konde and others

.....Respondents

Smt. M. M. Deshmukh a/w Mr. Shailesh Chavan i/b Mr. Milind
Deshmukh for the Petitioner

Mr. G. S. Godbole i/b Mr. Sumit Kothari for respondent nos. 1 to 4

CORAM : NITIN W. SAMBRE, J.**DATE : AUGUST 28, 2019.****P.C.**

The petitioner, original disputant before the Cooperative Court, Pune in Dispute No. 1 of 2016 sought an injunction below Exhibit 5 which came to be allowed vide order dated 23/12/2016 thereby restraining the respondent to the petition-original opponent in the dispute from dispossessing the disputant from the disputed property without following due process of law till the decision of the dispute. The respondent-opponent was also restrained from carrying out any

construction over disputed property till final disposal.

2 Opponent no. 3 filed Appeal being A.O. bearing no. 4 of 2017. The said Appeal came to be allowed vide order dated 16/03/2017 whereby the order of Cooperative Court passed on 23/12/2016 came to be set aside. As such, this petition.

3 This Court while ordering issuance of notice has directed the parties to the petition to maintain status-quo and stayed the order of State Government which is in operation for last more than two years.

4 It is the case of petitioner that respondent is in blood relation and he is the promoter and member of respondent no. 3 Cooperative Housing Society. There was a financial transaction in relation to plot no. B-1 area 116.20 Sq. Mtrs. in favour of petitioner and accordingly, respondent no. 3-society passed a resolution in its meeting dated 26/02/1998 approving the said transaction between the petitioner and respondent no. 1, however, an embargo is created

on the right of the petitioner from alienating the said property without permission of the society. Petitioner alleged that in violation of the aforesaid resolution, respondent no. 1, inspite of the physical possession, after having parted with the consideration of Rs. 20,000/- way back in 1996, started construction for the said property in April 2015 which has prompted him to file the dispute. His prayer for injunction came to be allowed on 23/12/2016. According to him, the Cooperative court while granting an order of injunction has lost sight of the fact that the petitioner was admitted as member in meeting dated 26/02/1998 thereby cancelling membership of respondent no. 1. According to him, the resolution dated 26/02/1998 claimed to have cancelled by respondent no. 3-society in its meeting dated 15/04/2001. He would urge that the said cancellation for the first time was communicated to the petitioner on 06/05/2015, though present petitioner was in possession of the plot in question. He would urge that the aforesaid factual matrix is lost sight by the Cooperative Appellate Court while vacating the order of injunction granted in his favour. According to him, order of injunction needs to be restored by quashing the order

of Cooperative Appellate Court dated 16/03/2017.

5 While countering the aforesaid submissions, Shri. Godbole, the learned counsel for respondent would urge that the petitioner is taking undue advantage of the relationship between the parties. According to him, the fact remains that cancellation of the resolution of 26/02/1998 in the meeting dated 15/04/2001 was well within the knowledge of the petitioner. According to him, the resolution was never questioned by the petitioner and it is for the first time the settled position of the respondent is sought to be challenged by virtue of the dispute in question that too after almost period of more than 11 years. Shri. Goldbole then would urge that his clients are ready and willing to furnish an undertaking to this Court that subject to outcome of the dispute, he be permitted to develop the property in question and he is ready and willing to furnish an undertaking that in case, if the dispute is allowed, he will not claim any equity in the matter. Shri. Godbole then would urge that this Court is required to appreciate *prima facie* case, balance of convenience in favour of respondent and that being so, petition lacks

merit and is liable to be dismissed.

6 Considered rival submissions.

7 It is a matter of record that on 26/02/1998, transfer of plot in question in favour of petitioner by respondent no. 1 was approved by respondent no. 3 vide resolution passed by the Executive Committee. The plot in question was came to be disputed by the petitioner having area of 116.20 meters and the said allotment and acceptance of the membership of the petitioner was after cancellation of membership of respondent no. 3-society.

8 The said resolution dated 26/02/1998 was communicated to the petitioner including that of cancellation of membership of respondent no. 1, admission of petitioner as member and allotment of the plot in question.

9 It is the case of respondent no. 1 that in the meeting dated 15/04/2001, said resolution came to be cancelled. It is the case of

the petitioner that the aforesaid cancellation for the first time was communicated by respondent no. 3 on 06/05/2015 which is one of the basis for initiation of the dispute in question. Petitioner in categorical terms has come out with a case that he has parted with the consideration and was accordingly admitted as a member of the respondent no. 3-society. The Cooperative Court being sensitive to the aforesaid evidence brought on record has considered *prima facie* case in favour of the petitioner including that of balance of convenience and proceeded to pass the order of injunction. The Cooperative Appellate Court while appreciating both resolutions i.e. 26/02/1998 and 15/04/2001 recorded a finding of fact that petitioner has approached the Court after lapse of more than 11 years for which there is no convincing explanation. The Cooperative Appellate Court then noted that neither the petitioner was admitted as a member nor there was any share certificate issued. The fact remains that order of Cooperative Appellate Court is based on re-appreciation of evidence and much weightage is given to respondent no. 1 as that of founder member.

10 The Cooperative Appellate Court has not dealt with an issue as to whether cancellation of the membership of respondent no. 1, admission of the petitioner as a member and allotment of plot in question in favour of the petitioner could have been cancelled by the resolution dated 15/04/2001. The Cooperative Appellate Court has also not recorded finding as to communication of the resolution dated 15/04/2001 cancelling resolution dated 26/02/1998 passed in favour of petitioner admitting him as member and cancelling the membership of respondent no. 1.

11 The fact remains that there is an injunction operating against respondent no. 1 since 2016 on-wards including that of order of State Government passed by this Court.

12 In the aforesaid background, in my opinion, the order impugned passed by the Cooperative Appellate Court is not justifiable as just because upon appreciation of evidence a different view was possible, it is not open for it to take such a view of the matter.

13 Apart from above, the fact remains that in view of cancellation of membership of respondent no. 1 by resolution of 1998 and admitting the petitioner as member and since there was an allotment of plot in question in his favour by a resolution of the Executive Committee, in my opinion, the undertaking as is sought to be furnished by respondent no. 1 is liable to be rejected.

14 As such, the Writ Petition in my opinion needs to be partly allowed. Respondent no. 1 to the present petition is restrained from carrying out any construction over the disputed property till the decision of Dispute No. 1 of 2016. It is expected of the Cooperative Court to expeditiously decide the dispute that too within period of 6 months from the date of production of the copy of this order.

[NITIN W. SAMBRE, J.]