

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5438 OF 2018

Prafull Shankar Sabnis ... Petitioner
V/s.
Vishwanath Vasant Poyekar & Anr. ... Respondents

**WITH
INTERIM APPLICATION NO.1342 OF 2021
IN
WRIT PETITION NO.5438 OF 2018**

Prafull Shankar Sabnis ... Applicant
V/s.
Vishwanath Vasant Poyekar & Anr. ... Respondents

**WITH
WRIT PETITION NO.5440 OF 2018**

Prafull Shankar Sabnis ... Petitioner
V/s.
Vishwanath Vasant Poyekar & Anr. ... Respondents

**WITH
INTERIM APPLICATION NO.1345 OF 2021
IN
WRIT PETITION NO.5440 OF 2018**

Prafull Shankar Sabnis ... Applicant
V/s.
Vishwanath Vasant Poyekar & Anr. ... Respondents

**WITH
WRIT PETITION NO.5441 OF 2018**

Prafull Shankar Sabnis ... Petitioner
V/s.
Vishwanath Vasant Poyekar & Anr. ... Respondents

WITH
INTERIM APPLICATION NO.1344 OF 2021
IN
WRIT PETITION NO.5441 OF 2018

Prafull Shankar Sabnis	... Applicant
V/s.	
Vishwanath Vasant Poyekar & Anr.	... Respondents

WITH
WRIT PETITION NO.5439 OF 2018

Prafull Shankar Sabnis	... Petitioner
V/s.	
Vishwanath Vasant Poyekar & Anr.	... Respondents

WITH
INTERIM APPLICATION NO.1343 OF 2021
IN
WRIT PETITION NO.5439 OF 2018

Prafull Shankar Sabnis	... Applicant
V/s.	
Vishwanath Vasant Poyekar & Anr.	... Respondents

WITH
WRIT PETITION NO.8573 OF 2018

Vishal Konkan Coop. Hsng. Scty. Ltd.	... Petitioner
V/s.	
Vishwanath Vasant Poyekar & Anr.	... Respondents

WITH
INTERIM APPLICATION NO.18459 OF 2023
IN
WRIT PETITION NO.8573 OF 2018

Vishwanath Vasant Poyekar	... Applicant
<i>In the matter between</i>	
Vishal Konkan Co-operative Housing	

Society Limited	... Petitioner
V/s.	
Prafulla S. Sabnis	... Respondent

**WITH
WRIT PETITION NO.8174 OF 2018**

Vishal Konkan Cooperative Housing Society Limited	... Petitioner
V/s.	
Vishwanath Vasant Poyekar & Anr.	... Respondents

**WITH
INTERIM APPLICATION NO.18455 OF 2023
IN
WRIT PETITION NO.8174 OF 2018**

Vishwanath Vasant Poyekar	... Applicant
<i>In the matter between</i>	
Vishal Konkan Co-operative Housing Society Limited	... Petitioner
V/s.	
Prafulla S. Sabnis	... Respondent

Mr. G. Krishna Mohan Nair for the petitioner in WP/5438/2018, WP/5440/2018, WP/5441/2018, WP/5439/2018 & for the applicant in connected IAs.

Mr. Ravindra P. Walwaikar for the petitioner in WP/8573/2018, WP/8174/2018 and for respondent No.2 in WP/5438/2018, WP/5440/2018, WP/5441/2018, WP/5439/2018 & for the respondent No.2 in connected IAs.

Mr. Achyut G. Pandit for respondent No.1 in all WPs.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 2, 2024

P.C.:

1. **Rule.** Rule is made returnable forthwith.
2. The writ petitions are filed challenging judgment and orders passed by the Cooperative Appellate Court confirming judgment and award passed by the Cooperative Court declaring resolution dated 15th June 1980 of general body meeting of the housing society for cancellation of allotment of respondent No.1 as illegal, and further declaring that respondent No.1 is entitled to allotment and vacant possession of flat No.3. The petitioners were further directed to handover vacant possession of flat No.3. The receiver was also directed to handover flat No.4 to the opponent No.2.
3. Aggrieved thereby, the society and the allottee of flat No.3 filed appeals before the Cooperative Appellate Court. The Cooperative Appellate Court allowed the appeals by judgment and order dated 27th November 2003. Aggrieved thereby, the disputant filed Writ Petition No.1109 of 2004.
4. This Court, by order dated 6th April 2016, allowed the petition and remanded proceedings back to the Cooperative Court to decide the issue of limitation. This Court also granted liberty to the disputant to file an application for condonation of delay in terms of section 92(3) of the Maharashtra Cooperative Societies Act, 1960. The Cooperative Court was directed to decide the issue of limitation and render its finding to the Cooperative Appellate Court after receipt of the report on the point of limitation. The Cooperative Appellate Court was directed to render a finding on the issue of limitation.

5. The disputant, therefore, filed an application for condonation of delay on 20th April 2016. The petitioner contested the application by filing his reply. The Cooperative Court, by order dated 17th December 2016, allowed the application for condonation of delay subject to costs of Rs.10,000/-.

6. The petitioner challenged the order on the application for condonation of delay by filing the Appeal from Order Nos.33 and 34 of 2017. The Appellate Court, by separate judgments, dismissed the Appeal from the Order filed by the Society and the allottee. The Cooperative Appellate Court allowed Appeal No.195 of 2003 modifying the award of the Cooperative Court to the extent it directed flat No.4 to be handed over to opponent No.2 (allottee). Aggrieved thereby, the society and the allottee have filed present six writ petitions.

7. Learned advocate for the allottee and the society submitted that respondent No.2-society on 15th June 1980 cancelled allotment of eight flats by general body resolution including flat No.3, which is subject matter of dispute on the ground of non-payment of balance amount. The allottee was allotted flat No.3 immediately in June 1980. The disputant filed the dispute in the month of November 1980. According to the petitioners, the said dispute did not contain a prayer for setting aside resolution dated 15th June 1980 nor a declaration in relation to the validity of the resolution passed by the general body cancelling the disputant's allotment was sought. The petitioner/society filed its written statement and raised the issue of maintainability of dispute. It was also pointed out that flat No.3 was disposed of. Therefore, the fact

of resolution of the general body was within the knowledge of the disputant on the date of filing of dispute i.e. in the year November, 1980. He sought relief of declaration of resolution regarding cancellation of his allotment on 22nd November 1996 by filing an application for amendment. Therefore, the petitioner submitted that such relief by way of amendment was barred by limitation. The cause furnished by the disputant cannot be termed a sufficient cause. On merits, it is submitted that the disputant had agreed to pay a cost of Rs.42,400/- out of which he paid Rs.21,449/-. Despite receiving notices on 24th March 1980, 15th April 1980, 7th May 1980, and 7th June 1980 the disputant did not pay the balance amount. Therefore, the society in general body meeting dated 15th June 1980 cancelled the disputant's allotment. The decision to cancel allotment was intimated to the disputant on 21st June 1980. He filed a dispute on 28th November 1980. It is submitted that the allottee was granted membership on 18th June 1980 and he occupied flat No.3 on 26th July 1980.

8. Per contra, the learned advocate for the disputant submitted that the disputant had sufficiently furnished an explanation for filing an application for amendment on 20th April 2016. Broadly, the sufficient cause shown by the disputant for condonation of delay of 16 years was on the ground of wrong legal advice by the advocates and domestic problems faced by the disputant. It was also stated that the disputant tried to settle the dispute with the society. The disputant has been seriously ill since 1988. It is also stated that in the year 1989, the disputant's father suffered an accident which ultimately resulted in death on 20th January 1990.

He further submitted that assuming the amendment is barred by limitation, in view of Rule 74 of the Maharashtra Cooperative Societies Rules, 1961 which were in force till 2014, strict rules of pleadings were not applicable to the dispute under section 91 of the Maharashtra Cooperative Societies Act, 1960. According to him, therefore, the relief of delivery of possession includes all necessary reliefs sought by the petitioner by way of amendment. According to him, strict rules of pleadings are inapplicable to the dispute under the Maharashtra Cooperative Societies Act, 1960. He submitted that the sufficient cause under section 5 of the Limitation Act, 1963 needs to be construed liberally. In support of his submission, he placed reliance on the judgment of the Apex Court in Civil Appeal No.4440 of 2008 [Perumon Bhagvathy Devaswom, Perinadu Village vs. Bhargavi Amma (Dead) By Lrs & Ors.] decided on 11th July 2008.

9. Having considered the submission made on behalf of both sides, it is necessary to set out the facts relevant for adjudication of the issue of limitation which are as under:

10. On 15th June 1980, respondent No.2-society cancelled the allotment of the disputant's flat.

11. On 28th November 1980, the disputant filed a dispute without prayer for declaration.

12. On 20th April 2016, the disputant filed an application for condonation of delay.

13. On 22nd November 1996, the disputant applied to amend the dispute to incorporate relief of declaration of the legality of the

general meeting dated 15th June 1980 and consequential allotment of the suit flat in favour of opponent No.2 and a declaration that the disputant is entitled to allotment of flat No.3.

14. For the purpose of considering sufficiency of cause in filing the application for amendment is concerned, the reasons stated by the disputant in an application for condonation of delay dated 20th April 2016 need to be considered. As observed earlier, the reasons in the application broadly are two (i) wrong legal advice by the concerned advocates; and (ii) inability to file such an application due to various domestic issues.

15. The Trial Court condoned the delay by treating inability due to domestic problems as sufficient cause. The Trial Court in its order referred to the illness of the disputant from the year 1988, the death of his father in 1990, death of his near relative in the year 1992 as the sufficient cause for condoning a delay of 16 years. The Trial Court also held that it is always desirable that the dispute between the parties be decided on merits and in the interest of justice, both parties need to be given opportunity. The Appellate Court in paragraph 41 referred to the circumstances noted by the Trial Court and observed that the circumstances prevalent prior relevant time were of such nature that the disputant was unable to make his own decision. It is held that the act of the disputant was not deliberate. It is held that the Trial Court has elaborately discussed the reasons for the condonation of delay which cannot be termed as perverse or illegal.

16. Having considered the facts of the case, in my opinion, it was

always open for the disputant to seek necessary reliefs regarding the declaration of inability to resolution cancelling allotment of the disputant and challenging the validity of allotment in favour of opponent No.2 (allottee). The disputant was deliberately pursuing the dispute till the filing of an application for amendment. The disputant was well aware of the existence of a general body resolution which cancelled his allotment. Once these facts which constitute a cause of action for seeking relief of declaration were within the knowledge of the disputant, the reasons such as wrong legal advice or inability due to domestic problems do not constitute sufficient cause for seeking relief of declaration after 16 years of filing of dispute.

17. It is true that the sufficient cause under section 5 of the Limitation Act, 1963 needs to be construed liberally. However, in the facts of the case, the explanation furnished by the disputant for condonation of delay of 16 years cannot, by any legal standard, be termed as sufficient cause. Therefore, both the Courts below were not justified in condoning a delay of 16 years in filing an application for amendment seeking relief of declaration.

18. The question therefore arises for consideration is whether the dispute without considering reliefs prayed by amendment can be allowed. To decide the said issue, it is necessary to set out the original prayers in the dispute and the amended prayers in the dispute which read as under:

The original prayers:

- a) That Opponent No.1 be ordered to restore the

membership of the Disputant which has been illegally expelled by the Opponent No.1;

b) That the Opponent No.1 and 2 be ordered to hand over the vacant possession of the Flat No.3 on ground floor, Vishal Konkan Co-operative Housing Society Ltd., Fateh-baug, S.V. Road, Kandivli (West), Bombay-400 067;

c) The Opponents be restrained by an ad-interim injunction from transferring or assigning the said tenements of creating any right, title and interest therein or parting with the possession of the whole or any part thereof in favour of any person other than the Disputant;

d) The Opponents be ordered and decreed to pay to the Disputant the costs of the present Dispute including the professional costs.”

The amended prayers.

a) That the Opponent No.1 be ordered to restore the membership of the Disputant which has been illegally expelled by the Opponent No.1; (Deleted)

a) The alleged resolutions with regard to cancellation of allotment of suit flat in favour of the Disputant alleged to have been passed in the meeting of the Extra Ordinary Special General Body meeting held on 15th June, 1980 be declared as illegal, invalid, improper and as null and void;

a-1) The alleged resolutions with regard to the allotment of suit flat in favour of the Opponent No.2 alleged to have been passed in the meetings of the Managing Committee held on 15th June, 1980 and 28th June, 1980 be declared as illegal, improper and null and void;

a-2) It be declared that the Disputant is entitled for an allotment and possession of flat No.3 on the ground floor of the building of the Opponent No.1;

b) That the Opponent No.1 and 2 be ordered to hand over

the vacant possession of the Flat No.3 on ground floor, Vishal Konkan Co-operative Housing Ltd., Fateh-baug, S. V. Road, Kandivli (West), Bombay-400 067;

b(1) The Opponents be ordered and decreed to pay to the Disputant the sum of Rs.28,410/- (Deleted)

b(2) The Opponents be ordered to pay interest at 18% per annum to the Disputant on the said sum of Rs.28,410/- from the date of this dispute. (Deleted)

c) The Opponents be restrained by an ad-interim injunction from transferring or assigning the said tenements of creating any right, title and interest therein or parting with the possession of the whole or any part thereof in favour of any person other than the Disputant;”

19. In so far as prayer clause (a) of unamended dispute is concerned, the disputant has sought direction against the housing society to restore his membership. In this regard, it is to be noted that it is not the case of respondent society that the disputant was expelled from his membership. The advocate for the society also states that the disputant continues to be a member of opponent No.1 society. Therefore, based on pleadings and material before this Court, it is held that the disputant continues to be a member of opponent No.1 society.

20. In so far as prayer clause (b) is concerned, the disputant is seeking relief of handing over of possession of flat No.3. As noted earlier, the general body of opponent No.1-society, on 15th June 1980, cancelled the allotment of eight flats including flat No.3 allotted to the disputant for non-payment of balance amount. It is not in dispute that the disputant failed to pay the balance amount on 15th June 1980. The total amount was Rs.42,400/- out of which

the respondent No.2 paid Rs.21449/-. It is also not in dispute that the flat in dispute was allotted to opponent No.2. It is also a proven fact that the disputant communicated on 21st June 1980 about the cancellation of his allotment. It is also a proven fact that opponent No.2 was allotted flat No.3. Therefore, in the absence of setting aside the effect of the resolution of the general body meeting dated 15th June 1980, thereby cancelling allotment of petitioner and without cancelling allotment in favour of opponent No.2, no relief of delivery of possession simpliciter in favour of the disputant can be granted. Ordinarily, in a suit for possession, it is not necessary to seek a declaration of ownership as such issue of ownership is inherent in the suit for possession. However, in the facts of the case, the general body resolution dated 15th June 1980 extinguishing the petitioner's right to occupy flat No.3 continues to hold the field. The fact of allotment of flat No.3 to opponent No.2 confers the right on opponent No.3 to occupy the said premises, in the absence of extinguishment of his right by the relief granted by the Court, the relief of possession in the facts of the case, amount to a consequential relief. In my opinion, in the facts of the case, relief of declaration regarding invalidity of resolution dated 15th June 1980 and invalidity of resolution of allotment of flat in favour of opponent No.2, constitute main relief. Therefore, the main relief being barred by limitation, the Court below could not have granted consequential relief of possession.

21. However, at this stage, it will be useful to advert to the observations of the Apex Court in the case of **Gurubax Sing v. Financial Commissioner**, reported in 1991 Supp (1) SCC 167, in

paragraph 23 which reads thus:

“Under the above circumstances we feel that while this Court is to administer justice according to law there may be scope for doing justice and equity between the parties. In such a situation we remember what the Institutes of Justinian, *De Justitia Et Jure*, in ‘*Liber Primus*’ Tit. I said: “*Justitia est constans et perpetua voluntas juxta sum cuique tribuendi.*” Justice is the constant and perpetual wish to render everyone his due. “*Jurisprudentia est divinarum atque humanarum rerum notitia, justis atque injustis scientia.*” Jurisprudence is the knowledge of the things divine and human; the science of the just and unjust. The divine is that which right reason commends. The humane is also in the contents of the law. As Mas Rumelin said in the struggle to Govern Law, “Justice is rivaled by equity.” The dilemma that equity is to be better than justice and yet not quite opposed to justice, but rather a kind of justice has troubled us. Gustav Radbruch clarifies the mutual relation between two kinds of justice, namely, cumulative and distributive. We may call “just” either the application or observance of law, or that law itself. “The former kind of justice, especially the justice of the Judge true to the law.” according to him, “might better be called righteousness.” Here “we are concerned not with justice which is measured by positive law, but rather with that by which positive law is measured.” Justice in this sense means equality. Aristotle's doctrine of justice of equality is called by him cumulative justice which requires at least two persons while distributive justice requires at least three. Relative equality in treating different persons while granting relief, according to need, or reward and punishment according to merit and guilt is the essence of distributive justice. While in cumulative justice the two persons confront each other as co-equals, three or more persons are necessary in

distributive justice in which one, imposes burdens upon or grants advantages to the others, is superior to them. Therefore, it presupposes an act of distributively justice which has granted to those concerned, equality or rights, equal capacity to act, equal status. According to Radbruch, distributive justice is the prototype of justice. In it we have found the idea of justice, toward which the concept of law must be oriented.” Law offers and protects the conditions necessary for the life of man and his perfection. In the words of Cardozo, “What we are seeking is not merely the justice that one receives when his rights and statute are determined by the law as it is what we are seeking is a justice to which law in its making should conform.” The sense of justice will be stable when it is firmly guided by the ‘pragma’ of objective and subjective interests.”

22. The Single Judge of this Court in case of **Siddharth Holding Pvt. Ltd. v. Saidale Co-operative Housing Society Ltd.**, reported in (2003) 6 Bom CR 857 at page 876 held as under

“A priori, I have no hesitation in taking the view that a Tenant Co-partnership Housing Society is under legal obligation to provide a suitable tenement to each of its members, the member of such a society has an inseparable right to seek house from the society.”

23. In the facts of the present case, it is not in dispute that the disputant continues to be a member of the Tenant Co-partnership housing society. Both parties submitted that the building is in dilapidated condition and, therefore, the matter needs to be decided at the stage of admission. It is also submitted that the society is considering a proposal for redevelopment of its building.

Therefore, in view of the observations made in **Siddharth Holding Pvt. Ltd.** (supra) and **Gurubax Sing** (supra), in my view, it would be necessary to direct the society, to ensure that the disputant is treated at par and equality with other members. Therefore it is directed that, in case the society decides to redevelop the building, the society shall consider allotment of flat to the disputant similar to other members in the redeveloped building on the disputant paying Rs.24,000/- along with simple interest at the rate of 8% from November 1980 till the payment of such amount.

24. With this modification, rule is made absolute in terms of prayer clause (a) in all petitions.

25. The writ petitions are stand disposed of. No costs.

26. In view of the disposal of the writ petitions, all interlocutory applications stand disposed of as infructuous.

27. The Court Receiver is directed to hand over possession of flat No.4 to the society within two weeks from the date of receipt of the order.

(AMIT BORKAR, J.)