

(2014) 09 BOM CK 0117

In the Bombay High Court

Case No : Civil Application (Review) No. 12 of 2002 in Appeal From Order No. 90 of 1992

Kamrudin J. Mavany

APPELLANT

Vs

Tajdin J. Mavany

RESPONDENT

Date of Decision : 01-09-2014

Acts Referred:

Citation : (2014) 09 BOM CK 0117

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : Sudin Usgaonkar, Advocate for the Appellant

Final Decision : Disposed Off

Judgement

U.V. Bakre, J.—Heard Mr. Usgaonkar, learned Counsel appearing on behalf of the applicants. None present for the respondents though they have been duly served.

2. By this review application, the applicants have sought review of the order dated 30.03.1998 passed by this Court (Coram: R. K. Batta, J.) in Appeal From Order No. 90 of 1992. In the said Appeal from Order, the order dated 05.03.1992 passed by the learned Civil Judge, Senior Division in Inventory Proceedings No. 19213 of 1980/A was challenged.

3. An application dated 03.03.1986 was filed in the said inventory proceedings by Smt. Gulshan Aziz Cassum and her husband Shri Aziz Cassum (respondents no. 2 and 3), inter-alia, alleging that by deed dated 27.05.1960, Khatijabai sold to a society named "Society Per Quotas", formed by her sons, a property known as "Udego" or "Mestabata" described in the land registration office under No. 9757 and that this property should be enlisted in the inventory proceedings since the said sale deed was prohibited under Article 1565 of the Portuguese Civil Code as there was no consent of the other children of said Khatijabai. Reply was filed by the Cabeca de Casal (Kamrudin J. Mavany) resisting the application. By order dated 05.03.1992, the learned Civil Judge Senior Division held that the said

Gulshan Aziz Cassum and her husband Aziz Cassum were entitled to succeed in their application to enlist the property known as "Udego" or "Mestabata" registered under No. 9757 since the same was sold to the partnership, which consisted of the sons of the deceased, about which no dispute was raised. It was held that Article 1565 of the Code prohibits such a sale by the parents and therefore the said property was to be considered as belonging to the estate. Hence, the application was allowed.

4. The said order dated 05.03.1992 was challenged by the present applicants before this Court and by the order dated 30.03.1998 passed in Appeal From Order No. 90 of 1992, the order passed by the learned Civil Judge Senior Division was maintained. The applicants approached the Hon"ble Supreme Court and in Petition(s) for Special Leave to Appeal (Civil) No. 13396/98, by order dated 31.08.1998, the Apex Court dismissed the petition as withdrawn, by granting leave to the applicants to withdraw the said petition and move the High Court for review of the judgment under appeal, as desired by the applicants. Therefore, the applicants are before this Court, by way of the present review application.

5. Mr. Usgaonkar, learned Counsel appearing on behalf of the applicants submits that the learned Single Judge as well as the learned Civil Judge Senior Division have misunderstood the law and have taken for granted that the said "Society Per Quotas" is a partnership firm. He submitted that in the year 1901, a new type of company namely "PER QUOTA SOCIETY" (Sociedade per Quotas) was brought in by the decree dated 11.04.1901. He submitted that in terms of the provisions of the said decree read with the provisions of Portuguese Commercial Code, 1888, "Society Per Quotas" cannot be equated with a Partnership, under the Indian Partnership Act, 1932 and that the same is nothing but a company and therefore, the finding of the learned Single Judge and the learned Civil Judge Senior Division to the effect that "Society Per Quotas" is a partnership is erroneous, since the above provisions have not been considered. He urged that if the above position of law was brought to the notice of Court, the situation would have certainly been different and hence, there is error apparent on the face of the record. He further submitted that Article 1565 of the Portuguese Civil Code is not at all applicable to the "Society Per Quotas".

6. A perusal of the impugned order passed by the learned Single Judge of this Court as well as the order dated 05.03.1992 of the learned Civil Judge Senior Division reveals that both the parties had made submissions by taking it for granted that said "Society Per Quotas" is a partnership consisting of sons of the deceased. In paragraph 13 of the order dated 05.03.1992, the learned Civil Judge Senior Division has observed that the property "Udego" or "Mestabata" bearing registration No. 9795 was sold to Partnership which consisted of the sons of the deceased and there was no dispute about this factual position. In paragraph 3 of the impugned order dated 30.03.1998, the learned Single Judge of this Court has observed that in this connection, the learned Advocate Shri Thali pointed out that the sale of the property in question has not been made to

the four sons of the deceased estate-leaver but to the partnership consisting of the said sons. It appears from the impugned order passed by the learned Single Judge of this Court and the order of the learned Civil Judge Senior Division that the submissions, which are now made, based on the decree dated 11.04.1901 and the Portuguese Commercial Code 1888, were not made before the learned Single Judge as well as the learned Civil Judge Senior Division and therefore, the orders have come in the manner in which they have been passed. There appears to be merit in the submission of the learned Counsel that if the said provisions were brought to the notice of the learned Civil Judge Senior Division, the position might have been different. It is submitted by the learned Counsel for the applicants that the inventory proceedings have been stayed on account of some stay order passed in Appeal from Order No. 75 of 2009.

7. In my view, in the peculiar facts and circumstances of the case, and in the interest of justice, the only alternative that remains is to quash and set aside the impugned order passed by this Court as well as the order dated 05.03.1992 passed by the learned Civil Judge Senior Division and remand the matter back to the learned Civil Judge Senior Division to decide the said application dated 03.03.1986 afresh by considering the submissions now made in the present review application and to decide whether the said "Society Per Quotas" is a partnership firm or a company and whether the provisions of Article 1365 of the Portuguese Civil Code are applicable to it or not.

8. In the result, the review application is partly allowed. The impugned order dated 30.03.1998 passed by this Court in Appeal From Order No. 90 of 1992 as well as the order dated 05.03.1992 passed by the learned Civil Judge Senior Division in Inventory Proceedings No. 19213 of 1980/A are quashed and set aside. The matter is remanded back to the Inventory Court to decide the said application dated 03.03.1986 afresh by giving opportunity of being heard to both the parties. The said application shall be taken up for hearing and decision as and when the stay order made in Appeal from Order No. 75 of 2009 is vacated and the inventory proceedings commence before it.

9. The review petition stands disposed of, accordingly.