

(1998) 01 BOM CK 0002

In the Bombay High Court

Case No : Appeal No. 1099 of 1997 in Notice of Motion No. 2833 of 1994 in Suit No. 4688 of 1994

Prakash R. Mehta and Another

APPELLANT

Vs

Veena D. Chhablani and Others

RESPONDENT

Date of Decision : 09-01-1998

Acts Referred:

Hindu Succession Act, 1956 — Section 23

Citation : (1998) 4 ALLMR 484 : (1998) 100 BOMLR 629

Hon'ble Judges : V.P. Tipnis, J;N. Aurumugham, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Aurumugham, J.—Leave to amend the appeal by adding grounds granted.

2. The order passed in Notice of Motion No. 2833 of 1994 dated 19.9.1997 by the learned Single Judge is sought to be challenged by filing this appeal on the grounds of its incorrectness and propriety.

3. The factual position is that the suit property is admittedly a dwelling house, but however belongs to the mother of the plaintiff and mother of Ramchand Chandulal Mehta. The original defendants in the suit are the heirs of said Ramchand Chandulal Mehta. The mother of the plaintiff Smt. Kaiserbai admittedly died on 12th June, 1990 while the father of the defendants died on 2.4.1990. The suit property is a flat standing in the name of mother of the plaintiff. Since she died intestate half share was claimed, but however, defendants have relied upon the deeds of relinquishments annexed to the affidavit in reply which shows that the plaintiff has relinquished her share. The learned trial Judge while passing the impugned order has not accepted the said relinquishments but held that the plaintiff has made out a strong prima facie case with reference to 50% share in the suit property. However, it is common case that the suit flat is occupied by the defendants Nos. 1 and 3, According to the learned Counsel Shri Tulzapurkar, as shown in his affidavit the plaintiff and

other parties to the proceedings who are long prior to the filing of the suit and the notice of motion were living away from the suit flat. It is in this context the relief of partition was asked for in the suit and the notice of motion was moved.

4. On consideration of arguments of rival parties the learned Single Judge has found that this is a fit case for appointment of Court Receiver and thereby he has passed the impugned order, which is sought to be challenged in this appeal.

5. We have heard the rival submissions made by the learned Counsel in respect of rival parties. It was argued by Mr. Kurup the learned Counsel for the appellant that firstly the suit itself was not maintainable under the provisions of Section 23 of the Hindu Succession Act as it relates to a dwelling house. Secondly that pursuant to the provisions of Section 51 of the Maharashtra Co-operative Societies Act, since the suit flat is under surveillance and management of the cooperative society, dispute however existing inter se among the parties must have been relegated to the authorities under the act and that therefore the suit was not maintainable. Thirdly the right and interest particularly the quantum of share of the plaintiff who are also major sharers in the suit property, has not at all been considered by the learned Single Judge. Dwelling upon the above three points the learned Counsel for the appellants challenged the impugned order very strenuously.

6. Mr. Tulzapurkar the learned Counsel appearing for the defendants respondents by way of answer to the contentions raised by the learned Counsel for the appellants on the third contention as referred to above, took us through specific averments made by him in his affidavit in reply stating that till dates of filing of the suit plaintiff or other defendants were not at all residing in the suit flat nor in occupation of the same except defendants Nos. 1 and 3 and this averment and above pleadings by sworn affidavit have not at all been controverted by whatever manner. All this would mean and clinchingly demonstrate the fact that either the plaintiff or any other parties were not in possession of the suit property or any portion thereof and that all of them were residing elsewhere barring the suit flat and that the defendants Nos. 1 and 3 alone were found in possession as held by the learned Single Judge.

7. The quantum of share due to the plaintiff and the defendants who are sharers and the heirs of sharers is not disputed by the parties herein at this stage. If this being so 1st and 3rd contentions raised by the learned Counsel for the appellant cannot be sustained. Therefore the question regarding maintainability of the suit by virtue of Section 23 of the Hindu Succession Act, 1956 does not arise and even so we feel this plea has not been taken or adverted to before the learned Single Judge in order to give total adjudication. If this is not done then to take such a plea or entertain a new plea no doubt would create prejudice to the other parties if we allow. Therefore we are not inclined to take such a plea regarding maintainability of the suit at this stage but however, it is always open to the appellants to take such points during the trial by following the legal procedure contemplated therefore.

8. Coming to the 2nd contention that the suit is hit by Section 91 of the Maharashtra Co-operative Societies Act, with great strain we are unable to countenance the same for several reasons; that the present suit matter involved herein do not at all correspond to any dispute among or between the society's internal affairs or administration or defendants Nos. 1 and 3 but conqueringly disputes existed in the instant case by the parties inter se for the relief of partition and so on and that could have been granted only by the Court of law and not by the special statutes of Maharashtra Co-operative Societies Act and therefore for the very simple reason we find no substance in this contention.

9. We have gone through the respective paper books and pleadings as also documentary evidence relied upon by the respective counsel of the parties and the impugned order and our perusal and the evaluation would clinchingly demonstrate that the impugned order passed by the learned Single Judge is quite justifiable and reasonable and to this extent we do not come across any of the aspects that remains to be cropped up further in this appeal for our consideration.

10. The appeal lacks in merits. In the result for the foregoing reasons, appeal fails and is accordingly dismissed.

Certified copy expedited.