

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 9309 OF 2014

Smt. Ramdulari C. Mishra (deceased)
And Ors.

...Petitioners

Versus

Vimladevi Rambali Mishra and Ors.

...Respondents

....

Mr.E.K. Sasidharan, Advocate for the Petitioners.

Mr.R.R. Tiwari i/b. Mr. Sanjay Kumar Dubey, Advocate for
Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 01st SEPTEMBER, 2016

P.C.

1. Heard Mr. E.K. Sasidharan, learned Counsel for the petitioners and Mr.R.R. Tiwari, learned Counsel for respondent No.1, at length. Office remark shows that respondents No.2 to 5 are duly served. However, none appears on their behalf.

2. Rule. Mr. Tiwari waives service for respondent No.1. As respondent No.1 is the only contesting respondent, notice on respondents No.2 to 5 is dispensed with. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the

Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the judgment and order dated 19.8.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra Branch) in Revision No.51/2014. By that order, the Appellate Court allowed Revision Application preferred by respondent No.1 hereinafter referred to as the 'applicant' for impleading her as defendant No.5 in the suit instituted by the plaintiffs and quashed and set aside the judgment and order dated 10.3.2014 passed by the learned trial Judge, presiding over Court No.34(BB) of Court of Small Causes, Mumbai below Exhibit-104.

4. Initially plaintiff No.1 Ramdulari and plaintiff No.2 Surajprasad instituted Suit against Rajmani Benimadhav in the year 1977. Plaintiff No.1 Ramdulari died on 11.1.1990. Plaintiff No.2 Surajprasad died on 7.9.1995. L.Rs. of plaintiff No.2 Surajprasad were brought on record as plaintiffs No.2(a) to 2(f). Defendant Rajmani died leaving behind L.Rs. who are defendant No.1 Dashrath and defendant No.2 Bhuwal. It is the case of the plaintiffs that after institution of the suit, defendants No.1 and 2 sub-let the premises to defendants No.3 and 4. Mr.Sasidharan submitted that the suit is part-heard in the sense the plaintiffs evidence is over. Defendants No.1 and 2 have filed their examination-in-chief and are under cross-examination. It is at that stage, the applicant filed

application Exhibit-104 in or about March, 2012 *inter alia* contending that the applicant is residing in the suit property since childhood. The applicant is born on 12.12.1943. It was further contended that at no point of time the applicant was given share of rent, settlement charges and/or transfer charges by the plaintiffs received from the tenants. In other words, no share and/or any of the profit derived from the profit was provided to the applicant for one reason or the other. The plaintiffs have settled the matter with other tenants and also made development of part of the property in S.R.A. The applicant was neither included nor her objection was obtained. The S.R.A. building and free sale building were constructed. However, the plaintiffs did not disclose receiving profits therefrom. The applicant is a co-owner of 50% and said fact is suppressed by the plaintiffs from the Court and/or S.R.A. Authorities.

5. The applicant further contended that the property is not divided between the owners, which is a co-parcenary property left by Shri Chhattarpal Mishra. The applicant and Surajprasad are the children of said Chhattarpal. The plaintiffs did not implead the applicant with mischievous intention of grabbing the property. The applicant, therefore, prayed that in the interest of justice, she should be joined as party defendant No.5 in the suit. The presence of the applicant before the Court is absolutely necessary for

adjudicating upon the matter. The applicant has direct interest in the suit property. It is quite possible that the plaintiffs may settle the suit with the tenants with a view to defeating her valuable right in the matter. In the past, the plaintiffs have settled various matters.

6. The plaintiffs filed affidavit in-reply opposing the application on 26.3.2012. Defendants No.1 and 2 filed reply supporting the application. Defendants No.3 and 4 though opposed the application by filing reply, in paragraph-7 gave no objection for the impleadment. The learned trial Judge rejected the application *inter alia* observing that the applicant is neither a necessary nor a proper party and it cannot be said that without her presence no effective decree can be passed. It was further observed that even if it is accepted that the applicant is 50% owner, it is settled position in law that one co-owner can institute suit for eviction against other tenants. The learned trial Judge accordingly rejected the application. Aggrieved by this order, the applicant preferred Revision Application. By the impugned order, Appellate Bench allowed Revision Application as indicated above. For all these reasons, he submitted that Petition requires consideration.

7. On the other hand, Mr. Tiwari supported the impugned order. He submitted that the learned trial Judge committed error in treating the application as one under

Order I Rule 10 of C.P.C. In fact, the application was made under Order XXII of C.P.C. Admittedly the applicant is daughter of plaintiff No.1 Ramdulari. The applicant is sister of plaintiff No.2 Surajprasad. In other words, she being legal heir and representative of plaintiff No.1 Ramdulari, is entitled to be brought on record in that capacity. Mr. Tiwari invited my attention to paragraph-17 of the impugned order and submitted that the learned Appellate Court observed that the question of impleading her as a party does not arise as after death of original plaintiff No.1, the applicant being daughter is a legal representative and right to sue survives to her against the defendants. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff No.1 Ramdulari and plaintiff No.2 Surajprasad have instituted suit in the year 1977. The evidence of the plaintiffs is over. Defendants No.1 and 2 have filed their examination-in-chief and presently are under cross-examination. Plaintiff No.1 Ramdulari died on 11.1.1990. Present application is made in March, 2012. Mr. Tiwari submitted that as the dispute between the plaintiffs and the applicant arose in the year 2012, present application

was made. It is common ground between the parties that the applicant has instituted Suit No.1619/2013 in the City Civil Court at Dindoshi for partition and separate possession and same is pending.

9. Perusal of the prayers made in the application Exhibit-104 shows that the applicant has prayed for impleading her as defendant No.5 in the suit. In other words, the applicant did not pray for bringing her on record as plaintiff being one of the heirs of plaintiff No.1 Ramdulari. During the course of arguments, Mr. Tiwari submitted that the applicant has no conflicting interest with that of the plaintiffs and the applicant is ready and willing to become plaintiff. Once it is conceded that the applicant has no conflict of interest, it is settled position in law that one of the co-owners can maintain the suit for eviction against the tenant. Even otherwise, one of the heirs represents the estate of plaintiff No.1 Ramdulari. In view thereof, I do not find any merit in the submission of Mr.Tiwari that the applicant is required to be impleaded as plaintiff in the capacity as heir and legal representative of plaintiff No.1.

10. In paragraph-15, Appellate Court observed that the applicant is admittedly one of the co-owners and as such is a necessary party to the suit. She cannot be deprived of her right on the ground that she has no concern or she has

no right, title or interest in the suit property. In my opinion, the Appellate Court totally misdirected itself in recording said finding. Section 29A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act') lays down that nothing contained in Sections 28 or 29 shall be deemed to bar a party to a suit, proceeding or appeal mentioned therein in which a question of title to premises arises and is determined, from suing a competent Court to establish his title to such premises.

11. In view thereof, I do not find that the Appellate Court was justified in relying upon the decision of **B. Valsala v. Sundaram Nadar Bhaskaran, AIR 1994 Kerala 164** and observing that the said decision is applicable to the facts of the present case.

12. In paragraph-17, the Appellate Court further observed that the applicant is the daughter of plaintiff No.1 (since deceased) and in such circumstances, question of challenging status of the applicant does not arise. Similarly the question that she be made a party or not does not arise as no effective orders can be passed against her because after the death of original plaintiff, she being daughter is the legal representative and right to sue survives to her against the defendants. She is, therefore, necessary party to the suit having right to sue survived to her against the defendants and she cannot be deprived of her right by

merely saying that no effective orders can be passed even if she is party or not to the suit.

13. For the reasons already indicated, I am of the opinion that the Appellate Court committed serious error in making observations in paragraph-17. The Appellate Court failed to notice that the applicant did not pray for impleading her as heir of original plaintiff No.1 as a plaintiff. The applicant has prayed for impleading her as defendant No.5. The Appellate Court failed to notice that by filing replies defendants No.1 and 2 and defendants No.3 and 4 supported the application. The reason is not far to seek. The application is made in March, 2012 when plaintiff No.1 died on 11.1.1990. The reason given for filing application belatedly is that the dispute started between the plaintiffs and the applicant in 2012 is unacceptable. The Appellate Court, however, observed that she being a legal representative, right to sue survives to the applicant against the defendants.

14. That apart, the Appellate Court also did not consider the maintainability of the Revision Application. In my opinion, the order passed by the learned trial Judge was purely procedural order not affecting the substantive rights of the applicant. As noted earlier, the applicant has already instituted suit for partition and separate possession of her share. Thus, the rights the applicant is claiming in

the suit property can be gone into in the partition suit. The Small Causes Court while trying suit for eviction cannot decide the interse dispute between the plaintiffs on one hand and the applicant herein on the other. That apart, plaintiff No.1 Ramdulari died on 11.1.1990 and the application is made in March, 2012. In view thereof also, the Appellate Court was not justified in allowing Revision Application. For all these reasons, the impugned order is set aside and that of the trial Court is restored. Application Exhibit-104 stands dismissed. Rule is made absolute in aforesaid terms with no order as to costs.

15. At this stage, Mr. Tiwari seeks liberty to file fresh application for impleading applicant as a plaintiff. I refrain from expressing any opinion. The applicant is at liberty to file such application, if permissible in law. Grant of liberty shall not be construed as an expression on merits either way. All contentions of the plaintiffs, including maintainability of such application, are kept open. Order accordingly.

(R. G. KETKAR, J.)