IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

WRIT PETITION NO. 5953 OF 2023

Smt. Lata wd/o Vinayakrao Avchar,
aged about 57 years, Occ. Household Work,
R/o Near New Rathod Panch Bungalow,
Shivaji Nagar, Akola, Tq. Akola, Dist. Akola.

...PETITIONER

Versus

1] Smt. Hema wd/o Dinesh Avchar,
aged about 32 years.

1-a] Ku. Radhika d/o Dinesh Avchar,
aged about 9 years, Occ. Student (Minor).

1-b] Ku. Akshara d/o Dinesh Avchar,
aged about 7 years, Occ. Student (Minor).

Respondent nos. 1-a and 1-b are minors
and represented by natural guardian/next
friend mother Smt. Hema wd/o Dinesh Avchar,
aged about 32 years, Occ. Household.

All are R/o C/o Shri Ramdas Rambhau Wankhade,
Near Deshmukh Mangal Karyalaya, Laxmi Nagar,
Dabki Road, Akola, Tq. & Dist. Akola.

2] Pavan s/o Vinayakrao Avchar,
aged about 38 years, Occ. Business.

3] Amol s/o Vinayakrao Avchar,
aged about 32 years, Occ. Business.

Respondent nos. 2 and 3 are R/o
Near New Rathod Panch Bungalow,
Shivaji Nagar, Akola, Tq. Akola, Dist. Akola.

...RESPONDENTS

Shri K.H. Anandani, Counsel for the petitioner.

Shri C.A. Joshi, Counsel for respondent no.1.
Shri V.D. Ruparelia, Counsel for respondent nos. 2 and 3.

CORAM : ANIL L. PANSARE, J.
DATE : SEPTEMBER 9, 2024

ORAL JUDGMENT :

The petitioner – original defendant no.1 is aggrieved by order passed below Exh.9 by the Civil Judge Senior Division, Akola, in M.J.C. No. 2419/2021, thereby directing her and respondent nos. 2 and 3 herein (original defendant nos. 2 and 3) to pay compensation of Rs.20,000/- per month as an interim maintenance to respondent nos. 1, 1-a and 1-b herein (original plaintiffs), and order dated 15/6/2023 passed below Exh. 13 seeking review of order passed below Exh.9. For the sake of convenience, the parties will be hereinafter referred to as by their original nomenclature.

2] The plaintiffs filed a suit for partition and separate possession of various properties belonging to their common ancestor. Plaintiff no.1 is the daughter-in-law of defendant no.1 and sister-in-law of defendant nos. 2 and 3. Plaintiff no.1's husband, who naturally was the son of defendant no.1 and brother of the other two defendants, has expired.

3] According to the plaintiffs, the suit properties, which consist of various immovable properties, a liquor bar, ornaments, etc. were owned by the common ancestor, Vinayakrao Avchar, the husband of defendant no.1 and father of other two defendants. After his death, plaintiff no.1's husband, being one of the sons of Vinayakrao, would inherit the properties along with the defendants and, thus, the plaintiffs will be entitled to the share in the properties to the extent of the share that would be allotted to plaintiff no.1's husband. According to the plaintiffs, they are entitled for maintenance pending suit from the properties that would fall in the share of plaintiff no.1's husband.

4] In the aforesaid set of facts, the plaintiffs filed an application (Exh. 9) seeking interim maintenance alleging therein that the suit properties are in the possession of the defendants and they are earning an income of about Rs.30,00,000/- per annum. The plaintiffs prayed for maintenance @ Rs.30,000/- per month from the defendants.

5] The trial Court relied upon the judgment passed by this Court in the case of *Sandeep Ramesh More & Ors. Vs. Narayan Deoba More & Ors. [AIR 2006 BOMBAY 253],* wherein the Court held that it is well settled that when an application for maintenance is submitted in a partition suit by the plaintiff, in view of the fact that the property is in possession of the defendant and the plaintiff is entitled to have maintenance out of the joint family property, such application is entertained and decided in view of the provisions of Section 151 and not under Order XXXIX or any other provision and, therefore, as against such order, miscellaneous appeal is not maintainable, since order XLII is not applicable to such order. Thus, appeal against such order was not tenable.

6] The Court then noted that the plaintiffs averred that the defendants are earning Rs.30,00,000/- per annum. The defendants have denied the allegation, however, have not made any statement about their income from these properties, including liquor bar. The Court then noted that the defendants are enjoying the fruits of the properties and, therefore, directed them to pay Rs.20,000/- per month to the plaintiffs.

7] Defendant no.1 then filed application (Exh. 13) seeking review of order, *inter alia,* on the ground that certain documents were found (details of which are not given) after passing order and further that the properties have been already partitioned and on 24/11/2015, a registered release deed was executed by all the sons in favour of defendant no.1 (which is also challenged in the suit). It is then averred that the bar and restaurant was closed and sealed since 31/3/2017 and no income is derived therefrom.

8] The trial Court rejected the application on the count that there is nothing in the application to show that while passing order below Exh. 9, there occurred an error apparent on the record. According to the trial Court, the application has been filed to avoid payment of maintenance and while rejecting the application, held that non-compliance of order of maintenance before next date would render striking off the defence.

9] Defendant no.1 is aggrieved by both the orders. The learned Counsel for defendant no.1 submits that there are no averments in the plaint for granting interim maintenance and, therefore, application under Section 151 was not maintainable. The learned Counsel then submits that opportunity of hearing in review application was not granted because the order doesn't speak of the same. According to defendant no.1, the documents ought to have been looked into by the trial Court in review application. The trial Court has also not considered the registered release deed executed by the sons of defendant no.1, including plaintiff no.1's husband. Therefore, defendant no.1 is the exclusive owner of the properties and the plaintiff no.1's husband is not entitled for share in the properties and in turn, the plaintiffs cannot seek maintenance from the properties alleging that plaintiff no.1's husband will inherit the suit properties.

10] As against, the learned Counsel for the plaintiffs submits that nothing prevented defendant no.1 to put forth these documents before the trial Court when application Exh.9 was decided. While seeking review, defendant no.1 has not averred that despite due diligence, documents could not be produced on record. He submits that nothing prevented defendant no.1 to show to the trial Court that the bar was closed/sealed in the year 2017. Nothing prevented defendant no.1 from disclosing the amount of earning out of the said properties. Having not done so, the learned Counsel for the plaintiffs submits that the orders impugned do not call for interference in writ jurisdiction.

11] I find substance in the submission made by the learned Counsel for the plaintiffs. Firstly, when the plaintiffs have averred that the defendants are earning huge money out of the immovable properties, including the liquor bar, the least that could have been done by the defendants was to place on record the evidence to show tentative income of the defendants out of the said properties. The defendants have, except for denial, made no other statement in reply to application Exh.9. Apart from denying the claim of the plaintiffs, the defendants have only pleaded about partition and release of the properties in the year 2015, which according to the plaintiffs, is a subject matter of challenge. On the point of documents, which were sought to be produced in review application, the defendants are completely silent as to what prevented them from filing those documents while filing reply to Exh. 9. The defendants have not justified that despite due diligence, those documents could not have been placed on record. That apart, details of the documents have been not mentioned in application Exh. 13. So far as closure of bar is concerned, again the defendants are silent as to why were these averments not made in reply filed to Exh.9.

12] Put all together, the trial Court has on the basis of material placed before it found that there are sufficient means available to the defendants to pay Rs.20,000/- per month to the plaintiffs. The view taken by the trial Court is a possible view and, therefore, I do not find any perversity in the impugned orders.

13] There is, thus, no substance in the petition. The same stands dismissed.

JUDGE

Sumit