IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.940 of 2016

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Arun Kumar Mukherjee

.... petitioner/s

Versus

Chittranjan Mukherjee & Ors

.... Respondent/s

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Appearance :
For the petitioner/s : Mr. S.S. Dvivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey, Advocate
Mr. Parth Gaurav, Advocate
For the Respondent No.1 & 2:Mr. Kamal Nayan Choubey, Sr. Advocate
Mr. Karandeep Kumar, Advocate
Mr. Manoj Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. ORDER

4 24-11-2016 The petitioner has filed this application under Article 227 of the Constitution of India for setting aside the order dated 01.06.2016 passed by the learned 3rd Subordinate Judge, Muzaffarpur in Final Decree Partition Suit No.41 of 1953 whereby the learned court below refused to recall the order dated 10.01.2012.

For better understanding, the facts may be narrated in short that Partition Suit No.41 of 1953 was filed by the father of the present petitioner claiming 1/4th share in the property of Muzaffarpur and Champaran. On 31.01.1958, the judgment and decree was passed as follows:

> "31.01.1958- Plaintiff files Hazri. Contesting Defendant takes no step. Case called out several times but non responds on repeated calls.

Dismissed for default.

Sd/- R.P. Mandal

31.01.1958- Plaintiff files a petition on which there is an endorsement of the defendant's pleader that no objection praying to recall the above order of dismissal for the reasons stated therein.

Let the previous order be recalled.

Sd/- R.P.Mandal

Later Case called out. Petition of contesting defendants 1 and 2 dated 09.01.1958 put up. Plaintiff examines(1) Arun Kumar Mukherjee ex-parte. The suit for partition in which the plaintiff's claims 1/4th share and of the preparation lying within the jurisdiction of Muzaffarpur District and disclaims his share in the properties lying within the district of Champaran. It is stated that defendant No.1 has 1/4th share while defendant No.2 has also 1/4th share and the remaining 1/4th share is owned by defendant No.3 and 4 jointly each having equal shares. The claim is proved by P.W.1. The suit is decreed on admission against defendant No.1 and ex-parte against the rest. Let a preliminary decree be drawn. Commissioner, if required by the parties

will be issued and the cost shall be borne by the parties according to their respective shares.

Sd/- R.P.Mandal."

It appears that thereafter decree was prepared by the office which was signed on 01.03.1958. On 10.01.2012, the aforesaid decree prepared was corrected/amended. The present petitioner filed application for recall of this order dated 10.01.2012 on the ground that prior to passing this order dated 10.01.2012 no opportunity of hearing was given as no notice was ever issued. By the impugned order, the court below has rejected this application filed by the plaintiff holding that there is no legal ground to recall the said order in view of the report of Seristedar as well as order dated 01.03.1958. While passing the order the court below has considered various decisions of different High Courts, Supreme Court and also Patna High Court.

The learned senior counsel, Mr. Dvivedi appearing for the petitioner submitted that application under Section 152 C.P.C. was filed by son of defendant No.1 on 27.01.2011 praying for amendment of the decree. No substitution was done, as such, the son of the original defendant no.1 was not party to the suit. Fraudulently, the said applicant got notice issued on the dead persons as by that time all the parties in partition suit had died. Substitution was made only in the year 2012. Notices were issued

to the deceased parties and on being satisfied about the service of notice, the court below by order dated 10.01.2012 amended the decree. Therefore, the son of defendant no.1 by playing fraud got the decree amended suppressing the fact that notices were issued on all the deceased parties and, therefore, any order or judgment or decree obtained fraudulently is non-est in the eye of law as such, liable to be set aside. The Court below without considering this aspect of the matter rejected the application of the petitioner to recall the order dated 10.01.2012.

The learned senior counsel further submitted that the son of defendant No.1 was not a party to the suit therefore, an application under Section 152 C.P.C. at his instance was not maintainable. Moreover, no notice was issued to the legal representatives of the deceased persons as by then, no substitution was done. According to the learned senior counsel, the order dated 10.01.2012 is thus tainted with fraud and is liable to the set aside and opportunity should be given to the petitioner to be heard in the matter of amendment of decree. In support of his contention, the learned senior counsel relied upon the following decisions:

(i) (1994)1 Supreme Court Cases 1 = AIR 1994 Supreme Court 853

(ii) (2007) 4 Supreme Court Cases 221

(iii) (2010) 8 Supreme Court Cases 383

(iv) AIR 1953 Hyderabad 3

(v) AIR 1943 Patna 72

(vi) 1980 BBCJ 374

The learned senior counsel, Mr. K.N.Choubey appearing for the respondents submitted that there is no question of playing fraud on the court arises. In fact, the petitioner is playing fraud and is trying to obtain benefit out of his fraudulent act. If there is any fraud in obtaining the order dated 10.01.2012, it can be set aside but then the fraud has to be proved. In the present case, this very petitioner was examined as P.W.1 on behalf of the plaintiff who was his father and this petitioner disclaimed 1/4th share in the property of Champaran which is clearly mentioned in the order/judgment dated 31.01.1958. The defendant No.1 i.e. father of the applicant, who filed application under Section 152 C.P.C., had filed written statement claiming the property of Champaran as his self-acquired property. The defendant No.2 and 3 had also filed written statement alleging that the properties in the district of Champaran are the self-acquired property of defendant No.1. In view of the deposition of this petitioner as P.W.1 that he disclaimed any share in the property of district Champaran and in view of admission, the judgment was passed on 31.01.1958 regarding 1/4th share of the plaintiff in the property within the district of Muzaffarpur. On filing the application, by the son of

defendant No.1, the report was called for from the Seristedar who submitted a report to the effect that the decree prepared by the office is not in conformity with the judgment dated 31.01.1958 and pursuant to this report the order dated 10.01.2012 was passed under Section 152 C.P.C. which empowers the court to correct any clerical mistake.

The learned senior counsel further submitted that so far the judgment and decree dated 31.01.1958 is concerned, it became final which was never challenged by the father of the petitioner nor by this petitioner. The father of the petitioner died in the year 1968 i.e. 10 years after the judgment dated 31.01.1958. Now, therefore, even if order dated 10.01.2012 is set aside and opportunity of being heard is given to the petitioner, it will not make any difference as it is admitted fact that this petitioner as P.W.1 disclaimed shares in the property of Champaran whereas in the decree prepared, which is clerical job, by mistake, shares have been given in the property of Champaran also which is not in conformity with the judgment dated 31.01.1958. In such circumstances, it can very safely be said that the petitioner is playing fraud and knowingly taking advantage of mistake in the decree sealed and signed on 01.03.1958 and was selling the property of Champaran knowing that he had no share which had been confirmed by the judgment dated 31.01.1958. This act of the

petitioner is fraudulent act only to harass the respondent. Therefore, no interference can be made in exercise of equitable supervisory jurisdiction.

I have perused the order passed by the court below. Admitted fact is that judgment was passed on 31.01.1958 considering the evidence of P.W.1 who was none else than this petitioner, Arun Kumar Mukherjee. From perusal of the judgment, quoted above, it is clear that this petitioner claimed 1/4th share in the property of Muzaffarpur only and he disclaimed any share in property of Champaran. The decree is annexed with the counter-affidavit. Although, in the judgment dated 31.01.1958, the suit was decreed to the extent of 1/4th share of the plaintiff, the operative part of the judgment was not mentioned in the decree by mistake. The Seristedar submitted a report which is also annexed with the counter-affidavit (Annexure E). The Seristedar submitted a report to the effect that a mistake has been committed by the office clerk while preparing the decree which is not in conformity with the judgment dated 31.01.1958. Here, there was accidental omission or mistakes in the form of the decree. The form of the decree should be according to the judgment. Moreover, the date of the judgment is the date of the decree and the operative part of the judgment is to be engrossed only in the form of a decree and that is required to be signed by the Presiding Officer. The Court below

then after perusing the record and the report of the Seristedar passed the order dated 10.01.2012 to the effect that correction be made in the decree dated 01.03.1958. Now this becomes admitted fact that the judgment was passed only with respect to property of Muzaffarpur. The plaintiff disclaimed the property of Champaran which was admitted by the defendants and, therefore, on admission, the judgment was passed. Therefore, the judgment dated 31.01.1958 is the preliminary judgment and decree. The subsequent engrossment of terms and conditions mentioned in the judgment is the clerical job. While engrossing the terms and conditions in the decree i.e. the operative part of the judgment, if any clerical mistake has been committed, the court has the jurisdiction to correct the same.

Section 152 C.P.C. reads as follows:

> **"152.- Amendment of judgments, decrees or orders:- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."**

In view of this provision, the Court of its own motion can also make necessary correction, if there is clerical mistake. In

the present case, the petitioner is not disputing that there is no clerical mistake. The petitioner is disputing the procedure such as, a person who is not party has filed the application, no notice was served on any of the defendants and no substitution was made as all the parties had died etc. etc.

From perusal of the impugned order, it appears that the court below clearly held that the mistake was committed by the office by including the properties of Champaran district and after perusal of the report of the Seristedar, the court detected the mistake committed by office. The order dated 10.01.2012 has been annexed by the petitioner. From perusal of the said order, it appears that the court below passed the order to the effect that on the basis of an application, the report of Seristedar was perused and the record was also perused and accordingly, directed for correction of the decree.

The Hon'ble Supreme Court in the case of **U.P.S.R.T.C. v. Imtiaz Hussain, AIR 2006 Supreme Court 649** has held that t**he corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omissions sought to be corrected which goes to the merit of the case is beyond the scope of section 152.** Therefore, in view of this decision of the

Supreme Court, the accidental omissions or mistakes can be corrected under Section 152 of the Code. Here, as stated above, the operative part of the judgment and decree was not engrossed on the form of the decree accidentally or by mistake and for correcting this accidental omission/mistake, merit is not required to be gone into.

Now, let us consider the decisions relied upon by the petitioner.

AIR 1943 Patna 72(Satyavadi Pradhan v. Kanhai Pradhan): It appears that in that case it was a consent decree and the High Court held that Court has no inherent jurisdiction to alter orders passed on consent, unless notice is given to the parties affected. Here, in the present case at our hand, the judgment and decree dated 31.01.1958 is not sought to be corrected or amended. The mistake of the office in engrossing the terms and conditions i.e. the operative part of the judgment and decree dated 31.01.1958 in the form of a decree is sought to be corrected as the office committed a mistake while engrossing it in the form of the decree. It will not be out of place to mention here that the judgment and decree is dated 31.01.1958 and this term mentioned in the judgment and decree is required to be incorporated in the form of a decree and while preparing this decree, the office is required to prepare the same according to the original decree. The mistake, if

committed, must be corrected so as to make it in conformity with the original judgment and decree.

(1994) 1 Supreme Court Cases 1(S.P.Chengalvaraya Naidu v. Jagannath & Ors.): So far the principles laid down by the Supreme Court in this decision, there is no dispute but it may be mentioned here that the Supreme Court in that case held that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. This is the view of the Supreme Court in the case of **A. V. Papayya Sastry and others v. Govt. of A.P. and others, (2007) 4 Supreme Court Cases 221 also and in the case of Meghmala & Ors. v. G. Narasimha Reddy and others, (2010) 8 Supreme Court Cases 383**. In all these cases, the Supreme Court was dealing regarding fraudulently obtaining order, judgment and decree. In the present case, it is not the case of the petitioner that the judgment and decree dated 31.01.1958 was fraudulently obtained. Petitioner's case is that order dated 10.01.2012 was fraudulently obtained and

by that order, the mistake committed by office was got fraudulently corrected. There is vast difference between the amendment or correction in the judgment and order and the correction in the form of the decree prepared by the office. It is reiterated here that the form of the decree which requires that it should be in conformity of the original judgment and decree. It cannot be contrary to the original judgment and decree. In the present case, there is no dispute between the parties with regard to the judgment and decree dated 31.01.1958. Admittedly, neither the father of the petitioner nor the present petitioner challenged the said judgment and decree either by filing appeal or review or anything. A mistake was committed by the office while preparing the decree in the form that is being corrected. In such circumstances, the court has the jurisdiction suo motu to even correct the mistake without application or even without notice to any party when the court comes to the finding that there is mistake committed by the office while engrossing the terms and conditions of the judgment and decree in the form. Further, the correction made is only accidental omission/mistake. Since it is the accidental mistake and by correcting the same the merit of the case has got nothing to do the court has the jurisdiction to correct the same in view of the Supreme Court decision.

AIR1953 Hyderabad 3 Waman Rao v. Daulat Rao:

The Division Bench has held that a person who is not a party to the suit for pre-emption or the decree passed therein has no right to apply for amendment of the decree under Section 152. So far this decision is concerned, it is not applicable in the present case as in the present case, no application for amendment was filed rather the application was filed for correction of the mistake/omission. Further, here, the petition was filed by the son of defendant no.1 and by that time his father had already died, therefore, the person who filed the application is claiming through defendant no.1 and moreover, subsequently he was also substituted.

1980 BBCJ 374(Smt. Sushila Devi & Another v. Smt. Madhuri Prasad & Others): The Patna High Court has held that the decree cannot be amended without notice to the parties. It appears that in that case the original decree declared the title of the plaintiff only over the disputed verandah indicated by letter A, B, C, D in the map of the pleader commissioner and defendants were directed to remove the encroachment. By the amendment, the western wall of the verandah was inserted in the decree as being the property of the plaintiff so as to form part of the letter A, B, C, D. This Court found that the District Judge did not say anything in his order as to whether he is doing so under his inherent power under Section 151 or under Section 152 because there was an error

arising from an accidental slip or omission, he has said nothing. He has simply allowed the amendment. Therefore, order is arbitrary and whimsical. The order was set aside and the matter sent back to the lower appellate court directing to proceed to dispose of the application for amendment. This decision is also not applicable in the present case because the original judgment and decree is not sought to be amended. The court below has also not amended the original judgment and decree by which the rights of the parties have been settled. In the judgment, it has been held that the plaintiff has got only 1/4th share in the property of Muzaffarpur. The part was omitted in the form of the decree. The question is whether the decree can be said to be correct decree subsequently sealed and signed which was prepared on the basis of the original judgment and decree. In my opinion, there should not be any difference between the judgment and the subsequent engrossment of the terms and conditions i.e. operative part of the judgment in the form of the decree and if there is mistake, the court has the jurisdiction to correct this accidental mistake committed in the form of the decree.

In view of the above facts, the fact of the above decisions is not applicable in the present one. Here, the court below on perusal of the report of the Seristedar and record found that there is a mistake committed by the office which was corrected.

From perusal of the impugned order, it appears that the court below has considered many decisions cited by both the parties and then has passed a reasoned order recording a finding that only the mistake has been corrected. Now, therefore, even if the matter is remanded to the court below directing to hear the petitioner then also it will not make any difference because the mistake is the mistake. It is not the case of the petitioner that there is no mistake or there is no accidental mistake or omission. The form of the decree is not in conformity with the judgment and decree dated 31.01.1958. Here, in the original judgment, no amendment is made nor any correction is made. Only while the terms and conditions i.e. operative part of the judgment are engrossed in the form of the decree, a mistake was committed by the office which has been corrected.

In view of the above facts and circumstances of the case, the decisions relied upon by the learned counsel for the petitioners are not applicable in the present case and are not in favour of the petitioner.

Further, the Hon'ble Supreme Court in the case of **Jai Singh and others v. Municipal Corporation of Delhi and another**, **2010(9) Supreme Court Cases 385** has held that for the purpose of supervising the order passed by the court below, the High Court cannot substitute its own finding/view. Moreover, in

the present case, in view of the above facts and circumstances of the case particularly when only mistake has been corrected under Section 152 on the basis of the report of the Seristedar, it can be treated to be an action taken by the Court suo motu under Section 152 C.P.C. for correcting the clerical mistake.

Thus, I find no reason to interfere with the impugned order and accordingly, this Civil Miscellaneous application is dismissed.

(Mungeshwar Sahoo, J)

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