

IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP No. 1189 OF 2022

Aparna Bewa and others *Petitioners*
Mr. Prafulla Kumar Rath, Advocate
-versus-
Bijuli Kamila and others *Opp. Parties*

CORAM:
JUSTICE K.R. MOHAPATRA

Order No.

ORDER
30.11.2022

01. 1. This matter is taken up through hybrid mode.
2. Order dated 29th September, 2022 (Annexure-1) passed by learned 1st Additional Senior Civil Judge, Balasore in F.D.O.S. No.213 of 1980-I is under challenge in this CMP, whereby an application under Section 152 C.P.C. filed by the Petitioners has been rejected.
3. Mr. Rath, learned counsel for the Petitioners submits that O.S. No.213 of 1980-I was filed for partition and preliminary decree was passed. During final decree proceeding, some developments took place. Since learned trial Court refused to take into consideration the contention of the Petitioners with regard to adjustment of the property purchased before making the preliminary decree final vide his order dated 4th July, 2014, the Petitioners moved this Court in CMP No.866 of 2014 disposed of on 8th December, 2015 with the following direction:

“7. From the facts narrated hereinabove and keeping in view the dispute involved in the case specifically keeping in mind the prayer made in the

application at the instance of present petitioners and further following the decision of this Court as well as the Hon'ble Apex Court, as discussed herein above, this Court observes that before sending the Civil Court Commissioner to decide the suit land in respect the possession of the co-sharers, the court taking up the final decree proceeding ought to have decided the merit of the application filed by the present petitioners and in the event it would have agreed that the claim of the present petitioners with regard to their right devolving upon death of some of the coparceners and by virtue of the subsequent sale deeds at the instance of some of the coparceners, in such event could have gone for a second preliminary decree and thereafter gone for the final decree of the proceeding. Consequently, while interfering in the impugned order, this Court remits back the matter to the trial court to take a decision on the application of the petitioner in the light of the observation made hereinabove and giving opportunity of hearing to the opposite parties and pass an order afresh. Till such period, deputation of Civil Court Commissioner for dividing the suit property respecting the possession of co-sharers of the suit land shall remain stayed."

Accordingly, the Petitioners produced documents, which were marked as Exts.A-2 to W-2/3 which included Exts.G/2 & K/2. But, while passing the preliminary decree on 9th March, 2018, learned trial Court omitted to take into consideration the land purchased in under the Ext.G/2 & K/2.

4. Since it was an inadvertent omission, the Petitioners filed an application under Section 152 C.P.C. for amendment of the final decree proceeding and to incorporate Exts.G/2 & K/2 in the final decree proceeding. The said application has been rejected vide order dated 29th September, 2022 under Annexure-1. Hence, this CMP has been filed.

5. Mr. Rath, learned counsel for the Petitioners referring to the order passed in CMP No.866 of 2014, Exhibits annexed to the CMP as Annexure-12 and observation of learned trial Court in the penultimate paragraph of the judgment dated 9th March, 2018, submitted that learned trial Court has taken into consideration Exts.G/2 & K/2 in the said judgment wherein it is observed as under:

“Furthr the OP Nos.1 to 7 have contended that the OP Nos.2,3 & 6 have purchased land from OP Nos.12,13,14 & 17. In respect of purchase by OP No.2 certain documents has been provided vide Exts.A-2 to W-2/3.”

6. Thus, it is apparent that omission of Exts.G/2 & K/2 in the said judgment was an accidental slip and inadvertent omission and squarely falls under Section 152 C.P.C. In order to avoid multiplicity of litigation, learned trial Court ought to have allowed the said petition and incorporated Exts.G/2 & K/2 in the subsequent preliminary decree. However, learned trial Court relying upon the case law in **Punjab –v- Darshan Singh**, reported in AIR 2003 SC 4179 and Civil Appeal No.4876 of 2007 dated 12th October, 2007 held that only accidental omission and mistake is permissible to be corrected under Section 152 C.P.C. and rejected the petition. It is also submitted that the impugned order under Annexure-1 is cryptic and non-speaking one. Hence, the impugned order under Annexure-1 is liable to be set aside and the matter be remitted back to learned trial Court for fresh adjudication of the petition under Section 152 C.P.C..

7. Considering the submission made by learned counsel for the Petitioners, this Court finds that although learned trial Court

has referred to Exts.A-2 to W-2/3, but, subsequently while discussing the matter did not refer to the Exts.G/2 & K/2 in the said paragraph. As such, incorporation of said Exts.G/2 & K/2 in the said judgment as well as preliminary decree, will require adjudication, which is not permissible under Section 152 C.P.C.. In that view of the matter, the Petitioners have remedy either to file a review or file an appeal against the said judgment and decree.

8. At this stage, Mr. Rath, learned counsel submits that interest of justice will be best served, if the Petitioners prefer an appeal, if so advised. But, there is a delay of more than four years in preferring the appeal. Hence, he prays for a direction to consider the application for condonation of delay liberally.

9. In view of the above, this Court without interfering with the impugned order under Annexure-1, disposes of the CMP with an observation that, if the Petitioners file an appeal against the judgment and decree in question within a period of two weeks hence, delay in filing the appeal may be considered liberally keeping in mind that the CMP was pending before this Court from 24th November, 2022 till date along with other grounds.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge