



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6611 OF 2012

Balkrishna s/o Vasudevrao Naik,
Age : 49 years, Occu. : Agri.
R/o. : AUSA, Tq. AUSA, Dist. Latur

.. Petitioner

Versus

1. Indubai w/o Baburao Borphale,
Age : 65 years, Occu. : Agri. & H.W.,
R/o. : AUSA, Dist. Latur.
2. Vijaykumar s/o Baburao Borphale,
Age : 46 years, Occu. : Agri.,
R/o. : Kajala, Dist. Osmanabad.
3. Sharad s/o Baburao Borphale,
Age : 43 years, Occu. : Agri.,
R/o. : Kajala, Dist. Osmanabad.
4. Maheshshankar s/o Baburao Borphale,
Age : 39 years, Occu. : Agri.,
R/o. : Kajala, Dist. Osmanabad.
5. Shantabai w/o Chandrakantrao Bhosale,
Age : 63 years, Occu. : Household.,
R/o. : AUSA, Dist. Latur.

6. Mohd. Mohiuddin Sayed,
Age : 59 years, Occu. : Agri.,
R/o. : Almala, Tq. AUSA, Dist. Latur.

.. Respondents

Mr. Vinesh C. Solshe, Advocate for the Petitioner.

Mr. M. L. Dharashive, Advocate for Respondent Nos. 2 to 4.

CORAM : SHAILESH P. BRAHME, J.

DATE : 13th DECEMBER, 2023.

JUDGMENT :-

. Heard learned counsel Mr. V. C. Solshe for the petitioner and learned counsel Mr. M. L. Dharashive for the respondent Nos. 2 to 4. None appears for the remaining respondents.

2. Rule. Rule is made returnable forthwith. Heard the parties finally at the admission stage.

3. The petitioner is challenging an order dated 05.07.2011 passed by the learned Principal District Judge, Latur in Misc. Civil Application No. 12/2007 thereby allowing the application and permitting to amend decree passed by the Appellate Court.

4. The petitioner is the original defendant No. 3. The respondent Nos. 2 to 4 had filed R.C.S. No. 170/1976 for partition and possession against the husband of the respondent No. 1 namely Baburao, the respondent No. 1 – Indubai and the purchasers including the present petitioner. The suit was decreed on 30.07.1980 by the Trial Court. The operative part of the judgment is as follows :

Order

The suit of the plaintiffs is partly decreed with proportionate costs.

(1) Plaintiffs are hereby declared owners having 4/6th share in the suit property agricultural land and house except 3 acres land out of 40/A which is in possession of Defendant

No. 3.

(2) Plaintiffs are entitled to partition and separate possession of their 4/6th share together (1/6th share of each plaintiffs) in the suit property agricultural land S. No. 41/A, admeasuring 9 acres 7 gunthas 43-A, 3 acres 2 gunthas and western side 3 acres portion of S. No. 40/A and suit house.

(3) The sale-deed executed by Defendant No. 1 in favour of Defendants Nos. 3, 4 and Defendant No. 5 are not binding on the shares of the plaintiffs.

(4) Partition of the agricultural land be effected through Collector, Osmanabad and copy of the decree be sent to Collector for partition.

(5) Partition of suit house be made through Court by appointing a Commissioner.

(6) Plaintiffs suit in respect of partition and possession of eastern side 3 acres land out of S. No. 40/A which was transferred in favour of Shri Digamberrao possession of Defendant No. 3 is dismissed.

5. Being aggrieved, the purchasers had filed Regular Civil Appeal Nos. 90/1980, 95/1980 and 96/1980. Pertinently, the respondent No. 1 – Indubai did not prefer any appeal. Neither an appeal was preferred by the plaintiff No. 4 – Narsing whose share is sought to be adjusted by the respondent No. 1 by her Misc. Application No. 12/2007. The appeals were dismissed on 29.04.1985. Against that, three second appeals were preferred which were also dismissed. The decree passed by the Trial Court became final and binding.

6. The respondent Nos. 2 to 4 filed Regular Darkhast No. 17/1983 for execution of the decree which received the finality. There was partition by metes and bounds of the suit lands involved in the suit. The decree was satisfied and hence, on 15.09.2005 an order was passed by the Executing Court in Regular Darkhast No. 17/1983. The respondent No. 1 was party to the suit, appeal as well as execution, but no grievance was made by her against the execution of the decree.

7. On 21.09.2007, the respondent No. 1 – Indubai preferred Misc. Application No. 12/2007 under Section 152 of the Code of Civil Procedure (for short “C.P.C.”) seeking modification in the decree. The learned Principal District Judge after hearing the parties allowed her application and the decree passed by the Trial Court which merged in the decree of appeal was directed to be amended as follows :

ORDER

The application is allowed with no costs.

The common judgment and decree, passed in Regular Civil Appeal Nos. 90 of 1980, 95 of 1980 and 96 of 1980, which were directed against the judgment and decree passed in RCS No. 170/1976, decided by the Civil Judge JD, Ausa, dist. Latur, is ordered to be amended by incorporating following sentences :-

“It is hereby declared that the applicant Indubai Baburao Borphale (original respondent No. 5 in three appeals) shall be entitled to 1/3rd share in the suit properties bearing Sy. Nos. 40/A, excluding 03 acres of land,

which is allowed to be retained by the purchaser and the field bearing Sy. No. 41/A and 43/A, situated at Ausa, Dist. Latur and also to the separate possession of her 1/3rd share in the above mentioned agricultural lands.

The precept u/s. 54 of CPC for carving out the separate 1/3rd share of the applicant in the above mentioned 03 properties, be sent to the Collector, Latur.

The amendment or correction in original judgment and decree, passed in three appeals, be carried out, along with the note of this order.”

8. The learned counsel for the petitioner submits that, he is the purchaser from Survey No. 40/A eastern side of three acres of land. The land acquired by the petitioner is excluded from the operation of the decree and rather the suit was dismissed to that extent which is evident from operative clause No. (6) of the judgment and decree dated 30.07.1980 passed by the Trial Court. The impugned order is without jurisdiction and perverse because the decree which attained finality and which is satisfied way back on 15.09.2005 is sought to be reopened after two (02) years.

9. The learned counsel submits that, the respondent No. 1 – Indubai was a party to the suit, appeal as well as execution. She did not raise any grievance against the decree passed. Hence, she is estopped from contending that modification is necessary and share which was falling to the account of Narsing needed to be adjusted. He further submits

that, the impugned order is against the scope and the ambit of the Section 152 of the C.P.C.

10. The learned counsel would submit that, because of the impugned order a great prejudice is caused to him and the position which is settled by the decree and which is confirmed by High Court has been unsettled. The finding recorded by the learned Judge that no decree is drawn in appeal by the First Appellate Court and there was no merger of the decree is perverse. He has assailed the finding recorded in paragraph Nos. 22 and 23 of the impugned order that Indubai gets share in the partition and inadvertently it was not given. He would submit that the findings recorded in paragraph Nos. 25, 26 and 27 are perverse and impermissible while entertaining the application under Section 152 of the C.P.C. Lastly, he would submit that, the learned Judge has travelled beyond the scope of Section 152 of the C.P.C. and reversed the position irreparably.

11. The learned counsel for the petitioner seeks reliance upon the judgment rendered by the Madras High Court in the case of A. Palanivel Chettiar Vs. R. Elumalai reported in AIR 1985 Madras 303 to buttress the submission that, when the decree is fully satisfied and becomes dead, it would not be possible to indulge in an amendment to the decree.

12. Per contra, the learned counsel for the respondent Nos. 2 to 4 supports the impugned order. All the aspects of the matter and the entitlement of the respondent No. 1 – Indubai have been taken into account by the learned Judge. He would submit that, Narsing – plaintiff No. 4 was having 1/3rd share and his share devolved/merged upon the share of Indubai. He further submits that, the correction in the decree can be made either suo motu, or on the application and there is no limitation for that. As the decree of the Trial Court merged in the Appellate Court's decree, the Appellate Court had every power to correct the decree under Section 152 of the C.P.C.

13. I have considered the rival submissions of the parties and gone through the relevant papers. Following are the admitted facts.

(i) R.C.S. No. 170/1976 was decreed on 30.07.1980. R.C.A. Nos. 90/1980, 95/1980 and 96/1980 were preferred which were dismissed on 29.04.1985. Against that, second appeals were preferred and dismissed.

(ii) The operative part of clause No. (6) of decree passed by the Trial Court relates to the claim and interest of the petitioner. No appeal is preferred against the same either by the respondent – Indubai or anybody. The said operative part has become final, binding and executable.

(iii) The decree is satisfied by allotting shares by metes and bounds. The satisfaction of the decree has been recorded by the order dated 15.09.2005. The execution proceedings are closed and nothing survive to be executed.

(iv) The respondent No. 1 for the first time on 21.09.2007 preferred application under Section 152 of the C.P.C. seeking correction in the decree before the District Court.

14. The respondent No. 1 preferred Misc. Application No. 12/2007 under Section 152 of the C.P.C. Section 152 of the C.P.C. is 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.”

15. In the present matter, the decree passed by the Trial Court on 30.07.1980 became final, binding and executable. By adopting due procedure of law through Regular Darkhast No. 17/1983 the decree has been executed allotting shares by metes and bounds. By order dated 15.09.2005, execution was closed as the decree was satisfied. When the decree is satisfied, all the rights and liabilities are settled,

certainly, it can be said to be dead for all the practical purposes.

16. The respondent No. 1 preferred application purported to be under Section 152 of the C.P.C. after two (02) years i.e. on 21.09.2007 for modification/correction of the decree. The respondent No. 2 was party to the suit, appeals and the execution and could have raised the objections or sought modification/correction of the decree when it was alive or yet to be satisfied. She is estopped from seeking any correction in a satisfied decree after two (02) years by filing present application.

17. Section 152 of the C.P.C. permits only clerical, arithmetical mistakes in the decrees or the errors from any accidental mistake, slip or omission to be corrected. The respondent No. 1 has come up with altogether new theory of her entitlement due to death of one of the parties Narsing. She claims entitlement of share after demise of Narsing which is inadvertently excluded by the Trial Court and the Appellate Courts. This is amounting to be opening of the matter which is not the purport to the Section 152 of the C.P.C.

18. There is very limited scope for correcting or modifying decree under provisions of Section 152 of the C.P.C. The decree, if satisfied, by allotting shares to the parties by metes and bound becomes dead one. Such dead decree can not be corrected on merits under Section 152 of

the C.P.C. If a decree is permitted to be corrected on merits that too when it has become dead, then no litigation will end. Even if the decree is unequitable or has some errors, that can not be corrected on merits by invoking Section 152 of the C.P.C.

19. The respondent No. 1 – Indubai had independent remedy to assert her claim, but not by way of application under Section 152 of the C.P.C. Even in summary manner and after satisfaction of the decree that too after two (02) years this type of enquiry which is conducted by the learned District Judge is without jurisdiction. I am of the considered view that the impugned order is in the abuse of process of law.

20. The findings recorded by the learned Judge that inadvertently Indubai was not given share and the decree of the Trial Court had not merged in the decree passed in appeal are perverse and unsustainable. In that view of the matter, I find merit in the submissions of the learned counsel for the petitioner that the respondent No. 1 is estopped from challenging the decree or seeking modification in the decree. He is right in submitting that the impugned order is beyond scope of Section 152 of the C.P.C.

21. The findings recorded by the learned District Judge in paragraph

Nos. 22 and 23 are unsustainable. The learned Judge was exercising limited jurisdiction under Section 152 of the C.P.C. and it was not permissible to re-assess the entitlement of the parties or to re-determine their shares which received finality.

22. The learned Judge has overlooked that by permitting to amend the decree the settled matter has been reversed. It has far reaching effects. I am of the considered view that the petitioner's right, title and interest is jeopardized by the impugned order. Because of the impugned order whole complexion would change and made it to further complications.

23. The submission of the learned counsel for the respondents that the decree can be corrected at any stage of the proceedings or time has no merit. It is not permissible to interfere with the decree on merits unless there is enabling statutory provisions. I have recorded that Section 152 of the C.P.C. has been violated. His further submission is that, the decree of the Trial Court merged in the Appellate Court and therefore, the Appellate Court can correct the decree is also not correct. The Appellate Court could not have corrected the decree after its satisfaction way back in the year 2005.

24. For the reasons recorded above, I dispose of this petition by following order.

ORDER

(i) The impugned order dated 05.07.2011 passed by the learned Principal District Judge, Latur in Misc. Application No. 12/2007 is quashed and set aside.

(ii) Misc. Application No. 12/2007 stands rejected.

(iii) The rule is made absolute. There shall be no order as to costs.

(SHAILESH P. BRAHME, J.)

PS.B.