

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.1740 OF 2022

IN

SUIT NO.639 OF 2000

VISHAL
SUBHASH
PAREKAR

Digitally signed by
VISHAL SUBHASH
PAREKAR
Date: 2023.02.23
18:32:48 +0530

M/s. Jayshree Builders

...Applicant/
Ori. Defendant No. 1

In the matter of
Bandra Rang Mahal Co-operative Housing
Society Limited and Others

...Plaintiffs

vs.

Jayshree Builders and Others

...Defendants

Mr. Shanay Shah a/w. Ms. Annapoorna Sheshadri i/b. M/s.
Narayanan & Narayanan, for the Applicant.

Mr. Rohaan Cama a/w. Mr. Bhavik Lalan, Mr. Naresh Chheda and
Mr. Rishab Murali i/b. Dhruve Liladhar & Co., for the Plaintiff No. 1.

CORAM : N. J. JAMADAR, J.

DATE : FEBRUARY 21, 2023

P.C.:

1. This application is preferred, purportedly under section 152 of the Code of Civil Procedure, 1908 (the Code) seeking, inter alia, the following reliefs:-

(a) This Court be pleased to allow the present application and permit the applicant/defendant No. 1 to annexe the plan of the property and schedule II referred to in paras 1(a) and 1(f) and 1(b) respectively of the consent terms and marked Exhibit B and Exhibit C hereto to the consent terms dated 12th December, 2007 passed in the above matter Exhibit A hereto.

(b) An order be passed by this Court disposing of the above suit in terms of the above consent terms with the annexures thereto as per prayer (a) above.

2. The applicant is the original defendant No. 1 in Suit No. 639 of 2000 which came to be disposed of in accordance with the consent terms dated 12th December, 2007 executed by and between plaintiff and defendant Nos. 2 to 15, on the one part and defendant No. 1, on the other part, consequent to the settlement having been arrived at between the parties, by an order dated 12th December, 2007 which reads as under:-

1] Parties to the suit have settled their dispute out of the Court. The terms of settlement are drawn in the form of consent terms dated 12.12.2007. They are duly signed by the plaintiff and defendant Nos. 1 to 14 and 16. The consent terms are taken on record and marked Exh."X" for identification.

2. Parties to the suit have also circulated Minutes of Order dated 12.12.2007 duly signed by the Advocate for the Plaintiff as well as by the defendant No.1 and Advocate for the Defendant Nos. 2 to 15. All of them jointly prayed that decree in terms of consent terms dated 12.12.2007, signed by the parties, be passed. Undertakings of all parties are accepted.

3. The suit and the Motion No. 641 of 2007 stand disposed of in terms of Minutes of order.

4. Parties to bear their own costs.

5. Decree be drawn up accordingly.

3. The applicant asserts the consent terms, inter alia, provided that the plaintiff Nos. 2 to 31 and defendant Nos. 2 to 15, in partial modification of the provisions contained in Clause 3 and 5 of the Agreement dated 30th May, 1997 (Exhibit C to the Plaint), agreed to

accept through plaintiff No. 1 an aggregate lumpsum of Rs. 1,50,00,000/- as consideration for cooperating with defendant No. 1 and not objecting to the development by defendant No. 1 of the rear portion of the land bearing CTS Nos. 722 to 726 of Bandra (w) as shown by a boundary line coloured green on the plan of the said property annexed to the said agreement and also annexed hereto (consent terms) in the manner contemplated under the said agreement.

4. The defendant No. 1 had paid to the plaintiffs and defendant Nos. 2 to 15, the sum of Rs. 70 lakhs prior to the filing of the said suit. The balance amount of Rs. 80 lakhs was paid to plaintiff No. 1 before the execution of the said consent terms. The plaintiff No. 1-society agreed to distribute the said sum of Rs. 80 lakhs amongst its members i.e. plaintiff Nos. 2 to 31 and defendant Nos. 2 to 15 according to their entitlements as more particularly set out in Schedule No. 2 appended thereto (the consent terms). The plaintiff and defendant Nos. 2 to 15 agreed and bound themselves not to raise any objection to defendant No. 1 carrying out additional construction as and when possible (by use of permitted TDR) in one or more phases, on the rear portion of the suit property (as shown by a boundary line coloured green on the plan of the said property

annexed to (Exhibit C to the Plaint) by way of vertical or horizontal development to the existing building, subject to stipulation as to the extent of the development.

5. The defendant No. 1 contends that though the consent terms make specific reference to the plan of the suit property (Exhibit C to the Plaint) and also record that the said plan was also annexed to the consent terms, in fact, the said plan and Schedule II containing the list of the members to whom the amount was distributed by plaintiff No. 1- Society was not annexed to the consent terms. When the applicant/defendant No.1 approached the 1st Assistant Master for settling the draft of the consent decree drawn up, the 1st Assistant Master opined that the plan referred to in paragraph 1(a) and 1(f), and Schedule II, referred to in paragraph (b), of the consent terms, do not appear to have been annexed to the consent terms and form part thereof. Therefore, the applicant/defendant No. 1 is constrained to approach the Court to seek amendment in the decree so as to annex the plan of the suit property and Schedule II referred to in paragraph Nos. 1(a), 1(f) and 1(d), respectively, of the consent terms. Hence, this application.

6. An affidavit in reply is filed on behalf of plaintiff No. 1.

7. The application is opposed on the ground that it is not at all tenable in a disposed of proceeding. The issue can not be reopened by preferring an interim application. The proper remedy is to prefer an application for review on the grounds permissible under Order 47 of the Code. Secondly, the application is hopelessly barred by limitation as it is moved after 15 years of the disposal of the suit. Even the application for drawn up decree before the Prothonotary was barred by limitation stipulated under the Bombay High Court (Original Side) Side Rules, 1980. Disguised as an application for correction of an innocuous error the defendant No. 1 desires to get away with the bar of limitation and seek an order from the Court which would imply that the suit came to be disposed of by such order. Since, the execution of the decree is clearly barred by the law of limitation, there is no propriety in now seeking the amendment in the decree.

8. The plaintiff No.1 further contends that the application is otherwise unwarranted as there is no dispute about the fact that the consent terms referred to the plan annexed to the Agreement (Exhibit C to the plaint). Nor there is any controversy over the payment of a sum of Rs. 80 lakhs by the defendant No.1 to plaintiff No. 1. The plaintiff No. 1 also objects to the correction of the decree

on the count of the conduct of the defendant No. 1 in not complying with the obligations under the decree and making the plaintiff No. 1 to seek redressal of the grievances by approaching the authorities. The present application, according to the plaintiff No. 1, is actuated by the design to obtain undue advantage of the change in the Development Control Regulations. Therefore, the application deserves to be rejected.

9. I have heard Mr. Shanay Shah, learned counsel for the applicant and Mr. Rohaan Cama, learned counsel for the plaintiff No. 1/ respondent.

10. At the outset Mr. Shah, the learned counsel for the applicant, on instruction, submitted that the applicant does not press the reliefs in terms of prayer clause (b) seeking an order for disposal of the suit in accordance with the consent terms sought to be amended in terms of prayer clause (a).

11. Mr. Cama, the learned counsel for the plaintiff No.1 submitted that nonetheless defendant No. 1 has to surmount insuperable impediments. First and foremost, according to Mr. Cama, application seeking relief by way of interim application in a

disposed of suit is legally impermissible. Once a suit or proceeding is disposed of, the Court becomes *functus officio*. It is not open to Court to pass orders in a matter which stood disposed.

12. Reliance was sought to be placed by Mr. Cama on an order passed by this Division Bench of this Court in the case of **Janhit Manch and Others vs. State of Maharashtra and Others**¹ wherein it was observed that the law is settled that once proceedings stand finally terminated by a judgment and order of the Court, the same cannot be reopened except by preferring an application for review on the grounds such as those mentioned in Order 47 of the Code.

13. Reliance was also placed on a judgment of the Supreme Court in the case of **State of Uttar Pradesh vs. Brahm Datt Sharma and Another**² wherein the Supreme Court proscribed the course of entertaining the Misc. Application in a proceeding which stood finally terminated by a decree and order.

14. I am afraid the aforesaid propositions govern the facts of the case with equal force. It is indubitable that the suit came to be disposed of on account of the settlement arrived at between the

¹ NMS No.140/09 in WP No.1325/03 Dt.14/07/22.

² (1987) 2 Supreme Court Cases 179.

parties as incorporated in the consent terms dated 12th December, 2007. The decree was ordered to be drawn in accordance with the consent terms. There is no controversy over either the execution of the consent terms, or at this stage, compliance thereof.

15. The substance of the instant application is that though the plan was specifically referred to in Clause 1(a) and 1(f) of the consent terms, as the very plan appended to the agreement (Exhibit C to the Complaint) and also stated to have been annexed to the consent terms, in fact, such plan was not annexed. It is imperative to note that the plaintiff No. 1 does not contend that either this stand of the defendant No. 1 is incorrect or the plan, as referred to in the consent terms, was annexed to the consent terms.

16. In a sense the parties are ad idem on the two points. First, the plan referred to in the consent terms was the very plan annexed to the agreement (Exhibit C to the Complaint). Two, the said plan was not annexed to the consent terms. In this fact situation, it would be apposite to consider the provisions contained in section 152 of the Code. They read as under:-

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.

17. The Court is empowered to correct the clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission. The stage of the proceeding does not matter. Such a correction can be made at any time. The Court is empowered to correct its record *suo motu* or on the application of any of the parties.

18. The power under section 152 of the Code, however, does not partake the character of review. The corrections which can be legitimately made by invoking section 152 are only accidental omissions or mistakes. Any correction which touches upon the merits of the case, falls beyond the purview of section 152 of the Code. The avowed purpose of the vesting of general power in a Court to amend its judgment or orders, is to ensure that the act of the Court does not cause prejudice to the parties.

19. A useful reference in this context can be made to a judgment of the Supreme Court in the case of State of Punjab vs. Darshan Singh³ wherein the Supreme Court expounded the nature and

3 (2004) 1 Supreme Court Cases 328.

import of the power contained in section 152 of the Code. It reads as under:-

12] [Section 152](#) provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under [Section 152](#) of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The 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 omission sought to be corrected which goes to the merits of the case is beyond the scope of [Section 152](#) as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the Section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of [Sections 151](#) and [152](#) of Code even after passing of effective orders in the lis pending before them. No Court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this

Court in [Dwaraka Das v. State of Madhya Pradesh and Anr.](#) (1999 (3) SCC 500) and [Jayalakshmi Coelho v. Oswald Joseph Coelho](#) (2001 (4) SCC 181).

13] The basis of the provision under [Section 152](#) of the Code is founded on the maxim '*actus curiae neminem gravabit*' i.e. an act of Court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law", said Cresswell J. in *Freeman v. Tranah* (ER p.967). An unintentional mistake of the Court which may prejudice the cause of any party must and alone could be rectified. In [Master Construction Co. \(P\) Ltd. v. State of Orissa](#) (AIR 1966 SC 1047) it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as to, in effect, pass an effective judicial order after the judgment in the case.

(emphasis supplied)

20. Reliance placed by Mr. Shah on the judgment of the Supreme Court in the case of [Jayalakshmi Coelho vs. Oswald Joseph Coelho](#)⁴ also appears to be well founded. The observations in paragraphs 13 and 14 read as under:-

13] So far as legal position is concerned, there would hardly be any doubt about the proposition that in terms of Section 152 C.P.C., any error occurred in the decree on account of arithmetical or clerical error or

4 (2001) 2 Supreme Court Cases 181.

accidental slip may be rectified by the court. The principle behind the provision is that no party should suffer due to mistake of the court and whatever is intended by the court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing the cause of justice. A reference to the following cases on the point may be made:

The basis of the provision under Section 152 C.P.C. is found on the maxim *actus curiae neminem gravabit* i.e. an act of Court shall prejudice no man (Jenk Cent-118) as observed in a case reported in AIR 1981 Guwahati 41, The Assam Tea Corporation Ltd. versus Narayan Singh and another. Hence, an unintentional mistake of the Court which may prejudice cause of any party must be rectified. In another case reported in AIR 1962 S.C. 633 I.L. Janakirama Iyer and others etc. versus P.M. Nilakanta Iyer it was found that by mistake word net profit was written in the decree in place of mesne profit. This mistake was found to be clear by looking to the earlier part of the judgment. The mistake was held to be inadvertent. In Bhikhi Lal and others versus Tribeni and others, AIR 1965 S.C. 1935 it was held that a decree which was in conformity with the judgment was not liable to be corrected. In another case reported in AIR 1966 S.C. 1047 Master Construction Co. (p) Ltd. versus State of Orissa and another it has been observed that arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate the point, it has been indicated as an example that in a case where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are attributable to the Court who may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits are required for such rectification of mistake. In a case reported in (1999) 3 S.C.C. 500 Dwarakadas Versus State of M.P. and Another this Court has held that the correction in the order or decree should be of the mistake or omission which is accidental and not intentional without going into the merits of the case. It is further observed that the provisions cannot be invoked to modify, alter or

add to the terms of the original decree so as to in effect pass an effective judicial order after the judgment in the case. The trial court had not granted the interest pendente lite though such a prayer was made in the plaint but on an application moved under Section 152 C.P.C. the interest pendente lite was awarded by correcting the judgment and the decree on the ground that non-awarding of the interest pendente lite was an accidental omission. It was held that the High Court was right in setting aside the order. Liberal use of the provisions under Section 152 C.P.C. by the Courts beyond its scope has been deprecated. While taking the above view this Court had approved the judgment of the Madras High Court in Thirugnanavalli Ammal versus P. Venugopala Pillai AIR 1940 Madras 29 and relied on Maharaj Puttu Lal versus Sripal Singh reported in AIR 1937 Oudh 191: ILR 12 Lucknow 759. Similar view is found to have been taken by this Court in a case reported in (1996) 11 S.C.C. 528 State of Bihar and another versus Nilmani Sahu and another where the Court in the guise of arithmetical mistake on re-consideration of the matter came to a fresh conclusion as to the number of trees and the valuations thereof in the matter which had already been finally decided. Similarly in the case of Bai Shakriben (dead) By Natwar Melsingh and others versus Special Land Acquisition Officer and another reported in (1996) 4 S.C.C. 533 this Court found omission of award of additional amount under [Section 23](#) (1-A), enhanced interest under [Section 28](#) and solatium etc. could not be treated as clerical or arithmetical error in the order. The application for amendment of the decree in awarding of the amount as indicated above was held to be bad in law.

14] As a matter of fact such inherent powers would generally be available to all courts and authorities irrespective of the fact whether the provisions contained under Section 152 C.P.C. may or may not strictly apply to any particular proceeding. In a matter where it is clear that something which the Court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the Court to rectify such mistake. But before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the

order or the decree contains or omits some thing which was intended to be otherwise that is to say while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed.. There should not be re-consideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of Courts inherent powers as contained under Section 152 C.P.C. It is to be confined to something initially intended but left out or added against such intention.

(emphasis supplied)

21. Mr. Cama would urge that there can be no quarrel with aforesaid propositions. However, according to him, in the case at hand, the defendant No. 1 is not seeking any amendment in the judgment, decree or order of the Court but seeks to amend the consent terms which the parties had executed. The Court can not lend its assistance to a party who was not diligent and, at any rate, after a period of 15 years. The submission does not merit countenance. It would be taking too restrictive a view of the matter to hold that where a decree is passed in accordance with the

consent terms, and which also form its part and parcel, the Court can not resort to the provisions contained in section 152 of the Code to correct an accidental slip or omission.

22. The prayer to amend the consent terms by inserting the plan, in respect of identity of which as the very plan which was annexed to the agreement (Exhibit C to the Plaint) there is no dispute, I am persuaded to hold that the prayer squarely falls within the ambit of section 152 of the Code.

23. As far as the prayer to amend the consent terms by annexing the chart (Exhibit C) containing the description of the amount which was paid by the plaintiff No. 1 to its members, the matter is not free from difficulty. The identity of the parties to whom the amounts were allegedly paid by plaintiff No. 1, quantum and proof thereof are all matters rooted in facts. Thus, I am not persuaded to allow the prayer to amend the consent terms by including the chart (Exhibit C).

24. The thrust of the submission of Mr. Cama that by seeking amendment in the consent terms, at this length of time, the defendant No. 1 seeks to overcome the bar of limitation, can be

taken care of by clarifying that the amendment shall be without prejudice to the rights and contentions of the parties including raising objections as to drawing up of a decree and execution thereof, on the ground of limitation.

25. Subject to the aforesaid clarification, the application stands allowed in terms of prayer clause (a) to the extent of amending the consent terms by inserting the plan (Exhibit B to the application) and consequently the decree.

26. The applicant/defendant No. 1 is permitted to annex the plan (Exhibit B) to the original consent terms within a period of one week.

27. The plan (Exhibit B) shall be construed as part and parcel of the consent terms and the decree.

28. The prayer to amend the consent terms by including the chart (Exhibit C) stands rejected.

Application disposed.

(N. J. JAMADAR, J.)