

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1338 of 2021

**Smt. Minati Ghosh & Ors.
Vs
Chameli Mondal & Ors.**

For the Petitioners : Mr Partha Pratim Roy
Mr. Sarbananda Sanyal
Ms. Poulomi Chakraborty

For the Opposite Parties : Mr. Siba Prasad Ghosh
Ms. Jyotsna Roy Mukherjee
Ms. Srinjani Mukherjee
Mr. H. Tewari
Ms. C. Roy

Heard on : 22.04.2024

Judgment on : 30.04.2024

Ajoy Kumar Mukherjee, J.

1. One Baidyanat Ghosh was the original owner of the suit plot being no. 1593 under Mouza Gobinda Sarak. Baidyanath sold the said property in favour of Banku Bihari Ghosh, Mathura Mohan Ghosh and Kalidas Ghosh vide registered sale deed in the year 1947 and the plaintiff purchased share of deceased Mathura Ghosh and Bipin Bihari Ghosh in 1981 in the said plot no. 1593 measuring about 10 annas 13 gondas 1 kora 1 kranti i.e. 2/3rd share of original owner Baidyanath. Plaintiff was enjoying the property

jointly with the other co-share but as she was facing inconveniences in joint possession, she filed partition suit before the Trial court, being T.S 313 of 1985. In the said suit the plaintiffs prayed for a decree of declaration of his 2/3rd share in the property but in the schedule he described the area of the property as 0.08 decimal. In fact plaintiff being the owner of 2/3rd share is entitled to more or less 8 (7.96) decimal in the suit plot but showing the lesser quantum of land, she sought for declaration in her favour, which may be intentional or unintentional.

2. In the said suit defendant no. 1/petitioner herein filed an application for pre-emption under section 4 of the Partition Act and the said prayer for pre-emption was allowed by the Trial court and Advocate Commissioner was appointed for assessing the value of the property, with a further direction to the plaintiff to transfer the suit property to the defendant no. 1. However, due to inadvertence of the court below, he directed the plaintiff instead of defendant no. 1 to deposit the required stamp duty on valuation but taking advantage of the wrong recording, the plaintiff deposited the stamp duty and a decree was drawn up on the same day in her favour. Defendant no1 filed an application under section 152 of the code of civil procedure for rectification of the said direction and it was allowed by the Trial court and plaintiff was given liberty to withdraw the stamp duty deposited by her and the final decree passed in her favour was recalled and the plaintiff was directed to execute a registered deed of conveyance in favour of defendant no. 1/petitioner herein.

3. Plaintiff filed Revisional Application before this court, challenging the order of pre-emption granted in favour of defendant no. 1, but such prayer

was rejected and since no appeal was preferred, so it can be said that plaintiffs accepted the order of pre-emption by which the plaintiffs were directed to transfer his share in favour of defendant no. 1 /petitioner.

4. Pursuant to the direction made by the court to deposit in terms of valuation of the property of the plaintiff, assessed by the Advocate Commissioner to the tune of Rs. 9,74,374/-, such deposit was made by the petitioner on 04.02.2015 but as the legal heirs of Pusparani, did not execute the deed in favour of petitioner, he filed Title Execution case no. 5 of 2015. It is submitted by Mr. Roy that in original suit Pusparani claimed 2/3rd share in connection with the deed of purchase for the year 1981, which is marked as exhibit-1 and the quantum of the land mentioned in the said deed is 8 decimal and not 0.08 decimal. Therefore the legal heirs of judgment debtor was duty bound to execute deed of conveyance in respect of 8 decimal of land and for which the petitioner herein prayed for amendment of decree by rectifying 0.08 decimal of land as 8 decimal, appearing in the judgment and decree.

5. Mr. Roy further submits, though the court below held that from the deed which is marked exhibit-1, it seems that the relevant schedule property is actually for 8 decimal of land but the decree was passed with regard to the schedule of plaint which relates to 0.08 decimal of land. He further observed that from the commissioner's report also it appears that the suit property is measuring about 7.9 decimal of land. Said commissioner's report has been accepted, upon hearing both the parties but inspite of that the Court below refused to make correction in the decree with the observation that the particular provision namely section 152 of the Code is for correcting

any clerical or typographical error in the decree and the condition precedent of such correction is that the error must have occurred on the part of the court. So he refused to correct the decree invoking jurisdiction under section 152 of the Code.

6. Mr. Roy in this context submits that the wrong or mistake whatever is appearing in the decree, is on the basis of the plaint which is created by the plaintiff and defendant no. 1/petitioner was not at all responsible for the said wrong. He further submits that from the exhibit-1 as well as commissioner's reports it is established beyond doubt that the actual measurement of the property in respect of which plaintiff sought for declaration of $2/3^{\text{rd}}$ share is measuring about 8 decimal, which learned commissioner has also confirmed while making the valuation. Moreover if the correction is made in the decree, the plaintiff will have no cause to prejudice as they are very much aware about the quantum of land which they are entitled and further the plaintiff cannot take advantage of his own wrong, and the petitioner should not be made to suffer for plaintiff's misrepresentation and/or mis-description of the measurement of the land. There are sufficient evidence for making rectification in the decree. He further submitted that this is not a case where the defendant is claiming more land that they are entitled. This is also not a case where by rectification, property is exchanged with another, for which it can be said, court cannot go beyond the decree. Accordingly he submits that court was not justified in observing that the court enjoins restricted power under section 151 or 152 of the Code or Court has no authority to establish the

identity of the suit property by making necessary correction in the decree. In this context plaintiff relied upon following decisions

(i) Tilak Raj Vs. Baikunthi Devi reported in **2010 (12) SCC 585**.

(ii) Tapas Guha and other Vs. Angur Bala Das , reported in **2009 SCC Online Cal 919**.

(iii) Tiko Vs. Lachmamn 1995 Supp (4) 582.

(iv) Sudarshan Das Vs. Kamalendu Mondal (C.O. 1576 of 2018).

7. Mr. Ghosh learned counsel appearing on behalf the opposite party submits that the petitioner herein filed an application for pre-emption long back and he never sought for any correction in the schedule mentioned property and accordingly the decree was passed and now he cannot pray for correcting the decree, since the executing court cannot go beyond the decree. Moreover the court below was justified in observing that by invoking jurisdiction under section 152 of the Code, the executing court can correct the decree where the mistake occurred due to slip of pen by the Court himself and not by the party in the proceeding. Accordingly the order impugned does not call for interference invoking jurisdiction under Article 227 of the Constitution of the India.

8. I have considered submissions made by the parties.

9. There is no dispute about the proposition of law that section 152 can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in the judgments and it cannot be invoked for claiming a substantive relief which was not granted under the decree. In other words the clerical errors which are not legal errors and which requires no review and which have crept in through inadvertence can be corrected

invoking jurisdiction under section 151 or section 152 of the Code of Civil Procedure.

10. In the present context there is no dispute that the plaintiff purchased the share of deceased Mathura Ghosh and Bipin Bihari Ghosh by dint of exhibit-1 in respect of $2/3^{\text{rd}}$ share of original owner Baidyanath Ghosh. It is also not in dispute that plaintiff being the owner of $2/3^{\text{rd}}$ share by purchase through exhibit-1, is entitled to more or less 8 (7.96) decimal in the suit plot and it can never be 0.08 decimal of land. Accordingly in the suit original plaintiff Puspa Rani claimed $2/3^{\text{rd}}$ share by deed of purchase marked exhibit-1 and the quantum of land in the said deed is more or less 8 decimal and not 0.08 decimal. Accordingly whatever decree passed in the said suit must have been passed in respect of $2/3^{\text{rd}}$ share of original owner Baidya Nath Ghosh and the question of declaring or passing decree cannot be in respect of 0.08 decimal of land. Such wrong/mistakes whatever has been appearing in the schedule of the plaint or in the decree is on the basis of plaint created by the plaintiff and the present petitioner defendant no. 1 was not at all responsible for the said wrong/mistake, though undoubtedly petitioner herein also ought to have vigilant, whether the schedule is depicting correct state of affairs or not.

11. From the plaintiffs deed marked Exhibit-1 as well as commissioners report, it clearly suggests that the actual measurement of the land in question is more or less 8 decimal and learned commissioner had also assessed the valuation of the property in respect of more or less 8 decimal of land in respect of which stamp duty has already been deposited by the petitioner. Learned Court while passing the order impugned also came to a

finding that from exhibit-1 it appears that the schedule property is actually 8 decimal and it also appears from the commissioner's report that the suit property is measuring about 7.9 decimal and said commissioner's report has also been accepted upon hearing both the parties and in the above backdrop the court below held that it can be safely said that the conduct of the opposite party has not been very fair as from all documents it is clear that the suit property relates to 8 decimal of land but the court below observed that the present case is in the stage of execution and there is little scope on the part of the court below to amend the decree and in his impugned order he suggested that the proper recourse for the aggrieved party will be to prefer appropriate proceedings before the appropriate superior forum.

12. Such finding of the court below is not sustainable in the eye of law in view of the fact that section 152 is based on two important principles:-

(i) That an act of the court shall prejudice no man

(ii) That courts have a duty to see that their records are true and they represent the correct state of affairs and even in the absence of move by the parties, the court can *suo moto* make the correction.

13. Needless to say where there is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding the suit, section 152 enables the court to vary its judgment and decree so as to give effect to its meaning and intention. In the present context the intention of the court was to declare plaintiff's share mentioned in exhibit-1 which plaintiffs are entitled. If there was no prayer for pre-emption and if plaintiffs succeeded in the suit, the judgment and decree would not have been meaningful for them.

The court has every power to amend its order so as to carry out the intention and express the meaning of the court at the time when the order was made.

14. In the present case what actually happened is that the decree has overlooked to mention the actual description of the suit property with reference to its measurements indicated in paragraph 2 & 3 of the plaint, which is apparently an accidental omission and as such it is certainly within the competence and jurisdiction of the executing court under section 152 of the Code to rectify such error in the decree. The test to determine whether the slip or omission is accidental or not, the best way is to judge whether the order as it stands represents the intention of the judge at the time he made it and if it does not then a mistake in it, can be treated as accidental slip or omission. The minimum requirement to determine this question would be the presence of some evidence or indication in the judgment that the court had originally intended to provide or grant that which has been omitted. In the present context the intention of the court undoubtedly was to grant relief in terms of the property mentioned in exhibit-1 corroborated by commissioner's report. It was never the intention of the judge at the time of passing the decree to give relief in connection with only 0.08 decimal of land, which is evident from the materials in record. The words clerical or arithmetical mistakes in judgement is qualified with the words "accidental slip or omission" in section 152, means the procedure prescribed by the section can be used to correct omissions however erroneous, which are accidental in the sense that the court had not meant to omit what was actually omitted. Here it is nobody's case that the court intended to omit 8

decimal of land and wanted to place in record only 0.08 decimal of land. In this context reliance can be placed upon judgment of Apex Court in ***Tilak Raj Vs. Baikunthi Devi***, reported in **(2010) 12 SCC 585** and the judgment of a coordinate Bench of this court in ***Tapas Guha and others Vs. Angur Bala Das***, reported in **2009 SCC Online Cal 919**.

15. Since the mistake appears to be clerical in nature in describing the measurement of the suit property in the schedule to the plaint and since the petitioner herein being not responsible for the said typographical mistake which occurred in mentioning schedule in the plaint, there is no reasons as to why such a genuine and *bonafide* mistake cannot be corrected by the court below, exercising his power under section 152 of the Code specifically when the plaintiffs are also aware of the identity of the suit property and the extent of his purchased portion .

16. In such view of the matter **C.O. 1338 of 2021** is allowed.

17. The court below is directed to correct the judgement and decree stating the measurement of the suit property as 8 decimal instead of 0.08 decimal.

18. The order impugned thus, set aside.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)