



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL APPLICATION NO. 250/2022 IN SECOND APPEAL NO. 171/2018

Girish Ramshankar Upadhyay and Ors. .Vs. Anantrai Girishbhai Upadhyay
(Dead thr. LRs.) Rama wd/o Anantrai Upadhyay and Ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

M. G. Bhangde, Senior Advocate assisted by Mr. Shajal S. Sarda,
Advocate for appellant.

Mr. R.D.Hajare, Advocate for respondent Nos. 1 A to 1F and 2 to 9.

Ms K. M. Joshi Advocate for respondent Nos. 1, 2(a), 4, 6, 8, 9 and
4A to 4F in M.C.A. No.122/2022

CORAM : ANIL L. PANSARE, J.

DATE OF RESERVING THE ORDER : AUGUST 14, 2024

DATE OF PRONOUNCING THE ORDER: AUGUST 20, 2024

Heard.

2. The applicants – original defendant Nos. 4, 9 and 10, have filed present application under Section 152 of the Civil Procedure Code, 1908 (hereinafter referred to as the, “CPC”), for amendment of preliminary decree dated 13.10.2003, passed by the Trial Court in Special Civil Suit No. 29/1996.

3. Non applicant No.1 – original plaintiff had filed a suit for partition and separate possession of house property and other properties. The Trial Court decreed the suit and granted 1/5th share each to non applicant No.1 – Anantrai (plaintiff), non applicant no.2 – Arvind (defendant No.1), non applicant No.3 – Vasant (defendant No.2), non applicant No.4 – Sharad (defendant No.3) and applicant No.1 – Girish (Defendant No.4).

4. Applicant Nos. 2 and 3 are sons of applicant No.1. The other non applicants are legal representatives of Arvind, Vasant and Sharad. Anantrai is now represented by his legal representatives.

5. For the purpose of present application, following facts are relevant.

6. One Ramshankar Prabhashankar Upadhyay had, in his lifetime, acquired the suit properties including plot Nos. 88 and 88/1 admeasuring 9122 Square Feet with construction of 2100 Sq. Ft. thereon (suit property No.3). He had three wives, Ramaben – died issueless, Muktaben – died leaving behind Anantrai – plaintiff and Hiraben – died leaving behind five sons namely, Arvind (defendant No.1), Vasant (defendant No.2), Sharad (defendant No.3) Girish (Defendant No.4) and Pravin, who expired in January, 1990 (predeceased his father Ramshankar).

7. Thus, for the purpose of inheritance of properties, Ramshankar had five sons, Anantrai (plaintiff), Arvind (defendant No.1), Vasant (defendant No.2), Sharad (defendant No.3) and Girish (defendant No.4). The Trial Court has accordingly decreed the suit, granting 1/5th share to each son. This decree has attained finality having been tested in all the Courts viz. First Appellate Court, Second Appellate Court and the Supreme Court.

8. Girish then approached the Trial Court, seeking amendment in the decree on the ground that Arvind, his wife and his son Jignesh (defendant No.6) had sold one of the suit

properties i.e. suit property No.3 to Girish and Chirag, vide registered sale deed dated 17.01.2000. Accordingly, Girish sought amendment in preliminary decree to the extent of increasing 1/5th share of Girish in the suit property No.3, so as to make it 2/5th share and correspondingly no share should be granted to Arvind in the said property.

9. The Trial Court rejected the application, *inter alia*, on the ground that this issue has been not raised before any Court including the Hon'ble Supreme Court and, therefore, it is too late to raise the issue in the execution proceeding. The order was challenged before the High Court, but in vain. The applicants have filed review petition against the said order dated 07.01.2021 and is pending before this Court being Misc. Civil Application (Review) No.345/2022.

10. Mr. M. G. Bhangde, learned Senior Counsel, by referring to the judgment of the Hon'ble Supreme Court in the case of **B. Boraiah Rep. Thr. LRs. Vs. M. G. Thirthaprasad & Ors., SLP (C) No.31174/2016**, submits that in terms of Section 153A of the CPC, the First Appellate Court or the High Court in the second appeal, which has confirmed the decree, is the right forum for seeking correction of decree and the Trial Court has no jurisdiction to entertain the application where the decree is affirmed by the First Appellate Court or the Second Appellate Court, as the case may be.

11. In the said case, the High Court of Karnataka, had in first appeal confirmed the decree of the Trial Court. The question that fell for consideration before the Supreme Court was whether the application for correction of the decree,

which has been confirmed by the High Court while deciding the appeal filed there against on merit can be corrected/alterd by the Trial Court, keeping in mind the purport of Section 153A of the CPC. The Supreme Court held that the application before the Trial Court for correction of a decree could be maintained only if the appeal is decided by the High Court under Rule 11 Order XLI of the CPC. However, where the High Court has decided the appeal after due consideration of all aspects on merit and not rejected the appeal under Rule 11 Order XLI of the CPC, the Trial Court has no jurisdiction to entertain the application for correction of the decree passed by the High Court in the first appeal and thus, the High Court will have jurisdiction to entertain the said application.

12. The learned Senior Counsel submits that applying the aforesaid analogy in the present case, this Court, having decided the second appeal on merit, will have jurisdiction to decide the application for correction of the decree. In other words, he submits that the Trial Court had no jurisdiction to entertain the application filed by the applicants for correction in decree. The order rejecting the application will, therefore, be *non est* in law and will be no bar to approach this Court for correction in decree.

13. I find substance in the contentions. The Supreme Court has, in clear terms, held that where the High Court has decided the appeal after due consideration of all aspects on merit and not rejected the appeal under Rule 11 Order XLI of the CPC, the Trial Court has no jurisdiction to entertain the

application for correction of the decree passed by the High Court in the first appeal and thus, the High Court will have jurisdiction to entertain the said application. The order by the Trial Court, in the present case, will be thus *non est* in law. Having said so, the question that now remains is, whether the correction in decree, as sought, could be granted?

14. The applicants have restricted the claim to the extent of 1/5th share in the suit property No.3 viz. Plot Nos. 88 and 88/1 admeasuring 9122 Square Feet along with construction of 2100 Sq. Ft. thereon, allotted to defendant No.1 Arvind. According to the applicants, this share should be given to the applicant No.1 – Girish. This claim has been made on the basis of sale deed dated 17.01.2000 executed by Arvind (defendant No.1), his wife and his son Jignesh, in favour of Girish and Chirag. As such, Arvind and his family has sold entire plot on the ground that Ramshankar Upadhyay (the predecessor in title) has bequeathed this plot in their favour; however, the Will, having been not proved, the Trial Court held that each son of Ramshankar will be entitled to 1/5th share in the property. Girish has come up with a case that though Will is not proved, the sale deed will be binding on Arvind and his legal representatives to the extent of their share i.e. 1/5th share and hence the 1/5th share allotted to Arvind in the said property ought to be given to Girish.

15. Mr. Bhangde, learned Senior Counsel, submits that this is a case of accidental slip inasmuch as the parties skipped the effect of sale deed and did not put forth their

claims in terms of the sale deed. Thus, according to him, this Court could correct the decree in terms of Section 152 of the CPC. The learned Senior Counsel, has invited my attention to the judgment passed by Hon'ble Supreme Court in the case of *S. Satnam Singh and Ors. Vs. Surender Kaur and anr.;* (2009) 2 SCC 562, wherein, the Supreme Court, while dealing with the amendment in decree, has held that in certain situations, for the purpose of complete adjudication of the dispute between the parties, the Appellate Court may also take into consideration subsequent events after passing of the preliminary decree. The Court held that if the property was subject matter of the pleadings and the Court did not frame an issue, which it ought to have done, it can, at later stage when pointed out, may amend the decree. The Supreme Court, however, has then held that the power of amendment will not only be dependent upon the power of the Court but also the principle that a Court shall always be ready and willing to rectify the mistake, which is committed. In the said case, despite pleadings, the Court below failed to frame an issue, which it ought to have and in that context the Supreme Court held that the Court should always be ready and willing to rectify the mistake and thus should amend the decree in such a case.

16. This judgment will be of no assistance to the applicants inasmuch as it is nobody's case that the issue of allotment of 1/5th share of Arvind to Girish, was ever pleaded and considered by any Court. In fact, the case of Girish is that Arvind and his legal representatives have acquired the suit property No.3 under a Will and have sold

entire property to him and his son. The Will was subject matter of trial. Arvind and his son Jignesh failed to prove the Will and, therefore, all the sons of Ramshankar Upadhyay were held entitled to 1/5th share in the said property as well i.e. the suit property No.3. Thus the fact that Arvind had only 1/5th share in the said property has been crystallized in the judgment and not prior thereto and, therefore, there would arise no question to frame issue in this regard. Consequently, it will not lie in the mouth of Girish that the Court, ought to have framed issue and, therefore, should rectify its mistake.

17. There is another reason why the prayer cannot be granted. Apart from the fact that Girish never raised this issue during the trial, appeal or the Special Leave Petition, the claim is based on the sale deed, which indicates that the property has been purchased by Girish and Chirag as partners of Everest Bakery. There is a note in the sale deed that the property has been purchased for Everest Bakery. Thus, firstly, this property has been purchased by two persons namely, Girish and Chirag. As against, Girish alone is seeking transfer of 1/5th share of Arvind. Learned Senior Counsel, during the course of argument, when this point was raised, submitted that the prayer could be amended, however, the prayer has been not amended. Another reason is, the property has been purchased in the capacity of partners of Everest Bakery. The property thus belongs to partnership firm. The learned Senior Counsel argued that the partnership firm is not a legal entity and thus the partners would own the property. However, it is well settled that once the property is brought into stock of the firm, its distribution will be subject to

contract between the partners. It is not known whether the firm has been dissolved. It is further not known as to how the property of the firm is/was to be distributed amongst the partners. In the circumstances, Girish alone cannot claim right over the 1/5th share of Arvind.

18. In any case, this is not a case of accidental slip or correction of clerical or arithmetical mistake in the judgment and decree. The decree, thus, cannot be amended as prayed for. There is no merit in the application. The application is, accordingly, rejected.

(Anil L. Pansare, J.)