

(2015) 04 TP CK 0021
In the Tripura High Court
Case No : CRP No. 113 of 2012

Bharati Nandi Majumder

APPELLANT

Vs

Arati Taran(Ghosh) and Others

RESPONDENT

Date of Decision : 22-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152, 96
Constitution of India, 1950 — Article 227
Hindu Succession Act, 1956 — Section 26

Citation : (2015) 04 TP CK 0021

Hon'ble Judges : S. Talapatra, J

Bench : Single Bench

Advocate : D.K. Biswas, for the Appellant; S.M. Chakraborty and P. Sen,
Advocates for the Respondent

Final Decision : Allowed

Judgement

S. Talapatra, J.—Heard Mr. D.K. Biswas, learned counsel appearing for the petitioners as well as Mr. S.M. Chakraborty, learned senior counsel assisted by Ms. P. Sen, learned counsel appearing for the respondents.

2. This is a petition under Article 227 of the Constitution of India challenging the legality of the order dated 11.05.2012 passed by the District Judge, North Tripura, Kailashahar, now Unakoti Judicial District in Title Appeal No. 05 of 2012 and Civil Misc. 10 of 2012 related to the Title Appeal No. 14 of 2009.

3. The respondent No. 6 filed an application for amendment of the judgment dated 09.07.2010 passed in Title Appeal No. 14 of 2009 under section 152 of the CPC contending that the petitioner herein filed the said appeal being Title Appeal No. 14 of 2009 in the court of the District Judge North Tripura, Kailashahar against the judgment and decree dated 31.07.2009 passed by the Civil Judge, Sr. Division, North Tripura, Kailashahar in T.S.(P) 02 of 2008. By the said judgment dated 31.07.2009, the suit filed by the petitioner herein was dismissed. According to the respondent No. 6, while passing the judgment in the

said appeal, her name was omitted as the co-sharer even though the intention of the court was expressed for giving her share. By that petition some other mistakes that crept in the said judgment had been pointed out. The District Judge, North Tripura, Kailashahar, despite the serious jurisprudential objection raised by the petitioner herein and some other respondents, by exercising the power under Section 152 of the C.P.C. has passed the impugned judgment and order dated 11.05.2012. The operative portion of the said judgment and order dated 11.05.2012 reads as under:

It is found that the court intended to give a share to the convert but it was not given. So the decree may be corrected and share is given to Minati Ghosh-defendant No. 6. In passing the final decree she is entitled to get 1/6th share out of total area of land is given to the defendant No. 6. Defendant No. 5 will get 50% share and 50% share will go in favour of the plaintiff-respondent and defendant No. 1-4 to 6.

Thus rest portion will be partitioned. Each will get 1/6th instead of 1/5th share as ordered earlier in the preliminary decree and the final decree passed by the Civil Judge (Sr. Division). The partition sold out by the defendants is to be excluded from his own share in order to remove the inconvenience for partition of the pond in the suit land the share in the pond may be sold out on market value and party under inconvenience may take the value of the share of property. Other share holder may purchased it and if there is dispute all the share holders are at liberty to sell the share to third party and divide the amount as per share of respective entitlement.

4. Having held thus, the petition filed under Section 152 of the C.P.C. has been allowed with a direction to prepare the decree making the necessary amendments in the judgment as pointed out.

5. Mr. D.K. Biswas, learned counsel while questioning seriously the jurisdiction of the District Judge in passing the impugned judgment and order has pointed out that by the judgment dated 09.07.2010 in Title Appeal No. 14 of 2009, it has been observed by the District Judge, North Tripura, Kailashahar that:

"In the plaint it was stated that the defendant No. 5 being the legal heir of Nikhil Ranjan Ghosh is entitled to get 50% share and the remaining 50% will be divided between the plaintiff and other defendants equally. This plea about the exclusion of two legal heirs from the right to property as per Section 26 of the Hindu Succession Act is also not raised in the memo of appeal. Section 26 of the Hindu Succession Act puts a bar to the succession in respect of the descendants of the converts not to converts at all. So, even a convert is not disqualified to be inherited, this argument of the Ld. Advocate has no force at all."

6. It has been gathered from the records that the respondent No. 6 simultaneous with that application under Section 152 of the C.P.C. had filed another appeal against the judgment and decree passed by the trial court in T.S (P) 02 of 2008. The said appeal appears to have been filed after the final decree was passed on

27.02.2012 in T.S (P) 02 of 2008 by the Civil Judge, Senior Division, North Tripura, now Unakoti Judicial District. Admittedly, the respondent No. 6 did not file any appeal against the preliminary decree and without challenging the preliminary decree, she had challenged the final decree passed by the Civil Judge, Senior Division, Kailashahar, North Tripura in Title Suit(P) 02 of 2008. Unless the preliminary decree as regards the declaration of share is challenged by the respondent No. 6 who was impleaded as the defendant No. 6 in the suit, she cannot challenge the final decree as the final decree is for purpose of physical demarcation of the joint property in accordance with the share declared in the preliminary decree. It appears from the final decree dated 27.02.2012 that on the basis of the report of the Survey Commissioner dated 18.12.2011, the final decree was drawn. Virtually the impugned order is in the nature of the judgment and order disposing both the Title Appeal No. 05 of 2012 filed against the said final decree and the Civil Misc. No. 10 of 2012 filed under Section 152 of the CPC.

7. Mr. Biswas, learned counsel appearing for the petitioner has submitted that while allowing the appeal, the District Judge, North Tripura, Kailashahar having relied on a decision of the apex court in Jayalakshmi Coelho Vs. Oswald Joseph Coelho, AIR 2001 SC 1084 : (2001) 1 DMC 440 : (2001) 3 JT 356 : (2001) 2 SCALE 277 : (2001) 4 SCC 181 : (2001) 2 SCR 207 : (2001) 2 UJ 952 : (2001) AIRSCW 1013 : (2001) 2 Supreme 209 has held that it transpires that what that court intended to do, but the same was accidentally slipped and that slip would deter the ends of justice if the court is not permitted to rectify such slip or mistake. Even the District Judge, North Tripura, Kailashahar has observed that even her conversion did not create any bar to her right to inheritance under Section 26 of the Hindu Succession Act. Section 26 of the Hindu Succession Act does not disqualify a convert. But the fundamental question that has surfaced is that how without any challenge against the preliminary decree, the final decree can be interfered with, has not been answered by the District Judge, North Tripura. He has emphatically laid his reasons in respect of the exercise of the jurisdiction under Section 152 of the C.P.C. Whether the alterations as made in the judgment and decree are permissible within the scope and ambit of Section 152 of the C.P.C.? Mr. Biswas, learned counsel submits that the impugned judgment and order has been passed in exceeding the jurisdiction as provided by Section 152 of the C.P.C. The language of Section 152 of the C.P.C. is unambiguous and that does not extend the jurisdiction of any court to alter the judgment in a free-wheeling manner. Moreover, Mr. Biswas, learned counsel has submitted that the plea raised in the Title Appeal No. 05 of 2012 or in the Civil Misc. No. 10 of 2012 from the respondent No. 6 was categorically rejected and from the reading of the judgment passed in the Title Appeal No. 14 of 2009, it would surface that nowhere the appellate court had expressed any observation that the respondent No. 6 was entitled to any share out of the 50% of the joint property, as it has been held that 50% of the share will go to the defendant No. 5, the respondent No. 5 herein. As such, according to Mr. Biswas, learned

counsel, the impugned order is liable to be interfered with.

8. Mr. S.M. Chakraborty, learned senior counsel appearing for the respondent No. 6 has submitted that if the end of substantial justice is considered, no prejudice has been caused by the impugned judgment and order. Apart that, he has submitted that after the final decree has been passed, the respondent No. 6 cannot have any other jurisdictions for undoing the justice that has occurred for slip.

From the rival contentions, two questions has emerged requiring the response from this Court:

(i) Whether without challenging the declaration made in the preliminary decree as to the share of the joint property, the final decree can be questioned?

9. This Court is of the considered opinion that unless the findings in the judgment based on which the preliminary decree has been passed in the title suit for purpose of partition is challenged, the person, aggrieved by such judgment, after passing of the final decree on the basis of that preliminary decree, is precluded from challenging any finding of the preliminary decree in the garb of challenging the final decree. As such, the impugned judgment and order is not sustainable in law. Apart that, the reason that has been given for altering the judgment and the preliminary decree passed in Title Appeal No. 14 of 2009 cannot be also held as good inasmuch as from reading of the said judgment dated 09.07.2010, it cannot be gathered that there has been any finding that the respondent No. 6 is entitled to any share of the joint property. The other question ancillary to the question above is that whether in exercise of power under Section 152 of C.P.C., the preliminary judgment can be altered substantially or not. Section 152 of the CPC provides that:

152. Amendments 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.

Except those well delineated premises, the court which has passed the judgment, cannot exercise its jurisdiction. No fresh finding, even in order to obviate any manifest error in the judgment cannot be corrected in exercise of the jurisdiction under Section 152 of the C.P.C. There is world of difference in the meaning of "omission and accidental omission".

(ii) Whether non-declaration of the share in favour of the respondent No. 6 is an accidental slip or omission or not?

10. According to this court, this is not at all slip or omission as the finding is very categorical that the plea for giving share in favour of the respondent No. 6 cannot be entertained by the appellate court. Thus, in view of the decision of the apex court in State of Punjab Vs. Darshan Singh, AIR 2003 SC 4179 : (2003) 4 CTC 442 : (2005) 11 JT 285 : (2003) 9 SCALE 35 : (2004) 1 SCC 328 : (2003) 4

SCR 1042 Supp : (2004) 1 UJ 377 : (2003) AIRSCW 5488 : (2003) 7 Supreme 474 , this court holds that:

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.

[Emphasis added]

11. The provisions under Section 152 of the C.P.C. does not confer the court the jurisdiction for granting substantial relief which was not granted by the judgment under reference. In this regard, the decision of the apex court in State of Punjab Vs. Darshan Singh, AIR 2003 SC 4179 : (2003) 4 CTC 442 : (2005) 11 JT 285 : (2003) 9 SCALE 35 : (2004) 1 SCC 328 : (2003) 4 SCR 1042 Supp : (2004) 1 UJ 377 : (2003) AIRSCW 5488 : (2003) 7 Supreme 474 , Bijay Kumar Saraogi Vs. State of Jharkhand, AIR 2005 SC 2435 : (2005) 11 JT 187 : (2005) 7 SCC 748 may be referred to.

12. Having held so, this Court finds that the District Judge, North Tripura, Kailashahar has exceeded its jurisdiction in passing the impugned judgment and order as he ought not have exercised its appellate power under Section 96 of the C.P.C. in the circumstances against the final decree neither ought he have exercised the power under Section 152 of the C.P.C. Hence, this petition is allowed. The impugned judgment and order is set aside.

13. Before parting with the records, it is made clear that if the respondent No. 6 is not precluded by this order from approaching the court of the competent jurisdiction, if she is so permitted by law.

There shall be no order as to costs.