
(2008) 12 KL CK 0054

In the High Court Of Kerala

Case No : I.A. No. 4579 of 2006 in C.M.A. No. 122 of 1996

Raman Nadar Velayudhan Nadar

APPELLANT

Vs

Janaki Karthi

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 152

Citation : (2011) 2 KLT 149

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : R.T. Pradeep and V. Vijulal, for the Appellant; T. Krishnan Unni R.S. Kalkura, Nagaraj Narayanan, T.A. Narayanan Nair and K.K. Chandran Pillai, for the Respondent

Judgement

K.T. Sankaran, J.—This is an application filed by the first Respondent in C.M.A. No. 122 of 1996, who is the second Defendant in O.S. No. 135 of 1973, Munsiffs Court, Neyyattinkara, u/s 152 of the CPC to correct certain errors arising from accidental slip or omission in the judgment in the C.M. Appeal. The suit was filed for partition of plaint A and B schedule items. A preliminary decree was passed on 17.2.1977. In the appeals filed therefrom, the preliminary decree was modified. Two applications were filed for passing a final decree; one by the Plaintiff and the other by the second Defendant. It would appear that in the application filed by the Plaintiff as I.A. No. 4307 of 1983, a final decree was passed. The final decree was challenged in A.S. No. 122 of 1985. It is stated by the counsel on either side that in the appeal, a modified preliminary decree was passed on 22.12.1989. Thereafter, on 27.8.1993, a final decree was passed pursuant to the judgment in A.S. No. 122 of 1985. That was challenged in A.S. No. 416 of 1993 by the second Defendant which was allowed and the case was remanded to the Trial Court as per judgment dated 9.1.1996. The order of remand was challenged by me Plaintiff in C.M.A. No. 122 of 1996. this Court disposed of C.M.A. No. 122 of 1996 as per the judgment dated 6.11.1997 and a final decree was passed. That final decree passed by this Court is sought to be

corrected pointing out that there are errors arising out of accidental slip or omission.

2. The Commissioner appointed in the final decree proceedings submitted eight plans. The Commissioner suggested two modes of division; namely, (1) taking note of the convenient enjoyment of the properties by the parties; and (2) by allotting shares to the sharers in each and every item of property. The division coming under the first category was dealt with in plans I and II (marked as Exts.C1(a) and C1(b)). The division under the second category was made by the Commissioner as per plans III to VIII, which were marked as Exts.C1(c) to C1(h). The Trial Court accepted plans I and II and passed the final decree. As stated earlier, the final decree was challenged by the second Defendant in appeal and the appellate court set aside the final decree passed by the Trial Court and remanded the case to the trial court with a direction to appoint another Commissioner to divide the properties. The appellate court set aside all the plans and report submitted by the Commissioner. The Plaintiff challenged the order of remand in C.M.A. No. 122 of 1996. This Court set aside the judgment of the Appellate Court and, as stated earlier, a final decree was passed accepting the division mentioned in plans III to VIII instead of the division as made in plans I and II.

3. The second Defendant filed an application before the executing court u/s 152 of the CPC to correct the final decree as passed in C.M.A. No. 122 of 1996. That application was dismissed by the executing court taking the view that it had no jurisdiction to correct the final decree which was passed by the High Court. The order of the executing court was challenged by the second Defendant in a Writ Petition, which was disposed of at the admission stage. The order passed by the executing court was set aside and that Court was directed to consider the application afresh. It was held that clerical or arithmetical errors could be corrected by the executing court. The Plaintiff filed a Review Petition in the Writ Petition pointing out that the Writ Petition was disposed of without hearing the Plaintiff and the affected parties. This Court allowed the Review Petition and held that the executing court has no jurisdiction to entertain an application for correction of the final decree, since the final decree was passed by the High Court and not by the Trial Court. It was also held that the second Defendant could approach the High Court for getting the decree corrected.

4. Thereafter, the second Defendant filed I.A. No. 3098 of 2005 before the High Court to amend the decree. That application was dismissed as per order dated 30.8.2008 holding that the decree is not at variance with the judgment and, therefore, there was no scope for correcting the decree making it in conformity with the judgment. The present application, namely, I.A. No. 4579 of 2006, was filed by the second Defendant in these circumstances.

5. The main grievance voiced by the second Defendant is that though a final decree was passed in terms of plans III to VIII, while mentioning the plots, certain errors occurred, thereby, the second Defendant had lost an extent of 71

cents of land mentioned in plan VI and that extent of land was allotted to the Plaintiff erroneously. It is pointed out that by that mistake the second Defendant is put to substantial loss and the Plaintiff is unjustly enriched. Certain other mistakes are also pointed out by the Petitioner which will be discussed in due course.

6. Heard Sri. R.T. Pradeep, learned Counsel appearing for the Petitioner, Senior Advocate Sri. T. Krishnan Unni, appearing for the third Respondent, Sri. R.S. Kalkura, learned Counsel appearing for Respondent No. 26 (assignee from the second Defendant), Sri. Nagaraj Narayanan, learned Counsel appearing for the fifth Respondent (assignee from the second Defendant), Sri. T.A. Narayanan Nair, learned Counsel appearing for the first Respondent/Plaintiff and Sri. K.K. Chandran Pillai, learned Counsel appearing for Respondent No. 6 (Defendant No. 18 - husband of the Plaintiff).

7. Sri. Krishnan Unni, Sri. R.S. Kalkura and Sri. Nagaraj Narayanan supported the Petitioner while the Plaintiff and her husband opposed the application. The Petitioner contended that a mistake was committed while passing the judgment in C.M.A. No. 122 of 1996, thereby, the second Defendant was deprived of a valuable item of property. Learned Counsel appearing for Respondents 1 and 6 submitted that there is no error arising out of an accidental slip or omission and the final decree was passed by this Court making a deviation from plan Nos. 3 to 8 submitted by the Commissioner. According to them, it was a deliberate deviation and such an allotment cannot be termed as an error arising out of accidental slip or omission. The counsel submitted that even assuming that there occurred a mistake in the judgment while considering the question on the merits, such mistakes can be corrected only by filing an appeal or by filing a Review Petition. An application u/s 152 is not maintainable at all to deal with such a situation.

8. The first question to be considered is whether there was an error while passing the judgment in C.M.A. No. 122 of 1996 and if so, whether it is an error which could be corrected by invoking Section 152 of the Code of Civil Procedure. The trial court had accepted plan Nos. I and II and division of the properties was made accordingly. The appellate court set aside the judgment of the trial court and set aside the Commissioner's report and plans and remanded the case to the trial court for fresh disposal. On a reading of the judgment in C.M.A. No. 122 of 1996, it could be seen that the High Court set aside the order of remand passed by the appellate court and accepted plan Nos. III to VIII and a final decree was passed accordingly. The division as per plans I and II did not provide properties to all the sharers in all the items. That was one of the main contentions raised by the second Defendant before the appellate court as well as before the High Court. The High Court stated in the judgment thus:

The second Defendant wanted share in each and every item of properties. Therefore, the commissioner has also prepared plan Nos. III to VIII allotting properties to each and every party in each and every item of property. It is true that this will cause inconvenience to enjoyment. But the Defendants have no

objection in enjoying those bits of land.

After stating so, the High Court set aside the judgment of the appellate court and accepted the division as shown in plan Nos. III to VIII. The grievance raised by the second Defendant and the supporting Respondents is that though the High Court accepted plan Nos. III to VIII and the division thereunder, while stating the different plots to be allotted to the different sharers, the High Court committed mistakes. If it is to be taken that the High Court had passed the final decree in terms of the allotment under plan Nos. III to VIII, it is evident that there are mistakes in stating the different plots to be allotted to the different sharers.

9. It is clear that the High Court while disposing of C.M.A. No. 122 of 1996, accepted plan Nos. III to VIII instead of plan Nos. I and II preferred by the trial court. The High Court also did not agree with the view taken by the lower appellate court that all the plans submitted by the Commissioner are liable to be set aside and the entire matter is liable to be remanded to the trial court. Instead, the High Court thought it fit to accept plan Nos. III to VIII and to pass a final decree accordingly. The judgment would clearly indicate that the High Court did not deviate from the allotment made as per plan Nos. III to VIII. There is no deliberate deviation from the allotment and thereby conferring certain additional rights on the Plaintiff. There is also no deliberate deviation in reducing the extent of land allotted by the Commissioner to the second Defendant. In short, no deviation at all was intended to be made by the High Court. On the other hand, all the facts and circumstances would clearly indicate that the High Court accepted the allotment as per plan Nos. III to VII. If that is so, the submission made by the learned Counsel for the Petitioner/second Defendant that there are errors arising out of accidental slip or omission in the judgment of the High court is liable to be accepted.

10. Plot measuring 84 cents in plan No. VI was not allotted to the Plaintiff by the Commissioner. From that plot, an extent of 71 cents was allotted to the second Defendant. The said extent of 71 cents comprises two plots and those plots were already transferred by the second Defendant to Defendants 7, 8 and 9. Another plot having an extent of 13 cents is occupied by kudikidappu. The allotment as per plan No. VI was made by the Commissioner so that, the second Defendant would be getting his legitimate share and at the same time, the assignees from the second Defendant would be protected. No reasons are stated by the High Court in the judgment in C.M.A. No. 122 of 1996 to alter this allotment and to allot the 71 cents in plan No. VI to the Plaintiff.

11. As per plan No. III, an extent of one acre and 33.830 cents of land was allotted to the second Defendant. The said plot is marked in the plan and the extent allotted to the second Defendant is excluding plot WXYZ marked in the plan. But while passing the final decree, it is pointed out that plot WXYZ is not excluded. In fact, the second Defendant would stand to gain if plot WXYZ is also allotted to his share. But, it is pointed out by the second Defendant that this plot having an extent of 4.5 cents is not allotted to any sharer, the land being

occupied by a kudikidappu. According to the Petitioner/second Defendant, this also constitutes an error in the final decree, arising out of an accidental slip or omission.

12. As per plan No. V, an extent of 93.910 cents was allotted to the second Defendant. In the final decree passed by the High Court that extent is retained towards allotment to the second Defendant. However, while describing the plot, a mistake was committed, submits the Petitioner. On a perusal of the plan as well as the final decree now passed, it is clear that two plots marked in the Commissioner's plan were omitted while describing the plot having an extent of 93.910 cents in the final decree. Evidently, this is a mistake. As per plan No. VIII, the property in Sy. No. 146/9 was divided into several plots. The judgment also indicates that plan No. VIII deals with Sy. No. 146/9, but in the allotment to the second Defendant, the survey number was shown as 140/9. This is a clerical mistake.

13. In the last portion of the judgment, the owelty to be paid by the different sharers is mentioned. It is pointed out by the learned Counsel for the Petitioner that this owelty amount shown in the last paragraph of the judgment related to owelty payable by the different sharers in case the allotment was made as per plan Nos. I and II. That is clear from a reading of paras. 18 and 24 of the Commissioner's report. The owelty mentioned in paragraph 18 of the Commissioner's report would be payable if the allotment is made as per plan Nos. I and II, whereas, owelty amount shown in para. 24 of the Commissioner's report would be payable if plan Nos. III to VIII are accepted. The High Court accepted plan Nos. III to VIII, but by an accidental slip, retained the owelty amount payable in case plan Nos. I and II were to be accepted. Even after accepting plans III to VIII, the court did not accept the owelty as shown in para. 24 of the Commission Report but retained para. 18 of the Commission Report which pertain to allotment as per plans I and II. This is an error arising out of an accidental slip or omission.

14. The next point to be considered is the contention that even if there are errors in the judgment those errors are not errors which could be corrected either u/s 152 or u/s 151 of the Code of Civil Procedure.

15. Learned senior counsel Sri. T. Krishnan Unni relied on the decision in Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. and Others, . He also referred to Rule 14(3) of Order XXVI of the CPC and submitted that where the Court confirms or varies the report of the Commissioner, it shall pass a decree in accordance with the same as confirmed or varied. According to him, if the mistakes pointed out by the Petitioner were not mistakes, but deliberate deviation in the allotment, such deviation should be reflected in the judgment. There is no such finding in the judgment that the Commissioner's report was varied or an allotment different from that made by the Commissioner in plan Nos. 111 to VIII was made as per the judgment.

16. In *Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. and Others*, the Supreme Court, while dealing with the scope and ambit of Sections 151 and 152 of the Code of Civil Procedure, held as follows:

19. CPC recognises the inherent power of the court. It is not only confined to the amendment of the judgment or decree as envisaged u/s 152 of the Code but also inherent power in general. The Courts also have duty to see that the records are true and present the correct state of affair. There cannot, however, be any doubt whatsoever that the Court cannot exercise the said jurisdiction so as to review its judgment. It cannot also exercise its jurisdiction when no mistake or slip occurred in the decree or order. This provision, in our opinion, should, however, not be construed in a pedantic manner. A decree may, therefore, be corrected by the Court both in exercise of its power u/s 152 as also u/s 151 of the Code of Civil Procedure. Such a power of the Court is well recognized.

(emphasis supplied)

17. In *Dwaraka Das Vs. State of Madhya Pradesh and Another*, the omission which was sought to be corrected was an omission in not granting pendente lite interest. It was held that it was not an accidental omission or mistake. The Supreme Court held as follows:

...The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistake 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 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be....

18. In *Jayalakshmi Coelho Vs. Oswald Joseph Coelho*, the Supreme Court held as follows:

15. 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 u/s 152, CPC 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 something 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 mention in the order or the judgment or something which was 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 or 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 Court's inherent powers as contained u/s 152, Code of Civil Procedure. It is to be confined to something initially intended but left out or added against such intention.

19. In *Master Construction Co. (P) Ltd. Vs. State of Orissa and Another*, , the Supreme Court considered as to what is an arithmetical mistake or accidental slip or omission. It was held as follows:

An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. There is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, on elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip or omission made by the court. The obvious instance is a slip or omission to embody in the order something which the court in fact ordered to be done....

20. In *State of Punjab Vs. Darshan Singh*, , the Supreme Court relied on the decisions in *Dwaraka Das's* case and *Jayalakshmi Coelho's* case and held as follows:

The powers u/s 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 Vs. State of Madhya Pradesh* and

Another, and Jayalakshmi Coelho Vs. Oswald Joseph Coelho, .

21. In *Kuruvilla Thomas v. State Bank of Travancore* 1988 (1) KLT 563 the test to be applied to determine whether an error arose out of accidental slip or omission, was laid down as follows:

I feel that a convenient and general test that can be applied to determine whether the correction sought for is in the field of slip or omission is accidental or not, is to examine whether the judgment as it stands represents the intention of the Judge at the time he made it, and if it does, then, a mistake in it cannot be treated as an accidental slip or omission.

22. To err is human. Courts are manned by human beings. In the course of passing a judgment or order, it cannot be said that no mistake whatsoever would be committed by a Judge or a Presiding Officer. The well accepted principle is that an act of Court shall do no harm to the litigant. If it is brought to the notice of the Court that while passing the judgment, a mistake was committed by the Court resulting in injury and hardship to a litigant, it is the duty of the Court to correct the mistake. As held in *Kuruvilla Thomas v. State Bank of Travancore* 1988 (1) KLT 563 the test to be applied as to what the Judge intended. With reference to the facts of the present case, if the Judge wanted to deviate from the allotment made by the Commissioner and it was reflected so in the judgment, there would be no ground to say that it was an error arising out of accidental slip or omission. On the other hand, if the Judge intended to retain the allotment as made by the Commissioner, but still, while stating the different plots to be allotted to different parties, a deviation is made, not deliberately, but inadvertently, that is a clear case of an error which arose out of accidental slip or omission. Such an error is evident in the case on hand. The only alternative that is possible is to correct the error and to remedy the injury caused to the litigant. Dismissal of the application on technical grounds would not be proper. A pragmatic approach to the question is necessary. It only adds to the prestige of the Court, if it corrects its own mistake. The Supreme Court has held in *Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. and Others*, that a decree can be corrected not only u/s 152 of the Code but also u/s 151 of the Code. Learned Counsel appearing for the first Respondent relied on the decision in *Velayudhan Nair v. Kerala K.Y. Kuries (P) Ltd.* 1987 (2) KLT 449 to support his contention that Section 151 CPC cannot be invoked when there is a specific provision under the CPC to deal with the situation. It is well settled that Section 151 of the Code would not be available if there is a specific provision in the Code to deal with a contingency. It is also well settled that an act of the Court shall do no harm to the litigant. In view of the decision of the Supreme Court in *Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Ltd. and Others*, (there cannot be any doubt that if the circumstances so warrant, even the jurisdiction u/s 151 of the Code can be resorted to, to correct a mistake which is evident on the face of record. The power that can be exercised u/s 151 is quite different from the power of review and the power of correcting errors u/s 152 of the Code

of Civil Procedure. Still there may be areas where such errors could not be corrected either by exercising the power of review or exercising the jurisdiction u/s 152 of the Code of Civil Procedure. In those cases, if the Court comes to the conclusion that an error of the Court has caused prejudice to the litigant resulting in injury, nothing prevents the Court from exercising the jurisdiction u/s 151 of the Code of Civil Procedure.

23. Sri. T.A. Narayanan Nair, learned Counsel appearing for the first Respondent, submitted that the present application is barred by res judicata in view of the dismissal of I.A. No. 3098 of 2005 by this Court. That was an application filed by the Petitioner to correct the decree. The application was filed by the Petitioner when R.P. No. 209 of 2005 in W.P. (C) No. 1798 of 2004 was allowed and the earlier order in the Writ Petition directing the executing court to correct the mistake was set aside in review. This Court held that the remedy of the Petitioner is to apply for correction of the decree. Accordingly, the Petitioner filed I. A. No. 3098 of 2005 to correct the decree. That application was dismissed on the ground that the decree is not in variance with the judgment and, therefore, there is no scope for correcting the decree. Thereafter, the present application was filed to correct the judgment by invoking Section 152 of the Code. The question whether there was an error arising out of accidental slip or omission Or a clerical or arithmetical mistake was not considered at any point of time by this Court on the merits and finally decided against the Petitioner. There was no adjudication of that question on the merits. On the other hand, I. A. No. 3098 of 2005 was dismissed on the ground that the application u/s 152 of the CPC was not maintainable to correct the decree when the decree was not in variance with the judgment. For the aforesaid reasons, I am not inclined to accept the contention of the first Respondent.

24. It is relevant to note that the High Court while passing the judgment in C.M.A. No. 122 of 1996 directed that Ext.C1(c) to Ext.C1(h), namely, plan Nos. III to VIII, shall be appended to the decree. This clearly means that the High Court accepted the allotment as per plan Nos. III to VIII. Had any variation been made, those variations should have been directed to be incorporated. Such a direction was not given. This is a clear indication that no deliberate variation was made by the Court while passing the judgment.

25. For the foregoing reasons, I am inclined to allow the application. Accordingly, I.A. No. 4579 of 2006 is allowed. The judgment and decree in C.M.A. No. 122 of 1996 shall stand corrected in the following manner;

1) In the allotment of properties made to the 2 Plaintiff, the following words and figures shall be omitted, namely, "ABCDEFGHJIJ - measuring 84 cents shown in plan No. VI".

2) In the judgment and decree, the allotment made to the second Defendant shall stand substituted as follows: The second Defendant is allotted CDEFGVUJKLTS plot in Sy. No. 139/2-1 in plan III excluding plot WXYZ having an

extent of 1.53.830 acres; NRSFGIJKLMIM3M4 plot excluding TUVW plot and plot B1B2B3B4 (total) 1.01.182 acres in plan IV; A1BCA3A2, FGG1G2G3HA4MM1UVWXY and PQRSTO plot measuring 93.910 cents in plan V; ABEFIJ& BCDE plot in Sy. No. 461/7B having an extent of 71 cents in plan No. VI and ALKHII plot in Sy. No. 461/7B having an extent of 4.224 cents in plan VII; and EFGH plot in Sy. No. 146/9 having an extent of 22.834 cents in plan VIII.

3) The paragraph in the judgment and decree as regards the owelty amount to be paid by the different sharers shall be substituted as follows: The second Defendant shall deposit? 17,141/- and the sixth Defendant shall deposit? 1,130/- towards owelty amount. The Plaintiff, fifth Defendant and the fourth Defendant would be entitled to get Rs. 5,222/-, Rs. 11,500/- and Rs. 1,549/- respectively towards owelty.