

(2010) 02 MAD CK 0229

In the Madras High Court

Case No : C.R.P. (NPD) No. 422 of 2004 and M.P. (MD) No. 1 of 2004

Sornalatha, Velmurugan, Uma and Easwara Pillai APPELLANT

Vs

Ramadhass, Arumugam Pillai (died), Sree Easwaradhas and RESPONDENT
Lakshmi

Date of Decision : 26-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 3, 151, 152, 155

Citation : (2010) 4 LW 236

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : K. Sreekumaran Nair, for the Appellant; M.P. Senthil, for the Respondent

Judgement

R.S. Ramanathan, J.—Heard both sides.

2. O.S. No. 21 of 1996, on the file of the Subordinate Judge, Padmanabhapuram, was filed by the first respondent herein against his father and two brothers and his father Arumugam Pillai was the first defendant and his brother, Sree Easwaradhas was the 2nd defendant and Raghavadhas was the 3rd defendant in the suit. That suit was filed for partition of the first respondent's 1/4th share in the suit property and in that suit, a compromise was arrived at among the parties and as per the memo of compromise, the suit schedule item No. 19 in Survey No. 390/2, of an extent of 19.250 cents, with building thereon was allotted to the share of the 2nd defendant in the suit, namely Easwaradhas and the remaining extent of 65.750 cents in Survey No. 390/2 was allotted to the share of Raghavadhas, the 3rd defendant in that suit. A plan was also attached to the memorandum of compromise and in that plan, 19.250 cents in Survey No. 390/2 was marked as "A plot and an extent of 65.750 cents in Survey No. 390/2 was marked as "B C D E" Plots. But due to inadvertence, while writing the memo of compromise, it was stated that the property that was allowed to the share of A. Sree Easwara Dhas, the 2nd defendant, having 19.250 cents in Survey No.

390/2 was mentioned as "B" Plot and an extent of 65.750 cents in Survey No. 390/2 was mentioned as "A" plot. As stated supra in the plan, 19.250 cents was shown as "A" part and 65.750 cents was shown as "B C D E" and the total extent in survey No. 390/2, after adding "A B C D E" is equivalent to 84 cents. Based on the memo of compromise with plan, a final decree was also passed on 15.04.1999. The parties were enjoying their respective extents as per the decree and later the legal-heirs of Raghavadhas, the 3rd defendant, found that in the plan annexed to the compromise memo, an area of 65.750 cents in Survey No. 390/2 was marked as "B C D E", but in the memo of compromise, it was described as "A" Plot and similarly, while describing the property allotted to Sree Easwara Dhas, the 2nd defendant, an extent of 19.250 cents in Survey No. 390/2 was mentioned as "A" plot in the plan, but in the compromise memo it was mentioned as "B" plot and therefore, the decree has to be amended by substituting "B" for "A" and substitute "A" as "B C D E" for the same relief. The two IAs viz., I.A. 1429 of 2002 and 417 of 2003 were filed and these applications were dismissed by the lower court and hence, the two revisions viz. CRP. Nos. 422 and 423 of 2004 were filed by the revision petitioners.

3. Mr. K. Sreekumaran Nair, the learned Counsel appearing for the revision petitioners submitted that a mistake has crept in the decree and also in the memorandum of compromise and while effecting partition and allotting the properties, the plaintiffs and the defendants in that suit, instead of mentioning "A" plot, having an extent of 19.250 cents, in Survey No. 390/2 allotted to Sree Easwaradhas, the 2nd defendant, it was mistakenly stated in the memo of compromise that an extent of 19.250 cents in Survey No. 390/2 is situate in "B" plot as per the plan annexed to the memorandum of compromise and similarly, the remaining extent in Survey No. 390/2, of an extent of 65.750 cents has been mentioned in the compromise memo as "A" Plot whereas the entire extent of 65.750 cents is situate in the portion "B C D E" in the plan attached to the compromise memo and therefore, as a result of that on the basis of the compromise decree, final decree was also passed incorporating the same terms and instead of mentioning "A" plot, it was mentioned as "B" plot in the property allowed to Sree Easwaradhas and instead of mentioning "B C D E" plots, it was mentioned as "A" plot, in respect of the properties allotted to Raghavadhas, the first defendant and that mistake has to be rectified.

4. He further submitted that the parties are enjoying the respective extents, after the compromise and in the plan also, it has been stated that "A" Plot is having an extent of 19.250 cents allotted to Sree Easwaradhas and "B C D E" Plots, of a total extent of 65.750 cents, were allotted to Raghavadhas, but in the memorandum of compromise, it was wrongly mentioned as "B" Plot for Sree Easwaradhas and "A" Plot for Ragavadhas.

5. He further submitted that Survey No. 390/2 is having a total extent of 84 cents and the entire extent in survey No. 390/2 was allotted only to Sree Easwaradhas and Raghavadhas and therefore, there is no dispute regarding the

total extent in Survey No. 390/2 and there is no dispute regarding the extent of property allotted to Sree Easwaradhas and Raghavadhas as per the compromise and hence, as per the plan, the property allotted to Sree Easwaradhas is in the portion shown as "A" and the property allotted to Raghavadhas is in the portion shown as "B C D E" and hence, as per the plan, a compromise decree has to be corrected and it is a clear case of clerical error and no prejudice would be caused by correcting the mistaking that has crept in, in the compromise decree.

6. He further relied upon the judgment of the Honourable Supreme Court reported in *Salkia Businessmen's Association and Others Vs. Howrah, Municipal Corporation and Others*, . *Jayalakshmi Coelho Vs. Oswald Joseph Coelho*, and 2004 (1) MLJ 61 (SC) in the case of *State of Punjab v. Darshan Singh*.

7. On the other hand, the learned Counsel appearing for the respondents, Mr. M.P. Senthil, submitted that as per the memorandum of compromise, Plot "A" was allotted to Raghavadhas and "B" plot was allotted to Sree Easwaradhas and as per the compromise, a decree was drafted and hence, there is no error or mistake in the decree and the decree cannot be amended by resorting to Section 152 CPC.

8. He further submitted that without amending the compromise memo, the decree cannot be amended as the decree was passed only on the basis of memo of compromise and as per Order 23 Rule 3, the Court shall pass a decree in accordance with the compromise and in this case, the decree was passed in accordance with compromise and there is no error in the decree, it cannot be rectified.

9. The point for consideration, in both the civil revision petitions, is:

Whether the compromise decree passed in O.S. No. 21 of 1996 is to be amended, as there is a clerical mistake, while drafting the decree as alleged by the petitioners?

10. In this case, it is not in dispute that there was a compromise entered into between the parties and as per the compromise, the properties were divided and as per the terms of compromise and plan attached to that, a compromise decree was passed. I.A. No. 417 of 2003 was filed by the revision petitioners against the plaintiff and the defendants in O.S. No. 21 of 1996 and for the same relief, I.A. No. 1429 of 2002 was also filed by the petitioners, which gave rise to these revision petitions.

11. It is contended by the 3rd respondent, Sree Easwaradhas that as per the compromise, Item No. 19 comprised in Survey No. 390/2 was divided into five plots and numbered as "A" to "E" plots and "C D E" were left un-allotted and as per the compromise, Plot "A" was allotted to the 3rd defendant viz., Raghavadhas and no building was allotted to him and the family building is situate in Plot "B" and the same was allotted to him and he was given 19.250 cents in Plot "B". The father Arumugam Pillai, the 2nd respondent herein,

contended that Item No. 19 viz., in Survey No. 390/2 was divided into five plots "A" to "E" and Sree Easwaradhas, the 3rd respondent in these revision petitions, was allotted "A" plot in the plan having 19.250 cents and the building situate therein and plots "B C D E" having an extent of 64.750 cents including the building No. 11-38/24 was allotted to Raghava Dhas, who is predecessor in title of the petitioners and building No. 11-38/24 and in the compromise memo as well as in the decree, it was mistakenly stated that "A" Plot is having an extent of 64.750 cents and it was a mistake and 64.750 cents is situate in Plot "B C D E" and those extent of 64.750 along with the main building was allotted to Raghava Dhas and Plot "A", having an extent of 19.250 cents was allotted to Sree Easwara Dhas and after the allotment of properties, Sree Easwara Dhas, the 3rd respondent herein, shifted his residence to the portion marked as "A" in the plan, of an extent of 19.250 cents and Raghava Dhas was also put up a compound wall on the western side of the Plot "B" and he took possession and therefore, he supported the case of the petitioners. Therefore, from the counter filed by the parties, it is seen that the father, Arumugam Pillai, supported the case of the petitioners and he has accepted that by mistake, in the memorandum of compromise, instead of stating "A" plot allotted to Sree Easwara Dhas, it was wrongly mentioned as "B" plot and instead of stating "B C D E" plots to Raghava Dhas, it was wrongly mentioned as "A" Plot. The 2nd respondent herein is the father of the revision petitioners and the 1st and 3rd respondents are his sons and the predecessor in-title of the petitioners viz., Raghava Dhas, was also one of his son. The father, Arumugam Pillai, further stated in the counter that after the allotment of properties Sree Easwara Dhas shifted his residence to Plot "A" mentioned, as per the plan and is in enjoyment of 19.250 cents and Raghava Dhas was in enjoyment of 64.750 cents along with the building therein and he has also put up a compound wall. As stated supra, the total extent in Survey No. 390/2 is only 84 cents and 19.250 cents was allotted to Sree Easwara Dhas, the 3rd respondent herein.

12. It is evident from the plan attached in the compromise memo, the portion shown as "A" Plot is having an extent of 19.250 cents and that is also the western portion. Therefore, as per the plan and as per the enjoyment of the property by Sree Easwara Dhas, the property was shown as "A" Plot in the plan and was allotted to Sree Easwara Dhas, the 3rd respondent herein. Therefore, in the compromise memo, instead of mentioning "A" plot in Survey No. 390/2, of an extent of 19.250 cents, it was mentioned as "B" Plot. Hence, according to me, it is a mistake.

13. Further, the contention of the 3rd respondent that Raghava Dhas was allotted "B" Plot of the suit property, that is having an extent of 47.250 cents and Plot "C D E" were not allotted to anybody. The 3rd respondent and Raghava Dhas are the parties concerned in this dispute. The 3rd respondent accepts that he was allotted 19.250 cents. According to him, as per compromise, Plot "A" was allotted to Raghava Dhas. If Plot "A" was allotted to Raghava Dhas, then Raghava Dhas would have been given only 19.250 cents. But admittedly,

Raghava Dhas was given 64.750 cents. Further, if "B" Plot was allotted to Sree Easwaradhas, as now contended by him, he would have been allotted 47.250 cents. According to him, he was allotted only 19.250 cents. Therefore, the contention of the 3rd respondent cannot be accepted and in my opinion, an extent of 19.250 falls within "A" marked portion and an extent of 64.750 falls within "B C D E" marked portion.

14. It is also admitted that the parties are enjoying their respective portions. Hence, taking into consideration of all these aspects, it is clear that plot "A" was allotted to Sree Easwaradhas, the 3rd respondent herein and Plot "B C D E" were allotted to Raghava Dhas, whose legal-heirs are the petitioners.

15. Mr. M.K. Senthil, the learned Counsel appearing for the 3rd respondent submitted that in this case, there is no mistake or clerical error in the decree and even in the compromise memo, it has been stated that Plot "B" was allotted to Easwara Dhas, of an extent of 19.250 cents and Plot "A" of extent of 65.750 cents was allotted to Raghava Dhas. The compromise decree was drafted in consonance with compromise memo filed by the parties and as per Order 23 Rule 1 CPC, compromise decree has to follow the compromise memo and hence, the same cannot be amended.

16. The learned Counsel appearing for the revision petitioners relied upon the judgments reported in Dwaraka Das Vs. State of Madhya Pradesh and Another, Jayalakshmi Coelho Vs. Oswald Joseph Coelho, M/s. Plasto Pack, Mumbai and Another Vs. Ratnakar Bank Ltd., Salkia Businessmen's Association and Others Vs. Howrah, Municipal Corporation and Others, and 2004 (1) MLJ 61 (SC), in the case of State of Punjab v. Darshan Singh. Relying upon those judgments, he submitted that it has been made clear by the Honourable Supreme Court, mistakes resulting from arithmetical or clerical errors or accidental slip in judgment or decree, which may prejudice the cause of any party, held, must be rectified, but rectification must be limited to something originally intended to be included and which is erroneously left out or something which has been included contrary to the original intention and power u/s 152 C.P.C cannot be used to improve upon a case.

17. As stated supra, as per the plan annexed to the Commissioner's report, Plot "A" is having an extent of 19.250 cents and Plots "B, C, D, E" are having a total extent of 64.750 cents and Easwara Dhas was allotted 19.250 cents and Raghava Dhas was allotted 64.750 cents. Therefore, if we go by extent, Plot "A" was allowed to Easwara Dhas and Plots "B, C, D, E" were allotted to Ragava Dhas. The problem arises that in the compromise memo, it has been stated that Easwara Dhas was allotted Plot "B" having an extent of 19.250 cents and Ragava Dhas was allotted 64.750 cents in Plot "A". Admittedly, Plot "A" as per plan does not have more than 19.250 cents. Of Course, from Plot "B", 19.250 cents can be culled out, having regard to the larger extent and the intention of the parties was spoken to by the Arumugam Pillai, the father and having regard to the extent, Plot "A" must have been allowed to Eawara Dhas and "B,C,D,E" must have been

allowed to Ragava Dhas. Therefore, a mistake has crept in, while drafting compromise memo, which was also followed in the compromise decree. Hence, the question now arise is whether that mistake can be rectified u/s 151 and 152 of C.P.C. Even though, Section 151 & 152 CPC deals with mistake committed in Court, in this case, a mistake has been committed by the party in drafting the compromise memo and that has been also carried out in the compromise decree. Therefore, in my opinion, Section 151 and 152 of C.P.C can be invoked in this case, as it is only a mistake committed by the parties in drafting the compromise memo.

18. It has been held in *Dwaraka Das Vs. State of Madhya Pradesh and Another*, , the inherent power u/s 152, contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistake which might have been committed by the court while passing the judgement, decree or order.

19. It has been held in 2004 (1) MLJ 61 (S.C), in the case of *State of Punjab v. Darshan Singh*, that an 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 careless mistake on the put of the court liable to be corrected.

20. In the judgment reported in *Jayalakshmi Coelho Vs. Oswald Joseph Coelho*, , it has been held that "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 fact 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 accidents 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 reconsideration 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 the 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 the court's inherent powers as contained u/s 152 CPC. It is to be confined to something initially intended but left out or added against such intention." Therefore, the above judgments of the Honourable Supreme Court makes it clear that what the parties have intended to be drawn up in the decree, which was accepted by the court can be rectified if the decree is otherwise.

21. As matter of fact, the judgment reported in Ramayya Pillai Vs. Ratnaswami Pillai and Others, , it has been held that Section 152 CPC is wide enough to include a compromise decree. It does not restrict itself to decrees passed other than compromise decrees. Even in compromise decrees, if there are clerical or arithmetical mistakes, certainly they can be rectified.

22. Further, it is contented by Eawara Dhas that Plots C, D, E" were not divided so far and "A" Plot was allotted to Ragava Dhas and "B" Plot was allotted to him. If the contention of Eawara Dhas is accepted, then "C, D, E" are to be partitioned. Admittedly, till date the parties have not applied for partition of Plots "C, D, E". Therefore, it is accepted by the parties by their conduct that "A" Plot was allotted to Easwara Dhas and Plots "B, C, D, E" were allotted to Ragava Dhas and that was the reason for not filing any partition suit by the parties for dividing "B, C, D, E" Plots.

23. In this case, as stated supra admittedly, Easwara Dhas is enjoying Plot "A", having an extent of 19.250 cents as shown in the plan and the legal-heirs of the Ragava Dhas are enjoying Plot "B, C, D, E" of an extent of 65.750 cents as shown in the plan and therefore, it is only a mistake that has been crept in, in the compromise decree and hence, the court can use its inherent power u/s 151 and 155 CPC, to rectify the mistake. The lower court has not properly appreciated the aforesaid provisions and therefore, the order of the lower court is set aside and accordingly, C.R.P.(NPD) Nos. 422 & 423 of 2004 are allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

24. CRP(PD)(MD) No. 1925 of 2009: This civil revision petition is filed by the legal-heirs of Ragava Dhas. Easwara Dhas, the first respondent, in this civil revision, filed O.S. 33 of 2009, on the file of the Sub Court, Padmanabhapuram, for injunction restraining the defendants therein from putting up any new boundaries, buildings or cutting or removing trees or from interfering with his joint possession of the properties mentioned therein. The schedule of properties mentioned in the suit are the properties covered under schedule "C, D, E" in O.S. No. 21 of 1996 and in the plaint, he has submitted that in the suit O.S. No. 21 of 1996, he was allotted Plot "B" and the Plot "A" was allotted to Ragava Dhas and "C, D, E" were not allotted to anybody. Plot "B, C, D, E" mentioned in the plan annexed to the compromise memo in O.S. No. 21 of 1996 are the subject matter of the suit O.S. No. 33 of 2009 and it is alleged that they are enjoyed in common by him and his brother and the coconut trees were grown and the legal-heirs of Raghava Dhas are attempting to put up boundaries and constructions in those properties and for the purpose, he filed the suit. In that suit, the revision petitioners herein filed a written statement stating that there was a mistake in the compromise memo filed therein and the same was carried out in the compromise decree and it has been wrongly stated that Plot "B" consisting of 19.250 cents was allotted to Easwara Dhas and it is only Plot "A" of an extent of 19.250 cents allotted to Easwara Das and instead of stating "B" of an extent of 65.750 cents, it has been wrongly stated as "A" Plot consisting of 65.750 cents

and it was only a mistake and the mistake has been rectified by filing application before this Court and therefore, the first respondent has no right or title to the schedule property and he is not entitled to decree as prayed for. Along with the suit, the first respondent filed E.A. 231 of 2009 in O.S. No. 33 of 2009 for the appointment of a Advocate Commissioner to pluck the coconuts from the trees and that was also ordered by the lower court and against the same, this civil revision is filed by the revision petitioners.

25. I have already held in CRP(NPD)(MD) Nos. 422 & 423 of 2004 that 19.250 cents in Plot "A" was allotted to Easwara Dhas and 65.750 cents in Plots "B,C,D,E" were allotted to Ragava Dhas and in the compromise memo and in the decree instead of stating "A" plot, it was stated as "B" plot and instead of stating "B, C, D, E" Plots, it has been stated as Plot "A" and therefore, the decree has to be amended and the decree was also amended as per the order in CRP. No. 422 and 423 of 2004 and hence, as per the amended decree, the first respondent herein, who is the plaintiff in O.S. No. 33 of 2009 has no right or title over the Plots "B, C, D, E" and the revision petitioners, who are the legal- heirs of the Ragava Dhas, are entitled to pluck coconuts.

26. Hence, the order of the lower court cannot be sustained, as there is no need to appoint a commissioner in the said suit. Accordingly, CRP(PD)(MD) No. 1925 of 2009 is allowed. Consequently, connected Miscellaneous Petition is closed. No costs.