

# **SUPREME COURT OF INDIA**

Srihari (DEAD) Thr. LR.Smt.Ch.Niveditha Reddy

Vs.

Syed Maqdoom Shah

C.A.Nos.2352-2354 of 2008

(Sudhansu Jyoti Mukhopadhaya and Prafulla C. Pant JJ.)

16.09.2014

## **JUDGMENT**

### **PRAFULLA C.PANT,J.**

1. All these three appeals are directed against the common judgment and order dated 21.4.2005 passed by the High Court of Andhra Pradesh in A.S.M.P. No.11880 of 2004, A.S.M.P. No. 1098 of 2005 and A.S.M.P. No.1099 of 2005 (moved in A.S. No. 734 of 1991) whereby the High Court exercising powers under Section 152 of the Code of Civil Procedure,1908 (hereinafter referred as ~the Code™), has allowed the applications, and directed that the preliminary decree passed in A.S. No. 734 of 1991, be amended allotting and dividing half share of Syed Makdoom Shah (defendant No.11) and Syed Hussain Shah in the suit schedule property in addition to 1/4th share of legal heirs of plaintiff Khadar Nawaz Khan (since dead) and 1/4th share of the legal heirs of defendant Feroz Khan (died on 22.1.1978).

2. Brief facts of the case are that one Qamaruddin Ali Khan was original owner and pattadar of agricultural land bearing S.Nos. 41 to 43 situated in Village Kokapet. The land was purchased by Khadar Hussain Khan through a registered sale deed, who died in the year 1942. Khadar Hussain Khan died issueless as an unmarried person, leaving behind his real sister Shahzadi Bee and two step brothers namely Feroz Khan and Khadar Nawaz Khan (plaintiff). Khadar Hussain Khan remained in possession and enjoyed the property in suit as absolute owner till his death in the year 1942 (year

1352 Fasli). It is pleaded by the plaintiff that after death of Khadar Hussain Khan the property was succeeded by his real sister Shahzadi Bee, and two step brothers namely Feroz Khan (died on 22.1.1978) and Khadar Nawaz Khan (plaintiff). On the death of Feroz Khan in the year 1978, his share is inherited by his widow Habib Khatoon (Defendant No.1) and children Moin Khatoon (Defendant No.2), Zehra Khatoon (Defendant No.3), Tehera Khatoon (Defendant No.4), Sughra Sameena Khatoon (Defendant No.5), Kaneez Fatima Khatoon (Defendant No.6), Butool Khatoon (Defendant No.7), Aysha Khatoon (Defendant No.8) and Khaderalikhan (Defendant No.9). A suit (O.S.No. 471 of 1987) was instituted by plaintiff Khadar Nawaz Khan for partition of his 1/4th share from plot S. Nos. 41 to 43 measuring area Ac.49.24 gts situated in aforesaid village Kokapet. It is further pleaded by the plaintiff that after death of Feroz Khan, plaintiff and defendant nos. 1 to 11 are in joint possession of the property. It is alleged by him that defendant no. 12 (Srihari) had no concern with the property in suit but he is trying to claim right over the property on the basis of some document said to have been executed by one of the co-sharers. Therefore the plaintiff felt that he is unable to enjoy his property, in joint possession with the original co-sharers as such he filed suit for partition of his 1/4th share.

3. Defendant Nos. 1 to 9 and defendant No. 11 in substance admitted the case of the plaintiff.(Defendant No.10 during the pendency of proceeding has died and his heirs are on record.) Defendant No. 11 filed his written statement and defendant Nos.1 to 9 adopted the same. It is admitted to defendant Nos.1 to 9 and defendant no. 11 that after the death of Khadar Hussain Khan, the property in suit devolved and was inherited by his real sister Shahzadi Bee and two step brothers namely Feroz Khan and Khadar Nawaz Khan. However, mutation was done in the name of Feroz Khan being elder male member in the family, and names of Shahzadi Bee and Khadar Nawaz Khan were shown ~shikmi™. It is further pleaded by the aforesaid defendants that on the death of Feroz Khan on 22.1.1978, defendant Nos. 1 to 9 (i.e. widow and children of the deceased) inherited his share. Defendant No.11 is the son of Shahzadi Bee (real sister of Khadar Hussain Khan). It is also admitted by the aforesaid defendants that defendant No.12 Srihari had no concern with the property in suit. It is further pleaded by aforesaid defendants (Nos.1 to 11) that the land in question is to be partitioned between the plaintiffs and the defendants.

4. Defendant No.12 Srihari, filed his separate written statement and contested the suit. Denying the allegations made in the plaint, he pleaded that the suit property is not

joint family property of plaintiff and the defendant Nos. 1 to 11. He further pleaded that the plaintiff has filed the suit in collusion with defendant Nos.1 to 11. However, defendant no.12 admitted that the property in suit originally belonged to Qamaruddin Ali Khan which was purchased by Khadar Hussain Khan through registered sale deed, and for valid consideration. He (defendant No.12) pleaded in his written statement that on the death of Khadar Hussain Khan, his step brother Feroz Khan (husband of Habib Khatoon defendant No.1 and father of defendant nos. 2 to 9) inherited the property by virtue of Succession Certificate No. 812 of 1357 Fasli issued by Director of Settlements. It is pleaded by defendant no.12 that Feroz Khan perfected his title over the land in suit being in exclusive possession as an absolute owner in the year 1965-66. It is pointed out that there had been some litigation under Section 145 of Code of Criminal Procedure between Feroz Khan and one Krishna Murthy but the same was closed. It is also pleaded by defendant no.12 that Feroz Khan thereafter instituted a suit (O.S. No. 31 of 1966) in the Court of IIIrd Additional Judge, City Civil Court, Hyderabad against Krishna Murthy for injunction which was renumbered as O.S.No. 512 of 1973 in the Court of Vth Additional Judge, City Civil Court, Hyderabad. In the said suit Feroz Khan (husband of defendant No.1 and father of defendant nos. 2 to 9) entered into settlement, and the entire land of S.Nos. 42 and 43 and portion of S.41 vested with the defendant no.12. It is further pleaded that in pursuance of said settlement, defendant no.12 was impleaded as second plaintiff with Feroz Khan (plaintiff no.1 of Suit No. 512 of 1973). Finally, Feroz Khan who was in need of money offered to sell land measuring Ac.18.25 gts of S.No.43 and executed agreement of sale on 23.3.1973. Said suit No. 512 of 1973 was disposed of by IVth Additional Judge, City Civil Court, Hyderabad holding that defendant No.12 (who was plaintiff No.2 in suit No. 512 of 1973) and Feroz Khan (plaintiff No.1 of said suit) were the owners of the land. Aggrieved by said judgment and decree dated 30.9.1976, Krishna Murthy (defendant of said case) filed an appeal No. CCA 142 of 1976 in the High Court. The legal proceedings referred above were finally decided in favour of the vendor. In the second round of litigation, defendant No.12 filed O.S.No.164 of 1981 before Vth Additional Judge, City Civil Court, Hyderabad for permanent injunction restraining defendant nos. 1 to 9, and present plaintiff from selling or otherwise disposing of the land covered by S.43 of Kokapet Village, except to the defendant no.12 (who was plaintiff of Suit No. 164 of 1981). Present defendant nos.1 to 9 contested Suit No. 164 of 1981 and the same was decreed in favour of present defendant no.12, and the defendants of said suit were restrained from transferring the suit land to third party. Aggrieved by the said judgment and decree, present defendant

nos. 1 to 9 filed appeal bearing No. AS 66 of 1984 before Chief Judge, City Civil Court, Hyderabad which was dismissed by the said Court on 27.11.1984. The appeal filed by Krishna Murthy bearing CCCA No. 142 of 1976 was also dismissed by the High Court on 11.12.1985. Thereafter, defendant No. 12 filed Original Suit No. 150 of 1986 for specific performance of agreement of sale dated 23.3.1973 in respect of land Ac.18.25 gts covered by S.No.43 of Village Kokapet. In pursuance to the order in said case possession of the land in question was jointly delivered to defendant no. 12 and defendant nos. 1 to 9 by the Bailiff and the suit was decreed by M.M. West on 2.11.1987 directing the defendant nos. 1 to 9 to execute sale deed in favour of defendant No.12. Present plaintiff Khadar Nawaz Khan never attempted to get impleaded in the aforesaid litigations. It is alleged by the defendant no.12 that after colluding with defendant no. 1 to defendant no.9, plaintiff has filed the present suit for partition to deprive defendant no.12 of his rights.

5. The trial court on the basis of the pleadings of the parties framed as many as eight issues, and after recording evidence and hearing the parties gave the finding that Feroz Khan had perfected title over the land in suit, and the plaintiff is not entitled to partition. On the issue of limitation, the trial court held that the suit is barred by limitation. With the above findings trial court (Additional Subordinate Judge/R.R. District) dismissed the suit vide judgment and decree dated 16.10.1990.

6. Aggrieved by the judgment and decree dated 16.10.1990 in O.S. No. 471 of 1987, the plaintiff Khadar Nawaz Khan filed an appeal before the High Court of Judicature at Andhra Pradesh which was registered as appeal No. 734 of 1991.

7. After hearing the parties, the Appellate Court re-appreciated the evidence and came to the conclusion and observed as under:

It is not disputed that the original owner of the property is one Qamaruddin Ali Khan and from him, Khader Hussain Khan purchased the same. The appellant late Feroz Khan and Shahzadi Bee are the step brother and sister of Khader Hussain Khan. It is also not disputed that the properties are matrooka properties. It is also not disputed that Khader Hussain Khan died as a bachelor leaving behind him Shahzadi Bee, his sister and step brothers, Feroz Khan and the appellant Khader Nawaz Khan. After the death of Khader Hussain Khan, the only heirs are late Feroz Khan and Khadar Nawaz Khan i.e. the appellant and

Shahzadi Bee. It is also not disputed that the suit properties being matrooka properties, under Muslim Laws, the property devolves on all the three heirs of Khader Hussain Khan viz., Shahzadi Bee, Feroz Khan and Khadar Nawaz Khan. When once the properties devolved on these three persons, who are the successors of Khader Hussain Khan, they are entitled to claim from out of the shares in accordance with Muslim Law and they are co- owners of the property. It is not disputed that when a co- heir is found to be in possession of the properties, it is presumed to be on behalf of the other co-owners and joint title and the possession of one co-heir is to be considered in Law as possession of all the co-heirs. The co-heir in possession cannot render his possession adverse to the other co-heirs not in possession. Therefore, on the death of Khader Hussain Khan, late Feroz Khan, Khadar Nawaz Khan, Khadar Nawaz Khan the appellant, Shahzadi Bee, who succeeded as co- heirs, are entitled to joint possession and even assuming that Feroz Khan was in possession of the property, his possession is on behalf of Shahzadi Bee and Khadar Nawaz Khan, who are the co-heirs/co-owners along with him. At this stage, it is relevant to refer Ex.A-2 which was relied on in the Judgment in CCCA No.142 of 1976 filed by Krishna Murthy against late Feroz Khan and the 1st respondent. In this appeal, a reference was made to the succession certificate granted to late Feroz Khan and Shahzadi Bee, the appellant i.e. Khadar Nawaz Khan.

The relevant portion has been marked as Ex.A-2 in the present suit. It reads: Letter No. 745 dated 7th Tir 1356 Fasli shows that the succession for three survey numbers was sanctioned in the name of the plaintiff. His younger brother Khadar Nawaz Khan and sister Shahzadi Bee are shown as co- sharers (Shikami). From a reading of Ex.A-2, it is clear that the possession obtained under Muslim Law was recognized by granting succession certificate in favour of all the three co-heirs.

The learned Judge, forgetting the legal position obtained under the Muslim Law and relying on various documents, held that late Feroz Khan was the exclusive possessor and pattadar of the suit land. The documents on which he relied are Ex.B- 7, Pahani Patrika for the year 1970-71, Ex.B-23 Khasra Pahani for the year 1954-55, Ex.B-24 certified copy of Faisal Patti, Ex.B-25 certified copy of Pahani Pathrika and Ex.B-26 to B-26 certified copies of Pahani Pathrikas. On

the basis of various entries made in the revenue records, the learned Judge held that late Feroz Khan was in exclusive possession of the property. It is true that in all the entries in the revenue records, late Feroz Khan and his legal representatives and the respondents were shown as the possessors of the land. However, they are only entries made in the revenue records. In other words, these are the entries relating to mutation proceedings effected on the death of the original owner and also on the death of Feroz Khan and after purchase by the defendant no.12.

8. After further discussing the evidence on record, the Appellate Court held that merely for the reason that the plaintiff did not raise any objection and did not participate in various proceedings, it cannot be said that he stood ousted from the co-ownership in the property inherited from Khader Hussain Khan. The Appellate Court further held that in fact plaintiff appears to have no knowledge of the proceedings in which he was not a party. It further observed that the joint possession over the land in suit of other co-sharers was also with the plaintiff. The Appellate Court after holding that the property was jointly owned by the parties decreed the suit for partition vide its judgment and decree dated 25.1.1999.

9. It appears that three applications viz. A.S.M.P. No.11880 of 2004, A.S.M.P. No. 1098 of 2005 and A.S.M.P. No.1099 of 2005 were moved on behalf of the defendants for declaration of their shares in the preliminary decree passed in A.S No. 734 of 1991 arisen out of Suit No.471 of 1987. The High Court by exercising powers contained in Section 151, and Section 152 read with Section 153 of the Code, disposed of these applications vide order dated 21.4.2005 which is challenged before us. The High Court by its order dated 21.4.2005 allowed the above mentioned applications and directed that half share belonging to Syed Maqdoom Shah and Syed Hussain Shah (heirs of Shahzadi Bee), 1/4th share of Basheer Khatoon, Quadir Hussain Khan, Rabia Khan, Razia Moiuddin, Dr. Masood Nawaz and Mohammad Yousuf Ali Khan (heirs of Khadar Nawaz Khan), and 1/4th share of Habib Khatoon, Moin Khatoon, Zehra Khatoon, Tehera Khatoon, Sughra Sameena Khatoon, Kaneez Fatima Khatoon, Butool Khatoon, Aysha Khatoon and Khaderalikhan (heirs of Feroz Khan) be partitioned.

10. We have heard learned counsel for the parties and perused the papers on record.

11. On behalf of defendant No.12 Srihari (appellant before us), it is argued that the

impugned order passed by the High Court is beyond the scope of Section 152 (read with Section 151 and Section 153) of the Code. In support of his argument he relied in the case of State of Punjab vs. Darshan Singh AIR 2003 SC 4179: (2004) 1 SCC 328 and Bijay Kumar Saraogi vs. State of Jharkhand (2005) 7 SCC 748. Before further discussion, we think just and proper to quote the relevant provision of law under which impugned order appears to have been passed by the High Court. Section 152 of Code of Civil Procedure, 1908 reads as under:

"Amendment 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."

12. From the language of Section 152 of the Code, as quoted above, and also from the interpretation of the section given in the case of State of Punjab vs. Darshan Singh (supra), the section is meant for correcting the clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. It is true that the powers under Section 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 under guise of invoking after the result of the judgment earlier rendered. The corrections contemplated under the section are of correcting only accidental omissions or mistakes and not all omissions and mistakes. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152. In Bijay Kumar Saraogi (supra) also it has been reiterated that Section 152 of the Code can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in judgments or accidental omissions.

13. Now we have to examine whether by the impugned order, the High Court has only corrected the clerical, arithmetical or accidental omission in the decree passed or not. To appreciate the same, first we think it necessary to mention as to what the word expression accidental omission means. In Master Construction Co. (P) Ltd. Vs. State of Orissa and Another AIR 1966 SC 1047, expression "accidental slip or omission" has been explained as an error due to a careless mistake or omission unintentionally made. It is further observed in the said case that 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, elaborate arguments on questions of fact or law.

14. Whether the High Court has acted within the scope of Section 152 of the Code or not, we have to see as to what were the pleadings of parties, what was the decree passed, and what was the correction made in it.

15. The relevant part in paragraph 12 of the plaint of Original Suit No. 471 of 1987 filed by Khader Nawaz Khan for partition, reads as under:

Hence it is prayed that, kindly the suit of the plaintiff be decreed as follows:

a) A preliminary decree be passed declaring the plaintiff is entitled for 1/4th share in the matrooka admeasuring Ac 49-24 guntas situated at Kokapet Village, Rajendranagar Revenue Mandal, RR District and a Commissioner be appointed for partition be delivered to the plaintiff to the extent of his share, if due to any legal hitch the court finds that the property is not partition able then the property be put in auction and sale proceeds be paid to the plaintiff to the extent of his 1/4th share in the interest of justice.

b) Cost of the suit to be awarded;

c) Any other relief or reliefs which the plaintiff is legally entitled to the same.

16. Defendant no.11 Syed Maqdoom Shah (respondent No.1 in these appeals) at the end of para 12 of his written statement, has pleaded and prayed as under:

Hence it is prayed that the suit of plaintiff may be decreed along with the share of defendant no.11 as shown under para no.6. Further the amount of Rs.2,082/- spent by the defendant no. 11 during last 28 years as shown above at para no. 7 and it may be decreed from the share of the plaintiff and other defendants or otherwise give 4 acres of land in lieu of Rs.2,182/- from the share of the plaintiff and other defendants in addition to his own share to meet the ends of justice.

Para 6 of which reference is given in above quoted para as pleaded by defendant no.11 reads as under:

The shares ascertained as given by the plaintiff under para (6) are correct.

17 In para 6 of the plaint, shares are mentioned as under:

6) That, the shares of the parties are as follows:

The defendants No. 10 and 11 are entitled for half share to the extent of their mother Shahzadi Bee.

The plaintiff is entitled for 1/4th share in the entire property.

The defendant no. 1 to 9 are entitled for 1/4th share only.

18. Now we re-produce the last sentence of judgment and order passed by the Appellate Court “ High Court of Andhra Pradesh in first appeal A.S. No. 734 of 1991 whereby suit for partition is decreed “ The suit is accordingly decreed and appeal is allowed with costs.

19. By the impugned order dated 21.4.2005 exercising powers under Section 152 of the Code, the First Appellate Court has now directed as under:

Accordingly, for the reasons stated above, these applications are allowed and the decree in A.S. No. 734 of 1991 dated 25.1.1996 is directed to be amended allotting and dividing half share in the suit schedule property to the petitioners 1 and 2, one-fourth share to respondents 1 to 6 herein and one-fourth share to respondents 7 to 15 herein. There shall be no order as to costs.

20. Had the appellate court, not decreed the suit with discussion of evidence after rejecting the plea of the defendant No.12 as to his claim of ownership, and had the defendants 1 to 11 not pleaded for separation of their shares with admission of share of the plaintiff as decreed by the Appellate Court , it could have been said that the High Court erred in declaring shares of the plaintiff or the defendants by resorting to Section 152 of the Code. But in the present case since there is a clear finding of shares of the parties in the judgment and order dated 25.1.1996, as such by clarifying the decree by the impugned order, in our opinion the High Court has committed no mistake of law. In this connection, we would like to re-produce sub-rule (2) of Rule 18

of Order XX of the Code, which reads as under:

18. Decree in suit for partition of property or separate possession of a share therein --Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,--

xxx xxx xxx xxx (2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required.

Above quoted sub-rule clearly indicates that in the preliminary decree not only the right of the plaintiff but rights and interests of others can also be declared.

21. At the end, we would also like to refer the case of Shub Karan Bubna alias Shub Karan vs. Sita Saran Bubna and Others (2009) 9 SCC 689 wherein it is explained that partition is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of land or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

22. This Court has earlier also reiterated in U.P.SRTC vs. Imtiaz Hussain (2006) 1 SCC 380 has reiterated that the basis of provision of Section 152 of the Code is found on the maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man. As such an unintentional mistake of the Court which may prejudice the cause of any party must be rectified. However, this does not mean that the Court is allowed to go into the merits of the case to alter or add to the terms of the original decree or to give a finding which does not exist in the body of the judgment sought to be corrected.

23. For the reasons as discussed above, we do not find force in these appeals which are liable to be dismissed. Accordingly, the appeals are dismissed. No order as to costs.