

(2013) 09 CAL CK 0091**Calcutta High Court****Case No:** C.O. 1218 of 2011 and CAN 7509 of 2013

Haradhan Malik

APPELLANT

Vs

Biswanath Malik and Others

RESPONDENT

Date of Decision: Sept. 26, 2013**Citation:** (2013) 4 CALLT 491 : (2013) 5 CHN 569**Hon'ble Judges:** Tarun Kumar Gupta, J**Bench:** Single Bench**Advocate:** Asish Bagchi, Mr. Sandip Roychowdhury and Ms. Madhumitra Patra, for the Appellant; Biswajit Basu, Susenjit Banik and Mr. Prasenjit Dey, for the Respondent**Final Decision:** Disposed Off**Judgement**

Tarun Kumar Gupta, J.

This application under Article 227 of the Constitution of India is directed against order dated 7th January, 2011 passed by learned District Judge at Hooghly, in Civil Revision No. 95 of 2009. By the order impugned learned District Judge rejected the revisional application filed by the present petitioner defendant challenging order dated 4th of May, 2009 passed by learned Additional Court of Civil Judge (Junior Division) Chandannagar in Title Suit No. 63 of 1987 whereby learned trial court allowed the petition dated 30th April, 2008 filed by the O.P. plaintiffs u/s 151 read with Section 152 of the CPC for correction of the decree passed in connection with judgment dated 30.07.1997 in Title Suit No. 63 of 1987.

The background fact of the case may be summarized as follows:-

01. The present O.P. plaintiffs filed said Title Suit No. 63 of 1987 against present petitioner defendant praying for declaration of their right, title and interest over "Ka-1" schedule property alleging that the petitioner defendant was threatening them dispossessing from said property being a part and parcel of plaintiff's land described in "Ka" schedule property and also for permanent injunction and other consequential reliefs.

02. During pendency of the suit O.P. plaintiffs were illegally dispossessed from said "Ka-1" schedule property by the petitioner defendant.

03. After contested hearing learned trial court decreed the suit by judgment dated 30.07.1997 declaring plaintiffs' right, title and interest in "ka-1 schedule property, restraining the defendant permanently from constructing any pillar thereupon, directing the defendant to demolish the pillar, if any, constructed thereupon during pendency of the suit and to deliver possession of the "Ka-1" schedule land to the plaintiffs in default plaintiffs will be at liberty to execute the decree through court, subject to payment of advalorem court fees of Rs. 10,000/- within 15 days from said date.

04. On 14.08.1997 the O.P. plaintiffs deposited in court the advalorem court fees of Rs. 750/- for value of "Ka-1" schedule property being Rs. 10,000/-.

05. The decree was drawn on 8th of August, 1997 without waiting for the period of 15 days from 30th July, 1997, and without incorporating the relief of delivery of possession of suit property as granted by the trial court in the judgment dated 30.07.1997.

06. The petitioner defendant preferred an appeal being Title Appeal No. 255 of 1997 against said judgment which ended in dismissal by judgment dated 24th of January, 2005 passed by learned Additional District Judge, Fast Track Court, First Court, Chandannagar.

07. The petitioner defendant moved this court against said order of dismissal of Title Appeal No. 255 of 1997 being S.A. No. 131 of 2007 which was rejected by this Court vide order dated 18th of September, 2006 under Order 41 Rule 11 of the Code of Civil Procedure.

08. The O.P. plaintiffs filed an execution case being Title Execution Case No. 7 of 2005 for execution of the decree of recovery of possession as petitioner defendant did not deliver possession in terms of the trial court judgment dated 30.07.1997 which was confirmed upto the level of this Court.

09. However, the execution court disposed of said execution case on full satisfaction.

10. The O.P. plaintiffs filed a revisional application being Civil Revision 21 of 2007 in the Revisional Court against said order of disposal of the title execution case on full satisfaction in spite of non-delivery of "Ka-1" schedule property by the petitioner defendant in favour of the O.P. plaintiffs.

11. During hearing before the revisional court it came out that though the O.P. plaintiffs deposited the advalorem court fees in the trial court within time but in spite of that it was not noted in the decree that "defendant is directed to deliver possession of suit land i.e., ("Ka-1" schedule property) to the plaintiffs in default plaintiffs will be at liberty to execute the order through court" though the same was

a part of the ordering portion of the judgment dated 30.07.1997.

12. However, revisional court did not take note of said apparent omission in the decree and disposed of the revisional application.

13. The O.P. petitioners thereafter filed one application dated 30.04.2008 u/s 152 read with Section 151 of the CPC for correction of the decree of the trial court drawn up in connection with judgment dated 30.07.1997 of Title Suit No. 63 of 1987.

14. After contested hearing learned trial court allowed said application and corrected the decree vide order dated 4th of May, 2009. Being aggrieved with said order of correction dated 4th of May, 2009 the petitioner defendant filed said revisional application being civil revision No. 95 of 2009 in the court of learned District Judge, Hooghly.

15. By the order impugned dated 7th January, 2011 learned District Judge, Hooghly dismissed said revisional application.

Mr. Asish Bagchi appearing for the petitioner defendant challenged the impugned order dated 07.01.2011 of learned District Judge, Hooghly affirming the order of correction of decree passed by learned trial court on 4th of May, 2009 on the following grounds.

01. The judgment as well as the decree as initially drawn were confirmed upto the level of this court and hence learned trial court had no authority to pass any order of correction of said decree on the alleged ground of clerical mistake u/s 151 read with Section 152 of the Code of Civil Procedure.

02. The execution case being Title Execution Case No. 7 of 2005 was filed and already disposed of.

03. As the title execution case was already disposed of, no execution case was pending on the date of filing of said application for correction on 30.04.2008.

04. After disposal of the execution case on satisfaction the court becomes functions officio as the decree has already been satisfied. Once a decree is already satisfied there is no scope of reopening of that matter in the name of correction of clerical errors etc. in the decree.

05. Reference was made to [A. Palanivel Chettiar Vs. R. Elumalai,](#)

06. O.P. plaintiffs can at best claim for refund of said court fees of Rs. 750/- deposited by them.

2. Mr. Biswajit Basu appearing for the O.P. plaintiffs submits as follows:-

01. Even after affirmation of the judgment of the trial court by lower appellate court and also by the court of second appeal if it is found that the decree drawn against said judgment of the trial court was defective for some clerical omission then the

concerned party is required to move the trial court for correction of the decree according to law and not to any other court.

02. When there was a specific order on contest allowing recovery of possession of "Ka-1" schedule property on payment of advalorem court fees and when said court fees have been paid within time, then learned trial court should have noted the order of recovery of possession of "Ka-1" schedule property in the decree.

03. For mistake/omission on the part of the court in the matter of drawing up of a decree, a party should not suffer. It is the duty of the court concerned to rectify the mistake as soon as the mistake is detected for doing justice to the party concerned.

04. A decree of declaration of title and injunction does not call for filing of an execution case and as such the alleged satisfaction of said execution case being Title Execution Case No. 7 of 2005 should have no bearing in the matter of correction of the decree.

The points for consideration in this case are as follows:-

(1) Whether there was clerical mistake in drawing up of the decree of the trial court by not incorporating the order of recovery of possession of Ka-1 schedule property on payment of advalorem court fees within 15 days from the date of judgment dated 30.07.1997.

(2) Whether after disposal of Title Execution Case No. 7 of 2005 there is any scope of filing of said application u/s 151 read with 152 of the CPC for correction of the decree.

(3) In which court said application for correction of the decree u/s 151 read with Section 152 of the CPC is required to be filed.

(4) Whether the order impugned dated 7th of January, 2011 passed by learned District Judge at Hooghly in Civil Revision No. 95 of 2009 is sustainable in law or not, and if not, what should be the order.

3. There is no denial that after contested hearing learned trial court at the time of passing the judgment dated 30th of July, 1997 declaring O.P. plaintiffs' right, title and interest in "Ka-1" schedule property also gave a decree of recovery of possession of the same on payment of advalorem court fees of Rs. 10,000/- within 15 days from said date. It is also an admitted fact that the O.P. plaintiffs deposited said advalorem court fees of Rs. 750/- over Rs. 10,000/- within the stipulated time frame. But at the time of drawing up the decree on 8th of August, 1987 the relief of delivery of possession of "Ka-1" schedule property was not incorporated therein. When after contested hearing learned trial court decreed the suit by granting recovery of khas possession of Ka-1 schedule property on payment of advalorem court fees within 15 days then the decree should have been drawn incorporating said direction of recovery of khas possession of Ka-1 schedule property particularly

when O.P. plaintiffs deposited said advalorem court fees within the stipulated time frame. It is thus clear that there was an apparent clerical mistake/omission in the matter of drawing up of the decree.

4. In terms of Section 152 of the CPC 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.

5. Section 151 of the CPC relates to inherent powers of the court which lays down that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

6. Admittedly no party should suffer for latches on the part of the court. As the O.P. plaintiffs deposited the required advalorem court fees within the time frame as prescribed by learned trial court, the order of recovery of possession of Ka-1 schedule property should have been incorporated in the decree drawn by the clerical staff of the trial court. It is thus palpable that it was a clerical mistake and that it should have been corrected by the court invoking Section 152 read with Section 151 of the Code of Civil Procedure.

7. After confirmation of said decree upto the level of the High Court, Calcutta O.P. plaintiffs filed Title Execution Case No. 7 of 2005 for execution of the decree for recovery of possession of Ka-1 schedule property as the petitioner defendant did not deliver possession of said "Ka-1" schedule property in terms of the judgment. It appears that learned executing court disposed of said Execution Case No. 7 of 2005 on full satisfaction without taking steps for delivery of khas possession of "ka-1" schedule property to the O.P. plaintiffs. The O.P. plaintiffs moved revisional court against said order of executing court and at that time it came out that the recovery portion of the judgment namely "defendant is directed to deliver possession of suit land i.e., "Ka-1" schedule property to the plaintiffs, in default, plaintiffs will be at liberty to execute the order through court" was not incorporated in the decree due to clerical mistake. However, revisional court did not take note of said apparent omission and rather disposed of the revisional application.

8. In this connection Mr. Asish Bagchi appearing for the petitioner defendant refers the case law reported in A. Palanivel Chettiar Vs. R. Elumalai, to impress upon this court that once decree was fully satisfied, there was no scope of amendment of the decree as nothing was remaining left for execution.

9. In the referred case a Money Decree was passed on 19.12.1978 and on 19.08.1982 in execution case No. 1507 of 1982 full satisfaction of the decree was recorded. On 21.08.1982 the decree holder took out an application to amend the decree to incorporate the award of interest as per judgment of the lower court. In the backdrop of said facts the High Court of Madras opined that once decree was fully

satisfied becoming non-est there was no scope of reopening of the same by way of allowing amendment. The facts of said case are quite different from the facts of the present case. In said referred case there was an executable decree i.e., money decree and the same was executed noting full satisfaction though the interest part was not incorporated therein. But in the case in hand, there was a decree of declaration of title, permanent injunction together with recovery of possession. The part relating to recovery of possession of the suit property was not included in the decree due to omission on the part of the concerned staff of the trial court. As such, the decree which was put into execution through title execution case No. 7 of 2005 was nothing but a simpliciter decree of declaration of title and permanent injunction. Admittedly, a simple decree of declaration of title and permanent injunction cannot be put into execution as it was not an executable decree. As such, it is apparent that while Title Execution Case No. 78 of 2005 was initiated the decree in question was not executable. If that be the factual position then it can only be said that the noting of full satisfaction of an unexecutable decree in an execution case has no legal effect. Unless the recovery portion of the judgment is brought into the decree there is no question of putting the decree into execution. As such, it is palpable that the noting of alleged full satisfaction of said decree in Title Execution Case No. 7 of 2005 by the executing court or affirmation of the same by the revisional court has no legal force for the simple reason that the decree which was put into execution was not at all executable. As such, the referred case law has no application in the present case.

10. Apart from that it was held by different High Courts that accidental slip or omission may be corrected at any time provided during the interval a third party has not acquired any interest in the subject matter of the litigation. This power can be exercised even when the decree is executed and fully satisfied.

11. In the case in hand, admittedly, the decree of declaration of title, permanent injunction and recovery of possession was confirmed by learned lower appellate court. When the petitioner defendant judgment debtor moved the High Court being S.A. No. 131 of 2007 the same was rejected by this court vide order dated 18th of September, 2006 under Order 41 Rule 11 of the Code of Civil Procedure.

12. Section 153A of the CPC runs as follows:-

Where an Appellate Court dismisses an appeal under Rule 11 of Order XLI, the power of the Court to amend, u/s 152, the decree or order appealed against may be exercised by the Court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order, as the case may be, passed by the Court of first instance.

13. From conjoint reading of Section 152 and Section 153A of the CPC it is clear that when an appeal has been summarily dismissed under Order 41 Rule 11 of the CPC the court which passed the decree or order against which said appeal was filed, is

competent to amend the decree or order. This expressed provision u/s 153A by necessary implication also makes it clear that in all other cases where the appellate decree becomes the final decree and the decree of the lower court merges with it, the application for amendment of the decree should be made to the appellate court.

14. In the case in hand, as the trial court decree merged with the decree of the lower appellate court, and the second appeal preferred by the defendant judgment debtor was dismissed by this High Court under Order 41 Rule 11 of the Code of Civil Procedure, the lower appellate court and not the trial court was competent to make necessary corrections in the decree by invoking Section 152 read with Section 151 of the Code of Civil Procedure.

15. In the case in hand, the O.P. plaintiff decree holder unfortunately filed said application for rectification in the trial court which was allowed by the trial court vide order dated 4th of May, 2009 and was confirmed by the revisional court by the impugned order dated 7th January, 2011.

16. In view of the discussion as made above I am of the opinion that the order impugned is not sustainable in law as learned trial court had no authority to correct the decree which has already been merged with the decree of the learned lower appellate court.

17. It is one of the cardinal principles of natural justice that a litigant should not suffer for any error and/or omission on the part of the court and/or the court staff. It has been well established that due to omission on the part of the court staff the decree of the trial court did not include the part of the recovery of possession of the suit property by the O.P. plaintiff/decree holders. I have already stated that there is no time limit in filing the application for correction of the decree u/s 151 read with Section 152 of the CPC so long a third party has not acquired any interest in the subject matter of the litigation. It is nobody's case that any third party has acquired any interest in the subject matter of the litigation. In view of the above I do hereby grant leave to the O.P. plaintiff/decree holders to file an appropriate application u/s 151 read with Section 152 of the CPC for correction of the decree in the lower appellate court at an early date and positively within a period of six weeks from the date of this order. On filing of said application, if any, learned lower appellate court should allow the same by effecting necessary corrections in the decree. Learned lower appellate court has to make said exercise within four weeks from the date of filing of said application by the O.P. plaintiff/decree holders. Thereafter O.P. plaintiff decree holder will be at liberty to move the executing court within four weeks for revival of the Title Execution Case No. 7 of 2005 and on filing of said application learned executing court should revive the execution case No. 7 of 2005 within four weeks from the date of filing of said application of revival. Thereafter, learned executing court should proceed with the execution case as per law after giving a notice to the present petitioner defendant/judgment debtor. The parties are hereby restrained from creating any third party interest in the suit property. They are also

directed to maintain status-quo as on date regarding possession till disposal of the execution case No. 7 of 2005 as per law after its revival.

18. The revisional application stands disposed of accordingly.

19. In view of disposal of the main case the application being CAN No. 7509 of 2013 praying for extending the interim order till disposal of the revisional application has become infructuous and stand disposed of.

20. No costs. Urgent photostat certified copy of this judgment be supplied to the learned counsels of the parties, if applied for.