

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Constitutional Petition No.D-120 of 2002

Present:
Mr. Justice Mahmood A. Khan
Mr. Justice Khadim Hussain Tunio

Mushtaq Ahmed and others - - - - - Petitioners

versus

Muhammad Shafi & others - - - - - Respondents

Mr. Badal Gahoti, advocate for petitioners.
Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.
Mr. Ahmed Murtuza A. Arab advocate for LR's of respondent No.1.

Date of hearing: 23.09.2021
Date of announcement
of judgment: 29.09.2021.

O R D E R

KHADIM HUSSAIN TUNIO, J.- Respondent No. 1 filed T.C Suit No. 16/1976 in the Court of Senior Civil Judge Mirpurkhas for pre-emption of suit land. Admittedly, respondent No. 1 claimed to have pre-emption rights over an agricultural land comprising of block No. 39/3, 4, 5, 6, 11, 12, 13, 14 and 54/3, 6, 11, 14 admeasuring 12 acres situated in Deh 349-A, Taluka Jamesabad which was earlier leased to the respondent No. 1's father. Due to absence of the defence counsel in the suit, it was decreed ex-parte in favour of the respondent No. 1. The same was appealed, vide Civil Appeal No. 60/1979 and the same was dismissed. Thereafter, the matter was again appealed, vide Revision Application No. 168/1983 and vide judgment dated 30.07.1992, the judgments and decree of the two courts below were set aside. This decision was appealed before the Hon'ble Apex Court, vide Civil Petition for Special Leave to Appeal No. K-448 of 1992 and vide judgment dated 20.12.1995, the judgment dated 30.07.1992 was dismissed and the judgment and decree passed by the learned Senior Civil Judge dated 28.1.1979 was restored. When it came to execution of the decree, the

respondent No. 1 filed execution application No. 1/1996 with respect to 60 acres of land in his favour to which the petitioners objected, but the execution application was allowed by the trial Court vide order dated 8.12.1996. The same was appealed by the petitioners, vide miscellaneous civil appeal No. 2 of 1997, but it was again dismissed vide judgment dated 20.09.1997. The petitioners then challenged the orders by filing Civil Revision Application bearing No. 150 of 1997 before this Court, claiming that the land which the respondent No. 1 sought to pre-empt was shown to be 12 acres and not 60 acres. The revision application was allowed vide judgment dated 17.04.1998 and the execution was altered to only include 12 acres of land. The decision was challenged by the respondent No. 1 before the Hon'ble Apex Court through Civil Petition for Leave to Appeal No. K-367 of 1998 and vide judgment dated 23.05.2001, the respondent was directed to file an application u/s 152 CPC for correction in decree before the Court that was ceased with the matter. Resultantly, respondent No. 1 filed the application before the Court of 2nd Senior Civil Judge Mirpurkhas which was subsequently allowed vide order dated 22.12.2001. The petitioners challenged the same before the District Judge Mirpurkhas in Civil Revision Application No. 34 of 2001 and vide order dated 27.03.2002, the same was dismissed. Now, the petitioners have approached this Court, challenging the same orders with respect to application u/s 152 CPC.

2. Learned counsel for the petitioners primarily contended that the respondent No. 1 had only shown the area of the agricultural land concerned inblock No. 39/3, 4, 5, 6, 11, 12, 13, 14 and 54/3, 6, 11 and 14 in Deh 349-A in Taluka Jamesabad to be 12 acres and the suit was decreed with respect to only 12 acres and despite having many opportunities to rectify the mistake during the process of appeals, respondent No. 1 failed to do so and therefore the impugned orders are liable to be set aside. In support of his contentions, learned counsel cited the case of *Baqar v. Muhammad Rafique and others (2003 SCMR 1401)*.

3. Learned counsel for legal heirs of respondent No.1 has supported the impugned order.

4. Conversely, learned A.A.G supported the impugned orders while arguing that the learned lower Courts were more than competent to pass the orders with respect to correction of decree in terms of S. 152 of the Civil Procedure Code and the same practice could be exercised by the executing Court at any time.

5. We have heard learned counsel for the petitioners as well as learned AAG and perused the record of the case. The total area of the concerned suit land pertains to 60-00 acres of land having Survey No. 33/1 to 8, 10 to 15, 39/3 to 6, 11 to 14, 40/8 to 16, 54/3 to 6, 11 to 15, 55/9, 10, 15, 16, 61/3 to 6, 65/3 to 6, 11, 12, 66/1 to 4 and 8 to 10 in Deh 349-A Taluka Jamesabad as shown in the original sale deed. When the matter was brought before the Hon'ble Apex Court, vide order dated 23.05.2001 in Civil Appeal No.1194 of 1998, it was observed by the Hon'ble Apex Court that there appears to be, *prima facie*, an error in the decree. By relying on the same observation, learned trial Court allowed the application u/s 152 CPC and altered the decree accordingly. A perusal of the prayer clause in the plaint of the original T.C Suit No. 16 of 1976 shows that the respondent No. 1 sought for pre-emption of "*all land under sale*" and not just the land specifically mentioned in paragraph 2 of the plaint. In the plaint, the respondent No. 1 has time and again mentioned the term "*other land*" alongside suit land. In paragraph 5 of the plaint, the respondent No. 1 has sought pre-emption of "*all land under sale or alternatively land comprising plaintiff's tenancy as shown in para 2 supra*". The "*suit land*" in the matter refers to the land mentioned in paragraph 2 which comprised of his tenancy whereas "*other land*" refers to all the adjoining land that was up for sale as shown in the sale deed. Section 152 of the Code provides that **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 on its own motion or on the application of any of the parties. The term arithmetical

refers to anything related to numbers, thereby providing that this includes the measurement of suit land in the present case *i.e.* 60 acres instead of 12 and the Survey numbers of the concerned land as shown in the sale deed. The phrase "*at any time*" provides that this process can be done at any given time on the application of either of the parties or by the Court itself, therefore making the contention of the counsel for petitioners with regard to the same is meritless. The Court's powers of amendment are not just restricted to errors that have crept in the judgment or decree but extended to errors that have crept in a plaint or sale certificate as well. Where a property was wrongly described in a plaint in suit and the mistake was repeated in the final decree without being noticed either by the parties or by the court, the court has ample powers to amend the plaint, decrees and the judgment and correct the given mistakes. In the case of Niyamat Ali Molla v. Sonargon Housing Co-operative Society Ltd. (AIR 2008 SC 225), a suit was filed for declaration and possession of suit property and was decreed as prayed and the same was upheld by the Indian Supreme Court. During the course of execution proceedings, the decree holder filed an application for amendment of plaint and the decree containing the schedule of property. The Trial Court allowed the amendment and the same was challenged before the Indian Supreme Court, wherein it was observed that:

"18. Section 152 of the Code of Civil Procedure empowers the Court to correct its own error in a judgment, decree or order from any accidental slip or omission. The principle behind the said provision is **actus curiae nemesis gravabit**, *i.e.*, nobody shall be prejudiced by an act of court.

19. Code of Civil Procedure recognises the inherent power of the court. It is not only confined to the amendment of the judgment or decree as envisaged under Section 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 under Section 152 as also under Section 151 of the Code of Civil Procedure. Such a power of the court is well recognized."

6. This is not a case where one property is being substituted by a completely different one or where the respondent No. 1 sought for amendment with regard to something that was not present in the plaint to begin with. The statements contained in the body of the plaint have sufficiently described the suit lands that the respondent sought pre-emption for. Only because some blanks in the plaint were left, the same, by itself, may not be a ground to deprive the respondent from the fruit of the decree. These blanks, in the present case, would be non-mentioning of survey numbers of the other land being sold, though sufficiently described and even shown in the accompanying sale deed. The suit was decreed in favour of the respondent No. 1 as prayed and as earlier stated, in the prayer clause, the respondent prayed for pre-emption of "*all land under sale*" or "*alternatively*" the land comprising tenancy of the respondent. The tone of the judgment and decree itself also suggests that it was passed for the entire land and not just the alternative provided in the prayer clause. In our view, neither of the parties will be prejudice if the amendment, as sought, is allowed. The Hon'ble Apex Court, in the case of *Muhammad Shafi and others v. Muhammad Boota and others (2004 SCMR 1611)* observed that:-

"Even the tenor of the judgment demonstrates that it was passed for the entire land, subject-matter of the present petition. It is an established principle of law that an act of the Court shall not prejudice any person. This Court has time and again stated authoritatively that technical objections should not come in the way of dispensation of complete and substantial justice."

7. As far as the contention of the counsel for petitioners regarding the decree having been passed with respect to only 12 acres and having already gone up to the Supreme Court is concerned, the same is inconsequential. In the case of *Manzoor Hussain and 9 others v. Malik Karam Khan and 2 others (1991 SCMR 2451)*, the Hon'ble Apex Court has been pleased to observe that:-

“The whole claim was founded on a written agreement. That agreement had been mentioned in the plaint as the basis of title and the foundation of rights. The specification or description of the property was evidently picked up from it. A copy of the agreement had accompanied the plaint. The defendants / judgment-debtors had as much notice of that document as of the plaint. None pointed out the discrepancy between the two. The Court too did not detect it. This Court has already held in Amir Abdullah Khan through legal heirs and others v. Col. Muhammad Attaullah Khan PLD 1990 SC 972 that where a claim is founded on a deed and the plaint incorporates by reference the contents of such deed, the incorrect specification or incorrect description of the particular of the property can always be resolved and corrected by the reference to the deed so incorporated and not beyond. The basic title deed is that accompanying document of which the parties had full notice. The contest is deemed to centre round that document as stood incorporated in the plaint. Unless the discrepancy in the two is detected by the parties to the contest or by the Court and remains unattended, correction of the incorporating document to bring it in conformity with the incorporated document cannot be refused. Whatever the stage when the discrepancy is detected correction of it can take place by resort to section 152, C.P.C.”

8. Resultantly, we find no force in the present constitutional petition as the impugned orders are well-reasoned and legal. Therefore, instant constitutional petition is dismissed.

JUDGE

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