

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.11.2007

Coram:

THE HONOURABLE JUSTICE MR.M.VENUGOPAL

C.R.P. (NPD) No.1736 of 2003
and
C.M.P.No.17702 of 2003

M.Shanmugam

.. Petitioner

1.UCO Bank
Erode Town,
Periyar District.

vs.

2.M/s.Salem Cones
3.K.Susheela
(R2 and R3-given up)

.. Respondents

Civil Revision Petition filed against the order dated 15.09.1997 made in O.S.No.55 of 1988 passed by the Sub Judge, Sankagiri.

For Petitioner : Mr.M.Jayaraman

For Respondent : Mr. A.V.Radhakrishnan for R1
R2 and R3 given up

ORDER

The civil revision petitioner is the second defendant in O.S.No.55 of 1988 on the file of the Sub Court, Sankagiri. In the said suit filed by the first respondent/Plaintiff Bank for hypothecation directing the defendants 1 to 3 to pay a sum of Rs.4,79,259/- with future interest at 13.5% per annum from the date of suit till date of payment towards the Term Loan, with a charge over the property described in the schedule and directing the sale of the hypothecated property in case of default of payment to be sold and the sale proceeds be applied for realisation of the decretal amount and directing the defendants to pay a sum of Rs.1,99,907.05/- with future interest at 15% p.a. from the date of suit till date of payment towards cash credit loan with a charge over the property described in the schedule and in case of default of payment, directing the hypothecated property in movables described in the schedule to be sold and the sale proceeds be applied for realisation of the decretal amount due under the cash credit loan amount and for cost, decree was passed by the trial Court on 26.09.1991.

2. An interlocutory application was filed by the first Respondent/Plaintiff Bank before the learned sub Judge, Sankagiri wherein it was inter alia averred that the suit was filed for recovery of money and create a charge over the hypothecated movables and there was no immovable collateral security obtained by the Bank at the time of advance of money to the defendants and there was also no prayer in the plaint to pass a preliminary mortgage decree on the immovable properties and that inadvertently a mistake crept-in while drafting the decree and that the decree was drafted as a preliminary mortgage decree and directed the decree holder to apply for final decree. In short, the first respondent/Plaintiff Bank in the interlocutory application has prayed for treating the decree as simple money decree by passing orders *Suo Motto* under section 152 of C.P.C. The said interlocutory application was received by the trial Court on 04.03.1997 and the said application in unnumbered stage was heard by the Court below on 15.09.1997 and orders were passed as follows:-

"Heard S.A.Shanmugam, Perused C.P.C. Commentaries 9th edition by W.W.Chitaley and V.B.Bakhale Volume II Pages 830, 838, 842, Amend the decree as Money decree."

3. Nearly after 5 years, 5 months and 7 days, the interlocutory application for amending the decree *Suo Motto* by the trial Court was filed under Section 152 of C.P.C. by the first Respondent/Plaintiff Bank.

4. It is the contention of the learned counsel for the Revision Petitioner/Second Defendant that the order passed by the learned Subordinate Judge, Sankagiri on 15.09.1997 in unnumbered application without ordering notice to the other side is illegal in the eye of law.

5. In this connection, it is pertinent to refer to Rule 32 of the Civil Rules of Practice, which enjoins as follows:-

"32. Proof of facts by affidavit:- Any fact required to be proved upon an interlocutory proceeding shall, unless otherwise provided by these rules, ordered by the Court, be proved by affidavit, but the judge may, in any case, direct evidence to be given orally; and thereupon the evidence shall be recorded and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibit shall be prepared and annexed to the judgment."

6. In the decision reported in (2006) 1 SCC 380, U.P.SRTC V. IMTIAZ HUSSAIN, it is observed by the Honourable Supreme Court as follows:-

"A. Labour Law - U.P. Industrial Disputes Act, 1947 (28 of 1947) - S.6(6) - Provision in, enabling to correct any clerical or arithmetical mistakes in the award, or errors arising therein from any accidental slip or omission - Scope - Held, it is similar to S.152

CPC - Restating the basis of and the limitations and principles applicable to S.152 CPC, held, they are applicable to S.6(6) of the U.P.Industrial Disputes Act as well - In the present case, employer SRT Corporation removing the conductor from service - Labour Court directing reinstatement but holding that as the said conductor's name was not in the list of permanent conductors' list, he was not entitled to back wages - Subsequently, on an application filed by the said conductor under S.6(6) of the U.P. Act, Labour Court passing certain directions about payment of salary, allowances, etc. from the date of raising of the Industrial dispute till reinstatement with continuity of service - Such modification of the award purportedly under S.6(6), held, not justified - Civil Procedure Code, 1908, S.152 - Maxims - "actus curiae neminem gravabit", "lex non cogit ad impossibilia"

B.Labour Law -U.P.Industrial Disputes Act, 1947 (28 of 1947) - S.6(6) - Analogous provisions - Held, it is similar to S.152 CPC - Civil Procedure Code, 1908, S.152 - Statute Law - Pari materia provisions."

7.In the decision reported in (1999) 3 SCC 500, DWARAKA DAS V. STATE OF M.P. AND ANOTHER, it is held as follows:-

"A. Civil Procedure Code, 1908 - Ss.152 and 151 - Correction of mistakes or errors in judgments, orders or decrees - Correction should be of the mistake or omission which is accidental and non-intentional and does not go to the merits of the case - Provision cannot be invoked to modify, alter or add to the terms of the original judgment, order or decree so as to in effect pass an effective judicial order - Liberal use of Ss.151 and 152, CPC by lower Courts to alter original judgment decree or order deprecated - On facts, trial Court in its decree having not granted interest pendente lite despite prayer made in that regard, held, erred in allowing an application under S.152 and by correction awarding interest pendente lite - Interest."

8.In the decision reported in AIR 2006 KERALA 40, THOMAS V. KUNJAMMA AND ANOTHER (FB), it is held as follows:-

"Civil P.C. (5 of 1908), O.6, R.17, S.152 - Amendment of plaint and decree - Application for - Injunction Suit - Confirmation of decree in first appeal and second appeal on merit - Any correction of plaint and decree to correct extent of plaint schedule property and survey number - Has to be made by second appellate Court only - Plea that appeal and second appeal from trial Court judgment were only dismissed confirming decree and therefore trial Court had jurisdiction to allow such amendment - Is not tenable."

9. In the decision reported in (2001) 6 SCC 683, PLASTO PACK, MUMBAI V. RATNAKAR BANK LTD., it is held as follows:-

"A. Civil Procedure Code, 1908 - Or.8 R.10 and Or.20 R.10 - Suit for recovery of dues - Decree passed under Or. 8 R.10 granting relief set out in the plaint "as it was" - Held, such prayers, as were not granted by the decree, would be deemed to have been refused and to that extent the suit shall be deemed to have been dismissed. (Para 12)

B. Civil Procedure Code, 1908 - S.152 and Or.9 Rr.13,14 - Amendment of decree - Power of, cannot be exercised so as to add to or subtract from any relief earlier granted - Some of the reliefs sought by the plaintiff not granted by the decree and as such the same were deemed to have been refused and to that extent suit was deemed to have been dismissed - After a long lapse of time (more than 2 years and 8 months), on a mere motion made by plaintiff, held, court cannot substitute almost a new decree in place of the old one by granting such reliefs as were not granted earlier and that too without giving notice to defendant (Para 12) "

10. It is brought to the notice of this Court that the first defendant and the second defendant in the suit filed C.M.A.No.736 of 1994 as appellants before this Court as against the orders passed in I.A.No.1231 of 1991 to set aside the ex parte decree dated 26.09.1991, which was dismissed by the Court below on 10.03.2003 and the C.M.A.No.736 of 1994 was dismissed by this Court on 16.04.1996. It is significant to point out that in C.M.A.No.736 of 1994 judgment dated 16.04.1996, this Court came to the conclusion that the conduct of the appellants clearly shows that they are least interested in disposing of the matter and having suffered ex parte decree and they are trying to drag on proceedings as much as possible. I do not think, the appellants are entitled to any indulgence from this Court, since the conditional order has not been complied with, I am of the view that the appellants cannot be permitted to argue the matter on merits. Perusal of the trial Court order would clearly show that the lower Court has considered the entire aspect and dismissed the application to set aside the ex parte decree dated 26.09.1991. There is no infirmity in the order of the trial Court and the appeal is dismissed. However, there is no order as to costs. In the said C.M.A. No.736 of 1994, the plaintiff/Bank figured as the respondent before the Honourable High Court.

11. According to the learned counsel for the first respondent/Bank that a sum of Rs.1,50,000/- was paid on 10.01.1996 after the sale of hypothecated machinery as per the decree and this amount is only a part payment to the Bank and the balance is to be paid by the defendants.

"However, this fact is not accepted by the revision petitioner ad according to him, a sum of Rs.1,50,000/- was paid as full and final settlement of the decree and reportedly, and E.A. under Order 21 Rule 2 and Section 151 C.P.C. was filed in this regard before the trial court on 12.02.1996."

12. As far as the present case is concerned, this Court is of the considered view that when the first respondent Bank has filed an unnumbered I.A. in O.S.No.55 of 1988 before the trial Court praying to amend the decree as simple money decree exercising its *Suo Motto* powers under Section 152 of C.P.C., then the trial Court ought to have numbered the said application and ordered notice to the other side in as much as it cannot pass unilateral orders, notwithstanding its powers under Section 152 C.P.C. either of its own motion or on the application of any parties to amend the Judgments, Decrees or Orders as the case may be.

13. It cannot be gain said that there is no limitation period for filing an application under Section 152 C.P.C. as per the decision reported in (2004) 1 AN WR 523 (AP). Further more, the matters decided judicially by decree cannot be reopened under Section 152 C.P.C as per the decision reported in (2005) 1 ALT 578 (DB) (AP). It is relevant to refer that the exercise of power under Section 152 contemplates the correction of mistakes by Court of its ministerial actions and does not contemplate of passing effective judicial orders after the Judgment, Decree or Order and that the corrections visualised are only accidental omissions or mistakes in the considered opinion of this Court.

14. Admittedly in O.S.No.55 of 1988, an *ex parte* decree was passed on 26.09.1991. Even C.M.A.No.736 of 1994 filed by the Appellants/Defendants 1 and 2 in the suit was dismissed as early as on 16.04.1996. When that be the factual situation, when the first respondent Bank filed the unnumbered I.A. praying for treating the decree already passed as money decree and amending the same under Section 152 C.P.C. the principles of natural justice required that an opportunity should have been given to the other side to file their counter if any and in fact, the trial Court ought to have numbered the said application and disposed of the same on merits. However, in the present case, this was not done by the trial Court and the trial Court has simply perused the C.P.C. Commentaries IX Edition by W.W.Chitaley and V.B.Bakhale Volume II Pages 830, 838, 842 and ordered for the amendment of the decree as money decree unilaterally. As per Rule 32 of the Civil Rules of Practice whereby the averments/facts mentioned in the affidavit can be proved by any party in an interlocutory proceeding either by an affidavit or by adducing direct evidence orally and by marking of documents as exhibits. In as much as the trial Court has passed orders on 15.09.1997, ordering for amending

<https://hcservices.ecourts.gov.in/decrees/> as money decree in the unnumbered application in O.S.No.55 of 1988 on the file of the learned Subordinate Judge, Sankagiri, this court sitting in Revision interferes with the

order of the lower Court, since it has failed to exercise its jurisdiction so vested in law and therefore, allows the Civil Revision Petition to prevent aberration of justice and to promote substantial cause of justice. Resultantly, the order passed by the trial Court in the unnumbered application dated 15.09.1997 is hereby set aside.

15. The learned subordinate Judge, Sankagiri is directed to restore the said application and directed to assign a number to the said application and order notice to the parties and after affording opportunity to both the parties to file counter and to adduce oral or documentary evidence, is directed to dispose of the same in accordance with law within a period of two months from the date of receipt of a copy of this order. However, there is no order as to costs. Since the main matter is disposed of, the connected C.M.P. is closed.

Sd/-
Asst. Registrar.
Dated : 06.12.2007

Corrected as per order of this Court
dated 07.01.2008 and made herein.

Sd/-
Asst. Registrar
Dated : 10.01.2008

/true copy/

Sub Asst. Registrar.

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To

1. The Subordinate Judge,
Sankagiri.

| To be substituted to the
| order already despatched
| on 12.12.2007

2. The Section Officer,
VR Section,
High Court, Madras.

1 cc to Mr.M. Jayaraman, SR. 71215

1 cc To Mr.A.V.Radhakrishnan, Advocate, SR.481.

KM (CO)

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RVL 10.01.2008