CASE NO.:
Appeal (civil) 768 of 2008

PETITIONER:
Hari Prasad Bhuyan

RESPONDENT:
Durga Prasad Bhuyan and Ors

DATE OF JUDGMENT: 29/01/2008

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (C) No.8870 of 2006)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Gauhati High Court, dismissing the applications for condonation of delay, setting aside of abatement and substitution of the heirs of the respondent nos. 13 and 24 in the Second Appeal no.80/1986. It was held that the appeal had abated and the judgment and order dated 18.5.1995 passed by the High Court in Second Appeal no.80/1986 was a nullity and, therefore, application under Section 152 of the Code of Civil Procedure, 1908 (in short the \021CPC\022) was not maintainable.

3. Background facts in a nutshell are as follows:

Predecessors-in-interest of the appellant filed suit TS no.26/1978 in the Court of Assistant District Judge No.1, Gauhati. The said suit, inter alia, was for recovery of possession, confirmation of possession and declaration of title over the suit properties and for cancellation of mutation of names of certain defendants. According to the appellant, the said suit specifically set out the cause of action against each defendant and the prayers in the suit were also specifically directed against the defendants in respect of the alleged holding in the scheduled properties. The Trial Court by judgment dated 11.1.1984 dismissed the suit. An appeal was preferred which was numbered as Appeal no.5/1984 and the same was dismissed by learned District Judge, Gauhati by order dated 30.1.1986. Plaintiffs filed a Second Appeal no.80 of 1986 in the Gauhati High Court. During pendency of the same, some of the plaintiffs died and their legal heirs were substituted. The Second Appeal filed by the plaintiffs was allowed by the Gauhati High Court and the suit was decreed. Plaintiffs filed an Execution Petition before the Trial Court which was numbered as Title Execution Case No. 4 of 1995. The Trial Court drew up the decree dated 7.4.1996 as directed by the High Court, but mistakenly set out only costs without setting out the reliefs in the suit which had been decreed. An S.L.P. (CC No.2275/96) filed by the respondents against the judgment and order dated 18.8.1995 passed by the High Court was dismissed by order dated 8.5.1996 with the following observations:

\023The Ld. Counsel for the petitioner submits that the petitioners have been advised to approach the High Court for recall of the order and he had instructions to withdraw this Special Leave Petition. We record the statements of the Ld Counsel and dismiss the Special Leave Petition as withdrawn\024.

In the Execution Petition filed by the appellants objection under Section 47 CPC was filed on behalf of the heirs of deceased respondent no.7 and the Trial Court by an order disposed of the said application, inter alia, observing as follows:

\023In the light of the above, I am of the considered view that the decree cannot be executed in respect of the E Schedule on the ground of nullity but the decree will be executable in respect of other properties as mentioned in the plaint except those in Schedule E and against the other judgment debtors. With this order, the petition stands disposed of. Steps be taken for execution of the decree.\024

On 26.8.1997 the trial Court by two separate orders in the suit in the execution proceedings observed that decree should have contained all the reliefs claimed and ordered accordingly. On 17.11.1997 the decree was drawn up as per the order dated 26.8.1997. Respondent no.6 i.e. Laxmi Ram Bhuyan filed a Civil Revision (CR No.423/1997) in the Gauhati High Court questioning orders dated 26.8.1997 and decree dated 17.11.1997. By order dated 29.9.1999 the High Court dismissed the Civil Revision. A petition was filed seeking review of the High Court\022s order dated 29.9.1999 in RP No.6 of 2000. A Special Leave Petition was filed against the order dated 10.4.2001, by which the High Court rejected the review Petition. On 20.11.2002 this Court granted liberty to the appellants to approach the High Court under Section 152 CPC for making appropriate corrections in the decree. The judgment is reported in Lakshmi Ram Bhuyan vs. Hari Prasad Bhuyan and Ors. (2003 (1) SCC 197). It was inter alia noted as follows:

11. The obligation is cast not only on the trial court but also on the appellate court. In the event of the suit having been decreed by the trial court if the appellate court interferes with the judgment of the trial court, the judgment of the appellate court should precisely and specifically set out the reliefs granted and the modifications, if any, made in the original decree explicitly and with particularity and precision. Order XLI Rule 31 CPC casts an obligation on the author of the appellate judgment to state the points for determination, the decision thereon, the reasons for the decision and when the decree appealed from is reversed or varied, the relief to which the appellant is entitled. If the suit was dismissed by the trial court and in appeal the decree of dismissal is reversed, the operative part of the judgment should be so precise and clear as it would have been if the suit was decreed by the trial court to enable a self-contained decree

being drawn up in conformity therewith. The plaintiff, being dominus litus, enjoys a free hand in couching the relief clause in the manner he pleases and cases are not wanting where the plaintiff makes full use of the liberty given to him. It is for the court, decreeing the suit, to examine the reliefs and then construct the operative part of the judgment in such manner as to bring the reliefs granted in conformity with the findings arrived at on different issues and also the admitted facts. The trial court merely observing in the operative part of the judgment that the suit is decreed or an appellate court disposing of an appeal against dismissal of suit observing the appeal is allowed, and then staying short at that, without specifying the reliefs to which the successful party has been found entitled tantamounts to a failure on the part of the author of the judgment to discharge obligation cast on the Judge by the provisions of the Code of Civil Procedure.

12. In the case at hand, a perusal of the reliefs prayed for in the plaint shows that the reliefs are not very happily worded. There are some reliefs which may not be necessary or may be uncalled for, though prayed for. The reliefs may have been considered capable of being recast or redefined so as to be precise and specific. May be, that the Court was inclined to grant some other relief so as to effectually adjudicate upon the controversy and bring it to an end. Nothing is spelled out from the appellate judgment. The trial court, on whom the obligation was cast by the second appellate judgment to draw up a decree, was also, as its order shows, not very clear in its mind and thought it safe to proceed on an assumption that all the reliefs sought for in the plaint were allowed to the plaintiffs. The learned Single Judge allowing the second appeal, should have clearly and precisely stated the extent and manner of reliefs to which the plaintiffs were found to be entitled in his view of the findings arrived at during the course of the appellate judgment. The parties, the draftsman of the decree and the executing court cannot be left guessing what was transpiring in the mind of the Judge decreeing the suit or allowing the appeal without further placing on record the reliefs to which the plaintiffs are held entitled in the Opinion of the Judge.

13. There is yet another infirmity. Ordinarily the decree should have been drawn up by the High Court itself. It has not been brought to the notice of this Court by the learned counsel for either parties if there are any rules framed by the High Court which countenance such a practice as directing the trial court to draw up a decree in conformity with the judgment of the High Court.

14. How to solve this riddle? In our opinion,

the successful party has no other option but to have recourse to Section 152 CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the court either on its own motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the court to vary its judgment so as to give effect to its meaning and intention. Power of the court to amend its orders so as to carry out the intention and express the meaning of the Court at the time when the order was made was upheld by Bowen, L.J. in Swire, Re, Mellor v. Swire subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice. Lindley, L.J. observed that if the order of the court, though drawn up, did not express the order as intended to be made then

\023there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal\024.

15. For the foregoing reasons the appeal is allowed. The order of the trial court drawing up the decree is set aside. The parties are allowed liberty of moving the High Court under Section 152 CPC seeking appropriate rectification in the judgment of the High Court so as to clearly specify the extent and manner of reliefs to which in the opinion of the High Court the successful party was found entitled consistently with the intention expressed in the judgment. The delay which would be occasioned has to be regretted but is unavoidable. Once the operative part of the judgment is rectified there would be no difficulty in drawing up a decree by the High Court itself in conformity with the operative part of the judgment. If the rules of the High Court so require, the ministerial act of drawing up of the decree may be left to be performed by the trial Court.

4. Accordingly the application was filed under Section 152 CPC before the High Court. On 26.6.2003, according to the appellant, he came to know about the death of respondent nos.13 and 24 in February 1999 and 1993 respectively. This according to the appellant came to the knowledge of the

appellant from the report of the Process Server dated 26.6.2003. On 2.8.2003 the appellant filed application for setting aside the abatement, substitution and for condonation of delay. By the impugned order, the learned Single Judge while dealing with application under Section 152 CPC declared the decree to be a nullity on account of death of respondent nos. 13 and 24 and the belated approach for bringing their legal heirs on record.

5. Learned counsel for the appellant submitted that the High Court has missed several relevant factors. Firstly, in the earlier round of litigation which resulted in the decision Lakshmi Ram Bhuyan\022s case (supra) it was not pointed out by the respondents about the death of respondent no.13 or respondent no. 24. The present respondents were the appellants in the appeal before this Court. They also did not point out about the death. There is no decree which was to be drawn up in line with this Court\022s judgment.

6. There is no dispute regarding the assertion of the appellant that he came to know about the death of respondents 13 and 24 from the process servers\022 report. Before this Court earlier also respondents did not disclose about their death. Since that has not been done, respondents cannot take any advantage from the belated approach by the appellant. This according to us is a clear case where the prayer for condonation of delay in seeking substitution by setting aside abatement and condonation of delay should have been accepted by the High Court. The High Court\022s order is set aside. The appeal is allowed. There will be no order as to costs.