

**THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA
RAO**

CIVIL REVISION PETITION No.4293 of 2013

ORDER:

This Civil Revision Petition is filed challenging the order dt.28-08-2013 in I.A.No.2889 of 2012 in O.S.No.122 of 1997 of the II Additional Chief Judge, City Civil Court, Hyderabad.

2. The petitioners herein are legal representatives of the 1st defendant in O.S.No.122 of 1997.

3. The said suit had been filed by the 1st respondent as O.S.No.755 of 1991 on the file of the IV Additional Judge, City Civil Court, Hyderabad for partition and separate possession of 1/3rd share of the 1st respondent in plaint A schedule house property bearing No.3-6-69/B/13 situated at Avanthinagar, Basheerbagh, Hyderabad, plaint-B schedule movable properties and for payment of his share at the rate of Rs.2,000/- per month towards mesne profits and costs.

4. In the plaint, the B schedule property was described as:

S.No.	List of movable properties of H.U.F.	Value – Rs.
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1.	Road Rollers (Diesel) 4 in number	6,00,000-00
2.	Five Lorries Leyland	7,00,000-00
3.	One loader	2,00,000-00
4.	One Hot Mix Paver	2,00,000-00
5.	<i>One Hot mixing plant at Mansoorabad in R.R. District with land value</i>	7,00,000-00
6.	One Chevrolet Van (Diesel)	20,000-00
7.	One Maruti Van ABI 7605	60,000-00
8.	One Maruti DeluxCar AHA 50	1,20,000-00
9.	Mahindra & Mahindra Jeep (Diesel) ADV 1355	1,00,000-00
10	Approximate value of other movable properties at 3-6-69/B/13 for which inventory has to be prepared by the Court including cash	3,00,000-00
	Value of plaintiff's 1/3 rd share	10,00,000-00

5. A preliminary decree dt.26-10-1998 was passed by the Court of II Additional Chief Judge, City Civil Court, Hyderabad in O.S.No.122 of 1997 granting to the 1st petitioner and respondent Nos.1 and 2, a 1/3rd share each in the plaint A & B schedule properties, and directing the 1st respondent to seek appointment of an Advocate Commissioner for physical division and separate possession of the said properties by filing a separate application. Relief of mesne profits was refused.

6. Challenging the same, C.C.C.A.No.39 of 1999 was filed by the 1st petitioner. In that appeal, C.M.P.No.4580 of 2003 was filed by the 1st respondent to amend the

plaint in O.S.No.122 of 1997 by substituting for item-5 of
plaint-B schedule, the following:

*“Land bearing Revenue Survey No.66/10/B of
Mansoorabad village, Saroornagar Mandal (Formerly
Hyderabad, East Taluq) Ranga Reddy District, totally
admeasuring around Ac.1.11 gts. Along with Hot
Mixing Plant embedded thereon, and bounded as
follows:*

*North : Land of Sri Venkatachalam
South : Land Sardar Singh
East : Survey No.66/10/C
West : Survey No.66/10/A”*

7. This application was allowed on 31-03-2003. Thus
in the B schedule, which is said to contain *movable*
properties, by virtue of allowing of C.M.P.No.4580 of 2003,
a n *immovable* property with the above details was
substituted in the place of item 5 mentioned as “*One Hot
Mixing Plant at Mansoorabad in R.R.District with land
value Rs.7.00 lakhs*”.

8. The C.C.C.A.No.39 of 1999 was dismissed by a
Division Bench of this Court on 30-09-2004. There was
no discussion in the judgment of the Division Bench in the
C.C.C.A. about the entitlement of the 1st respondent for
partition of the *immovable* property substituted in item-5 of
B schedule, and in fact no material was placed before the
Court by the 1st respondent that the above immovable
property is also liable for partition.

9. A Special Leave Petition was filed in the Supreme
Court of India by the legal heirs of the 1st petitioner i.e.

petitioner Nos.2 to 6 against the said judgment. It was admitted and numbered as Civil Appeal No.3855 of 2006. It was dismissed on 09-12-2010. A Review Petition (C) No.844 of 2011 was also filed by the 4th petitioner which was dismissed on 13-04-2011.

10. Thereafter, the 1st respondent filed before the II Additional Chief Judge, City Civil Court, Hyderabad, I.A.No.2889 of 2012 invoking Section 152 CPC contending that item-5 of the plaint-B schedule property was not exactly described at the time of filing of the suit; that this anomaly was observed and C.M.P.No.4580 of 2003 had been filed in C.C.C.A.No.39 of 1999 pending in the High Court for amendment of the plaint by giving correct description of item-5 of plaint B schedule; this was ordered on 31-03-2003; corresponding amendment in the plaint was carried out on 08-04-3003 by the

1st respondent/plaintiff by filing amended plaint by serving a copy thereof on the petitioners; since the matter was pending before Supreme Court and there was a stay from the said Court, appropriate steps for *amending the decree* as per the amendment carried out in the plaint, could not be done; and therefore it is necessary to amend the decree in the suit by substituting in the place of the movable property shown therein as item-5 of the B schedule property with the immovable property mentioned in para-6 above. It was contended that such

amendment to the decree is just and necessary and no prejudice would be caused to the petitioners if it is allowed, and that if it is refused, the 1st respondent would suffer irreparable loss and injury.

11. Counter affidavit was filed by the 4th petitioner opposing this application. He contended that the High Court had allowed only amendment of the pleadings in the plaint, but had not directed any change of the decree or its amendment; thereafter, the matter was carried to the apex Court and ended there; no order was obtained by the 1st respondent that he had any right in the property sought to be included in the decree; mere amendment of pleading does not automatically create right in the property, unless a finding is given by a Court in respect of the substituted immovable property also; the decree drawn as per the judgment cannot be amended without a finding therein that the property substituted by way of amendment is joint family property or not; only if such finding exists, decree can be amended; the property now included through amendment was never part of the suit when the judgment of the trial court was delivered; and since the amendment was allowed at the appellate stage after the judgment and decree of the trial Court, a fresh finding is required in regard to the substituted property. The petitioners deny that the substituted item-5 of plaint-B schedule immovable property is joint family property and contend that it is self

acquired property of the 1st petitioner; that it was purchased long after the death of his father and his father never had any income and did not contribute any part of money to purchase the same. It is also contended that there is no pleading as such in the plaint with regard to the immovable property substituted as item-5 of B schedule and that the amendment was allowed only to the plaint-B schedule. A further plea was taken that the 1st respondent has not stated when he carried out amendment in the original plaint since the original plaint was sent to the High Court and the Supreme Court; as per law, amendment had to be carried out within 14 days or by seeking further permission of the Court after the said period; and that the petitioner Nos.2 to 6 had been brought on record after the death of the 1st petitioner and they engaged a counsel recently. It was also contended that without a trial and finding with regard to the substituted property, when the substitution occurred in the appellate Court, the decree cannot be amended merely on the ground that the plaint was amended in the appeal.

12. By an order dt.28-08-2013, the Court below allowed I.A.No.2889 of 2012 amending the decree in respect of item-5 of B schedule in the decree as sought for by the 1st respondent. It observed that since the High Court allowed C.M.P.No.4580 of 2003 in C.C.C.A.No.39 of 1999, the same was also considered by the High Court and the

Supreme Court in the appeals filed by the petitioners and there was no need for the Court below to give an opportunity to both sides to adduce any evidence and hear on that aspect. It also held that allowing of C.M.P.No.4580 of 2003 does not mean that the nature of the suit is changed.

13. Challenging the same, this Revision Petition is filed.

14. By order dt.08-10-2013, this Court granted stay of all further proceedings pursuant to the preliminary decree in O.S.No.122 of 1997 on the file of the II Additional Chief Judge, City Civil Court, Hyderabad insofar as item-5 of B schedule property is concerned.

15. Heard Sri C.V.L.N.Murthy, learned counsel for the petitioners and Sri Rakesh Sanghi, learned counsel for 1st respondent.

16. Learned counsel for the petitioners contended that the order passed by the Court below is beyond the scope of Section 152 CPC since the omission in the decree which is sought to be corrected goes to the merits of the case. He contended that the power under Section 152 CPC is confined only to correct clerical or arithmetical mistakes in the judgments and decrees or errors arising from accidental slip or omission. He contended that the Court below, being the trial Court, cannot amend the preliminary decree directly since its judgment and decree

dt.26-10-1998 was confirmed on merits in the appeal C.C.C.A.No.39 of 1999 by the High Court since the judgment and decree of the trial Court got merged in the judgment and decree of the appellate Court; and therefore the application for amendment of a decree, if the law permits its amendment under Section 152 CPC, can only be entertained by the High Court and not by the Court below. He pointed out that after allowing C.M.P.No.4580 of 2003 in C.C.C.A.No.39 of 1999, the High Court had not adjudicated whether the 1st respondent is entitled to a decree even in respect of the amended item-5 of the B schedule; there is not even a pleading in the plaint with regard to the amended item-5 of the B schedule nor was there any evidence adduced in regard to this item by the 1st respondent/plaintiff in the High Court to show that it is also joint family property; therefore there cannot be said to be any decree in favour of the 1st respondent for that item; if the 1st respondent wanted a decree for partition for the substituted item-5 of B schedule, the 1st respondent should have valued the said relief, paid Court Fee thereon and filed a cross Appeal before the High Court; he cannot get any relief in respect of the substituted item-5 of B schedule in the C.C.C.A.No.39 of 1999 filed by the 1st petitioner without paying any Court Fee and without leading evidence or without advancing any arguments as to his entitlement for a decree for the said property. He

relied upon **Dwaraka Das Vs. State of Madhya Pradesh**^[1], **Maldar Mahaboob Sab and others Vs. Allabaksh**^[2], **Amina Bee (died) by L.Rs. Vs. Aisha Khatoon**^[3] and **Kannan Vs. Narayani**^[4].

17. The learned counsel for the 1st respondent refuted the above contentions and supported the order passed by the Court below. He contended that C.M.P.No.4580 of 2003 (filed by the 1st respondent to amend the plaint by substituting the immovable property mentioned in para-6 above in the place of the movable property indicated in item-5 of plaint-B schedule) was not even opposed by the 1st petitioner; it was allowed on 31-03-2003 by the High Court; therefore there is deemed to be an admission about the partibility of the said item by the

1st petitioner; and even though there is no discussion in the judgment dt.30-09-2004 in the C.C.C.A.No.39 of 1999, there is deemed to be a decree in favour of the 1st respondent in respect of the substituted item also. According to him, this was because the decree of the trial Court which had granted partition of item-5 of the plaint B schedule as it stood originally, was confirmed by the Division Bench in the C.C.C.A.No.39 of 1999 and the Division Bench had not allowed the said C.C.C.A. setting aside the decree granted by the trial Court in respect of the said item. He contends that once the said item was

substituted by immovable property, automatically there is deemed to be a decree for the substituted item-5 of B schedule also. He contended that it was a accidental slip or omission of the trial Court/High Court in not mentioning the substituted item-5 of the B schedule in the decree notwithstanding the allowing of C.M.P.No.4580 of 2003 by the High Court, and the 1st respondent was justified in invoking Section 152 CPC before the Court below. He also contended that technicalities should not be allowed to defeat substantial justice. He relied on **Niyamat Ali Molla Vs. Sonargon Housing Co-operative Society Limited and others**^[5] and **Pratap Singh Vs. Shri Krishna Gupta and others**^[6].

18. I have noted the submissions of both sides.

19. The following points arise for consideration in this Revision :

- (a) Whether there was any decree in favour of the

1st respondent in respect of the immoveable property substituted in the place of moveable property in item No.5 of Schedule 'B' in the decree dt.26-10-1998 in O.S.No.122 of 1997?
- (b) Whether I.A.No.2889 of 2012 for

modification of the decree dt.26-10-1998 in O.S.No.122 of 1997 could have been filed before the II Additional Chief Judge, City Civil Court, Hyderabad?

- (c) Whether I.A.No.2889 of 2012 filed under Section 152 C.P.C. is maintainable to substitute immoveable property in the place of moveable property in item No.5 of Schedule 'B' in the decree dt.26-10-1998 in O.S.No.122 of 1997?

Point (a)

20. From the facts narrated above, it is clear that there was a preliminary decree passed on 26-10-1998 in O.S.No.122 of 1997 by the II Additional Chief Judge, City Civil Court, Hyderabad on the basis of plaint filed in 1991 (O.S.No.755 of 1991 on the file of the IV Additional Judge, City Civil Court, Hyderabad). In the said plaint, item-5 of B schedule was described as *"One Hot Mixing Plant at Mansoorabad in R.R.District with land value of Rs.7.00 lakhs"*. The said plaint indicated that B schedule properties are 'movable properties' and apart from this item, nine other items of movable properties were mentioned therein. The only averment in the plaint regarding the B schedule properties was:

"4. It is further submitted that the Hindu Undivided Family also acquired a lot of moveable properties which are mentioned

in Schedule B of the plaint. In the said moveable, the plaintiff is entitled to 1/3rd share.”

21. No doubt after the decree was granted on 26-10-1998 in O.S.No.122 of 1997, the 1st petitioner questioned the same in C.C.C.A.No.39 of 1999 before this Court. In the said appeal, item-5 of the B schedule (which was moveable property) was sought to be substituted by immovable property with the description mentioned in para-6 supra in the schedule to the plaint. There was no pleading sought to be incorporated in the body of the plaint with regard to this item by the 1st respondent/plaintiff. The said application for amendment was allowed on 31-03-2003 by the High Court. Thus only the plaint filed by the 1st respondent in O.S.No.122 of 1997 (to the extent of substituting item-5 of B schedule (movable property) with the immovable property indicated in para-6 above) came to be amended without any pleading in the body of the plaint for partition of the immovable property substituted in the place of the movable property in item-5 of the plaint B schedule as it originally stood.

22. There was no evidence adduced seeking partition of the immovable property included in item-5 of B schedule by 1st respondent and no argument was addressed in regard thereto by the 1st respondent/plaintiff. There was no

discussion in the judgment dt.30-09-2004 in C.C.C.A.No.39 of 1999 as to the entitlement of the 1st respondent to partition of this item specifically. The result of this is that, notwithstanding the fact that C.M.P.No.4580 of 2003 was allowed and the immovable property mentioned in para-6 came to be substituted in the place of the movable property mentioned in item-5 of plaint-B schedule, only the decree of the trial Court was confirmed and there was no decree in the C.C.C.A. in favour of 1st respondent in respect of the substituted immoveable property in item 5 of B schedule at all. In fact there could not have been any decree in favour of the 1st respondent in respect of this item in this C.C.C.A. since it was not an appeal preferred by him and it was an appeal preferred by the 1st petitioner.

23. I agree with the contention of the counsel for the petitioners that the immovable property included in item 5 of B schedule through amendment of plaint was never part of the suit schedule when the judgment of the trial court was delivered and since the amendment was allowed at the appellate stage after the judgment and decree of the trial Court, a fresh finding is required in regard to the substituted property. Unless there is a decree granted in the C.C.C.A. in his favour in respect of this item specifically, it cannot be said that the 1st respondent is entitled for inclusion of this item in the

preliminary decree by invoking Section 152 CPC.

24. It is not open to the 1st respondent to contend that the trial Court had granted a decree in respect of item-5 of B schedule (movable property), and since it was substituted in C.C.C.A. by immovable property, the decree of the trial Court in respect of the movable property has to be taken as a decree in his favour in respect of the substituted immovable property, once the decree of the trial Court is confirmed in the C.C.C.A. Point (a) is answered accordingly in favour of the petitioners and against the 1st respondent.

Point (b)

25. Also once the decree of trial Court was confirmed on merits in the C.C.C.A., it has to be taken that there is a merger of the judgment and decree of the trial Court with that of the appellate Court and, assuming that a case is made out for amendment of the decree under Section 152 CPC, such amendment application can only be entertained by the High Court which decided the C.C.C.A. and not the trial Court.

26. In **Kunhayammed v. State of Kerala**^[7], the Supreme Court held that a judgment pronounced by the High Court in the exercise of its appellate or Revisional jurisdiction *after issue of notice and a full hearing in the presence of both parties* would replace the judgment of

the lower Court, thus constituting the judgment of the High Court as the only final judgment to be executed in accordance with law by the Court below. The Court held that so far as merger is concerned, on principle, there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority and that in all the three cases, the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision. It relied on the decisions in **Gojer Bros. (P) Ltd. Vs. Ratan Lal Singh**^[8] and **U.J.S.Chopra Vs. State of Bombay**^[9] and held:

“12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.”

27. I will now refer to Sections 152 and 153-A CPC.

They state:

“152. 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.”

“153A. Power to amend decree or order where appeal is summarily dismissed. *Where an Appellate Court dismisses an appeal under Rule 11 of Order XLI, the power of the Court to amend, under Section 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.”*

28. In **Maldar Mahaboob Sab and others** (2 supra), this Court considered the above provisions and held that confirmation of the decree of the trial Court by the appellate Court can occur either by summarily dismissing the appeal even without hearing the respondent or his counsel by invoking Order 41 Rule 11 CPC, or where the decree of trial Court is confirmed on merits after hearing both sides; in the former case only jurisdiction under Section 152 CPC can be exercised by the Court of first instance and in the latter case, the principle of merger would apply, and it is only the appellate Court which has jurisdiction under Section 152 CPC to correct or amend the decree, as if it has passed the decree.

29. In **Ameena Bee** (3 supra), a suit for partition of matruka properties of one late M.A.Lateef was filed and a

preliminary decree was passed on 21-06-1978. This was challenged in C.C.C.A.No.109 of 1979 and the appeal was partly allowed on 06-02-1986. L.P.A. filed against it was dismissed and so was a Special Leave Petition filed in the Supreme Court. An application to pass final decree was filed and in that application an Advocate-Commissioner was appointed for the purpose of inspection and for taking measurements of items. At that stage some parties raised objection that the decree mentions house No.23-2-145 and not 23-2-145/1 and the Commissioner also reported that on the spot, the house was found to have No.23-2-145/1 only. Therefore, an application was filed in the trial court to correct the house number as 23-2-145/1 instead of 23-2-145 as shown in the preliminary decree. This application was opposed but the trial Court allowed. This Court set aside the said order holding that once the preliminary decree was modified by the High Court in C.C.C.A.No.109 of 1979, only High Court can amend it and not the trial Court. This Court held that the decree of the trial Court had merged in the decree in the C.C.C.A., and only the decree in C.C.C.A. No.109 of 1979 was executable, and therefore the trial Court could not have ordered amendment of the preliminary decree granted by the High Court. It also held that since there was no clerical or arithmetical error, Section 152 C.P.C. is not attracted. It went further and held relying on the decision in

K.P.Rangaiah Vs. K.Krishnaiah ^[10] that if the error related to a mistaken identity of the property, but not mis-description thereof, Section 152 C.P.C. cannot be resorted to. Similar view has been expressed in **Kannan** (4 supra) by the Full Bench of Kerala High Court. Therefore point (b) is answered in favour of the petitioners and against the 1st respondent.

Point (c)

30. I am also of the opinion that Section 152 C.P.C. could not have been invoked even in the present case since the error sought to be corrected in the preliminary decree passed in O.S.No.122 of 1997 by substituting immovable property as item No.5 of 'B' schedule instead of moveable property originally mentioned cannot be said to be a mere clerical or arithmetical error.

31. Learned counsel for 1st respondent sought to rely on the decision in **Niyamat Ali Molla** (5 supra) and contended that pleadings of parties have to be construed liberally and not pedantically and the Court has power under Section 152 C.P.C. and also Section 151 of C.P.C. to correct its own errors in a judgment, decree or order from any accidental slip or omission since Courts have a duty to see that their records are true and present the correct state of affairs and nobody shall be prejudiced by an act of Court.

32. But I am of the opinion that the said judgment will not apply to the present case. In the present case, the 1st respondent was seeking a preliminary decree for the newly substituted immoveable property as item No.5 of 'B' schedule in the plaint (which had been amended pending the C.C.C.A.). Thus he is seeking a review of the decree of the trial Court without challenging the same. This judgment itself mentions that the power under Section 152 C.P.C. cannot be exercised so as to review the judgment of the Court and it cannot be exercised to resolve controversial points and get a decision as to what the parties intended or did not intend to do. *In para-26, it was specifically held that power under Section 152 C.P.C. cannot be exercised to substitute one property for another.*

33. No doubt in **Pratap Singh** (6 supra), cited by the learned counsel for 1st respondent, the Supreme Court has deprecated the tendency of the Courts towards technicality and observed that it is substance that counts and it takes precedence over mere form. This principle is not attracted to the present case since there is no decree at all in favour of the 1st respondent for the immoveable property substituted pending the C.C.C.A. in the place of the moveable property mentioned in item No.5 of 'B' schedule in the plaint. What the 1st respondent is trying to do is to invoke Section 152 C.P.C. and now get a decree,

that too from the trial Court, which is impermissible as explained above.

34. Therefore point (c) is answered accordingly in favour of the petitioners and against 1st respondent.

35. Therefore, the Civil Revision Petition is allowed. No costs.

36. As a sequel, miscellaneous petitions pending if any, in these Revisions shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 29-09-2015

Kvr/Vsv

[\[1\]](#) (1999) 3 S.C.C. 500

[\[2\]](#) 2004 (2) ALD 152

[\[3\]](#) 1998 (1) ALT 160

[\[4\]](#) 1980 AIR (KER) 76

[\[5\]](#) AIR 2008 S.C. 225 (1)

[\[6\]](#) AIR 1956 S.C. 140

[\[7\]](#) (2000) 6 S.C.C. 359

[\[8\]](#) (1974) 2 S.C.C. 453

[\[9\]](#) AIR 1955 S.C. 633

[\[10\]](#) AIR 1974 AP 201