

(1969) 08 AP CK 0004

In the Andhra Pradesh High Court

Case No : Letter Patent Appeal No. 177 of 1964 and A.A.A.O. No's. 14, 48 and 49 of 1968 and Civil Miscellaneous Petition No. 10875 of 1966

Chitturi Perraju and Another

APPELLANT

Vs

Yednapudi Venkamma and Others

RESPONDENT

Date of Decision : 21-08-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 6 Rule 17, 11, 151, 152
Evidence Act, 1872 — Section 95
Specific Relief Act, 1877 — Section 31

Citation : AIR 1971 AP 74

Hon'ble Judges : Sambasiva Rao, J;Kuppuswami, J

Bench : Division Bench

Advocate : G. Venkatarama Sastry, for M. Jagannadharao, for the Appellant;
K.B. Krishna Murty, for the Respondent

Judgement

Sambasiva Rao, J.—This batch of cases provides a classical illustration of abuse of processes of Court. They arise in execution. The suit was filed in the year 1941 and a decree therein was passed in 1942. Though nearly 27 long years have gone by, the curtain is not yet drawn on the litigation and the parties still continue to be at loggerheads. The parties have taken recourse to every available and conceivable stratagem in fighting each other with the result that they have not reached the stage of finality of that dispute.

2. The properties which are the subject-matter of the execution and the others, originally belonged to the second defendant in O. S. 674/41 D. M. C. Bandar. On 6-3-1937 he executed Ex. P-1, a settlement deed in favour of his wife. the first defendant, in respect of nearly Ac. 21-69 cents. The first defendant. in her turn, executed Ex. P-2 another settlement deed on 5-8-1939, conveying about Ac. 7-35 cents to the plaintiffs who are her daughter's sons and another extent of 6 acres to her daughter Annapoornamma. The third defendant is said to have been doped by defendants 1 and 2 in 1940. The first defendant executed yet another settlement deed Ex. P-4 on 6-3-1940 in favour of the third defendant, conveying

to him properties which were not covered by Ex. P-2. Evidently, some disputes arose between the parties . Consequently, the plaints filed O. S. No. 674 of 1941 in the District Munsif's Court, Bandar for declaration of their title and for recovery of possession of properties covered by Ex. P-2. The present defendants 1 to 3 were defendants in that suit. After contest, that suit was decreed on 28-11-1942. A. S. No. 167/43 filed on behalf of the third defendant the decree was allowed. The plaintiffs carried the matter in second appeal to the High Court of Madras in S. A. No. 1151 of 1944. There was a compromise between the parties at that stage and a compromise preliminary decree was passed in the second appeal on 3-9-1945. However, the natural mother of the minor third defendant filed O. S. No. 109 of 1946 for setting aside that compromise decree, alleging that the minor was not properly represented in the prior proceedings and the compromise therein was not beneficial to him.

In the meanwhile, the plaintiffs filed I. A. No. 584 of 1946 to pass a final decree in accordance with the compromise decree in O. S. No. 674 of 1941. After the Commissioner filed his report in regard to the actual partition of the different items of the property in accordance with the terms of the compromise. a final decree was passed on 15-7-1947. The Commissioner took elaborate pains to divide the properties by metes and bound. In order to help implementation of the terms of the compromise decree, he prepared six schedules and five plans in accordance with which he recommended the partition to be effected. "A" schedule showed the details of the properties to which the plaintiffs were immediately entitled to possession. A-1 schedule related to the properties which were allotted to the plaintiffs in which D-1 was given life interest. In A-2 schedule, the properties in which D-2 was given life interest with remainder estate to the plaintiffs were shown. Similarly properties which were allotted to the third defendant with immediate possession were shown in the B schedule. B-1 schedule contained properties which were allotted to him and in which the first defendant was given life interest. Likewise B-2 schedule showed the details of the properties which were allotted to the third defendant and in which life interest was given to the second defendant. The five plans showed how the division as per these schedules should be actually made on the land. To execute this final decree, the plaintiffs filed E. P. No. 104 of 1948 on 31-3-1948 A schedule properties were delivered to them. A few months thereafter, O. S. No. 109 of 1946 filed on behalf of the third defendant for setting aside the compromise decree was dismissed on 4-9-1948, after repelling the contentions advanced on his behalf.

A. S. No. 494 of 1949 was filled in the High Court of Madras against the dismissal of the suit. During the pendency of that appeal, a stay was sought and obtained in C. M. P. No. 6493 of 1949 on 24-10-1949, of the execution of the compromise decree passed in S. A. No. 1151 of 1944. In the meanwhile, the plaintiffs filed . A. No. 1237 of 1948 for mesne profits on the schedule properties which they had taken delivery of and they were awarded to them by the court on 2-2-1950., On 26-4-1950 the second defendant died. On his death, A-2 schedule properties

reverted to the plaintiffs and B-3 schedule properties reverted to the third defendant as per the compromise preliminary decree and the final decree. On behalf of the third defendant, the decree directing payment of mesne profits passed in I. A. No. 1237 of 1948 was appealed against in A. S. No. 74 of 1950 on the file of the Subordinate Judge's Court Bandar. That was, however, dismissed, A. S. No. 494 of 1949 on the file of the High Court of Madras filed against the decree and judgment in O. S. No. 109 of 1946 was dismissed on 7-78-1952. Thus, the decision rejecting the third defendant's suit for setting aside the compromise decree became final. Thereupon, on 17-3-1953 to recover mesne profits from A schedule properties awarded to them in Rae. A. No. 1237 of 1948.

As a counter blast, E. A. No. 1091 of 1953 was filed on 29-7-1953 on behalf of the third defendant, for redelivering the A schedule lands that had been delivered to the plaintiff in E. P. No. 104/48. E. P. No. 160 of 1953 to recover mesne profits from A schedule was granted on 27-8-1953. On 11-8-54 E. A. 1091 of 1953 for redelivery of the A schedule properties filed on behalf of the third defendant was dismissed. Since the second defendant had died, the plaintiffs became entitled to take possession of the A-2 schedule properties as per the compromise decree and accordingly, they filed an execution petition for delivery of those properties on 8-8-1955. That E. P. was rejected on 1-9-1955 without even being numbered.

The plaintiffs again filed E. P. No. 248 of 1958 on 20-1-1958 for delivery of the A-2 schedule properties. The mesne profits awarded in I. A. No. 1237 of 1948 were deposited into Court on behalf of the third defendant on 1-3-1958. An objection was raised on behalf of the third defendant to E. P. No. 248 of 1958 that it was barred by time. The Court rejected this objection and held on 4-8-1958 as a preliminary point, that the E. P. was in time. The third defendant carried this decision in appeal and second appeal about the bar of limitation. Both of them were dismissed. In the meanwhile, delivery proceedings in respect of the A-2 schedule properties were started. On 9-1-1959 the Amin returned the delivery warrant stating that delivery could not be effect as it was difficult to locate the A-2 schedules property on the land. The Amin's return was based on the report of the Karnam of the village dated 7-1-1959, who said in his report that the survey numbers as mentioned in the decree did not exist. Consequently, on 6-3-1959 the plaintiffs filed I. A. No. 808 of 1959 in the District Munsif's Court, Bandar for amendment of the survey numbers as they were stated in the decree.

On 16-4-1959 the Court directed in E. P. No. 248 of 1958 that the decree-holder may renew his execution petition after the disposal of the amendment petition I. A. No. 808 of 1959. Thereupon, the third defendant filed on 20-7-1959 E. A. No. 1095 of 1959 for restitution of mesne profits which he had deposited into Court on 1-3-1959 and E. A. No. 1096 of 1959 for redelivery of A schedule properties. The plaintiffs' application, I. A. No. 808 of 1959 for the amendment of the decree was dismissed by the District Munsif's Court on 1-10-1959 saying that it has no jurisdiction to do so. The plaintiffs once again filed an execution petition

for delivery of A-2 schedule properties in E. P. No. 17 of 1960 on 9-12-1959. That execution petition was, however, dismissed on 29-2-1960, was, however, dismissed on 29-2-1960, for non-prosecution of amendment proceedings before proper authorities. The plaintiffs carried the matter in appeal in A. S. No. 46 of 1960. The parties filed a joint memo therein on 15-11-1960 that item 3 of A-2 schedule could be identified. On the basis of this joint memo. the appellate Court allowed A. S. No. 46 of 1960 in respect of Item 3 and dismissed it in respect of Items 1 and 2 of A-2 schedule.

C. M. S. A. No. 38 of 1961 was filed by the plaintiffs in the High Court against the dismissal of their appeal A. S. No. 46 of 1960 in so far as Items 1 and 2 of A-2 schedule were concerned. They also filed E. P. No. 28 of 1962 for delivery of Item 3 of A-2 schedule, which was admitted by the third defendant to be identified and in third defendant to be identified and in respect of which A. S. No. 46 of 1960 was allowed. E. A. Nos. 1095 and 1096 filled by the third respondent for restitution of mesne profits and for redelivery of A schedule properties were renumbered as E. A. Nos. 4 and 5 of 1960 respectively and both of them were dismissed on 9-7-1964. Along with them E. P. No. 28 of 1962 filed by the plaintiffs for delivery of Item 3 of A-2 schedule was also heard and disposed of by a common order. That E. P. was granted, Basi Reddy J. (as he then was), dismissed on 26-10-1964 C. M. S. A. No. 38 of 1961 filed by the plaintiffs in so far as Items 1 and 2 of the A-2 schedule were concerned. It is against this decision that L. P. A. 177 of 1964 has been filed by the plaintiffs for delivery of Item 3 of A-2 schedule was also heard and disposed of by a common order. That E. P. was granted, Basi Reddy J. (as he then was), dismissed on 26-10-1964 C. M. S. A. No. 38 of 1961" filed by the plaintiffs in so far as Items 1 and 2 of the A-2 schedule were concerned. It is against this decision that L. P. A. 177 of 1964 has been filed by the plaintiffs.

The plaintiffs also filled E. P. No. 10 of 1966, which was practically renewal of E. P. No. 28 of 1962. for delivery of the property described inn Item 2 of the A-2 schedule. This execution was granted by the Court of first instance on 30th of September, 1966. However, the third defendant preferred A. S. No. 12 of 1967 against this order to the Subordinate Judge's Court. Machilipatnam. In view of Basi Reddy J's decision in C. M. S. A. No. 38 of 1961, this appeal was allowed and the E. P. was dismissed. C. M. S. A. No. 14 of 1968 is directed against the dismissal of A. S. No. 12 of 1967, by the plaintiffs. The third defendant had filed A. S. Nos. 3 and 6 of 1965 on the file of the sub-Court Bandar against the dismissal of his petitions in E. A. Nos. 5 and 4 of 1960. respectively. Both the appeals were dismissed and the third defendant filed C. M. S. A. Nos. 48 and 49 of 1968 against these two orders. dismissing A. S. Nos. 3 and 6 of 1965. In the meanwhile, the plaintiffs filed C. M. P. No. 10875 of 1966 in the High Court of Madras for amendment of the schedule in the decree is S. A. No. 1151 of 1944 and since the matter is within the purview of this Court, it was returned by the Madras High Court Andhra-presented in this Court. This is the chronological sequence of the tortuous litigation that has been carried on by the parties so far

and this is how these matters before us have arisen.

3. The above narration of fact shows that all these matters are intrinsically connected with each others and can be conveniently considered and disposed of together. We, therefore, propose to dispose them of in a common order.

4. We take up first L. P. A. o. 177 of 1964. The plaintiff-decree-holders have preferred this appeal against the judgment in C. M. S. A. No. 38 of 1961. Basi Reddy J., dismissed the said Civil Miscellaneous Second Appeal mainly on the ground of res judicata, which is stated by the learned Judge in the penultimate paragraph of his judgment, which reads as follows:

"It follows, therefore, that interpretation placed upon the decree in the present case by the competent Court in I. A. No. 80-8 of 1959 which decided the fact of E. P. No. 248 of 1958 would operate as res judicata in respect of the present execution petition. In the previous execution petition it was held by the Court that as the final decree stood, it was not capable of execution because the property was not identifiable. That being so, I am of opinion that a subsequent application on the footing that the decree is executable, is not maintainable and is barred by the principle of res judicata. Although the lower appellate Court has not put the matter as clearly as the first Court, I am of the view that the present execution petition is not maintainable".

The learned Judge was also of the opinion that both the Courts had found concurrently that the lands in question were not identifiable. If these two objections to the maintainability of the execution petition No. 17 of 1960 (out of which this L. P. A. arose) are valid. then this Letters Patent Appeal should fail.

5. The law on the point is well settled. The principle of res judicata applies not only to suits but also to the execution proceedings. The learned Judge referred to a decision of a Division Bench in Alluri Bapanna Vs. Inuganti Vengayya and Others, The learned Judges held in that case at p. 301 (of Mad LJ) = (at page 514 of AIR).

"If a Judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds, it must be held by the principle of constructive res judicata that his failure to do so has the same legal effect as if it had been raised and decided against him".

In Ritu Kuer v. Alakhdeo Narain Singh 47 Ind Cas 154 : (AIR 1918 Pat 67), it was held that-

"Where rightly or wrongly, a Court with jurisdiction, had disposed of the judgment-debtor's objection on the merits and has decided that the decree holder was not competent by reason of a defect of parties to proceed with the execution, the decision was binding on the decree-holder till it was set aside".

6. The Bombay High Court took the same view in Vyasacharya Madhavacharya Vs. Daji Baba, Further in Algappa Chettiar v. Somasundaram Chettiar 1937 MWN

465, a Division Bench of the Madras High Court had an occasion to consider whether the construction once placed on a document or a decree by a competent Court before which the question was directly and substantially in issue, is conclusive between the parties. After a review of the case law, Varadachari J., speaking for the Bench observed at page 468:

"Though the construction of a document may for certain purposes be regarded as involving a question of law, e. g. for the purposes of Section 100, Civil P. C., it is well established that a construction once placed on a document by a competent Court before which the question was direction and substantially in issue, is conclusive between the parties and it is immaterial that the property involved in the subsequent suit is not the same as that which formed the subject-matter of the first suitthe issue in the former litigation was whether the decree in O. S. No. 169 of 1910 was a personal decree against Chidambara (see the first issue in Ex. B) and that was decided by both the Courts in plaintiff's favour. I hold that this interpretation of that decree is conclusive between the parties even for the purposes of the present litigation. The decisions of the Privy Council in *Ram Kirpal v. Rup Kuai*. ILR (1884) All and *Beni Ram v. Nanhmal* ILR (1885) All 102, showed that the principle of finality of construction is equally applicable to decrees though the question, there arose in the course of proceedings in execution and not in a separate suit".

But at the same time the very principle and policy of Sec. 11 Civil P. C. should be borne in mind. In order to attract the bar *res judicata*, certain pre-conditions should be satisfied. It is not every matter decided in a former proceeding that can be pleaded as *res judicata* in a subsequent proceeding. To constitute a matter *res judicata* the following conditions must exist:-

(1) The matter directly and substantially in issue in the subsequent proceeding must be the same matter which was directly and substantially in issue either actually or constructively in the earlier proceeding finally decided by the Court in the earlier proceeding.

7. What is contended in the present case is, that the Execution Petition No. 17 of 1960 is barred by *res judicata* by virtue of the interpretation placed upon the decree that is sought to be executed in I. A. No. 808 of 1959 and E. P. No., 248 of 1958. Sri Venkatarama Sastry, appearing for the appellants does not dispute the existence of the conditions 1 to 4 of *res judicata*. But he strenuously contends that I. A. No. 808 of 1958 and E. P. No. 248 of 1958 (the decision in which is said to operate as *res judicata* to the present execution petition) were not heard and finally decided by the Court on the earlier occasion and, therefore, the orders therein do not operate as *res judicata* to the present execution petition. The question in this context, therefore, is whether those two petitions were heard and finally decided by the Court.

8. We have already stated the manner in which these two applications were filed. We will now refer to the relevant passages in the orders in those two applications

in order to find out whether they were heard and finally decided by the Court. The District Munsif's Court Masulipatnam dismissed, on 16-4-1959, E. P. N9. 248 of 1958 by stating:

"E. P. dismissed. The decree holders may file fresh E. P. after disposal of amendment petition".

It is impossible to understand this order, as it stands, as an order on merits passed after hearing and weighing relevant contentions of the parties. As the Privy Council held in *Parsotam Gir v. Narbada Gir* ILR (1899) All 505. Section 11 requires that there should be a final decision. The very concept of *res judicata* implies a matter on which the Court has exercised its judicial mind and has after argument and consideration, come to a decision on a contested matter. The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter *res judicata*; it is also essential that it should have been heard and finally decided. If the order in the former proceeding merely stated that it was subject to a decision of a higher Court the decision could not be a final one. (Vide AIR 1942 8 (Privy Council)) Applying these principles, we do not find that the order in E. P. No. 248 of 1958 dated 16-4-1959 purported to give a final decision. It did not even pretend to consider the merits and demerits of the contentions of the parties. It dismissed the E. P. by merely saying that a fresh execution petition might be filed after the disposal of amendment petition. It should be noted that I. A. No. 808 of 1959 filed by the plaintiffs decree-holders for amendment of the schedules in the decree was pending by that time. the order thus merely postponed the decision was disposed of. By no stretch of imagination, could it be said that such an order was one which finally decided the matter in dispute after hearing the parties.

9. Sri K. B. Krishna Murty, however, contends that this order should be read with an earlier order passed by the Court on the same application on 10-3-1959 wherein it was suggested that the schedules in the decree should be amended before the execution petition was proceeded with further. We cannot accede to this argument. In the first place that order, said to have been passed on 10-3-1959, was not relied on by the judgment-debtor as operating as *res judicata*. In fact, Basi Reddy J, did not advert to it. Secondly, that order has not been placed before the Court. Sri K. B. Krishnamurthy brings to our notice a casual reference made to an order of 10-3-1959 in the judgment of the District Munsif's Court in E. P. No. 17/60. Such casual reference is not adequate to sustain the plea of *res judicata*. In any case, we are not satisfied that that order, either by itself or read with the order of 16th April, 1959 passed in E. P. No. 248 of 1958, can operate as *res judicata* to the present execution petition. At best the order of 10th March, 1959 was only a suggestion that the schedules in the decree might be amended before further execution proceedings were taken. The latter order of 16th April, 1959 merely stated that another execution petition might be filed after the disposal of the amendment petition (I. A. No. 808 of 1959). Even reading them together, it is not possible for us to hold that the Court

has decided the contentions of the parties on their merits and decided the matter finally. In this execution petition, there was no consideration of the contention that the properties were identifiable despite the small discrepancies in the survey numbers or R. S. numbers and in the absence of any decision on that point that the decree was inexcusable, it cannot be said that there is a final decision on the crucial matter in the earlier decision on the crucial matter in the earlier decision. In our view, the order in E. P. No. 248 of 1958 is practically of the nature of returning the execution petition seeking some particulars, which may be represented afterwards. Surely such an order cannot operate as *res judicata* for a fresh execution petition.

10. The District Munsif's Court. Machilipatnam dismissed I. A. No. 808 of 1959 for amendment of the plaint schedules on 1st October, 1959, i.e. about 51/2 months after E. P. No. 248 of 1958 was rejected. The following two points were framed for consideration therein. (1) Whether this Court has jurisdiction to make the amendment proposed and (2) If so, whether the amendments are to be allowed? The Court held on the first point that it was only the High Court which could entertain any application for amendment, because it was that Court that had passed the preliminary decree. in accordance with which alone the final decree was passed by the trial Court. It held on point (2) that in view of its conclusion on point (1) it was not fit to go into the question on merits as to whether the amendments were to be allowed or not. This is once again an order passed without going into the merits of the case. The application for amendment was dismissed wholly on the ground that the Court had no jurisdiction. Obviously, such an order cannot operate as *res judicata*.

11. Even so, Shi Krishnamurthy, argues that by a reading of these orders together it must, by necessary implication, be held that the lands could not be identified and it is not, therefore, open to the plaintiffs to now argue that they can in fact be identified. We cannot agree with this argument. Both the applications viz., E. P. No. 248 of 1958 and I. a. No. 808 of 1959 were rejected and dismissed on technical grounds. The merits of the contention between the parties as to the identity of the lands were never gone into. There was not even an attempt on the part of the Court on both the occasions, to find out whether the final decree could really be executed and the division could really be executed and the division of the lands adumbrated therein could be implemented. In the circumstances, it would be futile to argue that the Court, by necessary implication, found that the lands could not be identified. This contention is, therefore without any substance.

12. The learned counsel for the respondent then lays great stress on the observation of Basi Reddy J., that the two lower Courts had concurrently found that the lands could not be identified. It is no doubt true that the learned Judge has opined that both the Courts have concurrently found that the lands could not be identified. With respect, we are enabled to agree with this opinion. We have carefully gone through the judgments of both the lower Courts. The Court of first

instance, after referring to the contentions of the parties . referred to the question of identifiability in paragraph 4 of its judgment. It observed:

"There are admittedly discrepancies in the survey numbers and prima facie it cannot readily be said that the properties of which the decree-holders now seek delivery are the same as those mentioned in the preliminary and final decrees. It will need some enquiry to ascertain whether there was a mistake in mentioning the survey numbers in the compromise petition, and if so, what are the items, really contemplated between the parties".

Having said so, one would expect the Court to make the necessary enquiry into the question. Unfortunately the Court did nothing of the sort. It later referred to the amendment petition filed by the plaintiffs-decree-holders and its dismissal by the Court. In view of that dismissal it felt that "it will be only aggravating the controversy to direct delivery disregarding patent discrepancies". For that reason, the present E. P. No. 17 of 1960 was dismissed by the Court of first instance. We cannot understand these observations as a finding, after necessary enquiry, that the lands could not be identified. To similar effect is the judgment of the District Judge Krishan in A. S. No. 46 of 1960 (filed against E. P. No. 17 of 1960). In paragraph 3 of his judgment, the learned District Judge referred to the discrepancies between the purvey numbers and the discrepancies in the extents of the lands and then observed:

"It is, therefore, clear that the properties sought to be delivered cannot be definitely ascertained from the preliminary and final decrees because of the discrepancies".

It referred to the dismissal of the amendment petition I. A. No. 808 of 1959 and then observed that:

"It may or may not be res judicata between the parties but the fact remains that the Court has already expressed its view that execution cannot be proceeded with without amendment of the decree being got done by the High Court and, therefore, the filing of the present execution petition once again would only be considered with great caution".

Finally the learned Judge expressed the opinion that it would be a case of substituting something which is not in the decree which the executing Court is not competent to do and, therefore, that the learned Munsif was correct in his view that he could not proceed to deliver the properties when there are serious discrepancies about the identity as between the decree and the execution petition for which amendment must be brought from the proper Court. However, on the basis of the joint memo, item (3) of A-2 schedule was directed to be delivered to the plaintiffs decree-holders. Once again even in this appellate order, we find that the reference was made only to the discrepancies in the survey numbers and the extends of the items. Needless to say that the present difficulty arose out of these discrepancies. But, unfortunately the Courts did not endeavour to resolve that difficulty by making the necessary enquiry as to

whether, despite the said apparent discrepancies, the actual intention of the parties and that of the final decree can be ascertained and the lands be identified. The Courts did not even care to notice that before passing the final decree, the Court had appointed a Commissioner who took great pains to survey the lands and divided them into different plots as per directions of the Court and the provisions of the preliminary decree and prepared the schedules as well as plans with meticulous care. Though they felt the need for an enquiry, both the Courts shirked doing it, by referring to the rejection of the amendment application. I. A. No. 808 of 1959. The conclusions of the courts below cannot certainly constitute findings of fact as to impossibility of identifying the different plots.

13. For these reasons, we hold that there is no bar for our consideration of the question as to the identity of the lands, arising out of *res judicata* or concurrent findings of fact.

14. It is the contention of Sri Venkatarama Sastry, the learned counsel for the appellants that the lands described in A-2 schedule can be identified on the basis of the material available on record, while Sri Krishnamurthy the learned counsel for the respondents contends that it is not possible to do so. Having come to the conclusion that there is no bar of *res judicata*, we have considered whether we should remit the matter back to the Court of first instance with a direction to consider whether the lands are identifiable or whether we should do it ourselves. In view of the unending litigation between the parties and the considerably delay that has so far occurred in determining the actual rights of the parties and also because of the availability of the necessary material on record, we have come to the conclusion that it would be in the best interests of justice and the parties, if we decide the question here and now. We therefore, proceed to consider whether the A-2 schedule properties are identifiable.

15. (After referring to documentary evidence the judgment proceeds:)

We have carefully scrutinized the plans attached to the final decree. The plans give the extents of the land on actual measurement and also the measurements of the different plots after delimitation as per the six schedules. when measurements were given in such detail. that too with reference to a specific plan, we fail to see any difficulty in identifying these plots of land. In addition and for greater precision the boundaries also were given in the schedules including the A-2 schedule. It is not anybody's case that there is difficulty about boundaries. It is well settled that even if there is some discrepancy about the actual extent of the land, the boundaries prevail. In view of this legal position, we are at a loss to know how the Courts below or for that matter the karnam and the Amin on the previous occasion felt difficulty in identifying the lands. Nobody, excepting the Karnam referred to the plans annexed to the final decree. Even the Karnam did not refer to the actual measurements of the entire plots and also their sub-divisions given in the plans. He merely referred to the ostensible disparity in the extents and numbers of the fields and with a stroke of pen

rejected the whole idea of demarcation as impossible. This, in our view was clearly failure to discharge his function and duty.

16-18. (After discussion of some further evidence the Judgment proceeds:) From the above, it is clear that the parties had no doubt whatever about the identity of the lands with which they were dealing. including the lands in A-2 schedule. It is obvious that these objections have subsequently been raised only for the purpose of evading and avoiding, if possible , the execution of the final decree. When location of the lands as per A-2 schedule is possible, then the plaintiff-decree-holders should be put in possession of them. The Court of first instance should, therefore, take immediate steps to do so with the help of the plans and schedules annexed to the final decree.

19. C. M. S. A. No. 14 of 1968 is directed against the decision of the Subordinate Judge, Machilipatnam in A. S. No. 12 of 1967 who purported to allow that appeal in view of the decision of Basi Reddy J., In C. M. S. No. 38 of 1961 (against which L. P. A. No. 177 of 1964) has been filed. We have already stated that in A. S. No. 46 of 1960 the parties filed a joint memo on 15-11-1960 that the properties as per Item 3 of A-2 schedule could be identified. On the basis of that joint memo, the Court, allowed the appeal to the extent of the said third item. For the purpose of getting delivery of the property described in the third item, the plaintiffs-decree-holders filed E. P. No. 10 of 1966. The executing Court granting that application in view of the joint memo, but the appellant Court allowed the appeal of Defendant No. 3, A. S. No. 12 of 1967 should have been dismissed by the learned Subordinate Judge, Machilipatnam in view of what had happened. But being under a wrong impression of the decision of Basi Reddy, J., he allowed it and dismissed the execution petition 10 of 1966. The third defendant himself admitted that the land in Item 3 could be identified. In any case, we have held that there is no bar of res judicata. Therefore, E. P. No. 10 of 1966 should be allowed and the execution sought therein should be granted. Accordingly C. M. S. A. No. 14 of 1968 is allowed.

20. We have already stated how the third defendant came to file C. M. S. A. Nos. 48 and 49 of 1968. He had filed E. A. Nos. 1095 and 1096 of 1959, for restitution of mesne profits which he had paid in respect of A-Schedule properties and for redelivery of A-Schedule properties which had been given possession to the plaintiffs-decree-holders. They were subsequently renumbered as E. A. Nos. 4 and 5 of 1960. They were dismissed on 9-7-1964. Thereupon he filed A. S. Nos. 3 and 6 of 1965 on the file of the Sub-Court, Bandar which also were dismissed. C. M. S. As. 48 and 49 of 1968 are directed against the dismissal of these appeals. Exactly the same contentions as have arisen in L . P. A. No. 177 of 1964 arise in this case also. We have already held that there is no bar of res judicata and that the lands described in the six schedules to the final decree could be identified. In fact, as far as A-schedule properties are concerned, which are the subject-matter of these two C. M. S. As. the third defendant himself filed an application for redelivery giving the new R. S. Numbers and extents. There is,

therefore, no substance in the contention that the lands cannot be identified. Therefore the contentions of the third defendant-appellant are rejected.

21. Even then, Sri Krishnamurthy's raises several other objections to our upholding the claims of the plaintiffs-decree-holders. Firstly, he contends that the minor was not properly represented in O. S. No. 674 of 1941 and therefore, neither the preliminary decree nor the final decree passed therein is binding on him. This objection is, however, wholly pointless. O. S. No. 109 of 1946 was filed on behalf of the third defendant for setting aside the compromise decree. That was dismissed as untenable. Not content with such dismissal, an appeal also was preferred. That also met with the same fate. Thus, that decision became final and now the third defendant cannot avoid the compromise decree. He is certainly bound by it.

22. His next objection is, since the preliminary compromise decree dealt with immovable properties other than those Immovable properties other than those originally included in the plaint, it should have been registered. Such registration could be done only of the original preliminary decree. But that was registered in this case was only a certified copy of the preliminary decree granted by the Court. According to Sri Krishnamurthy this is not sufficient in law. But as we have said the third defendant adopted every stratagem to fight the plaintiffs-decree-holders. He raised this objection on a former occasion and carried the matter right upto this Court in C. M. S. A. No. 516 of 1954. Chandra Reddy, J., dismissed that appeal on 15th July 1954 holding that registration of certified copy of a decree was sufficient compliance with the requirements of Sec. 17 of the Indian Registration Act. Therefore, this objection is not available to the third defendant.

23. Still another objection is that the preliminary decree in the case only declares the rights of the parties and that by itself is not an executable decree. For that reason, even the final decree is not executable. But, on a reading of the preliminary decree we are not in a position to agree with Mr. Krishnamurthy holding that the preliminary decree is merely a declaratory one and not executable. On a reading of the material clause together, it is clear that the preliminary decree not only declares the rights of the parties to the respective shares, but also empowers them to effect a division of the properties in accordance with the provisions of the preliminary decree between themselves if possible, and with the aid of the Court if necessary, by having a final decree passed. The very conception of a final decree implies executability. It means that the rights as declared by the preliminary decree should be implemented in a specified manner. The very fact that clause 10 of the decree empowers the parties to effect a division in accordance with its provisions and also to seek the passing of a final decree shows that it is an executable decree. Further clause (11) providing for mesne profits from Fasli 1355 till delivery of possession and that the said mesne profits shall be determined by Court in an appropriate proceeding, also shows that the preliminary decree is clearly executable. Indeed, a final decree was passed in pursuance of this decree. We therefore, find no force

at all in the contention of the learned counsel.

24. Yet another objection is raised that a consent decree dealing with properties other than the suit properties is not executable, to the extent of the other properties. The justification for this contention is that in the compromise that was arrived at between the parties, not only the properties that were given to the plaintiffs by the old couple, viz., defendants 1 and 2, but also the properties given to the third defendant, were clubbed together and divided, though in the plaint the plaintiffs sought declaration and possession in respect of the properties given to them alone. In support of this contention, reliance is placed upon Order 23, Rule 3 of Civil P. C. which is in the following terms:-

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit".

Emphasis is laid on the last words "so far as it relates to the suit". It is contended that though the decree may refer to the other properties also, the actual operative portion of the decree should be confined only to the items of the properties that are subject-matter of the suit. By virtue of registering such decree, the rights of the parties may be made secure. But, the decree, as such, cannot become executable in respect of the properties which are not the subject-matter of the suit. This is how the objection as to the executability of the compromise decree in this behalf is placed before us. It is true there is conflict of opinion, between different High Courts on this point. The Calcutta and Bombay High Courts took the view that such a decree is not executable to the extent of the other properties. But, our own High Court has taken a contrary view.

25. In *Seth Harak Chandas Vs. Hyderabad State Bank, Hyderabad*, a Division Bench of this Court took the view that an objection as to the execution of a consent decree, the operative part of which gives effect to terms of compromise which do not relate to the suit cannot be entertained by the executing Court. Manohar Pershad J., as he then was, speaking for the Court observed at page 58:

"It is true that having regard to the provisions of Order 23, Rule, 3, Civil P. C. the decree has to be passed only so far as the compromise relates to the suit. But a compromise which includes matters extraneous to the suit is not unlawful and cannot be rejected in its entirety. Vide. *Ranjit Singh v. Gobardhan Chandra* (1946) 50 CWN 447 and *Hari Chand v. Magi Mal* AIR 1917 Lah 282. The proper course for the Court in cases where the compromise comprises matters unconnected with the suit is to recite the compromise as a whole in its decree or in the form as a schedule to the decree for purposes of reference; but to restrict the operative part of the decree to those terms of the compromise which relate to suit. We agree with the contention of the learned counsel for the appellant

that in such a case the decree would be executable only in respect of the matters that relate to the suit and the remaining terms of the compromise, i.e., those which are not incorporated in the operative part of the decree may be enforced by means of a separate suit. We many in this connection refer to Hemanta Kumari v. Midnapur Zamindari Co. AIR 1919 PC 79; Shankar Balakrishna v. Shree Gopal Krishna Santhan AIR 1941 Nag 197; Balesar Misir Vs. Tekesar Misir and Others, ; Makhan Lal Samadder Vs. Khagendra Nath Chakravarty and Another, Rajagopalan v. Subbarama AIR 1919 Mad 305 and Vishnu Sitaram Auchat Vs. Ramchandra Govind Joshi, But where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit, question arises whether the executing Court is entitled and bound to refuse to execute the decree. On this question, there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras, Allahabad, Lahore, and Patna that the executing Court cannot refuse to execute the decree in such a case: Vide Manager of Sri Meenakshi Devasthanam, Madura v. Abdul Kasim Sahib ILR (1907) Mad 421; (Sahu) Shyam Lal Vs. M. Shayamlal, ; Lal Singh v. Mohan Singh AIR 1934 Lah 623 and Muhammad Ismail Vs. Bibi Shaima, . The reason according to the Madras High Court is that an objection to the decree cannot be allowed to be raised in the executing Court, but must be taken by way of appeal - Sabapathi v. Vanmahalinga AIR 1915 Mad 210. The High Court of Calcutta and the High Court of Bombay have held on the other hand that such a decree is inoperative and invalid and cannot be executed in so far as it give effect to the terms of a compromise not relating to the suit. Gurdeo Singh v. Chandrikah Singh ILR (1909) Cal 193 and Vishnu Sitaram Auchat Vs. Ramchandra Govind Joshi, We find ourselves in agreement with the view expressed by the High Court of Madras that such an objection cannot be raised in the executing Court and must be taken by way of appeal".

26. The learned Judges thus agreed with the view expressed by the High Court of Madras and held that such an objection cannot be raised in the executing Court and must be taken only by way of appeal . With respect, we are inclined to agree with the view taken by this Court as well as the Madras High Court, in preference to the view taken by the Calcutta and Bombay High Courts. Therefore, this objection also must be repelled.

27. The result is that L. P. A. No. 177 of 1964 and C. M. S. A. No. 14 of 1968 are allowed with costs and C. M. S. A. Nos. 48 and 49 of 1968 are dismissed with costs, and the E. P. Nos. 17/60 and 10/66 are remanded back to the District Munsif's Court Avanigadda for disposal in the light of the observations in this judgment.

28. Now remains the application, C. M. P. No. 10875 of 1966 for amendment of the decree passed in S. A. No. 1151 of 1944 It was in this second appeal the compromise preliminary decree was passed and in pursuance of that preliminary decree, the trial Court passed the final decree also. The preliminary decree was passed on 3-9-1945. It contained the schedules appended to the memo of

compromise, wherein the parties adopted the old survey numbers as given in Exs. P-2 and P-4, though resurvey had been made by that time and resurvey numbers were given to the fields. The same numbers were continued in the final decree, its schedules and plans also. But, as we have pointed out. in some of the plans the Commissioner gave new resurvey numbers in addition to the original survey numbers. When the third defendant raised an objection that there was some discrepancy in the survey numbers and the extends of the lands described in the schedules, the plaintiffs-decree-holders applied in the Courts below for amendment of the schedules. But, that application, I. A. NO. 808 of 1969 was rejecting on 1-10-1959. Therefore, they filed the present application for amendment soon after their C. M. S. A. No. 38 of 1961 was dismissed by this Court. It was originally filed in the High Court of Madras which passed the Preliminary decree, but it was returned by that Court and the parties represented it in this Court. The petition is filed under Sections 151, 152 and 153 of the Civil Procedure Code. The petition is in the following terms:

"For the reasons stated in the accompanying affidavit the petitioners herein pray that this Hon"ble Court be pleased to amend the Schedules to the memorandum of compromise included in and made part of the decree of this Hon"ble Court in the above Second Appeal dated 3rd September, 1945 and also to make similar amendment as may be necessary in the final decrees, schedules and plans as follows:

(a) In Schedule A to P-2 after the words "Resurvey Number" figure "31" may be mentioned and the words "Old Survey Number" be added before 10/1;

(b) In Schedule B attached to Exhibit P-4-

(i) Item 1 - Move Village after the figure "114" the words and figures R. S. No. 193/3" may be mentioned;

(ii) Item 2 - Yeddnapudi Village, after "D, No. 31/1" the words and figures "R. S. No. 1/1" may be mentioned,;

(iii) Item 4 - Pedapudi, after "D. No. 75" the words and figures r. S. No. 74" may be mentioned."

29. It is to be noted that the plaintiffs do not seek an amendment of either Ex. P-2 or Ex. P-4 as such. What they pray for is only the amendment of the schedules in the preliminary decree and the final decree and the plans therein. A reference to the schedules in Exs. P-2 and P-4 is made, because in the Schedules to the Memo of compromise those numbers given in the schedules to the documents were adopted . Therefore, the pertinent point that should be noted is that the plaintiffs do not seek an amendment of the schedules to Exs. P. 2 and P. 4.

30. Sri K. B. Krishnamurty objects to the amendment on more than one ground. Firstly he contends that a consent decree can be amended only by agreement between and consent of parties and cannot be corrected by the Court exercising

its jurisdiction under Ss. 151 to 153. The learned counsel may be correct if it is a substantial correction that is sought. If, on the other hand, the correction is only of a clerical error, committed by mutual mistake of parties in preparing their compromise petition there is no reason why it should not come within the purview of Section 152 C. P. C. In that case, what the Court has to examine is whether it is a clerical error and whether it has crept into the record on account of a mutual mistake of both the parties to the compromise. When these requirements are satisfied, we have no doubt that the Court has jurisdiction to correct such an accidental error in the record. To the same effect, is the decision of this court in *Venkateseshaiah v. Pullaiah Chetty* AIR 1962 AP 412, wherein it was held

"Where a decree is passed by consent of parties it should always so appear on the face of it as drawn up. It is however not necessary that it should record the compromise between the parties verbatim. It is enough if the terms of the compromise are indicated with sufficient clearness. the form of a consent decree omitting to embody the compromise between the parties can be corrected u/s 152 if the decree indicates that the Court had the intention to embody such compromise therein".

31. Therefore, the real question that has to be considered is whether the numbers that are sought to be introduced in the place of the old ones relates to the same properties which the parties, by their consent, made the subject-matter of their compromise. In other words, it is the identity of the properties that is important. If the Court is certain that the parties were dealing with a certain set of properties and it has no doubt about their identity, the error, if any, in the description of such properties that crept into the record can be corrected.

32. In this case, as we have held in the main batch of cases, there is no doubt about the identity of the properties with which the parties have dealt with in their compromise petition. They were clearly specified by boundaries and marked in plans. The only discrepancies that have crept into the description are in regard to the numbers and the extents. As far as the numbers are concerned, they were adopted from the old survey and perhaps the extents also were taken from the old survey. the Resurvey that was done in the year 1925 showed slight variations in the extents. Such slight variations from survey to survey are common. It is wholly beyond doubt from the record and particularly from E. A. No. 1096 of 1959, filed by the third defendant himself for redelivery of the A Schedule properties where he gave the numbers of all the different plots as per 1925 survey as well as 1951 survey along with their boundaries, that what the old survey of the lands numbers became what numbers in the resurvey. They substantially tally with the numbers given by the petitioner in his amendment petition. Thus, there is no difficulty about the identity of the lands and fixing their new numbers as per the resurvey. When that is the case, there cannot be any difficulty about granting of an amendment even of a consent decree u/s 152. In *Sheodhyan Singh and Others Vs. Musammam Sanichara Kuer and Others*, , the Supreme Court held:

"When there was a misdescription of the property in the final decree for sale and the sale certificate, but the identity of the property sold was well established the mistake in the plot number must be treated as a misdescription which did not affect the identity of the property sold."

33. Following this decision a Division Bench of this Court held in *Sri Rajah Rao Pradyumna Krishna Mahipathi Suryarao Bahadur v. Sri Rao Papayamma Rao*, A. S. No. 211 of 1959, D/- 25-2-1963 (AP) that though there was a wrong description in regard to the disputed items, they were also conveyed to the first defendant in that case. This objection must, therefore, fail.

34. Sri Krishnamurthy, next contends that the amendment that is prayed for is not merely of a clerical error and, therefore, cannot be corrected u/s 152 Civil P. C. the amendment petition seeks only a clarification by referring to the existing numbers of survey numbers and to add new resurvey numbers also along with them. Time and again, we have pointed out that the parties described the different plots in the compromise petition with reference to the old survey numbers. If only the scribe or the parties then noted that there were resurvey numbers to the said plots, they could have either adopted them or added them along with the old survey numbers. When everything else in the description of the property including the boundaries was carefully done, the mere reference to the old numbers, when the new survey numbers had been then come into vogue, we have no hesitation in holding, is a clerical mistake that can be corrected u/s 152, Civil P. C.

35. Even so, the learned counsel for the respondent objects to the proposed amendment contending that it would be tantamount to correcting the schedules in Exs. P-2 and P-4. He relies upon a Bench decision of the Madras High Court in *T.M. Ramakrishnan Chettiar alias Mannar Krishnan Chettiar and Others Vs. G. Radhakrishnan Chettiar and Others*, . This case does not support the objection raised to this present petition. In that case, an error arose in the judgment, the preliminary decree, and the final decree passed upon a mortgage deed, which itself contained the error. Therefore, the petitioner sought the correction of not only the record of the Court but also the mortgage deed itself. Rejecting this request, the Division Bench held that Section 152, Civil P. C. is for the purpose of correcting errors directly involved in the proceeding and is not intended to rectify mistakes in documents upon which suits are brought. Hence, whether there is a mistake in the insertion of a wrong survey number in the mortgage deed and the error is repeated in the plaint and the decree, the Court cannot rectify the error in the mortgage deed under S. 152 as it is not a clerical mistake or omission. The remedy lies by way of suit u/s 31 of the Specific Relief Act. We respectfully agree with the learned Judges in this statement of law. But, that was with specific reference to the circumstances of the case before them, wherein the mortgage deed itself upon which the judgment, the preliminary and final decrees were passed, was also sought to be amended. But, in the present case, as we have stated, there is no prayer for amending Exs. P-2 and P-4. In fact, there is no

need, as far as the present amendment application is concerned, to amend them. From the Court's record, it is obvious that the omission to refer to the Resurvey numbers has crept in by inadvertence of the parties. We do not, therefore, think that the decision of this Division Bench would come in the way of granting the amendment sought by the plaintiffs-decree-holders. On the other hand there is enough authority to support the view that such amendments can be granted u/s 152.

36. In *Yerramilli Satyanarayana Rao and Others Vs. Kandukuri Purnayya and Others*, , Pandalai, J., observed that:

"The object of empowering the Court to correct decrees and orders is to correct errors, and if it may be shown that an alleged mistake falls within the class of errors dealt with by Section 152, it seems to put an unnecessary hindrance upon the power to do justice which the section gives to say that the only mistakes of which the Court can take cognizance are those made either in the plaint or in subsequent documents in Courts.

There is nothing which limits the power of the Court u/s 152 to correcting errors, mistakes and omissions, which arise in the suit. Nothing prevents the Court from doing justice in an appropriate case where such mistakes arose by reason of copying an erroneous document into the plaint. A suit for rectification of the instrument and decree is not the only remedy and application for review may be appropriate ,but that is no obstacle u/s 152 to an application."

It must be noticed that this decision was distinguished in the later Bench decision in *T.M. Ramakrishnan Chettiar alias Mannar Krishnan Chettiar and Others Vs. G. Radhakrishnan Chettiar and Others*, But, however as we have said, the later case was dealing with an application for amendment of the mortgagee deed itself.

37. In *Katamraju v. Paripurnandam* AIR 1949 Mad 282, Rajmanner. Officiating C. J., as he then was, held that-

"Where a mistake had crept into the description of an item of property in the plaint schedule and the mistake had been carried over in the decree schedule, the Court has power u/s 152 and 153 to correct the error in the decree even after the disposal of the second appeal. It would not be correct to treat application for amendment as one under Order, 6, R. 17 for amendment of pleadings".

38. *Krishnaswami Naidu J., inn Appat Krishna Poduval Vs. Lakshmi Nathiar and Others*, ., distinguished the earlier Bench decision in *T.M. Ramakrishnan Chettiar alias Mannar Krishnan Chettiar and Others Vs. G. Radhakrishnan Chettiar and Others*, In the case before the learned Judge, there were errors in the assignment deed, which were continued in the plaint schedule and the decree schedule. But the application sought only the amendment of the plaint schedule and the decree schedule and there was no dispute as regards the identity of the property or its boundaries. Under the circumstances the learned Judges granted

the amendment holding:

"Where an application is filed for correction of an error as regards the survey numbers of an item of property in the plaint schedule and the decree schedule and there is no dispute as regards the identity of the property or boundaries to it, the amendment may be allowed u/s 152. The fact that the assignment deed of the property also has the same errors cannot disentitle the applicants to have therefore set right if they are entitled to it under the Code".

The learned Judge distinguished the Bench decision in T.M. Ramakrishnan Chettiar alias Mannar Krishnan Chettiar and Others Vs. G. Radhakrishnan Chettiar and Others, , on the ground that it related to rectification of the document itself and that in the case before him, no such rectification was sought as the plaintiffs had not based their claim on that document. In the case before us also the plaintiffs-decree-holders, who seek the execution, are claiming on the basis of the compromise petition and the consequential compromise decree.

39. Consequently, we cannot refuse to grant the amendment because similar errors had also occurred in Exhibits P-2 and P-4. If the parties want any rectification of those deeds, it is open to them to file a suit for rectification u/s 31 of the Specific Relief Act. But, that is no bar to the granting of the present amendment petition.

40. The above discussion shows that there is no difficulty about the identity of the properties that are dealt with by the parties. There is also no doubt about the new numbers that the properties have been given in the Resurvey. We are also of the opinion that introducing the new numbers in the schedules and the plan may help the parties to finalize their rights under the compromise decree very soon and that such an amendment is needed in the interests of justice. We have, therefore no hesitation in granting the application. However we make no order as to costs in this petition.

41. Orders accordingly.