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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 07.09.2016*

+ CM(M) 279/2015

DEEPAK SHARMA Petitioner

Through Mr.S.D.Dixit, Advocate

versus

RADHA & ANR. Respondents

Through Mr.Vivek B.Saharya, Adv. for R-1

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. The present petition is filed under Article 227 of the Constitution of India seeking to impugn the order dated 31.01.2015 by which an application filed under Order 1 Rule 10 CPC by the applicant/respondent No.1 was allowed.

2. The petitioner was born in 1991 out of the wedlock between his mother, Smt. Gulshan Sharma and respondent No.2. The mother of the petitioner and respondent No.2 have dissolved their marriage though as per the mother of the petitioner, the divorce was a fraud on her. The petitioner filed the present suit in 2004 seeking partition, rendition of accounts and permanent injunction against respondent No.2 through his mother/legal guardian for property bearing No. WZ/3350, Mahindra Park, Rani Bagh, Delhi by metes and bounds. It was the claim of the petitioner that this property was bought by his grandfather i.e. father of respondent No.2 from the sale proceeds of ancestral lands, in the name of his wife Smt.Laxmi Devi

and formed part of the joint family property. The trial court on 23.10.2007 passed a preliminary decree in favour of the petitioner. On 29.08.2008 a Local Commissioner was appointed to suggest the means of partition of the property by metes and bounds. Objections filed by respondent No.2 against the Local Commissioner's report were dismissed on 01.08.2013. During the pendency of the proceedings, an attempt was made to comprise the matter and the matter was referred to the Mediation Centre at Tis Hazari. A compromise was affected between the parties on 22.02.2014 regarding partition of the property in an agreed manner. When the petitioner prayed for a final decree, respondent No.1, the sister of respondent No.2 filed an application under Order 1 Rule 10 CPC. It was alleged in the application that late Smt. Laxmi Devi, the mother of the respondents had during her lifetime executed a will dated 07.05.2002 whereby the front portion of the suit property measuring 80 sq. yards out of total area of 227 sq. yards was bequeathed to her. Hence, it was urged that the applicant/respondent No.1 is a co-owner of the suit property by virtue of the Will. It is further urged that she was not aware about the filing of the suit by the petitioner and she came to know about the same only on 28.04.2014 when she returned from a marriage and found the petitioner unloading bricks adjacent to the suit property. On enquiry it was revealed that the property was to be partitioned in two shares between the petitioner and respondent No.2.

3. The petitioner has admitted that the suit property was purchased in the name of Smt. Laxmi Devi vide registered sale deed dated 03.11.1966. However, the claim was that the property was purchased from the sale proceeds of different ancestral land sold by Sh.Daulat Ram Sharma i.e. the grandfather of the petitioner which formed part of joint family properties.

4. The trial court by the impugned order noted that the probate of a Will is not required in Delhi and it also noted that in a suit for partition, all the parties having rights/shares in the suit property are necessary parties to the suit. Respondent No.1/the applicant being a necessary party, the trial court impleaded the said respondent as a defendant.

5. I have heard the learned counsel for the parties.

6. Learned counsel for the petitioner submits that the suit was fixed for final disposal on the settlement between the parties, namely, the petitioner and respondent No.2, and at that stage the applicant/respondent no.1 has in connivance with respondent No.2 filed the present application. Hence, it is urged that there was no reason to implead respondent No.1 on record. Learned counsel for the petitioner has relied upon the judgment of the Andhra Pradesh High Court in the case of ***Gooti Nagarathnamma vs. Cheenakeshapu Venkamma, 2006 (6) ALT 285.***

7. Learned counsel appearing for respondent No. 1 has relied upon the judgment of the Supreme Court in the case of ***Phoolchand & Anr. vs. Gopal Lal, AIR 1967 SC 1470*** to contend that where a preliminary decree has been passed, the court has powers to modify the said preliminary decree on account of any subsequent events so that the entire disputes are adjudicated upon between the parties. Reliance is also placed on the judgment of the Karnataka High Court in the case of ***Aswathamma vs. H.M.Vijayaraghava, AIR 1999 Karnataka 21.***

8. The first question to be addressed on facts is as to whether the applicant/respondent No.1 is a bona fide applicant who may have a claim on the suit property. Admittedly, the property is purchased in the name of the mother of the respondents, Smt. Laxmi Devi though it is said to have been

purchased from the sale of joint family properties and hence, the petitioner had pleaded that he has a claim to the same. The claim was accepted and a preliminary decree has been passed in favour of the petitioner. Hence, when the suit was filed by the petitioner, the natural legal heirs of Smt. Laxmi Devi would be a necessary and property party as they should have been given an opportunity to meet the contention of the petitioner that the property is an HUF property. In the present case, only the son of Smt. Laxmi Devi, namely, respondent No. 2 and the father of the petitioner was impleaded as a party. The daughter of Smt. Laxmi Devi who would be a legal heir under Hindu Succession Act was not impleaded as a necessary party and in the absence of respondent No.1, the preliminary decree was passed. The parties, namely, the petitioner and respondent No.2 have thereafter settled their differences before the Mediation Centre, Tis Hazari, Delhi whereby they have agreed to partition the property in equal shares of 113.5 sq. yards as agreed upon.

9. Order I Rule 10 (2) CPC reads as follows:-

“10. Suit in name of wrong plaintiff.- (1) xxx

(2) Court may strike out or add parties—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

10. In *Mumbai International Airport Pvt. Ltd. vs. Regency Convention Centre & Hotels Pvt. Ltd.*; 2007 SCC 417 the Supreme Court held as follows:-

“15. A “necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a “necessary party” is not impleaded, the suit itself is liable to be dismissed. A “proper party” is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

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22. Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act accordingly to reason and fair play and not according to whims and caprice.”

11. In ***Ramesh Hiranand Kundanmal vs. Municipal Corporation of Bombay; (1992)2SCC524*** the Supreme Court held as follows:-

“The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights.”

12. Hence, a proper party is a party whose presence would enable the court to completely, effectively and adequately adjudicate on all matters in dispute. Respondent No.1 being the daughter and legal heir of late Smt.Laxmi Devi, the registered owner of the suit property, is a necessary and proper party.

13. However, the problem in the present case is on account of the fact that the preliminary decree has been passed in the suit. The issue is whether at this belated stage, respondent No.1 could have been impleaded as a party to the suit. In this context reference may be had to the judgment of the Supreme Court in the case of ***Phoolchand & Anr. vs. Gopal Lal (supra)*** where the Supreme Court held as follows:-

“7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other

parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. In any case if two views are possible-and obviously this is so because the High Courts have differed on the question-we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the

preliminary decree, particularly in a partition suit due to deaths of some of the parties. Whether there can be more than one final decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the trial court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant.”

14. Hence, in a partition suit, where an event transpires after the preliminary decree which necessitates a change in shares, the court has the power to do the same. In case there is a dispute, the court has the power to decide the dispute and make variations in the share specified in the preliminary decree.

15. Similarly, the Karnataka High Court in the case of *Aswathamma vs. H.M.Vijayaraghava(supra)* held as follows:-

“22. Thus it appears to me that the stage in the suit is not closed till the final decree is passed. The preliminary decree no doubt determines the share, but with the preliminary decree the shares have been determined without hearing this person whose presence was necessary and whose impleadment was necessary,

no finality could be attached to the decree, in the sense that it was binding on the person, namely the applicant who was not impleaded in the suit, before the passing of the decree. So it is always open to the applicant to agitate that question and say the decree is not binding and partition is null and void, to get rid of all that resulting in harassment to parties by multiplicity of legal proceedings, in my view the Trial Court when it opined the applicant (respondent) should be impleaded and that he should be heard before any final decree is passed, it did not commit any error, because for it records no final decision in his favour as regard his right and claim on merits, if the applicant was adopted son or not or any will was executed in his favour. All these questions have to be settled, before final decree could be passed. But if on trial, it is found that respondent (applicant) is the adopted son of defendant 1 (original) and will was executed by first defendant in favour of the applicant, then question may arise to be determined whether plaintiff and other defendants were entitled to any share in the property in suit or not, if so to what extent. When the Court keeping in view these circumstances, points to be determined finally, has held that for final determination of all the questions involved, applicant is a necessary and proper party and to avoid multiplicity of proceedings impleadment is necessary and that it should exercise its discretionary jurisdiction to make impleadment, directing the parties to be added, to avoid multiplicity of legal proceeding, the order and decision is one within its jurisdiction and in my opinion it is not open to interference in revision under Section 115 of the Code.”

16. It is, hence, clear that the applicant/respondent No.1 was a necessary and proper party. She has wrongly not been impleaded as party by the petitioner. They cannot now complain that at this late stage, she has entered appearance. As the applicant has raised a dispute claiming rights to the suit property the issue would have to be adjudicated upon by the trial court. If necessary, the preliminary decree has to be modified accordingly.

17. Reliance of the learned counsel for the petitioner on the judgment of *Gooti Nagarathnamma vs. Cheenakeshapu Venkamma* (supra) of the Andhra Pradesh High Court does not help the petitioner. That was a case in which Court had held that final decree proceedings come to an end with the division of the properties and allotment of shares. If final decree is to result in delivery of possession of the properties and there exists any non-compliance of the final decree, the aggrieved party has to initiate execution proceedings. This judgment does not help the petitioner.

18. The impugned order suffers from no errors and has rightly impleaded the applicant. There is no merit in the present petition and the same is dismissed.

19. All pending applications also stand dismissed.

(JAYANT NATH)
JUDGE

SEPTEMBER 07, 2016

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signed on 15.1.2017