

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.327 of 2017

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1. Anjali Sinha, Daughter of Late Mahabir Prasad Sinha and Wife of Amarnath Sinha, Resident of 'Amar Shree' Mahadevpuri, Rajeshwari Path, East of Road No. 6C, Gardanibagh, Patna - 1
 2. Abha Sinha, Daughter of Late Mahabir Prasad Sinha, W/o Sri Sudhanshu Kumar, R/o Flat No. 202, Gitanjali Apartment Road No.4A, Gardanibagh, Patna - 1
 3. Kumar Sanjay Vijay, Son of Late Nalini Sinha, R/o 10, Revenue Colony, Chitragupta Nagar, Kankarbagh, Patna 20
 4. Anjay Kumar Sinha, Son of Late Kanan Sinha, R/o Ashirwad Ny 67, Janta Road behind Jhunjhun Mahal Gardanibagh, Patna - 1

.... Petitioner/s

Versus

1. Ashok Sinha, S/o Late Mahabir Prasad, R/o Mohalla - Lakhpati Niwas, Goriatoli, P.S. Kotwali, P.O. G.P.O. District - Patna
2. Malati Devi, W/o Late Anant Shankar Sinha,
3. Dheeraj Anand, S/o Late Anant Shankar Sinha,
4. Viraj Anand, S/o Late Anant Shankar Sinha,
5. Vishal Anand, S/o Late Anant Shankar Sinha,
6. Nidhi Anand, S/o Late Anant Shankar Sinha, Sl. No. 2 to 6 All R/o Lakhpati Niwas, Goriatoli, P.S. Kotwali, Patna, At Present - R/o Kashyap R.K. Plaza, Flat No. 401, behind CDA Building Laljitola, Patna
7. Ajit Sinha, S/o Late Mahabir Prasad,
8. Ranjita Verma, W/o Late Ajay Sinha,
9. Ankit Sinha, S/o Late Ajay Sinha,
10. Swarnim Sinha, D/o Late Ajay Sinha,
11. Ravi Shankar Sinha, S/o Late Mahabir Prasad, All resident of Lakhpati Niwas, Goriatoli, P.S. Kotwali, P.O. G.P.O., District - Patna

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ashok Kumar

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 27-09-2018

1. Heard Mr. Kamal Nayan Choubey, learned senior counsel appearing on behalf of the petitioners and Mr. Jitendra Kishore Verma, learned counsel appearing on behalf of the respondents.

2. The petitioners-intervenors filed this civil miscellaneous petition under Article 227 of the Constitution of India to set aside the



order dated 20.10.2016 passed by learned Sub Judge IX, Patna in Title Partition Suit No.149 of 2007 whereby the learned Sub Judge dismissed the petition dated 12.03.2014 filed by the petitioners under Order I Rule 10 read with Order XX Rule 18 and Section 151 of the Code of Civil Procedure.

3. One and only question arises for consideration in this civil miscellaneous petition is “whether the Court in exercise of power under Order I Rule 10(2) of the C.P.C. can implead necessary party in a suit for partition of property after preliminary decree for partition is passed and before the final decree is drawn?”

4. The facts relevant for the purpose of deciding this petition can be summarized as follows:

Mahavir Prasad Sinha was the common ancestor of the plaintiff and the defendants. Mahavir Prasad Sinha got five sons and five daughters. Ashok Sinha, one of the sons of Mahavir Prasad Sinha filed Partition Suit No.149 of 2007 in the Court of Sub Judge for partition of property mentioned in schedule of the plaint and allotment of his 1/5th share by carving out separate takhta. The plaintiff impleaded his four brothers as defendants in the partition suit but the plaintiff and the defendants did not disclose about the existence of daughters of Mahavir Prasad Sinha either in the plaint or in the written statement for the obvious reason of debarring them from



getting share in the ancestral property and share of their father, Late Mahavir Prasad Sinha. Preliminary decree was passed on 17.02.2011. After passing of preliminary decree, the daughters and descendants of the daughters of Mahavir Prasad Sinha filed petition under Order I Rule 10(2) read with Order XX Rule 18 and Section 151 C.P.C. The defendants filed rejoinder and after hearing the parties, learned Sub Judge IX dismissed the petition of the petitioners holding that the interveners-petitioners would not get any share in the undivided family property. Partition took place prior to the amendment of Section 6(i) and 6(v) of the Indian Succession Act and the transaction which may have taken place prior to 20.12.2004 i.e. date of introduction of the Bill shall be excluded. The amendments are applicable to living daughters of living coparceners. Being aggrieved by this order, the petitioner thought it proper to move this Court in this civil miscellaneous.

5. Mr. K.N.Choubey, learned senior counsel for the petitioners submits that Court has illegally rejected the petition of the petitioners for impleading them as defendants in the partition suit on the ground that the petitioners are not entitled to get any share in the property of Mahavir Prasad Sinha as Mahavir Prasad Sinha died prior to amendment in Section 6 of Hindu Succession Act. It is submitted that even if Mahavir Prasad Sinha died admittedly in the year 1975,



the daughters are entitled to get share in the share allotted to Mahavir Prasad Sinha at par with the brothers of the petitioners. The daughters may not be considered as coparceners on the death of Mahavir Prasad Sinha as it is settled law that living daughters of living coparceners is/are entitled to get share after amendment of Hindu Succession Act in the year 2005. It is further submitted that even after passing of preliminary decree, the daughters and legal heirs of the daughters of Mahavir Prasad Sinha are necessary party in the partition suit filed by the sons of Mahavir Prasad Sinha since they are entitled to get share in the share of Mahavir Prasad Sinha after death of Mahavir Prasad Sinha. Even preparation of preliminary decree, they are entitled to be impleaded as party and at their instance, preliminary decree can be recast or redrawn. It has been settled by a judgment of the Gujarat High Court in Kumari v. Huned decided on 09.12.2011. It is further submitted that in a partition suit, there can be more than one preliminary decree and in support of this submission, learned counsel placed reliance on the two judgments of the Supreme Court, **AIR 1967 Supreme Court 1470(Phoolchand and another v. Gopal Lal)** and **AIR 2012 Supreme Court 169(Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.)**. If during the pendency of the partition suit after passing of preliminary decree on account of development of certain events and circumstances warranting



reshaping of share among the parties and alteration of preliminary decree, the preliminary decree may be recast.

6. Mr. J.K.Verma, learned counsel for the respondents contending the submission of the petitioners has submitted that so far question of finality of preliminary decree is concerned, the Constitution Bench of Hon'ble Supreme Court in **AIR 1963 Supreme Court 992 (Venkata Reddy and others v. Pethi Reddy)** held that legislature has intended to pass two decrees in particular types of suits and accordingly amendment was brought about in Section 2(2) and Order XX Rule 18(2). In the preliminary decree, the rights and interest of the parties to a suit are decided and the party cannot raise the question of legality or illegality of preliminary decree at the time of preparation of final decree without filing appeal against the preliminary decree as provided under Sections 96 and 97 of the Code of Civil Procedure. It is further submitted that the Court cannot review on his own or at the instance of newly added party, the preliminary decree. Preliminary decree can be amended on the future happening such as death of a party or any events or the circumstances happened during the pendency of the suit but the preliminary decree cannot be reviewed or altered at the instance of a newly added party. If the petitioners have not been made party in the suit for partition although the petitioners are entitled to get share, the petitioners have got



remedy to file suit for setting aside the judgment and decree passed in the suit and the same is not binding on them. Mr. J.K.Verma in support of his submission and contention placed reliance on the judgment of Orissa High Court reported in AIR 1966 Orissa 160 in which it has been held that after passing of preliminary decree subsequent application to implead co-sharer as party to suit cannot be allowed as it would affect determination in preliminary decree which has become final.

7. On the petition of the petitioners, for being impleaded as parties, and for allowing them to file their pleadings and for modification of the preliminary decree declaring $1/10^{\text{th}}$ share each of the plaintiff, the defendants and these petitioners and till then for staying the preparation of final decree, the respondents (plaintiff and defendants) opposed the prayer on the following grounds that the preliminary decree was prepared defining $1/5^{\text{th}}$ share each of the plaintiff and defendant and the Pleader Commissioner has already submitted report which is pending for acceptance. The petitioners filed the petition at a very belated stage without preferring any appeal against the preliminary decree. In fact, suit property was separated and partitioned in the year 1973 between Late Mahavir Prasad Sinha, his wife and five sons and as such, there was no need to implead the petitioners as parties pursuant to the amendment in the year 2005 in



the Hindu Succession Act. Mahavir Prasad Sinha died on 28.12.1975 and the property owned by Mahavir Prasad Sinha devolves upon each heirs. It is further stated that if a coparcener dies leaving behind any family relatives mentioned as class I heirs in the Act, his undivided interest in Mitakshra coparcenary property would not devolve upon the surviving coparcener by way of survivorship rather the same would devolve by way of intestate succession. A female Hindu as a daughter has only right as resident in the dwelling house in case she is unmarried or deserted or separated by her husband post-marriage, on such, the learned Sub Judge held that the right conferred on a daughter of a coparcener is on and from the date of commencement of the Hindu Succession Act, 2005 and Section 6(iii) therein talks of death(of coparcener through whom daughter is claimed) after the amendment for its applicability. It is held that proviso of Section 6(i) and 6(v) clearly intend to exclude the transaction which may have taken place prior to 20.12.2004 i.e. date of introduction of the Bill and the rights under amendment are applicable to living daughters of living coparcener as on 09.09.2005 irrespective of when such daughters are born. Disposition or alienation including partition which may have taken place before 20.12.2004 as per the law applicable prior to the said date will remain unaffected and on such, the learned Sub Judge held that since the petitioners are not entitled to have any



share in the coparcenary property, therefore, the petition of the petitioners-interveners was held to be devoid of merits on all counts and the same was dismissed.

8. It is crystal clear from the order of the Sub Judge itself that the learned Sub Judge has erred in holding that if partition took place before 20.12.2004, the date on which the Hindu Succession Amendment Act, 2005 was introduced, the daughter shall not be entitled to have any share. Admittedly, a living daughter of living coparcener is entitled to get share as coparcener in the ancestral property only when on the date of amendment in Hindu Succession or thereafter the father of the living daughter was alive but if father of the living daughter dies before the Hindu Succession Act, 2005 came into effect, the daughter/daughters is/are entitled to get share equal to that of son in the share allotted to the father, if the partition took place before the amendment of the Hindu Succession Act, 2005. It is admitted case that Mahavir Prasad Sinha, the father of petitioner Nos.1 and 2 died in the year 1975. The plaintiff also admitted that before death of Mahavir Prasad Sinha, the property was partitioned among the father, mother and brothers but no document or evidence was brought on record to show that the partition took place in the year 1973. Mahavir Prasad Sinha died in the year 1975 and his daughters are entitled to get equal share as that of his brothers in the share fell in



the share of Mahavir Prasad Sinha. Therefore, I find that learned Sub Judge has erred in holding that the petitioners, daughters of Mahavir Prasad Sinha are not at all entitled to get any share and, therefore, their impleadment in the suit is of no merit. Learned Sub Judge has not given any finding on the petition of the petitioners-interveners that the petitioners are not entitled to be impleaded as parties in the suit after passing of the preliminary decree or at their instance, the preliminary decree cannot be reset as they are entitled to get share and they are necessary party in the suit but Mr. J.K.Verma, learned counsel for the respondents raised this question during the hearing that in the partition suit after preparation of preliminary decree, co-sharers or coparcener, who are left out from the suit, cannot be impleaded in the suit after preparation of preliminary decree.

9. In the case of **Venkata Reddy and others v. Pethi Reddy, AIR 1963 Supreme Court 992**, on which learned counsel for the respondents heavily placed reliance, it has been held that “**a decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as the same permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring**



an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees - a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the court arrived at the earlier stage also has a finality attached to it Section 97, C. P. C. clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree and if the preliminary decree is not challenged the same cannot be challenged in the appeal filed against the final decree.”

10. There left no doubt that in the preliminary decree also, the rights and entitlement of a party is decided. There is a provision of appeal against the preliminary decree, if a party does not dispute or raise objection with regard to the illegality of the preliminary decree,



the party to the suit cannot challenge the same in the appeal preferred against the final decree. In the aforesaid case, the fact was that after a father of a joint Hindu family became insolvent, the joint family properties consisting of him and his two sons' shares were sold by official receiver. The official receiver sold the entire property to the respondent. The two sons thereafter filed a suit for partition of the joint family property, in the suit, they made vendee/vendees defendants. A preliminary decree for partition was passed in favour of the sons and the decree was eventually affirmed by the High Court in the year 1946. In the meanwhile, there was an application by the sons for a final decree, which was granted ex parte. That decree was set aside at the instance of the respondents in 1950 because by that time, a new Section 28A of the Provincial Insolvency Act came into effect. The question in appeal before the Hon'ble Supreme Court in Special Leave was whether the first proviso to Section 28A would save the preliminary decree from being reopened and it was held that the preliminary decree has already been passed and the appeal against the preliminary decree was confirmed, therefore, the same became final and cannot be altered or revised in the proceeding for preparation of final decree but in that case, this question as to whether a coparcener or co-sharer left out to be made a party in the partition suit can be impleaded as party in the partition suit by filing petition under Order I



Rule 10(2) of Code of Civil Procedure after preparation of preliminary decree has not been decided. This question came up for consideration before a Single Bench of Orissa High Court in the case of **Baman Chandra Acharya and others v. Balaram Acharya and others**, AIR 1966 Orissa 160 and it was held in para 12 of the judgment which reads as follows:

“To sum up, even if other conditions under Or. 1, R. 10(2) are fulfilled, an application for addition of parties cannot be allowed after the preliminary decree is passed except in certain exceptional circumstances, such as, impletion of transferees subsequent to the preliminary decrees or death of parties whose rights were carved out in the preliminary decree. For instance, a preliminary decree declares that X, Y and Z have one-third share each in the disputed property Z dies leaving behind some heirs who are entitled to his share with varying interests. Such heirs can be added at the final decree stage in place of Z and on their desire their varying interests may be carved out at the final decree stage. In these exceptions, the heirs of the parties of the preliminary decree declaring rights, title and interest of the parties in a particular manner are not affected.”

11. From bare perusal of the provisions as contained in Order I Rule 10(2) C.P.C., it is crystal clear that the provision says that the Court may implead at any stage of the proceeding the name of any person as plaintiff or defendant, who ought to have been joined, and this expression is very wide but it qualifies that the Court may at any stage of the proceeding, in the name of any person, until the decree is passed, add party or struck out party, if other conditions of



the rule are satisfied and each case is to be determined on its own facts and circumstances. There is no dispute that in all suits where only one decree is passed completely disposing of the suit, there cannot be any addition of parties under Order I Rule 10 C.P.C. subsequent to the decree but then question arises where after passing of the preliminary decree if a person who is necessary party can be impleaded in the suit? There is no doubt that after disposal of the suit or even at the appellate stage if a petition under Order I Rule 10(2) is filed, the appellate court may also consider the desirability of such person to be added as party in the appeal. In the partition suit, even after preparation of preliminary decree on happening of future events and changing of the circumstances, the preliminary decree can be changed and a person being necessary party may be added in the suit and at his instance, the preliminary decree can be changed such as when a son or father files a partition suit and after preparation of preliminary decree, a new coparcener is born, the preliminary decree can be amended or revised. Secondly, when a coparcener or a party to the partition suit dies after preparation of preliminary decree leaving behind no heirs, the share of other parties shall be augmented and on such, the preliminary decree can be varied but these aspects have not been considered by learned Single Bench of Orissa High Court. In this view of the fact, I respectfully disagree with the view taken by learned



Single Judge of Orissa High Court.

12. It is settled law as has also been held by the Hon'ble Supreme Court in the case of **Phoolchand and Anr. v. gopal Lal reported in AIR 1967 Supreme Court 1470** that so far as partition suits are concerned, if an event transpires after the preliminary decree which necessitates a change in the 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 and this can only be done so long as the final decree has not been passed.

13. In the case of **Ganduri Koteswaramma & Anr. v. Chakiri Yanadi & Anr., AIR 2012 Supreme Court 169**, the Hon'ble Supreme Court held that "a preliminary decree also determines the right and interests of the parties but the suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the Court to



amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation. Section 97 provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree but that does not create any hindrance or obstruction in the power of the Court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial Court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. As such by passing of preliminary decree in partition suit before stipulated date it cannot be said that the rights of daughter to share in coparcenary property is lost.”

14. From the aforesaid two judgments of the Hon’ble Apex Court, it has become crystal clear that in a partition suit on the ground of happening of events and the circumstances occurred during the pendency of the suit, after preparation of preliminary decree, the



preliminary decree can be amended or altered. Thus, I am of the considered view on the facts that if a person filed partition suit against others but does not make other co-sharer who is entitled to get share in the property sought to be partitioned such co-sharers are necessary parties and even after preparation of preliminary decree such co-sharers being necessary party to the partition suit are entitled to be impleaded as party and at the instance of such newly added parties, the preliminary decree can be amended or verified in accordance with law or according to the entitlement of the parties. Such parties cannot be denied the valuable right of being impleaded as party in the partition suit on the ground that the preliminary decree has already been prepared driving such party to file fresh suit for declaration of the decree as illegal, void as obtained by practicing fraud or to file appeal against the preliminary decree. The Court has got inherent power under Section 151 C.P.C. and the same is wide enough to make amendment or reset the said preliminary decree obtained after practicing fraud or on concealment of facts allowing the parties to be added in the suit. It has been held by the Supreme Court in **Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 Supreme Court 527** that the provisions of the Code do not control the inherent power by virtue of its duty to do justice to the parties before it and in order to do justice to the parties and to avoid



multiplicity of proceedings and abuse the process of the court the court may exercise inherent power to modify the preliminary decree. My this view is fortified by the law laid down by the Single Bench of the Gujarat High Court in the case of **Kumari v. Huned**. In para 22 of the aforesaid judgment, which reads 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 No. 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 proceedings, the order and decision is one within its jurisdiction and in my opinion it is not open to interference in revision under S. 115 of the Code.”

15. Having considered the facts aforesaid and discussion



made above, I find and hold that even after passing of preliminary decree in a partition suit, a necessary party, deceitfully left out to be made a party in the suit can be impleaded and the preliminary decree can be amended and thus, learned Sub Judge has committed jurisdictional error in dismissing the petition of the petitioners for impleading them as party in the suit. Accordingly, the order dated 20.10.2016 passed in Title Partition Suit No.149 of 2007 is set aside. The petition filed under Order I Rule 10(2) C.P.C. is allowed. Thus, this civil miscellaneous petition is allowed.

(Prabhat Kumar Jha, J)

Saurabh/-

AFR/NAFR	A.F.R.
CAV DATE	N/A
Uploading Date	11.10.2018
Transmission Date	

