

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

965 WRIT PETITION NO.8512 OF 2022

Jayendra Sahdeo Abnave
Age : 61 years, Occu : Agri.,
R/o. Ward No. 6, Subhash Colony,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

... PETITIONER
(Orig. Defendant No.4)

VERSUS

- 1) Sou. Sunita Vilas Mahadik
Age : 52 years, Occu : Agri., & Household,
R/o. Thane Majiwada,
Tq. & Dist. Thane.
- 2) Sou. Shubhangi Sunil Rokade
Age : 53 years, Occu : Agri., & Household,
R/o. Mumbai Central Nagar Palika
Building, Mumbai Resp. Resp. No.1 & 2 Orig. Plaintiffs
- 3) Smt. Rukhminibai Sahadeo Abnave (Dead),
- 4) Shri. Arun Sahadeo Abnave,
Age : 63 years, Occu : Service,
R/o. Mumbra, Near Make Company,
Sanjaynagar, Mumbai
- 5) Shri. Pratap Sahadeo Abnave
Age : 61 years, Occu : Agri.,
R/o. Ward No. 6, Subhash Colony,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.
- 6) Shri. Shrikant Sahadeo Abnave,
Age : 50 years, Occu : Agri.,
R/o. Ward No. 6, Subhash Colony,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

...RESPONDENTS
(Orig. Defendants)

Shri. Vivek V. Tarde, Advocate for the petitioner
Shri. Abhijit B. Kale, Advocate for respondent Nos. 1 and 2.

CORAM : M. G. SEWLIKAR, J.
DATED : 19th AUGUST, 2022

JUDGMENT :-

1. Rule. Rule made returnable forthwith. With the consent of the parties taken up for final hearing at the admission stage.

2. By this writ petition, the petitioner is challenging the order passed by the learned Adhoc District Judge, Shrirampur in Civil Misc. Application No. 5 of 2018.

3. Facts in nutshell are that respondent Nos. 1 and 2 had filed Regular Civil Suit No. 82 of 2009 for partition and separate possession which was decreed by Civil Judge, Senior Division, Shrirampur on 18th October, 2013. Appeal was preferred against the said decree bearing Regular Civil Appeal No. 70 of 2013. The said appeal was decided on 27th June, 2016 and shares of the respondent Nos. 1 and 2 came to be determined. Accordingly, Regular Darkhast No. 150 of 2013 was filed for executing the preliminary decree. The matter was

referred to Collector for effecting partition. Possession is not yet delivered to the respondent Nos. 1 and 2.

4. Respondent Nos. 1 and 2 filed an application alleging therein that daughters have equal right in ancestral property in view of amendment to Section 6 of Hindu Succession Act, 2005. In the appellate court shares were determined as per notional partition. Now the law as regards daughters in ancestral property is settled. Now the daughters being coparceners have equal share in the ancestral property. Accordingly application was filed for amending the preliminary decree. This application was resisted by respondent No.3. According to the respondent No. 3 the respondent Nos. 1 and 2 ought to have preferred second appeal against the judgment and decree in R.C.A. No. 70 of 2013. Application is filed with an oblique motive. They, therefore, prayed for rejection of the application.

5. The learned Trial Court by its order dated 5th July, 2022 allowed the application and amended the preliminary decree by awarding 1/6 share. This order is impugned in this petition.

6. I have heard learned counsel Shri. Tarde for the petitioner and learned counsel Shri. Kale for respondent Nos. 1 and 2.

7. Learned counsel Shri. Tarde submits that the plaintiffs ought to have preferred second appeal against the judgment and decree in R.C.A. No.70 of 2013. Instead of pursuing this remedy, respondent Nos. 1 and 2 filed application for amending the decree. This course is impracticable.

8. Learned counsel Shri. Kale for respondent Nos. 1 and 2 submitted that in view of judgment of the Hon'ble Apex Court in the case of ***Vineeta Sharma Versus Rakesh Sharma and Others*** reported in ***(2020)9 Supreme Court Cases 1***, the Hon'ble Apex Court has held that application for amending preliminary decree can be filed and decree can be amended if there is change in law or any death or birth of coparcener.

9. Section 6 of Hindu Succession Act was amended in the year 2005 and the daughters have been given the status of coparceners. The question is whether preliminary decree can be

amended in view of change in the law during the pendency of appeal or during the pendency of execution proceedings. This issue is no more res integra. In the case of ***Vineeta Sharma Versus Rakesh Sharma and Others*** (supra) the Hon'ble Apex Court observed in paragraph No. 19 thus:-

"19. The High Court was clearly in error in not properly appreciating the scope of Order 20 Rule 18 of CPC. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the Government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The Court would thereafter proceed for preparation of final decree. In *Phoolchand*, this Court has stated the legal position that CPC creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. *The Court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.*"

10. This clearly indicates that court can take notice of subsequent events especially in case of suits for partition. In suits for partitions shares can be decreased or increased because of the death or birth of the coparceners.

11. Admittedly, suit of partition is not disposed of by passing of the preliminary decree. It is by final decree that 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 there are supervening events necessitating amendment in the preliminary decree, the same is permissible.

12. In the case at hand suit was decided against which appeal was preferred appeal came to be dismissed. The Hon'ble Supreme Court in the case of ***Vineeta Sharma Versus Rakesh Sharma and Others*** (supra) observed in para 99 thus:

"99. In *Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi*, this Court considered the amendment made in section 6 of the Hindu Succession Act in 2005 and held that the right of a daughter in coparcenary property is not lost by passing of a preliminary decree for partition before stipulated date i.e., 20-12-2004. A partition suit does not

stand disposed of by passing a preliminary decree. Relying inter alia, on S. Sai Reddy, it was held that the preliminary decree can be amended in order to fully recognise the rights of a daughter: (SCC pp. 794-97, paras 13-15 & 18-21)

"13. The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the Court. In the present case, admittedly, the partition has not been effected before 20-12-2004 either by a registered instrument of partition or by a decree of the Court. The only stage that has reached in the suit for partition filed by Respondent 1 is the determination of shares vide preliminary decree dated 19-3-1999, which came to be amended on 27-9-2003 and the receipt of the report of the Commissioner.

14. A preliminary decree determines the rights and interests of the parties. 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 redetermining the rights and interests of the parties having regard to

the changed situation.

15. We are fortified in our view by a three-Judge Bench decision of this Court in *Phoolchand & Anr. v. Gopal Lal*, wherein this Court stated as follows: (AIR p. 1473, para 7),

'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. ... 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; 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. 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. ... 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."

18. The above legal position is wholly and squarely applicable to the present case. It surprises us that the High Court was not apprised of the decisions of this Court in Phoolchand and S. Sai Reddy.

19. The High Court was clearly in error in not properly appreciating the scope of Order 20 Rule 18 of CPC. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the Government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The Court would thereafter proceed for preparation of final decree. In Phoolchand, this Court has stated the legal position that CPC creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The Court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings."

20. Section 97 of CPC that 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 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.

21. 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.

(emphasis supplied)

The effect of the legislative provision concerning partition was considered, and it was held that a preliminary decree merely declares the shares and on which law confers equal rights upon the daughter that is required to be recognised."

13. These observations of the Hon'ble Supreme Court clearly spell out that after the passing of the preliminary decree, the suit continues till the final decree is passed. After passing of the preliminary decree, the events and supervening circumstances necessitating change in shares is permissible for

the Court to amend preliminary decree for passing another preliminary decree determines the rights and interest of the parties. In the case of ***Vineeta Sharma Versus Rakesh Sharma and Others*** (supra) the Hon'ble Supreme Court held that the Amendments Act amending Section 6 has retrospective effect. Therefore, in view of the change the in circumstances the learned Trial Court did not commit any error in amending the shares and amending the preliminary decree. Writ petition is devoid of any substance, hence it is dismissed. No costs. Rule discharged.

[M. G. SEWLIKAR, J.]

ssp