

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.287 of 2017

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Bhola Sahu @ Bhola Sah son of Late Jagdish Sahu, Resident of Rosera Town,
P.S.-Rosera, District-Samastipur at present resident of Village-Kusheshwar
Asthan, P.S.-Singhia, District-Darbhanga. Appellant/s
Versus

1. Chandu Sahu son of Late Kishan Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
2. Garib Nath Sahu, son of Late Kishun Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
3. Mt. Gita Devi, W/o Late Kishun Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
4. Ranjit Sahu, S/o Late Bhagwan Lal Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
5. Santosh Sahu, son of Late Ramdeo Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
6. Binod Sahu, son of Late Ramdeo Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
7. Ramnath Sahu, son of Late Ramdeo Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
8. Umesh Sahu, son of Late Ram Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
9. Dinesh Sahu, son of Late Ram Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
10. Mahesh Sahu, son of Late Ram Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
11. Naresh Sahu, son of Late Ram Sahu, Resident of Rosera Town Dhabh Muhalla, P.S.-Rosera, District-Samastipur.
12. Malti Devi, W/o Rajesh Prasad, Resident of Village-Siwan, P.O. and P.s. Imli Chawk, District-Siwan.
13. Shanti Devi, Wife of Indra Mohan Prasad, Welfare Department, Patna, Mohalla-Welfare Department, Patna, P.O. and P.S.-Bankipur, Punaichak, District-Patna.
14. Asha Devi, W/o Prem Kumar, At and P.O.-Supaul, District-Madhepura, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
16. Ram Babu Sahu, Son of Late Shiv Shankar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
17. Munna Sahu, son of Late Ram Khelawan Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
18. Arun Sahu, son of Late Raghunath Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia,



District-Darbhanga.

19. Shambhu Sah, son of Late Raghunath Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
20. Sunil Sahu, son of Late Raghunath Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
21. Gopal Sahu, son of Late Baidyanath Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
22. Kanhaiya Sahu son of Late Baidyanath Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
23. Bijay Sahu, son of Late Jugeshwar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
24. Nandlal Sahu @ Munna Sahu, son of Late Jugeshwar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
25. Ashok Sahu (Purbey), son of Late Jugeshwar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
26. Mt. Manjula Devi, W/o Late Jugeshwar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
27. Smt. Kaushilya Devi, D/o Late Jugeshwar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
28. Munia Kumari, D/o Late Jugeshwar Sahu, resident of Town, P.S.-Rosera, District-Samastipur, at present Village-Kusheshwar Asthan, P.S.-Singhia, District-Darbhanga.
29. Birendra Prasad, Son of Late Baijnath Prasad, resident of Khagaria, P.S.-Khagaria, District-Munger (New District-Khagaria), at present Mohalla-Mahabir Asthan, Baidyanath Super Market, District-Samastipur.
30. Smt. Gayatri Devi, wife of Late Baijnath Prasad, resident of Khagaria, P.S.-Khagaria, District-Munger (New District-Khagaria), at present Mohalla-Mahabir Asthan, Baidyanath Super Market, District-Samastipur.
31. Devendra Prasad Nayak, son of Late Musai Nayak, Mohalla-Prabhu Thakur, Ward No.-08, Under Town Rosera, P.S.-Rosera, District-Samastipur.
32. Rameshwar Singh, son of Late Churamani Sahu, Mohalla-Dhab Under Town-Rosera, P.S.-Rosera, District-Samastipur.
33. Bhuvneshwar Singh, son of Late Churamani Sahu, Mohalla-Dhab Under Town-Rosera, P.S.-Rosera, District-Samastipur.
34. Jagdish Pd. Narain, son of Late Radhey Pd. Narain, Resident of Rosera Town, P.S. Rosera, District-Samastipur.



35. Smt. Rukmini Devi, Wife of Jagdish Prasad Narain, Resident of Rosera Town, P.S. Rosera, District-Samastipur.
36. Satyadeo Pandit, son of Late Madan Pandit, Resident of Cinema Chowk, Bhirha Road under Nagar Panchayat Rosera, P.S.-Rosera, District-Samastipur.
37. Manoj Pandit, son of Late Madan Pandit, Resident of Cinema Chowk, Bhirha Road under Nagar Panchayat Rosera, P.S.-Rosera, District-Samastipur.
38. Sri Raj Kumar Bhairve S/o Late Bhola Bhairve, Dist-Samastipur.
39. Sri Ajay Kumar Panjiyar, S/o Late Rajendra Panjiyar, Dist-Samastipur.

... ... Respondent/s

Appearance :

For the Appellant/s	:	Mr. Anil Kumar Jha, Sr. Advocate Mr. Sanat Kumar Mishra, Advocate
For the Respondent no. 9:		Mr. Ajit Kumar, Advocate Mr. Abhay Kumar, Advocate
For Respondent 1,2,3	:	Mr. Choudhary Shyam Nandan, Advocate
For Respondent 36&37	:	Mr. Uma Shankar Singh, Advocate Mr. Shishir Kumar Shishir, Advocate Mr. Binod Kumar Sinha, Advocate

**CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV JUDGMENT**

Date : 12-08-2024

This Second Appeal has been filed by the defendant no. 3/ appellant against the judgment and decree dated 18.04.2017 passed by the learned District Judge, Samastipur in Partition Appeal No. 04 of 2017 affirming the final judgement and decree dated 20.09.2016 passed by the learned Sub Judge III, Rosera in Partition Suit No. 33 of 1956 whereby the learned appellate court has held that the appeal is not maintainable in view of the provision contained in Section 97 of the Code of Civil Procedure and also dismissed the petition for condoning the delay as the appeal itself is not maintainable.



2. On 28.03.2023, the following substantial questions of law were formulated while admitting the appeal:-

(i) Whether without deciding question of limitation in filing of the appeal, appeal could be dismissed on the point of maintainability of the appeal?

(ii) Whether filing of appeal against final decree is maintainable when the appellant has not challenged the preliminary decree?

(iii) Whether objection against the Pleader Commissioner's report in a final decree proceeding by the appellant would entitle him to file appeal against the final decree?

3. A Partition Suit bearing Partition Suit No. 33 of 1956 was filed wherein, the appellant was defendant no. 3. A preliminary decree was passed on 23.11.1960 declaring plaintiffs 4 Aanas share and directing for preparation of final decree and in view of the preliminary decree respective shares of the parties were allotted as per the preliminary decree. No party to the suit raised any grievance against the preliminary decree and hence, no appeal was filed against preliminary decree. The learned trial court proceeded to prepare the final decree. A Survey Knowing Pleader Commissioner was appointed, who prepared his report. Objections were raised against the report by the defendant nos. 1, 2 & 3.



Other defendants also filed their objections in final decree stage.

Objection of the defendants-appellant was rejected.

4. The learned trial court accepted the Pleader Commissioner report and passed the judgement and final decree. Against the judgment and final decree, the defendant/appellant filed Partition Appeal No. 04 of 2017 which was delayed by 46 days and was accompanied by a petition for condonation of delay. The District Judge held that appeal is not fit to be admitted and there is no question of condoning the delay.

5. Learned counsel for the appellant submitted that appellant has not challenged correctness of the preliminary decree. The learned District Judge proceeded to interpret Section 97 of the Code of Civil Procedure wrongly and held that since the appellant has not filed appeal against preliminary decree hence, the appeal was not maintainable against final decree. However, in the instant appeal, the appellant is not disputing the correctness of the preliminary decree and the provisions does not come in the way.

6. The learned appellate court below relied upon a decision in the case of **Phoolchand and another v. Gopal Lal** reported in **AIR 1967 SC 1470**. The said decision is not at all relevant for the points in issue and has wrongly been relied upon. The learned Appellate Court further held that since the appeal



itself was not maintainable and not fit to be admitted, there was no question of condoning the delay. The appeal is not hit by Section 97 of the Code of Civil Procedure. The learned Appellate Court below has misinterpreted the provision of Section 97 of the Code of Civil Procedure, which is entirely foreign to the law. The learned lower Appellate Court has relied upon the decision reported in **AIR 1967 SC 1470 (Supra)** which do not lay down any such proposition and the principle laid down therein are otherwise. In fact, what Section 97 bars is that if no appeal is filed against preliminary decree, the correctness of preliminary decree cannot be challenged in an appeal against final decree and Section 97 nowhere lays down that no appeal lies against final decree if no appeal is filed against preliminary decree which has been misconceived and misconstrued by the learned lower appellate court. The decision of Hon'ble Apex Court cited by the learned lower Appellate Court seems to be a wrong citation. However, the quoted portion from the said decision deals with an altogether different situation which is wholly inapplicable to the facts of the present case as there is no subsequent variation of shares between the parties and further that decision nowhere lays down that if no appeal is preferred against preliminary decree, no appeal can be filed against final decree.



7. Reliance has been placed in the case of **T. Ravi and Another Vs. B. Chinna Narasimha and Others** and **Selvi Vs. Gopalakrishnan Nair (Dead) Through Legal Representatives and Others** reported in **2017 (7) SCC 342** and **2018 (7) SCC 319** respectively wherein, it is held that the scope of the Section is to the effect that matters which are concluded by preliminary decree cannot be re-agitated in an appeal against final decree. Thus, there is no bar in Section 97 regarding maintaining a first appeal against final decree if no appeal is preferred against preliminary decree. Therefore, the appeal is very much maintainable.

8. In such view of the matter, if preliminary decree was not appealed/challenged, the appeal against final decree is maintainable.

9. On the other hand, learned counsel for the respondent no. 9 and learned counsel for the respondent nos. 1, 2, 3, 4 and 7 have submitted that appeal filed against final decree without challenging the preliminary decree is not maintainable. Reliance has been placed in the case of **Phoolchand and another Vs. Gopal Lal and another (Supra)** which has clearly held that in case of present nature no appeal is maintainable against the Final Decree. Para 7 of the aforesaid Judgement clearly says that if an event after Preliminary Decree transpires that there is necessity



to change the shares, the Court may allow the same by making the variation in shares specified in the Preliminary Decree which would be liable to appeal. However the same can only be done so long as the final decree has not been passed. Similar view has been taken in the case of **Tapan Kumar Bhattacharjee Vs. Ratan Kr. Bhattacharjee and Others** reported in **AIR 2004 Gauhati 27**.

10. Learned counsel for the respondents further submitted that if there is variation in shares of respective parties in terms of Advocate Commissioner's report upon which Final Decree is passed, the aggrieved party cannot challenge the question of correctness of Advocate Commissioner Report in appeal against Final Decree.

11. Mr. J.K. Verma, learned counsel for the respondent nos. 38 & 39 supported the case of the appellant and submitted that the issue, in question, is squarely covered by a decision of this Court rendered in **S.A. No. 548 of 1992 (Digvijay Kumar Singh & Anr. Versus Pramila Devi & ors.)** decided on 24.11.2023 wherein, the same issue was considered and answered holding that non filing of appeal against preliminary decree does not operate as a bar to file appeal against final decree by relying upon a judgment in the case of **Mool Chand and Others Vs. Dy. Director, Consolidation and Others** reported in **1995 (5) SCC 631**. Section



97 bars only re-agitation of matters covered by preliminary decree regarding rights of parties, determination of shares etc. which becomes final on account of non filing of appeal but it nowhere precludes challenging the final decree by filing appeal on grounds other than those which are covered by preliminary decree and have come into existence on account of subsequent event of pleader commissioner report etc. and their correctness including the other legal infirmities in final decree proceeding leading upto passing thereof. If such view is not taken then it would lead to a situation where any illegality or infirmity vitiating the final decree proceeding or passing of final decree will be immune to challenge.

12. Learned counsel for the respondent nos. 38 & 39 in reply to 1st substantial question of law submitted that the lower appellate court has grossly erred in not considering the limitation petition first before deciding the maintainability of appeal matter. Unless the delay is condoned, there is no appeal legally before the court and as such the lower appellate court should have first decided the limitation matter and thereafter should have taken up the maintainability matter.

13. Since the lower appellate court has not admitted the appeal due to above misconception of legal position regarding non maintainability of appeal against final decree due to non filing of



appeal against preliminary decree, the judgment impugned is vitiated and dismissal of the appeal at the outset is illegal as he has failed to consider the limitation petition first on its own merits, and consequently failed to exercise the jurisdiction vested in it by law which resulted in passing the impugned judgment which is perverse and the limitation petition still remains unconsidered on merits.

14. Learned counsel for the respondent nos. 38 & 39 further replied to the IIIrd substantial question of law and submitted that there is no absolute bar regarding non maintainability of appeal in absence of objection to the report of Pleader Commissioner. This Hon'ble High Court in the decision rendered in **S.A. No. 548 of 1992 (Digvijay Kumar Singh & Anr. Versus Pramila Devi & ors.)** decided on **24.11.2023** has held that even a litigant who does not file an objection in the learned trial court in an appropriate case (though not as a general rule) can raise the same at the appellate stage. There is no bar in maintaining the certain circumstances appeal against final decree even if no objection is raised against preliminary decree. However, in the facts of the present case, as a matter of fact, the objections to the report of pleader commissioner were raised by defendant nos. 1, 2, 3, 3a, 3b and 15 etc. which is even recorded in the judgment of



final decree dated 20.09.2016 and thus even factually this Substantial Question of Law may not be attracted. The appellant is defendant no. 3, who raised the objection and other appellants and respondent nos. 38 and 39 are claiming through defendant nos. 1, 2 & 3 and some other defendants and as such it cannot be said that no objection was raised by these persons against report of Pleader Commissioner.

15. Considered the submission made on behalf of the parties and perused the impugned judgment as well as substantial question of law having been framed by this Court in this appeal. So far substantial question of law that failure to file appeal against the preliminary decree would operate as a bar in an appeal filed against final decree is concerned, the provision of Section 97 of the Code of Civil Procedure has been examined by the Hon'ble Supreme Court in the case of **Chitturi Subbanna Vs. Kudapa Subbanna and Others** reported in **(1965) 2 SCR 661** and it has been held that *"the object of the s. 97 is that questions which had been urged by the parties and decided by the Court at the stage of preliminary decree will not be open for re-agitation at the stage of preparation of final decree and would be taken as finally decided if no appeal had been preferred against preliminary decree."*



16. It is apparent from a bare perusal of the language of Section 96 that it provides for an Appeal against any decree unless it is otherwise provided for under the C.P.C., or under any other law for the time being in force.

17. Section 97 of the CPC provides thus:-

"Where any party aggrieved by a preliminary decree passed after the commencement of this 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."

18. In a suit for partition of property or separate possession of a share therein, Order XX Rule 18 of the CPC contemplates a decree has to be passed in the terms of Sub Rule 2. The relevant extract of which is quoted as under :-

"Order XX Rule 18.

Decree in suit for partition of property or separate possession of a share therein. - *Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, ---*

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of



the several parties, interested in the property and giving such further directions as may be required."

19. The partition suit is decided at two stages i.e. at first stage preliminary decree is passed and at second stage, a final decree. Passing of the preliminary decree does not decide the suit finally. Preparation of final decree is continuation of the same suit.

20. In **Shankar Balwant Lokhande versus Chandrakant Shankar Lokhande, (1995) 3 SCC 413**; while considering the provisions of Order 20 Rule 18, Code of Civil Procedure, and also the period prescribed for execution of a decree under the Limitation Act, the Apex Court has observed as under: -

4. "Thus it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further enquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The court is also empowered to give such further directions as may be required in this behalf. Preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by coparcener or co-sharer, the court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs after making them parties and then to pass a



preliminary decree. The words "declaring the rights of several parties interested in the property" in Sub Rule 2 would indicate that the shares of the parties, other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject matter of the suit. The final decree should specify the division by metes and bounds and it needs to be endorsed on stamped paper."

21. A preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined, a decree incorporating such determination needs to be drawn up which is the final decree.

22. A preliminary decree first 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 period i.e. after passing of the preliminary decree and before the



final decree is passed, the events and supervening circumstances occur necessitating changes 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.

23. In view of the preceding analysis, with regard to the maintainability of appeal against final decree even if no appeal is preferred against preliminary decree only restriction is that in the appeal against final decree one cannot dispute the correctness of preliminary decree if he has not filed appeal against preliminary decree.

24. The appellants of the Title Appeal have not challenged the correctness of the preliminary decree passed in partition suit. Therefore, any aggrieved party, who has not filed any appeal against the preliminary decree with regard to right, title and interest or shares can challenge final decree in appeal with regard to “Rai”, “Simt” and valuation as well as the same not being in consonance with the preliminary decree. Reference in this regard may be made to a decision of the Madras High Court in case of **Abdul Rasheed and Ors. Vs. Abdul Jabbar and Ors.**, reported in **AIR Online 2018 MAD 848** decided on **18.07.2018** in which it has been held that even a litigant who does not file



objection in trial court in an appropriate case (though not as a general rule) can raise the same at the appellate stage. However, the appellant as well as defendant nos. 1, 2, 3, 3a, 3b and 15 have raised objection against pleader commissioner report.

25. So far 1st substantial question of law is concerned, the lower appellate court erred in law. Without deciding the limitation of the appeal, the appeal was dismissed on the point of maintainability. The lower court should have first decide the limitation matter and thereafter, should have taken up the maintainability matter. The appellate court has not admitted the appeal due to above misconception of legal possession regarding non maintainability of the appeal against final decree due to non filing of appeal against preliminary decree.

26. In the light of the narrative and discussion (Supra), there can be no doubt that learned appellate court below erred and was not justified in passing the impugned judgment in appeal against final decree as not maintainable when the provision has not barred the appeal against final decree where correctness of the preliminary decree has not been challenged/questioned. Therefore, the Partition Appeal No. 04 of 2017 is maintainable against final decree.



27. The substantial questions of law are answered in favour of the appellants.

28. Accordingly, the judgment and decree of the lower appellate court passed in Partition Appeal No. 04 of 2017 by the learned District Judge, Samastipur is hereby set aside.

29. The matter is remanded to lower appellate court to first decide the limitation matter and then proceed accordingly.

30. With the above direction, the instant Second Appeal is allowed.

31. The learned lower Appellate Court is directed to decide the matter at the earliest, preferably, within a period of six months from the date of receipt/production of a copy of this order.

(Khatim Reza, J)

sankalp/-

AFR/NAFR	NAFR
CAV DATE	16.05.2024
Uploading Date	14.08.2024
Transmission Date	NA

