



**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

121

**RSA-3528-2023 (O&M)
Date of decision : 20.08.2024**

Lajwanti (Deceased) Through LRs and others **Appellants**

versus

Surjeet Bahadur (HUF) and others **Respondents**

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Ravi Dutt Sharma, Advocate
for LR of appellant No1 and
for appellants No.2 to 6.

PANKAJ JAIN, J. (Oral)

1. Defendants are in appeal. For convenience, parties hereinafter are referred to by their original position in the suit i.e. the appellants as defendants and respondents as plaintiffs.

2. Plaintiffs filed suit for partition claiming that they are owners in possession to the extent of 16 kanal 4 marlas in a joint khewat alongwith defendants who owned suit land to the extent of 3 kanal 2 marlas. So far as status of the parties with respect to ownership is concerned, the same is not in dispute.

3. Counsel for the defendants submits that Jagan Nath Jain was originally owner of a land wherein he constructed godowns and was in partnership with Ramesh Kumar. Jagan Nath Jain retired from partnership and Ramesh Kumar became owner of those godowns. So the land in question was being used as passage to the said godowns. The objection raised is that the land in question being used as passage is

impartible.



4. Section 54 of the Code of Civil Procedure, 1908 deals with partition of an estate or separation of share. The same reads as under:-

“54. Partition of Estate or separation of share:-

Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government or for the separate possession of share of such an estate, the partition of the estate or the separation of the share of such an estate shall be made by the Court in accordance with the law if any, for the time being in force relating to the partition , or the separate possession of shares and if necessary on the report of a revenue officer, not below the rank of tehsildar or such other person as the Court may appoint as Commissioner in that behalf."

5. Order 20 Rule 18 mandates that where Court is dealing with suit for partition of property or separate possession of share therein the Court may pass a preliminary decree declaring the rights of the several parties interested in the property and prescribes as under:-

“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,-

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector, deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(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.”



6. Order 26 Rule 14 provides the procedure to be followed by Commissioner to divide the property into shares as per the preliminary decree. The procedure prescribes reads as under:-

“14. Decree in pre-emption suit.

(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall-

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decrees against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,-

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emption shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.”

7. The scope of the preliminary decree has been spelled out by Supreme Court in the case of ***Renu Devi vs. Mahendra Singh*** reported as ***(2003) 10 SCC 200*** observing as under:-

“XX XX

7. In a suit for partition of property or separate possession of a share therein Order XX Rule 18 of the CPC contemplates decree to be passed in the following terms:



“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,-

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector, deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(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.”

8. The aforesaid ratio was further relied upon by Apex Court in the case of ***Hasham Abbas Sayyad vs. Usman Abbas Sayyad*** reported as ***(2007) 2 SCC 355*** to explain interplay between preliminary decree and final decree in the case of partition laying down the law as under:-

“xx xx

6. Order 20 of the Code of Civil Procedure provides as to when a judgment is said to be pronounced. Rule 7 thereof provides that a decree although prepared at a later date shall relate back to the date of the judgment. A Civil Court, in a suit for partition, may pass a preliminary decree in terms of Order 20 Rule 18 of the Civil Procedure Code, which reads as under :

“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,-



(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector, deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(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.

7. Preliminary decree declares the rights and liabilities of the parties. However, in a given case a decree may be both preliminary and final.

8. There can be more than one final decrees. A decree may be partly preliminary and partly final. (see *Rachakonda Venkat Rao v. R. Satya Bai* [(2003) 7 SCC 452].)

9. A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree.

10. Order 21 of the Code of Civil Procedure, inter alia, provides that a property can be put to sale only in execution of a decree.

11. Rules 13 and 14 of Order 26, which are also relevant for the purpose, read as under :

"13. Commission to make partition of immovable property.-

Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or



the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think it.

20. It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on auction sale, a final decree in respect thereof should have been passed. It is appealable. Only a final decree could be put to execution.”

9. Applying the aforesaid parameters to the present case, in a suit for partition, preliminary decree has been passed. Appellants want to resist the same claiming that the land used for passage by the parties being impartible cannot be included in the joint property to determine share of the parties. In the preliminary decree passed in partition proceedings, it is only the share of the co-shares i.e. first defined. The joint property shall include impartible property as well. The same being held jointly by the party.

10. The share of any of the co-owner is not in dispute. Plaintiffs are owners to the extent of 16 kanal 04 marlas, whereas the defendants are owners to the extent of 03 kanal 02 marlas. The question with respect to grant of passage to each of the co-sharer is subject matter of final

decree. At the time of passing of final decree, the Court while separating



the respective holdings of each co-owner will ascertain whether each of the co-sharers has proper path attached to his holding or not.

11. In view of above, this Court does not find any reason to interfere in the present appeal. However, appellants shall be at liberty to raise plea with respect to grant of passage to their share while passing of final decree.

12. Consequently, the present petition is dismissed.

13. Since the main case has been decided, pending miscellaneous application, if any, shall also stands disposed off.

(PANKAJ JAIN)
JUDGE

20.08.2024
Dinesh

Whether speaking/reasoned :	Yes
Whether Reportable :	Yes