

IN THE HIGH COURT AT CALCUTTA

Civil Revisional Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CO 4093 of 2024

Aktari Begum

Vs.

Sk. Kutubuddin & Ors.

For the Petitioner

: Mr. Sabir Ahmed,
Mr. Dhiman Banerjee,
Mr. Tasnim Ahmed.

For the Opposite Party Nos. 3 & 4 : Mr. Chittapriya Ghosh,
Ms. Aishwarya Gupta,
Ms. Priyanka Saha.

Hearing concluded on : 23.06.2025

Judgment on : 04.07.2025

SHAMPA DUTT (PAUL), J. :

- 1.** The revision has been preferred challenging an Order dated 03.06.2024 passed by the Learned Civil Judge (Senior Division) at Birbhum in Title Suit No.76 of 2011.
- 2.** Vide the order under challenge the trial Court while considering the petitioner's application under Order 1 Rule 10 CPC, held as follows:-

".....The petitioner stated that the petitioner and their brothers and sisters are the co-sharers of the suit property and possessing their respective shares and

same is evident from the report of concern R.I. of BL & LRO submitted in MP case no.-70 of 2017.

It is stated by the petitioner that plaintiffs of the present suit got decree by suppressing the true and actual fact by non-joining the petitioner and her brothers and sisters as parties to the instant suit and as such, the said decree is liable to be set aside.

*It transpires from the record that instant suit was decreed on contest in part against defendant nos.- 1 to 5 and as ex parte against the other defendants on 19.12.2016. **Admittedly, the present petitioner was not made party to the instant suit.** The present petitioner filed the instant petition where the final decree application is pending.*

As per section 96 of Code of Civil Procedure, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeal from decision of such court.

In the instant case, the present petitioner who raised the plea that she is also co-sharer of the suit property in respect of which preliminary decree has been passed in the instant suit and she has not been impleaded as party and therefore, she has been

aggrieved by the order of the preliminary decree, the remedy lies to her to file an appeal as aggrieved person. The court has already passed a preliminary decree it cannot entertain the instant petition and cannot set aside his own decree.

On the basis of above observation, this court is not inclined to allow the petition filed by the petitioner Under Order 1 Rule 10 read with section 151 of C.P.C., dt., 21.01.2019.

Hence, the petition is rejected and disposed of accordingly.....”

3. The petitioner along with his supplementary affidavit has filed a family succession chart, where in it appears that **the petitioner herein is also a co-sharer in the suit property but admittedly she was not made a party in the suit for partition, which has been decreed in preliminary form, of which the petitioner has prayed for re-opening.**
4. Written notes have been filed by both the parties along with judgments relied upon.
5. The following judgments have been relied upon by the petitioner:-

- i. ***Mumbai International Airport Private Limited vs Regency Convention Centre and Hotels Private Limited & Ors., (2010) 7 SCC 417.***
 - ii. ***Sumtibai & Ors. vs Paras Finance Co. & Ors., (2007) 10 SCC 82.***
 - iii. ***S. Pitchai vs Ponnammal & Ors., 2017 SCC OnLine Mad 37792.***
 - iv. ***Ramader Appala Narasinga Rao vs Chunduru Sarada, 1975 SCC OnLine AP 160.***
 - v. ***Jadabendra Narayan Choudhury & Ors. vs Shitanshu Kumar Choudhury @ Subhendra Choudhury, 2013 SCC OnLine Cal 610.***
- 6.** The following judgments have been relied upon by the opposite parties:-
- a) ***Neelakantha Pillai Ramachandran Nair vs Ayyappan Pillai Kumara Pillai, AIR 1978 Kerala 152.***
 - b) ***Shrimati Bijaya Acharya vs Shrimati Radhika Bala Mondal & Ors., 1997 SCC OnLine Cal 3.***
 - c) ***Kumari Bilkishben D/o Decd. Ishakbhai A. Kadarbhai vs Huned Saifuddin & 16, 2011 SCC OnLine Guj 7029.***
 - d) ***Kashed Alli Sardar & Ors. vs Ms. Hamida BiBi & Ors., AIR 2012 Calcutta 165.***

7. The Supreme Court in **Venkata Reddy & Ors. Versus Pethi**

Reddy (AIR 1963 Supreme Court 992) has held:-

“6. The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the first proviso. This proviso excepts from the operation of the Act a transaction such as a sale by an Official Receiver which has been the subject of a final decision by a competent court. The short question, therefore, is whether the preliminary decree for partition passed in this case which was affirmed finally in second appeal by the High Court of Madras can be regarded as a final decision. The competence of the court is not in question here. What is, however, contended is that in a partition suit the only decision which can be said to be a final decision is the final decree passed in the case and that since final decree proceedings were still going on when the Amending Act came into force the first proviso was not available to the appellants. It is contended on behalf of the appellants that since the rights of the parties are adjudicated upon by the court before a preliminary decree is passed that decree must, insofar as rights adjudicated upon are concerned, be deemed to be a final decision. The word decision even in its popular sense means a concluded opinion (see Stroud's Judicial Dictionary 3rd Edn. Vol. I, p. 743.) Where, therefore, the decision is embodied in the judgment which is followed by a decree finality must naturally attach itself to it in the sense that it is no longer open to question by either party except in an appeal, review or revision petition as provided for by law. The High Court has, however, observed:

“The mere declaration of the rights of the plaintiff by the preliminary decree, would, in our opinion not amount to a final decision for it is well known that even if a preliminary decree is passed either in a mortgage suit or in a partition suit, there are certain contingencies in which

such a preliminary decree can be modified or amended and therefore would not become final.”

*It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned Judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Sections 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be “modified and amended”. Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. 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 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. **It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree.** This provision thus 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.”

8. In **Kashed Ali Sardar & Ors. Versus Ms. Hamida Bibi & Ors.,**

AIR 2012 Calcutta 165, the Court held:-

“1. The common question involved in these revisional applications under Article 227 of the Constitution is whether the learned Judges of the trial Court were justified in allowing impleadment of new parties as additional defendants in the partition suits pending before them, upon allowing applications under Order I Rule 10(2), Code of Civil Procedure Code made in that behalf after preliminary decrees in the suits had been passed therein, which attained finality by reason of not being appealed against.

*6. A bare perusal of the aforesaid decisions would reveal that it is not the law that addition of party, after preliminary decree in a partition suit has been passed, can never be allowed. On the contrary, the rulings do seem to suggest that **the Court may, having regard to exceptional facts and circumstances, allow addition of a party even after preliminary decree has been passed.** However, the learned Judges appear to be ad idem that if addition of a party would necessitate ripping open the determination made in the preliminary decree already passed in the suit, in such a situation addition cannot be allowed. The learned Judges arrived at such conclusion considering Section 97 of the Code.*

*11. Strong reliance was placed by him on the decision in Phoolchand (supra). He contended that the said decision is an authority for the proposition that there could be more than one preliminary decree and that if an event transpires after the preliminary decree is passed, which necessitates a change in shares, it should be the duty of the Court to do so. Much emphasis was laid by him on the observation to the effect that “(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....**”. According to him, **consideration of adding a party in a partition suit, even after passing of preliminary decree***

therein, would not be confined only to death of a party or transfer of shares from lawful owners but would extend to any circumstance transpiring after such preliminary decree that would necessitate passing of a second preliminary decree, even by adding parties if required. He referred to 'fraud' as vitiating the most solemn of transactions and, according to him, if a party seeking addition in a partition suit is able to demonstrate that the preliminary decree that has been passed is vitiated by fraud, there is no reason as to why the addition may not be allowed merely because there is an unchallenged preliminary decree inter-se between the parties to the suit.

12. It was also contended by him that Section 97 of the Code would be applicable only to parties to the suit and a non-party, having an independent right and a direct interest in the subject matter of the suit, could be added as a defendant if he does satisfy the Court that he had no knowledge of the institution of the suit as well as the preliminary decree earlier. This is so because the Court in terms of Order 1 Rule 10(2) of the Code is entitled, at any stage of the proceedings, to add parties not only on the application of the plaintiff or the party seeking to be added but also suo motu and such power is not affected by any other provision of the Code.

16. For understanding the context in which the observations were made by the Supreme Court on which Mr. Roy Choudhury heavily relied, as extracted supra, it would be worthwhile to read the entire paragraph of the decision in Phoolchand (supra) wherein it occurs. Paragraph 7, being the relevant paragraph, reads thus:

***"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.”

19. The different High Courts, referred to above, appear to be *ad idem* on the point in issue. This has been the law for more than the last four decades. I do not see any reason to take a view different from the one taken. **If at all certain parties have instituted a collusive suit to obtain a decree for partition of lands that do not belong to them or over which they can claim no valid and legal right, title and interest, it would be open to the aggrieved opposite parties 1 to 20 in C.O. 1492 of 2011 to initiate steps in accordance with law to have the final decree declared null and void on all grounds that may be available to them in law, as and when the same is sought to be enforced.** Their addition as defendants at this stage of the suit, as rightly contended by Mr. Ghosh, is likely to result in ripping open the preliminary decree, which ought not to be encouraged.

21. Insofar as C.O. 2237 of 2011 is concerned, there appears to have been a transfer by lease resulting in increase in the number of share-holders after the

preliminary decree was passed. Having regard to the authorities noticed above, the order impugned must be upheld. C.O. 2237 of 2011 stands dismissed accordingly.”

9. In **Dinanath Kumar vs Nishi Kanta Kumar & Ors., 1951 SCC**

OnLine Cal 113, the Calcutta High Court held:-

*“2. We have heard the learned Advocates for the parties at considerable length and without going into all the details of the various arguments that have been advanced before us, we are impressed by the contention put forward by the learned Advocate for the petitioner before us viz., Dinanath, that if we permit Dinanath to intervene for adjudication of the question as to whether his son Nishikanta was merely benamdar for him, that will save multiplicity of proceedings and obviate much needless harassment to the mortgagors who are not challenging the right of Dinanath. **Even though a preliminary decree has been passed in the mortgage suit, the suit is still pending and there is no legal bar in appropriate circumstances to Dinanath being permitted to come in even at this stage.** It is obvious that the father and the son have fallen out for some reasons and if by refusing the prayer of Dinanath under O. 1, R. 10, we drive the parties to further litigation, the mortgagors will be put to much unnecessary harassment for no fault of theirs. We feel that in the circumstances of the present case Dinanath's presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In these circumstances we are of opinion that Dinanath's prayer for being added a party to the proceedings should be allowed.”*

10. **Admittedly the petitioner in this case** is a co-sharer in the suit property and having been left out of the suit for partition, has been prejudiced and is thus entitled to be made a party in the suit by way of **opening the preliminary decree and in this**

case it will not be a case of ripping open the preliminary decree.

11. A preliminary decree by the term itself indicates that it is not final and when a decree is not final and a person's right as to share in the property has been left out intentionally, the same amounts to fraud and ends of Justice requires that such wrong is rectified and this is best done before a final decree is passed.
12. The case as made out herein, is also an exceptional case and **there is no legal bar to a second preliminary decree.**
13. In ***Moreshar S/O Yadaorao Mahajan vs Vyankatesh Sitaram Bhedi (D) Thr. LRS. and Ors., in Civil Appeal Nos. 5755-5756 of 2011, decided on September 27, 2022***, the Supreme Court held:-

*"17. This Court, in the case of **Mumbai International Airport Private Limited** (supra), has observed thus:*

"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."

18. It could thus be seen that 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. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed.

20. It can thus be seen that what has been held by this Court is that for being a necessary party, the twin test has to be satisfied. The first one is that there must be a right to some relief against such party in respect of the controversies involved in the proceedings. The second one is that no effective decree can be passed in the absence of such a party."

- 14.** The order dated 03.06.2024 passed by the Learned Civil Judge (Senior Division) at Birbhum in Title Suit No.76 of 2011, **is thus set aside, being not in accordance with law.**
- 15.** Preliminary decree be reopened and the petitioner herein be added as a party on her application under Order 1 Rule 10 CPC being allowed. Trial Court to note accordingly.
- 16. Trial Court to dispose of the suit expeditiously on permitting the parties to adduce evidence, if deemed necessary for adjudication.**
- 17. CO 4093 of 2024 is disposed of.**
- 18.** All connected application, if any, stands disposed of.
- 19.** Interim order, if any, stands vacated.

- 20.** Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

[Shampa Dutt (Paul), J.]