

Court No. - 1**Case :-** MATTERS UNDER ARTICLE 227 No. - 8834 of 2023**Petitioner :-** Dhurv Chand**Respondent :-** Lal Babu And 11 Others**Counsel for Petitioner :-** Devendra Kumar Singh**Counsel for Respondent :-** Ashwani Kumar Mishra**Hon'ble Jayant Banerji,J.**

1. Heard Shri Syed Irfan Ali, learned counsel holding brief of Shri Devendra Kumar Singh, learned counsel for the petitioner and Shri Ashwani Kumar Mishra, learned counsel appearing for the respondent no. 4.

2. By this petition, challenge has been made to the order dated 20.9.2021 in F.D. Case No. 1195 of 1981 (Shyam Lal and others Vs. Mishri Lal and others) passed by the Civil Judge (Junior Division), Gorakhpur, whereby an application filed by the petitioner bearing Paper No. 256A2 seeking amendment in the application 4C for making of the final decree has been rejected. Also under challenge is the order dated 14.2.2023 passed in Civil Revision No. 45 of 2021 (Smt. Kusum Sharma Vs. Smt. Kamla Devi and others) by the Additional District Judge, Court No. 3, Gorakhpur, whereby, the revision filed by the petitioner against the aforesaid order dated 20.9.2021, has been dismissed.

3. The contention of the learned counsel for the petitioner is that a preliminary decree pursuant to a judgment in a suit for partition was made in which, the respective shares of the co-owners was held to be 1/6th each of the suit property. It is stated that thereafter some of the co-owners died and by the application no. 256A2, an amendment was sought in the application seeking preparation of final decree that the shares of the applicants be re-allocated inasmuch as some of the co-owners have died issue-less. It is stated that the Civil Judge (Junior Division) in its order dated 20.9.2021 had rejected the application observing that it will create complications in the matter. It is contended that the revisional court has also misdirected itself in rejecting the revision on the same ground.

4. It is stated that mere amendment in the application for making a final decree ought not to have been rejected, inasmuch as the

preliminary decree so made can very well have been corrected in view of the death of co-owners.

5. Shri Ashani Kumar Mishra, learned counsel appearing for the respondent no. 4 have strongly opposed the petition and has stated that relevant averments in this petition has not been made by the petitioner inasmuch as the previously an application bearing paper no. 246C which was application for deciding the share of the co-owners was already rejected. It is stated orally that a will was executed by a co-owner in favour of the respondent no. 4., which fact has been concealed by the petitioner.

6. A perusal of the judgment of the revisional court reveals that it is considered a judgment of the Supreme Court in the case of **Phoolchand and another Vs. Gopal Lal** reported in **AIR 1967 SC 1470** and has observed that where circumstances change due the death of party, more than one preliminary decree can be issued. The court has observed that it is for the petitioner to take proceedings under Order 20 Rule 18 of the CPC.

7. A perusal of the judgment in the **Phoolchand** reflects that the order of the revisional court is correct and in accordance with law. The Supreme Court has observed as follows:

"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....."

8. In the circumstances aforesaid, since, in my opinion the order of the revisional court is correctly decided, no interference is called for in this petition and is, accordingly, **dismissed**.

Order Date :- 4.12.2023

A. V. Singh

(Jayant Banerji, J.)