

Before R. N. Mittal, J.

PRITAM SINGH,—Petitioner.

versus

SURJIT SINGH AND OTHERS,—Respondents.

Civil Revision No. 2798 of 1979

November 2, 1983.

Code of Civil Procedure (V of 1908)—Section 54 and Order 20, Rule 18—Decree for possession by partition of two-third share passed by civil Court in respect of agricultural land and other properties—Such decree—Whether to be deemed a preliminary decree qua agricultural land—Mesne profits also claimed by the plaintiff but decree silent in regard to this relief—Decree holder—Whether can claim mesne profits in execution proceedings.

Held, that from a reading of Rule 18 of Order 20 and section 54 of the Code of Civil Procedure, 1908, it is apparent that if the decree relates to the land assessed to land revenue, the Court is entitled to declare the share of the respective parties and direct the Collector to partition the same and to deliver the possession to different owners. With regard to the other properties, the Court may give further directions for partitioning it if the same cannot be partitioned without further inquiry. Where the properties in dispute are not only the agricultural land subject to land revenue but also other properties, there cannot be any dispute that the decree is a preliminary decree in regard to the properties which do not fall within clause (1) of Rule 18. As regards the decree regarding the agricultural land, it is true that after the decree containing the declaration regarding rights of the parties everything is to be done by the Collector and later the intimation is to be given by him to the civil Court that the needful had been done. However, till the land is partitioned and possession delivered, the civil Court has got control over the proceedings before the Collector and can pass such orders which are deemed proper to effect the partition. Thus, if a suit for possession by partition of agricultural land subject to land revenue and other properties is filed, the decree regarding agricultural land under Rule 18(1) will be treated as a preliminary decree till it is partitioned and its possession is delivered by the revenue authorities.

(Paras 7 and 8).

Held, that where the plaintiff in a suit for possession by partition specifically claimed mesne profits and the Court decreed the suit for possession of the property and no relief regarding mesne profits was granted by it, the prayer regarding mesne profits should be

deemed to have been disallowed by the Court. If a prayer of the plaintiff in a suit is declined by a Court, he cannot make a similar prayer in execution proceedings. Since the plaintiff made a prayer for future mesne profits in the plaint and the same had been declined, he cannot claim the mesne profits in execution of that decree.

(Para 11).

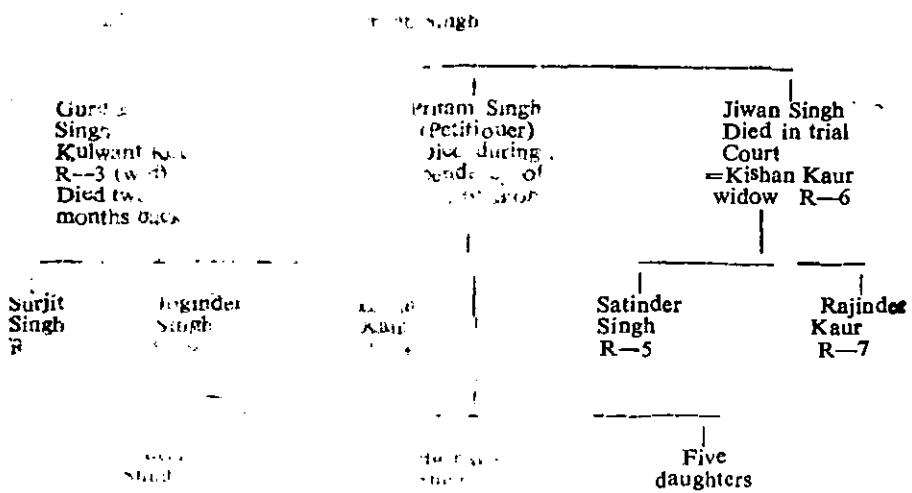
Petition under Section 115 C.P.C. for revision of the order of the Court of Shri Dina Nath, P.C.S., Senior Sub Judge, Patiala, dated 8th August, 1979, dismissing the application filed by the decree holder Pritam Singh for mesne profits.

Ram Singh Salooja, Advocate, for the Petitioner.

R. S. Mittal, Sr. Advocate with Ashok Sharma, Advocate, for Respondent Nos. 1 to 7.

CONTENT

The judgment in dispute is of C.R. Nos. 2798 of 1979 and 1063 of 1981. The facts in the judgment are being given from C.R. No. 2798 of 1979. The following pedigree table will be helpful in appreciating the facts of the case.



(It appeared as stated in the judgment dated 4th November, 1981 of the Court.)

(2) Briefly, the facts are that Pritam Singh, Jiwan Singh and Gurdial Singh were the owners of land measuring 1072 Bighas 19 Biswas situated in village Phalauli along with the shares in Samilat Deh, Gora Deh, Abadi Deh, one well for drinking water and one for irrigation, Kholas, and one house in the same village. Pritam Singh and Jiwan Singh filed a suit for possession of their $2/3$ rd share in the said property and for recovery of the amount of share of future profits in the land. The suit was decreed by the District Judge on 25-12-2006 B.K. (8th April, 1950) regarding the properties. However, there is no mention in the decree with regard to the relief of recovery of share of profits in the land. Gurdial Singh went up in appeal in the Pepsu High Court which was dismissed on 30th January, 1953. The decree-holders then filed an application for execution of the decree on 25th March, 1953, in the Court of the District Judge praying that the land be got partitioned by the Collector, that the costs be realised by attachment of the land of the share of the judgment-debtors and that the future profits be ascertained and recovered from them. The District Judge sent a request to the Collector to partition the land. He, however, consigned the execution file to the record office pending report from the Collector.

(3) The petitioner filed an application praying that the judgment-debtors be directed to furnish security for the amount of mesne profits. It was stated in the application that the decree for partition was passed by the trial Court as far back as 2006 BK and the same was confirmed by the PEPSU High Court on 30th January, 1953. Nothing has been paid by the judgment-debtors to the decree-holders during this period. Consequently the above said prayer was made. The application was contested by the judgment-debtors who denied their liability to pay any mesne profits to the petitioners.

(4) The learned trial Court held that the decree dated 25-12-2006 B.K. was not a preliminary decree and, therefore, the petitioners could not claim any mesne profits. It was further held that the mesne profits were not awarded by the trial Court and, therefore also they could not claim the same. The application was consequently dismissed. Pritm Slngn decree-holder came up in revision to this Court.

(5) During the pendency of the revision petition, the petitioner and Smt. Kulwant Kaur respondent No. 3 died. The legal representatives of the petitioner were brought on the record. However, no

application was made for deletion of the name of Smt. Kulwant Kaur.

(6) The first question that arises for determination is whether the decree dated 25-12-2006 (B.K.) is a preliminary decree or a final decree. The contention of the learned counsel for the petitioners is that the decree was for partitioning of the properties and, therefore, it is to be treated as a preliminary decree. He urges that the final decree will be passed after the properties have been partitioned. On the other hand, the learned counsel for the respondents, has argued that the plaintiffs sought partition of the agricultural land regarding which only a declaration can be given by the civil Court and thereafter the property is to be partitioned by the revenue authorities. He submits that now nothing is to be done by the civil Court and consequently the decree is a final decree.

(7) I have given my thoughtful consideration to the arguments of the learned counsel. In order to determine the issue, it is necessary to read Order 20, Rule 18 and section 54 of the Code of Civil Procedure, which are as under:—

Order 20, Rule 18:

"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."

Section 54:

"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 a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate, possession of shares, of such estates."

From a reading of the Rule and the section, it is apparent that if the decree relates to the land assessed to land revenue, the Court is entitled to declare the share of the respective parties and direct the Collector to partition the same and deliver the possession to different owners. With regard to the other properties, the Court may give further directions for partitioning it if the same cannot be partitioned without further inquiry. In the present case, the properties in dispute are not only the agricultural land subject to land revenue, but also Shamilat Deh, Gora Deh, Abadi Deh, wells, Kholas and a house. Regarding the Abadi Deh, wells which are not situated in agricultural land, the house and the Kohlas there cannot be any dispute that the decree is a preliminary decree as such properties do not fall within clause (1) of Rule 18 *ibid.* The main dispute is as to whether the decree regarding the agricultural land will be treated as a preliminary decree or a final decree. It is true that after the decree containing the declaration regarding rights of the parties, every thing is to be done by the Collector and later the intimation is to be given by him to the Civil Court that the needful has been done. However, till the land is partitioned and possession delivered, the Civil Court has got control over the proceedings before the Collector and can pass such orders which are deemed proper to effect the partition.

In the above view, I am fortified by the observations of Bombay High Court in *Parashuram Rajaram Tiwari v. Hirabai Rajaram Tiwari and others* (1). That was also a suit for partition. It was held there that the plaintiff was

(1) A.I.R. 1957 Bombay 59.

entitled to recover possession of 1/8th share in the properties which *inter alia* contained agricultural land. The partition of the lands was ordered to be done by the Collector or any of his gazetted subordinates and that of the other properties by the Commissioner to be appointed by the Court in execution proceedings. It was also directed that the copy of the decree would be forwarded to the Collector. Later, one of the defendants, who had 1/8th share, died and the plaintiff made an application that after his death, his share was augmented to 1/7th and, therefore, the decree be amended and his share be determined as 1/7th instead of 1/8th. A dispute was raised that he could not apply for change of share after the passing of the preliminary decree. It was held by a Division Bench that until there was a final decree in a partition suit the suit was deemed to be pending and thus the application by the plaintiff was made in a pending suit. It was also held that the plaintiff was entitled to claim his augmented share in the family property. From the above observations, it is evident that the decree with regard to both types of properties was treated as a preliminary decree. These observations were affirmed by the Supreme Court in *Phoolchand and another v. Gopal Lal* (2). There also a similar question was raised as was raised in *Parashuram Rajaram Tiwari's case* (supra), K. N. Wanchoo, J., speaking for the Court, followed the Bombay case and observed that if an event transpired after the primary decree which necessitated a change in shares, the Court could and should do so; and if there was 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 was a decree in itself, which would be liable to appeal. It was further observed that this could, however, be only done so long as the final decree had not been passed. The above view was followed by the Karnataka High Court in *A. Thakurdas and another v. A. Venilal and other* (3) and *Shivaramaiah v. Mallikarjunaiah and others*, (4). In *Shivaramaiah's case* (supra), the property in dispute also included agricultural land. The learned Bench observed as follows:—

“If the scheme of the two provisions under Order 20, Rule 18(1) and under Order 20, Rule 18(2) is analysed, it will be clear that the essential nature and character of both

(2) A.I.R. 1967 S.C. 1470.

(3) A.I.R. 1977 Karnataka 60.

(4) A.I.R. 1978 Karnataka 76.

the types of the decrees is the same. Though the decree passed under Order 20, Rule 18(1) is not described as a preliminary decree, whereas, the decree passed under Order 20, Rule 18(2) is a preliminary decree, in our opinion, so far as the essential character of the two decrees is concerned, there is no real difference. The decrees falling under both the clauses of Order 20, Rule 18, merely declare the rights of the parties in the two types of properties. The decrees passed under both the clauses contemplate partition or separation to be made to enable the parties to realise the fruits of the decree. This is done by passing a final decree if the decree for partition is made under Order 20, Rule 18(2) in respect of properties other than those in respect of which revenue is payable to the Government. The same object is achieved in respect of the partition decree made under Order 20, Rule 18(1), by sending the said decree to the Deputy Commissioner for effecting partition in respect of the estate assessed to payment of the land revenue to the Government. There is no bar for making more than one preliminary decree under Order 20, Rule 18(2) of the C.P.C. We do not find any such bar for passing more than one decree under Order 20, Rule 18(1) of the C.P.C. either. One of the reasons given by the Supreme Court is that if there is need for alteration of the shares before the final decree is made there is no reason why the same should not be done by passing appropriate further preliminary decree and that there is no reason why the parties should be driven to a fresh suit. Same thing can be said with equal justification in regard to decrees made under Order 20 Rule 18(1), as well..... We hold that if after the decree is mad under Order 20, Rule 18(1) of the C.P.C. and before the Deputy Commissioner effects partition, any party who has been allotted a share dies, necessary adjustment of the shares and the resolution of disputes arising in that behalf can be made by the Civil Court. The Civil Court can make appropriate adjustment and draw a further preliminary decree modifying the shares of the parties consequent upon the devolution of interest resulting from the death of one of the parties to the suit."

(8) The learned counsel for the respondents made a reference to *Ramabai Govind v. Anant Daji* (5), and *Keshao Raghunath Deosant and others v. Woman Keshao Deosant and another* (6). In the former case, a decree for partition of the lands subject to land revenue was passed. An application was filed to send the papers under Order 22, Rule 18(1), Code of Civil Procedure, to the Collector. The question arose whether the application was governed by Article 181 or Article 182 of the Limitation Act, 1908. The Bench held that the application was in the form of a *darkhast* application and was not governed by any Article of the Limitation Act. In *Keshao Raghunath Deosant's case* (supra), the question was as to whether a Commissioner could be appointed for effecting partition of an estate assessed to land revenue. It was held that the Court could not appoint a Commissioner for that purpose. From the above facts, it is evident that both the cases are distinguishable and therefore, the counsel cannot derive any benefit from the observations therein. From the above discussion, it emerges that if a suit for possession by partition of agricultural land subject to land revenue and other properties is filed, the decree regarding agricultural land under Order 20, Rule 18(1) of the Code, will be treated as a preliminary decree till it is partitioned and its possession is delivered by the revenue authorities. Therefore, the decree for partition of the agricultural land in the present case is a preliminary decree.

(9) The second question that arises for determination is whether in a suit for partition by one or more tenants in common, if the preliminary decree is silent about mesne profits, can these be granted by the Court *suo moto* or on the application of the plaintiff.

(10) The learned counsel for the petitioners has contended that the plaintiff did not claim the mesne profits in the suit and, therefore, he can make an application for the same after the passing of the preliminary decree, in the executing Court. To fortify his argument, he made a reference to two Full Bench judgments, namely, *Babburu Basayayya and others v. Babburu Gurayayya and another*, (7) and *Indradeo Prasad Singh and another v. Sheonath Prasad Singh and others*, (8).

(5) A.I.R. (32) 1945 Bombay 338.

(6) A.I.R. 1971 Bombay 26.

(7) A.I.R. 1951 Madras 938.

(8) A.I.R. 1980 Patna 201.

(11) I have considered the argument of the learned counsel. With the assistance of the parties, I went through the plaint and the preliminary decree passed by the trial Court as well as the decree of the High Court. The learned counsel for the petitioners is wrong in assuming that no prayer was made in the plaint for future mesne profits. The plaintiff has specifically claimed mesne profits in clause "Oora" of paragraphs 23 of the plaint which is in Punjabi. The Court decreed the suit of the plaintiff for possession of the property as mentioned in paragraph 23 (Oora) of the plaint, on 25-12-2006(BK). No relief regarding mesne profits was granted by it. Therefore, I am of the view that this prayer was disallowed by the trial Court. In appeal filed by Gurdial Singh, the decree of the trial Court was affirmed by the High Court,—*vide* its judgment and decree date 30th January, 1953. It may be highlighted that no appeal was filed against the decree of the trial Court by the plaintiff. It is well-settled that if a prayer of the plaintiff is declined by a Court, he cannot make a similar prayer in execution proceedings. In the present case, as the plaintiff made a prayer for future mesne profits in the plaint and the same had been declined, he cannot now claim the mesne profits in execution of that decree. In the above view, I get support from the observations in *Munshi Banesh Pradesh and others v. Jalpa Shankar Varma and others* (9) wherein it was held that where in a suit for possession the plaintiff expressly claimed future mesne profits but neither judgment nor the decree allowed the claim for mesne profits expressly or by implication, it must be deemed to have been refused and, therefore, the plaintiff is not entitled to make an application for ascertainment of mesne profits under Order 20, Rule 12, Code of Civil Procedure.

(12) In *Babburu Basayayya's case* (supra), it was observed that in a suit for partition, the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected. Even after the passing of the preliminary decree it is open to the Court to give appropriate

directions regarding all or any of these matters either *suo motu* or on the application of the parties. Order 20, Rule 18, Code of Civil Procedure, does not prohibit the Court from issuing such directions after the stage of a preliminary decree. The mere fact that the preliminary decree does not direct an inquiry into profits subsequent to the date of the suit does not preclude the parties from applying for, or the Court from awarding such profits by its final decree. It was further held that this inquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree and in either case the result of the inquiry has to be incorporated in the final decree. The above case is distinguishable. It is evident from the facts of the said case that no prayer was made in the plaint for recovery of mesne profits and, therefore, the question of declining that prayer did not arise. It is not necessary to decide in this case the question that if in a suit for partition by a tenant in common, no prayer is made in the plaint regarding the future mesne profits, can the same be granted by the executing Court before passing of the final decree. The question before the Full Bench of the Patna High Court in *Indradeo Prasad Singh's case* (supra) was also the same which was before the Full Bench of the Madras High Court. The facts of both the cases are different and the counsel for the petitioner cannot derive any benefit from them.

(13) After taking into consideration the facts of the case, I am of the opinion that the executing Court cannot determine the mesne profits in execution proceedings at the request of the petitioners.

(14) Now, I advert to C.R. No. 1985 of 1981. Pritam Singh made an application for appointment of a Local Commissioner for partitioning the properties except the agricultural land. The application has been dismissed *inter alia* on the ground that the decree has been sent to the Collector for execution regarding all the properties in dispute and that the matter whether the decree constitutes a preliminary or a final decree is the subject-matter of the revision petition in the High Court.

(15) The question arises whether the decree with regard to the properties which are not subject to payment of the land revenue is a preliminary decree or not. Order 20, Rule 18 of the Code, has already been reproduced above. It is evident from clause (2) of the said Rule that if the decree is regarding immovable properties

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other than agricultural land or movable properties, and if the partition or separation cannot be conveniently made without further inquiry, the decree will be a preliminary decree. In the present case, the plaintiff had filed a suit for possession through partition of the land measuring 715 bighas 6 biswas being 2/3rd share out of 1072 bighas 19 biswas including share in Shamilat Deh, Gora and Abadi Deh, Kholas and well; for possession of 2/3rd share of a residential site situated in village Philauli bounded as under:—

East	...	Vacant site
West	...	Gorewala well
North	...	Fields in dispute
South	...	Fields in dispute

and for declaration that the plaintiffs were owners of 2/3rd share of 42 bighas 5 biswas of land comprised in Khewat Nos. 7, 14, 15 and 17, and for some other reliefs. The suit of the plaintiffs was decreed regarding the reliefs given in clause "Oora" of paragraph 23 of the plaint, as already stated above. From a reading of the above prayer, it is clear that some of the properties, the partition of which has been sought are not subject to land revenue. In this situation, the decree regarding such properties will be considered a preliminary decree under Order 20, Rule 18(2) of the Code. The details of the Kholas have fully been given in the plaint. Normally, Abadi Deh is also not subject to payment of land revenue and the area situated therein is to be partitioned by the Civil Court. Therefore, I am of the opinion that the trial Court has to partition the properties which are not subject to land revenue. The question, which of the properties are subject to payment of land revenue and which are not shall be gone into by the trial Court after allowing the parties to lead evidence. It shall thereafter proceed to partition the properties in accordance with law.

(16) For the aforesaid reasons, I dismiss Civil Revision No. 2798 of 1979 and allow Civil Revision No. 1985 of 1981 and remand the case to the trial Court to decide the matter afresh. In view of the partial success of the case, I leave the parties to bear their own costs.