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**(2012) 06 SHI CK 0106**

**In the High Court Of Himachal Pradesh**

**Case No :** Regular Second Appeal No. 154 of 2003

Khalilul Rehman, Retired P.T.I. and Others — APPELLANT

Vs

Sh. Ashraf Ali and Others — RESPONDENT

**Date of Decision :** 12-06-2012

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) — Section 151, 152, 97

**Citation :** (2012) 06 SHI CK 0106

**Hon'ble Judges :** Rajiv Sharma, J

**Bench :** Single Bench

**Advocate :** Karan Singh Kanwar, for the Appellant; Sanjeev Kuthiala, Advocate, for the Respondent

**Final Decision :** Dismissed

## Judgement

Justice Rajiv Sharma, Judge.

1. This Regular Second Appeal is directed against the judgment and decree dated 15.1.2003 rendered by the learned District Judge, Sirmaur District at Nahan in Civil Appeal No.104-CA/13 of 2001. Material facts necessary for the adjudication of this Regular Second Appeal are that the respondents-plaintiffs (hereinafter referred to as the ''plaintiffs'' for convenience sake) filed a civil suit No.125/1 of 1987 for partition. The preliminary decree for partition of suit property comprised in Khasra Nos. 1186, 1167, 1169, 1174, 1179, 1180, 1181 to 1185, 1170, 1176, 1180/1, 1188, 1175, 1165, 1168, 1172, 1173 and 1187 measuring 522.81 square meters situated in Muhal Haripur, Nahan was passed. Plaintiffs preferred an appeal before the learned District Judge, Sirmaur District at Nahan. Learned District Judge vide judgment and decree dated 12.4.1996 modified the judgment and decree whereby the shares of each co sharers have been defined as under:

Suit property comprised under khasra Nos. 1186, 1167, 1170, 1176, 1180/1, 1188, 1175, 1165, 1168, 1172 and 1167 measuring 237-49 square meters whereby 1/4th share has been defined in favour of Jai Singh, predecessor-in-

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interest of defendants No.29 to 33 (19 to 23) in judgment.

11/48 share to Ashraf Ali and Mushraf Ali, 1/18th share each total 1/6th share to Hasmat, Majidan and Alijan (4 to 6) and 5/4th share to respondents No.3 to 13 (3-A to 3-K).

Similarly, in old khasra No.534, new khasra No.1169, 1174, 1179, 1180, 1181, 1182, 1183, 1184 and 1185 total measuring 285.32 square meters, Jai Singh has been allotted 11/64 share, petitioners Ashraf Ali, is given 11/64 share, Hasmat Majidan and Alijan 1/24th share, Mehmuda (2), 5/64 share, respondent No.3 to 13 (3-A to 3-K) 1/8th share and other respondents 15/64 shares.

2. Thereafter, plaintiffs prayed for final decree of partition in accordance with law and preliminary decree dated 12.4.1996 was passed by the learned District Judge, Sirmaur District at Nahan. Several commissions were issued to the Revenue Officers as well as expert persons, i.e. Engineers. Their reports were called for. The parties seriously contested the reports. Ultimately, one Sh. Fagu Ram, retired Naib Tehsildar and Sh. R.S. Chandel, Assistant Engineer, were appointed as Local Commissioners on 23.6.2001. They submitted their report dated 12/13.7.2001 Ex.C-1. Sh. Fagu Ram was examined by the Court on 8.8.2001. Sh. Khalilu Rehman has raised the objection that the report submitted by Sh. Fagu Ram was totally wrong being against the facts prevailing on spot. According to him, his residential house was built over khasra No. 1185 but the Local Commissioner disturbed the possession at the time of preparing report and suggesting the mode of partition. Adjacent to his residential house built over khasra No. 1185, the land measuring 22-60 square meters comprised under Khasra No. 1181/2, which has been coming in possession from the time of his predecessor-in-interest, has been wrongly allotted to Sh. Ashraf Ali because the land of Khasra No. 1174 and 1175 is in possession of Abdul Khalik and Kasim Ali, who were residing separately from him. He purchased share of respondent Smt. Mehmuda measuring 47.03 square meters in the suit property denoted by Khasra no. 1181 vide sale deed dated 3.1.2000, which share was existing near his house built over Khasra No. 1185. He was entitled to possession of the same but the Local Commissioners have wrongly allotted this land to plaintiff Ashraf Ali. According to him, the Local Commissioner has also wrongly allotted Khasra No. 1165 and 1168 to him. Reply was filed to the objections by the decree holders. It was denied that the house built over Khasra No. 1185 and land comprised under Khasra No. 1180/2 is in exclusive possession of respondent Khalilu Rehman from the time of his ancestors. It was further alleged that Abdul Khalil and Kasim Ali are the nephews of objector Khalilu Rehman and they are living separately with the consent of objector, but the objector is holding general attorney of his nephews and the share of objector and his nephews has been allotted jointly at one place and in all 139-37 square meters of the property against total property of their share measuring 142-06 square meters has been allotted to them at one place in the shape of compact plot including the place under joint path and for the deficient area measuring 2-69 square meters the

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cost of ` 8,992.50 paisa as per average costs has been recommended to be paid to them by Mohmad Iqbal and Yusaf Ali. Against the constructed portion of 78-79 square meters, good value of constructed property measuring 98-32 square meters has been allotted to the objector and his nephews, so there was no question to allot more constructed property to them. According to them, Ashraf Ali was having 39-10 square meters of the constructed area in his possession against the entitlement of area to the extent of 71-25 square meters, so even after allotting built up area of 18-70 square meters to the non-objector in khasra No.1185, still he has been allotted less property than his share. Learned Senior Sub Judge accepted the reports of the Local Commissioners dated 12/13.7.2001 and final decree of partition of the suit property, as proposed by the Local Commissioners, was passed. The reports of the Local Commissioners dated 12/13.7.2001 was directed to be treated as integral part of the decree. Respondents-defendants preferred an appeal before the District Judge, Sirmaur District at Nahan. He dismissed the same on 15.1.2003. Hence, the present Regular Second Appeal. It was admitted on 25.8.2005 on the following substantial question of law:

Whether reports of R.S. Chandel and Fagu Ram, Local Commissioners for partitioning suit property are in terms of preliminary decree dated 12.4.1996 and whether allotted portions of the suit property can be beneficially, effectively and equitably used by the allotted and whether learned courts below have erred in passing final decree in terms of those reports?.

3. Mr. Karan Singh Kanwar, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have wrongly placed reliance on the report of the Local Commissioners, Sh. Fagu Ram and R.S. Chandel dated 12/13.7.2001. According to him, the constructed portion could not be handed over to the plaintiffs.

4. Mr. Sanjeev Kuthiala has supported the final decree.

5. I have heard the leaned counsel for the parties and have perused the pleadings carefully.

6. In this case, the preliminary decree was passed in civil suit No. 125/1 of 1987, which was modified by the learned District Judge on 12.4.1996. Decree holders/ plaintiffs have approached the Court for passing final decree. The Local Commissioners were appointed but their reports were not acceptable to the parties. With the consent of the parties, the trial court appointed Sh. Fagu Ram, retired Naib Tehsildar and Sh. R.S. Chandel, Assistant Engineer, as Local Commissioners. They have visited the spot and furnished their reports dated 12/13.7.2001 Ex.C-1. Sh. Fagu Ram was also examined on 8.8.2001.

7. According to Mr. Karan Singh Kanwar, the Local Commissioners have not visited the spot and the fact that his client has constructed his house over khasra No. 1185 has not been taken into consideration. According to him, land measuring 22-60 meters under Khasra No. 1181/2 has wrongly been allotted to

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Ashraf Ali. He then contended that his client has purchased the share of Smt. Mehmuda measuring 47-03 square meters vide sale deed dated 3.1.2000 and the same has wrongly been allotted to Ashraf Ali. According to him, the Local Commissioners have wrongly allotted Khasra Nos. 1165 and 1168 to his client. The Local Commissioners were appointed with the consent of the parties and they have given their reports after visiting the spot. The Local Commissioners have also prepared the site plan. According to the reports of the Local Commissioners, share allotted to the objector, i.e. appellant Khalilu Rehman and his nephew has been shown in the report at page 7. According to the report, they are entitled to 78-79 square meters built up portion and 63-67 square meters un-built portion, total measuring 142-06 square meters but they are in possession of Khasra No. 1170, 1174, 1175, 1185 and part of Khasra No.1181 measuring 22-00, 65-00, 21-52, 18-70 square meters total measuring 127-22 square meters whereby it has been proposed that property of Khasra No. 1174, 1175, 1167, 1165 measuring 65-00, 21-52, 6-25 and 5-75 square meters respectively, built up portion total 98-52 square meters and un-built area of khasra No. 1170/3, 1168 measuring 19-78 square meters and 7-35 square meters respectively, total 27-13 square meters be allotted to them. In addition to it, the land measuring 13-72 square meters has been allotted to them for common path for common use of the objector and his nephew as such total area of 139-39 square meters has been proposed to be allotted to the objector and his nephew against their entitlement of 142-06 square meters. In order to make good the deficiency of 2-69 square meters, the Local Commissioners proposed that heirs of Gulam Sabir and Gulam Kabir would make the payment of ` 8992.50 paisa to the objector and his nephew based on five years average price. This is compact plot. The portion proposed to be allotted to objector Khalilu Rehman and his nephew has been depicted in red dotted lines. This is a compact plot proposed to be allotted to the objector Khalilu Rehman and his nephew and the part shown in the green colour in the site plan has been proposed to be allotted to the petitioners Ashraf Ali and portion shown with black line has been proposed to be allotted to Mohammad Islam etc. and Nasir etc. whereas the portion shown with blue ink has been proposed to be allotted to Sh. Mehandi Hussan etc. and lastly the portion shown with gray colour has been proposed to be allotted to Sh. Shivraj Singh. Thus, the objector and his nephew were proposed to be allotted compact plot in the suit property duly shown in the site plan in red dotted lines prepared by the Local Commissioner on 12.7.2001.

8. In the instant case the property has been partitioned by metes and bounds. The appellant-defendant Khalilu Rehman has been given compact piece of land with his nephew by the Local Commissioners. The Local Commissioners, as noticed above, after visiting the spot have given the detailed report. The value of the property was assessed by the Local Commissioners. In these circumstances, appellants-defendants could not insist for allotment of constructed portion of house situated on khasra No. 1185. Khasra No. 1185 is situated on the other side of the property and in between there is a big khasra No. 1181 falling

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between the land allotted to the defendant Khalilul Rehman and that of the respondents. If this khasra No.1185 is allotted to Khalilul Rehman, the purpose of partition would be defeated. Khalilul Rehman and his nephew were allotted the land according to their shares including the land, which Khalilul Rehman has purchased from Mehmuda measuring 47-03 square meters denoted by Khasra No. 1181, as per sale deed dated 3.1.2000. The Local Commissioner has asked Khalilul Rehman to dismantle his house for constructing a path for this land and also give some part of the constructed property for allotment to Asraf Ali in lieu of proposed allotment of house situated in Khasra No.1185 and land comprised in Khasra No. 1181/5, however, Khalilul Rehman has not agreed. The Local Commissioners have partitioned the entire constructed and open space on the spot. Accordingly, both the courts below have rightly accepted the reports of the Local Commissioners Ex.C-1 dated 12/13.7.2001. The parties have been allotted land strictly according to their shares. No mala fide have been alleged against the Local Commissioners, who were appointed with the consent of the parties. Since the partition has taken place by metes and bounds, there were bound to be some disturbance.

9. Their Lordships of the Hon''ble Supreme Court in Venkata Reddi and Others Vs. Pothi Reddi, have held that 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 recorded as conclusive. Their Lordships have held as under:

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 apt peal 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, in so far 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 Shroud''s Judicial Dictionary 3rd Ed. 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

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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 Ss. 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 CPC as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as resj udicata 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 it''s 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 S. 97 of the CPC 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.

10. Their Lordships of the Hon''ble Supreme Court in Muthangi Ayyanna Vs. Muthangi Jaggarao and Others, have held that final decree cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree. Their Lordships have held as under:

5. This appeal, coming up before us from the final decree, raises the question whether the preliminary decree, confines, as the learned Counsel for the

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appellant-defendant No. 4 submits, accounting to the claims made by and against individual parties mentioned in the preliminary decree. He urges that it cannot be extended to all parties, including the defendant No. 4, if the terms of the preliminary decree are binding. The contention is based on the well recognised proposition that a final decree cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree.

Accordingly, in view of the observations and discussions made hereinabove, there is no merit in the Regular Second Appeal and the same is dismissed. There shall, however, be no order as to costs.

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