

**PARTITION SUITS- PRELIMINARY, FINAL DECREES, MESNE PROFITS
AND STATUS OF THIRD PARTY PURCHASER**

By:

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The process of adjudication in a civil suit reaches its conclusion with the passing of Judgment and Decree. Section 33 of Code of Civil Procedure (hereinafter 'CPC') requires the court to pronounce judgment followed by a decree. Rules 1 to 5 of Order 20 CPC deal with judgment which contains a concise statement of case, points for determination, decision thereon and reasons for such decision. Rules 6 to 19 deals with decrees. As per the scheme of the code, the decree should follow the judgment and must agree with it and it must be self-contained and capable of execution without referring to other documents or pleadings of the parties.¹ In the words of Stuart C.J., in the case of **Ranjith Singh Vs. Illahi Baksh**², "a decree is a mouthpiece of the suit in its immediate result".

As per Section 2(2) CPC, decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. As per the explanation to the above section, a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit settling all the matters in dispute between the parties. It may be partly preliminary and partly final.

'Preliminary Decree' is not defined in the CPC. However, a passing reference is found in section 2 (2) of CPC, i.e., a Decree can be preliminary, final or partly

¹ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 188

² (1883) ILR 5 All 520, as cited in Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 188

preliminary and partly final. As the very name suggests, a preliminary Decree will not become final until a final Decree is passed. Therefore, after passing of a preliminary Decree and until the passing of a final Decree, a suit is said to be pending. For this reason alone, there is no applicability of the Limitation Act for filing of an application for passing of final Decree. Upon passing of a preliminary Decree, the rights of the parties get crystalized but will materialize finally only when the final Decree is passed, which alone is executable.³

DECREEES IN A SUIT FOR PARTITION

In a partition suit the court will issue three kinds of decrees to settle the issue to rest: preliminary decree, composite decree (partly preliminary & partly final), and final decree. The purpose of a suit for partition or separation of a share is twofold: one declaration of plaintiff's share in the suit properties under the preliminary decree, and the other is division of his share by metes and bounds which would take place under the final decree. In some cases the property will be put to sale and the proceeds will be shared among the share holders which can be termed a final decree. In a partition suit, if the court cannot make a division of property by metes and bounds forthright without further inquiry, the court will initially pass a preliminary decree. A preliminary decree for partition identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. The prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings.⁴

COMPOSITE DECREE IN A SUIT FOR PARTITION

In regard to immovable properties (other than agricultural lands paying land revenue) - such as buildings, plots etc. or movable properties - where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a composite decree comprising the preliminary decree declaring the rights of

³ <https://www.mondaq.com/india/arbitration--dispute-resolution/1235190/preliminary-decree-and-final-decree-in-cpc>

⁴ <https://www.lawyersclubindia.com/articles/partition-suit-principles-practices--10449.asp>

several parties and also a final decree dividing the suit properties by metes and bounds, in one judgment. The composite decree is partly preliminary and partly final. The decree declares the proportion of shares and divide the property, thereby settling the partition to rest in one go.⁵

PRELIMINARY DECREE

Only in certain civil cases, CPC requires for passing of preliminary Decree. Such suits are as mentioned below:

1. Suits for partition and separate possession; Order 20 Rule 18.
2. Suits for possession and mesne profits; Order 20 Rule 12
3. Suits for Sale of Mortgaged property; Order 34 Rules 4 and 5.
4. Administrative suits; Order 20 Rule 13.
5. Suits for pre-emption; Order 20 Rule 14.,
6. Suits for Dissolution of partnership and rendition of accounts; Order 20 Rule 15
7. Suits for Accounts between a principal and an agent ; Order 20 Rule 16.
8. Suits for foreclosure of mortgage; Order 34 Rules 2 and 3.
9. Suits for redemption of mortgage; Order 34 Rules 7 and 8.

However, the present paper has confined its scope to preliminary decrees in suits for partition and separate possession. Order 20 rule 18 CPC deals with decree in suit for partition of property or separate possession of a share therein. There are two decrees in a suit for partition; a preliminary decree and a final decree. “A preliminary decree determines and declares the rights of parties and shares of all eligible claimants, final decree carries out and effects partition by metes and bounds of the property on the basis of preliminary decree. If an estate is assessed to payment of revenue to the Government, Collector or his nominee will effect partition. In other cases, however, Commissioner will effect such partition”.⁶

⁵ <https://www.lawyersclubindia.com/articles/partition-suit-principles-practices--10449.asp>

⁶ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 313

The Hon'ble Supreme Court in *Shankar Balwant Lokhande Vs Chandrakant Shankar Lokhande* reported in AIR 1995 SC 1211, held that where a decree relates to any immovable property and the partition or separation cannot conveniently be effected without further inquiry, then the court should pass a preliminary decree declaring the rights of parties having interest in the property. The court is also empowered to give such directions as may be required. A preliminary decree in a partition suit is a step in the suit which continues until the final decree is passed.⁷

The Apex Court in *Venkata Reddy Vs Pethi Reddy* reported in AIR 1963 SC 992, 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 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".⁸

The character of decree passed under sub rules (1) and (2) of Order XX Rule 18 is the same. It is true that the decree passed under sub rule (1) of Rule 18 is not described as preliminary and the decree under sub rule (2) is declared as preliminary, there is no real difference between the two inasmuch as under both the provisions, the court determines and declares the rights of parties and under both the sub rules, partition, separation or division by metes and bounds has to be effected thereafter. Whereas, under sub rule (1), Collector effects partition, under sub rule (2), it is Commissioner appointed by the court who undertakes the said exercise.⁹

⁷ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 313

⁸ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 314

⁹ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 313

Process of partition of estate assessed to payment of revenue

“In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of CPC. If the Collector takes action in the decree appropriately, the matter will not come back to the court and the court will not have to interfere in the partition, except attending any complaint of an affected third party. While making the partition the Collector is bound by declaration of the rights of the parties in the preliminary decree. But the Court has no power to fetter the discretion of the Collector conferred under the law. However in regard to any issue on which the Collector is not competent to decide, the Civil Court will have the power to dispose of. If the Collector disregards the terms of the decree, the Court is entitled to refer the case back to the Collector to re-partition the property. The Collector must actually divide the estate in the manner he thinks best keeping in mind the nature of the land as revenue paying entity and the stipulations of the decree. The object of this provision is two fold: firstly, the revenue authorities are more conversant and better equipped to deal with such matters than a civil court and secondly, the interest of the government in regard to the revenue paying estate would be better safeguarded by the Collector than by the civil court.”¹⁰

A preliminary decree is a stage where the rights of the parties are worked out which are then to be finally adjudicated by passing of a final decree. The Hon’ble Supreme Court in Venkata Reddy Vs Pethi Reddy reported in AIR 1963 SC 992 explained in detail about “preliminary decree” and “final decree” and stated :
“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

10 <https://www.lawyersclubindia.com/articles/partition-suit-principles-practices--10449.asp>

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”.¹¹

MORE THAN ONE PRELIMINARY DECREE

Initially, there was divergence in opinion with regard to passing of more than one preliminary decree in the same suit. According to one school of thought, there can only be one preliminary decree in a suit and as per the other school of thought, there can be more than one preliminary decree in a suit. The Hon’ble Apex Court in *in Phoolchand Vs Gopal Lal* reported in AIR 1967 SC 1470 brought an end to the conundrum by observing that CPC does not prohibit passing of more than one preliminary decree if circumstances justify it and it is necessary to do so. Their Lordships observed in the said judgment that “there may be more than one

¹¹ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 318

preliminary decree if circumstances justify particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. It was also observed that it would be convenient to the court and advantageous to the parties to have disputed rights finally settled and specification of shares in the preliminary decree varied before final decree is passed. If any event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so”.¹²

When passing a preliminary decree in a partition suit, the court is required to adjust equities between the parties. The preliminary decree determines claims of respective sharers and furnishes the basis upon which the division of property should be made. The court is also expected to consider other factors, such as, realization of outstandings, discharge of liabilities, receipt of profits from the properties during the pendency of proceedings, grant of owelty, provisions for maintenance or other expenses etc.¹³

It is true that where a preliminary decree expressly or constructively decides a particular point, the matter stands concluded and the decision on that point can be set aside only by appellate or revisional court. But, subject to that condition, there is no reason why if the suit is pending, the court should be precluded from dealing with a matter which has not been expressly or constructively decided by the court.¹⁴

FINAL DECREE

“A final decree is one which completely disposes of the suit and finally settles all the questions in controversy between the parties and nothing further remains to be decided thereafter. A preliminary decree in a partition suit merely determines and declares the rights of the parties in the properties and the extent to which they are entitled. But it is the final decree which ultimately divides the properties by metes

¹² Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 320

¹³ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 320

¹⁴ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 320

and bounds and awards separate possession of the properties to the claimants. The function of the final decree is to restate and apply what the preliminary decree has ordered. A final decree is thus based upon and controlled by preliminary decree. It is settled legal position that final decree proceedings are in continuation of preliminary decree proceedings and there is no executable decree unless the final decree is passed. The final decree does not originate itself, but flows from preliminary decree already passed in a suit determining and declaring the rights and interests of the parties in the suit. The final decree is not a decree in execution of preliminary decree but decree in a suit. It is the final decree which is to be enforced”.¹⁵

Their Lordships of the Privy Council in *Ditta Vs Ditta* reported in AIR 1935 PC 12 observed that final decree neither relates to substantive rights of the parties nor decides or declares title to the property or shares of the parties to the partition suit and till the final decree is passed, there is no executable decree as envisaged by Order 20 Rule 18 of CPC. The Hon’ble Supreme Court in *Muthangi Ayyana Vs Muthangi Jagga Rao* reported in (1977) 1 SCC 241 held that a final decree cannot go behind, amend or alter preliminary decree.¹⁶

MORE THAN ONE FINAL DECREE

Usually, there will be only one preliminary decree and one final decree in a suit but there was a difference in opinion prior to 1947 as to whether there can be more than one preliminary decree and one final decree in a suit. The Hon’ble High Court of Madras in *Kasi Vs Ramanathan* reported in (1947) Mad LJ 523¹⁷ comprehensively took up the issue and observed “no doubt ordinarily there would be one preliminary decree followed by one final decree in suits of the kind mentioned in Order 20 Rules 12 to 18, which accordingly provide for a preliminary decree or a final decree as the case may be, being passed, but no inference can, in our opinion, be drawn from the

¹⁵ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 322

¹⁶ Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 322

¹⁷ As cited in Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 323

general language used that the Code does not contemplate and the court has in consequence no power, even in special cases involving a multiplicity of claims or other complications, to pass more than one preliminary decree or one final decree. The *argumentum ab inconvenienti* in view of the possibility of numerous appeals is not very convincing. Considerations of convenience are not all in favour of a single preliminary and a single final decree being allowed in a suit. It is easy to imagine cases where it would be expedient to allow a party to settle a disputed point by preferring an immediate appeal and stopping an inquiry consequent on the adjudication of the trial court, instead of requiring him to face the inconvenience and expense of such inquiry which would have been wholly unnecessary if such adjudication was ultimately reversed in appeal.

Patanjali Sastri, J in this case concluded the matter holding that the question is not whether the Code allows more than one preliminary decree or one final decree to be made, but whether the Code contains a prohibition against the court in a proper case passing more than one such decree. We are unable to discover anything in the Code that can be construed as such prohibition. On the other hand, as we have already observed, there are indications that the Code contemplates more than one preliminary decree and one final or executable decree in a suit”.¹⁸

In ***A.R.Veerappa Gounder Vs Sengoda Gounder*** reported in (1975) 1 Mad LJ 53,¹⁹ in a suit for partition and separate possession, preliminary decree. Then an application for ascertainment of profits and allotment of share was made. But final decree was passed without considering the application. The application was thereafter dismissed and it was contended that the application could not have been dismissed. Upholding the said contention, the court stated that normally the future profits have to be ascertained before the passing of the final decree and the same should be incorporated in the final decree. But that does not mean that if profits had not been so ascertained before the passing of the final decree and it had not been

18 Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 324

19 As cited in Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 324

incorporated in the said final decree, the court cannot ascertain the profits and divide the same among the sharers. I am clearly of the view that the court has not only the power but also the duty to ascertain the profits and divide the same according to the shares declared in the preliminary decree. Till this is done, the suit for partition cannot be said to have been completely disposed of in spite of the court having already passed a final decree. Though, normally, the suit for partition is completely disposed of when a final decree is passed, if the final decree does not cover all the properties that are to be divided, then undoubtedly the suit must be held to be still pending and not completely disposed of.²⁰

Referring to several earlier decisions, the Hon'ble High Court of Andhra Pradesh in *Azizabi Vs Fathimabi* reported in (1976) 2 APLJ 397²¹ held that "We would only like to emphasise that so long as the reliefs prayed for in a suit for partition and separate possession and ascertainment of profits are not either expressly granted or rejected and so long as the directions contained in the preliminary decree regarding division of the properties and allotment of the shares therein and the ascertainment and allotment of the decree holder's share of the profits are not carried out by either granting or refusing them, notwithstanding the passing of a final decree with reference to one of the directions in the preliminary decree, a petition for passing a final decree with reference to the other directions in the preliminary decree is maintainable and the court is empowered to pass more than one final decree to completely dispose of the suit".²²

The Hon'ble Supreme Court in *Shankar Balwant Lokhande's* case (cited supra) held that it is settled law that more than one final decree can be passed.

ISSUE OF COMMISSION TO MAKE PARTITION

20 Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 325

21 As cited in Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 325

22 Code of Civil Procedure, by Thakker, C.K., Volume 4, 2009 edition, Eastern Book Company, Lucknow, page No. 325

In case of immovable property other than the one mentioned in Order 20 Rule 18 (1), where the court passes a preliminary decree for partition, the Court may issue a commission, under Order 26 Rules 13 and 14, to a person (usually an advocate along with a survey official) to physically examine various aspects and conditions of the property to be divided and make partition or separation of property according to the rights declared by the court in the preliminary decree. The Commissioner will, after necessary inquiry, physically examine and divide the property into required number of shares and allot such shares to the parties. The commissioner shall, if so authorised in the court order, award such amount of money to be paid to the parties for the purpose of equalising the value of the shares. The division by metes and bounds is a ministerial or administrative function requiring physical inspection, measurement, calculation and consideration of various possibilities of division. The commissioner will then prepare a report apportioning each share by metes and bounds in a distinguishing manner and send it to the court. If the commission consist of more than one person and they cannot agree the commissioners can send separate reports to the court.²³

COURT CAN DIRECT SALE INSTEAD OF PARTITIONING

“In a suit for partition, if it appears to the court that a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial to the shareholders, the court may, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. The court can proceed for sale only on the request of a party or parties. This can be done under Section 2 of the Partition Act. The request from the shareholders for sale of property does not have to be in the nature of a formal prayer but if the words employed simply denote it, that itself is enough. If the request thus

23 <https://www.lawyersclubindia.com/articles/partition-suit-principles-practices--10449.asp>

made is on behalf of a person under disability the court has enough discretion to see whether the request is for the benefit of the person under disability or not (See The Partition Act, 1893 Section 5). A request of a co-owner essentially means he is ready to convert his share into money. However the court has enough discretion in formulating a suitable method for arriving at a just and fair division of property, which is beneficial to all the shareholders, based on the facts of the matter. When a party asks for and the court directs a sale of the property on a request by a party and any other shareholder seeks the court's permission to buy the share, the court shall order for a valuation of the share/shares and sell the property to the shareholder so requested at the price the court may think fit based on the valuation. When two or more share holders come forward to buy the share the court should consider the higher offer. When such a request is there it is obligatory on the part of the court to offer to sell the property to the intending shareholder without opting for a different course of action, normally. When no shareholder comes forward to buy the property, the court should proceed for public sale of the property In any exceptional case wherein a co-owner alone has the financial capacity for purchase the shares and he offers a meagre price leading to patent injustice, the court has enough authority to exercise its inherent powers to sell the property in public auction. An order of sale by the court can be done either through public auction, under Section 2 of the Partition Act or by bidding process within the shareholders, under Section 3 of the Act. The right of a co-sharer to purchase a property accrues on the date the co-sharer requests the court to sell the property under Section 2 of the Partition Act. The valuation has to be made as on the day. After the shareholder applies for court's permission to buy the share under Section 3 of the Partition Act, the plaintiff who requested for sale under Section 2 of the Act cannot withdraw the suit under Order 23 Rule 1 of the CPC.”²⁴

24 <https://www.lawyersclubindia.com/articles/partition-suit-principles-practices--10449.asp>

NO LIMITATION APPLICABLE TO A FINAL DECREE

It is the duty of the court to pass a final decree in a suit for partition after preliminary decree is passed and therefore, Order 20 Rule 18 does not contemplate filing of any application by a party for prescribes any limitation within which such application can be made for passing of final decree. A partition suit is said to be finally disposed of only when a final decree is passed. As per Article 136 of Limitation Act 1963, period of limitation for execution of partition decree is 12 years from the date the decree becomes enforceable.

MESNE PROFITS

The concept of mesne profits is developed from the principle *Ubi jus Ibi remedium* as natural law provides right to compensation in case of breach or infringement of a right. “The dictionary meaning of the term **Mesne Profits** is the profits of an estate received by a tenant in wrongful possession and recoverable by the landlord. It is further explained as the profits which have accrued while there was a dispute over land ownership. And if it is determined that the party using the land did not have legal ownership, the true owner can sue for some or all of the profits made in the interim by the illegal tenant, which are thus called 'Mesne Profits. Considering the legal sanction of the term, **Mesne Profits** of property has been defined under Section 2 (12) of the Code of the Civil Procedure, 1908 as those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. The measure of Mesne Profits is the profits which the person in wrongful possession actually received or might with ordinary diligence have received from the property, together with interest on such profits, and not what the original Claimant loses by his/her exclusion from the property. Mesne Profits include those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom. Wrongful possession of the

Defendant is the very essence of a claim for Mesne Profits and the very foundation of the Defendant's liability therefor. Liability to pay Mesne Profits goes with actual possession of the land. Generally, the person in wrongful possession and enjoyment of the immovable property is liable for Mesne Profits. A person is said to be in wrongful possession when he/she enjoys such possession despite, another person is entitled to it under law.”²⁵

In *Nataraja Achari Vs Balambal Ammal*, reported in AIR 1980 Mad 2228²⁶, taking into consideration the definition of Mesne Profits provided under Section 2 (12), Hon'ble High Court observed that there are three different types of cases in which question of rights of profits arise:²⁷

1. Suit for Ejectment or Recovery of Possession of Immovable Property from a person in possession without title, together with a claim for past or past and future Mesne Profits.
2. A Suit for Partition by one or more tenants in common against others with a claim for account of past or past and future profits.
3. Suits for Partition by a member of Joint Hindu Family with a claim for an account from the Manager.

The Court observed, In the first case, the possession of the Defendant not being lawful, the Plaintiff is entitled to recover Mesne Profits such profits being really in the nature of damages. In second case the possession and receipt of profits by the Defendant not being wrongful the Plaintiff's remedy is to have an account of such profits making all just allowance in the favour of the collecting tenant in common. In the third case the Plaintiff must take the Joint Family Property as it exists at the date of the demand for partition and is not entitled to open up past account or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation. The Plaintiff

²⁵ <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

²⁶ As cited in <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

²⁷ <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

would however, be in the position of the tenant in common from the date of severance in status and his/her right would have to be worked out on that basis.²⁸

INTEREST ON MESNE PROFITS

“The definition of the term Mesne Profit provided under Section 2 (12) of the Code of Civil Procedure, 1908 explicitly provides that interest is an integral part of Mesne Profits. From the expression together with interest on such profits in Section 2 (12) of the Code of Civil Procedure, 1908, it is apparent that Mesne Profit includes within its fold an interest component. And the rate of interest to be allowed in regard to Mesne Profits varies depending upon the facts and circumstances of each case. Since the statute does not fix any rate of interest it is left at the discretion of the Court to determine the rate of interest but the same should not exceed six per cent per annum.”²⁹

The Hon’ble Supreme Court in *Mahant Narayana Dasjee Vs Tirupathi Devasthanam*, reported in AIR 1965 SC 1231³⁰ observed that:³¹ “Under Section 2 (12) of the Code of Civil Procedure, 1908 which contains the definition of Mesne Profits, interest is an integral part of Mesne Profits and has, therefore, to be allowed in the computation of Mesne Profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself/herself gets the benefit of the interest on such income”.³²

CPC does not provide the criteria for assessment of mesne profits and the discretion therein is given to the courts to determine the quantum of mesne profits. “The Court measures the Mesne Profits based on what the Defendant has gained or reasonably might have gained with ordinary diligence by wrongfully possessing the

28 <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

29 <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

30 As cited in <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

31 <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

32 <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

property and not what the Plaintiff has lost because of being deprived of possession. Mesne Profits are something which a Plaintiff cannot evaluate, it is solely for the Court to determine on the evidence before it. The amount of Mesne Profits to which the rightful owner of the property is entitled is not fixed either by an agreement or some statute and depends on the result of the inquiry conducted by the Court with a view to ascertain the amount which the rightful owner of the property is entitled to get from the person in wrongful possession. Mesne Profits are, therefore, unliquidated damages”.³³

THIRD PARTY PURCHASER

The question as to whether a person can claim to be added as a party in a partition suit if he has entered into an agreement of sale with one defendant was considered by the Hon’ble High Court of Bombay in *Jagannath Khanderao Kedar Vs Gopinath Bhimaji Kedar*³⁴ In the said case, defendants No.15 and 16 filed an application for their impleadment as they contend that their agreement of sale with defendant No.1 makes clothes them as necessary parties, at any rate, as proper parties. The plaintiff opposed the said application. The question that came up for consideration was whether the said third parties are necessary or proper parties? It was observed by the court that:³⁵ “The well entrenched principle is that the plaintiff is dominus litis which latin expression means that the plaintiff is the master of the suit. The plaintiff cannot be compelled to wage a legal battle against a person, against the plaintiff’s Will. The exception would be if the compulsion of law would necessitate the presence of third party, either as necessary party or proper party. A distinction between the plaintiff seeking addition of third party, and either, third party of the defendant invoking the provisions of Order I Rule 10 (2) of the Code, will also have to be borne in mind. I have already held that the third parties do not have any

33 <https://www.legalserviceindia.com/legal/article-6942-concept-of-mesne-profits-under-code-of-civil-procedure-1908.html>

34 WRIT PETITION NO.6355 OF 2019 dt:06-06-2022 as cited in <https://www.lawweb.in/2022/07/can-person-claim-to-be-added-as-party.html>

35 <https://www.lawweb.in/2022/07/can-person-claim-to-be-added-as-party.html>

share or interest in the subject matter of the suit. The Agreement of Sale does not create any interest in the property. A necessary party would be a party, in whose absence, no effective decree can be passed. A proper party, would be a party, in whose absence, an effective order can be passed but whose presence is necessary for complete and final decision on the questions involved in the proceedings. In the factual matrix, the suit is brought for partition and possession. The third parties, who claim to hold an Agreement of Sale executed qua the suit property by defendant 1 are neither necessary parties nor a proper parties considering the question involved. The third parties claim to have an Agreement of Sale executed in their favour by defendant 1. The right of third parties to enforce the agreement is restricted to defendant 1 and the property which may fall to his share in view of the final adjudication in the partition suit. The third party may, if permissible in law, proceed on the basis of the Agreement of Sale, against the portion of the suit property which may be allotted to the defendant 1, in the partition suit. The said decision and the other decisions which consider similar situation do not take the case of third parties any further since third parties have no interest in the property and merely hold an Agreement of Sale and not Conveyance Deed as would transfer title and create share and interest in the property in favour of third parties.”

Where either of the original parties to the suit transfers the suit property to a subsequent purchaser pendent lite, the transferee becomes a third party purchaser to the pending suit.

CONCLUSION:

Under CPC, court can pass preliminary decree or final decree or partly preliminary or partly final decree. In a suit for partition, court can pass more than one preliminary decree and more than one final decree if the circumstances in the case so warrant. It is settled law that a second preliminary decree can be issued in a partition case to modify the shares that had already been allocated in the first decree and resolve any disagreements that might have arisen between the parties who survived

the partition. It is also settled law that once a party who suffers preliminary decree challenges the final decree alone without appealing the preliminary decree, he is precluded from challenging it as principle of estoppel applies and he/she is estopped from disputing the correctness or validity of preliminary decree in final decree proceedings. The term Mesne Profits, under Section 2 (12) of Code of Civil Procedure, 1908 also includes within its ambit interest on such profits, but it does not include profits made due to improvement in the immovable property. CPC does not lay down any uniform standard for assessment of mesne profits as they are in the nature of compensation and the adjudicating courts are best placed to assess them on case to case basis. Courts are required to exercise their powers judiciously when determining the quantum of mesne profits and the interest thereon.