
 (2025) 6 ILRA 92
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.06.2023

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Matters Under Article 227 No. 14008 of
 2024 (Civil)

Tara Chandra Gupta ...Petitioner
Versus
Dr. Shakti Basu & Ors. ...Respondents

Counsel for the Petitioner:

Sri Bhuwan Raj, Sri Shiv Om Vikram Singh Chauhan, Sri Vishnu Gupta (Sr. Adv.), Sri Manish Goyal (Sr. Adv.)

Counsel for the Respondents:

Sri Nitin Yasharth, Sri Yasharth, Sri V.K. Upadhyay (Sr. Adv.)

A. Civil Law - Partition suit - Preliminary decree - Modification of shares on death of co-sharer - Civil Procedure Code, S. 97 - Scope of Section 97 CPC - Power of Court to vary shares before final decree - Pending final decree, the shares are liable to be varied on account of intervening events such as death of a party or change of law, and though Section 97 CPC provides an appeal against a preliminary decree, the said provision would not be a bar to file an application for amendment of a decree. Remedy to question the preliminary decree is under Section 97 CPC by filing appeal and not by making any application for recalling the order. (Para 59-61)

B. Chandi Das Basu filed Suit No. 254 of 1976 seeking partition by metes and bounds of ancestral properties. A preliminary decree determining the shares of co-sharers was passed on 27.11.1979, which was affirmed in First Appeal. For execution, Final Decree Case No. 111 of

1980 was instituted by Chandi Das Basu. On 20.06.1991, defendant no. 1, Ajay Kumar Basu (brother of Chandi Das Basu) died. On 17.02.1993 Chandi Charan Basu, brother of Chandi Das Basu, died issueless and intestate. On 27.03.1995, Chandi Das Basu executed a registered agreement to sell in favour of Tara Chandra Gupta (present petitioner), his own share and also the share of his deceased brother Chandi Charan Basu. The agreement disclosed existence of pending litigation and preliminary decree. In the year 1997, Chandi Das Basu died. His legal heirs filed substitution application in Final Decree Case No. 111/1980 on 01.07.1997, but never pressed it. On 23.08.1997 he executed another agreement to sell in favour of Naseem Uddin and Safiq Ahmad, despite the earlier 1995 agreement in favour of Tara Chandra Gupta. On 28.09.1998, Tara Chandra Gupta filed suit for specific performance against heirs of Chandi Das Basu and Naseem Uddin & Safiq Ahmad. It was decreed on 20.04.2010. First Appeal was dismissed on 22.10.2017; Second Appeal was dismissed on 28.02.2020; SLP dismissed by Supreme Court on 14.09.2021. Tara Chandra Gupta's right to obtain the sale deed attained finality. On 25.04.2009, Amitabh Basu, one of the sons of late Ajay Kumar Basu (original defendant no. 1) filed Application 65-C in Final Decree Case No. 111 of 1980 seeking variation in shares of co-sharers after death of Chandi Charan Basu (who had died issueless). On 07.05.2012 Application 65-C was allowed; preliminary decree modified. On 04.02.2021 Tara Chandra Gupta filed Application 72-C to be impleaded in Final Decree Case No. 111 of 1980; which was allowed on 20.07.2021. On 13.08.2021 Tara Chandra Gupta filed Application 86-C to recall/set aside the order dated 07.05.2012 modifying the preliminary decree. Tara Chandra Gupta argued that order dated 07.05.2012 was ex parte, passed without notice to all necessary parties including heirs of Chandi Das Basu. On 08.12.2021, the sale deed was executed from the Executing Court in favour of Tara Chandra Gupta in respect of

agreement to sell executed by Chandi Das Basu. Courts below rejected Tara Chandra Gupta's recall plea holding that the order of 07.05.2012 was not ex parte, parties were duly represented. Tara Chandra Gupta invoked Article 227 of the Constitution challenging orders rejecting his recall application 86-C. Held: Petitioner purchased knowing the litigation and after nine years of modification of the preliminary decree cannot allege the order dated 07.05.2012 as ex-parte. After the death of Chandi Charan Basu no formal application for amendment was moved by his heirs, the application by the legal heirs of defendant no. 1 was rightly allowed on 07.05.2012; twice publication was made for appearance of the heirs of the plaintiff, who after filing substitution application in 1997 stayed away from the litigation and even did not contest the specific performance suit. The order dated 07.05.2012 was therefore not ex-parte, and the remedy to question the preliminary decree is under Section 97 CPC by filing appeal and not by making any application for recalling the order dated 07.05.2012. Petitioner cannot claim the benefit of Section 41 of the Transfer of Property Act as he knew the fact that by preliminary decree dated 27.11.1979, the shares of the parties have been defined and plaintiff-Chandi Das Basu could only transfer his 5/48 and 5/24 share of property mentioned in Schedule-A & B, but has also entered into an agreement for the share of Chandi Charan Basu without there being any modification of preliminary decree. (Para 58, 61)

Dismissed. (E-5)

(Delivered by Hon'ble Rohit Ranjan
Agarwal, J.)

1. Heard Sri Vishnu Gupta, learned Senior Counsel along with Sri Manish Goyal, learned Senior Advocate assisted by Shiv Om Vikram Singh Chauhan for the petitioner and Sri V.K. Upadhyay, learned

Senior Advocate along with Sri Yasharth, learned counsel for respondent no.7.

2. Present writ petition filed under Article 227 of the Constitution of India questions the order dated 23.09.2024 passed in Civil Revision No.92 of 2024 by Additional District Judge/ Special Judge (E.C. Act), Prayagraj, and order dated 29.05.2024 passed by Judge, Small Cause Court, Prayagraj on Application 86-C for recall of the order dated 07.05.2012 passed in F.D. Case No.111 of 1980 for modifying the preliminary decree passed in Original Suit No.254 of 1976.

3. Facts, in brief, are that one Shyama Charan Basu had two sons, Shrish Chandra Basu and BamanDas Basu. He was employed as a headmaster and later as Registrar at Lahore, and after his death Shrish Chandra Basu and Baman Das Basu settled at Allahabad (now Prayagraj). Shrish Chandra Basu was a District Judge and died in the year 1918 while in service. BamanDas Basu was a medical graduate and was employed as a Major in the Medical Corps in the Indian Army. Both the brothers lived together during their lifetime at 63 Bahadurganj, Allahabad.

4. After death of Shrish Chandra Basu, his sons and grandsons and after the death of Major Baman Das Basu, his son Dr. L.M. Basu continued to live at 63 Bahadurganj. In 1931, L.M. Basu shifted at 249, Leader Road, and since then the branch of BamanDas Basu is not in the occupation of House No.63 Bahadurganj.

5. Shrish Chandra Basu had two sons, Dr. S.N. Basu and Ramendranath Basu. During his lifetime, Shrish Chandra Basu had purchased other immovable property given in Schedule-B to the plaint.

S.N. Basu had died issueless in the year 1967, however, he executed a Will bequeathing his share to the three sons of Ramendranath Basu and lifetime interest in favour of Km. Deepti Basu in respect of House No.63 Bahadurganj.

6. Ramendranath Basu had three sons from his first wife, namely, Ajay Kumar Basu, Chandi Charan Basu and Chandi Das Basu. After death of his first wife, he re-married and had one son Gopal Chandra Basu and two daughters Preeti Basu and Dipti Ghosh. Share of Baman Das Basu was inherited by his son Lalit Mohan Basu and thereafter by his son Deepankar Basu.

7. Chandi Das Basu son of Late Ramendranath Basu filed Suit No.254 of 1976 before the Court of Civil Judge (Senior Division), Allahabad seeking partition by meets and bounds of Property No.63 Bahadurganj, Allahabad described in Schedule-A to the plaint and claimed 5/48 share, while also claimed relief for affecting partition of immovable property detailed in Schedule-B, claiming 5/24 share.

8. According to the plaint, Shrish Chandra Basu and Baman Das Basu had half share in Property No.63 Bahadurganj, while the property described in Schedule-B of the plaint was exclusively purchased by Shrish Chandra Basu during his lifetime which was to be succeeded by his branch i.e. the heirs of Lt. Ramendranath Basu.

9. By the judgment dated 27.11.1979, Civil Judge (Senior Division), Allahabad allotted 5/48 share in property Schedule-A to plaintiff Chandi Das Basu and 5/24 share in Schedule-B. While, defendant no.6- Deepankar Basu was

allotted half share in the property mentioned in Schedule-A. Further, a preliminary decree was prepared as regards the share of all the co-sharers of the property mentioned in Schedule-A and B. Chandi Das Basu filed a Final Decree Case No.111 of 1980.

10. Defendant no.1- Ajay Kumar Basu filed First Appeal No.162 of 1980 challenging the preliminary decree before this Court against the order of the trial Court for directing the rendition of accounts, but did not challenge the share determined in the preliminary decree. The appeal was partly allowed and the decree passed by the trial Court for partition of plaintiff's 5/48 share mentioned in Schedule-A and 5/24 share in property mentioned in Schedule-B except House No.71, Bahadurganj and Plot No.27, Bai Ka Bagh, Allahabad was affirmed subject to plaintiff making good the deficiency of court fees amounting to Rs.966/-. Further, the decree passed in favour of defendant no.6 was also affirmed.

11. Amin report dated 13.05.1985 was confirmed by the trial Court, but on objections of one of the defendants, Ajay Kumar Basu, the order was recalled on 12.02.1987. Chandi Das Basu challenged the said order through Civil Revision No.363 of 1987 before this Court. An order of status quo was passed directing the parties not to alienate the property.

12. On 20.06.1991, Ajay Kumar Basu died leaving behind his wife, four sons and three daughters. On 17.02.1993, Chandi Charan Basu also died issueless. A registered agreement to sell was executed by Chandi Das Basu on 27.03.1995 in favour of petitioner- Tara Chandra Gupta in respect of his share and also of his brother

Chandi Charan Basu, in respect of House Nos.63, 65 and 67, Bahadurganj for Rs.4 lakhs. Rs.50,000/- was paid in advance, and the balance amount was to be paid at the time of execution of the sale deed. Amitabh Basu, legal heir of Ajay Kumar Basu filed Contempt No.655 of 1995 against Chandi Das Basu for flouting the orders of this Court passed in Civil Revision No.363 of 1987.

13. On 09.11.1995, Civil Revision No.363 of 1987 was dismissed. An S.L.P. No.8939 of 1996 was filed by Chandi Das Basu before Hon'ble Apex Court which was dismissed on 09.12.1996 and order dated 12.02.1987 passed by Civil Judge asking for fresh amin report was confirmed.

14. On the other hand, Dipankar Basu sold half of his share in favour of Janhit Sahkari Avas Samiti, which thereafter transferred the same to Motilal Gupta, who thereafter instituted proceedings for preparation of final decree which was registered as Final Decree Case No.33 of 1997.

15. On 09.05.2005, Civil Judge (Senior Division) issued direction carving out share of Dipankar Basu by calling second amin report. The said order was challenged through civil appeal before the District Judge by wife of Ajay Kumar Basu. The said appeal was allowed by order dated 12.11.2008, and the matter was remanded back to the trial Court for fresh amin report which is still pending.

16. In the meantime, Amitabh Basu one of the legal heirs of Ajay Kumar Basu filed an application 65-C on 25.04.2009 for variation in share of co-sharers after the death of Chandi Charan Basu who had died issueless and intestate. On 07.05.2012,

application 65-C was allowed and preliminary decree was modified.

17. In the meantime, Chandi Das Basu died in the year 1997 and his legal heirs Vishwajit Basu, Samarjit Basu and Smt. Iti Rakshit entered into an agreement to sell with one Naseem Uddin and Safiq Ahmad in respect of share of Chandi Das Basu and Chandi Charan Basu, for which, already an agreement to sell was registered in favour of petitioner- Tara Chandra Gupta on 27.03.1995.

18. Tara Chandra Gupta on 28.09.1998 filed a suit for specific performance which was registered as Suit No.520 of 1998 against Naseem Uddina, Safiq Ahmad and legal heirs of Chandi Das Basu. It was decreed on 20.04.2010. A First Appeal No.74 of 2010 was filed by Naseem Uddin and Safiq Ahmad which was dismissed on 22.10.2017. Against the said judgment, Naseem Uddin and Safiq Ahmad filed Second Appeal No.722 of 2017 before this Court. The Co-ordinate Bench of this Court on 28.02.2020 dismissed the second appeal, against which, a Special Leave to Appeal (C) No.9688 of 2020 was filed before the Hon'ble Apex Court which was dismissed on 14.09.2021.

19. Petitioner- Tara Chandra Gupta filed application 72-C on 04.02.2021 for impleadig him as a party in the Final Decree Case No.111 of 1980. The said application was allowed on 20.07.2021. Thereafter, Tara Chandra Gupta filed application 86-C on 13.08.2021 for setting aside the order dated 07.05.2012 modifying the preliminary decree and the shares of the co-sharers. Objections 94-C was filed by Amitabh Basu.

20. During pendency of the said application, on 08.12.2021, the sale deed

was executed from the Executing Court in favour of Tara Chandra Gupta in respect of agreement to sell executed by Chandi Das Basu. Both the Final Decree Cases No.111 of 1980 and 33 of 1997 were consolidated by the orders of Civil Judge (Senior Division), Allahabad on 11.01.2022.

21. Application 86-C was dismissed by the trial Court on 29.05.2024, against which, the petitioner preferred Civil Revision No.92 of 2024 which was dismissed by order dated 23.09.2024, hence the present writ petition.

22. Sri Manish Goyal, learned Senior Counsel appearing for the petitioner submitted that on the application moved for modification of preliminary decree, it was necessary to issue notice to all the parties. The order dated 07.05.2012 was passed without issuing due notice to all necessary parties. According to him, Chandi Charan Basu had passed away in 1993, and an application for modification in respect of preliminary decree dated 27.11.1979 was filed in the year 2009 i.e. after more than 16 years. He also submitted that Section 141 CPC provides for misc. proceedings and procedures to be followed in regard to suits. Thus, it was mandatory on the part of the Court before allowing modification application to have followed the procedures provided therein.

23. He next contended that modification application dated 25.04.2009 was filed by Dr. Amitabh Basu on behalf of Lt. Ajay Kumar Basu was not maintainable when heirs of Ajay Kumar Basu were taken on record in the year 2015. He also contends that the Court below committed error in allowing the modification application filed in Final Decree Case No.111 of 1980, while dealing with Final

Decree Case No.33 of 1997. The order was passed on consent of Motilal Gupta, a stranger to the property in question, without hearing the heirs of Chandi Das Basu and other coparcener, who were necessary parties.

24. He also emphasised that Motilal Gupta had purchased the share of BamanDas Basu which was inherited by his grandson Dipankar Basu who had transferred his half of share in favour of Janhit Sakhari Avas Samiti and proceedings of Final Decree Case No.33 of 1997 were initiated by Motilal Gupta whose consent was immaterial in Final Decree Case No.111 of 1980.

25. He next contended that application seeking recall of order dated 07.05.2012 filed by petitioner ought to have been considered on merit inasmuch as petitioner was entitled to be heard in the first instance. Modification of preliminary decree was done behind the back of heirs of Chandi Das Basu. Once, the petitioner has stepped into shoes of Chandi Das Basu, he had right to contest the application on which orders were passed ex-parte.

26. It was also contended that sale of property to petitioner by Chandi Das Basu which included share of Chandi Charan Basu having been affirmed by Hon'ble Apex Court by dismissal of SLP filed against the judgment upholding agreement to sale would debar petitioner from contesting the same. According to him, Chandi Charan Basu died issueless and according to Dayabhaga school, Chandi Das Basu was the lone surviving brother and the share of Chandi Charan Basu was succeeded by Chandi Das Basu, which both the Courts below failed to consider. He has also relied upon Section 8

of Hindu Succession Act, 1956 especially to the schedule wherein class-II heirs have been mentioned who shall succeed to the property of male Hindu dying intestate. According to him, it is only Chandi Das Basu who was entitled to succeed as Ajay Kumar Basu died in the year 1991, and Chandi Charan Basu died issueless in the year 1993.

27. He lastly contended that petitioner being bonafide purchaser is protected under Section 41 of Transfer of Property Act, 1882 having entered into a registered agreement to sell with Chandi Das Basu during his lifetime on 27.03.1995 and sale deed finally executed after the suit for specific performance was decreed by the trial Court having been confirmed by Hon'ble Apex Court on 08.12.2021. Reliance has been placed upon the decision rendered by Hon'ble Apex Court in the following cases:-

1. *Venkata Reddy and others Vs. Pethi Reddy, 1962 SCC OnLine SC 320,*

2. *Bikoba Deora Gaikwad and another Vs. Hirabai Marutirao Ghorgare, (2008) 8 SCC 198*

3. *Shri Ramesh Chandra Vs. Seth Ghansham Das, 1955 SCC OnLine ALL 75*

4. *Ram Kumar Vs. State of U.P. and Others, (2023) 16 SCC 691*

5. *A.V. Papayya Sastry and others Vs. Govt. of A.P. and Others, (2007) 4 SCC 221*

6. *S.P. Chengalvaraya Naiduv Vs. Jagannath and others, (1994) 1 SCC 1*

7. *Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) Vs. Indian Young Lawyers Assn., (2020) 2 SCC 1*

8. *Spencer and Company Ltd. And another vs. Vishwadarshan Distributors Pvt. And others (1995) SCC 1*

9. *Suganthi Suresh Kumar Vs. Jagdeeshan (2002) 2 SCC 420*

10. *Titupati Balaji Developers (P) Ltd. vs. State of Bihar (2004) 5 SCC 1*

11. *Ram Kishore vs. State of U.P. (2012) SCC OnLine All 605*

12. *Crystal Developers Vs. Asha Lata Ghosh, (2005) 9 SCC 375*

13. *Syed Abdul Khader Vs. Rami Reddy, (1979) 2 SCC 601*

14. *Kannappa Chettiar Vs. Abbas Ali, (1952) 2 SCC 124*

15. *Ram Chandra Aggarwal Vs. State of U.P., (1966) SCC OnLine SC 232*

16. *Jaswant Singh Vs. Parkash Kaur, (2018) 12 SCC 249*

17. *Mst. Nagina Devi Vs. Brijnandan Pd. Sinha, (1972) SCC OnLine 74*

18. *Sheo Soondary Vs. Pirthee Singh, (1877) SCC OnLine 6*

19. *Rajkishore Lahoory Vs. Gobind Chunder Lahoory, (1875) I.L.R. 1 C 28*

20. Asha Vaish Vs. VII Additional District Judge Alld, (1997) SCC OnLine All 308

28. Sri V.K. Upadhyay, learned Senior Counsel appearing for respondent no.7 submitted that partition suit filed in the year 1976 by plaintiff Chandi Das Basu clearly reveals in para 2 of the plaint that common ancestor late Shyama Charan Basu was employed as a headmaster and later on as a Registrar at Lahore. After his death, his sons settled down at Allahabad, and they lived together jointly during their lifetime at 63 Bahadurganj, Allahabad. There is no averment in the plaint that plaintiff and defendant hails from West Bengal and have migrated to U.P. and are governed by principles of Dayabhaga Law in the matter of succession.

29. It is for the first time that subsequent purchaser of plaintiff has raised this question because parties are Bengali. No such issue was raised either before the trial Court, or revisional Court. Applicability of Mitakshara or Dayabhaga is mixed a question of fact to be decided on the basis of pleading and proof on the records of case. Reliance has been placed upon a decision rendered in case of **Badriparasad Jagannath Agrawal and another Vs. Madhu Dr. Harindrakumar Lahiri and others, 2008 (4) Mh.L.J. 185.**

30. It was next contended that the suit filed by Chandi Das Basu clearly reveals that pleadings were based on Mitakshara School of Law, and in absence of initial pleading and necessary proof for Dayabhaga Law, no Court could return any finding on the said question.

31. It is not the right stage or forum to decide question of inheritance of share of

deceased Chandi Charan Basu. The Court in its supervisory jurisdiction under Article 227 of the Constitution of India may not consider the submissions made on petitioner's behalf as there is neither pleading nor any material before the Court or any forum where the matter was raised. Reliance has been placed upon the decision rendered in case of **K. Chinnammal (Dead) Thr. Lrs. Vs. L.R. Eknath and another, 2023 SCC OnLine SC 611.**

32. It was next contended that without any adjudication by Court, the purchaser in interest of plaintiff i.e. Chandi Das Basu on his own allocated the share of brother Chandi Charan Basu and unilaterally altered the share of 5/48 in Schedule-A i.e. House No.63 Bahadurganj, and 5/24 in Schedule-B property decided in preliminary decree dated 27.11.1979, which was affirmed by this Court vide its judgment dated 16.05.1986.

33. According to him, it is inconsequential that Executing Court, pursuant to decree in the specific performance suit of the petitioner, had transferred the entire share of Chandi Das Basu including that of Chandi Charan Basu in favour of petitioner as there was no dispute regarding the extent of share of Chandi Das Basu in the said proceedings. As far as the share of Chandi Charan Basu was concerned, it was neither an issue nor was adjudicated by any Court in specific performance suit which culminated by decision of Hon'ble Apex Court. It is only on the basis of narration made in the agreement to sell that the sale deed was executed and the suit for specific performance was decreed.

34. He next contended that application 65-C was filed on behalf of

Ajay Kumar Basu through his legal heirs in Final Decree Case No.111 of 1980. All family members were parties in both the Final Decree Case No.33 of 1997 and 111 of 1980. The heirs of defendant no.1 Ajay Kumar Basu had come on record in Final Decree Case No.33 of 1997 as evident from the order-sheet dated 10.12.2004. Further, the order-sheet reveals that heirs of Chandi Das Basu were served by publication on 12.01.2000 itself and service was deemed sufficient by publication on 25.01.2005. On 08.04.2005, Court directed to put up connected file on 28.05.2005 for final disposal.

35. The order dated 09.05.2005 deciding both the Final Decree Case No.33 of 1997 and 111 of 1980 was passed in the same order-sheet. Moreover, Amitabh Basu son of defendant no.1 and his brothers had already come on record by means of Civil Appeal No.142 of 2005 preferred against the order dated 09.05.2005.

36. He also contended that order-sheet reveals that both the Final Decree Cases were connected though, no formal order was passed. At the time of consideration of application 65-C, petitioner was not the party, and had only agreement to sell in his favour. He despite having knowledge by means of agreement to sell that Final Decree Case No.111 of 1980 was going on, the petitioner deliberately did not move any impleadment application before passing of the order dated 07.05.2012. The petitioner had filed recall application 86-C on 13.08.2021 i.e. after 9 years, though even then at that time, no sale deed was executed in his favour.

37. It was then contended that petitioner cannot be allowed to take up case of heirs of Chandi Das Basu to say that

order dated 07.05.2012 is *ex-parte*, as there was conflict of interest between the petitioner and heirs of Chandi Das Basu.

38. Sri Upadhyay then emphasised that heirs of Chandi Das Basu filed substitution application (Paper No.16-A) on 01.07.1997, while they executed agreement to sell on 23.08.1997 in favour of Safiq Ahmad and Naseem Uddin and thereafter, never pressed the substitution application and left the Final Decree Case. However, heirs of Chandi Das Basu were served by publication on 12.01.2000 which is clear from the order dated 25.01.2005 and were again served by publication in Civil Appeal No.142 of 2005 arising out of order dated 09.05.2005. The heirs of Chandi Das Basu never turned before any Court, admittedly even proceedings before all the Courts in specific performance case filed by petitioner right from trial Court uptill Apex Court. It was thus not possible to serve copy of application 65-C to petitioner or legal heirs of Chandi Das Basu. Recall application 86-C moved on 13.08.2021 is primarily on two grounds; (i) that order dated 07.05.2012 is *ex-parte* and, (ii) application 65-C was moved in Final Decree Case No.111 of 1980, but order was passed in Final Decree Case No.33 of 1997. Revisional Court had recorded categorical findings on both these grounds taken.

39. It was also contended that in a partition suit, modification of shares always take place on birth and death of co-sharers even after passing of preliminary decree and it is only in partition suits that two or more decree can be passed, but not in other suits. A Suit No.386 of 2024 has already been filed for cancellation of sale deed dated 08.12.2021 which is pending consideration before Civil Judge (Senior Division), Allahabad.

40. It has been lastly contended that the petitioner had remedy of challenging the order dated 07.05.2012 in an appeal and no application for modification or recalling the order is maintainable.

41. I have heard respective counsel for the parties and perused the material on record.

42. The case in hand has a long chequered history. In a partition suit filed in the year 1976, a preliminary decree was passed on 27.11.1979 defining the shares of all the co-sharers in the suit. It is an admitted fact that one of the co-sharers/defendant no.1- Ajay Kumar Basu had challenged the preliminary decree before this Court through First Appeal No.162 of 1980. The first appeal was partly allowed on 16.05.1986 and this Court confirmed the preliminary decree of the trial Court to the extent of shares of the parties therein and directed the plaintiff Chandi Das Basu to make good deficiency of court fees.

43. During the pendency of first appeal before this Court, plaintiff Chandi Das Basu had admittedly filed Final Decree Case No.111 of 1980. In the said case, amin report was confirmed, later on the application of one of the parties, the report was recalled by order dated 12.02.1987. The order of the trial Court was challenged by Chandi Das Basu through Civil Revision No.363 of 1987, which was finally dismissed on 09.11.1995. In the meantime, two brothers of Chandi Das Basu, namely, Ajay Kumar Basu and Chandi Charan Basu unfortunately died on 20.06.1991 and 17.02.1993.

44. Chandi Das Basu who had filed Final Decree Case No.111 of 1980 never

moved any application before the Court for modifying the preliminary decree. Instead, he entered into a registered agreement to sell on 12.03.1995 with petitioner- Tara Chandra Gupta not only in respect of his 5/48 share in Schedule- A and 5/24 in Schedule-B allotted to him in the preliminary decree, but also in respect of share allotted to his deceased brother Chandi Charan Basu. Entire description of the suit filed in the year 1976 including the preliminary decree and filing of Final Decree Case No.111 of 1980 was disclosed in the agreement to sell.

45. Petitioner- Tara Chandra Gupta immediately became aware of the fact that he was purchasing the property which was in litigation as till date no final decree was prepared and property was not divided by meets and bounds, only the shares of the parties were determined by the preliminary decree which was affirmed by the judgment of this Court rendered in First Appeal No.162 of 1980.

46. Chandi Das Basu had specifically mentioned in the agreement to sell that on the basis of Dayabhaga School of Law, he was entitled to the share of Chandi Charan Basu and was entering into agreement to sell with petitioner- Tara Chandra Gupta, but he never made any application before the Court for getting the preliminary decree modified. It was after his death in the year 1997 that his two sons Vishwajit Basu, Samarjit Basu and daughter Smt. Iti Rakshit moved a substitution application (Paper No.16-A) on 01.07.1997 in Final Decree Case No.111 of 1980. The legal heirs of Chandi Das Basu thereafter executed a registered agreement to sell on 23.08.1997 in favour of Safiq Ahmad and Naseem Uddin in respect of the same property for which Chandi Das Basu

had earlier executed agreement to sell in favour of petitioner on 12.03.1995.

47. This led to filing of Suit No.520 of 1998 by petitioner- Tara Chandra Gupta for specific performance against the legal heirs of Chandi Das Basu and Naseem Uddin and Safiq Ahmad. In the said suit, none of the co-sharers of the property in dispute were arrayed as a party. Though, petitioner- Tara Chandra Gupta had full knowledge of the fact that Final Decree Case which was filed by Chandi Das Basu himself was pending before the Court. It is wrong to say that the heirs of Chandi Das Basu were not made party in subsequent proceedings as they had filed their substitution application (Paper No.16-A), but did not press the same due to the fact that they already transferred their interest to Naseem Uddin and Safiq Ahmad, despite the fact that their father had already entered into agreement to sell with Tara Chandra Gupta in the year 1995.

48. The legal heirs of Chandi Das Basu were never interested in contesting the Final Decree Case No.111 of 1980. The suit for specific performance filed by petitioner- Tara Chandra Gupta attained finality by the orders of Apex Court dated 14.09.2021 and was binding between the parties *inter se*.

49. In the meantime, the other branch of Baman Das Basu where there was no dispute as to their share, his grandson Dipankar Basu had transferred his half share of property mentioned in Schedule-A to Janhit Sahkari Avs Samiti who finally transferred it to Motilal Gupta who had filed Final Decree Case No.33 of 1997. As the heirs of Chandi Das Basu were not pursuing Final Decree Case No.111 of 1980, publication was made in

daily newspaper in the year 2000, and Court proceeded to hold the notice to be sufficient upon them in the year 2005. The order dated 09.05.2005 was subjected to challenge in civil appeal in which publication was also made as regards legal heirs of Chandi Das Basu, but they chose to stay away as they had already transferred their share in favour of Naseem Uddin and Safiq Ahmad after taking due consideration from them and suit being contested by petitioner, Naseem Uddin and Safiq Ahmad.

50. The legal heirs of defendant no.1 were left with no option, but to continue with Final Decree Case No.111 of 1980 and moved application 65-C in the year 2009 for getting the preliminary decree modified. Argument raised by petitioner counsel that no notice was issued to legal heirs prior to the passing of modification order dated 07.05.2012 falls flat in view of the fact that after moving substitution application on 01.07.1997, legal heirs of Chandi Das Basu lost interest in contesting the matter as they themselves had executed agreement to sell in favour of Naseem Uddin and Safiq Ahmad on 23.08.1997.

51. Both the father and his children had executed agreement to sell in favour of petitioner and Naseem Uddin and Safiq Ahmad in the year 1995 and 1997 without getting the preliminary decree of 1979 modified.

52. At this stage, petitioner cannot raise question as to shares of all coparceners to be divided on the basis of Dayabhaga School of Law as neither the plaint discloses any fact nor any effort was made by the plaintiff himself after the death of Chandi Charan Basu on 17.02.1993. The

legal heirs of Chandi Das Basu also after 1997 never got the preliminary decree modified on the basis of present claim as raised by petitioner before this Court. Both the alleged transfer of their rights through agreement to sell by Chandi Das Basu and his legal heirs in regard to share of Chandi Charan Basu could not have taken place without the preliminary decree being modified.

53. From the judgment placed before Co-ordinate Bench of this Court rendered in Second Appeal No.722 of 2017, it is clear that issue was never raised or brought to the notice of the Court that share of Chandi Charan Basu is also included in the agreement to sell on the basis of Dayabhaga School of Law. Judgment clearly reveals that only consideration was as to whether the agreement to sell executed and entered by Chandi Das Basu in favour of petitioner- Tara Chandra Gupta would prevail over the subsequent agreement to sell executed by Vishwajit Basu, Samarjit Basu and Iti Rakshit in favour of Naseem Uddin and Safiq Ahmad. It was on the basis of preliminary decree passed in the suit filed by the plaintiff Chandi Das Basu, a registered agreement to sell having been entered on 12.03.1995, the suit for specific performance was decreed and was confirmed by Hon'ble Apex Court.

54. Issue in regard to the shares of other co-sharers after death of Chandi Charan Basu was never in consideration before the Courts, nor the co-sharers were made party in the suit instituted by plaintiff being Suit No.520 of 1998, though he was well aware of Final Decree Case No.111 of 1980 pending consideration among the co-sharers.

55. Chandi Das Basu could not have transferred the share of Chandi Charan Basu

without getting the preliminary decree of 1979 modified. It was a fraud played by him upon the other co-sharers as the preliminary decree dated 27.11.1979 had defined share of each co-sharer in the property mentioned in Schedule-A & B of the plaint.

56. Transfer could have only been made after getting the preliminary decree modified. Both Chandi Das Basu and his legal heirs have washed away their hands by entering into their respective agreement to sell with parties leading chaos and unnecessary litigation between co-sharers and outsiders.

57. Petitioner who was well aware that he was purchasing a disputed property and litigation was pending between co-sharers, never moved any application for being impleaded as a party in the said proceedings. On the contrary, after the preliminary decree was modified on 07.05.2012, he has moved an application 86-C for recalling the said order on 13.08.2021 i.e. prior to the decision of the Apex Court as well as before the sale deed was executed on 08.12.2021.

58. He cannot claim the benefit of Section 41 of the Transfer of Property Act being a bonafide purchaser knowing the fact that by preliminary decree dated 27.11.1979, the shares of the parties have been defined which was confirmed in First Appeal No.162 of 1980, and plaintiff- Chandi Das Basu could only transfer his 5/48 and 5/24 share of property mentioned in Schedule-A & B, but has also entered into an agreement for the share of Chandi Charan Basu without their being any modification of preliminary decree.

59. He has knowingly purchased the litigation and after 9 years of modification of preliminary decree, cannot

stand up and allege the order dated 07.05.2012 as ex-parte. Section 97 CPC provides for appeal from preliminary decree, which is as under:-

“97. Appeal from final decree where no appeal from preliminary decree. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

60. In **Phoolchand vs. Gopal Lal, 1967 AIR (SC) 1470**, Hon’ble Court laid emphasis that pending final decree, shares are liable to be varied on account of intervening event such as death of a party, or change of law. This was subsequently followed by Hon’ble Apex Court in case of **S. Sai Reddy vs. S.Narayan Reddy, 1991 (3) SCC 647**, wherein the Court held that shares are liable to be varied on account of intervening events.

61. The Apex Court in **Baliram Atmaram Kelapure vs. Indirabai, 1996 (8) SCC 400**, held that though Section 97 CPC provides for an appeal against preliminary decree, but amendment of a decree was not barred. Similar view was taken by Apex Court in case of **S. Satnam Singh & Ors. vs. Surender Kaur & Anr., (2009) 2 SCC 562**, wherein the Apex Court taking a similar view held as under:-

“20. Indisputably, Section 97 of the Code of Civil Procedure provides for an appeal against preliminary decree but the said provision, in our opinion, would not be a bar to file an application for amendment of a decree.

21. The court may not have a suo motu power to amend a decree but the

same would not mean that the court cannot rectify a mistake. If a property was subject matter of pleadings and the court did not frame an issue which it ought to have done, it can, at a later stage, when pointed out, may amend the decree.

22. The power of amendment, in a case of this nature, as noticed hereinbefore, would not only be dependent upon the power of the court but also the principle that a court shall always be ready and willing to rectify the mistake it has committed.”

62. Thus, I find that after the death of Chandi Charan Basu no formal application for amending the preliminary decree as to his share was moved by Chandi Das Basu, nor his legal heirs, thus, the application moved by legal heirs of defendant no.1 was rightly allowed on 07.05.2012, on the basis of material available on record and the parties being represented therein. Once, the legal heirs of Chandi Das Basu were avoiding the Court and petitioner was watching the litigation from outside without intervening the same, the Court could not be faulted for amending the preliminary decree so as to vary the shares of the co-sharers after death of Chandi Charan Basu.

63. Argument raised on behalf of petitioner as to order being an ex-parte order holds no ground in view of above discussion and also the fact that twice publication was made for appearance of legal heirs of Chandi Das Basu, who after filing substitution application in 1997 stayed away from the litigation itself. They had also not contested the suit for specific performance instituted by the petitioner which itself is the revelation of the fact that after getting the money, they were not interested in pursuing the matter.

