

OD-20

IN THE HIGH COURT AT CALCUTTA  
ORIGINAL SIDE  
Ordinary Original Civil Jurisdiction

IA NO. GA/29/2025  
In  
CS/911/1988

SRI SUSANTA DEY & ORS. VERSUS SRI NANDALAL DEY AND ORS.

Before:

The Hon'ble Justice BISWAROOP CHOWDHURY

Date: 04<sup>st</sup> September 2025

*Appearance*

Mr. Sakya Sen, Adv.  
Ms. Sormi Dutta, Adv.  
Mr. Meghnad Dutta, Adv.  
Mr. Sayak Konar, Adv.  
Mr. Arun Kr. Das, Adv.

The Court: This application is filed by the Petitioners/Plaintiff Nos. 1(c), 1(d) and 1(e) with the following prayers:

- a) Delay in filing the instant application be condoned and abatement if any be set aside.
- b) Death of the plaintiff Nos. 1(b), 1(f) and the defendant No.5 be recorded.
- c) The plaint be amended in the manner as shown in the red ink in a copy of the proposed amended plaint being annexure 'S' to the instant application.
- d) Department concerned of this Hon'ble Court be directed to carry out the order within a period of two weeks from the date of the order to be made herein.
- e) Leave be granted to the petitioners to re-verify and/or re-affirm the plaint filed in the instant suit upon amendments being carried out.
- f) The service of fresh unit of summons upon the substituted plaintiffs and defendants be waived.
- g) Costs of and incidental to this application be costs of the case.

- h) Ad-interim orders in respect of the prayers above.
- i) Such further or other reliefs as your Lordships may deem fit and proper.

A preliminary point is taken by Learned Advocate for Defendant no. 18B, 18C and 18D that the application is not maintainable as the suit is disposed.

Learned Advocate in support of the stand taken by him has relied upon the following decrees and orders.

- A. Preliminary Decree, dated 17/09/2002 declaring shares with respect to 5 properties and appointing partition Commissioner to submit report within 6 months.
- B. Order dated 16.1.2003 incorporating two more properties in the list of undisputed properties which were inadvertently missed out.
- C. Final decree dated 11-08-2025 based on the Return filed by the Commissioner with respect to the undisputed properties and with respect to the disputed properties the relief claimed was rejected.
- D. By order dated 05-09-2012 appeal being APD No. 8 of 2010 filed by the Defendant no. 3 and 6 against the final decree and judgment dated 11.08.2005 was disposed of keeping the operation of the final decree in abeyance and giving liberty to the appellants therein to file an application taking exception to the report of the Commissioner. It was specifically observed in the said order that in the event the application did not succeed the final decree so passed shall stand revised.
- E. By order dated 04-4-2014 the application challenging the report of the Commissioner was dismissed with the observation that there is no reason to set aside the Return filed by the Commissioner of partition.
- F. By Order dated 28.08.2014 the Appeal being APO No. 222 of 2014 which was preferred against Order dated 04-4-2014 was dismissed.

- G. By order dated 09.03.2016 Learned Co-ordinate Bench was pleased to consider the Execution case being EC No. 143 of 2009 by directing the Special Officer for handing over notional possession to the defendants with respect to the properties mentioned therein.
- H. By Order dated 14-06-2016, the Learned Co-Ordinate Bench was pleased to dismiss the Execution Petition being EC 143 of 2009 recording satisfaction of the decree.
- I. By Order dated 13-07-2018 application filed for recalling order dated 14-06-2016 was dismissed.

Learned Advocate for the petitioner/plaintiffs submits that the instant suit is for partition and administration between the family members of two sons of one Late Rasik Lal Dey. A preliminary decree was passed in respect of 50% shares of five properties and remaining 50% shares of the some properties have remained undeclared till date. Later on by an Order dated 16.01.2003 two more properties were included in the preliminary decree and the Joint Commissioner of Partition was appointed. Learned Advocate further submits that plaintiffs had preferred an appeal against the final decree and the Hon'ble Division Bench was pleased to allow the plaintiffs to file an application to take an exception to the Return of the Commissioner. The final decree was kept in abeyance for thirty days. It was clarified that in the event this applications of taking exception fails the final decree passed shall stand revived. The application for taking exception to the final report was dismissed by the Learned Trial Judge with the following observation.

'The point urged before me on behalf of the plaintiffs that the final decree dt. 11.08.05 disposed of the suit for partition partially did not appear to be taken before the Appeal Court by the plaintiffs who were the appellants there. Parties were bound by the final decree dated 11.08.05 and the judgment of the Division Bench dated 05.09.12. In such view the contention on behalf of the plaintiffs in that regard could

not be accepted.'

An appeal was preferred against Order dated 4-04-2014 and by Order dated 28-08-2014, the Hon'ble Division observed as follows:

'According to the plaintiffs, the final decree dated August 11, 2005 considered partition suit partially which was not challenged by the plaintiffs who were the appellants there. Therefore parties were bound by the final decree dated 11.08.05 and the judgment of the Division Bench dated 05.09.12. this contention according to us seems to be erroneous.'

Learned Advocate also submits that in view of the order of the Hon'ble Division Bench the suit is still alive and the Executing Court has erroneously proceeded with execution. It is submitted by the Learned Advocate that the Court can proceed to decide finally what is the respective share of each of the parties to the suit so far as the residuary properties and business depending upon the evidence recorded by the Commissioner. It is also open to the plaintiffs to seek relief of permitting them to lead evidence if they have not done so. It is further submitted that the petition upon which the said judgment dated 04.04.2014 was passed by the Hon'ble Division Bench the decree is still kept in abeyance. Under the circumstances the question of reviving the decree cannot and does not arise. The question of execution also does not arise. The Court has erroneously proceeded with execution. As long as the decree is kept in abeyance the Executing Court does not have the power to proceed with execution. The suit is still alive in respect of each of the properties mentioned in the schedule F, G, and H of the plaint.

As argument is advanced by the petitioner that the suit is still alive and the executing court does not have the power to proceed with the Execution this Court is of the view at the very outset it is to be remembered as a Learned Co-ordinate Bench upon hearing the parties observed that the Court can proceed with the Execution such issue cannot be re-opened as this will amount to sitting in appeal over the order

of Co-ordinate Bench which is not permissible under law.

However as the Learned Advocate for the petitioner sought to rely upon the observation made by the Hon'ble Appeal Court to justify that the suit is alive it is necessary to quote the relevant observation in this regard.

The Hon'ble Appeal Court in APO No 222 of 2014 by Order dated August 28, 2014, was pleased to observe as follows:

'As stated above the Court can proceed to decide finally what is the respective share of each of the parties to the suit so far as the residuary properties and business depending upon the evidence recorded by the Commissioner. It is also open to the plaintiffs to seek relief of permitting them to lead evidence.'

Thus it will appear that although the Appeal was dismissed but liberty was granted to the plaintiffs to seek relief of permitting them to lead evidence if they have not done so. Although leave was granted plaintiffs/petitioners chose not to file any application in this regard prior to the execution of the decree. Without necessary application it cannot be held at this that suit still survives.

Now the question which comes for consideration is whether there can be more than one final decree in a partition suit.

In the case of Shankar B. Lakhande V Chyandrakanti S. Lakhande reported in (1995) 3 SCC. P. 413 the Hon'ble Court observed as follows:

'7. Question is whether the aforesaid view is correct? Since the decree is one which is prior to the Limitation Act, 1963, we are to look to the provisions contained in the Limitation Act, 1908, (for short, 'the old Act'), for deciding the controversy. Article 182 of the First Schedule to the old Act envisages that "for the execution of a decree or order of any civil court not provided for by Article 183 or by Section 48 of CPC, the period of limitation of three years begins to run from the date the final order was passed on an application made in accordance with law to the proper court for execution, or to take some step in aid of execution of the decree or

order. Explanation 1 provides that

"where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in note 5 of the article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all."

Therefore, it would be clear that where decree or order has been passed jointly against more persons than one, the application shall take effect against them all, even if it is made by one or more. It is seen that the preliminary decree is a declaration of the rights of the parties with a charge on the properties to be allotted and a Commissioner is required to be appointed for partition of certain specified properties. Therefore, as envisaged in sub-r. (2) of Rule 18 of Order 20, it was only a preliminary decree declaring the rights of the parties with power to the court to give further directions in that behalf. It is settled law that more than one final decree can be passed. With the passing of the final decree in respect of the share of the first respondent, the rights of the parties in respect of other properties have not been crystallised and no final decree dividing the properties by metes and bounds was passed nor any application was made to divide the properties in terms of the shares of the parties declared in the preliminary decree.'

As partition Suit can also be said to be a suit for Administration more than one final decree can be passed to prevent multiplicity of litigation if all properties are not taken into consideration while passing Final Decree.

The Learned Co-ordinate Bench while dealing with the execution case EC-143 of 2009 also observed as follows:

‘Though Mr. Sen submits that while granting leave to the plaintiffs to take exception to the report of the partition Commissioner, the Division Bench did not interfere with the decree but simply postponed its enforceability till the time the same is adjudicated by the Trial Court, but I find that certain observations have been recorded by another Division Bench on 28<sup>th</sup> August 2014, which according to the plaintiffs has virtually set aside the final decree.

The Executing Court is not supposed to travel beyond the scope of a decree and it is left open to the parties to agitate such point before proper forum.’

Thus it will appear from the observation from the Learned Co-Ordinate Bench that rights of the parties in a partition suit or dispute whether the decree included all joint properties are to be decided not by Executing Court but in a different forum.

Although Appeal being 222 of 2014 was disposed in the year 2014 and the Execution of decree carried out in the year 2017 but till date no appropriate application is made in terms of liberty granted by Appeal Court to justify that suit is alive in respect of each of the properties mentioned in the schedules F, G, and H of the plaint. Thus at present there is no dispute pending before this Court to be adjudicated.

In the absence of pendency of any dispute/application there is no scope to entertain any application for substitution.

Thus this application for substitution being GA 29/2025 is dismissed at this stage in terms of the above observation.

It is however made clear that this Court has not gone into the merits of the case or rights of the parties.

(BISWAROOP CHOWDHURY, J.)

A.Bhar(P.A)