

A.F.R.

Judgment Reserved On: 07.03.2025

Judgment Delivered On: 15.07.2025

Court No. - 9

Case :- WRIT - C No. - 41837 of 2024

Petitioner :- Ashok Kumar Maurya

Respondent :- The State Of U.P. And 25 Others

Counsel for Petitioner :- Mata Achal Mishra, Vinay Mishra

Counsel for Respondent :- Bhupendra Kumar Tripathi, C.S.C., Kailash Singh Yadav

Hon'ble Manish Kumar Nigam, J.

1. Heard Shri Mata Achal Mishra, learned counsel for the petitioner, Shri S. N. Srivastava, learned Additional Chief Standing Counsel, Shri Kailash Singh Yadav, learned counsel for private respondents, Shri B.K. Tripathi, learned counsel for Gaon Sabha and perused the record.

2. This petition has been filed for the following relief:

“I. Issue a Writ, Order or Direction in the nature of Writ of Certiorari for quashing the impugned order dated 23.10.2024 passed by the Respondent No. 2 in Case No. 4197/2022 (Daroga versus Chhedi Lal and others) Under Section 116 of U.P. Revenue Code, 2006

II. Issue a Writ, Order or Direction in the nature of ad-interim Mandamus Commanding and directing the Respondents for maintaining status quo over the land in dispute.

III. Issue any suitable writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case to meet the ends of justice.

IV. Award Cost of the Writ Petition to the Petitioner.”

3. Brief facts of the case are that respondent no. 4 filed a suit bearing Suit No. 4197 of 2022 (Daroga v. Chhedi Lal and others) for partition against the petitioner and respondent nos. 5 to 26 under Section 116 of

the U.P. Revenue Code, 2006 (hereinafter referred to as “the Code, 2006”) in the court of Sub Divisional Magistrate, Sadar, Varanasi seeking a decree of division of holding. Present petitioner was arrayed as defendant no. 15 in the aforesaid suit who filed his objection/written statement in the aforesaid suit denying the allegations made in the plaint of suit for division of holdings.

4. The trial court i.e. Additional City Magistrate, 1st Class, Varanasi by order dated 23.10.2024, passed a preliminary decree in the suit determining the shares of the parties to the suit and has directed the Tehsildar, Sadar to submit qurra (specific portion as per the shares determined), hence the present writ petition.
5. Shri Kailash Singh Yadav, learned counsel for private respondents, Shri B.K. Tripathi, learned counsel for Gaon Sabha as well as learned Standing Counsel have raised a preliminary objection with regard to the maintainability of the present writ petition, inter-alia, contending that the order impugned is appealable under Section 207 of the Code, 2006. It has been further contended by learned counsel for the respondents that since the petitioner has an alternative remedy of filing statutory appeal, the writ petition may not be entertained by this Court.
6. Refuting the submission of learned counsel for the respondents, learned counsel for the petitioner submitted that preliminary decree being an interim measure in continuation of the suit, will not be appealable in view of provisions of Sub-section (f) of Section 209 of the Code, 2006. Section 209 of the Code, 2006 prohibits filing of an appeal under Section 207 and 208 in the contingency mentioned in Section 209 of the the Code, 2006.
7. Learned counsel for the petitioner submitted that in view of the bar created by Section 209 of the Code, 2006, first appeal as provided

under Section 207 of the Code, 2006, will not lie and therefore, the petitioner has no statutory remedy against the preliminary decree and the present petition is maintainable.

8. Before considering the rival submissions as made by learned counsel appearing for the parties, it would be appropriate for this Court to consider the relevant statutory provisions first. Chapter 13 of the Code, 2006 deals with proceedings and jurisdiction of the revenue courts. Section 206 of the Code, 2006 deals with jurisdiction of Civil Courts and Revenue Courts. Section 206 of the Code, 2006 is quoted as under:

“S. 206. Jurisdiction of civil court and revenue courts: (1) Notwithstanding anything contained in any law for the time being in force, but subject to the provisions of this Code, no Civil Court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any revenue Court or revenue officer is, by or under this Code, empowered to determine, decide or dispose of.

(2) Without prejudice to the generality of the provisions of sub-section (1), and save as otherwise expressly provided by or under this Code -

(a) no civil Court shall exercise jurisdiction over any of the matters specified in the Second Schedule; and

(b) no Court other than the revenue Court or the revenue officer specified in [Column 3] [subs. by U.P. Act No. 4 of 2016, S. 158(b)] of the Third Schedule shall entertain any [suit application] [Corrected by Corrigenda, vide Noti. No. 1662/79-V-1-15-1-(ka)33/06, dt. 18-12-15.] or proceeding specified in [Column 2][Subs. by U.P. Act No. 4 of 2016, S. 158(b)] thereof.

(3) Notwithstanding anything contained in this Code, an objection that a Court or officer mentioned in sub-section (2) (b) had or had no jurisdiction with respect to any suit, application or proceeding, shall not be entertained by any appellate, revisional or executing Court, unless the objection was taken before the Court or officer of the first instance, at the earliest opportunity, and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.”

9. Section 207 of the Code, 2006 provides for first appeal and the same is quoted as under:

“S. 207. First appeal. -(1)Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in [Column 2][Subs by U.P. Act No. 4 of 2016, S. 159(a)] of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in [Column 4][Subs by U.P. Act No. 4 of 2016, S. 159(a)], where such order or decree was passed by a Court or officer specified against it in [Column 3][Subs by U.P. Act No. 4 of 2016, S. 159(a)] thereof.

(2) A first appeal shall also lie against an order of the nature specified -

(a)in Section 47 of the Code of Civil Procedure, 1908; or

(b)in Section 104 of the said Code; or

(c)in Order XLIII Rule 1 of the First Schedule to the said Code.

(3)The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against.”

10. Section 208 of the Code, 2006 provides for second appeal and the same is quoted as under:

“208. Second appeal.-(1)Wherein any suit, application or proceeding specified in [Column 2][Subs by U.P. Act No. 4 of 2016, S. 160(a)] of the Third Schedule, any final order or decree is passed in any first appeal filed under Section 207, and any party to such appeal is aggrieved by it, such party may prefer a second appeal to the Court specified against it in [Column 5][Subs by U.P. Act No. 4 of 2016, S. 159(a)].

(2)The appellate Court shall not entertain a second appeal unless it is satisfied that the case involves a substantial question of law.

(3)The period of limitation for filing a second appeal under this section shall be ninety days from the date of the order or decree appeal against.

11. Section 209 of the Code, 2006 provides for bar against certain appeals and the same is quoted as under:

“S. 209. Bar against certain appeals. - Notwithstanding anything contained in Sections 207 and 208, no appeal shall lie against any order or decree-

(a)made under [Chapter XI][Subs by U.P. Act No. 4 of 2016, S. 161(b)] of this Code;

(b)granting or rejecting an application for condonation of delay under Section 5 of the Limitation Act, 1963;

(c)rejecting an application for [revision][Subs by U.P. Act No. 4 of 2016, S. 161(c)];

(d)granting or rejecting an application for stay;

(e)remanding the case to any subordinate [Court][Corrected by Corrigenda, vide Noti. No. 1662/79-V-1-15-1(ka)33/06, dt. 18-12-15]; or

(f)where such order or decree is of an interim nature.

(g) passed by Court or officer with the consent of parties; or [Ins. By U.P. Act No. 4 of 2016, S. 161(e)]

(h) where order has been passed ex-parte or by default;

Provided that any party aggrieved by order passed ex-parte or by default, may move application for setting aside such order within a period of thirty days from the date of the order:

Provided further that no such order shall be shall be reversed or altered without previously summoning the party in whose favour order has been passed to appear and be heard in support of it.”

12. Section 207, provides for first appeal by a party aggrieved against a final order or decree passed in any suit, application or proceedings before court/officer specified in Column-4 of the Schedule III, where such order or decree was passed by a court or officer specified in Column-3 of Schedule III. Suit under Section 116 of the U.P. Revenue Code, 2006 for division of holding is mentioned in Schedule III and as per the Schedule III, the court or officer of original jurisdiction to decide the suit under Section 116 of the Code, 2006 is Sub Divisional Officer. Appeal against an order passed by Sub Divisional Officer lies to the Commissioner and further second appeal lies before the Board of Revenue.

13. Procedure for entertaining a suit under Section 116 of the Code, 2006 for division of holdings has been prescribed under Rule 107, 108 & 109 of the U.P. Revenue Code Rules, 2016 (herein after referred to as “the Rules, 2016”). Rule 107, 108 & 109 of the Rules, 2016 are quoted as under:

“R. 107. Suit for division of holding (Section 116). - Every plaint in a suit for division of a holding (including trees, wells and other improvements) shall contain the following particulars:-

(1) Name, parentage and address of the plaintiff.

(2) Name parentage and address of other co-sharers of the holding.

(3) Share claimed by the plaintiff.

(4) Share of other co-tenure holders.

(5) Detailed particulars of the holding including plot numbers, area and land revenue.

(6) Whether the plaintiff is a recorded or unrecorded tenure holder.

Note: The plaint shall be accompanied by a certified copy of the Khatauni and other documents relied upon by the plaintiff.

R. 108. Suit for division for several holdings (Section 116). - Where the suit relates to the division of more than one holding, the particulars specified in rule 107 shall be mentioned in the plaint in respect of all such holdings.

R. 109. Preliminary and Final decrees (Section 117). (1) If the plaint referred to in rule 107 or rule 108 is in order, it shall be registered as a suit and the defendants shall be called upon to file their written statements. The suit shall then be decided according to the provisions of the Code of Civil Procedure, 1908.

(2) Before making a division the court shall-

(a) determine separately the share of the plaintiff and each of the other co-tenure holders ;

(b)record which, if any, of the co-tenure holders wish to remain joint ; and

(c)make valuation of the holding (or holdings) in accordance with the circle rate fixed by the Collector applicable to each plot in the holding.

(3)If the suit is decreed, the Court shall pass a preliminary decree declaring the share of the plaintiff.

(4)After the preparation of preliminary decree the Sub Divisional Officer shall get the Kurra prepared through the Lekhpal.

(5)The Lekhpal shall submit the Kurra report within a period of one month from the date of receiving the order in this regard and at the time of preparation of Kurra he shall observe the following principles-

(a)the plot or plots shall be allotted to each party in proportionate to his share in the holding;

(b)the portion allotted to each party shall be as compact as possible;

(c)as far as possible no party shall be given all the inferior or all the superior classes of land;

(d)as far as possible existing fields shall not be split up;

(e)Plots which are in the separate possession of a tenure holder shall, as far as possible, be allotted to such tenure holder if they are not in access of his share;

(f)If the plot or any part thereof is of commercial value or is adjacent to road, abadi or any other land of commercial value, the same shall be allotted to each tenure holder proportionately and in the case of second condition the same shall be allotted proportionately adjacent to road, abadi or other land of commercial value; and

(g)If the co-tenure holders are in separate possession on the basis of mutual consent or family settlement, the Kurra shall, as far as possible, be fixed accordingly.

(6)When the report regarding Kurra is submitted by the Lekhpal, the objection shall be invited thereon and thereafter the appropriate order shall be passed by the Sub Divisional Officer after affording opportunity of hearing to the parties and considering the objection, if any, filed against the report submitted by the Lekhpal.

(7) If the report and Kurra is confirmed by the Sub Divisional Officer, the final decree shall follow it.

(8) At the stage of the final decree, the Court shall-

(a) Separate the share of the plaintiff from that of the defendant by metes and bounds.

(b) Place on record a map showing in different colours the properties given to plaintiff as distinct from those given to the defendant.

(c) Apportion the land revenue payable by the parties.

(d) Direct the record of rights and map to be corrected accordingly.

(9) If, for adjusting the equities between the parties, payment of compensation regarding trees, wells or other improvements becomes necessary, the revenue Court concerned may also pass necessary orders at the stage of final decree.

(10) The Sub-Divisional Officer shall make an endeavor to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded.”

14. Section 214 of Code, 2006 provides for applicability of Code of Civil Procedure, 1908 (hereinafter referred to as “the C.P.C.”) and the same is quoted as under:

“S. 214. Applicability of Code of Civil Procedure, 1908 and Limitation Act, 1963.- Unless otherwise expressly provided by or under this Code, the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or proceeding under this Code.”

15. Learned counsel for the petitioner relied upon the judgment of this Court in case of **Amarjeet v. State of U.P. and another** reported in **2021 (151) RD 345**. Facts in brief in case of Amarjeet (Supra) were that against a preliminary decree, an appeal was filed under Section 207 before the Commissioner by the defendants and the question of maintainability of the said appeal was raised by the opposite party on the ground that in view of Section 209 (f) of the U.P. Revenue Code, 2006, first appeal was not maintainable against a preliminary decree

but the appellate court admitted the appeal. The order of admission in appeal was challenged before writ court. This Court has taken a view that an appeal under Section 207 will not lie against a preliminary decree passed in a partition suit under Section 116 of U.P. Revenue Code, 2006 in view of provisions contained in Clause (f) of Section 209. This Court after considering all relevant provisions of U.P. Revenue Code, 2006, C.P.C. and case laws held as under in Paragraph nos. 66, 67, 70, 71, 76, 77, 78, 79, 80 & 81 which are quoted as under:

“66. We will now consider whether a preliminary decree under Rule 109 of the Rules of 2016 can be considered to be a decree of an interim nature?”

67. A preliminary decree under Rule 109(3) declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held, and pursuant to the result of further inquiry a final decree shall be passed.

70. A preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined, a decree incorporating such determination needs to be drawn up which is the final decree.

71. A preliminary decree first determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation.

76. Section 209 of the U.P. Revenue Code provides that appeals may not be filed against merely procedural or interlocutory orders which are steps taken towards the final adjudication and for assisting the parties in prosecution of the

case in the pending proceedings. The legislature could not have intended that the parties would be harassed with endless expenses and delay by appeals from such procedural orders. No doubt the U.P. Revenue Code does refer in the language of Rule 109 that whenever a partition suit shall be filed and the plaint is found in order it shall be registered as a regular suit and further proceedings shall be taken in accordance with the procedure prescribed under the Civil Procedure Code, but would such a provision make the consideration of a partition suit by a revenue court not feasible but that it would have to be considered by the civil court?

77. Truly speaking, under Rule 109 a partition suit would continue to remain a suit to be decided by a revenue court as under Section 206 of the Revenue Code it has been clearly provided that ‘notwithstanding anything contained in any law for the time being in force, but subject to the provisions of the Revenue Code’, no civil court shall entertain any suit, application or proceeding to obtain a decision or order on any matter in which the State Government, the Board, or any revenue court or revenue officer is, by or under this Code, empowered to determine, decide or dispose of.

It also provides that no civil court shall exercise jurisdiction over any of the matters specified in the Second Schedule and no court other than the revenue court or the revenue officers specified in column 3 of the Third Schedule shall entertain any suit, application or proceeding specified in column 2 thereof. Section 206 sub clause 2(b) refers to the matters specified in the Third Schedule to the Revenue Code and provides that only that Court or Officer which is specified in column 3 thereof shall entertain any suit, application or proceeding mentioned in column 2. The relevant entry in Schedule III talks of a partition suit being cognizable by the Sub Divisional Officer and the appeal against his order would lie to the Commissioner and thereafter to the Board.

78. Hence, a partition suit under section 116 of the U.P. Revenue Code would remain to be a partition suit under the Code and shall not become a partition suit under the C.P.C. merely because the procedure that has to be followed by the revenue court in deciding the partition suit would be the same as is followed by the civil court under the C.P.C. An appeal against the decree by the revenue court would also lie under the U.P. Land Revenue Code and Rules made thereunder. No doubt Rule 109 of the Rules made under the U.P. Revenue Code do employ the words “It shall be registered as a suit and the defendant shall be called upon to file the written statement. That suit shall then be decided according to the provisions of the Code of Civil Procedure 1908,” but that would not make a partition suit for division of a holding filed under section 116 of the U.P. Revenue Code, a suit for division of properties under the Civil Procedure Code.

79. *In view of the fact that an issue of division of holding between parties to the agricultural land can only be decided by the revenue court, it cannot be said that an appeal shall lie under Section 97 of the C.P.C. to the first Appellate court mentioned in the C.P.C. In case of properties other than lands liable to payment of land revenue, the civil court normally passes a preliminary decree which is followed by a final decree, the proceedings between preliminary decree and final decree are analogous to the proceedings before the Collector for the partition of lands amenable to payment of land revenue. It cannot be disputed that the final decree of a court which allocates specific properties to different shareholders involves the rendering of decision and the passing of a decretal order. But in the Revenue Code it is the Collector alone who has the jurisdiction with regard to questions involved in the partition of revenue paying lands.*

80. *It must be remembered that the powers of revision under Section 210 of the U.P. Revenue Code are wide enough to examine the legality, propriety and regularity of any order passed in a suit or proceeding by any Subordinate Revenue Court in which no appeal lies. There are no fetters like those provided in Section 115 of the Code of Civil Procedure. We must remember that when the Revenue Code was framed the legislature had before it the provisions of Section 96 and 97 and 100 of the Code of Civil Procedure. Had the Legislature intended that even a preliminary decree in a partition suit may be challenged in a regular first appeal, then it would have provided so either in the main section i.e. Section 207, or at least not created a specific bar under Section 209 to entertaining certain appeals including an appeal against a decree which is of an interim nature.*

81. *For the reasons as aforesaid, this Court finds that the Appeal was wrongly admitted by the Additional Commissioner, and also because the Additional Commissioners' order does not give any reason for entertaining the Appeal, the order impugned dated 21.01.2021 is set aside.*

16. Per contra, learned counsel appearing for respondents relied upon another judgment of this Court in case of **Manoj and others v. State of U.P. and others** reported in **2024 (164) RD 534** holding that an appeal will lie against a preliminary decree passed in a partition suit under Section 116 of U.P. Revenue Code, 2006. Paragraph nos. 29, 30, 31, 32 & 34 in case of **Manoj and others v. State** (supra), are quoted as under:

29. *The incorporation of the expression "if the suit is decreed" in Rule 109(3) clarifies that before preparation of the 'Preliminary Decree', shares of co-tenure holders have been determined under Rule 109 (2) and the suit is decreed, and only after that, Court assumes the power to pass a preliminary declaring the share of the plaintiff. In other words, the preliminary decree declaring the share of the plaintiff shall be passed by the Court only after the share of co-sharers in the holding is determined by the court under Rule 109(2) and suit is decreed, and, thereafter, the Sub Divisional Officer shall get the Kurra prepared through the Lekhpal. Therefore, the contention of learned counsel for the petitioner that since at the stage of preliminary decree, the rights have not been comprehensively determined and co-sharers still have the right to raise objection lack substance for the reason that after the suit is decreed as is evident from Rule 109 (3), the preliminary decree is prepared and Kurra is prepared in accordance with the share determined by the Court.*

30. *Rule 109 (5) of the U.P. Revenue Code Rules, 2016 provides how the Kurra is to be prepared. Rule 109 (6) of the U.P. Revenue Code Rules, 2016 gives the right to the tenure holders to submit an objection to the Sub Divisional Officer concerning the preparation of the Kurra. After the Kurra is confirmed by the Sub Divisional Magistrate, the final decree is prepared under Rule 109 (7) of the U.P. Revenue Code Rules, 2016.*

31. *So the limited objection that the co-tenure holder can raise after the preparation of Kurra in the light of the preliminary decree is with regard to making of Kurra if it is not prepared in accordance with the share determined under the preliminary decree, and after the confirmation of Kurra, the final decree is prepared and the suit concludes.*

32. *Therefore, given the detailed deliberation, the expression "if the suit is decreed" incorporated by legislature in Rule 109 (3) if read with Rule 109 (2)(a), manifests the intention of the legislature that before preparation of preliminary decree, the right of the parties with respect to their share in the holding is determined and their rights regarding their shares in the holding are conclusively adjudicated and the suit is decreed, and to say that before preparation of preliminary decree, the rights of the parties are not determined, that would be a misinterpretation of language used in Rule 109 (3). Therefore, the contention of learned counsel for the petitioners that appeal under Section 207 of the U.P. Revenue Code, 2006 would not lie against the preliminary decree being interlocutory is not sustainable in law for the aforesaid reason.*

34. The submission of learned counsel for the petitioners that the appeal against the order of Sub-Divisional Magistrate being ex parte order shall not lie in view of specific bar under Section 209 (h) of the U.P. Revenue Code, 2006 is also misconceived for the reason that Section 209 (h) of the U.P. Revenue Code, 2006 uses the word 'order' and it does not talk of the word 'decree' whereas in the present case, suit is decreed concerning the rights of the co-tenure holders regarding their share before preparation of preliminary decree, and therefore, Section 209 (h) of the U.P. Revenue Code, 2006 would also not come in the aid of the petitioners."

17. It has also been contended by learned counsel for the respondents that judgment in case of Amarjeet v. State (Supra) was considered by this Court in case of Manoj and others v. State (supra) in paragraph no. 33 which is quoted as under:

33. Now so far as the judgment relied upon by learned counsel for the petitioners is concerned, in the said case, the Court has not considered the object of incorporating the expression "if the suit is decreed" by the legislature in Rule 109 (2) of the U.P. Revenue Code Rules, 2016 which mandates that the court is empowered to pass a preliminary decree only on the contingency that if the Suit is decreed. In such view of the fact, the judgment of this Court in the case of Amarjeet (supra) is distinguishable and does not apply to the facts of the present case.

18. In case of Amarjeet v. State (supra) it has been held by this Court that against a preliminary decree passed in partition suit filed under Section 116 of the U.P. Revenue Code, 2006, an appeal would not lie under Section 207 of the U.P. Revenue Code, 2006, in view of prohibition contained in Sub-Section (f) of Section 209 of U.P. Revenue Code, 2006. It has been held by this Court that preliminary decree does not conclude the proceedings of a partition suit, and therefore, will be an interlocutory order (interim measure) in the progress of the suit.
19. In case of Manoj and others (supra) this Court has taken view that against a preliminary decree passed in a partition suit filed under Section 116 of U.P. Revenue Code, 2006, an appeal will lie under

Section 207 of the U.P. Revenue Code, 2006 interpreting the Rule 109(2) of the U.P. Revenue Code Rules, 2016.

20. Since, there are two conflicting judgments with regard to maintainability of an appeal against a preliminary decree passed in a partition suit under Section 116 of U.P. Revenue Code, 2006, I am of the view that the matter be referred to a larger Bench, and therefore, the matter is being referred with following questions:

1. Whether a preliminary decree passed in a partition suit would amount to an interlocutory order (an interim measure during the progress of the suit attracting bar created by Sub-Section (f) of Section 209 of the U.P. Revenue Code, 2006) or the same will be a decree conclusively deciding the substantive rights as to shares in the holdings of the parties?

2. Whether an appeal under Section 207 of the U.P. Revenue Code, 2006 will lie against a preliminary decree passed in a suit for partition holdings under Section 116 of the U.P. Revenue Code, 2006?

21. Let this order along with record of case be placed before Hon'ble the Chief Justice, within a week, for necessary orders.

Order Date :- 15.07.2025

Ved Prakash

(Manish Kumar Nigam, J.)