

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.879 of 2016**

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Awadeshnandan Kumar @ Awadesh Singh & Anr

.... Appellant/s

Versus

Smt. Sweta Singh

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Jai Prakash Verma

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER**

3 09-11-2016 Heard learned counsel for the petitioners and learned
counsel for the respondent.

2. Perused the impugned order dated 11.05.2016 passed
by the Sub-Judge, Paliganj (Patna) in T.S. No. 65 of 2008,
whereby the learned court below rejected the amendment
application filed by the defendants-petitioners.

3. From perusal of the impugned order, it appears that
the court below rejected the amendment application deciding the
amendment application on merit.

4. Admittedly, the issues have not been framed in the
suit. Therefore, the amendment sought for by the defendants by
way of counter claim is a pre-trial amendment. The plaintiff-
respondent filed suit for partition. The defendants-petitioners filed
written statement and subsequently counter claim has been filed
claiming some particular property is also a joint family property,

therefore, the same may also be partitioned. The court below deciding on merit rejected the application recording finding that it is self acquired property of the plaintiff.

5. The Hon'ble Supreme Court in the case of ***Rajesh Kumar Agarwal & Ors. Versus K.K. Modi & Ors.*** reported in ***2006 (4) SCC 385*** has held that while considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

6. Admittedly, in the present case partition is sought for by amendment in the written statement incorporating counter claim. It is also settled principle of law that the cause of action for partition is recurring cause of action. The partition as claimed by the defendants-petitioners by way of counter claim can be claimed by the petitioners by filing a separate suit for partition with respect to that property. If the separate suit for partition is not barred by law of limitation, there is no question of limitation in filing the counter claim arises. Thus, in my opinion, the learned court below has wrongly refused to exercise the jurisdiction vested in it by law

and rejected the amendment application filed by the defendants-
petitioners in the manner not permitted by law and thereby
occasioned failure of justice. Accordingly, this civil miscellaneous
application is allowed. The impugned order is set aside and the
amendment sought for by the petitioners is allowed. The
respondent shall be at liberty to file written statement as provided
under Order 8 Rule 6(A) Sub-Rule 4 C.P.C.

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(Mungeshwar Sahoo, J)