

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.220 of 2016**

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Vivekanand Pathak

.... Appellant/s

Versus

Vinayanand Pathak

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Abhay Kumar Thakur

For the Respondent/s : Mr.

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

4 11-11-2016

Heard the learned counsel for the petitioner and the
learned counsel for the respondent.

Perused the impugned order dated 18.04.2016 passed
by Sub Judge I, Siwan in Title Suit No.28 of 2002 whereby the
Court below rejected the amendment application filed by the
plaintiff-petitioner.

It appears that aforesaid partition suit was filed by the
plaintiff. The suit was decreed in part. Thereafter, the plaintiff
filed title appeal which was dismissed and Second Appeal was
also dismissed. The review is pending. Thereafter, pleader
commissioner was appointed for takhtabandi. The Pleader
Commissioner submitted the report with respect to the suit
property. At this stage, the plaintiff-petitioner filed application for
amendment in the schedule of the plaint alleging that some of the
joint property has been left. The plaintiff alleged that defendant in



the written statement admitted that these properties are the joint family properties and the amendment in the written statement was allowed but it was not incorporated by the defendant. Rejoinder was filed by the defendant. However, the Court below by the impugned order has rejected this amendment application on the ground that at this stage, after submission of the report by the Pleader Commissioner, amendment cannot be allowed.

It is admitted fact that in the written statement filed by the defendant, it was admitted by him that the properties which are sought to be brought on record by way of amendment by the plaintiff are the joint family property. The plaintiff on the basis of this statement in the amendment application by the defendant has filed this amendment application. So far delay is concerned or that the Pleader Commissioner has already submitted the report, it may be mentioned here that in a partition suit, there can be more than one preliminary decree.

The Hon'ble Supreme Court in **AIR 1967 Supreme Court 1470(Phoolchand and another v. Gopal Lal)** has held that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree



some parties dies and shares of other parties are thereby augmented. It had also been held that it is not disputed that in partition suit, the court can do so even after the preliminary decree is passed and it would be convenient to the court and advantageous to the party to add disputed rights finally settled and specifications and shares in the preliminary decree varied before a final decree is prepared and if this is done, there is clear determination of the rights of the parties to the suit on the question in dispute. This decision of the Supreme Court has been followed by this Court in **AIR 2008 Patna 50(Sheo Pujan Rai and Ors. v. Ram Ekbal Rai and Ors)**. In this decision also, after preliminary decree, amendment was allowed on the ground that addition of properties which were joint and ancestral properties covered under same Act of facts already decided at the time of passing of preliminary decree would neither change nature of the suit nor it would take otherwise by surprise.

In the present case, as has been stated above, the defendants came with a case that these properties which are joint family properties have been left out. Therefore, there is no surprise to the defendant and the plaintiff is only seeking for amendment for addition of the some properties which according to the plaintiff are joint family properties. Now, Pleader Commissioner has

already submitted the report. In such circumstances, so far the rights of the parties with respect to the properties which are being sought to be added by way of amendment shall be finally determined by the Court by passing another preliminary decree. There is no bar according to the decision of the Supreme Court referred to above which has been reiterated again by the Supreme Court in AIR 2012 Supreme Court 169(Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.).

In my opinion, therefore, the amendment sought for by the plaintiff is necessary for determination of the controversy between the parties in the present suit itself and if it is not allowed it will lead to multiplicity of proceeding. Since the defendant in the written statement came with a case that those properties are joint family properties, there is no question of prejudice to the defendant arises.

In the result, this Civil Miscellaneous application is allowed. The impugned order is set aside. The amendment application filed by the plaintiff is thus allowed. The Court below is directed to decide the dispute between the parties according to law.

(Mungeshwar Sahoo, J)

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