

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL MISCELLANEOUS JURISDICTION No. 1293 of 2017**

- =====
1. Dip Narayan Upadhyay
  2. Jay Narayan Upadhyay
  3. Deo Narayan Upadhyay

Petitioner nos. 1 to 3 are sons of late Bhagwati Sharan Upadhyay.

4. Mira Devi, W/o late Satya Narayan Upadhyay.

All Petitioners nos. 1 to 4 are R/o Village- Nautan Bazar, P.S. Ekma, District- Saran.

.... .... (Defendants-Respondents).....Petitioners  
Versus

1. Anil Kumar Choube
2. Arun Kumar Choube
3. Ajay Kumar Choube

All respondents are sons Madhusudan Choube, R/o Village- Karnai, P.S. Darauli, District- Siwan.

.... .... (Defendants-Respondents)...Respondents

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**Appearance :**

For the Appellant/s : Mr. Ram Suresh Roy, Sr. Adv.  
Mr. Anant Kumar Bhaskar, Adv.  
Mr. Sanjay Kumar Jha, Adv.

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH**

**ORAL JUDGMENT & ORDER**

**Date: 11-10-2017**

The petitioners challenge an order, dated 06.06.2017,  
passed by the learned Sub-Judge-Ist, Saran at Chapra, in Execution



Case No. 1 of 1985, by which an application, dated 25.04.2017, filed, under Order 21, Rule 15 read with Section 151 of the Civil Procedure Code (*in short* '**Code**'), on behalf of the respondents, for carving out their share from Schedule II property, have been allowed.

2. It appears from the pleadings on record, which is admitted, that Partition Suit No. 127 of 1975 was decreed on 03.08.1982 and preliminary decree and final decree were, accordingly, prepared. One Rameshwar Upadhyay happened to be the common ancestor of Ram Bilas Upadhyay, Ram Kailash Upadhyay and Bhagwati Sharan Upadhyay. Parties to the said partition suit are/were the descendants of the three. Apparently,  $\frac{1}{3}^{\text{rd}}$  share was to go to each of the branches. The son of Ram Bilas Upadhyay, namely, Surya Upadhyay, was defendant No. 1, who contested the suit with defendant Nos. 2, 3, 4 and 5, the sons of Bhagwati Sharan Upadhyay. The sons of Ram Kailash Upadhyay, *i.e.*, the plaintiff, namely, Awadh Bihari Sharan Upadhyay, and defendant No. 6, namely, Bipin Bihari Sharan Upadhyay, were allotted  $\frac{1}{6}^{\text{th}}$  share each. So far as defendant Nos. 1 to 5 are concerned,  $\frac{2}{3}^{\text{rd}}$  share was allotted to them. It was admittedly done, since Surya Upadhyay was entitled for  $\frac{1}{3}^{\text{rd}}$  of the share and the sons of Bhagwati Sharan Upadhyay were entitled jointly for  $\frac{1}{3}^{\text{rd}}$  of



the share. Accordingly, defendant Nos. 1 to 5 were allotted  $2/3^{\text{rd}}$  of the share.

3. The executing Court has taken care of  $1/3^{\text{rd}}$  share, which said Surya Upadhyay was entitled for and, therefore, his descendents were entitled to have, consequent upon the partition.

4. Assailing the impugned order, learned Senior Counsel, appearing on behalf of the petitioners, has submitted that the court below, while executing the decree, has varied the terms of decree and, therefore, the said impugned order, dated 06.06.2017, needs interference.

5. I have perused the impugned order. The court below has taken into account the spirit of Order 21, Rule 11 of the CPC and after having examined the preliminary decree and final decree, prepared by the trial Court, has recorded that if the prayer made on behalf of the heirs of the said defendant No. 1 was allowed, it will not offend the decree. I do not find any infirmity in the impugned order, since it cannot be said to be varying the terms of the decree.

6. Learned Senior Counsel, appearing on behalf of the petitioners, has attempted to persuade this Court that the said defendant No. 1 had executed gift-deed in favour of defendant Nos. 2 to 5. The descendents of defendant No. 1 have filed a separate suit for carving out their share from the share allotted to defendant



Nos. 1 to 5, in the decree, in Partition Suit No. 127 of 1975.

7. The plea of the petitioners that defendant No. 1 has executed a deed of gift itself cannot be basis for interfering with the impugned order.

8. I do not find any merit in this application. This application is, accordingly, dismissed.

**(Chakradhari Sharan Singh, J)**

Praveen-II/-

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