

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5160 of 2012

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Om Prakash Nayak @ Om Prakash

.... Petitioner/s

Versus

Dr.Mahesh Kumar Lakhotiya & Ors.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kamal Deo Sharma

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

7 07-08-2017 (1) Heard the learned counsel, Mr. Bhupendra Narain Singh for the petitioner.

(2) The defendant-petitioner has filed this writ application for setting aside the order dated 28.04.2009 passed by the learned Sub Judge II, Rosera in Title (Partition) Suit No.10 of 1987 giving rise to Final Decree No.5 of 1995 whereby the learned court below allowed the application filed by respondent Nos.1 and 2 for being added as party under Order I Rule 10(2) C.P.C.

(3) From perusal of the impugned order, it appears that the court below recorded clear finding that the mother of the defendant filed partition suit claiming 1/7th share in the suit property. After preliminary decree, she sold schedule II property to the respondent Nos.1 and 2 by registered sale deed in the year 1992. During the pendency of the final decree, the respondent



Nos.1 and 2 filed the aforesaid application and, therefore, the learned court below found that their presence after the death of the plaintiff is necessary in allotting the share to the parties.

(4) The learned counsel, Mr. Bhupendra Narain Singh appearing on behalf of the defendant-petitioner submitted that transfer made by the mother of the petitioner, who was the plaintiff in the partition suit, is hit by the principle of *lis pendense*. The learned counsel in support of his contention relied upon the decision of this court reported in AIR 2009 Patna 83 and further submitted that the purchasers are not at all necessary party in partition suit and for that, the learned counsel relied upon the decision of this court in 2014(4) PLJR 300.

(5) From perusal of the decision reported in AIR 2009 Patna 83, it appears that in that case, the fact was entirely different and, therefore, it is not applicable in the present facts and circumstances of the case. Moreover, the said decision has not considered the decision of the Supreme Court in **AIR 2005 Supreme Court 2209(Amit Kumar Shaw and another v. Farida Khatoon and another)** wherein it has been held that “though the plaintiff is under no obligation to make a lis pendens transferee a party; under O. 22, R. 10 an alienee pendente lite may be joined as party, the Court has discretion in the matter which



must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests.”

(6) Admittedly, in the present case, the plaintiff has already died. It further appears that said decision has also not considered the decision of the Supreme Court in the case of **2009(4) PLJR 225(SC) (Gajara Vishnu Gosavi v. Prakash Nanasahed Kamble & Ors.)** wherein the Supreme Court has held that “the purchaser has a right only to sue for partition of the property and ask for allotment of his share in the suit property.” Now therefore, if the purchaser has a right to file partition suit and pray for separation of his share why not he be allowed to pray the same in the present partition suit.

(7) The learned counsel for the petitioner submitted that the mother has sold more than her share and that the sale deed is fraudulent sale deed. So far these submissions are concerned, it may be mentioned here that these are the matters that can be decided in presence of the purchasers.

(8) It is settled principles of law that “a preliminary decree determines the right 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.” The reference may be made in this respect to the decision of the Supreme Court **AIR 2012 Supreme Court 169(Ganduri Koteswaramma & Anr. v. Chakiri Yanadi & Anr.)**.

(9) From perusal of the impugned order, it appears that court below considered in right perspective and has rightly allowed the intervention application under Order I Rule 10 C.P.C. Thus, the impugned order neither suffers from jurisdictional error nor there is any irregularity nor any illegality in the order.

(10) Thus, this writ application is dismissed.

(Mungeshwar Sahoo, J)

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