

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.152 of 2021**

Siya Devi @ Siyapati Devi D/o Late Wisar Rai, W/o Janlal Rai Resident of Village- Madhusudan Pakri, P.O. Manikpuar Pakri, P.S.- Lalganj, Dist- Vaishali.

... .. Petitioner/s

Versus

1. Meera Devi D/o Late Asharfi Rai, W/o Raj Kumar Rai Resident of Village- Madhusudan Pakri, P.O. Manikpuar Pakri, P.S.- Lalganj, Dist- Vaishali.
2. Ram Naresh Rai Son of Late Asharfi Rai Resident of Village- Rahimpur, P.O.- Rahimpur, P.S.- Vaishali, Dist- Vaishali.
3. Sita Ram Rai Son of Late Wasar Rai Resident of Village- Rahimpur, P.O.- Rahimpur, P.S.- Vaishali, Dist- Vaishali.
4. Geeta Devi Wife of Rajendra Rai, D/o Sitaram Rai Resident of Village- Vaishali, P.O. and P.S.- Vaishali, Dist- Vaishali.
5. Sangeeta Devi Wife of Ashok Rai, D/o Sita Ram Rai Resident of Village- Mansurpur, P.O. and P.S.- Sarai, Dist- Vaishali.
6. Ashok Rai Son of Ram Prasad Rai Resident of Village- Mansurpur, P.O. and P.S.- Sarai, Dist- Vaishali.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Mukesh Kumar Jha Mr. Rakesh Kumar Soni
For the Respondent no.3	:	Mr. Ranjit Kumar Thakur

**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV ORDER

7 04-07-2022 I have already heard the learned counsel for the petitioner and learned counsel for the respondents.

Being aggrieved by the order dated 23.12.2020, passed by the learned Sub-Judge-X, Vaishali at Hajipur in Partition Suit No. 180 of 2007, whereby the petition on behalf of the respondent/defendant nos. 3 and 6 dated 13.02.2020 challenging the report of the survey knowing Advocate



Commissioner has been allowed, setting aside the report of the survey knowing Advocate Commissioner, whereunder he has included the properties which were already sold by defendant nos. 2 and 3.

The brief facts of this case is that the petitioner/plaintiff instituted Partition Suit No. 180 of 2007 with a prayer for declaration that she is entitled to 1/9th share in Schedule-II properties mentioned in the plaint and for passing a preliminary decree in that respect. A prayer was also made for appointing a survey knowing Advocate Commissioner for carving out 1/9th share of the plaintiff.

Some of the defendants denied the fact that the petitioner/plaintiff was belonging to the same family and they averred that the petitioner/plaintiff was stranger to the family of the defendants, as such, she was not entitled for partition. The learned trial court decreed the suit and appointed the survey knowing Advocate Commissioner.

The learned counsel for the petitioner/plaintiff has submitted that the survey knowing Advocate Commissioner submits his report and he has rightly included the property sold by defendant no.2 and 3 for *pattibandi* as the learned trial court has specifically mentioned in its order in paragraph no.15 that



the purchasers were entitled to get the share as purchased by them from the respective coparceners up-to the right which he has got over the properties. So in the opinion of the court below, the plaintiff is entitled to get the decree of partition as claimed by her. Learned counsel has submitted further that, despite the specific finding of the court, a petition was filed on behalf of defendants/respondents to exclude the properties sold out by the defendants from the partition and the learned trial court has illegally allowed that petition and excluded those properties from being partitioned.

The learned counsel for the defendants/respondents has submitted that the learned trial court in the same paragraph no.15 has decided issue no.5. In the last line of paragraph no.15, it has specifically been mentioned that *kebala* executed by defendant nos. 2 and 3 be excluded. He has submitted further that as there was specific direction of the court to exclude the *kebala* executed by defendant nos. 2 and 3, the learned court below has rightly excluded those sale deeds, vide its order dated 23.12.2020. Paragraph no. 15 of the judgment of the trial court in Title Suit No. 180 of 2007 is being extracted hereinbelow:-

“15. Issue no. V- The plaintiff has been able to prove that plaintiff and defendant are both joint owner of the property and



they are in the joint possession of the property. The purchaser were entitled to get the share as purchased by them from the respective co-parcener up to the right which he has got over the property. So in the opinion of this court the plaintiff is entitled to get the decree of partition as claimed by her. Save and except the kebala executed by Defendant no.2 and 3.”

From bare perusal of the above mentioned portion of the judgment, though the learned trial court has specifically mentioned that the purchasers were entitled to get the share by them from the respective co-parceners up to the right, which he has got over the property, meaning thereby that the purchasers of the defendants were entitled only to the extent of the share of their vendee. If the property sold out by defendant nos. 2 and 3 is excluded from the subject matter of the suit, how the share of their vendee can be determined in that property?

It appears that in the last line of paragraph no.15 of the judgment, the phrase ‘save and except the *kebala* executed by defendant nos. 2 and 3’ has been mentioned due to inadvertence. From perusal of the upper portion of paragraph no.15, it appears that it was the intention of the learned trial court to include the properties sold by the defendant nos. 2 and



3 for *pattibandi*.

Considering the above facts and circumstances, the order dated 23.12.2020, passed by the learned trial court is set aside and this civil miscellaneous petition is allowed.

(Nawneet Kumar Pandey, J)

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