(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu***

Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this

nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misioinder of parties as well as misioinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land.

It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the

service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787***, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State

of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pvari Mohun Bose v. Kedarnath Rovi*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of

defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

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26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

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22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

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29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint

exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in

paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***I. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787***, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate

court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and

pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

“Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant’s interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff’s demand.”

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

“Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice.”

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu***

Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this

nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint

exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

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14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in

paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***I. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

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court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

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25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and

pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu***

Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this

nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint

exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in

paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***I. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787***, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate

court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and

pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

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7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

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15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

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(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this

nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint

exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in

paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***I. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787***, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate

court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and

pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu***

Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this

nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint

exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in

paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***I. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

"23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43, Rule 1 (u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

(emphasis is mine)

20. The powers of the Appellate Court under section 96 (2) of the CPC while hearing appeal against ex parte decree has been explained by the Apex Court in the case of ***Bhanu Kumar Jain v. Archana Kumar and ors, since reported in (2005) 1 SCC 787***, which is as follows:-

"24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein."

21. Ex parte judgment is to be set aside against the concerned defendants against whom ex parte decree has been passed. Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless decree is of such nature that it cannot be set aside against such defendant only.

22. In present case judgment and decree has been passed against defendant no. 1 State of Bihar on contest against whom there was separate and distinct cause of action and decree is separable and independent as such, there was no occasion for the first appellate

court to set aside the judgment and decree passed by the trial court against defendant no. 1 (State of Bihar) particularly when the first appellate court has observed that appellant is not aggrieved by the judgment and decree by which name of State of Bihar entered in the municipal records have been directed to be deleted.

23. First appellate court has set aside the judgment and decree on the ground that there was no valid service of notice upon defendant 3rd party, however, on said ground whole judgment and decree cannot be set aside as said judgment and decree has been passed on contest against defendant no. 1 State of Bihar which has attained finality as State of Bihar has not challenged said judgment and decree and none of the parties either plaintiff or defendant 3rd party are aggrieved by said judgment and decree passed against defendant 1st party State of Bihar.

24. In the present case defendant 3rd party has been arrayed as proforma defendants against whom neither any relief has been claimed nor any decree has been passed by the trial court. In the plaint, plaintiff has claimed his exclusive right over the property against state of Bihar, as such defendant 3rd party was not required to be made party, however, plaintiff has made defendant 3rd party as proforma defendant who is supposed to support the claim of plaintiff.

25. In law, proforma defendant has same interest in the suit property as that of plaintiff. His status is as that of co- plaintiff and on being refused by a party to be a co-plaintiff he is arrayed as proforma defendant having same right and interest in the suit property as that of plaintiff. If plaintiff succeeds proforma defendant also succeeds and if plaintiff fails proforma defendant also fails. There is no conflict of interest between plaintiff and proforma defendant as their right and interest are common and mutual and as such no relief is claimed against proforma defendant and if any relief is claimed against him he is to be made contesting defendant. The benefit of judgment and decree passed in favour of plaintiff will enure to the benefit of proforma defendant also.

26. The Apex Court in the case of ***Jahar Roy (Dead) through L.Rs and Ors v. Premji Bhimji Mansata and Ors since reported in AIR 1977 SC 2439***, has held as follows:-

"11. It is Order 1, Rule 1 of the CPC, which deals with the procedure in civil actions of this nature and it provides as follows,1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from ***Biri Singh and another v. Nawal Singh*** which was decided in 1898) and ***Pyari Mohun Bose v. Kedarnath Roy*** which was decided in 1899), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to ***Monghibai v. Cooverji Umersay 15 IA 210***, where it has been observed as follows:-

It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

27. Plaintiff thereafter deliberately, purposely and knowingly suppressed service of notice upon defendant 3rd party, as he was fully aware that defendant no. 3rd party will not support his claim of relinquishment of share by mother of defendant 3rd party and his exclusive right over the suit property and had notices been served upon defendant 3rd party, they would file their W.S. denying the claim of plaintiff and thereafter status of defendant 3rd party would not remain of proforma defendant but contesting defendant. Judgment and decree was binding upon defendant 3rd party being party in the suit and

pleadings of plaintiff if remained un-controverted would affect right, title and interest of defendant 3rd party in the suit property and as such defendant 3rd party filed the First Appeal denying the claim of relinquishment as well as having half share in the suit property upon which the first appellate court remanded the matter to the trial court.

28. In the memo of appeal filed also plaintiff- appellants have stick to their claim of exclusive right over the suit property and their grievance as stated in memo of appeal is that if defendant 3rd party was aggrieved by the judgment and decree passed by the trial court, they ought to have filed a separate suit for setting aside the judgment and decree of the trial court but no first appeal was maintainable as no relief was claimed against them. However, in view of judgment and order passed by the Apex Court, as referred above, defendant 3rd party had all the three options either to file an application under Order 9, Rule 13 of CPC or to file a review petition or to file appeal, under section 96(2) of CPC, as such the first appeal filed by defendant 3rd party was maintainable.

29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

“Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant’s interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff’s demand.”

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

“Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice.”

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.

(i)Civil Procedure Code, 1908, Order 9, Rule 13, and Section 96 (2)

Judgment and Decree Challenged: The judgment and decree were passed against Defendant No.1, the State of Bihar. The case against Defendant No.1 involved a separate and distinct cause of action. The decree against Defendant No.1 is separable and independent.

First Appellate Court's Decision: The first Appellate Court set aside the judgment and decree passed by the Trial Court against Defendant No.1. This decision was made despite the first Appellate Court noting that the appellant was not aggrieved by the judgment and decree, which ordered the deletion of the State of Bihar's name from municipal records. The first Appellate Court remanded the matter for a fresh trial, citing invalid service of notices to Defendant No.3, preventing them from appearing and contesting the suit.

Miscellaneous Appeal Filed: The plaintiff filed the present miscellaneous appeal against the remand order. The remand order by the first Appellate Court dated 13.05.2013 was partly set aside by the 1st Additional District Judge. The remand order was confined to the adjudication of the dispute between the plaintiff and Defendant No.3.

[Paras 18, 27 and 31]

(ii)Civil Procedure Code, 1908, Order 1, Rule 3, and Order 7, Rule 5

1. Ex Parte Judgment and Decree:

– Ex parte judgment is to be set aside against the concerned defendants against whom the ex parte decree has been passed.

– Judgment and decree cannot be set aside against defendants who had appeared and contested the case unless the decree is of such a nature that it cannot be set aside against such defendants only.

2. Proforma Defendant's Interest:

– In law, a proforma defendant has the same interest in the suit property as that of the plaintiff.

– The status of a proforma defendant is equivalent to that of a co-plaintiff.

– The proforma defendant is included as a defendant because they have the same rights and interests in the suit property as the plaintiff.

– If the plaintiff succeeds, the proforma defendant also succeeds, and if the plaintiff fails, the proforma defendant also fails.

– There is no conflict of interest between the plaintiff and the proforma defendant since their rights and interests are common and mutual.

– No relief is claimed against the proforma defendant; if any relief is claimed against him, he must be made a contesting defendant.

3. Benefit of Judgment and Decree:

– The benefit of the judgment and decree passed in favor of the plaintiff will also extend to the proforma defendant.

– The miscellaneous appeal is allowed.

[Paras 21, 25 and 30]

For the Appellants:- Mr. J.S. Arora, Sr. Advocate and Mr. Manoj Kumar, Advocate.

For the Respondents No.1:- Mr. Siya Ram Sahi, Mr. Sandip Kumar and Mr. V.M.K. Singh, Advocates.

For the Respondents Nos.5, 10 and 11:- Mr. Chandra Kant, Mr. Navin Kumar and Mr. Dhirendra Kumar, Advocates.

JUDGMENT

S. Kumar, J. (Oral) – Heard the parties.

2. This miscellaneous appeal has been filed on behalf of plaintiffs/appellants against the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010 by which the learned 1st appellate court has remanded the matter to the trial court after setting aside the judgment and decree of the trial court and framed two issues to be determined by the trial court as well as liberty to trial court to frame any other issue if found necessary after filing of written statement by defendant 3rd party.

3. Plaintiffs/appellants had filed suit for declaration of their right, title, interest and possession over the suit property as detailed in Schedule-A of the plaint and further for declaration that the entry made in the name of State of Bihar in the Municipal Survey Records is wrong and incorrect and same is to be deleted and recorded in the name of plaintiff as he has got valid title and possession over the suit property.

4. The case of the plaintiff as set out in the plaint is that Late Beer Narain Chand was the common ancestor of plaintiff and defendant 2nd party and defendant 3rd party who owned and possessed the suit lands measuring about 3 bighas 1 kathas which was orally settled 70 years before in his favour by ex-landlord and the land was demarcated by raising boundary wall and same remained in his possession throughout. Holding was created in the Purnea Municipality in respect of suit property in the name of late Beer Narain Chand who paid the municipal taxes and after his death plaintiff used to pay municipal taxes.

5. After vesting of the interest of ex-landlord in the State of Bihar Late Beer Narain Chand was recognized by the State of Bihar as its tenant in respect of suit land and in revenue records of Government of Bihar, his name was entered in Register-II and Jamabandi was running in the name of Late Beer Narain Chand and rent was paid and receipt was being granted by State of Bihar. Beer Narain Chand died on 02.05.88 leaving behind one son Pratap Narain Chand and a daughter Madhuri Singh as his legal heirs and successors.

6. It was stated by the plaintiff in his plaint that Madhuri Singh d/o recorded tenant late Beer Narain Chand was married in a well to do family and her husband T.P. Singh was a high official as such she disowned her claim over the suit land and accordingly, Pratap Narain Chand, father of plaintiff became the exclusive owner of the suit land and remained in possession during his lifetime, however, in order to avoid any future complication the heir of Madhuri Singh (deceased) were made defendants third party in the Suit.

7. Pratap Narain Chand died on 30.03.1990 leaving behind plaintiff and defendant 2nd party as his legal heirs but his daughter defendant no. 5 was married in a well to do family and she disowned her claim over the suit land and other properties in favour of plaintiffs and as such the plaintiff and defendant no. 2 to 4 became exclusive owner of the suit land. It is further stated in the plaint that by virtue of amicable partition between plaintiff and defendants no. 2 to 4 the suit properties fully detailed in Schedule-A of the plaint exclusively fell in the share of plaintiff and since then plaintiff is coming in possession of the suit land as its exclusive owner, however, in order to avoid any future complication the other heirs of late Pratap Narain Chand and daughter of late Pratap Narain Chand are made defendants no. 2 to 5 as defendant 2nd party in the suit.

8. It has been stated in the plaint that cause of action for filing the suit arose on 26.07.92 when the Karmachari and the Amlas and other staff of State of Bihar came to the residential house of plaintiff and threatened to dispossess them as the suit lands were recorded in the name of State of Bihar and plaintiffs came to know for the first time on 26.07.92 that the suit property has been recorded in municipal survey records in the name of State of Bihar which necessitated for filing of the suit for correction in the entry made in municipal survey records.

9. It has been further stated in the plaint that municipal survey entry in respect of suit property as detailed in schedule A of the plaint has incorrectly been recorded in the name of State of Bihar which does not affect the right, title, interest and possession of the plaintiff over the suit land and plaintiff sent a notice under section 80 CPC to the State of Bihar through Collector, Purnea, and thereafter authorities of respondent State of Bihar threatened to dispossess them on 11.08.93. The reliefs prayed in the plaint is for declaration that plaintiff has right, title and interest over the suit property as detailed in schedule A of the plaint and State of Bihar is landlord and has right to receive rent only.

10. The State of Bihar appeared and filed its written statement in which it has been admitted that Jamabandi is running in the name of Late Beer Narain Chand but creation of Jamabandi does not create any right, title and interest in the suit lands. The lands have rightly been recorded in the name of State of Bihar in municipal survey records.

11. Notices were issued to all the defendants and State of Bihar appeared and contested the suit by filing written statement as well as by examining and cross examining the witnesses on behalf of plaintiff as well as leading their evidence. The defendant 3rd party in spite of valid service of notice did not appear to contest the suit.

12. On the rival pleadings of the parties, the trial court framed 10 issues in which issue Nos. 6, 7 and 8 are the core and relevant issues.

13. The trial court has held that the plaintiffs have got right, title and possession over the suit land as described in Schedule-A of the plaint and State of Bihar defendant 1st party has no right, title, interest and possession over the suit land and decreed the suit in favour of plaintiff and against defendant 1st party.

14. The trial court has further held that the plaintiff's ancestor and plaintiff are coming in possession over the suit land since 1955 and even prior thereto, to the knowledge of defendant 1st party which is adverse and uninterrupted against defendant 1st party, as such plaintiffs have acquired good title against defendant 1st party by adverse possession.

15. The suit was finally decreed in favour of plaintiffs and against defendant 1st party with cost. The trial court has specifically recorded that other defendants i.e. defendant 3rd party are performa defendants as no relief has been prayed against them nor any decree has been passed against them.

16. In the decree prepared also it has been stated that it is declared and adjudicated by the court that the plaintiffs have got good and valid right, title and interest in the suit properties as detailed in schedule A of the plaint and the State of Bihar defendant No. 1 is a landlord and entitled to receive the rent and has no any other interest in the schedule A properties of the plaint.

17. Although no decree was passed against defendant no. 3 and no relief was claimed against him, defendant No. 3 preferred first appeal before the District Judge, Purnea as on the basis of said judgment and decree plaintiff started claiming suit property as his exclusive property to the exclusion of the defendant 3rd party and also got his name mutated in the records of municipality and when same came to the knowledge of defendant no. 3 in the year 2010 he preferred first appeal before the District Judge, Purnea, giving rise to Title Appeal No. 25 of 2010 on the ground that ex parte judgment and decree has been obtained against defendant 3rd party without any valid service of notice upon them which was transferred to the court of A.D.J. 1st, Purnea for disposal.

18. The first appellate court has held that from the records, it appears that the notices were not validly served upon the defendant 3rd party and present appellant and all the service report are collusive. The appellate court has further observed that before directing for ex-parte proceeding the learned trial court ought to have made Gazette publication in paper for substituted service of notice on defendant 3rd party and present appellant. The first appellate court after setting aside the judgment and decree has remanded the matter for fresh trial on the ground that no notices were validly served upon defendant 3rd party, as such they could not appear and contest the suit and against said order of remand the present miscellaneous appeal has been filed on behalf of plaintiff.

19. The scope of appellate court hearing appeal against the order of remand has been considered by the Apex Court in the case of ***J. Balaji Singh v. Diwakar Cole & Ors since reported in AIR 2017 SC 2402***, and in paragraph nos. 23 and 24 has held as follows:-

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24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43, Rule 1 (u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43, Rule 1 (u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43, Rule 1 (u) which reads thus:

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26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

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29. After denying the claim of plaintiff, the title suit filed by plaintiff in its present form would not be maintainable and plaintiff will have to amend his plaint seeking relief against defendant 3rd party as well as disclosing cause of action against them and status of defendant will change from proforma defendant to that of contesting defendant within the meaning of Order 1, Rule 3 and Order 7, Rule 5 of CPC which reads as follows:-

"Order 1, Rule 3 . Who may be joined as defendants.-All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.]

Order 7, Rule 5 . Defendant's interest and liability to be shown.-The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

30. As the cause of action against State of Bihar (defendant no. 1) and cause of action

against defendant 3rd party is separate and distinct the trial court will also have to address the issue of misjoinder of parties as well as misjoinder of cause of action, and it shall be open to the trial court to adjudicate the dispute in present suit or order separate trial as same lies within the exclusive domain of the trial court. Order 1, Rule 3A and Order 2, Rule 3 and Rule 6 reads as follows:-

"Order 1, Rule 3A . Power to order separate trials where joinder of defendants may embarrass or delay trial.-Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interests of justice.

Order 2, Rule 3 . Joinder of causes of action-

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Order 2, Rule 6 . Power of Court to order separate trials.-Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

31. For the reasons as stated above, the judgment and order dated 13.05.2013 passed by 1st Additional District Judge, Purnea in Title Appeal No. 25 of 2010, is partly set aside and the remand order is confined for adjudication of dispute between the plaintiff and defendant 3rd party in terms of order of remand and the judgment and decree passed by the trial court dated 05.09.1994 passed in Title Suit No. 284 of 1993 requires no interference.

32.The miscellaneous appeal is allowed to the extent as indicated above.

Let LCR be returned to the court concerned forthwith.