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**(2014) 07 JH CK 0094**

**Jharkhand High Court**

**Case No:** Miscellaneous Appeal No. 391 of 2008

Nicholas Ekka

APPELLANT

Vs

Lal Ekka

RESPONDENT

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**Date of Decision:** July 16, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 23

**Citation:** (2014) 3 JLR 610

**Hon'ble Judges:** Dhruv Narayan Upadhyay, J

**Bench:** Single Bench

**Advocate:** Amar Kumar Sinha, Atul Kumar and Abdul Wahab, Advocate for the Appellant;  
Hasnain Waris, Advocate for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

Dhruv Narayan Upadhyay, J.

This miscellaneous appeal has been preferred against the judgment dated 29th November, 2008, passed by learned Addl. District Judge (F.T.C.), Simdega in connection with Partition Appeal No. 11 of 2005 whereby the learned Addl. District Judge has set aside the judgment passed on 30.06.2005 and decree signed on 11.07.2005 in connection with Title Partition Suit No. 11 of 2004 and remanded the suit back to the trial Court with a direction to re-admit the suit under its original number in the suit register, take additional evidence, if produced and proceed to determine the suit at the earliest, preferably within four months and the parties shall bear their own costs.

2. Besides setting aside the impugned judgment and decree the learned Addl. District Judge, by invoking Rule 23 of Order XLI of the Civil Procedure Code, framed following additional issues for proper adjudication of the dispute involved in the suit:

Issue No. 10: Whether the entire suit land including land of Saldega Khata No. 73 are self acquired property of late Stanislas Ekka or it is joint properties of the parties to the suit ?

Issue No. 11: Whether the possession of land of village Tabhadih and Gondlipani by plaintiff and possession of land of village Saldega by contesting defendants are joint possession of all parties or it has excluded their right and title on the principles of estoppel or ouster from partition of suit land ?

3. The plaintiff/respondent no. 1 had filed Partition Suit No. 11 of 2004 in the Court of learned Sub-Judge-I, Simdega in which the defendants, who were brothers, were arrayed as defendant nos. 1, 2 and 3 whereas Bhushan Ekka, brother of Lal Ekka was made proforma defendant no. 4. During pendency of Partition Suit No. 11 of 2004. Joseph Ekka died and vide order dated 08.01.2010 he was substituted by his sons Saurav Ekka and Swapnil Sonal Ekka who were represented through their natural mother Pushpa Ekka, wife of late Joseph Ekka. The plaintiff/respondent no. 1 had made out a case in its plaint that Allois Ekka and Stainless Ekka both sons of Joseph Bhukhan Ekka had acquired landed property jointly in their names by virtue of following three sale deeds at different villages:

(i) through registered sale deed no. 11 dated 15.01.1951, executed by Jugal Singh son of Swarup Singh and Gandharv Singh @ Shanichar Singh in favour of Allois Ekka and Stainless Ekka at village Tawadih.

(ii) through registered sale deed no. 188-66 dated 23.03.1966, executed by Gujju @ Joseph Khariya son of Ram Khariya in favour of Allois Ekka and Stainless Ekka for the land situated at village Saldega.

(iii) through registered sale deed no. 501 dated 29.07.1966 executed by Atma Ram Marwari son of late Dhannu Ram Marwari in favour of Allois Ekka and Smt. Albina Ekka, wife of Stainless Ekka for the land situated at village Gundalipani.

The properties, as mentioned above, have been more fully described in the schedule of the plaint. Plaintiff Lal Ekka and proforma respondent Bhushan Ekka in the original suit no. 11 of 2004, are sons of Allois Ekka whereas original defendant Nicholas Ekka, Suprian Ekka and Joseph Ekka are sons of late Stainless Ekka. Since the landed property, as detailed above, were acquired by father of the plaintiff and defendants, they jointly enjoyed their peaceful possession over the same during their life time. After the death of their father, the plaintiff and defendants have succeeded and inherited jointly their right, title and interest in the said property. No partition had taken place in respect of suit property during the life time of Allois Ekka and Stainless Ekka but the parties were enjoying and cultivating their possession over the suit-land according to their convenience.

4. Since the plaintiff and proforma defendant were entitled to receive half of the share in the suit property they requested the defendants to partition the property

but they had not paid any heed to it which created necessity for the suit. That the cause of action arose on and from when the plaintiff and proforma defendants asked for partition of the property and lastly on 2nd October, 2004 when the defendants flatly refused to partition the schedule land.

5. The contesting defendant nos. 1, 2 and 3 appeared in the Court of learned Sub Judge-1 and filed their written statement mainly on the ground that there are other ancestral properties which have not been partitioned among the co-sharer and detail of those ancestral properties are find mentioned in para-2 of the written statement. It was also averred that the suit property was not jointly acquired by the plaintiff's father and the defendant's father. It is contended that father of the defendants was driver in Indian Railways and he was receiving a good salary. He had handed over money to his brother Allois Ekka to purchase landed property in the joint name. They were also having their ancestral house and land at village Tamra. The defendants have also tried to make out a case that the suit property were purchased from the income of their father who was in service but the properties were purchased in the joint name of two brothers because necessary permission under Section 46 of the C.N.T. Act was obtained by Allois Ekka. The further case of the defendant is that the suit framed in its present form is not maintainable and it is liable to be dismissed for non-joinder of necessary parties. The suit is barred by adverse possession and hit by the principles of law of waiver, estoppel, acquiescence and res-judicata.

6. Learned Sub Judge-1, on the basis of pleadings available on record, framed issues and finally dismissed the partition suit on the ground of non-joinder of necessary parties and also on the ground that partial partition is not permissible in the law. Learned Sub Judge has further held that the plaintiff and defendants were having other ancestral property besides the suit property in which there are more co-sharers than the plaintiffs and defendants. Since other co-sharers have not been made parties, the suit for partition is not maintainable.

7. Being aggrieved by and dissatisfied with the judgment and decree passed in Title Suit no. 11 of 2004 the plaintiff/respondent no. 1 preferred an appeal before the District Judge, Simdega which was registered as Partition Appeal no. 11 of 2005 and transferred to the Court of Addl. District Judge, F.T.C. for disposal. The learned Addl. District Judge, after considering the rival submissions, held that ancestral properties and the lands purchased by those three sale deeds by two brothers are identically different in character. Ancestral properties were having so many co-sharers but the land purchased through those three sale deeds were joint properties of the co-owners i.e. Allois Ekka and Stainless Ekka acquired by them in which other co-sharers of ancestral property have no claim. The properties acquired by those three sale deeds were joint properties of two brothers Allois Ekka and Stainless Ekka and therefore, legal heirs and successors of Allois Ekka and Stainless Ekka have acquired right, title and interest over the suit property in which other co-sharers

have no right to claim. The first appellate Court has further held that in view of the special and different character of the suit land from the ancestral property, being purchased jointly by two brothers i.e. fathers of the parties to the suit and if any of the descendants of those two brothers brings a suit for partition, that cannot be said to be a case of partial partition. It was further observed that above fact had been completely ignored by the trial Court by jumping on the conclusion that it was a suit for partial partition which cannot be allowed and this view of the trial Court is incorrect.

8. Learned lower appellate Court has further considered that the trial Court has failed to frame appropriate issue on the basis of pleadings. The defendants, in their written statement, had made out a case that land situated at village Saldega under Khata no. 73 was the self-acquired property of late Stainless Ekka and the plaintiff had no right to claim in the suit property but no issue on this point has been framed whether the land situate at Saldega under khata no. 73 is self-acquired property of late Stainless Ekka or it is a joint property of plaintiff and defendants. Additional issues have been framed and directions have been given by the lower appellate Court to learned Sub-Judge to decide the same and those issues are:-

Issue No. 10: Whether the entire suit land including land of Saldega Khata No. 73 are self acquired property of late Stanislas Ekka or it is joint properties of the parties to the suit ?

Issue No. 11: Whether the possession of land of village Tabhadih and Gondlipani by plaintiff and possession of land of village Saldega by contesting defendants are joint possession of all parties or it has excluded their right and title on the principles of estoppel or ouster from partition of suit land ?

The lower appellate Court, by invoking provisions contained under Order XLI Rule 23 of the C.P.C., has framed above said two issues, in addition to the issues framed by the trial Court, and remanded the suit to the trial Court for trial and the parties were permitted to adduce further evidence in support of their claim and hence this appeal.

9. The appellants have assailed the impugned judgment on the ground that findings of the trial Court is perfectly correct and it was not required to be interfered with. The plaintiff/respondent no. 1 could have amended the plaint after other ancestral properties which were not partitioned among the co-sharers, had been brought on record but he did not do so. The learned lower appellate Court has passed the impugned judgment under mis-conception of law and the Court has forgotten this aspect that the plaintiff as well as the defendants had also inherited other ancestral properties beyond the suit property.

10. The learned counsel appearing for the respondents has submitted that trial Court has made certain observations in respect to the properties situated at Saldega, Tabhadih and Gondlipani without being an issue framed on that point and

therefore, the lower appellate Court has rightly framed the issues invoking provisions contained under Order XLI Rule 23 C.P.C. and rightly remanded the matter back to the trial Court. The main point which the respondent has raised before this Court is that the properties purchased through those three sale deeds were purchased by the father of the plaintiff and the defendants jointly in their name and therefore, the plaintiff and proforma defendant cannot be debarred from getting their right, title, interest and possession in the suit property and they cannot be held remediless because of the dismissal of the suit on the ground of partial partition.

11. I have perused the case record of trial Court as well as the case record of lower appellate Court. The appellants/defendants have very clearly asserted in their written statement that the plaintiff as well as defendants had inherited other ancestral properties too, beyond the suit properties which were acquired by their late fathers during their life time to which the plaintiff/respondents did not deny. In the circumstances, the facts remain that plaintiffs and defendants were having other ancestral property beyond the properties acquired by their respective father during their life time for which no partition had taken place. If this was the situation prevailing, certainly other ancestral properties ought to have been sought for partition and co-sharers other than the plaintiffs and defendants ought to have been made parties. Since the suit was wrongly framed for partition, the learned trial Court has rightly dismissed the same by holding that the suit is not maintainable in its present form and no partial partition can be allowed. Further, the suit is also dismissed due to non-joinder of the necessary parties. The view expressed by the lower appellate Court that identically the suit property and other ancestral properties having more co-sharers are quite different is correct. Even admitting the aforesaid view expressed by learned appellate Court, the suit as framed for partition of the properties which were acquired jointly by the parties to the suit is incorrect and it should not have been framed as partition suit without adding other ancestral properties and other co-sharers as necessary party. I am also of the view that properties, which were purchased by Allois Ekka and Stainless Ekka during their life time in their joint name have been inherited by their legal heirs and successors after their death and the plaintiff respondent no. 1 and proforma defendant no. 4 had inherited the share of their father Allois Ekka in the said joint property. So far another issue whether the properties so purchased by aforesaid three sale deeds were purchased from the joint income of those two brothers or it were purchased from the income of only Stainless Ekka is required to be addressed to but not in a partition suit as framed by the plaintiff respondent no. 1. The issues, as indicated above, may well be framed in a title suit by any of the descendants of late Allois Ekka or Stainless Ekka claiming their share in the joint property standing in the name of aforesaid two brothers. The plaintiff/respondent shall be at liberty to file title suit for claiming his share in the joint property standing in the name of his father Allois Ekka and uncle Stainless Ekka. Since the lower appellate Court has wrongly considered

the issues under mis-conception of law, the impugned judgment cannot be sustained and the same stands set aside with the liberty to the parties to the suit to file a fresh suit for carving out their respective share from the properties standing in the name of their father and uncle which were purchased by them during their life time.

12. Accordingly, this appeal stands disposed of with the aforesaid observations.