

Court No. - 36

Case :- SECOND APPEAL No. - 259 of 2014

Appellant :- Santosh Kumar Srivastava Dead And 2 Ors.

Respondent :- Narendra Kumar Srivastava

Counsel for Appellant :- Ajay Kumar Singh, Ashish Kumar Singh

Counsel for Respondent :- D. K. Panday, D. K. Singh, Kartikeya Narain, Sudarshan Singh

Hon'ble Kshitij Shailendra, J.

1. Heard Shri Ajay Kumar Singh, learned counsel for the appellants and Shri Ravi Prakash Srivastava, along with Shri Sudarshan Singh, learned counsel for the respondent.
2. The dispute in this appeal is in between two real brothers and the property in dispute is a residential flat comprised in different floors. It is not disputed that both the parties are residing in different portions of the same building.
3. The appeal arises out of Original Suit No. 389 of 1998 filed by the plaintiff-respondent initially claiming a decree for permanent prohibitory injunction and, later on, by way of amendment, a relief of declaration was added in the year 2009 to the effect that a lease deed/sale deed dated 15.02.1984 registered on 20.10.1984 executed in favour of the defendant-appellants be held to be a property belonging to Hindu Undivided Family (HUF) and that both parties have half share therein. The defendant filed a counter claim contained in his written statement alleging the plaintiff-respondent to be his licensee and claimed a decree of dispossession.

4. The trial court, by judgment and decree dated 05.08.2011, dismissed the suit and decreed the counter claim directing the plaintiff-respondent to vacate the property within three months.

5. A single Civil Appeal No. 74 of 2011 was filed by the plaintiff-respondent challenging that part of the decree by which the suit was dismissed. Admittedly, no appeal was filed against that part of the judgment by which counter claim was decreed. It is the said civil appeal which has been allowed by the learned Additional District Judge, Court No. 5, Varanasi by the impugned judgment dated 21.11.2013. The operative portion shows that counter claim has been dismissed by the first appellate court and a declaration has been made declaring the property in dispute as belonging to joint Hindu family.

6. The instant appeal was admitted by the Co-ordinate Bench of this Court by order dated 19.01.2015 on following nine questions of law.:

"(I) Whether single appeal against the decree passed by Trial Court dismissing suit of plaintiff-respondent and also against decree passed by Trial Court decreeing counter claim filed by defendant-appellant, is maintainable?

(II) Whether due to non-challenge of other part of decree of counter claim by the plaintiff, it was open for the lower appellate court to set aside judgement and decree passed by Trial Court, which makes appeal No.74 of 2011 not maintainable and decree of Trial Court will operate as *res judicata*?

(III) Whether plaintiff failed to prove necessary ingredients of Joint Hindu Family, the property, nucleus in absence of that judgment and decree passed by lower appellate court can be sustained?

(IV) Whether plaintiff failed to prove status of parties as Hindu Undivided Family unity of ownership, fooding, lodging and interest, as such decree can be passed in his favour?

(V) Whether suit as framed is not maintainable without seeking relief of partition and suit is barred by Section 4 of the Partition Act?

(VI) Whether suit is barred by Section 42 of Specific Relief Act?

(VII) Whether status of plaintiff as of licensee, stood revoked by filing written statement and status of plaintiff is that of trespasser?

(VIII) Whether relief of declaration claim in respect of lease/sale-deed dated 15.2.1984/22.10.1984 by way of suit of 1998, in the year 2009 by way of amendment is hopelessly barred by time?

(IX) Whether amendment seeking decree of declaration will relate back to filing of the suit in the year 1998, even then it is barred by time?"

7. Shri Ajay Kumar Singh, learned counsel for the appellants submits that in case the present appeal is heard on the first two questions and they are answered in favour of the appellants, there would not be any necessity to decide other questions which deal with the merits of the case. His submission is that first two questions relate to maintainability of Civil Appeal No. 74 of 2011 in the sense that once no appeal was filed challenging that part of the decree whereby counter claim was decreed by the trial court, the first appellate court had no jurisdiction to dismiss the counter claim.

8. Elaborating his submissions, it is contended that plaintiff-respondent had paid Rs. 700/- as court fees in the suit i.e. Rs. 200/- for the relief of declaration added through amendment and Rs. 500/- for the relief of injunction initially

claimed whereas the defendant-appellants had paid Rs. 4157.50/- as court fees seeking dispossession through counter claim. It is further contended that plaint contained contradictory pleadings and as far as license is concerned, at one place the said status of the plaintiff-respondent was admitted but at another place, plea of adverse possession was raised by him. Submission is that in absence of challenge to the decree drawn by the trial court decreeing the counter claim, the findings recorded on absolute ownership of the appellants would operate as *res judicata* against the plaintiff-respondent and, therefore, the first appellate court had no jurisdiction to reverse the decision in absence of a challenge.

9. In support of his submission that decree drawn in a counter claim is a separate decree giving rise to requirement of raising a challenge by way of a separate appeal, reliance has been placed on judgment of the Supreme Court in **Rajni Rani and another vs. Khairati Lal and others: (2015) 2 SCC 682**. In support of his submission that for want of challenge to the partial decree drawn by the trial court, findings recorded in that part of the decree shall operate as *res judicata*, reliance has been placed upon Supreme Court's judgment in **Premier Tyres Limited vs. Kerala State Road Transport Corporation: 1993 AIR (SC) 1202**.

10. It is also contended that recently requirement of filing separate appeals in a case where two suits or single suit but written statement containing a counter claim is there, this Court has elaborately dealt with the legal proposition in **Second Appeal No. 507 of 2024; Ramnath Singh Vs. Parshuram Singh and others** decided on 14.08.2024.

11. *Per contra*, learned counsel for the respondent submits that the trial court had decided the suit by a composite order dated 05.08.2011 dismissing the suit and decreeing the counter claim, therefore, there was no requirement to file a separate first appeal. As regards challenge to the first appellate court's judgment, it is contended that though the respondent has not filed second appeal challenging that part of the judgment whereby relief of injunction has been denied by the first appellate court, since the first appellate court has dealt with the entire evidence on record and has recorded pure findings of fact to the effect that property in dispute has been purchased from joint Hindu family funds, even in absence of a challenge to the decree drawn in the counter claim and denial to grant a decree of injunction, this Court cannot interfere in the findings of fact based upon proper appreciation of evidence.

12. Having heard learned counsel for the parties, this Court is of the view that in case first two questions are answered in favour of the appellants, decision on other questions would be a futile exercise. Therefore, the Court proceeds to deal with the first two questions.

13. The first question relates to maintainability of a single appeal against the decree drawn by the trial court and the second question is regarding operation of the judgment of the trial court as *res judicata* as far as counter claim is concerned.

14. The Supreme Court, in **Rajni Rani** (*supra*), has elaborately dealt with the provisions of Order 8 Rule 6-A read with Section 2(2) CPC. Reliance was placed upon previous decisions also and it has been held that when a counter claim is decreed, the same amounts to a separate

decree itself as rights of the parties are finally adjudicated. Relevant observations and ratio of the authority are reproduced as under:

"9. To appreciate the controversy in proper perspective it is imperative to appreciate the scheme relating to the counter claim that has been introduced by Civil Procedure Code (Amendment) Act 104 of 1976 with effect from 1-2-1977:

9.1. Order 8 Rule 6-A deals with counter claim by the defendant. Rule 6-A(2) stipulates thus:

"6-A. (2) Such counter claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim."

9.2. Rule 6-A(3) enables the plaintiff to file a written statement. The said provision reads as follows:

"6-A. (3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the Court."

9.3. Rule 6-A(4) of the said Order postulates that:

"6-A. (4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaint."

9.4. Rule 6-B provides how the counter claim is to be stated and Rule 6-C deals with exclusion of counter claim.

9.5. Rule 6-D deals with the situation when the suit is discontinued. It is as follows:

"6-D. Effect of discontinuance of suit.- If in any case in which the defendant sets up a counter claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter claim may nevertheless be proceeded with."

9.6. On a plain reading of the aforesaid provisions it is quite limpid that a counter claim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counter claim shall remain alive for adjudication. For making a counter claim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counter claim. The plaintiff is obliged to file

a written statement and in case there is default the court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counter claim is to avoid multiplicity of the proceedings. When a counter claim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6-A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter claim. The seminal purpose is to avoid piecemeal adjudication. The plaintiff can file an application for exclusion of a counter claim and can do so at any time before issues are settled in relation to the counter claim. We are not concerned with such a situation.

10. In the instant case, the counter claim has been dismissed finally by expressing an opinion that it is barred by principles of Order 2 Rule 2 CPC. The question is what status is to be given to such an expression of opinion. In this context we may refer with profit the definition of the term "decree" as contained in Section 2(2) CPC:

"2. (2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

11. In *R. Rathinavel Chettiar v. V. Sivaraman* dealing with the basic components of a decree, it has been held thus: (SCC pp. 93-94, paras 10-11)

"10. Thus a 'decree' has to have the following essential elements, namely:

(i) There must have been an adjudication in a suit.

(ii) The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.

(iii) Such determination must be a conclusive determination resulting in a formal expression of the adjudication.

11. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant."

12. From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counter claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2 Rule 2 CPC. The claim of the defendants has been negated. In *Jag Mohan Chawla v. Dera Radha Swami Satsang* dealing with the concept of counter claim, the Court has opined thus: (SCC p. 703, para 5)

"5. is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit."

13. Keeping in mind the conceptual meaning given to the counter claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter claim is barred by principles

of Order 2 Rule 2 CPC, it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit.

14. In this context, we may fruitfully refer to a three-Judge Bench decision in *Ram Chand Spg. & Wvg. Mills v. Bijli Cotton Mills (P) Ltd.*⁵ wherein Their Lordships were dealing with what constituted a final order to be a decree. The thrust of the controversy therein was that whether an order passed by the executing court setting aside an auction-sale as a nullity is an appealable order or not.

15. The Court referred to the decisions in *Jethanand and Sons v. State of U.P.*⁶ and *Abdul Rahman v. D.K. Cassim and Sons* and proceeded to state as follows: (*Ram Chand Spg. & Wvg. cases*, AIR p. 1347, para 13)

"13. In deciding the question whether the order is a final order determining the rights of parties and, therefore, falling within the definition of a decree in Section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position however, of the auction-purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the court. Where an application is made to set aside the 689 auction-sale as a nullity, if the court sets it aside either by an order on such an application or *suo motu* the only question arising in such a case as between him and the judgment-debtor is whether the auction was a nullity by reason of any violation of Order 21 Rule 84 or other similar mandatory provisions. If the court sets aside the auction-sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction-sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction-sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a

case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction- sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally determines the rights and liabilities of the parties viz. the judgment-debtor and the auction- purchaser in regard to that sale, as after that order nothing remains to be determined as between them."

After so stating, the Court ruled that the order in question was a final order determining the rights of the parties and, therefore, fell within the definition of a decree under Section 2(2) read with Section 47 and was an appealable order.

16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A court may draw up a formal decree or may not, but if by virtue of the order of the court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

15. **Ramnath Singh** (*supra*) is in fact an authority on maintainability of one or two second appeals in the light of High Court Rules and is not directly applicable in the facts of the present case except that no second appeal has been filed against denial to grant a decree for permanent prohibitory injunction. However, ratio laid down therein need not be elaborated.

16. In view of the above discussions, the first question is answered in favour of the defendant-appellants holding that single appeal against composite decision dismissing the suit and decreeing the counter claim was not maintainable.

17. As far as second question is concerned, the Supreme Court, in **Premier Tyres Limited** (*supra*), has observed as under:

"3. The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned Sr. Advocate appearing on behalf of the appellant. It is urged that Section 11 of the Civil Procedure Code does not apply as such. According to him since both the suits were connected and decided by a common order the issue in neither suit can be said to have been decided in a former suit. Therefore, the basic ingredient of Section 11 of the C.P.C. was not satisfied. The submission derives some support from observations in *Narhari v. Shanker*, AIR 1953 Supreme Court 419, that, 'even when there are two suits it has been held that decision given simultaneously cannot be a decision in the former suit'. But this decision was distinguished in *Sheodan Singh v. Smt. Daryao Kunwar* 1966 SC 1332, as it related to only one suit, therefore, the observations extracted above were not relevant in a case where more than one suit were decided by a common order. The Court further held that where more than one suit were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal was dismissed either as barred by time or abated then the order operated as *res judicata* in other appeals, 'In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suits Nos. 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to *res judicata* in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail'. In *Shri Ramagya Prasad Gupta v. Sri Murli Prasad*, (1974) 2 SCC 266, an effort was made to get the decision in *Sheodan Singh* (*supra*) reconsidered. But the Court did not consider it necessary to examine the matter as the subject matter of two suits being different one of the necessary ingredients for applicability of Section 11 of the C.P.C. were found missing.

4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suits is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment

or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from."

18. The aforesaid ratio laid down in relation to Section 11 of CPC is directly applicable in the present case and, therefore, this Court is not in a position to take a different view of the matter and holds that findings recorded by the trial court decreeing the counter claim would operate as *res judicata*.

19. In view of the above, second question framed by this Court is also answered in favour of the defendant appellants.

20. The other questions relate to bar of limitation concerning the suit in the light of newly added relief by way of amendment, maintainability of suit in the light of Section 4 of the Partition Act, Section 42 of the Specific Relief Act and other aspects. All these questions could arise for adjudication, in case the answers to the first two questions would have gone against the defendant-appellants and once this Court is satisfied that the first appellate court was not justified in dismissing the counter claim in absence of a separate appeal against the decree drawn by the trial court, answering the remaining questions would be an exercise in futility.

21. Consequently, the second appeal is **allowed**.

22. Impugned judgment and order dated 21.11.2013 passed by Learned Additional District Judge, Court No. 5, Varanasi in Civil Appeal No. 74 of 2011 is set aside.

23. The Original Suit No. 389 of 1998 is hereby **dismissed** *in toto* and judgment as well as decree of the trial court dated 05.08.2011 decreeing the counter claim is upheld.

24. Office is directed to remit the record of the courts below to the District Judgeship after preparation of decree or within one month whichever is earlier.

Order Date :- 8.1.2025

K.K.Tiwari