

In the High Court of Punjab and Haryana at Chandigarh

**R.S.A. No. 581 of 2013 (O&M)
Date of Decision: January 27, 2016**

Bhajan Singh

... Appellant

Versus

Jasvir Kaur

... Respondent

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

- 1) Whether Reporters of the local papers may be allowed to see the judgments? **YES**
- 2) To be referred to the Reporters or not? **YES**
- 3) Whether the judgment should be reported in the Digest? **YES**

**Present: Mr. G.P.S. Bal, Advocate,
for the appellant.**

**Mr. Aakash Singla, Advocate,
for the respondent.**

Paramjeet Singh Dhaliwal, J.

CM-14360 and 14362-C-2015

Having heard learned counsel for the appellant and for the reasons recorded in the Civil Misc. applications, same are allowed.

Amended grounds of appeal are taken on record.

RSA No. 581 of 2013 (O&M)

This regular second appeal has been preferred by the appellant/defendant against the judgment and decree dated 14.09.2011 passed by learned Civil Judge (Senior Division), Barnala whereby suit filed by the respondent/plaintiff for possession has been decreed, as well

as, against the judgment and decree dated 04.12.2012 passed by learned Additional District Judge, Barnala whereby appeal preferred by the appellant/defendant has been dismissed.

For convenience sake, hereinafter parties will be referred to as they are arrayed in the Court of first instance.

The detailed facts are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, brief facts relevant for disposal of this second appeal are that plaintiff filed a suit for possession and permanent injunction against the defendant on the ground that Harbans Kaur, wife of the plaintiff, was owner in possession of the land in dispute. She died on 01.04.1994. After her death, plaintiff inherited the land of his wife and became owner in possession of the same. On 15.06.1996, taking benefit of the old age of the plaintiff, defendant took forcible possession of the land in his absence. The defendant without notice to the plaintiff and with malafide intention and in connivance with revenue officials got corrected khasra girdwari of the suit land in his name, alleging himself to be owner of the suit land. Plaintiff requested the defendant to hand over possession, but he refused to do the same. Hence, suit was filed.

Upon notice, defendant appeared and filed written statement along with counter claim taking various preliminary objections. On merits, it is averred that during her life time, Harbans Kaur handed over possession of the land to the defendant as owner in the presence of Ravi Singh son of Nand Singh and Sher Singh son of Inder Singh in the year 1990 and since then, defendant is owner in possession of the same. Later

on, the ownership of the suit land was transferred to the name of the Government of Punjab. Harbans Kaur has no right or title in the suit land.

On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

- “1. *Whether the plaintiff is entitled for possession of the property in dispute as prayed for? OPP*
2. *Whether the plaintiff is entitled for permanent injunction as prayed for? OPP*
3. *Whether the plaintiff has no concern with the property in dispute? OPD*
4. *Whether the mutation no. 9114/A sanctioned, in favour of plaintiff is null and void and is not binding upon the rights of defendant? OPD*
5. *Whether defendant is entitled for counter claim, as prayed for? OPD*
6. *Whether the plaintiff has no locus standi and cause of action to file the suit? OPD*
7. *Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD*
8. *Whether the suit of the plaintiff is barred by time of limitation? OPD*
9. *Whether the defendant is entitled for special compensatory costs u/s 35A CPC? OPD*
10. *Relief.?*

The Court of first instance, after perusal of the evidence led by the parties, decreed the suit and dismissed the counter claim filed by the defendant vide judgment and decree dated 14.09.2011. Against that, defendant preferred an appeal, which has been dismissed by the first appellate Court vide judgment and decree dated 04.12.2012. Hence, this

second appeal.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the appellant submitted that substantial questions of law formulated in para no. 4 of the amended grounds of appeal, arise for consideration in this second appeal, which read as under:-

- “i) Whether the judgments and decrees passed by the learned Courts below are illegal and perverse?*
- ii) Whether the findings of the learned lower Courts are suffering from in apparent perversity as the face of it being contrary to law and facts on record?*
- iii) Whether the impugned judgments and decrees do not suffer an appellant, illegality and perversity because of ignoring the material piece of evidence have been direct impact on decision of the case?*
- iv) Whether the impugned judgments and decrees can be allowed to be sustained especially when the same are result of consideration of irrelevant fact and non-consideration of relevant fact?*
- v) Whether the learned Courts below have committed serious irregularities and illegalities, in decreeing the suit of the respondent/plaintiff.*
- vi) Whether the findings recorded by the learned lower Courts are perverse in nature?*
- vii) Whether the learned lower Courts have misread and misconstrued the evidence on the file and have failed to consider the material evidence on the file and thus have committed serious illegality?*
- (ia) Whether it is actually the revenue Courts which have the jurisdiction to deal with the entries of khasra girdawaris and their entries and that the revenue record in such situation*

acquires the role of a civil Court for adjudicating such matter?

- (iia) Whether the jurisdiction of civil Courts are barred from dealing with issues of khasra girdawari entries of khasra girdawari in the revenue record?*
- (iiia) Whether without challenging the entries of khasra girdawaris and getting them set aside despite their sustenance and existence on record, suit for possession before the Civil Judge is maintainable after a long delay?*
- (iva) Whether a Civil Judge can pass orders/judgment granting possession to a party as against the entries of khasra girdawari in the revenue record and without the said khasra girdawari being set aside?*
- (va) Whether the sole procedure of law as envisaged to be followed by the plaintiff was to file/challenge khasra girdawari before the revenue Courts?*
- (via) Whether without challenging the khasra girdawari the concerned person can claim/seek possession of the land?*
- (viia) By filing suit barred by jurisdiction and by not challenging khasra girdawari, whether the plaintiff has waived his right as per statutory provisions of law?*
- (ixa) Whether the issue in the present matter, is barred by limitation?*
- (xa) Whether the suit is maintainable in the present form?"*

Learned counsel for the appellant-defendant contended that the findings recorded by both the Courts below are against law, without appreciation of facts and evidence on record, as such, are not sustainable in the eyes of law. Therefore, the impugned judgments and decrees are liable to be set aside.

On the other hand, learned counsel for the respondent-plaintiff

contended that both the Courts below have rightly decreed the suit. The learned counsel for the plaintiff further contended that concurrent findings of fact have been recorded by both the Courts below. Findings recorded by the Courts below are based on documentary evidence. Learned counsel for the respondent-plaintiff further contended that defendant did not prefer two appeals challenging the decree in the suit and dismissal of counter-claim meaning thereby that he has accepted the impugned judgment and decree in counter-claim. Since counter-claim is just like an independent suit, two appeals ought to have been filed. In absence of same, principle of *res judicata* will apply. Reference has been made to the decision rendered by the Hon'ble Supreme Court in ***Harbans Singh and others vs. Sant Hari Singh and Ors., AIR 2009 SC 1819*** .

I have given my thoughtful consideration to the contentions raised by learned counsel for the parties and with the assistance perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded concurrent findings of fact. The findings of fact recorded by the first appellate Court are as under:-

“10. It is admitted case of the defendant that Harbans Kaur was owner in possession of the land in dispute. Although it has been alleged by the defendant that she transferred possession of the suit land in his favour during her life time in the year 1990 and admitted him owner but no document of transfer of ownership has been placed on record. Land in dispute is admittedly of the value of more than Rs.100/- and thus title of the suit land could not be transferred by Harbans Kaur in favour of defendant without registered document.

During his cross examination it was admitted by the defendant that during her life time Harbans Kaur remained in possession of the disputed land. He also admitted that Harbans Kaur was issueless and after her death her property has been inherited by the plaintiff being her husband. He also admitted that he was not having any document of change of ownership in his possession. He admitted that no document was executed by Harbans Kaur at the time of delivery of possession to him. He also admitted that at the time of entry of mutation on the basis of inheritance in favour of the plaintiff, he did not raise any objection and such inheritance has not been challenged by him before any forum. DW1 Ravi Singh, in whose presence the alleged possession with ownership was passed on to the defendant, also admitted in his cross examination that Harbans Kaur wife of Hardev Singh was owner in possession of the disputed land during her life time. He admitted that she died issueless on 1.4.1994. Once Harbans Kaur remained in possession of the land in dispute, till her death on 1.4.1994, there was no occasion for the defendant to acquire possession from her in the year 1990. DW1 Ravi Singh further admitted that Hardev Singh has inherited the property of Harbans Kaur and has become owner of the same. Although he deposed that State of Punjab acquired the land in the year 1990, but he could not produce any document of such acquisition. He further admitted that no document of change of possession and ownership was executed by Harbans Kaur in favour of the defendant. It was also admitted that at the time of death of Harbans Kaur, plaintiff was more than 90 years of age. Even otherwise permissive possession could be acquired by the defendant either on the basis of lease, gift, sale or relinquishment but the defendant has not propounded any of the aforesaid modes of transfer of possession. Defendant has also not raised any

plea of adverse possession. So even if for the sake of arguments, it is considered that Harbans Kaur handed over possession of such land, of which she was admittedly owner, to the defendant during her life time and such possession is not with the defendant in any of the legal rights, plaintiff, who has inherited her property, is entitled to get back possession from the defendant at any time because no plea of adverse possession has been taken by the defendant. The learned trial Court rightly observed that no prudent man will hand over possession of her 36 kanals 3 marlas of land to any person without any consideration or without any writing more particularly when defendant was not related to her. Hence, defendant has been rightly declared to be in illegal possession of the property in dispute. Mere entry of khasra girdwari in favour of the defendant does not cloth him with any right to retain possession without any right. So once the plaintiff has been proved to be owner of the suit land and further when there is mutation no. 9111/A according to which Punjab Government has transferred ownership of the suit property in favour of Harbans Kaur and further when mutation of inheritance was sanctioned in favour of the plaintiff after the death of Harbans Kaur, defendant cannot resist the delivery of possession to the plaintiff because of being in illegal possession of the land in dispute. Hence the learned trial Court rightly decreed the suit of the plaintiff. Finding no merit in this appeal, it is dismissed with costs.....”

In view of the submissions made by the learned counsel for the parties, following substantial questions of law arise for consideration:-

- “i) What status is to be assigned to judgment in counter-claim?*
- ii) Whether appellant-defendant was required to file two appeals before the first appellate Court as well as this Court. In case one appeal is filed will the principle of res-judicata apply?”*

Re: Question No.1:

To appreciate the controversy, it is imperative to appreciate the scheme relating to the counter-claim that has been introduced by CPC (amendment) Act 104 of 1976 with effect from 1.2.1977. Order 8, Rule 6A deals with counter-claim by the defendant. Rule 6A(2) stipulates thus:-

“(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.”

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

“(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.”

Rule 6A(4) of the said Rule provides that the counter-claim shall be treated as a plaint and governed by rules applicable to a plaint. Rule 6B provides how the counter-claim is to be stated and Rule 6C deals with exclusion of counter-claim. Rule 6D deals with the situation when the suit is discontinued. It is as follows:-

“R. 6D. 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.”

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. The purpose

of counter-claim is to avoid multiplicity of the proceedings. When counter-claim of the defendant is dismissed on adjudication, it forecloses the rights of the defendant subject to appeal and separate judgment is required to be pronounced under Rule 6A(2) by the Court with respect to counter claim. Hon'ble Supreme Court in Jag Mohan Chawla and another vs. Dera Radha Swami Satsang and others, (1996) 4 SCC 699, dealing with the concept of counter-claim has held as under:-

“... The counter-claim expressly 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.”

Hon'ble Supreme Court in Rajni Rani and another vs. Khairati Lal and others, (2015) 2 SCC 682, has held as under:-

“17. 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.”

From the above, it is clear that counter claim is an independent suit and in this regard, separate court fee is required to be paid. The Court may draw up a formal decree or may not, but if by virtue of the judgment of the Court, the rights have finally been adjudicated, it would assume the status of a decree. In the present case, the suit has been decreed and counter-claim has been dismissed, but the defendant(appellant before this Court), filed one appeal before the first appellate Court. Thus, the suit and counter-claim are to be treated as two suits and if two suits, filed by the parties against each other pertaining to the same property/subject matter involving same questions were heard and decided by the Court by a common judgment, then the status of judgment in the counter-claim would be treated as independent decree. In view of the discussion above a appeal filed against one of the decree would not be sustainable and other decree which remains unchallenged will operate as res- judicata . So the question is answered accordingly.

Re: Question No.2:

As discussed above, the counter-claim is like a separate suit and separate appeal was required to be filed. In the absence of same, the principle of res-judicata will apply, Hon'ble Supreme Court in **Harbans Singh and others vs. Sant Hari Singh and others, 2009(3) RCR (Civil) 862**, has held as under:-

“13. Both the suits, as noticed hereinbefore, were consolidated. They were heard together. The disputes between the parties to both the suits were common. The issues raised therein also were common. The Managing Committee filed a suit for declaration that it was in management and control of the said Gurudwara Sahib and was entitled thereto as also a declaration that the respondent was not a Mohtmim of the said Gurudwara and, thus, not entitled to manage its affairs. As the said decree had attained finality, it is binding on the appellants also. Appellants, therefore, in law, were required to prefer another Second Appeal against the judgment and decree passed in the said suit. The principle of res judicata in the aforementioned fact situation, in our opinion, has rightly been applied by the High Court.

14. Section 11 of the Code of Civil Procedure reads thus:

"Section 11 - Res judicata.-- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

15. In Premier Tyres Limited vs. Kerala State Road Transport Corporation [1993 Suppl. (2) SCC 146], this Court held:

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

5. Mention may be made of a Constitution Bench decision in Badri Narayan Singh v. Kamdeo Prasad Singh. In an election petition filed by the respondent a declaration was sought to declare the election of appellant as invalid and to declare the respondent as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed, "We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not 9 have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect."

In Union of India vs.V. Pundarikakshudu & sons & anr.

[(2003) 8 SCC 168], this Court held:

"31. In this case the District Judge as also the High Court of Madras clearly held that the award cannot be sustained having regard to the inherent inconsistency contained therein. The arbitrator, as has been correctly held by the District Judge and the High Court, committed a legal misconduct in arriving at an inconsistent finding as regards breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable being self-contradictory."

As no appeal was preferred by the Union of India while accepting the award made in favour of the first respondent, it had attained finality and, thus, the principle of res judicata was found to be applicable. It was opined:

"35. As the appellant failed to get that part of the award which was made by the arbitrator in favour 10 of the first respondent set aside, the basic conclusion of the High Court cannot be faulted. The Court upon setting aside the whole award could have remitted back the matter to the arbitrator in terms of Section 16 of the Act or could have appointed another arbitrator, but at this juncture no such order can be passed as the award in part has become final."

The said decision applies to the facts of the present case also."

This Court in **Sukhdev Singh vs. Baldev Singh and others, 2014(4) PLR 651**, has held as under:-

*“13. Moreover, the plaintiff has not preferred separate appeal challenging the acceptance of counter-claim of defendant no.1 meaning thereby that he has accepted the impugned judgment. Since counter-claim is just like an independent suit, two appeals ought to have been filed. In absence of same, principle of res judicata will apply. Reference can be made to the decision rendered in **Harbans Singh and others vs. Sant Hari Singh and others, AIR 2009 SC 1819** by the Hon'ble Supreme Court.”*

In the present case, although one decree has been framed by the Court of first instance, but the suit as well as counter-claim have been adjudicated by common judgment. Issue no 5 is regarding counter-claim which has been decided against the defendant-appellant. Meaning thereby the counter-claim has been dismissed. In view of law laid down in the judgments referred to above, in the present case two appeals were required to be filed before the first appellate Court as well as before this Court. Therefore, principle of res-judicata will apply. Hence, question no.2 is answered accordingly.

Identical questions of law have been decided by this Court vide judgment dated 12.01.2016 passed in **RSA No. 96 of 2016 titled “Suresh Kumar vs. Maala Ram”** and judgment dated 25.01.2016 passed in **RSA No. 213 of 2015 titled “Baldev Singh vs. Rakesh Kumar and others”**.

Furthermore learned counsel for the appellant has failed to show that the findings of fact recorded by both the Courts below are

perverse or illegal or based on misreading, non-reading or mis-appreciation of the material evidence on record.

In view of concurrent findings of fact recorded by both the Courts below as well as on account of the fact that two appeals were required to be filed before first appellate court and this court, I do not find any illegality or perversity in the impugned judgments and decrees passed by both the Courts below.

No other points have been urged.

Dismissed. No costs.

January 27, 2016
vkd

[Paramjeet Singh Dhaliwal]
Judge