

In the High Court of Punjab and Haryana at Chandigarh

**R.S.A. No. 213 of 2015 (O&M)
Date of Decision: January 25, 2016**

Baldev Singh

... Appellant

Versus

Rakesh Kumar and others

... Respondents

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

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

**Present: Mr. Vivek K. Thakur, Advocate,
for the appellant.**

Paramjeet Singh Dhaliwal, J.

CM-554-C-2015

Having heard learned counsel for the appellant and for the reasons recorded in the Civil Misc. application, same is allowed. Delay of 141 days in re-filing the appeal is condoned.

RSA No. 213 of 2015

This regular second appeal has been preferred by the appellant/plaintiff against the judgment and decree dated 12.09.2011 passed by learned Additional Civil Judge (Senior Division), Kapurthala whereby suit filed by the applicant/plaintiff for declaration and permanent injunction has been partly decreed and counter-claim filed by defendant nos. 1 and 2 has been partly decreed, as well as, against the judgment and decree dated

11.12.2013 passed by learned Addl. District Judge, Kapurthala, whereby appeal preferred by the appellant/plaintiff 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 declaration and permanent injunction on the ground that plaintiff and defendant no.3 have become owner of the land measuring 173K-3M situated at Pir Choudhary Road, within the revenue estate of Kapurthala, on the basis of a court decree dated 04.12.1980. An oral partition took place between them which was put in action and a mutation in this regard was sanctioned. Plaintiff became owner of 62K-4M land, whereas defendant no.3 became owner of 59K-18M land and remaining 51K-1M land remained joint. The plaintiff had been serving in Indian Army since the year 1970 upto the year 1996. On account of his duties, he could not maintain and look after the land, so he gave a power of attorney to defendant no.3. Defendant no.3 has sold more land than his share in the joint land. After return, the plaintiff demanded partition, but no convincing reply was given by defendant no.3. Thereafter, plaintiff got a deed registered on 13.11.1997 cancelling the general power of attorney dated 19.06.1981, besides giving a public notice in the newspaper in this regard. The plaintiff came to know that defendant no.3 through defendant no.4 as an attorney, has sold 15 marlas area out of khasra No. 10791/4844 (16-4) through sale deed dated 19.02.1999. As per jamabandi for the year 1995-96, share of defendant no.3 in khasra no. 10791/4844, was 2K-4M out of 16K-4M and that of the

plaintiff was 5K-12M. Defendant no.3 had already sold an area measuring 13-13 ½, which is in excess to an area measuring 19-1/2 marlas. He had no right to sell the land in excess of his share. Hence, suit was filed.

Upon notice, defendants no. 1 and 2 contested the suit by taking various preliminary objections. On merits, it has been pleaded that there was no oral partition effected between the parties, as alleged. Defendant no.3 was in actual possession of the said plots and he has delivered the possession to defendants no.1 and 2 and they are in possession of the same, since then. After execution of sale deeds in their favour, defendants no.1 and 2 have constructed boundary wall and have installed a gate. The joint land of the plaintiff and defendant no.3 was not of equal value. Defendant no.3 filed separate written statement almost on the lines of written statement filed by defendants no.1 and 2. Defendants no. 1 and 2 also filed counter claim claiming that having purchased specific khasra numbers to the extent of 18-1/2/1775 share vide sale deeds dated 19.02.1999 and 30.06.2000, they have become co-sharer in the entire land of joint khatta of plaintiff and defendant no.3 and that mutation no. 23025 has wrongly been termed as “Nazarsany” without notice to them.

Upon notice, plaintiff has contested the counter claim on the ground that defendant no.3 was not having an inch of land to his credit in Khasra No. 4844(16-4) as he has already disposed of the area more than his entitlement and had ceased to be a co-sharer/co-owner in the said khasra number.

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

- “1. Whether the sale deed dated 19.02.1999 is illegal, null and void? OPP
2. Whether the plaintiff is entitled to the relief of declaration, he has prayed for? OPP
3. Whether the plaintiff is entitled to the relief of possession, he has prayed for?
4. Whether the plaintiff is entitled to the relief of permanent injunction, he has prayed for? OPP
5. Whether the suit is not maintainable in the present form? OPD
6. Whether the plaintiff has got no cause of action or locus standi to file the present suit? OPD
7. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD
8. Whether the plaintiff has not come to the court with clean hands, if so, its effect? OPD
9. Whether the suit is bad for non-joinder of necessary parties? OPD
10. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD
11. Whether the suit is filed by the plaintiff in collusion with the defendant no.3? OPD 1 & 2
12. Whether the suit is within limitation period? OPP
13. Whether the defendants no.1 and 2 are entitled to the relief of declaration, they have prayed for through counter claim? OPD 1 and 2
14. Whether the defendants no.1 and 2 are entitled to the relief of permanent injunction, they have prayed for? OPD 1 and 2
15. Relief.”

The Court of first instance, after perusal of the evidence led by the parties, partly decreed the suit vide judgment and decree dated 12.09.2011 and also partly decreed the counter claim filed by defendants no.1 and 2. Against that, plaintiff preferred an appeal, which has been dismissed by the first appellate Court vide judgment and decree dated

11.12.2013. Hence, this second appeal.

I have heard learned counsel for the appellant.

Learned counsel for the appellant submitted that substantial questions of law formulated in para no. 10 of grounds of appeal, arise for consideration in this second appeal, which are as under:-

- “i) Whether respondents no.1 and 2 are entitled to remain in possession of specific portion of the land, whereas the sale deed, on the basis of which they are claiming possession, has already been declared as null and void?*
- ii) Whether respondents no.1 and 2 can assert the exclusive ownership of the specific portion of the land?*
- iii) Whether the defendants/respondents no.1 and 2 can be held as co-owners whereas the sale deed on the basis of which they have asserted their right, has already been declared as null and void?*
- iv) Whether the judgment passed by both the Courts below in not decreeing the suit qua possessio is against the law?”*

Learned counsel for the appellant contended that the impugned judgments and decrees passed by both the Courts below are the result of misreading of evidence on record. Learned counsel further contended that both the Courts below have failed to take into consideration the fact that at this stage, the respondents cannot be held to be co-sharers as the sale deed executed in their favour has already been declared null and void. Therefore, the impugned judgments and decrees are liable to be set aside.

I have considered the contentions raised by learned counsel for the appellant and perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded findings of fact with regard to the existence of passage. The Court of first instance recorded the following findings:-

“42. The sale deed dated 19.2.1999 has been proved on record. Attested copy of the same is Ex.P2, PW2/A and D14 on record. Perusal of the same reveals that 15/324 share in Khata No. 1276/1926, Khasra No. 10791/4844 (16-4) measuring 15 Marlas stood sold with specific boundaries in the year 1999 when the jamabandi for the year 1995-96 was in practice. Copy of the jamabandi for the year 1995-96 is Ex.PW4/B and Ex.D6 on record. Perusal of the same reveals that defendant no.3 was having 14/214 share in the land. He had sold 15/324 share. The sale deed do not mention the year of jamabandi as per which the said share was sold. On the other hand the Sub Registrar concerned has also failed to bother as to how a sale of 15 Marlas land being 15/324 share in a particular khasra number with a particular boundaries was got sold through the said sale deed. In that sense the sale deed is illegal, null and void and it does not confer any right, title or interest to defendants no.1 and 2 over the specific khasra number sold to them by defendant no.3 with specific boundaries. The said sale deed will amount to be a deemed sale of 15 Marlas area as a share of defendant no.3 in the entire joint khewat, subject to its determination, and defendants no.1 and 2 through the said sale deed would be deemed to be the co-sharers to the extent of that share, if they derived, subject to the conclusion of the partition proceedings regarding the suit land, besides the other joint land in between the plaintiff and defendant no.3, may be other co-sharers also.

43. In these facts and circumstances, in the light of said discussion and observations, this court is of an opinion that the sale deed dated 19.2.1999 is illegal, null and void that it does not confer any right, title or interest in the defendants no.1 and 2, in exclusion of others, including the plaintiffs, in the particular area of a particular khasra number as mentioned in the sale deed. The sale would amount to be the sale of a share by defendant no.3 in the joint khewat to defendants no.1 and 2,

subject to its availability, which could only be determined in the partition proceedings, admittedly pending adjudication in between the parties. The plaintiff is entitled to the declaration to that extent. Accordingly, issues no.1 and 2 are therefore decided in favour of the plaintiff and against the defendants.

44. As far as the possession of land is concerned, since the defendants no.1 and 2 are in possession of the suit land on the basis of a sale deed dated 19.2.1999 which is deemed to be a share in the entire joint land, till the completion of the partition proceedings they are entitled to remain in its possession, but, not beyond the right, title and interest of defendant no.3 as was at the time of the sale deed dated 19.2.1999, in partition proceedings pending adjudication separately. The issue no.3 is accordingly decided against the plaintiff and in favour of defendants no.1 and 2.

45. As far as the question of its alienation by defendants no.1 and 2 is concerned, as held above they have not derived any right, title or interest in the suit land on the basis of the sale deed dated 19.2.1999. Therefore, they are restrained from alienating it further in the same manner as specific fee land in a particular khasra number, without there being a partition. Therefore, defendants no.1 and 2 are restrained from alienating the suit land in the manner in which they have purchased it vide sale deed dated 19.2.1999. Accordingly, issue no.4 is decided in favour of the plaintiff and against the defendants no.1 and 2.

48. As far as the right of defendants no.1 and 2 is concerned they have merely stepped into the shoes of defendant no.3 as was on the date of sale deed dated 19.2.1999. The right, title and interest of defendant no.3 is pending adjudication in a separate suit of partition of the property pending in between the parties. Till the assignment of a right of defendant no.3 in the suit land, defendants no.1 and 2 cannot be declared having any specific right. In case it will be concluded in the partition

proceedings that defendant no.3 had a 15 marlas land to his credit as a co-sharer in the entire joint khewat on 19.02.1999 capable to be sold further, the defendants no.1 and 2 will derive the said interest, right and title automatically. Otherwise they would be left with no right, title and interest to excess to what their vendor defendant no.3 was having on 19.2.1999. At present they can be declared as deemed co-sharers in the entire joint khewat to the extent of 15 marlas subject to the ascertainment of right, title and interest of defendant no.3 in the partition proceeding pending trial separately. Therefore, issue no.13 is decided accordingly in favour of the defendants no.1 and 2 and against the plaintiff.

49. As far as the relief of permanent injunction to defendants no.1 and 2 is concerned, they are the wrong doer, who have purchased a share through an illegally executed/registered sale deed. Since their status is of a deemed co-sharer, subject to establishment of a right of their vendor defendant no.3 in the partition proceedings, they cannot ask an injunction against an established co-owner plaintiff Baldev Singh. Therefore, they are not entitled to the relief of permanent injunction they have prayed for. Accordingly, issue no.14 is decided against the defendants no.1 and 2 and in favour of the plaintiff.”

The Court of first instance, thus, partly decreed the suit and also partly decreed the counter claim. The plaintiff filed one appeal against the judgment and decree of Court of first instance. The first appellate Court dismissed the appeal.

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

- “i) What status is to be assigned to a partly allowed counter-claim?*
- ii) Whether appellant-plaintiff was required to file two appeals before the first appellate Court as well as before 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 counterclaim 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. Rules 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 counterclaim, 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, suit as well as counter-claim have been partly allowed, but the plaintiff (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 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 separately determined the rights in the suit and counter-claim. The costs have also been assessed separately for the suit as well as counter-claim. In view of law laid down in the judgments referred above, in the present case two appeals were required to be filed before the first appellate Court as well as before this Court. Therefore, the principles 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”**.

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 in limine. No costs.

January 25, 2016
vkd

[Paramjeet Singh Dhaliwal]
Judge