

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.274 of 2002

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1. Smt.Kishori Devi, wife of Srilal Babu
 2. Lal Babu Gold Smith @ Lal Babu Prasad Shwarnakar
 3. Jugal Gold Smith (Swarnakar) both sons of Late Laxmi Gold Smith, resident of Chauk Bazar Sation Road, Town P.S., P.O. and District Siwan
- Defendant..... Respondent

.... Appellants

Versus

Rameshwar Prasad, son of Sheo Prasad, Goldsmith, resident of Mohalla Chakbazar, Station Road, P.S. Town P.S. P.O. and District Siwan

..... Plaintiff Appellant

.... Respondents

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Appearance :

For the Appellant/s : Mr. Mungeshwar Prasad Sinha, Sr. Advocate
Mr. Uma Shankar Verma
Mr. Vinod Kumar Mishra

For the Respondent/s : Mr. Binod Kumar Singh
Mr. Umesh Prasad Singh

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 24-07-2017

Heard Mr. Mungeshwar Prasad Sinha, learned Senior Counsel appearing for the appellants, and Mr. Binod Kumar Singh, learned Counsel for the respondent.

2. The defendants are the appellants in this appeal against the judgment and decree of reversal granting the decree to the plaintiff as prayed. The material facts for consideration of the submissions on behalf of the parties are that the plaintiff-respondent filed T.S. No. 361 of 1979 for declaration that he was tenant of the suit shop and the defendants had no right to forcefully dispossess him from the suit shop. The defendant-appellants filed their written statement contesting the assertion and the relief as prayed by the plaintiff and further filed a counter claim



praying for ejectment of the plaintiff from the suit shop asserting that he was in illegal possession of the same. The case of the plaintiff, in short, was that the plaintiff had been the tenant in the suit shop from before the purchase by the defendants and he had been in occupation of the same as tenant of the vendor of the defendants. To the contrary, the case of the defendants was that the plaintiff had been engaged by them as a labourer in the suit shop, and with mala fide motive he has started claiming himself to be the tenant of the suit shop under the defendants.

3. The trial court after considering the pleadings and evidence of the parties returned the finding that the plaintiff had failed to establish his status as tenant in possession of the suit shop. After recording the findings in favour of the defendants accepting their case, as made out in the counter claim, the suit was dismissed and the counter claim was decreed directing the plaintiff to vacate the suit shop.

4. The plaintiff filed T.A. No. 41 of 1993 against the judgment and decree passed by the trial court. The appellate court by the impugned judgment and decree has allowed the appeal and set aside the judgment and decree of the trial court holding that the plaintiff is the tenant of the defendant Kishori Devi and further holding that the counter claim of the defendant has no merit.

5. This appeal has been admitted for hearing on the following substantial question of law:-

“Whether the first appellate court should consider the reasonings and evidence of the trial court in deciding the appeal?”

6. At the outset Mr. Sinha, learned Senior Counsel for the



appellants, has submitted that another question of law in the facts and circumstances of the case also arises for consideration pertaining to the bar of res judicata on the basis that no separate appeal was filed by the plaintiff-respondent in the court below against the judgment and decree passed in the counter claim. It has been contended that a decree passed on a counter claim is appealable independently in accordance with law after payment of requisite court fee but in the present case only one appeal has been filed apparently against the decree dismissing the suit because admittedly no separate court fee for appeal against the decree of counter claim has been paid by the appellant in the court below. The learned Senior Counsel has placed strong reliance on the decision dated 7.2.1997 passed by the Madras High Court in **Vediammal & others vs. M. Kandasamy and others** and produced a web copy of the said decision before the Court wherein equivalent citation has been mentioned as **1997(IMLJ) 529**.

7. After considering the submissions on behalf of the parties and in the facts and circumstances of the case this Court finds substance in the submission on behalf of the appellants and accordingly following additional substantial questions of law are framed in this appeal for consideration:-

- (i) Whether a decree granting relief to the defendants in the counter claim is separately appealable or a composite appeal is maintainable against the judgment and decree of the trial court by the plaintiff whereby the suit has been dismissed but the counter claim has been decreed?



(ii) Whether non filing of the appeal against the decree passed in the counter claim in accordance with law and procedure would attract the bar of *res judicata* in the appeal filed only against the judgment and decree dismissing the suit?”

8. Mr. Sinha, has mainly raised two contentions. Firstly, it has been submitted that absence of appeal against the decree passed in the counter claim would attract the bar of *res judicata* in the appeal filed only against the decree passed in the suit on the original claim. It has been next submitted that even otherwise also the findings by the appellate court below suffers from non consideration of evidence and therefore not sustainable especially in a case of reversal of the findings of the trial court. Learned Senior Counsel has elaborately placed the pleadings and the judgments of both the courts below to substantiate his submissions.

9. Mr. Singh, learned Counsel appearing for the respondent, however, has contended that in view of the provisions as contained in Order VIII Rule 6A(2) the Court has been empowered to pronounce a final judgment in the same suit both on the original claim and on the counter claim and in that view of the matter no separate appeal is required to be filed by the person aggrieved by the decree in the counter claim. Elaborating his submissions, it has been contended that admittedly only one decree has been prepared in the suit and as such also there was no scope or occasion for the plaintiff-respondent to file another appeal. Reliance has been placed in support of this contention on the decision in the case of ***Pampara Philip vs. Koorithottiyil Kinhimohammed AIR 2007 Kerala 69***. It has been next submitted that



the appellate court below has taken into notice the evidence adduced by both parties which fact is apparent from the impugned judgment and therefore the same does not suffer from non consideration of evidence It has also been faintly submitted, in reply to submissions on behalf of the appellant, that a counter claim can be made only in a money suit and, as such, the counter claim filed by the defendant-appellants was not maintainable.

10. After considering the submission and perusal of the judgments of both the courts below as well as the materials on record it is pellucid that the plaintiff-respondent filed the suit for declaration of his status as tenant in possession of the suit shop. The defendants filed their counter claim in the suit seeking a decree of ejectment alleging illegal possession of the plaintiff-respondent over the suit shop. It is also transparent from the trial court judgment that both the suit and the counter claim were heard by the trial court in accordance with law and the judgment and decree was passed whereby the suit was dismissed and the counter claim was allowed. There is no dispute to the fact that only one appeal was filed by the plaintiff-respondent against the said judgment and decree. It is also manifest from the judgment of the trial court that besides granting the decree as prayed in the counter claim, the defendant-appellants were also held entitled to damages against the plaintiff-respondent @ Rs. 50/- per month.

11. The legal nodus as raised in this appeal regarding appealability of a final order disposing of a counter claim in the suit came up for consideration by the apex court in ***Rajni Rani & anr. Vs. Khairati Lal & ors. (2015) 2 SCC 682*** and their lordships have ruled as follows:-



“12. On a plain reading of the aforesaid provisions it is quite limpid that a counterclaim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit dismissed, counterclaim shall remain alive for adjudication. For making a counterclaim entertainable by the court, the Defendant is required to pay the requisite court fee on the valuation of the counterclaim. 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 counterclaim put forth by the defendant as it has an independent status.....
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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 counterclaim. The seminal purpose is to avoid piecemeal adjudication.”

“17. 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 counterclaim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counterclaim. 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.....”

(emphasis supplied).

12. In view of the aforesaid dictum of the apex court the reliance placed on behalf of the respondent in the decision in the case of **Pampara Philip** (supra) in support of the contrary stand cannot be countenanced.

13. The issue of maintainability of a composite appeal in case of dismissal of the suit and the counter claim in view of the principle as laid down in Rajani Rani (supra) has been considered by Himachal Pradesh High Court in S.A. No. 140 of 2006 (**Kedar Singh Vs. HPMC Limited**) in the decision dated 6.12.2016. The issue in that case was almost identical and it has been held as follows:-

“38. After perusing the aforesaid judgment by the Hon’ble Apex Court this Court need not to elaborate further on the issue at hand because Hon’ble Apex Court has categorically held that if by virtue of order of the court rights have finally been adjudicated, it would assume the status of decree. Hon’ble Apex Court has also stated that court may or may not draw a final



decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by the trial court which has the status of decree and challenge to the same has to be made before the appropriate forum where the appeal could lay by paying requisite fee.”

“39. Accordingly, in view of the detailed discussion made hereinabove as well as the law laid down by Hon’ble Apex Court, this Court sees no force in the contention put forth on behalf of the Counsel representing the appellant-defendant that in absence of specific decree drawn by the learned trial court at the time of dismissal of their counterclaim defendant could not file separate appeal”.

“44. Consequently, in view of the detailed discussion made hereinabove, this Court is of the view that the learned 1st appellate court erred in entertaining the composite appeal having been preferred on behalf of the appellant/defendants laying challenge therein to the judgment passed by the learned trial court decreeing the suit of the plaintiffs as well as dismissing the counterclaim preferred on behalf of the appellant/defendant. In view of the latest law laid down by Hon’ble Apex Court as well as the provisions contained in the law as discussed above, the



appellant/defendant being aggrieved with the dismissal of the counterclaim ought to have filed separate appeal by affixing separate court fee and composite appeal, as has been preferred in the present case, was not maintainable.”

14. In addition to the aforesaid judicial pronouncements, it would also be fruitful here to take into notice the decision of the Madras High Court in **Vediammal** (supra) strongly relied upon on behalf of the appellants. In that case the suit was dismissed in part but the counterclaim was allowed with regard to the claim of the defendant. The plaintiff filed an appeal before the appellate court which concurred with all the findings of the trial court. The plaintiff thereafter preferred second appeal before the High Court where the issue of bar of *res judicata* in the facts and circumstances was raised as preliminary contention. After examining the authoritative pronouncements on the ambit, scope and nature of the counterclaim it has been held:-

“27. From the above discussions, the following principles emerge:

A counter-claim is really a suit, though the same is taken in the written statement. Just as a suit is filed by the plaintiff, defendant seeks a relief against the plaintiff on a cause of action which he has against the plaintiff. It is an independent cause of action which could also be agitated in a separate suit. It is to avoid multiplicity of proceedings that the defendant is given liberty to file a counter-claim and get adjudication.....”



“29. If the counter-claim is treated as a suit, and the same is disposed of by a common judgment, and if one of the judgments is not appealed against, the principle of res judicata has to be applied. For the definition of ‘former suit’ we need look into only Explanation 1 to Section 11 of the Code of Civil Procedure. If the decision in one suit has become final in which the issue which has to be decided in appeal was heard and finally decided, the connected suit cannot be appealed against, for the same is barred by res judicata

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I need only refer to a very recent decision of the Supreme Court reported in **Premier Tyres Limited v. Kerala State Road Transport Corporation AIR 1993 SC 1202**. In that case their Lordships considered a similar question in paragraph 3 onwards which reads thus:-

The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned Senior 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 that, veven 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](#) 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 suits 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 Suit 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.

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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. Mention may be made of a



Constitution Bench in Badri Narayan Singh v. Kamdeo Prasad Singh.

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Thus the finality of finding recorded in the connected suit, due to non-filing of appeal, precluded the court from proceeding with appeal in other, suit.

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15. After considering the above judicial pronouncements and the principles laid down therein, there is no escape from the conclusion that a counter-claim filed in a suit has to be tried as a cross suit with all legal implications and consequences and the order passed in such a counter claim has to be appealed separately in accordance with law and procedure. In the present case, admittedly, no separate appeal was filed by the plaintiff-respondent against the decree of the counter-claim of the defendants which attained finality thereby and the said fact was potent enough to attract the bar of res judicata. This Court, therefore holds that in the facts and circumstances of the case the appeal filed by the plaintiff-respondent in the court below was barred by res judicata and the impugned judgment and decree passed by the appellate court, therefore, cannot be legally sustained. The additional substantial questions of law are, therefore, decided in favour of the appellants.

16. The perusal of the impugned judgment of the appellate court below clearly demonstrates that the appellate court below has firstly catalogued the evidence led by the parties. However, while recording the finding on the issue the appellate court below has manifestly omitted to consider any of the evidence of the parties. In this fact situation there



remains no scintilla of doubt that the finding by the appellate court below suffers from the vice of non consideration of evidence and this aspect becomes more glaring when the findings of the trial court have been reversed. It is well settled that an appellate court in appeal is required to reappraise the evidence on record as well as to consider the reasonings of the trial court. By not doing so the appellate court has definitely committed error in law and its conclusions deserve to be overturned. It is done so accordingly. The substantial question of law in this regard as framed is decided in favour of the appellants.

16. For the reasons and discussion as above, this appeal succeeds and the impugned judgment and decree passed by the appellate court below is set aside. In the facts and circumstances of the case there shall, however, be no order as to cost.

(V. Nath, J.)

Snkumar/-

AFR/NAFR	
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