

In the High Court of Punjab and Haryana at Chandigarh

**RSA No. 4397 of 2011(O&M)
Date of Decision:22.11.2018**

Surat Singh @ Surta and others

---Appellants

vs.

Ram Mehar

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Baldev Raj Mahajan, Senior Advocate
with Mr. Amit Sharma, Advocate
for the Appellants

Mr. A.K.Kansal, Advocate
for the respondent

Rekha Mittal, J.

The present appeal directs challenge against the judgment and decree dated 18.10.2011 passed by the Additional District Judge, Jind whereby appeal against judgment and decree dated 30.9.2008 passed by the Additional Civil Judge (Senior Division), Safidon decreeing suit of the appellants-plaintiffs was accepted, judgment and decree impugned were set aside and suit filed by the appellants was dismissed whereas counter claim preferred by the respondent-defendant was allowed.

The present litigation pertains to inheritance to the estate of Ms. Phoola @ Phoolo daughter of Chandan son of Ganeshi and Smt. Patori @ Patora. Chandan died on 18.1.1972 and Smt. Patori @ Patora pre-deceased him. Chandan had only one daughter Smt. Phoola @ Phoolo.

The appellants-plaintiffs have claimed ownership of the suit land to the extent of 1/4th share of land measuring 106 kanal 4 marlas previously owned by Smt. Phoola @ Phoolo on the basis of Will dated 25.4.1979 purported to be executed by Smt. Phoola @ Phoolo who died on 29.4.1979. The appellants have also challenged mutation qua suit property in favour of Smt. Rajni by describing her as widow of Chandan when as a matter of fact, Smt. Patori @ Patora was the wife of Chandan and she died during life time of Chandan. It is averred that mutation qua inheritance to the estate of Sh. Chandan was to be entered and sanctioned in favour of Smt. Patori @ Patora in place of Smt. Rajni.

The contesting defendant No. 1-respondent filed the written statement raising preliminary objections inter alia that the suit is barred by time; the plaintiffs are estopped by their act and conduct to file the suit; they have not come to the court with clean hands; the suit is not maintainable in the present form; the plaintiffs have got no cause of action and locus standi to file the suit and suit being bad for non-joinder and mis-joinder of necessary parties. On merits, it is pleaded that suit land was owned and possessed by Ganeshi son of Sukh. Smt. Phoola @ Phoolo, mother of the answering defendant was the only legal heir and successor of Chandan and his wife Smt. Patori @ Patora. Will No. 6 dated 25.4.1979 is forged, fake and is the result of fraud and misrepresentation. Smt. Patori @ Patora died on 29.4.1979 and alleged Will is executed four days before her death. In fact, she was not of sound health and mind on the date of execution of the the alleged Will rather she was on death bed on that day. The answering defendant is the only legal heir and has inherited suit land on

death of Smt. Phoola @ Phoolo. The defendant also filed the counter claim raising the similar allegations as were brought forth by way of defence plea in the written statement filed by him.

Defendants No. 2 and 3 (proforma defendants) were proceeded against ex parte vide order dated 21.2.2003.

The appellants filed replication and reply to the counter claim controverting the allegations raised in the written statement and re-asserted their claim raised in the plaint.

The controversy between the parties led to framing of following issues by the trial court:-

1. Whether the plaintiffs are entitled to the declaration, as prayed for? OPP
2. Whether the plaintiffs are also entitled to injunction, as alleged? OPP
3. Whether the suit of the plaintiffs is not maintainable in the present form? OPD
4. Whether the plaintiffs have got no cause of action and locus standi to file the present suit? OPD
5. Whether the suit is barred by limitation? OPD
6. Whether the suit is liable to be dismissed under order 2 rule 2 CPC ?OPD
7. Whether the suit is bad for non-joinder and mis-joinder of necessary parties.
8. Relief

The parties were permitted to adduce evidence in support of their respective contentions.

The appellants examined Suraj Parkash PW1, Vinod Kumar PW2, Ram Kumar PW3, Satnarain PW4, Rohtash one of the plaintiffs PW5.

They tendered into evidence documents Ex. P1 to P21, noticed in para 7 of the judgment of trial court.

Ram Mehar, defendant-respondent appeared in the witness box as his own witness.

Having heard counsel for the parties in the light of materials on record, the trial court accepted claim of the appellants that they have inherited the suit land on the basis of Will dated 25.4.1979 executed by Smt. Phoola @ Phoolo by deciding issues No. 1 and 2 in favour of the plaintiffs and issues No. 3 to 7 against the defendants when all these issues were taken up together for the purpose of discussion and decision. The appeal preferred by unsuccessful defendant against acceptance of claim of the plaintiffs-appellants and dismissal of his counter claim was allowed by the first Appellate Court.

Sh. B.R.Mahajan, Senior Advocate, would urge that judgment and decree passed by the Appellate Court cannot be allowed to sustain as the respondent-defendant did not file an appeal to challenge dismissal of his counter claim while decreeing suit of the appellants-plaintiffs. It is further argued that findings of the trial court qua dismissal of counter claim would constitute res judicata in appeal preferred by the respondent-defendant against decree passed in favour of the plaintiffs-appellants by the trial court. In support of his contention, he has referred to judgments of this court **Sukhdev Singh vs. Baldev Singh and others 2014(55) RCR (Civil) 861** and **Nirmal Kaur vs. Sawinder Singh and others RSA No. 2782 of 2017** decided on 30.11.2017. Further reference has been made to judgments of the Kerala High Court **Girija and others vs. Rajan and others 2015(2)**

RCR(Civil) 320 and Ravi Chandran vs. Philip 2011(32) RCR (Civil) 881.

Another submission made by counsel is that findings recorded by the trial court accepting Will dated 25.4.1979 propounded by the plaintiffs-appellants are liable to be restored by setting aside judgment of the first Appellate Court.

Counsel representing the respondent-defendant has supported the impugned judgment and decree passed by the first Appellate Court. It is argued that counter claim preferred by the respondent-defendant was not registered separately nor any issues were framed on the basis of averments raised in the counter claim. The suit filed by the appellants and counter claim by the respondent was decided by a composite judgment and decree dated 30.9.2008 passed by the trial court. It is vehemently argued that as the trial court did not draw a separate decree with regard to counter claim preferred by the respondent, there was no reason for the respondent to file separate appeal to assail findings of the trial court qua dismissal of counter claim. Further argued that the appellants did not raise an objection before the Appellate Court that as the defendant has not filed separate appeal qua dismissal of his counter claim, arguments raised to challenge dismissal of counter claim cannot be entertained much less accepted or the appeal is liable to be dismissed for want of filing a separate appeal against dismissal of counter claim. The last submission made by counsel is that appeal filed by the respondent-defendant before the first Appellate Court, in the circumstances of the present case highlighted hereinbefore, is maintainable and has rightly been allowed by the court concerned. In support of his

contention, he has relied upon Division Bench judgment of the Kerala High Court **Cholapilakkal Abdul Nazeer vs. Kuttanparambath K Lakshmana Das and another AIR 2016 CC 2864**. Further reference has been made to judgment of this Court **Ranjan Sood vs. Om Parkash RSA No. 927 of 2018 decided on 3.7.2018** and that of the Delhi High Court **Ejaz Ahmed Aslam vs. Mohammad Azim Ahmed, Regular Second Appeal No. 118 of 2018 decidedj on 4.10.2018**.

With regard to merits of the case, it is argued that the respondent-defendant is the only class-I heir left behind by deceased Phoola @ Phoolo. The appellants have failed to prove Will dated 25.4.1979, in accordance with law, much less that the said Will was executed by Smt. Phoola @ Phoolo in her sound disposing mind and without any influence. It is further argued that nothing has been mentioned in the Will as to why the respondent, the only class-I heir being son of deceased Phoola @ Phoolo was excluded from inheritance particularly in the circumstances that there is nothing on record suggestive of the fact that relations between Phoola @ Phoolo and the respondent were not cordial.

I have heard counsel for the parties, perused the paper book and records.

Indisputably, the appellants-plaintiffs claimed ownership of suit land on the basis of testamentary succession of Smt. Phoola @ Phoolo by propounding Will dated 25.4.1979. The respondent-defendant, undisputedly, is the son of Phoola @ Phoolo and only class-I heir left behind by the deceased. The respondent-defendant filed the written statement and categorically raised a plea that the Will is the result of fraud

and misrepresentation played by the plaintiffs-appellants and the testator was not in sound health and mind on 25.4.1979. He filed the counter claim raising same allegations to challenge Will dated 25.4.1979 and asserting his claim to the suit property on the basis of natural succession.

Perusal of the issues framed by the trial court makes it evident that the trial court framed issues on the basis of contesting claims of the parties in the plaint and the written statement. No issue was framed by the trial court with regard to any plea raised in the counter claim. The counter claim was not registered separately though the same is treated as a cross suit. The court decided the suit and counter claim by a composite judgment and only one decree was prepared with regard to decreeing suit of the appellants and dismissal of counter claim filed by the respondents-defendants. As a matter of fact, in the entire judgment, there is reference to rival contentions of the parties raised in the plaint and written statement but in issue No. 8 pertaining to relief, there is one line that the counter claim of the defendant has no force and the same is hereby dismissed as there is no evidence on the file.

The question for consideration is, 'whether the respondent was required in law to file a separate appeal against dismissal of counter claim in the given circumstances. If so, what is the adverse affect of non-filing of a separate appeal against dismissal of counter claim'.

In **Sukhdev Singh's case (supra)**, suit filed by the plaintiff-appellant was dismissed but counter claim of the defendants was allowed. The plaintiff filed an appeal against dismissal of suit but did not file appeal against allowing of counter claim. This Court by relying upon judgment of

Hon'ble the Supreme Court in **Harbans Singh and others vs. Sant Hari Singh and others AIR 2009 SC 1819** has held that plaintiff has not preferred separate appeal challenging 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. In para 6 of the judgment, issues framed by the court of first instance have been reproduced. A specific issue was framed with regard to claim raised by the defendants for possession of land measuring 1 marla 2 ½ sarsahi allegedly encroached upon by the plaintiff who had filed the suit for permanent injunction.

In **Nirmal Kaur's case (supra)**, suit for mandatory injunction filed by the plaintiff and counter claim by defendant No. 1 for declaration and joint possession were decided whereby suit of the plaintiff was dismissed but counter claim of defendant No. 1 was decreed. The plaintiff filed single first appeal which was dismissed being not maintainable as decree of counter claim and judgment has not been specifically challenged. This court, by relying upon various judgments, has held that no fault can be found in the judgment and decree passed by the Additional District Judge, Amritsar.

In **Girija and others' case (supra)**, the Kerala High Court has held that if defendant raised a counter claim in suit and fails both in the suit and in counter claim, he will have to file separate appeals challenging the decree in the suit and the counter claim.

In **Ravi Chandran's case (supra)**, rejection of counter claim

was not challenged and the appeal was filed only against the decree passed in favour of the plaintiff, it was held that appeal filed against the decision in only one of the them without challenging other would operate as barred by res judicata.

A Division Bench of the Kerala High Court in **Cholapilakkal Abdul Nazeer's case (supra)**, on a detailed consideration of the provisions of Section 96, Order 8 Rule 6A and Order 20 Rule 19 of the Code of Civil Procedure (in short “the Code”) and judgments of the Hon'ble Supreme Court and Kerala High Court has held, quoted thus:-

“Filing of separate appeals against the case and counter claim is only a procedural aspect which has not been specifically provided in the Code. What is contemplated is only an appeal against the decree and where case and counter claim are disposed of by a judgment in the same suit followed by a composite decree, there is only one decree and not separate decrees as in the case of decrees being drawn in respect of suits disposed of by a common judgment. In such circumstances, insisting for a separate appeal for a suit and counter claim by the same party will only cause unnecessary hardship and create unnecessary procedural hurdle to advance justice. So I am agreeing with the conclusion arrived by my brother that single appeal will lie against case and counter claim and only separate court fee will have to be paid for the respective claims and that will be sufficient.”

In **Harbans Singh and others' case (supra)** relied upon by

this Court in **Sukhdev Singh's case (supra)**, there were two separate suits which were consolidated and were decided by a common judgment and in those circumstances, it was held that two separate appeals were required to be filed against the decrees passed in the suits.

Counsel for the appellants has failed to cite any judgment of Hon'ble the Supreme Court in support of his plea that where a suit and a counter claim has been decided by a common judgment and a composite decree has been passed, two separate appeals are required to be filed to challenge the judgment in suit as well as in counter claim even if there is one decree drawn by the court.

There can be no denial that appeal is a statutory right provided under the Code. The form in which the appeal has to be filed is only a procedure. There is no specific form provided as to how in a case where suit and counter claim are disposed of by a common judgment, the appeal has to be preferred. However, it cannot be treated as disposal of several independent suits having common question to be decided by joint trial by a common judgment. In such cases, though the suits are disposed of by a common judgment, separate issues are framed in respect of each suit, they are answered and then separate decrees are drawn in respect of each suit tried jointly. As such, independent decrees are available as regards disposal of several suits by a common judgment and each decree is separately appealable and separate appeals will have to be filed against each decree by the aggrieved party. It is settled law that procedural law should never affect the substantive law and the procedural justice should always give way to advance substantive justice. Taking into consideration the peculiar facts

and circumstances of the present case when examined in the light of Division Bench judgment of the Kerala High Court in **Cholapilakkal Abdul Nazeer's case (supra)**, I find it difficult to accept contention of the appellants that judgment and decree passed by the first Appellate Court suffer from a legal flaw for want of filing of separate appeal by the respondent against dismissal of his counter claim. In this view of the matter, this issue is answered against the appellants and in favour of the respondent.

This brings the court to merits of the appeal qua setting aside findings of the trial court on issues No. 1 and 2 by the first Appellate Court. The appellants-plaintiffs have claimed their right in suit land on the basis of Will dated 25.4.1979 purported to be executed by Smt. Phoola @ Phoolo, mother of the respondent-defendant. The scribe and both the attesting witnesses of the Will are stated to have passed away. The son of the scribe was examined to prove that the Will was scribe by his father. The appellants also examined witnesses to prove attestation of the Will by the witnesses namely Chatter Singh Lambardar and Ram Kumar. Counsel for the appellants has not disputed that if both the attesting witnesses of the Will have passed away, the Will is required to be proved in consonance with the provisions of Section 69 of the Evidence Act, 1872 that says “if no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person”. The appellants examined Suraj Parkash PW1 to prove registration of the

Will after the contents thereof were read over to the executant. However, in opening line of his cross examination, he would state that he did not know Smt. Phoola @ Phoolo personally. The appellants did not examine a witness to prove one of the essentials of Section 69 of the Evidence Act that thumb impressions on the Will are that of Smt. Phoola @ Phoolo. They did not get compared disputed thumb impressions on the Will with standard thumb impressions of Smt. Phoola @ Phoolo, available on a document.

The trial court, despite having noticed the provisions of Section 69 of the Evidence Act, has failed to appreciate that neither testimony of Suraj Parkash can be considered to be that of an attesting witness nor is sufficient to prove that the Will bears thumb impressions of the alleged testator Smt. Phoola @ Phoolo. Since the appellants failed to prove the Will in accordance with Section 69 of the Evidence Act and dispel the suspicious circumstance as to why the testator excluded her only class-I heir from inheritance, the Appellate Court has rightly reversed findings of the trial court with regard to correctness of Will dated 25.4.1979. I would hasten to add that plaint filed by the appellants is conspicuously silent that at the time of execution of Will, Smt. Phoola @ Phoolo had good health or the Will was executed by the testator in her sound disposing mind. There is no evidence adduced by the appellants to prove physical and mental condition of Smt. Phoola @ Phoolo on 25.4.1979 when admittedly she passed away on 29.4.1979. Analyzed from any angle, findings of the Appellate Court rejecting Will dated 25.4.1979 do not suffer from an error much less perversity, warranting intervention. No sooner the Will dated 25.4.1979 set up by the appellants is rejected, land left behind by Smt. Phoola @ Phoolo (since deceased) would be inherited by her heir(s) in

accordance with provisions of the Hindu Succession Act, 1956.

In view of what has been discussed hereinbefore, finding no merit, the appeal fails and is accordingly dismissed, in the light of aforesaid observations.

(Rekha Mittal)
Judge

22.11.2018
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No