

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.458 of 2006

Bhagwat Prasad (Dead) through his LR's

1. Gannu Ram Sahu, aged about 58 years, S/o late Bhagwat Prasad Sahu, R/o Village Khaira, Tahsil Kota, Distt. Bilaspur (CG)
2. Smt.Bichit Bai, aged about 40 years, D/o Late Bhagwat Prasad Sahu, W/o Baijnath Sahu, R/o Village Hadigaon, Tahsil Lormi, Distt. Mungeli (CG)
3. Smt.Jamuna Bai, aged about 35 years, D/o Late Bhagwat Prasad Sahu, W/o Bhanu Pratap Sahu, R/o Village Pendarwa, Tahsil Bilha, Distt. Bilaspur (CG)
4. Smt. Sarswati Bai, aged about 33 years, D/o late Bhagwat Prasad Sahu, W/o Jamuna Prasad Sahu, R/o Village Seoni, Tahsil Marwahi, Distt. Bilaspur (CG)
5. Binod Kumar Sahu, aged about 30 years, S/o Late Bhagwat Prasad Sahu, R/o Village Khaira, Tahsil Kota, Distt. Bilaspur (CG)

---- Appellants

Versus

1. Samaru Ram S/o late Tularam Sahu, Aged 51 years,
----- Respondent/Plaintiff
2. Saharu Ram S/o Late Tularam Sahu, Aged 44 years,
3. Rambahoran S/o Late Tularam Sahu, Aged 38 years
All R/o Village Khaira, Tah. Kota, Distt. Bilaspur (CG)
4. State of Chhattisgarh, Through Collector, Bilaspur (CG)

----- Respondents

For Appellants/LR's of Defendant No.1:

Mr.Ravindra Agrawal, Advocate

For Respondent No.1/plaintiff:

Mr.Arvind Dubey, Advocate

For Respondent No.4: Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

03/12/2019

1. This second appeal preferred by appellant/defendant No.1 under Section 100 of the CPC was admitted for hearing by formulating the following substantial

question of law: -

"Whether the first appellate Court was justified in reversing the judgment and decree of the trial Court granting decree of specific performance of the contract and declaration of title in favour of defendant No.1 (on his counter claim) by recording perverse finding in light of the fact that plaintiff did not question the decree of specific performance of the contract granted in favour of defendant No.1 including no court fee for challenging the decree of specific performance was paid ?

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. Plaintiff-Samaruram filed a suit for declaration of title and permanent injunction, in which defendant No.1 also filed counter-claim and claimed decree of specific performance of the contract in addition to declaration of title on the basis of adverse possession. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 12.11.2003, dismissed the suit of the plaintiff for declaration of title and permanent injunction and allowed the counter-claim filed by defendant No.1 granting decree of specific performance of the contract in his favour. On appeal being preferred by the plaintiff, the first appellate Court granted decree for declaration of title in favour of the plaintiff and set aside the decree of specific performance of the

contract, against which, this second appeal under Section 100 of the CPC has been preferred by the original appellant/defendant No.1, in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.

3. Mr.Ravindra Agrawal, learned counsel for the appellants/legal representatives of defendant NO.1, would submit that the first appellate Court would not have interfered with the decree granted by the trial Court in view of appeal not being preferred before the first appellate Court along with court fee of ₹ 250/- against the decree of specific performance of the contract, as such, decree for specific performance of the contract has become final for non-payment of court fee as well as for not preferring the appeal against the decree granting counter-claim in his favour, as such, the decree to that extent deserves to be set aside.

4. On the other hand, Mr.Arvind Dubey, learned counsel for respondent No.1/plaintiff, would submit that since suit and counter-claim proceedings being unified proceedings, therefore, the plaintiff filed consolidated appeal and defendant No.1 did not take any objection and took a calculated chance and when the appeal turned against him, he invented a new ground, which cannot be entertained and as such,

the appeal deserved to be dismissed.

5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the record with utmost circumspection.

6. Perusal of the records would clearly show that in a suit filed by the plaintiff, defendant No.1 laid counter-claim claiming decree for specific performance of the contract. The trial Court while dismissing the suit of the plaintiff allowed the counter-claim granting decree for specific performance of the contract in favour of defendant NO.1, which the plaintiff assailed by filing first appeal before the first appellate Court. That appeal was consolidated appeal claiming setting aside the judgment and decree of the trial Court dismissing the plaintiff's suit for declaration of title and granting the defendant's counter-claim for specific performance of the contract.

7. At this stage, it would be appropriate to notice Order 20 Rule 19 of the CPC which states as under:-

"19. Decree when set-off or counter-claim is allowed.-(1) Where the defendant has been allowed a set-off or counter-claim against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Appeal from decree relating to set-off

or counter-claim.- Any decree passed in a suit in which a set-off or counter-claim is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if not set-off or counter-claim had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under Rule 6 of Order VIII or otherwise."

8. In the matter of Sultan Singh and others v. Rachhpal and other¹, the Division Bench of the Pepsu High Court has held that in a case where against two separate decrees, one consolidated second appeal was filed from both the decrees, whereas two appeals ought to have been preferred but no objection to procedure was taken by respondent and that mistake was also not detected by the officer when appeals were filed, the procedure was held to be irregular.
9. The Kerala High Court in the matter of Pampara Philip v. Koorithottiyil Kinhimohammed² has held that where a counter-claim by defendant is dismissed and claim of the plaintiff is allowed, the defendant need not file a separate appeal for his counter-claim in addition to the regular appeal against the decree, but a single appeal before the High Court challenging both findings is maintainable. It was further held that suit and counter-claim proceedings being unified

1 AIR 1953 PEPSU 129

2 AIR 2007 KERALA 69

proceedings, valuation of appeal would be combination of valuation of suit and valuation of counter-claim.

10. The principle of law laid down by the Pepsu High Court in Sultan Singh (supra) was followed with approval by the Bombay High High in the matter of The State of Maharashtra, through Collector, Yavatmal v. Krishnaawatar Daulatsingh Madan³.

11. Reverting to the facts of the present case in light of legal position, in the instant case, the plaintiff while preferring first appeal before the first appellate Court valued the appeal for valuation of the suit, but did not include valuation of counter-claim and did not pay court fee of ₹ 250/- for counter-claim. In fact, he intended to challenge the judgment & decree of the trial Court dismissing the suit and granting counter-claim as a whole, but erroneously and inadvertently did not value the appeal for valuation of counter-claim, but after being noticed, defendant No.1 also did not raise any such objection and participated in hearing of the appeal and when decree was passed against him, the issue of improper valuation of appeal qua decree for specific performance of the contract has been raised and taking the plea that since court fee has

3 2012 SCC OnLine Bom 324

not been paid and appeal has not been valued for counter-claim and argument is that decree of counter-claim has become final, which cannot be entertained in view of the provisions contained in Order 20 Rule 19 of the CPC as it has already been held by the Kerala High Court in Pampara Philip (supra) that suit and counter-claim proceedings being unified proceedings, valuation of appeal would be combination of valuation of suit and valuation of counter-claim, as such, non-filing of separate appeal by the plaintiff questioning the decree of counter-claim, it cannot be held that decree for specific performance of the contract has become final against the plaintiff. It is only a procedural irregularity.

12. Since the appeal was heard on merits and final judgment has already been delivered and no objection was raised by defendant No.1 before the first appellate Court and he participated in the appeal proceedings without protest and demur, he cannot be permitted to raise such a point before the second appellate Court. It is true that the appeal filed was not valued for decree of specific performance of the contract, but that would not make the decree invalid as consolidated appeal was entertained by the first appellate Court. However, the plaintiff would pay additional court fee of ₹

250/- for counter-claim before the first appellate Court as valued before the trial Court within 45 days from today and decree of the first appellate Court would be operative subject to payment of court fee as held hereinabove.

13. The judgment and decree of the first appellate Court is accordingly modified. No cost(s). The appellate decree be drawn.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-