

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision:3.9.2019

RSA No. 3505 of 2019 (O&M)

Rajesh Kumar

---Appellant

versus

Dharamraj Singh

---Respondent

CR No. 4572 of 2019 (O&M)

Rajesh Kumar

---Petitioner

versus

Dharamraj Singh

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Sudhir Rana, Advocate
for Mr. Vishwajeet Singh, Advocate
for the appellant in RSA No. 3505 of 2019
for the petitioner in CR No. 4572 of 2019

Mr. Ram Kumar Saini, Advocate
for the caveator/respondent in RSA- 3505 of 2019

Rekha Mittal, J.

This order will dispose of RSA No. 3505 of 2019 and C.R. No. 4572 of 2019 as these are the off shoot of judgment and decree dated 15.3.2017 passed by the Civil Judge (Junior Division), Gurugram, judgment and decree dated 22.5.2019 by the Additional District Judge, Gurugram and order dated 22.5.2019 by the same court dismissing application for

condonation of delay under Section 5 of the Limitation Act. For facility of reference, facts are taken from RSA No. 3505 of 2019.

A brief backdrop of the case is that respondent Dharamraj Singh, brother of appellant Rajesh Kumar filed a suit for partition in respect of plot measuring 174 square yards, situated within revenue estate of village Gurgaon now known as Laxman Vihar Phase-II, Dhanwapur Road, Gurgaon. The suit was contested by appellant Rajesh Kumar by filing the written statement. In addition thereto, he filed counter claim on the allegation that on the request of appellant, respondent-plaintiff located a plot in Gurgaon. Thereafter, the appellant arranged money for purchase of same. He could not arrange the entire sale consideration and some financial help was given by the respondent but respondent secretly got registered sale deed No. 9050 dated 7.1.1991 in joint name of the plaintiff and defendant. The appellant returned the borrowed amount of Rs. 49,000/- along with interest but the respondent failed to transfer his recorded share in the name of appellant, as promised. He sought declaration that he is absolute owner of the suit property and name of respondent-plaintiff in sale deed aforesaid is liable to be struck off.

The trial court decreed the suit filed by respondent but counter claim of the appellant-defendant was dismissed on 15.3.2017.

The appellant-defendant filed Civil Appeal No. 40 of 2017 on 24.4.2017 to challenge decision of the trial court both in respect of suit as well as counter claim. Later, another appeal was filed by him bearing No. 263 of 2019 to assail dismissal of counter claim. Along with Appeal No. 263 of 2019, application was filed for condoning delay of 2 years and 17 days.

The First Appellate Court dismissed Civil Appeal No. 40 of 2017 vide judgment and decree dated 22.5.2019, challenged in RSA No. 3505 of 2019. The application for condonation of delay in Civil Appeal No. 263 of 2019 was dismissed vide order of even date namely 22.5.2019 that led to filing of Civil Revision No. 4572 of 2019.

Counsel for the appellant-petitioner would argue that as the trial court decided the suit and counter claim by a composite judgment and decree dated 15.3.2017, the appellant could maintain a single appeal to assail findings of the trial court both in the suit and counter claim. It is argued that an appeal can be maintained only against a decree and not a judgment. It is further argued that even if the First Appellate Court was of the view that the appellant was required to file two separate appeals in respect of decision in civil suit and counter claim, since appeal No. 40 of 2017 dated 24.4.2017 was pending decision before the court, to do substantial justice, the court should have condoned delay in filing Civil Appeal No. 263 of 2019 in place of dismissing appeal No. 263 of 2019 on technical consideration of delay.

Counsel representing the respondent, on the contrary, would argue that since counter claim is a cross suit filed by the appellant, two separate appeals were required to be filed if the appellant-petitioner had a grievance to express against findings of the trial court qua decree passed in favour of the respondent in the suit for partition and dismissal of his counter claim asserting his exclusive right of ownership to the property in dispute. It is further argued that since the appellant had filed Appeal No. 40 of 2017 with an application to condone delay of four days in filing the appeal, his contentions in the application for condonation of delay of more than two

years in filing CA No. 263 of 2019 have rightly been rejected by the First Appellate Court. It is further argued that since appeal filed against decision in counter claim has been dismissed being barred by limitation, findings in the counter claim would constitute res judicata, therefore, appeal filed by the appellant against decree of partition passed in favour of the respondent has rightly been dismissed by the First Appellate Court. In support of his contention that two separate appeals were required to be filed by the appellant i.e. one against the decree passed in the suit and other against dismissal of counter claim, he has relied upon judgment of Hon'ble the Supreme Court **Harbans Singh and others vs. Sant Hari Singh and others 2009 (3) RCR (Civil) 862**. Further reference has been made to judgments of this Court **Sukhdev Singh vs. Baldev Singh and others 2014 (4) PLR 651, Bhajan Singh vs. Jasvir Kaur 2016(2) PLR 489** and **Samay Singh vs. Mona Yadav and another RSA No. 1759 of 2019 decided on 12.4.2019**.

I have heard counsel for the parties, perused the paper book and impugned judgment dated 22.5.2019 and order of even date dismissing application for condonation of delay passed by the First Appellate Court.

Be that as it may, it is undisputed position of the case that the trial court decided Civil Suit No. 14 of 2013 filed by respondent Dharamraj Singh and counter claim filed by the appellant vide common judgment and decree dated 15.3.2017. Indeed, counter claim is a cross suit filed by the defendant and needs to be registered separately. There is nothing on record suggestive of the fact that counter claim preferred by the appellant was registered separately by the trial court. However, it remains a fact that civil suit and counter claim were disposed of vide composite

judgment and decree dated 15.3.2017.

Counsel for the respondent, in response to a query, would fairly inform that trial court did not draw a separate decree in respect of dismissal of counter claim preferred by Rajesh Kumar. There cannot be dispute about the settled position in law that appeal lies against a decree and not against a judgment. Since the trial court did not draw a separate decree with regard to dismissal of counter claim, the appellant could prefer a single appeal to assail findings of the trial court both in respect of decree passed in favour of the respondent as well as dismissal of his counter claim.

Perusal of grounds of appeal in Civil Appeal No. 40 of 2017 would reveal that appellant challenged decree passed in favour of the respondent and dismissal of his counter claim. That being so, there was no requirement to file a separate appeal to challenge counter claim which was in fact filed by the appellant, may be under some wrong legal advice, with an application to condone delay of more than two years in filing Civil Appeal No. 263 of 2019. I find fortification to my observations from the judgment of this Court **Babu Lal and others vs. Ram Pyari and others RSA No. 5364 of 2012 decided on 3.7.2019**. A relevant extract from the judgment, reads as follows:-

“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 that where a suit and a counter claim has been decided by a common judgment and a composite decree has been prepared, 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.

In this view of the matter, contention raised by counsel for the appellants that since the respondents did not file two appeals against the judgment and decree passed by the trial court, the appeal was liable to be dismissed by invoking the principle of res judicata is not meritorious and accordingly rejected.”

To be fair to the respondent, counsel for the respondent has cited judgment of Hon'ble the Supreme Court in **Harbans Singh and others' case (supra)** and judgments of this Court in support of his contention that a separate appeal was required to be filed against dismissal of counter claim. Counsel has failed to point out, if in any of the cited authorities, it has been held that if the suit and counter claim have been decided by a composite judgment and decree or to say that no separate decree has been prepared in respect of counter claim, the aggrieved party is obligated to file separate appeals. On the contrary, the referred authorities relate to the cases where more than one suit has been decided by a common judgment but separate decrees were prepared and in those circumstances, it has been held that separate appeals are required to be filed to assail the decrees passed in separate suits. That being so, the respondent cannot derive any advantage to his contention from the referred authorities.

A Division Bench of the Kerala High Court in **Cholapilakkal Abdul Nazer vs. Kuttanparambath K. Laxmana and another AIR 2016 CC 2864**, dealt with an issue raised by Registry of the Court that a single memorandum of Regular First Appeal would not suffice against a decree dismissing the suit and decreeing the counter claim. The Registry opined that two separate memorandum of Regular First Appeal need to be filed against the decree in view of **Girija vs. Rajan, 2015 (1) KLT 695**. The Division Bench, by considering in detail the provisions of Order 8 rule 6A

and Order 20 Rule 19 of the Code of Civil Procedure and various judgments on the issue by Hon'ble the Supreme Court as well as the 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 view of the above, I find it difficult to accept contention of the respondent that appellant was required to file two separate appeals to assail decree in suit of the respondent and dismissal of his counter claim. Since the appellant can maintain a single appeal to express his grievance against the decree passed in favour of the respondent and dismissal of his counter claim and he had actually filed Civil Appeal No. 40 of 2017 for the purpose, findings of the First Appellate Court to dismiss Civil appeal No. 40 of 2017 on the ground of res judicata cannot be allowed to sustain. Since the appellant can maintain single appeal as has been done by filing Civil Appeal 40 of 2017, the second appeal or an application for condonation of delay is inconsequential in the given scenario. That being so, the Appellate Court was required to decide Civil Appeal No. 40 of 2017 on merits of the controversy. In this view of the matter, judgment and decree dated 22.5.2019 passed by the First Appellate Court cannot be allowed to sustain

and is accordingly set aside. The matter is remitted to the First Appellate Court for decision of both the appeals on merits after hearing counsel for the parties, in accordance with law. The parties through their counsel are directed to appear before the Appellate Court on 23.9.2019. The Appellate Court shall dispose of the appeals within a period of three months of the parties putting in appearance. In the peculiar facts and circumstances., parties are left to bear their own costs.

The appeal and civil revision stand disposed of accordingly.

(Rekha Mittal)
Judge

3.9.2019

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes/No