Rajni Rani & Anr vs Khairati Lal & Ors on 14 October, 2014

Author: Dipak Misra

Bench: Dipak Misra, V. Gopala Gowda

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6862 OF 2014
[Arising out of S.L.P. (C) No. 6757 of 2012)

Rajni Rani & Anr. ... Appellants

Versus

Khairati Lal & Ors. ...Respondents

J U D G M E N T

Dipak Misra, J.

The centrirorial issue that has stemmed in this appeal by grant of special leave is whether an order of dismissal of the counter-claim being barred by principles of Order 2, Rule 2 of the Code of Civil Procedure (C.P.C.) can be set aside in exercise of revisional jurisdiction under Section 115 of the C.P.C. or in exercise of power of superintendence under Article 227 of the Constitution of India or is it required to be assailed by preferring an appeal.

The factual score need not be exposited in detail. Suffice it to state that one Phoolan Rani, wife of Om Prakash, and another instituted Civil Suit No. 107B of 2003 seeking a declaration that they are the owners in possession of the land admeasuring 1/9th share in the suit land and further praying for permanent injunction against the defendants. After issue of notice, the defendants entered contest and the defendant Nos.12 to 14 filed a counter-claim putting forth that they had the right, title and interest as the original owner, Jeth Ram, had executed a Will dated 18.5.1995 in their favour.

After the counter-claim was filed, defendant Nos. 1 and 2 filed an application for dismissal of the counter-claim on the foundation that the same did not merit consideration as it was barred by Order 2, Rule 2 of C.P.C. It was set forth in the application that a suit for declaration was earlier filed by the present appellants along with others against the defendants and a decree was passed in their favour on 21.9.2002 whereby it was held that the present appellants and some of the respondents

were entitled to 1/4th share each. The judgment and decree passed in the said suit was assailed in appeal and the appellate court modified the judgment and decree dated 21.9.2002 vide judgment dated 15.2.2003 holding that each one of them was entitled to 1/9th share and the said modification was done on the ground that the property was ancestral in nature and the sisters had their shares. After disposal of the appeal, one of the sisters filed a declaratory suit to the effect that she is the owner in possession of land in respect of 1/9th share in the suit land and in the said suit a counter-claim was filed by defendant Nos. 12 to 14 stating that they had become owners in possession of the suit property on the basis of a properly registered Will dated 18.5.1995 executed by Jeth Ram. In the application it was set forth that the counter-claim had been filed in collusion with the plaintiff as the plea of claiming any status under the Will dated 18.5.1995 was never raised in the earlier suit. It was urged that the plea having not been raised in the earlier suit, it could not have been raised by way of a counter-claim in the second suit being barred by the principles of Order 2, Rule 2 of C.P.C.

The learned trial Judge adverted to the lis in the first suit, the factum of not raising the plea with regard to Will in the earlier suit and came to hold that the counter-claim could not be advanced solely on the ground that the existence of the Will had come to the knowledge of the defendants only in the year 2003. Being of this view, the learned trial Judge allowed the application filed by the defendant Nos. 1 and 2 and resultantly dismissed the counter-claim filed by the defendant Nos. 12 to 14 vide order dated 13.10.2010.

The legal substantiality of the aforesaid order was called in question in Civil Revision No. 900 of 2011 preferred under Article 227 of the Constitution of India wherein the High Court taking note of the previous factual background came to hold that the learned trial Judge had failed to appreciate that the Will dated 18.5.1995 executed by Jeth Ram, the father of defendant Nos. 12 to 14, was alive at the time of adjudication of the earlier suit and hence, the said Will could not have taken aid of during his lifetime. The aforesaid analysis persuaded the learned Single Judge to set aside the order passed by the learned trial Judge. However, the Single Judge observed that it would be open to the plaintiff to raise all pleas against the counter-claim.

We have heard Mr. Arvinder Arora, learned counsel for the appellants and Mr. S.S. Nara, learned counsel for the respondents.

7. At the very outset, we must make it clear that we are not inclined to advert to the defensibility or justifiability of the order of rejection of the counter-claim by the learned trial Judge or the annulment or invalidation of the said order by the High Court. We shall only dwell upon the issue whether the revision petition could have been entertained or was it obligatory on the part of respondents herein to assail the order by way of appeal.

8. The submission of Mr. Arora, learned counsel appearing for the appellants is that the counter-claim is in the nature of a plaint and when it is dismissed it has to be assailed by way of appeal before the competent forum by paying the requisite court fee on the basis of the claim and such an order cannot be set at naught in exercise of supervisory jurisdiction of the High Court. Learned counsel for the respondents, per contra, would contend that such an order is revisable and, in any case, when cause of justice has been subserved this Court should not interfere in exercise of

its jurisdiction under Article 136 of the Constitution of India.

9. To appreciate the controversy in proper perspective 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."

10. 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."

11. Rule 6A(4) of the said Rule postulates that the counter-claim 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 counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with."

12. 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. For making a counter- claim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counter-claim. 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 counter-claim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counter-claim is to avoid multiplicity of the proceedings. When a counter-claim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim. The seminal purpose is to avoid piece-meal adjudication. The plaintiff can file an application for exclusion of a counter-claim and can do so at any time before issues are settled in relation to the counter-claim. We are not concerned with such a situation.

13. In the instant case, the counter-claim has been dismissed finally by expressing an opinion that it is barred by principles of Order 2, Rule 2 of the CPC. The question is what status is to be given to such an expression of opinion. In this context we may refer with profit the definition of the term decree as contained in section 2(2) of CPC:-

> "(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include – any adjudication from which an appeal lies as an appeal from an order, or any order of dismissal for default.
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> Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

14. In R. Rathinavel Chettiar and Another v. V. Sivaraman and Others[2] dealing with the basic components of a decree, it has been held thus:-

> "10. Thus a "decree" has to have the following essential elements, namely:
>
> There must have been an adjudication in a suit.
>
> The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.
>
> Such determination must be a conclusive determination resulting in a formal expression of the adjudication.
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> [pic]
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> 11. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant."

15. From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counter-claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2, Rule 2 of C.P.C. The claim of the defendants has been negatived. In Jag Mohan Chawla and Another v. Dera Radha Swami Satsang and Others[3] dealing with the concept of counter-claim, the Court has opined thus:-

> "... 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."

16. Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 C.P.C., it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit. In this context, we may fruitfully refer to a three-Judge Bench decision in M/s. Ram Chand Spg. & Wvg. Mills v. M/s. Bijli Cotton Mills (P) Ltd., Hathras and Others[4] wherein their Lordships was dealing with what constituted a final order to be a decree. The thrust of the controversy therein was that whether an order passed by the executing court setting aside an auction sale as a nullity is an appealable order or not. The Court referred to the decisions in Jethanand and Sons v. State of Uttar Pradesh[5] and Abdul Rahman v. D.K. Kassim and Sons[6] and proceeded to state as follows:-

> "In deciding the question whether the order is a final order determining the rights of parties and, therefore, falling within the definition of a decree in Section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case — the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position however, of the auction-purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the court. Where an application is made to set aside the auction sale as a nullity, if the court sets it aside either by an order on such an application or suo motu the only question arising in such a case as between him and the judgment- debtor is whether the auction was a nullity by reason of any violation of Order 21, Rule 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order

> setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally, determines the rights and liabilities of the parties, viz., the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them." After so stating, the Court ruled that the order in question was a final order determining the rights of the parties and, therefore, fell within the definition of a decree under Section 2(2) read with Section 47 and was an appealable order.

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.

18. Consequently, the appeal is allowed and the order passed by the High Court is set aside. However, as we are annulling the order on the ground that revision was not maintainable, liberty is granted to the respondents to prefer an appeal before the appropriate forum as required under law. We may hasten to add that we have not expressed any opinion on the merits of the case. There shall be no order as to costs.

.....J. [Dipak Misra] .....J. [V. Gopala Gowda] New Delhi;

October 14, 2014

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[1] The words and figures "section 47 or" omitted by CPC (Amendment) Act 104 of 1976, S 3 (w.e.f. 1-2.1077)
[2] (1999) 4 SCC 89
[3] (1996) 4 SCC 699
[4] AIR 1967 SC 1344
[5] AIR 1961 SC 794
[6] AIR 1933 PC 58
