

**IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**

**Appeal Decree/TA/4836/2004/Rajsamand.**

1. Shri Deep Lal Chhajer son of Shri Amba Lal resident of Delwara Tehsil Nathdwara Distt. Rajsamand (deceased) through LRs:-
  - 1/1 Prakash Chand son of Deep Lal  
Resident of Delwara Tehsil Nathdwara Distt. Rajsamand.
  - 1/2 Smt. Pushpa daughter of Deep Lal resident of Udaipur.
  - 1/3 Smt. Manju daughter of Deep Lal resident of Mumbai
  - 1/4 Smt. Madhu daughter of Deep Lal resident of Mumbai
  - 1/5 Smt. Prem daughter of Deep Lal resident of Mumbai.

**...Appellants.**

*Versus*

1. Shri Jatan Singh son of Amba Lal Chhajer resident of village Delwara Tehsil Nathdwara Distt. Rajsamand.
2. Shri Roshan Lal son of Amba Lal (deceased) through LRs:-
  - 2/1 Smt. Patasi Devi widow of Roshan Lal
  - 2/2 Sushri Sangeeta daughter of Roshan Lal Mahajan
  - 2/3 Hemant son of Roshan Lal Mahajan
  - 2/4 Vijay son of Roshan Lal Mahajan  
All residents of Delwara presently residing at 57, Maldas Street, Udaipur.
3. State of Rajasthan through Tehsildar, Nathdwara Distt. Rajsamand.

**...Respondents.**

**D.B.**

**Shri Mukesh Kumar Sharma, Chairman  
Shri Rajinder Kumar, Member**

**Present:-**

1. Shri Y. D. Sharma, counsel for the appellants.
2. Shri Mukesh Jain, counsel for the respondent No. 1

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**J U D G M E N T**

**Date: 06-02-2019**

*Per Shri Rajinder Kumar, Member*

1. This second appeal has arisen out of the judgment and decree dated 9.7.2004 of the learned Revenue Appellate Authority, Udaipur whereby the appeal No. 169/02 preferred by the defendants/appellants against the judgment dated 30.10.2002 of the trial court of

Sub-Divisional Officer, Nathdwara (Distt. Rajsamand) decreeing the plaintiff's suit was dismissed.

2. Facts of the case are that the respondent Jatan Singh filed a suit in the trial court against his brothers, namely, Deep Lal and Roshan Lal seeking the reliefs of division of holding in respect of their co-tenancy lands in pursuance to the family settlements of the year 1982 and 1984 and for restraining the defendants from interfering into the possession of the plaintiff over the land which he is cultivating since long. The State Government was also made a party to the suit. The defendant No. 2 did not contest the suit and remained ex-parte after the service of summons. The appellant/ defendant No. 1 controverted the plaint allegations by filing written statement thereto. He also submitted a counter claim stating that the alleged family partition is not admissible in evidence. The lagaan of the entire land is being deposited by the defendant No. 1 since the time of death of his father. All the co-tenants are entitled to get division of holding by metes and bounds. Therefore, a prayer was made to dismiss the suit and pass a decree of division of holdings in the manner claimed by him. The plaintiff filed a rejoinder to the counter claim. Thereafter, the learned trial court after framing the issues recorded evidence of the parties and vide judgment and decree dated 30.10.2002 decreed the plaintiff's suit. Feeling aggrieved the defendant No. 1/ appellant filed first appeal which was dismissed by the learned Revenue Appellate Authority. Hence, this second appeal.

3. We have heard the learned counsels.

4. On behalf of the defendant/ appellant, it was argued that the alleged family agreement dated 5.10.1982 relied upon by the plaintiff/ respondent has been written on plain paper. Therefore, the same was not admissible in evidence by virtue of the provisions of section 17 of the Indian Registration Act, 1908. The second agreement dated 6.8.1984 is also unregistered and has been executed on insufficient stamp paper. This document also has no evidentiary value. The agricultural lands cannot be divided without the consent of the land holder. In this case, there is no evidence on record to show that the

consent of the Tehsildar was obtained before partitioning the lands in the manner indicated by the plaintiff. Therefore, the disputed lands can be divided only by metes and bounds. The courts below committed material illegalities in decreeing the suit of the plaintiff and dismissing the appeal of the defendant/ appellant. The learned counsel also argued that a suit for partition can be decided initially by passing a preliminary decree only and in this case, the trial court has not passed the preliminary decree as per mandate of the Rajasthan Tenancy Act, 1955 and the rules framed thereunder. Therefore, a prayer was made to accept the appeal and set aside the judgments and decrees of the courts below and to direct the trial court to make division of holdings by metes and bounds. In support of the aforesaid submissions, the learned counsel relied upon following citations:-

- (1) 2006 (1) RRT 45 'Rukmani Devi and anr Vs. Nand Kishore and ors'- In this case, it was held by the Hon'ble Rajasthan High Court that where the terms of family settlement are reduced into writing, its registration would be compulsory.
- (2) 2013 (20) RBJ 241 'Prabhu Lal and anr Vs. Chittar and anr' - In this case, it was held by the Hon'ble Rajasthan High Court that a family settlement deed which was neither registered nor stamped would not be admitted in evidence.
- (3) 2001 (1) RRT 10 'Kunaram Vs. Udaram'- In this case, it was held by the Board of Revenue that partition cannot be effected on the basis of unregistered partition deed.
- (4) 1997 RRD 68 'Harshvardhan Singh Vs. Ranveer Sngh and ors'- In this case, it was held by the Hon'ble Rajasthan High Court that a family settlement seeking to create legal rights in immovable property requires registration.

5. Learned counsel for the plaintiff/ respondent opposed the above submissions. He supported the judgments and decrees of the courts below. He further argued that the courts below rightly relied upon the documents in question. The concurrent findings of facts of the courts below are binding on this Board sitting in second appeal. He further argued that the defendant/ appellant in addition to contesting the suit also filed a counter claim. The suit of the plaintiff was decreed and the

counter claim was dismissed by the trial court. In such a situation, the defendant was required to file two separate appeals and having filed only one appeal, the same was not maintainable. Even on merits, the first appellate court rightly confirmed the findings of the trial court. A prayer was made to dismiss the appeal. In support of his submissions he has relied upon AIR 1995 (SC) 1724 'Digamber Adhar Vs. Devram'. In that case, it was held that it is not necessary that partition should be effected by registered deed.

6. We have given our thoughtful consideration to the above submissions and perused the records carefully.

7. There are concurrent findings of facts of the courts below that partition of the disputed lands had already taken place between the parties and in pursuance to the same, they are holding their respective shares and are cultivating the lands accordingly. These concurrent findings of facts are neither perverse nor illegal. Therefore, the same are binding on us in this second appeal.

8. A cursory look at Order VIII Rule 6 of the Code of Civil Procedure, 1908 would reveal that a counter-claim is a cross-suit with all the trappings of a separate suit. In Premier Tyres Ltd Vs Kerala State Road Transport Corporation (AIR 1993 SC 1202), the Hon'ble Supreme Court has held as under:-

*"Where no appeal is filed, as in this case from the decree in connected suit it has the same effect of non filing of appeal against a judgment or decree..... 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."*

The question as to the impact of the principle of res-judicata in a case wherein the suit is resisted by a defendant not only by denying the plaintiff's claim, but by raising a counter-claim, was examined by Hon'ble Kerala High Court in Girija & ors Vs. Rajan & ors (R.S.A. No. 14 of 2015 decided on 28.01.2015) and after discussing a catena of decisions on the subject, it was observed as under:-

*"From the above discussion, it is discernible that the law stated in Order 8 Rule 6A C.P.C. makes it abundantly clear that the counter claim in a suit will have all the characteristics of a cross suit including the vulnerability of suffering the bar of res-judicata enshrined in section 11 C.P.C., if not properly challenged."*

Thereafter, the Hon'ble High Court held as under:-

*"Therefore, I find that the question of law arising in this case can only be decided against the appellants, finding that if a defendant who raised a counter claim in a suit, fails both in the suit and in the counter claim, will have to file separate appeals challenging the decree in the suit and the counter claim. Since the appellants in this case failed to do so before the lower appellate court, I am of the view that the first appeal itself was barred by res-judicata."*

9. Having so stated the legal propositions, we may now advert to the facts of the present appeals. Here also the plaintiff/respondent preferred a suit and the defendant/ appellant preferred a counter-claim. The learned trial court vide judgment dated 30.10.2002 decreed the suit. In such circumstances, the defendant/ appellant ought to have preferred two separate appeals against the judgment and decree of the trial court. In this regard, reliance is placed on a larger bench judgment of the Hon'ble Supreme Court in AIR 1976 (SC) 1645 'Lonankutty Vs. Thomaan'. In that case, the Hon'ble Supreme Court held that the circumstance that the court has disposed of the matters by common judgment cannot effect the applicability of Section 11 of the Civil Procedure Code, 1908.

10. Although the learned trial court did not specifically pass the order of dismissal of counter-claim but the same could be inferred by necessary implication. A perusal of Explanation V to Section 11 of the CPC is very clear on the point, according to which any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purpose of this section, be deemed have been refused.

As the principle of 'res-judicata' is applicable in such proceedings, where only one appeal is filed against the common judgment passed in more than one proceedings, therefore, also the Explanation V of section 11 would get attracted in the present matter. It is in these circumstances also that the contesting defendant ought to have preferred two separate appeals, if he was really aggrieved by the judgment and decree of the trial court. In view of the above discussion, no illegality was committed by the learned first appellate court in dismissing the appeal filed by the defendant/ appellant. Therefore, this appeal is liable to be dismissed.

11. Resultantly, this second appeal is dismissed.

Pronounced.

**(Rajinder Kumar)**  
Member

**(Mukesh Kumar Sharma)**  
Chairman