



RSA No. 918/2018

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2025:KER:8241
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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

MONDAY, THE 3RD DAY OF FEBRUARY 2025 / 14TH MAGHA, 1946

RSA NO. 918 OF 2018

AGAINST THE JUDGMENT & DECREE DATED IN AS NO.38 OF 2016 OF DISTRICT COURT, KASARAGOD ARISING OUT OF THE JUDGMENT&DECREE DATED 29.03.2016 IN OS NO.219 OF 2012 OF PRINCIPAL MUNSIFF, KASARAGOD

APPELLANT/SUPPL.APPELLANT IN AS/LEGAL HEIR OF DEFENDANT IN OS:

USHA M.S, AGED 42 YEARS
D/O. LATE BALRAJ AND LATE B.M.RADHA, RESIDING AT KODANGE IN KODIBAIL VILLAGE, NOW MANJESWAR TALUK, KASARGOD P.O, UPPALA 671322.

BY ADVS.
R.LAKSHMI NARAYAN
SMT.R.RANJANIE

RESPONDENT/RESPONDENT IN AS/PLAINTIFF IN OS:

C.SADASHIVA ACHARYA
AGED 67 YEARS
S/O. ACHUTHA ACHARYA, HINDU, MECHANIC BY PROFESSION,
RESIDING AT CHIPPAR HOUSE IN PAIVALIKE VILLAGE, NOW
MANJESWAR TALUK, KASARGOD DISTRICT, P.O PAIVALIKE 671348

BY ADVS.
K.I.MAYANKUTTY MATHER
SMT.T.K.SREEKALA

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 03.02.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



JUDGMENT

1. Appellant is the legal heir of the defendant in the suit. The suit was for recovery of possession of Plaintiff A scheduled property on the strength of the title. As per the plaintiff allegations, Plaintiff A schedule property originally belonged to one Sheik Ahmmmed as per Ext.A2 Assignment dated 25.11.1978; that the said Sheik Ahmmmed executed Ext.A1 Sale Deed dt. 12.02.1981 conveying the plaintiff schedule property to the plaintiff; that the defendant has 8 cents of land on the western side of the plaintiff A schedule property; that the defendant constructed a house in a portion of A schedule property; that the defendant shifted her residence to the newly constructed house in Plaintiff A schedule property; and that though the plaintiff demanded to surrender vacant possession of the Plaintiff A Schedule property, the defendant



refused to surrender the same to the plaintiff. Hence, the suit was filed.

2. The defendant contested the suit by filing a Written Statement and raising a counterclaim. The defendant contended *inter alia* that the defendant is in exclusive possession of 'X' schedule property described in the Written Statement as per document No.4/1982 of SRO Manjeshwar; that there was a vacant land extending 15 cents in front of the residential building of the defendant belonging to the plaintiff; that the defendant encroached into the said 15 cents of land and made construction of residential house and the said portion of Plaintiff A schedule property is shown as 'Y' schedule property; that the defendant has been in possession and enjoyment of 'Y' schedule property for last more than 31 years openly and peacefully and uninterrupted to the knowledge of the plaintiff and she has perfected title by adverse possession. On these contentions, the defendants prayed for a declaration that she



had perfected her title to the 'Y' schedule property by adverse possession and limitation and for a consequential relief for a permanent prohibitory injunction.

3. Neither the plaintiff nor the defendant adduced any oral evidence. Exts.A1 to A3 and A4 Series were marked from the side of the plaintiff, and Ext.B1 and B2 were marked from the side of the defendant. The Commission Report and Plan are marked as Ext.C1 and C2.
4. The Trial Court found that the plaintiff is entitled to the decree for recovery of possession of the plaint A schedule property on the strength of title. The Trial Court found that the defendant failed to prove any right over the plaint A schedule property, and hence, the Counter Claim is liable to be dismissed. On the said findings, the suit was decreed directing the defendant to surrender vacant possession of plaint A schedule property, which is shown as B1and B2 plots in Ext.C2 Plan, to the plaintiff



within two months, failing which the plaintiff is allowed to execute the decree through the process of the court. The Trial Court dismissed the counterclaim raised by the defendant.

5. The defendant filed A.S.No. 38/2016 before the First Appellate Court challenging the judgment and decree in the suit. The defendant did not file any appeal challenging the dismissal of Counter Claim by the Trial Court.

6. The First Appellate Court found that the plaintiff failed to adduce evidence to prove that he had come into actual possession of plaintiff A schedule property as per Ext.A1 and that the suit claim is unsustainable. But the First Appellate Court refused to allow the appeal, finding that the failure of the appellant to file an appeal against the dismissal of her Counter Claim stands in the way to allow the appeal filed by her. The Appellate Court further found that the defendant was permitted by the Trial Court to appear through a guardian as per order dt 19.02.2013 in I. A



No. 1862/2012 and thereafter the defendant was conducting the case through her guardian. There was no application either by the defendant or by her guardian for discharge and there was no order of the Court discharging the guardian. But the appeal was filed by the original defendant by herself and Vakalath was executed by her for filing the appeal. The First Appellate Court held that it is an omission on the part of the Court, and it will not cause prejudice to the party as the guardian appointed for the defendant was her own daughter, and the very same person represents the estate of the defendant on her death pending the appeal.

7. The present Appeal is filed challenging the judgment and decree passed by the First Appellate Court confirming the judgment and decree passed by the Trial Court in the suit.
8. This Court had issued notice before admission to the respondent, and the respondent appeared through counsel. On



the question of admission of the Second Appeal, I heard the learned Senior Counsel Sri.R. Lakshmi Narayanan, instructed by Adv. Smt.R.Ranjini and the learned Counsel for the respondent, Smt.Nikitha Susan Paulson.

9. The learned Senior Counsel for the appellant contended that in view of the decision of this Court in **Abdul Nazer v. Lakshmana Das 2016 (3) KLT 450**, there is no necessity for filing two separate appeals before the First Appellate Court against the decree in the suit and in the Counter Claim when the suit is decreed, and Counter Claim is dismissed. Learned Senior Counsel pointed out that it is specifically stated in the Memorandum of Appeal filed in the First Appellate Court that the appellant does not intend to file any appeal as against the dismissal of the Counter Claim by the Trial Court. It is a settled law that a party to the suit can withdraw the suit even during the pendency of the appeal. The said statement in the Memorandum of First Appeal is to be treated as withdrawal as



a counterclaim by the defendant at the appellate stage. The Learned Counsel raised another argument that when the First Appellate Court found that the Appeal was incompetent, it should have returned the appeal back to the party for proper presentation rather than deciding the matter on merits. The filing of the appeal by the defendant directly, without discharging the guardian appointed by the Trial Court, is done by the counsel; the defendant shall not be prejudiced on account of the mistake committed by the counsel. On merits, the First Appellate Court has found in favour of the defendant holding that the suit claim is not maintainable. The First Appellate Court specifically found that the plaintiff was relying on a paper transfer of land, and he had never possessed the plaintiff schedule property. The defendant claimed possession of only 15 cents out of the Plaintiff A schedule property, but the Trial Court decreed the suit, allowing recovery of the entire Plaintiff A schedule property from the defendant. There is a specific condition in Ext.B1 dt,



07.04.1977 that the property assigned therein shall not be transferred within a period of ten years. The Assignee in Ext.B1 transferred the property in favour of the plaintiff as per Ext.A1 dt 12.02.1981. The said transfer is within ten years, and hence, the said transfer is void. Ext.B2 Report of the Village Officer would prove that the assignee violated the conditions of the assignment. Hence, the Trial Court acted illegally in finding the title of the plaintiff over plaint A schedule property. The learned Senior Counsel concluded by submitting that there are substantial questions of law in the matter requiring admission of this Second Appeal.

10. On the other hand, the learned Counsel for the respondent/plaintiff contended that what is declared in the decision in Abdul Nazer (supra) is that separate appeals are not required for challenging the judgment in the suit and in the counterclaim. But such an appeal should be one Composite Appeal challenging the judgment and decree in the suit as well



as the counterclaim by making payment of court fee for challenging the judgment in the suit as well as in the counterclaim. Learned Counsel relied on the decisions of this court in **Girija and others v. Rajan and another 2015(1) KL T 695** and **Janardhanan Pillai and Others v. Ponnamma and Others 2017(2) KLT 443** in support of her contentions. Admittedly, the defendant has filed an Appeal before the First Appellate Court challenging the judgment and decree passed in the suit alone by making payment of court fee with respect to the said challenge alone, and she did not make any challenge against the judgment and decree in the Counter Claim and did not pay any court fee with respect to the same. Ext.A1 is perfectly valid and legal as Ext.B1 property was alienated after three years provided in the Kerala Land Assignment Rules. The period of 10 years mentioned in Ext.B1 is not relevant or material in the light of the judgment of this Court in W.P(c) No.17443/2017, holding there could not be any contra



prescription against the provisions of the statute. As per Rule 8(1A) of the Kerala land assignment Rules, which existed as on the date of Ext.A2, the restriction against alienation is only three years, and the property was alienated much after the said period of three years. She concluded by submitting that there is no substantial question of law in the matter warranting admission of this Second Appeal as the questions of law involved are well settled.

11. I had considered the rival contentions.

12. It is well settled that when there are suit and counterclaim, and both are disposed of by a single judgment, the aggrieved party has to file an appeal against the decree in the suit and the decree in the counterclaim either by filing a separate appeal or by filing a composite appeal by making payment for court fee with respect to both the challenges. As rightly pointed out by the learned Counsel for the respondent, the defendant filed an



appeal only against the decree in the suit. The defendant did not challenge the decree dismissing the counterclaim. The court fee is paid only with respect to the challenge against the decree in the suit. Hence, the judgment and decree in the counterclaim, which remained unchallenged by the defendant, would operate as res-judicata against the challenge with respect to the judgment and decree in the suit.

13. In **Girija (supra)**, this Court considered two questions of law-

(1) Is a defendant who raised a counter-claim in the suit bound to file two appeals if the suit was decreed after rejecting the counter-claim? (2) Will that part of the judgment, disallowing the counter-claim, operate as res-judicata insofar as the appeal filed against the decree in the suit is concerned? This Court answered both the questions of law against the appellant therein. It is useful to extract Paragraph 4 of the said decision:



"14. From the above discussion, it is discernible that the law stated in O.8 R.6A CPC 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 S.11 CPC if not properly challenged. Therefore, I find that the questions 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 counterclaim. 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. Hence, the second appeal is not maintainable. In view of the findings on the substantial questions of law, the appeal is only to be dismissed."

14. In the above decision, this Court found that separate appeals are necessary and that if only one appeal is filed, the said appeal is barred by the principle of res-judicata. The learned Senior counsel for the appellant contended that the said decision was overruled by the Division Bench of this Court in



Abdul Nazer(supra). As rightly pointed out by the learned Counsel for the respondent, what is overruled by the Division Bench in **Abdul Nazer(supra)** is the finding in **Girija(supra)** that separate appeals are to be filed challenging the decree in suit and counterclaim when the appellant fails both in the counterclaim and in the suit. It is useful to extract Paragraphs 9 and 10 of **Abdul Nazer(supra)** :

“8. It has been held in A. Z. Muhammed Farook v. State Government, 1984 KHC 217: 1984 KLT 346: 1984 KLJ 145: ILR 1984 (1) Ker. 405: AIR 1984 Ker. 126 that the subject - matter would be the aggregate of the amounts claimed in the plaint and the counter-claim. The subject - matter of the suit and the counterclaim has been separately valued, and the court - fee paid thereon in the single memorandum of appeal. The subject - matter in the suit and the counterclaim is one and the same in the instant case, and there is no dispute as regards the forum to which the appeal lies. We hold that the memorandum of Regular First Appeal



filed impugning the composite decree in the suit and in the counter-claim is properly constituted and maintainable.

9. The decision in Girija's case (*supra*) to the extent it holds that separate appeals need to be filed challenging the decree in the suit and in the counter - claim does not lay down the correct law. The said decision militates against the scheme of the Statute and also the dictum in Philip's case (*supra*) and is hereby overruled. We add that this precise question was not answered in *Mathew v. Rajan*, CDJ 2016 Ker HC 110 for the reason that such an issue did not arise in that case as stated therein.

15. It is clear from the decision of the Division Bench in **Abdul Nazer(*supra*)** that there should be a challenge against the decrees in both the suit and the counterclaim by the defeated party, and in case the challenge is confined to only one decree, the said challenge is not maintainable on account of the principles of res-judicata under S.11 CPC. In view of the said



decision, only one appeal is sufficient to challenge the decree in the suit and the decree in the counterclaim. But it shall be a composite Appeal incorporating a challenge against both the decrees with payment of court fees for both challenges. In the decision of this Court in **Janardhanan Pillai(supra)**, cited by the Counsel for the respondent, this Court considered the effect of nonpayment of court fee with respect to Counter Claim in a Composite Appeal and found that when no court - fee was paid on the appeal against the decree in the Counter Claim, the First Appellate Court ought to have considered that there was no appeal against the decree in the counterclaim and in such case, the First Appellate Court ought to have considered that the appeal against the dismissal of the suit was hit by the principles of res-judicata on account of a want of appeal against the decree in the counterclaim.

16. In view of the aforesaid well-settled propositions of law, the First Appellate Court rightly found that the appeal before it



challenging the decree in the Suit is barred by res-judicata on account of the nonchallenge against the decree in the counterclaim.

17. The Appellant has filed the present appeal challenging only the judgment and decree in the suit, which is confirmed by the First Appellate Court. It is quite interesting to note that she has paid court fees for the Suit Claim and the counterclaim in this appeal. Such payments of court fees will be of no use in the absence of any prayer with respect to the decree in the Counter Claim. Even if such prayer is there, the Appeal could not be treated as a composite appeal for want of challenge against the decree in the Counter Claim before the First Appellate Court. Only one decree of the First Appellate Court is available for challenge in this Court, and hence, there could not be a composite challenge.



18. The contention of the learned Senior Counsel for the appellant is that the statement in the Memorandum of Appeal before the First Appellate Court that the appellant does not intend to file any appeal against the dismissal of the counterclaim by the Trial Court is to be treated as a withdrawal of the Counter Claim and that hence there is no need to file an appeal against the decree in the Counterclaim. Of course, it is open to a party to withdraw the original proceeding during the pendency of the appeal against the same. But here, the appeal against the counterclaim was not pending before the First Appellate Court, enabling the appellant to withdraw the counterclaim. Hence, the said contention is unsustainable.

19. The next contention of the Senior Counsel is that the Appeal before the First Appellate Court was filed by the defendant directly without discharging the guardian appointed by the Trial Court. This contention would make the position of the appellant worse. True, the appeal ought to have been filed



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either by the guardian representing the appellant or the defendant directly after seeking the discharge of the guardian. If such contention is accepted, this Court will have to hold that the appeal by the appellant is an incompetent one. Such contention will not in any way help the appellant to overcome the above bar on the principle of res-judicata. The appellant could not contend that a mistake was committed by the First Appellate Court in not returning the appeal for proper presentation and that a mistake was committed by the counsel in filing an improper appeal since on the death of the defendant during the pendency of the first appeal, her daughter who is the appellant herein and who was the guardian for the defendant appointed by the Trial Court got herself impleaded as the legal heir of the defendant and prosecuted the appeal. She had no case before the First Appellate Court that the appeal was incompetent and was liable to be returned.



20. I find that the appeal filed by the defendant before the First Appellate Court was not maintainable, and the First Appellate Court rightly dismissed the same on the principles of res-judicata.

21. The counsel on both sides advanced arguments with respect to the legality of alienation of Ext.B1 property as per Ext.A1 Sale Deed before the 10 years; I am not going into the said question on merits as the same is not open for consideration and the decision on the said question in either way would not make any difference in the fate of this appeal.

22. I do not find any ground or reason to interfere with the judgment and decree passed by the First Appellate Court. Though questions of law are involved in the matter, the same are not substantial in nature and are answered in the light of the precedents laid down by this Court in the aforesaid decisions. The second Appeal is not liable to be admitted when the



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substantial questions of law involved therein are settled questions of law. No substantial question of law arises in this appeal warranting admission of the Second Appeal. Accordingly, this Regular Second Appeal is dismissed.

Sd/-

M.A.ABDUL HAKHIM

JUDGE

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