

REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 17TH DAY OF MAY, 2022

BEFORE

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ,

CHIEF JUSTICE

&

HON'BLE MS. JUSTICE JYOTSNA REWAL DUA

REGULAR SECOND APPEAL No.57 of 2017
A/W CONNECTED MATTERS

Between:-

1. RSA No.57 of 2017

**SHRI RAMESH CHAND
SON OF SHRI KISHAN
CHAND, RESIDENT OF
MAHAL KATHIARA,
MAUJA GARLI, TEHSIL
DEHRA, DISTRICT
KANGRA, H.P.**

.....APPELLANT

**(BY MR. B.M. CHAUHAN,
SENIOR ADVOCATE WITH
MR.M.S. KATOCH, ADVOCATE)**

AND

- 1. OM RAJ, SON OF SHRI
HARBANS**
- 2. RANJIT SINGH, SON OF
HARBANS**

3. MANBHARI, WIFE OF
RANJIT SINGH
4. JEEVANA, WIFE OF OM
RAJ
ALL RESIDENTS OF
MAHAL KATHIARA,
MAUJA GARLI, TEHSIL
DEHRA, DISTRICT
KANGRA, H.P.

.....RESPONDENTS

(BY MR.SANJEEV KUTHIALA,
SENIOR ADVOCATE WITH
MS.ANAIDA KUTHIALA &
MS.AMITA CHANDEL,
ADVOCATES)

2. RSA No.515 of 2017

SMT. NIRMAL THAKUR
W/O LATE SH. MANGAT
RAM R/O MANGAT NIWAS,
NEAR KRISHNA JIM,
JIWANU COLONY TEHSIL
AND DISTRICT SHIMLA
H.P.

.....APPELLANT

(BY MR. TEK CHAND SHARMA,
ADVOCATE)

AND

1. SMT. SURAJ NEGI W/O
LATE SH. PRAKASH
CHAND NEGI R/O PREETI
PUNEET KUTIR JIWANU
COLONY, PARIMAHAL
KASUMPTI, TEHSIL AND
DISTRICT SHIMLA H.P.
2. EXECUTIVE ENGINEER,

SHIMLA ELECTRIC SUB-
DIVISION KHALINI
DISTRICT SHIMLA H.P.

.....RESPONDENTS

(NONE FOR R-1,
MR. ADARSH K. SHARMA,
ADDITIONAL ADVOCATE GENERAL,
FOR R-2)

3. RSA No.381 of 2017

SHRI THAKUR DASS
SHARMA S/O SHRI SITA
RAM CHAIRMAN, ALFA
PUBLIC SCHOOL,
BERTHIN, TEHSIL
JHANDUTTA, DISTRICT
BILASPUR (H.P.)

.....APPELLANT

(BY MR. AJAY KUMAR, SENIOR
ADVOCATE WITH MR. GAUTAM
SOOD, ADVOCATE)

AND

SHRI MADAN LAL S/O
SHRI MAHANT RAM R/O
VILLAGE MAHHAN,
PARGANA SUNHANI,
TEHSIL JHANDUTTA
DISTRICT BILASPUR, H.P.

.....RESPONDENT

NONE FOR THE RESPONDENT.

4. RSA No.237 of 2019.

MOHAN SINGH S/O LATE
SH. NEK RAM
(DECEASED) THROUGH
LRS.

1-A. SH. VED PRAKASH S/O

LATE SH.MOHAN SINGH
 1-B. SMT. BIMLA DEVI
 1-C. SMT. GANGA DEVI
 1-D. SMT. KANTA DEVI W/O
 LATE SH. MOHAN SINGH.
 2. SH. MANI RAM
 3. SMT. DAWARKOO DEVI,
 4. SMT. SANTI DEVI,
 5. SMT. MATHI DEVI,
 6. SMT. GAURI DEVI,
 7. SMT. KHEMI DEVI
 ALL SONS AND
 DAUGHTERS OF LATE SH.
 NEK RAM
 ALL RESIDENTS OF
 VILLAGE PATHAI,
 PARGANA LACHHANG,
 P.O. RAURI. TEHSIL
 KASAULI, DISTRICT
 SOLAN, H.P.

.....APPELLANTS

(BY MR. SUDHIR THAKUR,
 SENIOR ADVOCATE WITH
 MR.KARUN NEGI, ADVOCATE)

AND

1. HUKUM SINGH S/O LATE.
 SMT. MALGIRU DEVI W/O
 LATE SH. ATMA RAM,
 2. SMT. SATY DEVI,
 3. SMT. PUSHPA DEVI
 4. SMT. LEELA DEVI,
 5. SMT. SAVATRI DEVI
 ALL DAUGHTER OF LATE
 SMI. MALGIRU DEVI, WIFE
 OF LATE SH. ATMA RAM
 6. SH. HEMAND KUMAR,
 7. SH. SANJAY KUMAR,
 BOTH SON OF LATE SH.
 TURAL RAM SON OF,

- LATE SH. ATMA RAM
8. SMT. JAMNA DEVI D/O OF
LATE SH.TULA RAM, S/O
LATE SH. ATMA
RAM,
 9. SMT. RITA DEVI WD/O OF
LATE SH.TULA RAM S/O
OF LATE SH. ATMA RAM,
 10. SH.PAT RAM,
 11. SH. NAND LAL
BOTH SONS OF LATE SH.
MAN SINGH BOTH
RESIDENTS OF VILLAGE
SHANGLI, PARGANA
LACHRANG. THE.
KASAULI, DISTRICT
SOLAN, H.P.
 12. SH. BANSI RAM
(DECEASED) THROUGH
LRS:
 - 12A SH. HEMANT KUMAR SON
OF LATE SH. BANSI RAM,
RESIDENT OF VILLAGE
SHANGLI, P.O. KANDA,
TEHSIL KASAULI,
DISTRICT SOLAN H.P.
 - 12-B SMT. PRAVEEN KUMARI
DAUGHTER OF LATE SH.
BANSI RAM, RESIDENT OF
VILLAGE & P.O. KOT
BEJA, TEHSIL KASAULI,
DISTRICT SOLAN H.P.
 13. SMT. GULAB DEVI
 14. SMT. SURMA DEVI
BOTH DAUGHTERS OF
LATE SH. MAN SINGH
BOTH RESIDENT OF
VILLAGE SHANGLI.
PARGANA LACHHRANG.
TEHSIL KASAULI,
DISTRICT SOLAN H.P.
 15. SH. OM CHAND

16. SH. DURGA RAM
17. SH. BAHADUR SINGH
ALL SONS OF LATE SMT.
NAJKU D/O LATE SH. MAN
SINGH
18. SMT. HIRA
19. SMT. JAMNA
BOTH D/O LATE SMT.
NAJKU D/O LATE SH. MAN
SINGH
ALL RESIDENT OF
VILLAGE NAUN, P.LO.
JABLI, TEHSIL KASAULI,
DISTRICT SOLAN, H.P.
20. SH. ROSHAN LAL
21. SMT. HAR DEVI
22. SMT. JAMNA DEVI
23. SMT. DAYA VANTI
ALL SONS AND
DAUGHTERS OF LATE SH.
BALA RAM
24. SMT. CHAIN DEVI WIDOW
OF LATE SH. BALA RAM
SON OF SH. BALAK RAM
ALL RESIDENT OF
VILLAGE KAHNO,
PARGANA LACHHANG,
P.O. RAURI,
TEHSIL KASAULI,
DISTRICT SOLAN H.P.
25. SH. CHAIN SINGH
(DECEASED) THROUGH
LRS:
- 25-A SMT. TARA DEVI WIDOW
OF SH. CHAIN
SINGH
- 25-B SH. HARI KISHAN
- 25-C SH. KULDEEP
KUMARCHAIN
- 25-D SMT. USHA DEVI
- 25-E SMT. SANTOSH
- 25-F SMT. SHAKUNTALA

ALL SONS AND
DAUGHTERS OF LATE SH.
CHAIN SINGH

ALL RESIDENT OF
VILLAGE KASAULI GAON,
P.O. GARKHAL, TEHSIL
KASAULI, DISTRICT
SOLAN H.P.

26. SH. CHET RAM

27. SH. THAKUR SINGH

28. SH. ISHWAR DUTT

ALL RESIDENT OF
VILLAGE SHANGULI,
KHURD, PARGANA
LACHHRANG.

TEHSIL KASAULI,
DISTRICT SOLAN H.P.

29. SMT. TARA DEVI WIFE OF
SH. TEK CHAND,
DAUGHTER LATE SMT.
KIRI, RESIDENT OF
VILLAGE BADYAR, P.O.
JUBBAR, TEHSIL
KASAULI, DISTRICT
SOLAN H.P.

30. SMT. NIRMALA DEVI WIFE
OF SH. OM PARKASH,
DAUGHTER OF LATE SMT.
KIRI

31. SMT. UMA DEVI WIFE OF
SH. DHEERAJ BHADUR
DAUGHTER OF LATE SMT.
KIRI

BOTH RESIDENT OF
VILLAGE TAMLOG. P.O.
JAGJIT NAGAR, TEHSIL
KASAULI, DISTRICT
SOLAN H.P.

32. SMT. MEENA DEVI WIFE OF
SH. NARINDER SINGH
DAUGHTER LATE SMT.
KIRI, RESIDENT OF

- VILLAGE MAGOTI MORE,
P.O. MANDHO DHAR,
TEHSIL KASAULI,
DISTRICT SOLAN H.P.
33. SMT. KAVITA DEVI WIFE
OF SH. BALWANT SINGH,
DAUGHTER OF LATE SMT.
KIRI, RESIDENT OF
VILLAGE PALECH, P.O.
AND TEHSIL KANDAGHAT,
DISTRICT SOLAN H.P.
34. SMT. PRATIMA WIFE OF
SH. RAJESH DAUGHTER
OF LATE SMT. KIRI,
RESIDENT OF VILLAGE
BANGLA, P.O. AND TEHSIL
KASAULI, DISTRICT
SOLAN H.P.
35. SMT. LALITA DEVI WIFE
OF SH. TARA DUTT
DAUGHTER OF LATE
SMT.KIRI, RESIDENT OF
VILLAGE BAANDH, P.O.
BHAGURI. TEHSIL
KASAULI, DISTRICT
SOLAN H.P.
36. SH. LEKH RAJ SON OF
LATE SMT. KIRI WIFE OF
SH. DEVI SING, RESIDENT
OF VILLAGE BARAHA,
P.O. GARKHAL, TEHSIL
KASAULI, DISTRICT
SOLAN H.P.
37. SMT. SHILA
38. SMT. MATHURA
ALL DAUGHTERS OF SH.
DHANI RAM
39. SMT. KAMLA
ALL RESIDENT OF
VILLAGE SHANGULI
KHURD, PARGANA
LACHHHRANG, TEHSIL

KASALI, DISTRICT
SOLAN, H.P.

.....RESPONDENTS

(MR. P.S. GOVERDHAN,
ADVOCATE, FOR R-1, R-6 TO
R-11, R-12(A) AND 12(B)

[MR. K.D. SOOD, SENIOR
ADVOCATE WITH MR. HET
RAM THAKUR, ADVOCATE,
MR. BHUPENDER GUPTA,
SENIOR ADVOCATE WITH MR.
JANESH GUPTA, ADVOCATE
AND;
MR. SHRAWAN DOGRA
SENIOR ADVOCATE WITH MR.
HARSH KALTA, ADVOCATE.
MR. MANIK SETHI, ADVOCATE
AS INTERVENERS]

RESERVED ON: 31.3.2022
PRONOUNCED ON: 17.05.2022

*These appeals coming on for pronouncement of the
judgment this day, **Hon'ble Mr. Justice Mohammad Rafiq,**
passed the following:*

ORDER

These matters have been referred to the Larger Bench
by the order of the Single Bench dated 19th December, 2017 passed
in two Regular Second Appeals, namely, RSA Nos.57 of 2017 and
381 of 2017.

2. RSA No.57 of 2017 is plaintiff's appeal against the judgment and decree dated 16.09.2016 passed by the Additional District Judge (II) Kangra at Dharamshala who thereby set aside the judgment and decree passed by the Civil Judge(Senior Division), Court No.1, Dehra, District Kangra in the civil suit as well as counter claim decided on 28.09.2012, dismissing the suit filed by the plaintiff/appellant and decreeing the counter claim of the defendants/respondents. Further prayer has been made to set aside the judgment and decree passed by Additional District Judge and decree the suit of the appellant/plaintiff and dismiss the counter claim filed by the respondents/defendants. The plaintiff in this case filed a suit for permanent prohibitory injunction, in which the defendants/respondents filed a counter claim. Both, the suit and the counter claim, were tried together and were allowed in part by a common judgment. The plaintiff was held entitled to the relief of permanent prohibitory injunction against the defendants over a part of the land classified as '*gair-mumkin-abadi*' measuring 0-06-00 hectares, out of the total land measuring 0-10-91 hectares. The counter claim of the defendants was also partly allowed holding them entitled to the relief of permanent prohibitory injunction against the plaintiff, who was restrained from interfering over a portion of the

land classified as '*banjar kadeem*' measuring 0-04-91 hectares.

3. RSA No.381 of 2017 is defendant's appeal against the judgment and decree dated 31.05.2017 passed by the Additional District Judge, Ghumarwin, District Bilaspur affirming the judgment and decree dated 30.06.2016 passed by the Civil Judge (Junior Division) Court No.2, Ghumarwin, District Bilaspur, who thereby decreed the civil suit filed by the plaintiff/respondent for recovery of an amount of Rs.2,25,975/- with interest at the rate of 15% per annum with quarterly rests from the date of filing of the suit till realization of the whole amount from the defendant and dismissed the counter claim for recovery of Rs.2,85,159/- filed by the appellant/defendant against the plaintiff/respondent.

4. The question that arose before the learned Single Judge was whether a common appeal questioning correctness of the judgment and decree passed in civil suit as well as in counter claim was legally maintainable before the Court below. The learned Single Judge noticing the conflict of opinion between the Single Bench judgment of this Court in **RSA No.561 of 2005**, titled **Pohlo Ram vs. Jindu Ram and others** decided on 28.10.2005 on one hand and three judgments of different Single Benches of this Court passed in (i) **Smt. Satya Devi vs. Partap Singh and others, AIR**

2006 HP 75 and (ii) **H.P. State Forest Corporation through its Divisional Manager vs. Kahan Singh, 2017(1) Him. L.R. 36** and in (iii) **Mohan Singh vs. Inder Singh & others 2017(1) Him. L.R. 368**, on the other hand, while disagreeing with the view expressed in **Pohlo Ram** (supra), has referred the matter to the Larger Bench for an authoritative pronouncement.

5. We have heard Mr. B.M. Chauhan, Mr. Ajay Kumar, Mr. Sudhir Thakur, learned Senior counsels & Mr. Tek Chand Sharma, learned counsel appearing for the appellants and Mr. Sanjeev Kuthiala, learned Senior Counsel, appearing for the respondents in RSA No. 57 of 2017 and Mr. K.D. Sood, Mr. Bhupender Gupta and Mr. Shrawan Dogra, learned Senior Counsel & Mr. Malkiyat Singh, learned counsel, appearing as interveners.

6. Mr. B.M. Chauhan, learned Senior Counsel appearing for the appellant in RSA No. 57 of 2017, argued that Section 2(2) of the Code defines decree as formal expression of an adjudication which conclusively determines the right of the parties with regard to all or any of the matters in controversy. Section 2 (9) of the Code defines judgment to be statement given by the judge on the grounds of a decree or order. Order 8 Rule 6-A of the Code provides for filing of counter claim in a suit against the claim of the plaintiff by the

defendant. Order 8 Rule 6-A (2) of the Code provides that such counter claim shall have the same effect as the cross suit so as to enable the court to pronounce a final judgment in the same suit both in the original claim and in the counter claim. Sub rule 6-A (4) of Order 8 of the Code categorically provides that counter claim shall be treated as a plaint and governed by the rules applicable to the plaint. Relying on the judgment of Supreme Court in ***Rajni Rani and another versus Khairati Lal and others, (2015) 2 SCC 682***, the learned Senior Counsel argued that in that case it was held that dismissal of counter claim on merits after adjudication would attach finality to it in respect of the rights of defendant and get the status of a decree and therefore appeal is proper remedy against final order of dismissal of counter claim on merits. A counter claim preferred by the defendant in a suit is in the nature of the cross suit and by a statutory command, even if the suit is dismissed, counter claim shall remain alive for adjudication. It is argued that the aforementioned provisions suggest that counter claim, if any, filed on behalf of the defendant would be treated as plaint and the same would be governed by the rules applicable to the plaint. It would have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the civil suit, both on the original claim and the

counter claim.

7. The learned Senior Counsel argued that in the present case, the learned trial court partly decreed the suit of the plaintiff for permanent and prohibitory injunction against the defendant over one portion of the land and partly allowed the counter claim filed by the defendants holding them entitled to the relief of permanent and prohibitory injunction restraining the plaintiff from interfering with their possession in another portion of land. There were thus two adjudications made by learned trial court vide which both original claim as well as counter claim had been conclusively adjudicated on merits. The defendants were, therefore, aggrieved by the judgment and decree passed both in the original claim as well as in the counter claim. The learned first appellate Court has erred in law by entertaining and deciding a composite appeal against the common judgment/decreed partly allowing the civil suit as well as partly accepting the counter claim. The learned First Appellate Court erred in law in not appreciating that in absence of two separate appeals against the judgment and decree passed by the trial Court, adjudication in one matter would act as a *res-judicata* qua the other and a composite appeal was not maintainable.

8. Mr.B.M. Chauhan, the learned Senior Counsel argued

that a party aggrieved by finding on any issue on counter claim has to agitate the same in appeal, lest it becomes final qua that party upon his failure to file appeal against such finding. A composite appeal covering both the subject matters of original claim as well as the counter claim cannot be maintained. The learned Senior Counsel for the appellant in support of his arguments has relied upon the judgments of the Supreme Court in **Premium Tyres Ltd. vs. Kerala State Road Transport Corporation, (1993) Supp (2) SCC 146** and in **Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammal and others, (2015) 3 SCC, 624**. Learned Senior Counsel in support of his arguments also relied upon the judgments of this Court in **Parso Ram vs. Dumnu Ram, 2017(3) SLC 1270**, **Kahan Singh (supra)**, **Mohan Singh (supra)** and **Piar Chand vs. Ranjeet, 2016 (Supp) SLC 612**. It is submitted that in all these judgments, view has been taken and rightly so that the counter claim has effect of the suit and the same has to be treated as the plaint and the effect of the counter claim is that even if the suit of the plaintiff is stayed, discontinued, dismissed or withdrawn, counter claim can yet be decided on merits.

9. Mr. Ajay Kumar, learned Senior Counsel appearing for the appellant in RSA No.381 of 2017 argued that the

plaintiff/respondent in this case filed a civil suit in the trial court against the defendant/appellant for recovery of Rs.2,34,500. In the said suit, the appellant/defendant also filed a counter claim for recovery of Rs.2,85,159/-. The learned trial court by a common judgment passed in the suit and counter claim decreed the suit of the plaintiff/respondent and at the same time, dismissed the counter claim of the appellant/defendant. A single/composite decree sheet, both for the suit as well as the counter claim, was drawn by the learned trial court. Aggrieved thereby, the appellant/defendant filed a single appeal in the Court of Additional District Judge, Ghumarwin, who vide his judgment dated 31.05.2017 dismissed the appeal on the ground that in view of the decision of this Court in **Piar Chand** (supra) single appeal is not maintainable. The learned Senior Counsel submitted that in view of the amendments carried out in the Code of Civil Procedure, the memorandum of appeal is now not required to be accompanied by a decree sheet as per the provisions of Order 41 Rule 1 and Order 20 Rule 6-A of Code. Rule 6-A of Order 20 of the Code came into force w.e.f. 01.07.2002. It has, therefore, been made now possible to file appeal only on the basis of judgment and the memo of appeal need not be accompanied by copy of decree sheet. In the present case, however, there was a

composite decree sheet which was filed alongwith the appeal. Learned Senior Counsel relied on the judgment of Supreme Court in **Narhari and others vs. Shanker and others, AIR 1953 SC 419** to argue that where there is one trial, one finding and one decision, a single appeal would be competent. In order to buttress his arguments, the learned Senior Counsel also relied on the judgment of this Court in **Pohlo Ram** (supra).

10. It is further argued that the right to appeal is a substantial right of a litigant and substantial rights should not be allowed to be defeated on technical grounds. The learned Senior Counsel has on this aspect of law placed reliance on judgment of the Supreme Court in **B.S. Sheshagiri Setty and others vs. State of Karnataka and others, (2016) 2 SCC 123**, and **Rani Kusum vs. Kanchan Devi and others, (2005) 6 SCC 705**. It is submitted that no one has vested right in the procedure and processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Relying on the judgment of Supreme Court in **Shreenath and another vs. Rajesh and others, 1998(4) SCC 543**, learned Senior Counsel argued that in that it was held that in interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice, is to be

adopted. The procedural law is always subservient to and in aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.

11. Mr. Sanjeev Kuthiala, learned Senior Counsel appearing for the respondents/defendants in RSA No.57 of 2017 submitted that there is an express provision in Order 20 Rule 19(2) of the Code that in the case an appeal from a decree passed in a suit, where a counter claim has been made, can be filed as if no counter claim has been claimed, which necessarily means that the appellants would be entitled to question the decree of the counter claim in the same appeal and there is no necessity of filing separate appeal in case the counter claim preferred in the suit has been decreed by the trial court. Such provision was incorporated by the amendment in CPC whereby the term "counter-claim" was added to the provision of Order 20 Rule 19(2) of CPC. It was argued that prior to the aforementioned amendment, a similar question had arisen before the Supreme Court in **Narhari** (supra), wherein it was held that one appeal can be filed with respect to the suit and the counter claim. The learned Senior Counsel argued that this Court in **Kedar Singh 2017 (1) Shimla Law Cases 469**, **Mohan Singh** (supra), 2017 (1) Latest Himachal Law Reports 387, **Baldev Singh vs. Chet Ram**

and Kahan Singh (supra); has taken the view that where in a matter both suit and counter claim are filed and where there is a composite decree, then a composite appeal is not maintainable but separate appeals are required to be preferred and not a composite appeal. In none of these judgments, binding precedent of the Supreme Court in **Narhari** (supra) was considered and also the effect of the amended provision of Order 20 Rule 19(2) of the Code was not analyzed. Language of this provision expressly provides that in an appeal from a decree passed in the suit where a counter claim has been made, the appeal would be filed as if no counter claim had been made. Relying on the judgment of Rajasthan High Court in **Iqbal Banu vs Ramesh, 2018 Supreme (Raj.) 870**, the learned Senior Counsel argued that therein correctness of the judgments of **Kahan Singh** (supra) and **Parso** (supra) has been doubted on the premise that these two judgments failed to consider the effect of Order 20 Rule 19(2) of the Code. It was held therein that a single appeal against a common decree passed by the trial court dismissing the suit and accepting the counter claim was maintainable. The learned Senior Counsel further submitted that right of appeal conferred by the statute has to be liberally construed. Where appeals lie to the same authority, it would be too technical an approach to adopt to partly

reject a composite appeal on the ground that separate appeals, instead of a composite appeal, ought to have been filed. The right of appeal is a remedy provided under the statute and should not ordinarily be denied unless the law expressly prohibits it. The learned Senior Counsel, therefore, argued that a single appeal is maintainable questioning correctness of the judgment and decree passed in the civil suit as also the counter claim.

12. On the question of *res-judicata*, Mr. Sanjeev Kuthaila, the learned Senior Counsel argued that this principle would be applicable only where two or more suits are disposed of by a common judgment but separate decrees are prepared or where two suits are filed and connected and decided by a common judgment and decree. In such a situation, where multiple suits are disposed of by one judgment but by different decrees or otherwise, two or more appeals would be requisite. The learned Senior Counsel in support of his arguments relied on the judgments of the Supreme Court in **Shri Ramagy Prasad Gupta and others vs. Sri Murli Prasad and others, (1974) 2 SCC 266, Premium Tyres Ltd. (supra), Rajni Rani (supra); Sri Gangai Vinayagar Temple (supra) and State of Andhra Pradesh and others vs. B. Ranga Reddy (Dead) by Legal Representatives and others, 2020(15) SCC 681**

13. Mr. K.D. Sood, learned Senior Counsel, appearing as intervener, submitted that though an appeal lies against a decree under Order 41 Rule 1 of CPC but the requirement of filing appeal, following amendment brought in the Code with effect from 01.07.2002, is that the appeal has to be accompanied with copy of the judgment only. Referring to Order 20 Rule 6 & 6A CPC, the learned Senior Counsel argued that a decree sheet is required to be drawn up/prepared in every case which is decided, but preparation of drawing of a decree is a ministerial act and the appeal can be filed even without attaching a copy of decree, on the basis of judgment alone. With the pronouncement of judgment, copy of the judgment is required to be delivered to the parties. As per order 20 Rule 6A and 6B of C.P.C, the decree sheet is to be prepared as expeditiously as possible, in any case within 15 days from the date on which the judgment is pronounced. Order 20 Rule 19 of CPC contemplates drawing up a decree in case of set off or counter claim and sub rule (2) thereof only enables the filing of appeals in case of set off or counter claim. Order 8 Rule 6A to 6G of CPC provides for the mode of trial for counter- claim which can be decreed if the written statement etc. is not filed either before the decision of the suit and also in case the suit is stayed, in that event the counter claim can

proceed. It is trite that counter claim is to be tried as a separate suit, like a cross suit and the court is entitled to pronounce the judgment in the same suit, both in respect of the claim in the suit and the counter claim. The learned Senior Counsel, therefore, argued that the decree sheet is required to be drawn up in every case bearing number of the suit or number of the cross suit/counter claim/set off. When Section 96 or Section 100 CPC provides for appeal against the decree, unless the two or more suits are consolidated, there has to be separate appeals against the judgment and decree in each suit, cross suit, counter claim etc. However when two or more suits are consolidated, evidence is recorded in one case which is considered in all the matters, it is treated as one suit. Therefore, unlike consolidated suits, the cross suits or counter claims are to be treated as separate and distinct suits. They are not treated as consolidated with the main suit. The argument therefore, is that the appeals in such a situation have to be filed against all the decrees which may be accompanied with the copy of the judgment. The learned Senior Counsel in support of his arguments, relied upon the following judgments:-

(i) **Narhari** (supra); (ii) **AIR 1996 SC 1322 Sheoden Singh versus Daryao Kanwar**; (iii) **Ramagya Prasad Gupta and**

others vs. Murli Prasad and others, AIR 1974 SC 1320, (iv) Premier Tyres (supra); (v) AIR 1997 SC 1736 Ram Prakash versus Charan Kaur; (vi) **Mt. Lachhhmi vs. Mt. Bhuli, AIR 1927 Lahore 289; (vii) Appa and others vs. Kachai Bayyan Kutti and others, AIR 1932 Madras 689; (viii) Satya Devi (supra); (ix) Rajni Rani (supra); were approved by the Supreme Court in **Narhari (supra).****

14. Mr. K.D. Sood, learned Senior Counsel argued that judgments of the this Court **Kahan Singh (supra), Mohan Singh (supra)** and **Satya Devi (supra)** have been correctly decided, wherein it has been held that when two suits or a suit and counter claim, are decided by common judgment, separate appeals have to be filed against the decree sheet in both of them. Judgment of the Rajasthan High Court in **Iqbal Banu (supra)** does not lay down correct law because Order 20 Rule 19(2) of the Code only provides and enables that an appeal can be filed against the adjudication of a counter claim, set off and nothing more than that is contemplated or provided therein. However, exception will be only in the case where the suits are consolidated and the same is treated as one suit for all intents and purposes, by recording evidence in one case which is treated as evidence in all cases and all the cases being tried and disposed of by a common judgment and drawing up of a common

decree treating it as one decision.

15. Mr. Shrawan Dogra, learned Senior Counsel appearing as intervener, submitted that Order 8 Rule 6-A of the Code provides for counter claim by defendant and sub-rule (4) thereof provides that counter claim shall be treated as a plaint and would be governed by the rules applicable to plaints. Such counter claim as per sub-rule (2) thereof is to be tried as cross suit and the Court has to pronounce final judgment both on original claim and on the counter-claim. Section 2(2) of the Code defines decree as formal expression of an adjudication which conclusively determines the rights of the parties. Section 2(9) of the the Code defines judgment to be statement given by the Judge on the grounds of a decree. Order 14 of the Code refers to the framing of the issues and requirement of pronouncement of judgment on all issues. Order 20 Rule 5 of the Code requires the Court to state decision on each issue. Order 20 Rule 19(2) of the Code provides for appeal from counter claim which would be subject to same provision as to appeal against original decree. It is argued that any pronouncement on the issues framed in pursuance to the pleadings in counter-claim will adjudicate the controversy between the parties. The parties have to deal with such findings in the same manner as it would have behaved in case

pronouncement is on the issues between the parties in the original claim. A party aggrieved by any finding on any issue in counter claim has to agitate the same in appeal, lest the same becomes final qua that party in case no appeal is filed against such finding. Finding on any issue becoming final, whether in original claim or the counter claim, will bind the parties. There may be a situation that the court may pronounce common judgment for original claim as well as counter-claim, covering all the issues raised in both, and eventually, a common decree may be passed covering all the aspects of the common judgment. In such a situation also, the parties have to challenge the findings in appeal separately by identifying and locating the issues framed. In case issue(s) relate to original claim, appeal has to be filed with regard to subject matter covering the original claim. Similarly, in case the issue(s) relate to counter-claim, then the appeal has to be filed with respect to the subject matter covering the counter-claim. In other words, a common appeal covering both the subject matters of the original claim as well as counter claim, cannot be maintained. There has to be separate appeal with regard to both subject matters. The learned Senior Counsel argued that in case appeal is filed qua only one subject matter, i.e. original claim or the counter-claim, then the party is,

consciously, allowing the findings in respect of the other subject matter, to become final. Such conduct of the party will determine the future consequence of such finality like *res-judicata* etc. between the parties. Therefore, in case only one appeal is filed touching subject matter and issues. involved either in original claim or in counter-claim, then such appeal has to be confined to such subject matter alone. Resultantly, the consequence of finality attained on other findings in the other claim will entail its necessary effect on the determination of rights of the parties keeping in view the fact of such finality.

16. Mr. Manik Sethi, learned counsel also appearing as intervener, submitted that the counter claim is not an independent suit for all purposes but is deemed to be an independent suit for the purposes as mentioned in the Code under Order 8 Rule 6A (2), (3) & (4) and for the purpose of limitation as per Section 3(2)(b) of the Limitation Act, 1963. If the counter claim is to be treated as a separate suit, independent from the main suit, then it would amount to rewriting Order 8 Rule 6A (2), which mandates "a final judgment" and in "same suit". Further, treating counter claim as a separate suit would mean that there will be a "common judgment" as against the "final judgment" and that it will be common for "both the suits" as

against the mandate of having it in the "same suit" per Order 8 Rule 6A (2). As the counter claim can also be set up through amendment (Order 8 Rule 8 the Code) and by way of subsequent pleadings (Order 8 Rule 9 the Code), treating the counter claim as an independent suit would mean that a suit may be filed by way of amendment or by way of subsequent proceedings, which is impermissible. It is submitted that the Code only allows the pleadings to be amended or substituted and not an independent suit. It is argued that if counter claim is to be treated as a separate suit, independent from the main suit, then the same would amount to rendering Order 8 Rule 6-C otiose, which deals with "Exclusion of Counter claim". This provision gives power to the Court to exclude the counter claim, for it to be treated as an independent suit and tried independently. If counter claim is meant to be an independent suit in itself, then there cannot be any "exclusion" from the main suit as an independent suit cannot be said to be "included" in the main suit. It can at best be "connected" but not included with the main suit.

The learned counsel in support of his arguments relied upon the judgment of Supreme Court in **Indian Bank vs. ABS Marine Products (P) Ltd., (2006) 5 SCC 72**, to argue that the Supreme Court therein held that a counter claim cannot be given the status of

an independent proceedings.

17. We have given our thoughtful consideration to the rival submissions and perused the material on record.

18. Starting with leading judgment of the Supreme Court on the subject in **Premier Tyres Limited** (supra), a suit was filed by the appellant (Premier Tyres Limited) therein for recovery of certain amount on account of supply of goods made by it to the respondent-Kerala State Road Transport Corporation. The respondent also filed a suit for recovery of amount paid in excess of DGS & D contract rates. Both the suits were connected and tried together. As the nature of dispute in both the suits was same, common issues were framed in both the suits. The trial court found that the respondent-Corporation was liable to pay only at DGS & D contract rates and was entitled to refund to the extent of excess payment made by it and that the appellant was entitled to recover to the extent its claim was found to be substantiated even on the basis of DGS & D contract rates. Both the suits were thus decreed partly. The appellant did not file any appeal against dismissal of the suit for the part of its claim but filed appeal against the decree granted in favour of the respondent-Corporation in the suit filed by it. At the time of hearing, the High Court dismissed the appeal of the appellant

as barred by *res judicata* as the finding recorded in the connected suit that the appellant was entitled to charge and collect only on the DGS & D rates and not on the invoice price, had become final. The argument of the appellant before the Supreme Court that Section 11 of CPC pertaining to *res judicata* would not apply to such a case since both the suits were connected and decided by a common judgment therefore, the issue in neither suit can be said to have been decided in a former suit was repelled. The Supreme Court while dismissing the appeal of the appellant held that the effect of non-filing of appeal against a judgment and decree is that it becomes final.

19. The Supreme court in ***Ramagya Prasad Gupta*** case, supra was called upon to reconsider the judgment in **Sheodan Singh** (supra) but it did not consider it necessary to examine the matter as the subject matter of two suits being different, one of the necessary ingredients for applicability of Section 11 of CPC, was found missing. In that case, three suits were filed before the trial court by two different parties. While P filed suit for accounting, M filed suit for declaration that he alone was entitled to money payable by the Government and also filed a suit to declare that he continues to be the partner of the firm which purchased the assets in a public

auction although at an earlier stage he had withdrawn from the firm. The trial Court decreed the suit filed by P but dismissed the other two suits, by a common judgment. N filed an appeal against the said judgment, but later on he got it dismissed for non-prosecution. M, however, preferred two appeals, one against the decree passed in the suit filed by P and the other against the dismissal of his own suit. The High Court decided the two appeals by a common judgment and held that M alone was entitled to the money deposited in the Court. The share of A in the partnership was 10 annas. He entered in the partnership as the Head and Karta of joint family which consisted of R and B, besides others. Against the decision of the High Court, R filed two separate appeals and B also filed two appeals. However, before these four appeals came up for hearing, one of the respondents died and his legal representatives were not brought on record. Consequently, appeals filed by both R and B were dismissed as abated. The questions that were raised before the Supreme Court was, firstly; whether the remaining appeals were barred by *res judicata* and, secondly; whether M alone was entitled to money because the partnership was void. The Supreme Court held that in appeals arising out of a subsequent suit and an earlier suit where there were common issues, common subject-matter and

common trial and the appeals arising out of the subsequent suit, were dismissed, a question may also arise where the subject-matter is the same and the issues are common in the two suits but where some of the parties are different in one suit, whether the bar of *res judicata* would operate against the parties who are common, but the subject-matters of the suit are different. The Supreme Court held that even if some of the issues are common but some issues were different, the bar of *res judicata* would not apply. Whatever may have been the common issues between the two suits, one issue which is not common and makes the subject-matter of both the suits different is that M is solely entitled to compensation from the State. This issue is not necessarily confined to the existence or validity of the partnership but as to whether the other parties to the suit have contributed to the capital of the firm or paid M any amounts which they are entitled to recover from out of the compensation amount. It was therefore held that no question of *res judicata* would arise.

20. In **Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, 1964 AIR (SC) 11**, the suit was filed by one partner against the heirs of deceased partner for specific performance of agreement. The defendants filed counter claim for accounts of the dissolved firm. The plaintiff filed reply to the counter

claim contending that the same was not legally maintainable and prayed for dismissal for the counter claim with costs. The argument of the appellant before the Supreme Court was that the trial court dismissed the suit filed by the plaintiff but while dealing with the issue relating to the counter claim that the real nature of the suit being that of specific enforcement of the agreement a counter claim was not admissible. The prayer of the defendants to treat the counter claim as a plaint in a cross suit by them was rejected. The trial court therefore while dismissing the counter claim held that the defendants could bring a separate suit for accounts and for a share of the profits of the dissolved partnership, if so advised. While the plaintiff remained contented with the judgment which he obtained on his claim but the defendants preferred an appeal to the District judge questioning correctness of the order dismissing the counter-claim as not maintainable. That appeal was however dismissed. Thereafter the defendants brought the matter before the High Court by way of a second appeal. The High Court allowed the appeal and while setting aside the order of dismissal of counter claim, remanded the matter to the trial judge with the direction that the counter claim be treated as a plaint in the cross suit and the reply of the plaintiff to the counter claim be treated as written statement to the cross suit

and thereafter the cross suit be tried and disposed of, in accordance with law. The majority opinion of the Supreme court in **Laxmidas Dayabhai Kabrawala** (supra) was expressed in para-11 of the report as under:-

“11. The question has therefore to be considered on principle as to whether there is anything in law-statutory or otherwise-which precludes a court from treating a counter-claim as a plaint in a cross suit. We are unable to see any. No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counterclaim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a Written Statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr. Desai had to concede that in such a case the Court was not prevented from separating the Written Statement proper from what was described as a counter-claim and treating the latter as a cross-suit. If so much is conceded it would then become merely a matter of

degree as to whether the counter-claim contains all the necessary requisite sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a Court to covert or treat the counter-claim as a plaint in a cross suit. To hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in Order 8 Rule 6 or in any other provision of the Code which laid an embargo on a Court adopting such a course”.

21. In **Sheodan Singh** (supra), one of the common issues related to respective rights of the parties to the suit property. The finding of the trial court on this issue was that the respondent-Smt. Daryao Kunwar was entitled to the properties claimed by the appellant's father in his suit No. 37 of 1950. The trial court therefore dismissed that suit and in view of that finding, suit No. 91 of 1950 filed by the respondent was decreed in her favour. Further suit No. 42 of 1950 filed by the appellant's father was on the same finding decreed to the extent of half only and suit No. 77 of 1950 filed by the respondent was also decreed to the extent of half and a permanent injunction was granted in favour of the respondent-Smt. Daryao Kunwar as prayed for by her in that suit. The appellant's father aggrieved by these judgments filed two first appeals in the High

Court being Appeal No. 365 of 1951 against the dismissal of suit No. 37 of 1950 and appeal No. 366 of 1951 against the dismissal of suit No. 42 of 1950. The appellant's father also filed two appeals in the court of the District Judge against the judgments and decrees in the suit filed by the respondent-Smt. Daryao Kunwar. Appeal No. 452 of 1951 was filed against the decree in suit No. 77 of 1950 while appeal No. 453 of 1951 was against the decree in suit No. 91 of 1950. By an order of the High Court, the two appeals pending in the court of the District Judge were transferred to the High Court. Thereafter appeal No. 453 of 1951 arising out of suit No. 91 of 1950 was dismissed by the High Court on October 9, 1953 being time barred and appeal No. 452 of 1951 arising out of suit No. 77 of 1950 was dismissed by the High Court on October 7, 1955, on account of failure of the appellant's father to apply for translation and printing of the record as required by the rules of the High Court. After dismissal of these two appeals, an application was made on behalf of the respondent-Smt. Daryao Kunwar, praying that first appeals Nos. 365 and 366 of 1951 be dismissed, as the main question involved therein, namely, title of Smt. Daryao Kunwar to the suit property, had become final on account of the dismissal of the appeals arising out of suits Nos. 77 and 91 of 1950. When this

question came up for hearing before a learned Single Judge, he made a reference to the Full Bench for an authoritative pronouncement in view of the conflict between two Division Benches of the High Court on the question "whether the appeal is barred by Section 11 of the Code of Civil Procedure or by the general principles of *res judicata* as the appeals against the decisions in suits Nos. 77 and 91 of 1950 were rejected and dismissed by this Court and those decisions have become final and binding between the parties". In those facts, the Full Bench came to the conclusion that two matters were directly and substantially in issue in all the four suits, namely (i) whether Harnam Singh and his adopted son Ram Kishan died in a state of jointness with the appellant and his father, and (ii) whether the property in suit was joint family property of Ram Kishan and the appellant's father. The decision of the trial court on both these issues was against the appellant and his father and in favour of the respondent-Smt. Daryao Kunwar. The Full Bench held that there were four appeals originally before the High Court, two of them had been dismissed. The very same issues which arose in first appeals Nos. 365 and 366 had also arisen in those two appeals which had been dismissed. The Full Bench concluded that the terms of Section 11 of the Code of Civil Procedure were fully applicable

and therefore the two first appeals Nos. 365 and 366 were barred by *res judicata* to the extent of the decision on the five issues which were common in four connected appeals. The judgment of the Supreme Court in **Nahari** (supra) was cited to question the correctness of the view taken by the Full Bench. Distinguishing that judgment, the Supreme court in paras-13 and 14 of the report held as under:

“13. Then it is urged that all the four suits were consolidated and decided on the same day by the same judgment and there can therefore be no question that suits Nos. 77 and 91 were former suits and thus the decision as to title in those suits became res judicata. It is not in dispute that the High Court's decision in the appeals arising from suits Nos. 77 and 91 was earlier. Reliance in this connection is placed on the decision of this Court in Nahari v. Shankar. That case however has no application to the facts of the present case, because there the suit was only one which was followed by two appeals. The appeals were heard together and disposed of by the same judgment though separate decrees were prepared. An appeal was taken against one of the decrees. In those circumstances this Court held that as there was only one suit, it was not necessary to file two separate appeals and the fact that one of the appeals was time-barred did not affect the maintainability of the other appeal and the

question of res judicata did not at all arise. In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suits Nos' 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail.

14. This brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground

of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit. But none of these considerations apply in the present case, for the Additional Civil Judge decided all the four suits on the merits and decided the issue as to title on merits against the appellant and his father. It is true that the High Court dismissed the appeals arising out of suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the issue as to title on merits stood confirmed by the order of the High Court. In such a case, even though the order of the High Court may itself not be on the merit the result of the High

Court's decision is to confirm the decision on the issue of title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial court on the merits, whatever may be the reason for the dismissal of the appeals arising from suits Nos. 77 and 91. In these circumstances though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals arising out of suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore it must be held that by dismissing the appeals arising out of suits Nos. 77 and 91 the High Court heard and finally decided the matter for it confirmed the judgment of the trial court on the issue of title arising between the parties and the decision of the trial court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits. To hold otherwise would make res judicata impossible in cases where the trial court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the merits. It is well-settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once res judicata again becomes res subjudice and it is the decree of the appeal court which will then be res judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal

court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming into the trial court's decision given on merits, the appeal court's decree cannot be res judicata, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be res judicata. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no res judicata if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits

whatever may be the ground for dismissal of the appeal.”

22. In **Narhari** (supra), there was single suit, which was filed for possession of the land and for *mesne* profits. The plaintiffs claimed possession on the ground that survey No. 214 was an *inam* land and according to the family custom belonged to them exclusively as members of the senior line as against the defendants who were of the junior lines. There were two sets of defendants, namely, defendants Nos. 1 to 4 belonged to one branch of the family and defendant Nos. 5 to 8 to another. Each set claimed that they are in possession of one-third of the land and maintained that they were entitled to it as their share in the family property. They denied the custom of exclusive possession by the senior branch, asserted by the plaintiffs. The trial court decreed the suit in favour of the plaintiffs. Two separate appeals were taken by the two sets of the defendants to the first appellate court each claiming one-third portion of the land and each paid the court fee to the extent of their share. The first appellate court, allowed both the appeals and dismissed the plaintiffs' suit by common judgment and directed that a copy of the judgment be placed on the file of the other connected appeal. On the basis of this judgment, two separate

decrees were prepared by the first appellate court. The plaintiffs preferred two appeals to the High Court. In one appeal, the decree passed in appeal of defendants No.1 to 4 was attached/filed and in another appeal decree passed in appeal of defendants No.5 to 8 was attached/filed. This latter appeal was time barred having been filed 29 days beyond the period of limitation. It was filed on one-rupee stamp paper and a note was made therein that the full court fee had been paid in the appeal filed earlier registered as Appeal No. 331 of 1346 F. At the hearing of the appeals, a preliminary objection was raised by the defendants that as the other appeal i.e., No. 332 of 1346F. was filed beyond the period of limitation, it cannot be maintained and that when the other appeal is thus dismissed, the principle of *res judicata* would apply to the first appeal, i.e., No. 331 of 1346 and it should also fail. The High Court held that the plaintiffs should have filed two separate appeals within the period of limitation and as the other appeal was admittedly time-barred, the first appeal also failed by the application of the principle of *res judicata*. The High Court dismissed both the appeals. Against this judgment of the High Court, two appeals were preferred to the Judicial Committee of the State which

were made over to the Supreme Court under article 374(4) of the Constitution. The Supreme Court while reversing the judgment of the High Court in para 5 of the report held as under:-

“5. The plaintiffs in their appeal to the High Court have impleaded all the defendants as respondents and their prayer covers both the appeals and they have paid consolidated court-fee for the whole suit. It is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand J. in his learned judgment in Mst. Lachmi v. Mst. Bhuli mentioned above, the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain

effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one. Besides, the High Court was wrong in not giving to the appellants the benefit of Section 5 of the Limitation Act because there was conflict of decisions regarding this question not only in the High Court of the State but also among the different High Courts in India.”

23. In **Ram Prakash vs. Charan Kaur (Smt) and another, (1997) 9 SCC 543**, two suits were filed by the petitioner and respondents, claiming damages against each other. Both the suits were tried together and dismissed. While the judgment and decree passed in the suit of the petitioner attained finality, no appeal having been preferred there against, the suit of the respondent was decreed in first appeal filed by him. The petitioner preferred second appeal against the decree for damages granted against him. The second appeal preferred by the petitioner for damages granted against him was held to be barred by principle of *res judicata* as the judgment dismissing his suit had attained finality.

24. In **Rajni Rani and another vs. Khairati Lal and others (2015) 2 SCC 682**, the question that was raised before

the Supreme Court was whether an order of dismissal of the counter-claim being barred by principles of Order 2, Rule 2 of CPC, can be set aside by the High Court in exercise of revisional jurisdiction under Section 115 of CPC or in exercise of power of superintendence under Article 227 of the Constitution of India or the same is required to be assailed by preferring an appeal. The Supreme Court held 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. Interpreting the provisions of Order 8 Rule 6-A(2) of CPC, it was held that 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 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. It was held that the purpose of the scheme relating to counter-claim is to avoid multiplicity of the proceedings and piecemeal adjudication. When a counter-claim filed by the defendant is adjudicated on merits 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. The Supreme Court held that in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 of CPC, it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. Nothing else survives for the defendants who had filed the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit. Therefore, the order passed by the trial court 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. Holding thus, the order of the High Court was set aside.

25. In **Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammal and others, (2015) 3 SCC 624**, multiple suits were disposed of by one common judgment by the trial court but by separate decrees. The appeal was preferred against the decree passed only in one suit. The suit in respect of which the decree was passed, but, no appeal was filed there against, was held to have assumed the character of former suit and therefore it was held that the finding recorded in such decree having attained finality, would operate as *res judicata*. One suit was filed by the respondents and two suits were filed by the appellant. In pleadings of all suits, the respondents directly and substantially raised question of appellants' title over suit property. While the suit filed by the respondents was dismissed, one suit of the appellants regarding rent arrears was decreed but another suit of the appellants was dismissed by the trial court by a common judgment in view of common issues, common trial and common evidence involved in three suits. An appeal was filed by the respondents against only one of the decrees. It was held that

non-filing of appeals by the respondents and the appellants against all the respective adverse decrees, resulted in their attaining status of former suit and finality and this consequence permeated into sinews of all three suits. Accordingly, finding that the appellants had title over the suit property, contrary to the respondents claim, had become final and operated as *res judicata*. In absence of appeals against adverse decrees the respondents were barred by the principle of *res judicata* from challenging findings of trial court especially in regard to the appellant Trust's ownership of demised property. Similarly, the appellant Trust not having filed any appeal against any of the decrees, all findings against it had also attained finality.

26. In ***Satya Devi vs. Partap Singh and others, AIR 2006 HP 75***, this Court was dealing with regular second appeal filed by defendant-appellant Smt Satya Devi against the judgments and decrees of the Courts below whereby the two suits, one filed by Partap Singh and the other Smt. Suhli Devi, were decreed and the sale deed in favour of Smt. Satya Devi was held to be illegal and void and the first appeal filed by Smt. Satya Devi, was dismissed by the learned District Judge. In that case, both the suits were consolidated and it was directed that

the evidence recorded in one suit shall be treated as the evidence recorded in the other. Thereafter, both suits were decreed by a common judgment. Aggrieved against the same, Smt. Satya Devi, who was the defendant in both the suits, filed only one appeal before the District Judge alongwith the memorandum of appeal, certified copy of the common judgment was filed along with the certified copy of one of the decrees i.e. the decree passed in Civil Suit No. 199 of 91/RBT 18/95 titled Smt. Suhli Devi vs Milkhi Ram etc. The certified copy of the decree sheet in the other suit filed by Partap Singh titled Partap Singh vs. Smt. Suhli Devi was not filed along with the memorandum of appeal. This appeal was filed on 27.1.1998 prior to the coming into force of the Code of Civil Procedure (Amendment) Act, 1999, with effect from 1.7.2002. Therefore, as per the provisions of the relevant time, the memorandum of appeal was required to be accompanied by a certified copy of the decree appealed from unless the appellate Court dispenses with the same and also the certified copy of the judgment on which it was founded. This court after relying on the judgment of Supreme Court in **Jagat Dhish Bhargava vs. Jawahar Lal Bhargava and others, AIR 1961 SC 832** held

that filing of decree along with memorandum of appeal is mandatory, and in the absence of the decree, filing of the appeal would be incomplete, defective and incompetent. It was therefore held that the appeal which was filed by Smt.Satya Devi before the District Judge, could be treated as an appeal only against the decree passed by the trial Court in the suit filed by Smt. Suhli Devi, inasmuch as, only copy of the decree passed by the trial Court in the suit filed by Smt. Suhli Devi was filed along with common judgment and the memorandum of appeal and the copy of the decree passed by the trial Court in the other suit filed by Partap Singh was not filed along with the memorandum of appeal and the copy of the common judgment. This Court therefore concluded that the decree passed by the trial Court in the civil suit filed by Partap Singh was not appealed against by Smt. Satya Devi and the said decree had become final. Relying upon the judgment of the Supreme Court in **Premier Tyres Limited** (supra) it was held that the appeal filed by Smt. Satya Devi was liable to be dismissed, since Smt. Satya Devi had filed only one appeal against the two decrees, whereby the suits filed by Partap Singh and Smt. Suhli Devi had been decreed by the trial Court

and only one appeal was filed against the decree passed in the suit filed by Smt. Suhli Devi and in this manner, the decree passed in the suit filed by Pratap Singh became final between the parties and the findings recorded therein would be *res judicata* in the appeal filed by Smt. Satya Devi against the decree in the suit filed by Smt. Suhli Devi.

27. In **Kedar Singh** (supra), this court was dealing with regular second appeal filed against the judgment and decree passed by the District Judge, Kinnaur Civil Division at Rampur Bushahr, affirming the judgment and decree passed by Civil Judge (Senior Division), Kinnaur camp at Rampur Bushahr. The respondent-plaintiff in that case filed a suit for recovery of Rs.10,512.94 paise against appellant-defendant. The defendant by filing written statement refuted the claim of the respondent-plaintiff. The appellant-defendant filed a counter claim to the tune of Rs.30,600/- and the respondent-plaintiff filed written statement to the counter claim filed by the appellant-defendant wherein it was stated that the counter claim made by the defendant is not maintainable in the present form because it should have been made in the written statement as provided under Order 8 Rule 1(A) of CPC

Procedure and all the documents on which he relies should have been filed with the written statement. The objection was also raised that the counter claim was time barred. The trial Court vide judgment and decree dated 18.6.2004 decreed the suit for recovery in favour of the plaintiff but dismissed the counter claim filed by the defendant. Aggrieved thereby, the appellant-defendant preferred a composite appeal before the District Judge Kinnaur at Rampur Bushahr H.P, which was dismissed. The appellant-defendant thereafter filed Regular Second Appeal before this Court. The second appeal was admitted on question of law “whether the two courts below have erred in dismissing the counter claim, on the ground that the counter claim when preferred, had become barred by time.” An objection was raised that dismissal of the counter claim, even if the formal decree was not drawn but by reason of the fact that rights of the parties are finally adjudicated, assumes the status of a decree and needs to be separately challenged by filing separate appeal affixing required court fee. Reliance was placed on the judgment of the Supreme Court in **Rajni Rani** (supra), **Laxmidas Dayabhai Kabrawala** (supra) and the judgment of this Court in RSA No.293 of 2006, titled as **Piar**

Chand & Others vs. Ranjeet Singh & Others. The argument of the appellant-defendant was that since the trial Court had not drawn formal decree while dismissing the counter claim, there was no occasion for him to file separate appeal. Repelling this argument, it was held that the definition of “decree” under Section 2(2) of CPC clearly suggests that there has to be formal expression of adjudication, the trial court may or may not draw formal decree but if by virtue of order of the court, rights have finally been adjudicated, the same would assume status of a decree. The trial Court while rejecting the counter claim specifically observed that no counter claim could be entertained being hopelessly time barred. Although, it is true that counter claims being in nature of cross-suit, the trial court ought to have passed separate decree specially dismissing the counter claim but the argument of the defendant that he was not required to challenge the judgment on the counter claim because of non-preparation of decree cannot be accepted, held this Court.

28. This Court in **Parso vs. Dummu Ram and others, 2017(3) SimLC 1270**, was dealing with a case where the respondents-plaintiffs filed a suit for declaration for permanent

prohibitory injunction against the appellant-defendant. The defendant-appellant in that case had filed counter claim. While the suit filed by the respondents-plaintiffs was dismissed, the counter claim filed by the defendant-appellant was allowed. The respondents-plaintiffs filed a single appeal against the dismissal of the civil suit and allowing of counter claim. The first appellate court allowed the appeal thereby decreed suit filed by the respondents-plaintiffs and set aside the decree passed in favour of the defendant-appellant in counter claim. This Court relying on the judgments of the Supreme Court in **Ramagya Prasad Gupta** (supra), **Premier Tyres Limited** (supra), **Ram Prakash** (supra) and **Shri Gangai Vinayagar Temple** (supra), set aside the judgment of the first appellate court and held that the said court erred in not appreciating that in the absence of two separate appeals filed against the judgment and decree passed by the trial court in suit as well as in counter claim, adjudication in one matter acted as *res-judicata* qua the other and therefore the single appeal was barred by principle of *res judicata* and not maintainable.

29. This Court in **Mohan Singh** (supra) was also dealing with identical case in the suit filed by the plaintiff which

was dismissed and the counter claim filed by the defendants was decreed. The plaintiff filed a composite appeal thereagainst. This Court held that since no challenge has been laid to the judgment and decree passed by the trial Court decreeing the counter claim of the defendants, whereby they have been declared to be owner-in-possession of the suit property, composite appeal laying challenge to the judgment and decree passed by the civil court in civil suit was not maintainable. Relief as claimed in the appeal having been filed by the appellant-plaintiff could not be extended to him without setting aside the judgment and decree passed in the counter claim. The contention of the appellant-defendant that in the absence of specific decree drawn by learned trial Court at the time of decreeing the counter claim filed by the defendants, plaintiff could not file separate appeal was rejected and the appeal was dismissed by this Court.

30. This Court in **H.P. State Forest Corporation through its Divisional Manager vs. Kahan Singh, 2017(Vol.1) Him. L.R. 36**, was dealing with a case where trial court while partly allowing the suit for recovery filed by the plaintiff, dismissed counter claim filed by the defendant, vide

which the defendant had prayed for decree for recovery of a sum of Rs.60,031/-. The defendant rather than filing two separate appeals, one against the decree which was passed in favour of the plaintiff by trial court in his civil suit and second against the dismissal of his counter claim, filed only one appeal before the first appellate court. It was held that the defendant erred in doing so because the partial decreeing of the suit of the plaintiff and dismissal of the counter claim of the defendant were two distinct adjudications, though made by way of same judgment and decree by trial court. Both these adjudications assumed the status of a decree. They were required to be challenged separately and filing only one appeal against both the said adjudications was not permissible in law as the adjudication of suit as well as counter claim assumes the status of two distinct decrees.

31. This Court in **Piar Chand and others vs. Ranjeet Singh and others, 2016 (supp) Shim. LC 612** was dealing with a case in which the plaintiff filed a suit for declaration and injunction whereas the defendant filed counter claim. The trial court decreed the suit and dismissed the counter claim. Aggrieved thereby, the defendant-respondent approached the

court of District Judge by filing regular first appeal under Section 96 of CPC while praying for setting aside the judgment and decree passed by the trial court, the defendant in his appeal also prayed for allowing the counter claim. The Additional District Judge, Ghumarwin vide his judgment and decree dated 20.3.2005 accepted the appeal preferred by the defendants by setting aside the judgment and decree passed by the learned trial Court and also decreed the counter claim of the defendants. The plaintiff approached this Court in the regular second appeal. The argument of the defendants before this Court was that since no separate decree was prepared by the trial court while dismissing the counter claim, the defendants were justified in filing a common appeal. This Court relying on the judgment of the three-Judge Bench of the Supreme Court in **M/s. Ram Chand Spg. & Wvg. Mills vs. M/s. Bijli Cotton Mills (P) Ltd., AIR 1967 SC 1344** held that by virtue of the order of the court passed in the counter claim, rights of the parties were finally adjudicated and therefore such order would assume the status of decree. The Supreme Court in that case held that the court may or may not draw formal decree, but if rights are finally adjudicated, it would

assume the status of decree. The Supreme Court further held that in such like situation, the order passed by trial court has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

32. A view contrary to the other judgments of this Court has been taken by the learned Single Judge in **Pohlo Ram** (supra) when Court was dealing with a case where suit for injunction filed by the plaintiff had been partly decreed by the trial court and the counter claim filed by defendant No.2 therein seeking a decree for declaration was dismissed by the trial court. The question that arose before the learned Single Judge of this court was with regard to the maintainability of single appeal in teeth of suit being partly decreed and the counter claim being dismissed . It was held that mere non-filing of two appeals would be of no consequence, the lower appellate court had accepted the appeal of defendant No.2 only in respect of decree passed by the trial court, vide which the suit of the plaintiff had been partly decreed. So far as the dismissal of the counter-claim filed by defendant No.2 is concerned, the trial court had not granted any relief to

defendant No.2 and, as such, the dismissal of the counter claim of defendant No.2 had not been set aside by the learned Additional District Judge while deciding the appeal filed by defendant No.2 and as such it cannot be said that the appeal filed by defendant No.2 against the judgment and decree dated 25.8.1999, vide which the suit of the plaintiff was partly decreed, was not maintainable merely because defendant No.2 had not filed a separate appeal challenging the dismissal of his counter-claim. Even if defendant No.2 while filing the appeal had challenged the findings of the trial Court not only with regard to the suit of the plaintiff having been partly decreed but also with regard to the dismissal of his counter-claim, the same would be of no consequence since nothing has come on the record to show that during arguments the counsel appearing for defendant No.2 before the lower appellate court had also sought any relief against the dismissal of the counter-claim filed by him. The question of filing two separate appeals would arise only if the defendant was also pressing his counter-claim, which was dismissed by the learned trial court and the question regarding the counter-claim could be considered only if defendant No.2 had filed two appeals, one against the suit of

the plaintiff having been partly decreed and the other against the dismissal of the counter claim. In case defendant No.2 is not seeking relief before the lower appellate Court in respect of the counter-claim, it would not be necessary for him to file two separate appeals against the judgment and decree of the trial court.

33. Before the Gujarat High Court in ***Darayas Bamanshah Medhora vs. Nariman Bamansha Medhora, AIR 2002 Gujrat 166***, there were two cross suits between the very same parties and the subject matter of dispute was also with regard to the same property, and that the reliefs sought by each plaintiff in their respective suits were similar. The trial court by consent of parties consolidated the two suits and directed that they be tried together. Consequently, the two suits were consolidated, common issues were framed, common evidence was led, and the two suits were decided by a common judgment. As a result of the common judgment, the suit filed by the appellant before the High Court was dismissed, whereas the suit filed by the respondent was allowed. Both the suits were decided by common judgment although it dealt with two separate suits and consequently the common judgment resulted in two separate

and distinct decrees. An appeal under Section 96 CPC. was filed by the appellant before the High Court challenging the decree passed in Special Civil Suit No. 700 of 2000 filed by the respondent. The respondent, however, contended that since two suits were decided by a common judgment, each suit resulted in a separate and independent decree, and therefore, an appeal filed from only one of the decrees would be incompetent. The Gujarat High Court, after examining various judgments of the Supreme Courts and different High Courts and mainly relying on the judgment of the Supreme Court in **Premier Tyres Limited** (supra) and **Sheodan Singh** (supra), **Ramagya Prasad Gupta** (supra) in para 10.4, 11 and 18 held as under:-

"10.4 The entire controversy in law as to whether a single appeal would lie from one of the decrees arising from a common judgment has been considered in the various decisions aforesaid, only by testing against and applying the principle of res judicata. In the context of these decisions it is necessary to bear in mind that a reference to the judgment, and consequently a reference to a supposed judgment resulting in one of the decrees, is only necessary to ascertain whether the question substantially in issue" was common in both the suits.

11. While considering the aforesaid decisions, which, as aforesaid, have also been considered by the subsequent decisions of the Supreme Court, it also requires to be kept in mind that the principle of *res judicata* is not the only principle upon which this legal controversy can be reflected upon. Another principle which, in our opinion, would have a bearing on this controversy is the principle of acquiescence and/or estoppel. This principle would also apply to the controversy in issue, inasmuch as it could be urged that when only one decree is challenged in the singular appeal, the other decree which is not the subject matter in appeal, is a decree which is acquiesced to. Ultimately it makes no difference whether the same set of reasons and the same set of findings justify both the decrees. This may perhaps appear to be similar to calling a glass half full or also calling it half empty. It may be that such a description carries different concepts, although the factual result is the same. The distinction in law lies in the real and substantive distinction between an appeal from a judgment and an appeal from a decree. Once this distinction is established and kept in mind, it becomes a simpler exercise to appreciate the view expressed by the Supreme Court in the decisions hereinafter discussed.

12 to 17. xxxxx xxxxx xxxxx

18. In the premises aforesaid, we are of the opinion that the present appeal is not maintainable and is consequently dismissed with no order as to costs.”

34. The Rajasthan High Court in **Iqbal Banu** (supra), while examining the judgment of this Court in **Parso Ram** (supra) held that this Court in that judgment did not notice the provisions contained in Order 20 Rule 19 of CPC, which provides that where the defendant has been allowed a counter claim against the claim of the plaintiff, the decree shall state so. Sub rule (2) of Rule 19 of Order 20 of CPC deals with the appeal from decree relating to counter claim which expressly provides that any decree passed in a suit in which a counter claim is claimed, shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed. The Rajasthan High Court therefore held that the language of this provision is explicit, wherein, it has expressly provided that in an appeal from decree passed in suit where a counter claim has been claimed, the appeal would be filed as if no counter claim had been claimed, which necessarily means that the appeal would be against the decree passed in the main suit and the appellant would be entitled to question the passing of the decree on counter claim and therefore there is absolutely no necessity of filing separate appeal in case where the counter claim preferred

in a suit has been decreed by the trial Court.

35. Even though Sections 96 and 100 of the Code of Civil Procedure provide that the appeal shall lie from every decree passed by any Court exercising, original jurisdiction or first Appellate jurisdiction respectively but the mandatory requirement of filing decree alongwith the memorandum of appeal has been some what relaxed by amending Act 46 of 1999 whereby Rule 6-A was inserted in Order 20 of the Code of Civil Procedure, while sub Rule (1) provides that every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible and in any case, within 15 days from the date of pronouncement of the judgment. But further sub Rule (2) stipulates that an appeal may be preferred against the decree without filing a copy of the decree and in such case the copy of the judgment made available to the parties by the Court, shall for the purpose of Rule 1 of Order 21 be treated as decree. This is however subject to a rider that as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purpose of execution or any other purpose. There may be two situations emerging out of this, first; where the trial Court in terms of Order 20 Rule-6-A (1) has

prepared the decree little later than the delivery of the judgment, which as per the requirement of the said provisions, should be within 15 days and secondly suits in which counter-claim has also been decided, may be by a common order or a separate judgment but where only a common decree has been prepared or no separate decree is prepared on counter claim. Even in such situation the order by itself would tantamount to decree. In ***Rajni Rani*** case, supra, the Supreme Court examined the question as to when can an order amount to a decree and held that the order of dismissal of counter-claim by itself constitutes a decree. It was held that when a counter-claim is conclusively adjudicated on merits and dismissed by order of the Court, finality is attached in respect of the rights of the defendant. Such order of dismissal on the ground of being barred under Order 2 Rule 2 amounts to decree where against the appeal is the proper remedy and a Revision Petition under Section 115 of the CPC and Petition under Article 227 of the Constitution, would not be maintainable.

36. This Court in ***Kedar Singh's*** case, supra, was dealing with a case where the trial Court decreed the suit for recovery in favour of the plaintiff but dismissed the counter

claim filed by the defendant. Aggrieved thereby, the appellant-defendant preferred a composite appeal before the first Appellate Court which was dismissed. The appellant thereafter filed Regular Second Appeal before this Court. The second appeal was admitted on question of law “whether the two courts below have erred in dismissing the counter claim, on the ground that the counter claim when preferred, had become barred by time.” An objection was raised that dismissal of the counter claim, even if the formal decree was not drawn but by reason of the fact that rights of the parties are finally adjudicated, assumes the status of a decree and needs to be separately challenged by filing separate appeal affixing required court fee. The Trial Court rejected the counter-claim by observing that the same being hopelessly time barred, would not be entertained.

37. Even in ***Mohan Singh’s*** case, supra, in which the plaintiff filed a composite appeal against the order dismissing the suit and counter claim, contention of the appellant-defendant that in the absence of specific decree drawn by learned trial Court at the time of decreeing the counter claim filed by the defendants, plaintiff could not file separate appeal,

was rejected and the appeal was dismissed by this Court. In **Piar Chand's** case *supra*, this Court was dealing with a case in which the plaintiff filed a suit and the defendant filed counter claim. The trial Court decreed the suit and dismissed the counter claim. The plaintiff approached this Court in the regular second appeal. The objection was raised before this Court that since no separate decree was prepared by the trial court while dismissing the counter claim, the defendants were justified in filing a common appeal. This Court relying on the judgment of the three-Judge Bench of the Supreme Court in **M/s. Ram Chand Spg. & Wvg. Mills** case *supra* held that by virtue of the order of the court passed in the counter claim, rights of the parties were finally adjudicated and therefore such order would assume the status of decree. The Supreme Court in that case held that the court may or may not draw formal decree, but if rights are finally adjudicated, it would assume the status of decree. It was held that such an order has to be also treated as a decree.

38. Now coming to Order 20 Rule 19 CPC wherein counter claim has been inserted along with set off by amending Act 104 of 1976 w.e.f. 1.2.1977. Sub-Rule 1 of Rule 19 of

Order 20 provides 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. An argument has been raised that a common appeal against a decree passed in the suit as well as the counter claim can be maintainable by relying on the judgment of Rajasthan High Court in ***Iqbal Banu's*** case, supra . Order 20 Rule 19 (2), inter alia provides that any decree passed in a suit in which set off or counter claim is claimed, shall be subject to the same provisions in respect of an appeal to which it would have been subject if no set off or counter claim had been claimed. The Rajasthan High Court in ***Iqbal Banu's*** case supra while interpreting Order 20 Rule 19 (2) CPC held that the language of this provision is explicit, wherein, it has expressly provided that in an appeal from decree passed in suit where a counter claim has been claimed, the appeal would be filed as if no counter claim had been claimed, which necessarily means that the appeal would be against the decree passed in the main suit and the appellant would be entitled to question the passing of the decree on

counter claim and therefore there is absolutely no necessity of filing separate appeal in case where the counter claim preferred in a suit has been decreed by the trial Court. We find ourselves unable to agree with this interpretation because Order 20 Rule 19 (2) CPC merely contemplates drawing of a decree in case of set off or counter claim, which by virtue of this enabling provisions has been made subject to the same provision in respect of appeal to which it would have been subject if no set off or counter claim was filed. The word “counter-claim” inserted in the provisions of Order 20 Rule 19(2) CPC by virtue of amendment does not mean that no separate decree would be required to be prepared on decision of the counter claim or that decision would not be treated as a decree necessitating filing of a separate appeal. Sub-rule 2 of Rule 19 of Order 20 is therefore, merely an enabling provision which expressly provides that any decree passed in a suit in which a counter claim is claimed, shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed. But there is no warrant to read into this that one appeal would suffice the challenge to judgment and decree passed both in suit and counter claim/set

off.

39. Order 41 Rule 1 of CPC provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment. This provision earlier provided that memorandum of such appeal shall be accompanied by a copy of decree but now the word “decree” has been deleted by Act of 46 of 1999 w.e.f. 1.7.2002 by substituting the same with copy of judgment. Proviso to Order 41 Rule 1 however stipulates that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court may dispense with the filing of more than one copy of the judgment.

40. The contention that the counter-claim cannot be tried as an independent suit for all purposes but is deemed to be an independent suit for the purposes as mentioned in the Code under Order 8 Rule 6A (2), (3) & (4) and for the purpose of limitation as per Section 3(2)(b) of the Limitation Act, 1963,

cannot be countenanced for reasons to be stated presently. We also cannot agree with the argument that if the counter claim is to be treated as a separate suit, independent from the main suit, then it would amount to rewriting Order 8 Rule 6A (2), which mandates "a final judgment" and in "same suit". Further argument that treating counter claim as a separate suit would mean that there will be a "common judgment" as against the "final judgment" and that it will be common for "both the suits" as against the mandate of having it in the "same suit" per Order 8 Rule 6A (2) also does not convince us. Further submission that since the counter claim can also be set up through amendment (Order 8 Rule 8 the Code) and by way of subsequent pleadings (Order 8 Rule 9 the Code), treating the counter claim as an independent suit would mean that a suit may be filed by way of amendment or by way of subsequent proceedings, is also not founded on a sound interpretation. One of the consequence of the amendment in 1976 amendment in Order 8 by virtue of insertion of Rule 6-D is that 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 survives. Moreover, this clearly signifies

independent character of the counter-claim. A reading of Order 20 Rule 19 (1) clearly shows that separate decrees are required to be prepared for set off as well as counter claim which 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. Order 20 Rule 19 (2), *inter alia* provides that any decree passed in a suit in which set off or counter claim is claimed, shall be subject to the same provisions in respect of an appeal to which it would have been subject if no set off or counter claim had been claimed.

41. The Supreme Court in ***Laxmidas Dayabhai*** case supra examined the question whether there is anything in law which precludes to treat the counter claim as a plaint in a cross suit and answered the same in the negative. The Supreme Court held that even though CPC prescribes the contents of a plaint and it might very well be that a counter claim, which is to be treated as a cross-suit, might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a Written Statement

either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. The unamended provisions of CPC prior to 1976 was that any respondent though he may not have filed an appeal from any part of the decree, may still support the decree to the extent to which it is already in his favour, at the same time by laying challenge to a finding recorded in the impugned judgment against him. That however, is not the position of law now after 1976 amendment in CPC. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) thereof makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour. But if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. Post-amendment, read in the light of the Explanation to Order 41 Rule 22(1) though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding

adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. After the aforesaid amendment in CPC, if the appeal stands withdrawn or dismissed in default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC, the Supreme Court held.

42. The principles deducible from the afore-discussed law can be summarized as follows:-

- (i) When two suits are consolidated and tried together with common issues framed and common evidence led by the parties, resulting in a common judgment and decree, the same can be subjected to challenge by way of a single appeal at the instance of the aggrieved party;
- (ii) Where a single appeal is filed questioning the judgment and decree passed in two suits, which were consolidated and decided by a common judgment, decision of such single appeal, by a common judgment, reversing or modifying the

claim in one suit out of the two, can be challenged by the aggrieved party also, in a single appeal.

(iii) When two suits though not consolidated but are decided by a common judgment, resulting into preparation of two separate decrees, the aggrieved party would be required to challenge both of them by filing separate appeals;

(iv) When both the suit and the counter claim are decreed by a common judgment, regardless of whether separate decree has been prepared in the counter claim, both would be required to be challenged by separate appeals;

(v) In a case where two separate appeals are required to be filed against judgment of the suit and the counter claim and if appeal is filed only against one and not against the other, non filing of appeal against such judgment and decree would attach finality thereto and would attract not only the principle of *res-judicata* but also waiver and estoppel and the judgment and decree not appealed against would be taken to have been acquiesced to by the party not filing appeal;

(vi) When however, two appeals are filed against a common judgment passed by the trial Court, both by the plaintiff and the

defendant, and are disposed of by the first appellate Court by modifying/reversing/affirming judgment of the trial Court, the aggrieved party, would be required to challenge both by two separate appeals, in absence of which, non-filing of appeal against one shall attract bar of the principles of *res-judicata* against another.

(vii) Where more than one appeals are required to be filed or are filed and one or more of them are dismissed for default, delay or any other similar reason, any such situation would attract *res judicata* and such dismissal would satisfy the requirement of appeal being heard and finally decided on merits “in a former suit” for the purpose of attracting principles of *res judicata*.

43. In view of the position of law delineated hereinabove, the judgment passed by this Court in **RSA No.561 of 2005**, titled **Pohlo Ram vs. Jindu Ram and others** decided on 28.10.2005 cannot be held to have laid down good law whereas judgments passed in (i) **Smt. Satya Devi vs. Partap Singh and others, AIR 2006 HP 75** and (ii) **H.P. State Forest Corporation through its Divisional Manager vs. Kahan Singh, 2017(1) Him. L.R. 36** and in (iii) **Mohan Singh vs.**

Inder Singh & others 2017(1) Him. L.R. 368, are held to have been decided correctly.

44. Referred question having been answered thus, let the matters may now be placed before the appropriate Bench as per Roster.

**(Mohammad Rafiq)
Chief Justice**

May 17, 2022
(vt /cm Thakur)

**(Jyotsna Rewal Dua)
Judge**