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Court : Kerala

Decided On : Jan-20-2016

Judge : Antony Dominic & A. Hariprasad

Appeal No. : RFA. No. 475 of 2014

Appellant : Mathew

Respondent : Rajan

Judgement :

A. Hariprasad, J.

1. Defendant in a suit for partition is the appellant. He is aggrieved by the judgment and decree passed by the trial court, rejecting his contention that the subject matter of the suit is not a co-ownership property of the plaintiff and the defendant, but it is a property belonging to a partnership firm, constituted by the parties to the suit. Appellant therefore contended that a suit for partition is incompetent.

2. We heard the learned counsel on both sides. We carefully perused the lower court records.

3. Facts relevant for disposal of the appeal, stated shortly, are as follows: The appellant and respondent are brothers. Two others by names Varghese and Babu,

are their siblings. Plaintiff schedule property was acquired by all the four brothers in the year 1973 as per Ext.A1 registered sale deed. A cinema theater by name 'Thavus Theater' was established in the property under a partnership by all the four co-owners. While so, a suit for dissolution of partnership and rendition of accounts was filed by the appellant and one of his brothers before the Sub Court, Thrissur as O.S.No.1532 of 1992. The suit was decreed by the trial court. The decree and judgment had been challenged in A.S.No.24 of 1999 before the District Court, Thrissur. That appeal was dismissed confirming the decree. Against the said appellate decree, a second appeal was filed before this Court. Pending the appeal, the parties settled their disputes amicably. Pursuant to the settlement, appellant's brother Babu assigned his rights over the plaintiff schedule property to the respondent through Ext.A2 document. Varghese assigned his rights over the plaintiff schedule property as per Ext.A3 document in favour of the appellant. A compromise under Order XXIII Rule 3 of the Code of Civil Procedure (in short, CPC) was filed before this Court. In accordance with the compromise, this Court, as per Ext.A4 judgment, disposed of the second appeal. The compromise arrived at between the parties has been made a part of the decree in the second appeal.

4. The respondent/plaintiff contended that after the compromise, the property became a co-ownership property with half right devolved on the appellant and the remaining half on the respondent. Respondent wanted division of the property by metes and bounds for which the appellant was not agreeable. Hence he approached the trial court with the suit for partition.

5. Appellant/defendant opposed the suit. Virtually, derivation of title over the property is admitted. Appellant is one of the plaintiffs in O.S.No.1532 of 1992, a suit for dissolution of partnership and rendition of accounts. According to the appellant, deceased Thavu's children started the theater in the property to perpetuate their father's memory. So the appellant would contend that the respondent too had an obligation to continue the business. Accordingly, a decision was taken by four brothers, when the second appeal was pending before this Court, that two brothers would assign their rights over the property in favour of the appellant and the respondent. They, in turn, should continue the business in fond remembrance of their father. It is also contended that an oral partnership

agreement was made on 29.10.2009. Only after reaching at a consensus, the compromise was filed before this Court and the second appeal was disposed in terms of the compromise. It is also the contention of the appellant in his written statement that the respondent had removed 350 chairs, 30 fans, 2 projector motors, generator and water tank from the theater. The respondent is liable to return the movable properties to the theater. Hence, a prayer for mandatory injunction is sought by the appellant against the respondent as a counter claim. Gist of the contentions raised by the appellant is that as agreed to between the parties, before the compromise was effected in the first round of litigation, a partnership between the appellant and respondent was formed orally on 29.10.2009 and even after the disposal of the second appeal, the said partnership continued. The property has become an asset of the firm. Therefore, a suit for partition simplicitor is not maintainable as the respondent has to work out his remedy in the previous suit, wherein only a preliminary decree for dissolution of the firm was passed. That suit must have a logical conclusion by passing a final decree. Hence this suit is liable to be dismissed and the counter claim is only to be allowed.

6. Learned counsel for the appellant strongly contended that the suit as framed is not maintainable. According to him, Ext.A4 compromise decree in R.S.A.No.754 of 2003 of this Court only confirmed the preliminary decree passed in O.S.No.1532 of 1992 and the sole remedy available to the plaintiff/respondent is to get a final decree passed in the said suit for dissolution of partnership and rendition of accounts. By virtue of Section 14 of the Partnership Act, 1932 (in short, the Act), the property described in the plaint schedule has become an asset of the firm. If that be so, a suit for partition simplicitor is not maintainable. Per contra, learned counsel for the respondent contended that the parties in the suit for dissolution of partnership and rendition of accounts have settled the entire disputes and nothing survives in the earlier suit. After recording the compromise, the property has become a co-ownership property, wherein the appellant and the respondent have equal rights.

7. The scope and legal effect of Ext.A4 decree passed by this Court pursuant to the compromise entered into between the parties to O.S.No.1532 of 1992 on the

file of the Sub Court, Thrissur is the pivotal point in this case. As mentioned above, before effecting the compromise, two brothers of the contesting parties assigned their respective shares in favour of the appellant and the respondent. So, the appellant and the respondent became the rightful claimants over the property at the time of recording the compromise. The compromise petition executed between the parties under Order XXIII Rule 3 CPC is also part of the decree in R.S.A.No.754 of 2003. On a careful reading of the terms of the compromise, it is discernible that no claim in O.S.No.1532 of 1992 survived subsequent to the compromise. In paragraph 5 of the compromise petition, it is mentioned that the appellant and his brother Varghese filed O.S.No.1532 of 1992 initially for rendition of accounts and later amended it as a suit for dissolution of partnership as well. The trial court passed a preliminary decree dissolving the partnership. Appellate court also confirmed the decree. Against that judgment and decree, the aggrieved parties came up in second appeal. It is mentioned in paragraph 8 of the compromise petition that each of the parties (erstwhile partners) was having 1/4th share in the land, building and theater. Two brothers assigned their rights to the appellant and the respondent. In paragraph 9 of the compromise petition, it is clearly mentioned that the appellant and respondent obtained whole right over the property in moieties. In paragraph 11, the terms of settlement are clearly enumerated. It speaks about the settlement of monetary claims. Further, it speaks about the retrenchment of employees who were working in the theater. Still further, it speaks about the steps to be taken for discharging the receiver appointed by the lower court. All these terms and conditions, according to us, indicate the intention of the parties to sever the jural relationship in a partnership. In clause 11 (D) in the compromise, it is mentioned as follows:

The Receiver shall be discharged and vacant possession of the partnership property shall be given to the appellant herein (2nd defendant in the suit) and to the 2nd respondent herein who is the 2nd plaintiff in the suit who will be in joint ownership and possession with right each in the property, and the partnership stands dissolved as ordered by Sub Court, Thrissur as per the judgment and preliminary decree dated 21.8.1998. The attachment of the 1st defendant's (Sri.C.T.Babu) compensation money in LAC 72/2005 of the Spl.Tahsildar LA (General) referred to above by the plaintiff will stand vacated.

8. Learned counsel for the appellant contended that the words the partnership stands dissolved as ordered by Sub Court, Thrissur in the above quoted clause only indicate that the parties agreed to confirm the preliminary decree pronounced in the dissolution suit. In other words, they never intended to abandon their rights to get a final decree passed in the above suit. We cannot accept this contention for the following reasons.

9. Section 2(2) CPC defines the expression decree . It reads as follows:

decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

From the explanation, it is evident that a decree can be called preliminary only when further proceedings have to be taken before the suit can be completely disposed of. As a corollary, a decree becomes a final decree when it completely disposes of the suit. There may be situations where the decree can be partly preliminary and partly final. It is well settled that a compromise decree also falls within the ambit of Section 2(2) CPC and it is a decree which is capable of execution depending on the terms in it.

10. It is axiomatic that if, in a given case, it is possible to adjudicate the matter in one stroke, there need not be any division of the decrees into two, viz., preliminary and final decrees. Exception to this proposition is provided in Order XXXIV of the CPC. Order XXXIV Rule 2 CPC dealing with decrees in foreclosure suits speaks about the mandatory requirement of passing a preliminary decree in the matters

specified therein. Such a stipulation is absent in Order XX Rule 15 CPC, the provision relating to the decrees in suits for dissolution of partnerships. It reads as follows:

Decree in suit for dissolution of partnership.- Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

The provision makes it clear that in a suit for dissolution of partnership or taking accounts, the court, before passing a final decree, may pass a preliminary decree declaring the proportionate share of the parties and fix the date on which the partnership should stand dissolved. It is not obligatory on the part of the court to pass preliminary decree and final decree in all cases. If the parties settle the entire disputes regarding the rights and liabilities in a given case, there is no bar for the court in passing a final decree straightaway in a suit for dissolution of partnership.

11. Similar is the provision in Order XX Rule 18 CPC relating to the decrees in partition suits. It is quoted hereunder for profit:

Decree in suit for partition of property or separate possession of a share therein.- Where the Court passes a decree for the partition of the property or for the separate possession of a share therein, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving, such further directions as may be required.

12. Supreme Court had occasion to consider the question relevant in this case in the context of a suit for partition in *Renu Devi v. Mahendra Singh and others* (AIR 2003 SC 1608). The legal effect of a compromise and requirement of a final decree in terms of the compromise were the disputes raised before the Supreme Court. Following observations made by the Supreme Court are relevant:

In the instant case the decree dated 13-2-1978 passed in the suit for partition and the contents of the compromise application with the three schedules of properties annexed thereto shows that the property was partitioned by metes and bounds; not only the shares but the property actually falling to the share of each of the 3 groups were actually defined and given to the party entitled thereto. Therefore, for all practical purposes the decree dated 13-2-1978 was a final decree. Under O. 20, R. 18 it is not necessary to pass a preliminary decree; the Court may pass preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very first instance. Often such are the cases which are based on compromise. The present one is such a case.

This decision was followed in *Bimal Kumar and another v. Shakuntala Debi and others* (AIR 2012 SC 1586). The relevant portion reads as follows:

Applying the principles laid down in the aforesaid authorities, it is graphically clear that in the case at hand, the parties entered into a compromise and clearly admitted that they were in separate and exclusive possession of the properties and the same had already been allotted to them. It was also admitted that they were in possession of their respective shares and, therefore, no final decree or execution was required to be filed. It is demonstrable that the compromise application does not contain any clause regarding the future course of action. The parties were absolutely conscious and rightly so, that their rights had been fructified and their possession had been exclusively determined. They were well aware that the decree was final in nature as their shares were allotted and nothing remained to be done by metes and bounds. Their rights had attained finality and no further enquiry from any spectrum was required to be carried out. The whole thing had been embodied in the decree passed on the foundation of compromise.

In the light of the provisions in Order XX Rule 15 CPC relating to the decrees in suits for dissolution of partnership and the pari material provisions in Order XX Rule 18 CPC and also by applying the principles laid down by the Apex Court in the above decisions, we are of the view, taking into account the terms in the

compromise, that there is no mandatory requirement that the earlier suit between the parties for dissolution of partnership and rendition of accounts should culminate in a final decree. What is important is the intention of the parties to have finality of the litigation as revealed from the terms of compromise. The contention of the learned counsel for the appellant that Section 48 of the Act requires passing of a final decree is also unsustainable. Section 48 of the Act deals with the mode of settlement of accounts between partners. It says that in settling the accounts of a firm after dissolution, the rules therein shall, subject to the agreement between the parties, be observed. It is clear that the parties in a given case have the right to take a different course, which had been taken in this case. As mentioned above, Ext.A4 speaks about devolution of property on the appellant and respondent in moieties. Further, as per the compromise they intended to have joint ownership and possession in respect of the property. Further more, they declared that the partnership stood dissolved as ordered by the Sub Court, Thrissur in O.S.No.1532 of 1992. They had decided to retrench the employees in the theater and pay compensation from out of the funds deposited by the receiver. Above all, the contention raised by the appellant that pending the litigation, on 29.10.2009 an oral partnership was formed between the appellant and the respondent is not at all probalised by the terms of the compromise. Had it been so, naturally the parties would have mentioned that fact in the compromise petition. Not only that the parties never intended to take accounts of the partnership or to compel anyone for rendition of the accounts. Giving up that claim is also an indication that the parties agreed to put an end to the partnership. Therefore, from the factual as well as legal angles, we are of the view that Ext.A4 compromise finally concluded the rights of the parties and no final decree is required to effectuate the compromise. In the light of the fact that such a course is legally open to the parties and they have resorted to the same, we reject the contention of the appellant that a partition suit is incompetent.

13. Learned counsel for the appellant relied on a decision rendered by the Supreme Court in Hasham Abbas Sayyad v. Usman Abbas Sayyad and others ((2007) 2 SCC 355). The Supreme Court decided a question whether a preliminary decree passed in a partition suit could be put to execution without passing a final decree in continuation thereto. Apex Court, considering the facts and

circumstances in the case, held that a final decree alone can be executed and not a preliminary decree. This general rule is beyond any challenge. But, the ratio in the said decision has no application to the facts of this case. Therefore, we are not impressed with the contention of the learned counsel for the appellant that a final decree should have been passed in the previous suit for dissolution of partnership and rendition of accounts between the parties.

14. We notice another legal flaw in the case of the appellant. In the suit for partition, the appellant not only contested the claim of the plaintiff/respondent, but also raised a counter claim based on the premise that the plaint schedule property, even after the compromise, retained the character of an asset of a partnership firm. The principle that one co-owner cannot seek mandatory injunction for recovery of movables against another co-owner in a suit for partition is unchallengeable. Remedy of the aggrieved co-owner in such a situation is only to claim partition of those movables too along with other items. Obvious legal reason is that every co-owner is the owner of every inch or every item of property, whether it be movable or immovable. Therefore, the prayer for mandatory injunction can only be made on the assumption that the movable properties belonged to an existing partnership firm. Every partner is legally presumed to be an agent of the firm. The trial court having repelled the counter claim raised by the appellant and passed a preliminary decree in the suit for partition, it goes without saying that the appellant is legally aggrieved not only by the grant of the respondent's claim, but also by the denial of his plea. In other words, the reason for allowing the respondent's claim and the reason for disallowing the appellant's claim is one and the same, viz., the property was found to be a co-ownership property liable to be partitioned. In unequivocal terms, the court below found that the property is not the asset of the firm. In any view of the matter, therefore, the defendant/appellant should have challenged the adverse decision of the court below in the counter claim.

15. Then the question springs up for consideration is whether the appeal is maintainable without challenging the decision in the counter claim. Stated more precisely, whether there will be bar of res judicata in this appeal is the germane legal issue. Order VIII Rule 6A CPC enables a defendant in a suit to raise a

counter claim. On a careful perusal of the above provision, it can be seen that a defendant in a suit is permitted not only to resist the plaintiff's action, but also to raise a counter claim against the claim of the plaintiff. A counter claim by the defendant need not be confined to monetary claims alone as in the case of set off provided under Order VIII Rule 6 CPC. A counter claim can be in respect of any relief, subject to the condition that the claim shall be in respect of any right arising from a cause of action accrued to the defendant against the plaintiff either before or after filing of the suit, but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. Another rider is that the counter claim shall not exceed the pecuniary limits of jurisdiction of the court in which the suit is laid. Sub-rule (2) of Order 8 Rule 6A CPC clearly states that such a counter claim raised in a suit shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the suit, both in the original claim and in the counter claim. In other words, the Code allows a defendant to raise a counter claim instead of filing a cross suit. It also says that both should be tried as a single suit, though in reality they are cross suits.

16. Sub-rule (3) of Order VIII Rule 6A CPC makes it clear that the plaintiff in the suit shall be at liberty to file a written statement in answer to the counter claim raised by the defendant. Sub-rule (4) shows that the counter claim shall be treated as a plaint governed by the rules applicable to plaints. All these provisions in Order VIII Rule 6A CPC would show that a counter claim raised by a defendant in a suit is essentially a separate suit having all the characteristics of a cross suit, including the liability to pay court fee. Only distinction drawable is that the defendant raising a counter claim need not venture to take out summons to the plaintiff as he already appears in the suit.

17. Order 8 Rule 6C CPC empowers the plaintiff to challenge the maintainability of the counter claim raised by the defendant in his suit and permits him to seek exclusion of the counter claim, provided he makes an application at any time before the issues are settled in relation to the counter claim. Obvious reason for this provision is to avoid frustration or embarrassment of the trial. Order 8 Rule 6D CPC says that in any case in which the defendant has set up a counter claim, the staying, discontinuance or dismissal of the suit will not affect the counter claim and

it can be proceeded with. All these factors will show that the counter claim is a cross suit with all the trappings of a separate suit.

18. It is well settled that where an appeal arising out of a connected suit is dismissed on merit, the other appeal in respect of the other suit cannot be heard and has to be dismissed as the second one is barred by *res judicata*. Likewise, where no separate appeals are filed from the decrees in connected suits, it has the same effect of not filing an appeal against a judgment and decree resulting in the bar of *res judicata*. If the findings recorded in one of the connected suits are allowed to attain finality, the appellate court is legally barred from proceeding with the appeal against the decree in the other suit. These principles are well settled by plethora of judicial pronouncements. We need only mention a couple of decisions to fortify our reasoning.

19. A Full Bench of this Court in *Janardhanan Pillai and others v. Kochunarayani Amma and others* (ILR 1976 (1) Kerala 489) held thus:

It is the decree which is the foundation for the appeal. The scheme of the Code of Civil Procedure is to provide for a decree and judgment in every suit. The fact that the court orders joint trial of two suits in exercise of its inherent power does not mean that it dispenses with the passing of judgment and decree in the suit as required by the Civil Procedure Code. Consolidation of two suits need not necessarily be by agreement of parties, for, if a court, after hearing parties, feels that, in the interests of justice, it is necessary that two or more proceedings should be tried together, it is open to it to order so to avoid repetition of the same evidence in the different cases or to avoid the possibility of conflicting decisions in those cases or for such other justifying reasons. But nevertheless the court is not absolved from the duty of passing a judgment in those cases nor drawing up decrees in those cases. May be that a common judgment is delivered by a court but it is, in essence, a judgment in each and everyone of the cases and decrees have to be drawn up in those different cases. May be that there is only one trial. But that, does not in any way affect the rule that there should be separate appeals. If the consequence of a decree being left unchallenged is to render it final, such consequence will work itself out irrespective of the question whether the decree in

the connected suit has been subjected to appeal. When a party has obtained the benefit of the finality of a decision in one suit if proceeding by way of appeal in a connected suit is nevertheless to continue, necessarily the party has to face the same issue twice over. It is not possible to find any logic which compels us to adopt the view that an earlier decision in a former suit may not operate as res judicata in the event that decision was reached simultaneously with the decision in the suit from which the appeal is taken. That would be against the plain provision in section 11 of the Code of Civil Procedure. The question whether the plea of res judicata is available is to be decided with reference to the time the matter comes up for consideration and if by that time there is an earlier decision by a competent court between the same parties which has become final and the question is directly and substantially the same such earlier decision would operate as res judicata barring a fresh decision by the appellate court.

The Supreme Court in *Premier Tyres Ltd. v. Kerala State Road Transport Corporation* (1993(2) KLT 130) after elaborate consideration of the point held as follows:

Where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed. Where no appeal is filed, as in this case from the decree in connected suit it has the same effect of non filing of appeal against a judgment or decree. Thus the finality of finding recorded in the connected suit, due to non filing appeal precludes the Court from proceeding with appeal in other suit.

20. We are of the view that the said principles should be applied in the case of a suit and counter claim, as they are essentially cross suits. Another principle that res judicata applies between two stages in the same litigation is also well settled. Apex Court in *C. V. Rajendran and another v. N. M. Muhammed Kunhi* (AIR 2003 SC 649) has held that the principle of res judicata applies as between two stages in the same litigation so that, if any issue has been decided at an earlier stage against the party, it cannot be re-agitated by him at a subsequent stage in the same suit or proceeding. Although there are many other decisions on these points, we are not cataloging them in order to avoid verbosity.

21. It is, therefore, unquestionable that if two suits involving common issues were disposed of by one judgment and an appeal was filed against the decree in one and not in the other, the matter decided in the latter suit becomes final and will be hit by res judicata so that, the issues cannot be reopened in an appeal. Of course, the plea of res judicata must be raised in the pleadings and then an issue must be framed and tried. Res judicata being a rule of estoppel by judgment based on the public policy a party entitled to raise a plea thereon is equally entitled to waive it. Unless the plea is proved to be waived by a party, the bar under Section 11 CPC will come into play. These propositions are well settled. In this case, there is no reason to hold that the respondent has waived the plea. This Court in *Girija v. Rajan* (2015 (1) KLT 695) had occasion to consider this question. It is held that the legal provision in Order VIII Rule 6A CPC makes it abundantly clear that a counter claim in a suit will have all the characteristics of a cross suit, including the vulnerability of attracting bar of res judicata enshrined in Section 11 CPC, if not properly challenged. We may refer to a decision of the Supreme Court in *Rajni Rani and another v. Khairati Lal and others* ((2015) 2 SCC 682) to strengthen the view in *Girija's* case. The principles of law stated therein read as follows:

12. From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counterclaim has been adjudicated and decided on merits holding that it is barred by principle of Order 2 Rule 2 CPC. The claim of the defendants has been negated.

13. Keeping in mind the conceptual meaning given to the counterclaim and the definitive character assigned to it, there can be no shadow of doubt that when the counterclaim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood, it conveys that there has to be a formal expression of an adjudication as far as that court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere.

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16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A court may draw up a formal decree or may not, but if by virtue of the order of the court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counterclaim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counterclaim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible.

So, the said proposition in Girija's case (supra) is beyond any challenge.

22. Whether two separate appeals are to be filed by a party who suffered a decree in the suit and whose counter claim was rejected could be a debatable question. In the light of the pronouncement of law by the Apex Court in Rajni Rani's case (supra), the decision in the counter claim is also a decree. A decree can be challenged only as provided in Section 96 CPC. So, drawing up of a decree in a counter claim and challenging it, if it is adverse to a party, are unavoidable matters. If not challenged, the bar under Section 11 CPC will be attracted. For filing an appeal against the decree in a counter claim, no special provision could be seen either in the Code or in the Civil Rules of practice. These are some aspects worthy of mentioning in this context. However, we avoid any pronouncement on the question about the form of appeals from counter claims since such an issue does not arise in this case. In this particular case, we notice that no serious challenge is made against the dismissal of the counter claim. Still further, not even court fee has been paid in the appeal to challenge the dismissal of the counter claim. Hence we have no hesitation to hold that the denial of relief in the counter claim remains unchallenged.

23. We notice an illegality in the judgment and decree passed by the court below in this case. Even though there is a specific finding in paragraph 12 of the judgment on issue number No.5 that the appellant/defendant is not entitled to get the mandatory injunction decree sought for in the counter claim, in the decretal portion of the judgment that finding has not been reproduced by the trial Judge. That is a serious omission on the part of the trial Judge. Consequently in the decree, denial of the relief claimed in the counter claim has not been reflected. It is pertinent to note that the decree in counter claim is capable of execution. Non-application of mind by the trial court has resulted in a grave legal error. Not only the provisions in the Code, but also the principles in the decision rendered by a Full Bench in Janardhanan Pillai's case (supra) have been flagrantly violated by non-drawal of a decree in the counter claim. Such slipshod attitudes of the trial courts are to be avoided and courts shall take extreme care to see that the operative portion of the judgment is written correctly, clearly and without any scope for confusion so that, it can be reproduced in the decree. By doing so, mistake in drafting the decree can be avoided. However, in our opinion, the error committed by the lower court in this case will not enure to the benefit of the appellant as he has not chosen to get the decree amended or to take any legal step to challenge the rejection of his counter claim. For the said reason also, we find that the appeal is legally unsustainable.

In the result, we dismiss the appeal as it is factually and legally unsustainable. Reckoning the relationship between the parties, there is no order as to costs.

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