Madras High Court
Vediammal And Ors. vs M. Kandasamy And Ors. on 7 February, 1997
Equivalent citations: (1997) 1 MLJ 529
Author: S Subramani
JUDGMENT S.S. Subramani, J.

1. Plaintiffs in O.S. No. 337 of 1985, on the file of District Munsif's Court, Harur, are the appellants.

2. Suit filed by them was to declare their title to 1-17 acres of land which is more specifically described in the plaint schedule. It is their case that they purchased the property as per sale deed dated 29.5.1974 from Chinnappa Gounder, Sevatha Gounder and Raja Gounder. It is further said that even though the sale deed refers to only one acre of land, in fact they obtained possession of 1-17 acres, and ever since the sale deed of 1974, they came into possession of the property, and the same was within the boundaries described in the sale deed. It is further said that the property has also been sub-divided and the said 1 acre, 17 cents has been given sub-division numbers, and they are also paying revenue to the Government. Cause of action was stated to be that defendants 2 to 4, who are previous owners have instigated first defendant to trespass into the portion and, therefore, the suit was filed for the reliefs stated above.

3. In the written statement filed by defendants 2 to 4, they contended that the sale deed in favour of plaintiff is only for one acre, and the allegation that it covers 1 acre, 17 cents is not correct. The 17 cents is forming part of their property and the plaintiff is attempting to trespass into the same. They further state that they sold 4 cents of land to first defendant out of the 17 cents since the said portion is touching his building. It is further said that the first defendant is the absolute owner of the 4 cents. They prayed for dismissal of the suit.

4. First defendant, in a separate written statement, contended that he has taken 4 cents of land from defendants 2 to 4, and plaintiffs have title only for an extent of 1 acre. He prayed that the suit may be dismissed.

5. By an additional written statement, he claimed that he may be given possession of 4 cents of land which plaintiff has trespassed in 1985, on the basis of title. That was in the nature of a counter-claim, under 0.8, Rule 6-A, C.P.C. The said relief was separately valued under Section 25(A) of the Tamil Nadu Court-fees and Suits Valuation Act. First defendant prayed that the court may be pleased to dismiss the suit and decree the counter-claim, and render justice.

6. Trial court held that the plaintiff obtained title only for one acre. There was trespass by plaintiff in the year 1985, and he has no possession before that. The claim that he obtained possession from 1984 onwards is incorrect. First defendant obtained title to 4 cents. Therefore, plaintiff was directed to handover possession of 4 cents; A decree was granted in favour of plaintiff only for one acre, and, in respect of the disputed portion of 17 cents, the suit was dismissed. At the same time, the counterclaim was allowed, directing the plaintiff to handover possession of the 4 cents, which he purchased under Ex. B-4.

7. An appeal was filed before the lower appellate Court by plaintiff. Lower appellate court also confirmed all the findings of the trial court.

8. It is against the concurrent judgments of both the courts below, plaintiff has preferred this second appeal.

9. Since caveat was filed, even at the time of admission stage, with the consent of learned Counsel on both sides, the main second appeal itself was heard for final disposal on merits.

10. Learned Counsel for 1ST respondent took a preliminary contention that the second appeal is not maintainable since the same is barred by res judicata It is his case that his counter-claim has been allowed, and when the same is not appealed against, that decision binds the plaintiff, and the second appeal is, therefore, not maintainable.

11. As against the said contention, learned Counsel for the respondents submitted that the principle of res judicata may not apply since there is only one suit and one decree. Against that decree, the appeal is preferred. There is no former or subsequent suit, and there is only a unified proceeding, and hence there is no necessity for applying the principle of res judicata.

12. Both parties agreed that a decision on the above point will conclude the matter.

13. Before proceeding further with the discussion on the legal point, we have to take into consideration Section 11 of the Code of Civil Procedure, and also the relevant provisions of Order 8, Rules 6-A to G of the Code of Civil Procedure.

14. Section 11, C.P.C. says thus:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

(Italics supplied)

15. Suit has not been defined anywhere in the Code of Civil Procedure. So, we have to take only the general meaning of a suit.

16. In a recent decision of the Supreme Court reported in Pandurang Ramchandra Mandalik v. Shantibdi Ramchandra Ghatge and Ors. (1989) 2 S.C.C. (Supp.) 627, their Lordships said in paragraph 18 (at page 639) thus:

It is true that Section 11 is now made applicable by the Explanations and interpretation to certain proceedings giving more extensive meaning to the word "suit'. In its comprehensive sense the word suit' is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy with the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a court of justice the proceeding by which the decision of the court is sought may be a suit. But if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of Section 11.

[Italics supplied]

17. Ramanatha Iyer's 'Law Lexicon' - 1997 Edition (at page 1831) defines 'Suit' thus:

A process instituted in a court of justice for recovery or protection of a right, the enforcement of a claim, or the redress of a wrong.

Suit. Prosecution or pursuit of some claim, demand or request: the act of suing, the process by which one endeavours to gain an end or object; attempt to attain a certain result: the act of suing; the process by which one gains an end or object, an action or process for the recovery of a right or claim; the prosecution of some demand in a Court of Justice; any proceeding in a Court of Justice in which plaintiff pursues his remedy to recovery a right or claim; the mode and manner adopted by law to redress civil injuries; a proceeding in a Court of Justice for the enforcement of a right.

Order 8, Rule 6-A, C.P.C. enables a defendant in a suit to set up a set-off under Rule 6, in addition to his right of pleading, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. It further says that when such a counter-claim is filed, it shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. Sub-rule (3) says that if such a counter-claim is made, plaintiff will be at liberty to file a written statement in answer to the same. So far as the counter-claim is concerned, Rule 4 says that 'The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints' - Order 8, Rule 6-C, C.P.C. enables the plaintiff in certain circumstances to seek orders of court that the counter-claim should not be tacked on with the plaint and the same may be treated as a suit. The court, on hearing such application, shall make necessary orders Order 8, Rule 6-D, C.P.C. says that in cases where defendant sets up a counter-claim, even if the plaintiff's suit is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with Order 8, Rule 6-E, C.P.C. is corresponding to Order 8, Rule 10, C.P.C. It says that if the plaintiff fails to file a reply to the counter-claim, the Court may pronounce judgment on die counter-claim. Rule 6-G says that in respect of the statement to be filed by plaintiff, provisions of Order 8, C.P.C, will apply.

18. What is the nature of a counter-claim?

19. Under the English Judicature Act, 1873, O.19, Rule 3 says thus:

The defendant may plead a set-off or set up by way of counter-claim any right or claim, whether sounding in damages or not, against the claims of the plaintiff, The rule further says:

Such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim.

(Italics supplied) This is more or less similar to Order 8, Rule 6-A, Sub-rules (1) and (2) of our Code, i.e., Civil Procedure Code.

20. In law Reports Exchequer Division, Volume II, at page 243 The Manchester Sheffield, and Linconnshire Railway Company and The London and North Western Railway Company v. Brooks, a suit was filed by more than one plaintiff, i.e., two Railways Companies filed a suit against the defendant. The defendant set up counter-claims against each of the plaintiffs. The question was, whether such a counter-claims could be maintained and what is the effect. While considering the same, their Lordships said thus:

... The defendant here claims unliquidated damages for non-delivery of coals. Then we come to the question of parties, and without referring to the terms of the Acts and Rules, it is enough to say that the court has large powers of joining plaintiffs and defendants, and if parties are improperly joined the court can strike them out. Then the question is, these claims being separate against each of the two plaintiff companies, has the court jurisdiction to deal with them in this action? It is clear that it has....

Their Lordships further went on to say thus:

...it is enough to read Sub-section (7) of Section 24 of the Judicature Act, 1873 by which the court in every cause or matter shall have power to grant and shall grant "all such remedies whatsoever as any of the parties thereto may appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matter avoided." It consider this to be one of the most salutary enactments in the Judicature Acts, and the present case comes within the express words and the very spirit of that Section. I think, therefore, that the present counter-claims may and ought to be finally determined in this action.

21. In 1889 Queens Bench Division page 543, the question was, how the cost has to be taxed on a counter-claim. At page 547, it was held thus:

This case illustrates the rule in somewhat the same way as Mc Gowan v. Middleton, which the question was whether a plaintiff who was met by a counter-claim was at liberty by discontinuing his own claim to put an end to the counter-claim. Now if a counter-claim is to be treated as having no

vitality except as a bar to the action, it becomes, a defence and not a counter-claim; but, as was said in that case, it is more than a defence, it is in the nature of a proceeding in a cross-action, and when necessary for the purposes of justice it must be so treated. A counter-claim is therefore to be treated, for all purposes for which justice requires it to be so treated, as an independent action, and it is necessary for justice to be done under Order 65, Rule 12, to consider it as not being part of the action, but as being disconnected from it.

[Italics supplied]

22. Even before Amendment to the Code of Civil Procedure, by Act 104 of 1976, the Supreme Court had occasion to consider the nature of a counterclaim. The same is reported in Laxmidas v. Nanabhai : (1965) 1 S.C.J. 1, wherein their Lordships said that 'A right to make a counter-claim is statutory and a counter-claim is not admissible in a case which is admittedly not within Order 8, Rule 6, C.P.C In paragraph 11 of the judgment, their Lordships said thus:

But there is nothing in law - statutory or otherwise - which precludes a court from treating a counter-claim as a plaint in a cross suit. No doubt, the Civil Procedure Code 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 annexure to it or as part and parcel thereof, though described as a counter-claim, there can 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 the plaint. In such a case the court is not prevented from separating the Written Statement proper from what was described as a counter-claim and treating the latter as a cross suit, and if the counter-claim contains all the necessary requisities sufficient to be treated as a plaint making a claim for the relief sought, it would be open to a court to convert or treat the counter-claim as a plaint in a cross suit.

23. In Uthandarama Pillai v. Arumugam Pillai , a Division Bench of this Court considered as to what is meant by counter-claim, and when the same can be entertained. Their Lordships said thus:

A. counter-claim is one based on an independent cause of action which distinguishes it from a set-off generally arises as a part of the transaction giving rise to the cause of action for the suit. The essence of counter-claim in that the defendant should have a cause of action against the plaintiff and should be in the nature of a cross-action against the plaintiff and not merely a defence to the plaintiff's claim.

[Italics supplied] In that case, their Lordships said that the defendant cannot prefer a counter-claim for improvements in a suit for redemption filed by the plaintiff for the reason that if redemption is not allowed, the value of improvements also cannot be granted: So, it is not an independent cause of action. The said decision is now given a legislative sanction, according to me, in view of Rules 6-D and 6-E to Order 8, C.P.C. That is why Rules say hat even in the case of the plaintiff's suit being stayed, discontinued or dismissed, the counterclaim has to be continued, and, even if the plaintiff is

not filing a written statement to the counter-claim, the Court can pass a judgment on the counter-claim. Since it has an independent cause of action, an adjudication is required, and the court is allowed to proceed to adjudicate the same in spite of the fact that the claim is made in a suit filed by the plaintiff.

24. In Daga Films v. Lotus Production , a learned Judge of the Calcutta High Court reiterated the same legal position.

25. In Narayan Chandra Dev v. Pratirodh Sahni , a learned Judge of that High Court was considering whether a revision is maintainable against the dismissal of a counter-claim, while the suit was pending, defendant put forward a counter-claim in the written statement. The trial court held that the same is not maintainable. A revision was taken. The learned Judge said that even if a decree is not prepared by the office, it is an adjudication of rights of parties and, therefore, comes within the definition of 'decree'. The revision was, therefore, not maintainable. In paragraph 8 of the judgment, the learned Judge said thus:

It is urged that the preparation of a formal decree or otherwise is immaterial for determination whether a particular order constitutes a decree, I am referred to the decision in Kanji Hirajbhai Gondalia v. Jivaraj Bharamshi , which, according to the opposite party, lends support to his contention. The plaintiff sued for possession and arrears of rent. Trial court held that the suit for possession was not maintainable for want of a valid notice. Trial court refused to draw up a formal decree on the ground that a part of the suit had been disposed of on a preliminary issue and the other part of the suit viz., suit for rent was pending. It was held that the decision of the learned trial Judge so far as the relief for possession was concerned was a substantive decision or determination. It is a final adjudication between the parties in respect of a suit for possession. Order of the learned trial Judge conclusively determined the rights of the parties on the question of eviction. It was held whether an order passed by a court is a decree or not could not depend on the drawing up of a decree by the court as formal drawing up of a decree was the duty of the court. If a court did not draw up a decree, it could not be said that the order of the court by which rights of the parties were finally adjudicated upon was not a decree.

Finally, accepting the decision of the Gujarat High Court referred to supra, the learned Judge said thus:

I have already opined that the counter-claim is a suit for all intents and purposes. And the order of the learned Munsif finally disposes of the suit while he held that the counter claim was not maintainable. It is immaterial that no formal decree was drawn up in the instant case also.

26. In this connection, it may also be noted that all the provisions of a plaint are made applicable to a counter-claim. In the decision reported in Sarojini Amma v. Dakshyani Amma 1996 K.L.J. 722, the question that came for consideration before the kerala High Court was, whether in a counter-claim, impleading application under Order 1, Rule 10, C.P.C. can be filed. In that case, plaintiff had not impleaded certain persons. But the defendant, in a counter-claim in that suit, wanted to implead certain persons, who were according to the defendant, answerable to the counter-claim. In that case

the court held that 'under Order 1, Rule 10, C.P.C, at the instance of the defendant, additional parties could be impleaded to the counterclaim. While considering the same, the learned Judge held thus:

The main purpose of setting up a counter-claim is to prevent multiplicity of proceedings between the parties. As observed already, it has to be treated as a plaint and is governed by the rules applicable to it. It has to contain the particulars as in Order 7, Rule 1, C.P.C. among other requirements. Indeed, "Plaint" has not been statutorily defined. But it should contain necessary and relevant facts constituting the cause of action. The counterclaim need not necessarily be confined to the claim made against the plaintiff, and if for its effective adjudication besides the plaintiff* other interested persons should be made parties, they should be impleaded, if the court is satisfied that without them the adjudication will be incomplete. Order 8, Rule 6-A, C.P.C. does not say as to who shall be parties to the counter-claim. The provisions as to joinder of parties under Order 1, Rule 10, C.P.C. would also apply to counter-claim, no doubt, subject to the condition that persons impleaded are necessary and proper parties for an effective adjudication of the questions involved. The submission that Order 8, Rule 6-A does not enable the participation of persons who are not already parties to the suit is difficult to accept.

27. From the above decisions, the following principles emerge:

A counter-claim is really a suit, though the same is taken in the written statement. Just as a suit is filed by the plaintiff, defendant seeks a relief against the plaintiff on a cause of action which he has against the plaintiff. It is an independent cause of action which could also be agitated in a separate suit. It is to avoid multiplicity of proceedings, defendant is given liberty to file a counter-claim and get adjudication. Issues are suggested in both the original claim as well as in the counter-claim, and both are disposed of by a common judgment (Order 8, Rule 6-A(2), C.P.C. says that there can be a final judgment in the same suit, both on the original claim and counter-claim). In common parlance, 'common judgment' means, 'decision arrived simultaneously in more than one suit tried together.' In view of the legal position under Order 8, Rule 6-A, C.P.C, a counter-claim or set-off can be made in many forms in a suit. But they need not be given separate numbers. The counter-claim is also said to be a weapon on evidence and enables the defendant to enforce the claim against the plaintiff as effectively as an independent action. As stated earlier, it is an enabling provision which gives a right to the defendant that instead of filing an independent action, he can seek that relief in a suit filed by plaintiff against him. Originally, there was a doubt whether the counter-claim filed in a suit for recovery of money and whether there should be nexus to the cause of action on which the suit is instituted. The legal position is now settled in view of the judgment reported in Shri Jag Mohan Chawla v. Dera Radha Swami Satsang J.T. (1996) 5 S.C. 428, wherein their Lordships have held thus:

...The counter-claim could be treated as a cross-suit and it could be decided in the same suit without relegating the parties to a fresh suit. It is true that in money suits, decree must be conformable to Order 20, Rule 18, C.P.C. but the object of the amendments introduced by Rules 6-A to 6-G are conferment of a statutory right to the defendant to set up a counter-claim independent of the claim on the basis of which the plaintiff laid the suit, on his own cause of action. In Sub-rule (1) of Rule 6-A, the language is so couched with words of wide width as to enable the parties to bring his own

independent cause of action in respect of any claim that would be the subject-matter of an independent suit. Thereby, it is not longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words "any right or claim in respect of a cause of action accruing with the defendant" would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit. The counterclaim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court-fee thereon. Instead of relegating the defendant to an independent suit, to avoid, multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause, of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit....

[Italics supplied] The said decision has been subsequently followed by the Bombay High Court in the decision reported in Hemraj v. Yamunabai (1996) 2 Mah.L.J. 844. From the judgment of the Supreme Court, it is clear that the scope of a counter-claim is in the nature of a cross-suit for all purposes.

28. This view of mine is supported by the decision reported in Shivkali Bai v. Meera Devi 1991 M.P.L.J. 102, wherein a learned Judge of that High Court held thus:

Counter-claim being in the nature of cross-suit, is not affected by the dismissal of plaintiff's suit. The counter claim has to be disposed of on merits. Therefore, the dismissal of plaintiff's suit on the ground of non-joinder of necessary party would not affect the counter claim of the defendant.

The only difference is, instead of filing two suits having two registered numbers, relief is sought for in the same suit by both plaintiff and defendant. The inference is irresistible therefore, that a counter-claim will be a suit. It must have a cause of action and that cause of action can be independently enforced. Necessary court-fee must be paid on the relief sought lor.

29. If the counter-claim is treated as a suit, and the same is disposed of by a common judgment, and if one of the judgments is not appealed against, the principle of res judicata has to be applied. For the definition of 'former suit' we need look into only Explanation 1 to Section 11 of the Code of Civil Procedure. If the decision in one suit has become final in which the issue which has to be decided in appeal was heard and finally decided, the connected suit cannot be appealed against, for, the same is barred by res judicata I need only refer to a very recent decision of the Supreme Court reported in Premier Tyres Limited v. Kerala State Road Transport Corporation . In that case, their Lordships considered a similar question in paragraph 3 onwards, which reads thus:

The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned Senior advocate appearing on behalf of the appellant. It is urged that Section 11 of the Civil Procedure Code does not apply as such. According to him since both the suits were connected and decided by a common order the issue in neither suit can be said to have been decided in a former suit. Therefore, the basic ingredient of Section 11 of the C.P.C. was not satisfied. The submission derives some support from observations in Narhari v.Shanker that, veven when there are two suits it has been held that decision given simultaneously cannot be a decision in the former suit." But this decision was distinugished in Sheodan Singh v. Smt. Daryao Kunwar as it related to only one suit, therefore, the observations extracted above were not relevant in a case where more than one suit were decided by a common order. The court further held that where more than one suits were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal was dismissed either as barred by time or abated then the order operated as res judicata in other appeals.

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 Suit 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.

In Ramagya Prasad Gupta v. Murli Prasad an effort was made to get the decision in Sheodan Singh reconsidered. But the Court 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 the C.P.C. were found missing.

Although none of these decisions were concerned with the situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from. Mention may be made of a Constitution Bench in Badri Narayan Singh v. Kamdeo Prasad Singh. In an election petition filed by the respondent a declaration was sought to declare the respondent as the as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The court observed, We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that finding is incorrect.

Thus the finality of finding recorded in the connected suit, due to non-filing of appeal, precluded the court from proceeding with appeal in other, suit. In any view of the matter the order of the High Court is not liable to interference.

30. Our High Court also had occasion to consider a similar question in the decision reported in Angappa Gounder v. Rajavelu Gounder , where also the scope of a former suit was discussed. Yet another decision is reported in Kandaswami v. B.A. Murugesa , wherein the same legal position was reiterated.

31. Learned Counsel for the appellants relied on the following decisions to contend that the Appeal is not barred by res judicata. The first decision is Panchanada Velan v. Vaithinatha Sastrigal I.L.R. 29 Mad. 333. The second decision is by a learned Judge of this Court reported in T.K.V.S. Vidyapoornachary Sons by one of its Partners and Ors. v. K.R. Krishnamachary (1983) 2 M.L.J. 4. The last decision referred by him is, Managing Director v. K. Ramachandra Naidu (1994) 2 L.W. 738.

32. In the first decision, two suits were jointly tried and against the common judgment, only one appeal was filed. A contention was taken that the appeal was barred by res judicata. Learned Judge overruled the objection on the following grounds:

...The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide res judicata.

I do not think the above decision holds good in view of the decision reported in Premier Tyres Limited v. Kerala State Road Transport Corporation . In that judgment, their Lordships said:

...The question is, what happened where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law....

[Italics supplied]

33. In the second decision, viz., T.K.V.S. Vidyapoornachary Sons by one of its Partners v. K.R. Krishnamachary (1983) 2 M.L.J. 4, counterclaim was raised by defendant. In view of his absence, an ex parte decree was passed in the suit, and his counter-claim was dismissed for default. Defendant filed an application under Order 9, Rule 9, C.P.C. to have the counter-claim restored. At the same time, he did not file an application to have the ex parte decree set aside. The question was, whether such an application is necessary. The question of res judicata was not a matter in issue. In that case, a learned Judge of this Court held that if the counterclaim is restored, the effect is that the entire defence is also restored, for, without the written statement, there cannot be a counter-claim. So, a further application is not necessary. I do not think, the same has any bearing to the facts of this case.

34. In the last decision cited by learned Counsel for appellant, namely, Managing Director v. K. Ramachandra Naidu (1994) 2 L.W. 738, against an order in a writ petition, the State filed an Appeal, and the same was dismissed on the ground of delay. Other parties to the writ petition filed an Appeal. The question was, whether the subsequent appeal filed by the other person, is barred by res judicata In that case, their Lordships followed the decision of the Supreme Court in Narhari v. Shankar , wherein it was said that if there was only one suit, the principle of res judicata will not apply. According to me, the said decision may not have any application here. If a counter-claim is considered as a suit, naturally, if we interpret the word 'common judgment' it follows that two suits have been tried jointly and a common judgment is pronounced. Hence, that decision also may not have any application to the facts of this case.

35. In view of the above legal position, it cannot be doubted that the second appeal is not maintainable, and the same is barred by res judicata.

36. On merits also both the courts below have held that the title of the plaintiff is only for 1 acre, and that he has trespassed in 1985, and the first defendant has got valid title. That is also a pure question of fact. In either way, the second appeal has no merits. The same is accordingly dismissed. Taking into consideration the legal position involved in this case, I direct the parties to suffer their respective costs. C.M.P. No. 10753 of 1996 for stay is also dismissed consequently.