

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.1012 of 1991 (O & M)
Date of Decision:08.03.2018

Chhabil Dass and others

...Appellants

Versus

Hem Raj and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Ajay Jain, Advocate
for the appellants.

Mr. Tarun Singla, Advocate
for respondent No.1.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the Courts below.

Plaintiffs filed a suit for declaration claiming that they are owners in possession of the suit land and the order passed by the authorities declaring the land to be surplus (beyond the land ceiling prescribed by the State Government) are illegal, null and void.

Plaintiffs pleaded that Smt. Jany wife of Chhabil Dass was owner of the land. Dalip Singh and Chhotu Singh sons of Surja were declared owners of the suit land vide Civil Court decree dated 16.03.1970. Dalip Singh and Chhotu Singh thereafter sold the suit land to the plaintiffs vide registered sale deed dated 06.08.1974. It was further pleaded by the plaintiffs that the order declaring the land to be surplus in the hands of Smt.

Jany dated 26.03.1979 is wholly erroneous and illegal as the orders were

passed without hearing the plaintiffs.

Defendants contested the suit and pleaded that the orders passed by the authorities were correct. Defendants No.6 to 8 filed a written statement admitting the claim of the plaintiff.

On appreciation of evidence available on the file, both the Courts have concurrently found that the orders passed by the authorities declaring the land to be surplus dated 23.03.1979 is without issuing notice to the plaintiffs, who had become owner of the suit property in the year 1974, hence decreed the suit.

Two first appeals were preferred, one by the State of Haryana and the second by defendant No.4 and Jany, the original owner. Both the appeals were dismissed by the Court after re-appreciating the evidence available on the file. Present appeal has been filed by defendant No.4 and Smt. Jany. This Court has heard learned counsel for the parties at length and with their able assistance gone through the record of the case.

Learned counsel for the appellants has submitted that the plaintiffs before filing the suit, had filed a writ petition in the High Court along with one Suraj Bhan, which was dismissed by the High Court on 07.10.1980. Hence, the order passed by the High Court operates as res judicata. He further submitted that jurisdiction of the Civil Court is barred under the Haryana Ceiling on Land Holdings Act, 1972 and hence also the judgments passed by the Courts below are liable to be set aside.

Learned counsel during the course of the arguments did not dispute that the earlier writ petition filed by the plaintiffs along with one another petitioner, was dismissed by single word order i.e. 'dismissed' on

Issue which arises for consideration is whether dismissal of the previous writ petition by single word, without a speaking order can operate as res judicata in a subsequent suit.

Procedure in the civil suits are governed by Code of Civil Procedure. Section 11 of the Code of Civil Procedure provides that if in a previous suit between the same parties in which the issues involved are directly and substantially in issue as in the present suit and have been adjudicated upon finally and such finding would operate as res judicata. Section 11 of the Code of Civil Procedure is extracted as under:-

“11. Res judicata.-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 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.

Explanation II : For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII :An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit,

notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

In the present case, there was no previous suit between the parties. In any case, even if this point is examined from another angle i.e. constructive res judicata, which is based on public policy. Still in the considered opinion of this Court, previous writ which was dismissed with single word, by a non-speaking order would not operate as constructive res judicata. Before a Court invokes rule of res judicata, the Court has to be certain and in a position to return a finding that previous writ petition was dismissed on merits after considering all aspects of the case. It would be unsafe and difficult for the Court to record a finding that the summary dismissal of the writ petition was decision on merits or the writ petition was dismissed on account of delay and laches, or an alternative remedy or the Court did not feel inclined to interfere in a writ jurisdiction. There can be more than one reason to dismiss the writ petition.

The Constitutional Bench of the Hon'ble Supreme Court while considering this aspect in the case of AIR 1961 SC 1457 **“Daryao and others vs. State of U.P. and others”** has laid down that dismissal of the writ petition by one word shall not be the ground to decline the second proceeding on the basis of rule of res judicata. Para 19 of the judgment passed by the Hon'ble Supreme Court is extracted as under:-

“We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter

and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar

of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us. ”

This judgment has been consistently followed by the Hon'ble Supreme Court in subsequent judgments also. Reference in this regard can be made to judgment reported as (1989) 3 SCC 433 “Smt. Pujari vs. Madan Lal”.

Learned counsel for the appellant tried to distinguish the aforesaid judgments by submitting that the writ petition was dismissed after issuing notice. He submitted that hence the dismissal of the writ petition

must be assumed to be on merits.

In the considered opinion of this Court, it will be difficult for the Court to assume something, which cannot deciphered from the order passed. Rule of res judicata debars the Court to subsequently examine an issue, which has been decided by the Court in previous proceedings. Invocation of such rule of law has to be strictly construed and cannot be invoked solely on the basis of inferences.

Section 11 of the Code of Civil Procedure specifically provides that the previous suit should be between the same parties or their predecessor-in-interest and the issue should be directly and substantially in issue and should have been finally adjudicated upon in the previous suit.

Next submission of learned counsel is that the jurisdiction of the Civil Court is barred under Section 26 of the Haryana Ceiling on Land Holdings Act, 1972.

Learned counsel for the appellant has not disputed that the order passed by the authority declaring the land to be surplus (beyond the ceiling limits laid down by the State) was without issuing notice to the plaintiffs who had become owner in 1974, the order passed by the authority was wholly perverse and against the principles of natural justice. Reference in this regard can be made to a Full Bench judgment of this Court in **“State of Haryana and others vs. Vinod Kumar and others”** 1986 RLR 331. It has been held that in such circumstances jurisdiction of the civil Court cannot be held to be barred.

In view of the discussion made above, this Court does not feel that any good ground is made out to interfere with the concurrent findings

Hence the regular second appeal is dismissed.

However, the authorities under the Haryana Ceiling of Land Holdings Act, 1972 shall be at liberty to pass a fresh order after giving opportunity of hearing to the owners i.e. plaintiffs.

08.03.2018
sheetal

(ANIL KSHETARPAL)
JUDGE

Whether Speaking/Reasoned: Yes/No
Whether Reportable : Yes/No