

---

**(2014) 05 UK CK 0013**

**In the Uttarakhand High Court**

**Case No : Writ Petition No. 2041 (MS) of 2007**

Gaina Singh

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

---

**Date of Decision : 15-05-2014**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11 — Constitution of India, 1950  
- Article 226

**Citation : (2015) 1 UC 574**

**Hon'ble Judges : Alok Singh, J.**

**Bench : Single Bench**

**Advocate : Rakesh Thapliyal, Advocate, for the Appellant; Gajendra Tripathi, Brief Holder, for the Respondent**

**Final Decision : Dismissed**

---

## **Judgement**

Alok Singh, J. Undisputedly, petitioner earlier filed civil suit being O.S. No. 1 of 2004 (Gaina Singh Negi v. Surendra Singh Padiyar) for permanent prohibitory injunction restraining the defendant (respondent No. 3 herein) in making any interference in possession of the plaintiff/petitioner over the property, in question, viz. plot No. BTX-I. It was specifically stated in paragraph 5 of the plaint that Director, Rehabilitation (respondent No. 2 herein) had cancelled the order of allotment of the property, in question, issued in favour of the plaintiff/petitioner and cancellation order was never served on the plaintiff/petitioner, herein. It was further stated in paragraph 5 of the plaint that after the cancellation of allotment of property, in question, in favour of petitioner, the same was allotted in favour of defendant/respondent No. 3, herein. Learned Civil Judge (JD), Tehri Garhwal vide judgment & decree dated 01.02.2005 was pleased to dismiss the suit filed by the plaintiff/petitioner saying petitioner ought to have challenged the order of cancellation of allotment as well as subsequent allotment order made in favour of the defendant/respondent No. 3, herein, too, instead of seeking only relief of permanent prohibitory injunction. It was further observed by the learned Civil Judge that since order of cancellation of allotment

in favour of the petitioner and subsequent, allotment in favour of the defendant/respondent No. 3 were not challenged, therefore, same had attained finality, therefore, plaintiff had absolutely no right over the property, in question, thus, no injunction in favour of plaintiff/petitioner could be granted.

2. Feeling aggrieved, plaintiff/petitioner, herein, filed Civil Appeal before District Judge being Civil Appeal No. 03 of 2005 assailing the judgment and decree dated 01.02.005 passed by Civil Judge, (JD), Tehri Garhwal dismissing the suit No. 01 of 2004. Learned Appellate Court/District Judge, Tehri Garhwal vide judgment dated 02.06.2007 was pleased to dismiss the appeal as well. Thereafter, petitioner preferred present writ petition challenging the order dated 21.01.2003 whereby allotment of the petitioner was cancelled as well as order dated 23.08.2003 whereby property, in question, was subsequently allotted to respondent No. 3.

3. In view of the statement made by the plaintiff/petitioner in paragraph 5 of the plaint filed by the plaintiff, it was within the knowledge of the plaintiff/petitioner that prior to filing of the suit, allotment made in favour of the petitioner was cancelled and it was subsequently allotted to respondent No. 3. Therefore, plaintiff/petitioner ought to have challenged the order dated 21.01.2003 whereby allotment in his favour was cancelled as well as our dated 23.08.2013 whereby same was subsequently allotted to the respondent No. 3 in the suit.

4. Section 11 and Order 2 Rule 2 of CPC reads 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 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..

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."

"2. Suit to include the whole claim.--(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.--Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.--A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.--For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

5. Perusal of Explanation IV of the Section 11 CPC would demonstrate that any claim or defence ought to have been taken but not taken would be deemed to have been a matter directly and substantially in issue in the previous suit.

6. Sub-Rule (2) and (3) of Rule 2 of Order II CPC provides that plaintiff has to put forward all the claims and should seek all the reliefs available at the time of filing of suit. As per sub-Rule (2) and (3) of Rule 2 of Order II, if all the claims and reliefs are not sought in the previous suit, which are available at the time of filing of previous suit, plaintiff would be debarred in making such claims and seeking those reliefs in a subsequent suit and subsequent suit shall be barred by Order 2 Rule 2 CPC.

7. In view of the above discussion made hereinbefore, in my considered opinion, since petitioner could have taken the plea that orders dated 21.01.2003 and 23.08.2003 were bad in law, illegal or without jurisdiction, therefore, were liable to be cancelled/revoked or declared as such, therefore, petitioner cannot be allowed to take such plea or relief in the present petition in view of principle of constructive res judicata under Explanation IV of Section 11 CPC and principle of relinquishment under Order II Rule 2 CPC.

8. Mr. Rakesh Thapliyal, Advocate appearing for the petitioner, has vehemently argued that after dismissal of earlier suit and appeal arising therefrom, petitioner has filed present petition, which cannot be held to be barred by explanation IV of Section 11 and Order II Rule 2 CPC, in view of the fact that provisions of CPC are not applicable to the writ petition filed under Article 226 of the Constitution of India. Argument advanced by Mr. Rakesh Thapliyal, Advocate for the petitioner, is misconceived. It is true that rigid principles of CPC are not applicable in the writ petition, however, broad principles of CPC are always applicable. Since petitioner did not take all the claims and did not seek all the reliefs available to him, at the time of filing of earlier civil suit, therefore, subsequent writ petition putting forward those claims and seeking those reliefs, which were available to the petitioner, at the time of filing of previous suit would be barred by the principles of constructive Res Judicata and relinquishment. Rule of law and public policy requires that none should be allowed to abuse the process of law; there should be end of matter. In view of the discussion made hereinbefore, writ petition fails and is hereby dismissed. No cost.