
(1978) 03 P&H CK 0029

In the Punjab And Haryana At Chandigarh

Case No : Letter Patent Appeal No. 618 of 1974

Union of India and Others

APPELLANT

Vs

Diwan Chand and Others

RESPONDENT

Date of Decision : 16-03-1978

Acts Referred:

Citation : AIR 1978 P&H 258

Hon'ble Judges : A.D. Koshal, C.J.;S.S. Dewan, J

Bench : Division Bench

Judgement

A.D. Koshal, C.J.—The facts giving rise to this appeal under clause 10 of the Letters Patent against an order passed by a learned single Judge accepting Civil Writ Petition No. 1391 of 1968 may be shortly stated. The petitioner was allotted 2.13 standard acres of land in lieu of that left by him in Pakistan on the partition of the country in the year 1947. The allotment in his favour was, however, cancelled on the 27th of July, 1968, by the concerned Managing Officer who gave permission to the petitioner to purchase an area of 6 standard acre against a payment of Rs. 675/-per acre. The petitioner availed of the permission, deposited the price in the treasury and was sold the said area of 6 standard acre in the year 1960. Later on by an order dated the 13th of August, 1963, the Chief Settlement Commissioner affirmed the order of cancellation. The petitioner then applied for permission to purchase the area covered by the cancellation order. The purchase was allowed on payment of the market value but he refused the officer as he insisted on paying only the "reserve" price which was not acceptable to the rehabilitation authorities.

The petitioner then knocked at the door of this Court in Civil Writ Petition No. 2280 of 1963 in which, according to his pleadings, the prayer made was that the cancellation of the allotment ordered by the Managing Officer and the Chief Settlement Commissioner be quashed. That petition was dismissed in limine on the 20th of December, 1963, by a Division Bench of this Court.

By means of the petition decided by the learned single Judge the petitioner

sought afresh the quashing of the order of cancellation of allotment and also prayed for the setting aside of the order refusing to sell to him the disputed land having an area of 2.7 standard acres at the "reserve" price.

2. At the hearing before the learned single Judge a plea was raised on behalf of the respondents to the petition who are the appellants before us and are so referred to hereinafter, that the order of cancellation of allotment could not be challenged a second time and that the order dismissing Civil Writ Petition No. 2280 of 1963 operated as *res judicata*. The learned single Judge refused to entertain the plea on the ground that it has been waived because it had not been raised in the written statement filed by the appellants. This opinion of the learned, Single Judge cannot be accepted as correct in view of the dictum of their Lordships of the Supreme Court in *State of Punjab Vs. Bua Das Kaushal*, . In that case no specific plea of *res judicata* was taken in the written statement nor was any issue framed on the point before the trial Court but the necessary facts were present to the mind of the parties and were present to the mind of the parties and were gone into by the Court. When the matter came up in appeal before a learned Single Judge of this Court, he framed two issues in relation to the point and called for a report thereon from the trial Court. The order of the learned Single Judge was upheld by their Lordships of the Supreme Court who observed in this connection (at p. 1678).

"We are wholly unable to understand how in the above circumstances any question of waiver could arise when the point had throughout been under consideration and discussion and how the appellant could be precluded from pressing that point before the Supreme Court."

The present case is practically on all fours with that decided by the Supreme Court in so far as the facts are concerned. The writ petitioner himself averred in paragraph 9 of the petition that he had challenged the order cancelling the allotment by way of Civil Writ Petition No. 2280 of 1963 which, according to him, was dismissed in limine on the 20th of December, 1963, by a Division Bench of this Court. These averments were accepted as correct in the written statement filed by the appellants and they constitute a complete set of facts on which a plea of *res judicata* may be based and such a plea was actually raised before the learned Single Judge. In these circumstances there was no question of waiver which has to be a conscious act in the giving up of rights of which the concerned party is fully aware. Mere inaction to raise a plea which is open to a party cannot, without more, be regarded as waiver. This principle presumably in the basis of the dictum of their Lordships of the Supreme Court.

The writ petitioner having challenged the legality of the order of cancellation of allotment and having failed in his attempt to have it set aside because of the order of dismissal of his earlier writ petition, cannot be allowed to re-agitate the same matter over again on principles analogous to those of *res judicata* even though the order of dismissal was passed in limine. This follows from what a Full Bench of this Court has held in *Bansi and Another Vs. Additional Director*,

3. Mr. Chawla, learned counsel for the writ petitioner, lays stress on three matters for the proposition that the petition accepted by means of the impugned order is not barred for reasons analogous to those of *res judicata*. Those matters are that the pleadings of the parties in the earlier case are not before the Court, that the order of dismissal of the previous writ petition is not shown to have been made on merits and that the matter now being agitated before the Court cannot be said to be directly and substantially in issue in that petition. We do not find any force in the proposition. In so far as the absence of the pleadings in the earlier writ petition is concerned, their production in the present proceedings is not at all necessary in view of what the writ petitioner has averred in paragraph 9 of the petition to which a reference has already been made. No further material is needed for the plea of *res judicata* to be raised and decided, for, the facts remain that the order of cancellation of allotment was made the subject-matter of the previous writ petition, that a prayer therein was made that that order be quashed and that that petition was dismissed in limine. So far as the cancellation, of the allotment is concerned, therefore, the dismissal operated as a final judgment in regard thereto. It goes without saying that the question of the legality or illegality of the order of cancellation of allotment was directly and substantially in issue in the previous writ petition.

Learned counsel for both the parties are agreed that the order dismissing the previous writ petition consisted of a single word "Dismissed". According to Mr. Chawla, that order cannot be said to have been made on merits because it is not a speaking order. The argument is fallacious. Had the order been passed because of laches on the part of the writ petitioner or for the reasons that an alternative remedy was available to him or on a ground analogous thereto, the order would certainly have said so. Its silence on these points is conclusive to show that the dismissal was ordered on merits. In the absence of any specific reason making out that the dismissal was ordered on account of a technical defect or some such reason, such a defect or reason cannot be read into it..

The proposition put forward on behalf of the writ petitioner must thus be and is hereby repelled. In view of what we have said above, the impugned order cannot be sustained. Accepting the appeal, therefore, we set it aside on the ground that the writ petition decided thereby is barred on principles analogous to those of *res judicata* in so far as the legality of the order of cancellation of allotment is concerned.

4. The question of the right of the writ petitioner to purchase the disputed land measuring 2.7 standard acres at the "reserve" price was not decided by the learned Single Judge and has to be determined before the writ petition can be finally disposed of. We direct, therefore, that the case be laid before a learned Single Judge for determination of that point.

In relation to the land measuring 6 standard acre and mentioned above, it was

claimed by the writ petitioner in paragraph 21 of his petition that the same had been auctioned by the appellants along with the other land allotted to him and had been purchased by four persons who are arrayed as respondents Nos. 2 to 5 in the appeal being decided by this judgment. In so far as that area (6 standard acre) is concerned, the writ petitioner has already become its owner by reason of the purchase from the Rehabilitation Department in the year 1960 as stated in an earlier part of the appellants is wholly unjustified and is, therefore, struck down.

5. There will be no order as to costs.

6. Appeal allowed.