

BAKHTAWAR SINGH AND ANR.

v.

SADA Kaur AND ANR.

AUGUST 28, 1996

[N.P. SINGH AND FAIZAN UDDIN, JJ.]

*Limitation Act, 1963 : Article 65 and Section 14.*

*Adverse possession—Plaintiffs withdrew earlier suit with permission—Fresh suit filed—Meanwhile, defendant perfected title by adverse possession—Plaintiff claimed exclusion of time under S.14—Held: Fresh suit barred by limitation—Plaintiffs failed to show that permission to withdraw suit was granted in accordance with O.23 R1(3) CPC—Nor the essential for taking benefit of S.14 satisfied—Code of Civil Procedure, 1908, O 23R1(3).*

The suit land was the ancestral land originally belonging to one G who died leaving behind five sons. The defendant-respondent was married to one of the sons viz. D. After the death of D the respondent contracted 'Karewa' marriage with the younger brother of D. The plaintiff-appellants who are two sons of G filed a declaratory suit on 19.1.1962 contended that they were in possession as owners of 2/3rd share in the estate of D on account of the marriage by virtue of the prevalent custom. The suit was dismissed but the appeal filed by the plaintiffs was allowed on 7.8.1963. Thereafter, the plaintiffs filed another suit in 1964 against the respondent to get back the possession of the suit land as, according to them, in the meanwhile the defendant had taken forcible possession of the suit land. During its pendency, the respondent filed a second appeal against the judgment of the appellate court dated 7.8.1963. The High Court dismissed the respondent's second appeal but granted certificate and leave to appeal to this Court. Subsequently, on 20.5.1979 the plaintiffs withdrew their suit filed in 1964 from the court with liberty to file a fresh suit for possession of land.

On 24-7-1980 this Court dismissed the appeal holding that the respondent had lost her rights in the estate of D when she contracted 'Kerewa' marriage. Thereafter, on 28.11.1980 the plaintiffs Appellants again filed a fresh suit for possession against the respondent in accordance with the terms of withdrawal of the first suit. The court took the view

A that the plaintiffs' suit was barred by limitation and the defendant-respondent had perfected her title by adverse possession. The first appellate court as well as the High Court upheld this view. Hence this appeal.

B On behalf of the appellants it was contended that since the plaintiffs had withdrawn their earlier suit with permission to file a fresh suit on the same cause of action in accordance with the provisions contained in clause (3) of Rule 1 of Order 23 of the Code of Civil Procedure, 1908 the plaintiffs were entitled to exclude the time spent in prosecuting the said earlier suit as provided under Section 14 of the Limitation Act, 1963.

C Dismissing the appeal, this Court

D HELD : 1.1. In the present case all the courts below including the High Court concurrently found that the plaintiffs/appellants failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject matter. The plaintiffs had not even produced the application which is said to have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same cause of action to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. In these facts and circumstances no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier suit was made out by the plaintiffs/appellants in accordance with the provisions of Clause (3) of Order 23 Rule 1 of the Code of Civil Procedure, 1908. [239-C-F]

F 1.2. As regards the exclusion of time under Section 14 of the Limitation Act, 1963 it was essential for its application to show that the proceedings related to the same matter in issue and the plaintiff prosecuted the suit in good faith in a court which, from defect of jurisdiction or other cause of like nature is unable to entertain it. The plaintiff/appellants have failed to show as to what was the defect of jurisdiction or any other cause of like nature by reason of which the earlier suit was entertainable or competent. That being so, the benefit of the provisions of Section 14 cannot be legitimately extended to the suit of the plaintiffs. In these facts and circumstances the Plaintiffs' suit has rightly been dismissed as barred by limitation. [239-G-H; 240-A]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5178 of 1995. A

From the Judgment and Order dated 4.9.86 of the Punjab & Haryana High Court in C.R.S.A. No. 3533/85 and C. Misc. 3764/C of 1985.

O.P. Sharma, R.C. Gubrele, K.R. Gupta, Vivek Sharma and Ms. Namita Sharma for the Appellants. B

Ujagar Singh and Ms. Naresh Bakshi for the Respondents.

The Judgment of the Court was delivered by C

• **FAIZAN UDDIN, J.** 1. This is an appeal by the unsuccessful plaintiffs whose suit for declaration to the effect that they are in possession as owners of 2/3 share in the estate of the husband of respondent No. 1 was dismissed by the sub-Judge. 1st Class, Muktsar as barred by limitation by his judgment and decree dated May 17, 1983, which has been affirmed by the First appellate Court and the High Court. D

2. The land in suit is the ancestral land originally belonging to Gulab Singh who died leaving behind him his five sons, namely, Sampuran Singh, Jeet Singh, Dalip Singh, Chand Singh and Bakhtawar Singh, The defendant respondent herein was married to Dalip Singh. Dalip Singh died in the year 1932 whereafter the respondent Sada Kaur contracted 'Karewa' marriage with Chand Singh the younger brother of her deceased husband Dalip Singh. E

3. The plaintiffs appellants who are two sons of late Gulab Singh filed a declaratory suit on 19.1.1962 by contending that they were in possession as owner of 2/3 share in the estate of Dalip Singh, the late husband of defendant/respondent No. 1 and that the defendant/ respondent No. 1 had forfeited her right in the estate of her deceased husband on account of marriage, by virtue of the prevalent custom amongst them and the plaintiffs being the reversionaries were entitled to inherit the same. The said suit of the plaintiffs was dismissed on June 19, 1962 on the findings that the defendant respondent No. 1 did not forfeit her right on her remarriage with the younger brother of her late husband. But the appeal filed by plaintiffs against the said judgment and decree was allowed on August 7, 1963 reversing the judgment and decree passed by the Trial Court. F G H

A 4. Thereafter the plaintiffs filed another suit against the defendant respondent No. 1 being civil suit no. 661 of 1964 to get back the possession of the suit land as according to them, in the mean-while the defendant had taken forcible possession of the suit land.

B 5. The defendant respondent No. 1 filed second appeal in the High Court against the reversing judgment of the appellate court dated August 7, 1963 but the High Court maintained the judgment and decree and dismissed the second appeal. The High Court, however, granted Certificate and leave to appeal to the Supreme Court on the point whether a widow forfeits her rights or not by 'Karewa' marriage with her brother-in-law.

C 6. Subsequently, on May 20, 1971 the plaintiffs withdrew their civil suit No. 661 of 1964 from the Court of Sub-Judge with liberty to file a fresh suit for possession of land.

D 7. On July 24, 1980 the Supreme Court dismissed the appeal filed by the respondent Sada Kaur upholding the judgment of the civil courts and the High Court holding that the respondent No. 1 had lost her rights in the estate of her deceased husband Dalip Singh when she contracted 'Karewa' marriage with her brother-in-law, Chand Singh. Thereafter on November 28, 1990 the plaintiffs appellants again filed a fresh suit for possession against the respondent No. 1 in accordance with the terms of withdrawal of the first suit (Civil Suit No. 661 of 1964). The Sub-Judge took the view that the plaintiffs suit was barred by limitation and the defendant respondent No. 1 had perfected her title by adverse possession. The Additional District Judge, Faridkot by his judgment dated August 27, 1985 as well as the High Court by the impugned judgment dated September 4, 1986 upheld the findings recorded by the Trial Court and dismissed the plaintiffs appeal against which this appeal has been directed.

G 8. The contention of the learned counsel for the appellants is that since the plaintiffs had withdrawn their earlier suit (Civil Suit No. 661 of 1964) with permission to file a fresh suit on the same cause of action in accordance with the provisions contained in clause (3) of rule 1 of Order XXIII of the Code of Civil Procedure (hereinafter the Code) and, therefore, the plaintiffs were entitled to exclude the time spent in prosecuting the said earlier suit as provided under Section 14 of the Limitation Act,

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(hereinafter the Act). The question, therefore, that arises for our consideration is whether the plaintiffs appellants were permitted to withdraw the suit in accordance with the provisions contained in clause (3) of Order XXIII, rule 1 of the Code and whether in the facts and circumstances of the present case the plaintiffs appellants are entitled for exclusion of the time under Section 14 of the Act. Clause (3) of Order XXIII rule 1 of the Code contemplates that where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of subject matter of such suit or such part of the claim. In the present case all the courts below including the High Court concurrently found that the plaintiffs/appellants failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject matter. Not only this the plaintiffs had not even produced the application which is said to have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same cause of action to show as to what was formal defect in the earlier suit by reason of which it was sought to be withdrawn. However, the order dated May 20, 1971 passed by the civil court was on record which did not indicate as to what was the formal defect in the suit by reason of which the permission to withdraw the same was accorded. In these facts and circumstances no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier suit was made out by the plaintiffs/appellants in accordance with the provisions of clause (3) of order XXIII rule 1 of the code.

9. As regards the exclusion of time under Section 14 of the Limitation Act it was essential for its application to show that the proceedings related to the same matter in issue and the plaintiff prosecuted the suit in good faith in a court which, from defect of jurisdiction or other cause of like nature is unable to entertain it. As discussed above the plaintiffs/appellants have miserably failed to show as to what was the defect of jurisdiction or any other cause of like nature by reason of which the earlier suit was not entertainable or competent. That being so, the benefit of the provisions of

**A** Section 14 cannot be legitimately extended to the suit of the plaintiffs. In these, facts and circumstances the plaintiffs suit has rightly been dismissed as barred by limitation.

10. For the reasons stated above the appeal fails and is hereby dismissed. We make no order as to costs.

**B**

V.S.S.

Appeal dismissed.