

Before J. V. Gupta, J.

BAKHTAWAR SINGH and another,—Appellants

versus

SADA KAUR and another,—Respondents.

Regular Second Appeal No. 3533 of 1985.

September 4, 1986.

Limitation Act (XXXVI of 1963)—Section 14—Code of Civil Procedure (V of 1908)—Order XXIII, Rules 1 and 2—Plaintiffs' suit for possession withdrawn with permission to file a fresh suit on the same cause of action—Plaintiff, however, failing to show that suit was likely to fail for formal defect in the frame of the suit as required by section 14(3) of the Limitation Act—No reasons for withdrawal stated—Plaintiff filing another suit for possession on the same cause of action—Defendant raising plea of limitation—Plaintiff—Whether entitled to claim benefit of section 14(3) for exclusion of time spent in pursuing the earlier suit—Suit for possession—Whether barred by limitation.

Held, that Rule (2) of Order XXIII of the Code of Civil Procedure, 1908, provides that in any fresh suit instituted with permission granted under Rule (1) of this Order the plaintiffs shall be bound by the law of limitation in the same manner as if the suit had not been instituted. The plaintiffs cannot claim extension of limitation because the earlier suit was allowed to be withdrawn with permission to file a fresh suit on the same cause of action. Extension of time can be claimed under sub-section (3) of section 14 of the Limitation Act, 1963, only if the said suit was allowed to be withdrawn on account of formal defect in the jurisdiction of the Court or other cause of a like nature or in view of clause (c) to the explanation appended to sub-section (3) of section 14, that the suit was allowed to be withdrawn due to the defect of misjoinder of parties or causes of action that shall be deemed to be the cause of a like nature with defect of jurisdiction, which the plaintiffs failed to prove by leading evidence. Since the plaintiffs did not make any effort to prove the formal defect on the basis of which the former suit was allowed to be withdrawn and that suit was bound to fail by reason of the defect in the jurisdiction of the Court or because of some of other cause of a like nature it has to be held that the plaintiffs are not entitled to claim extension of time under sub-section (3) of section 14 of the Act and the suit filed was barred by limitation. (Paras 7, 7-A and 9).

Regular Second Appeal from the decree of the Court of Additional District Judge, Faridkot, dated the 27th day of August, 1985,

affirming with costs that of the Sub-Judge 1st Class, Muktsar, dated the 17th day of May, 1982 dismissing the suit of the plaintiffs and leaving the parties to bear their own costs.

C.M. No. 3764/C/85.

Application under order 41 and 27 CPC, praying that the copy of the order of the Supreme Court may be allowed to be produced.

N. L. Dhingra, Advocate, for the Appellants.

D. S. Nehra and Arun Nehra, Advocates, for the Respondents.

JUDGMENT

J. V. Gupta, J.—

1. This is plaintiffs' second appeal whose suit for possession has been dismissed as barred by time by both the Courts below.

2. Gulab Singh had five sons, namely, Sampuran Singh, Jit Singh, Dalip Singh, Chand Singh and Bakhtawar Singh. Sada Kaur, defendant, was married to Dalip Singh in the year 1927. He died in the year 1932. A few months thereafter Sada Kaur contracted *karewa* marriage with Chand Singh, the brother of her deceased husband Dalip Singh. Chand Singh, defendant, and his brother Sampuran Singh had partitioned the estate left by Dalip Singh in four shares and occupied the same as owners. The suit land was ancestral. The parties were Dhaliwal Jats dependant upon agriculture. According to the custom prevalent, a widow who remarried after the death of her husband, forfeited her rights in the estate of her deceased husband and the reversioners were entitled to inherit the same. Thus, Sada Kaur, defendant, after her remarriage with Chand Singh, lost her rights in the estate of her deceased husband Dalip Singh. Accordingly, the property was inherited equally by all the four brothers. Even Chand Singh, who had married Sada Kaur by *karewa* had also agreed to the said partition. Dalip Singh had died leaving behind no son or daughter whereas Sampuran Singh, brother of the plaintiffs, had died leaving behind two daughters, namely, Kartar Kaur and Jas Kaur. Both of them sold the estate inherited by them from their father Sampuran Singh to the plaintiffs and Chand Singh, defendant. Thus, the plaintiffs and Chand Singh, defendant, came into possession of the entire estate of their father in equal shares. In November, 1961, Sada Kaur, defendant, had denied the title of the plaintiffs. Her name existed in the

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revenue record as the widow of Dalip Singh. This necessitated the filing of a declaratory suit by the plaintiffs on January 19, 1962, to the effect that they were the owners in possession of two-thirds share in the estate of Dalip Singh, deceased. In the written statement, the defendants pleaded that Sada Kaur was in possession of the land and that her title thereto had been perfected by adverse possession. The trial Court found that the plaintiffs were in actual possession of the land and that Sada Kaur was not in adverse possession thereof, as alleged. However, the said suit was dismissed by the trial Court on June 13, 1962, on the ground that the widow did not forfeit her rights on remarriage with her deceased husband's brother. In the appeal filed by the plaintiffs, the learned District Judge allowed the appeal on August 7, 1964, and, thus, decreed the plaintiffs' suit. In the second appeal in this Court by Sada Kaur, the finding of the trial Court that the plaintiffs were in possession of the land was not disputed. The only ground debated in the said appeal was: whether a widow forfeited her rights after *karewa* marriage or not. During the year 1961-62, the consolidation of holdings took place in the village. Since the name of Sada Kaur existed in the revenue record as the widow of Dalip Singh, the consolidation authorities allotted her a separate *kurra* and she took possession thereof in March, 1963. Thereon, the plaintiffs filed a suit on 9/10th November, 1964, for possession. However, the proceedings in the said suit were stayed under section 10 of the Code of Civil Procedure, in view of the pendency of the regular second appeal filed by Sada Kaur in this Court arising out of the suit for the grant of declaration. Ultimately, the second appeal filed by Sada Kaur was dismissed by the Full Bench of this Court on November 3, 1969. The judgment of the Full Bench of this Court was also upheld by the Supreme Court in the year 1980. In the Supreme Court, an application for stay of the proceedings in the suit instituted in the year 1964 (Suit No. 561 of 1964) was also filed and the proceedings therein were thus stayed by the Supreme Court. For the reasons best known to the plaintiffs, they moved an application for withdrawal of the said suit with permission to file a fresh suit on the same cause of action. The said application was not contested by the defendants. Consequently, the trial Court allowed the suit to be withdrawn on May 20, 1971,—*vide* order copy, Exhibit P. 11. After the dismissal of the appeal by the Supreme Court, Sada Kaur, defendant, was approached by the plaintiffs for the restoration of the possession of the land on October 1, 1980, but she refused to do so; hence the present

suit for possession of the suit land on October 27, 1980. In the written statement filed on behalf of Sada Kaur, defendant, *inter alia* objection was raised that the suit was not within time. However, it was admitted that she was married to Dalip Singh and after his death she had remarried Chand Singh. She denied that she had forfeited her rights in the estate of her deceased husband Dalip Singh after her remarriage with Chand Singh. She also pleaded that consolidation of holdings had taken place in the village in the year 1961 and that she was in possession of the suit land as the owner since the year 1963. In the trial Court all the issues except the issue: whether the suit of the plaintiffs is not within limitation, were decided in favour of the plaintiffs because of the earlier litigation between the parties, but they were non-suited as under the said issue, it was held that their suit was barred by time. It also held that Sada Kaur, defendant, had become the owner of the suit land by way of adverse possession. Consequently the plaintiffs' suit was dismissed. In appeal, the learned Additional District Judge affirmed the said finding of the trial Court on the question of limitation and, thus, maintained the decree dismissing the plaintiffs' suit. Dissatisfied with the same, they have filed this second appeal in this Court.

3. The only question involved in this appeal is: whether the suit filed by the plaintiffs on October 27, 1980, was within limitation or not?

4. According to the plaintiffs-appellants, since the suit filed by them earlier was allowed to be withdrawn with permission to file a fresh suit on the same cause of action, the plaintiffs were entitled to exclude the time taken in prosecuting the earlier suit as provided under section 14 of the Limitation Act, (hereinafter called the Act) and, therefore, the instant suit was within time. According to the learned counsel since the withdrawal of the said suit was not contested by the defendants, they were not entitled to raise any objection in this regard in the present suit. So far as the order of withdrawal of the suit with permission to file a fresh suit on the same cause of action is concerned, according to the learned counsel, the same was final between the parties and that being so, they were entitled to exclude the time taken by them in pursuing the previous suit. In support of the contention, the learned counsel relied upon *H. Nath Roy v. R. C. Barna Sarma* (1), *Raj Kumar Mahton v.*

(1) A.I.R. 1921 Cal. 34.

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Khelawan Singh (2), *Nirbheram v. Sukhdeo* (3), *Bhimangouda v. S. I. Patil* (4) and *Najarkhan v. Kesarkhan* (5). The learned counsel also relied upon *Director of Inspection I. T. v. Pooran Mall & Sons* (6), to contend that the defendants were estopped by their conduct to challenge the earlier order of the withdrawal of the suit dated May 20, 1971, copy, Exhibit P. 11. On the other hand, the learned counsel for the defendants-respondents submitted that the plaintiffs were not entitled to exclude the time taken in pursuing the earlier suit simply on the ground that it was allowed to be withdrawn with permission to file a fresh suit on the same cause of action. According to the learned counsel, extension in time could be claimed as provided under sub-section (3) of section 14 of the Act, only. It was contended that the plaintiffs had not led any evidence to show that the permission to withdraw the suit was given as it was bound to fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature. Thus, argued the learned counsel, in the absence of any such evidence, the plaintiffs could not claim the exclusion of time under section 14 of the Act. In support of the contention, the learned counsel placed reliance on *Johri Mal v. Surjan Singh* (7), *Braja Gopal Mukherji v. Tara Chand Marwari* (8), *Munsha Singh v. Gurdit Singh* (9), *Zafar Khan v. Board of Revenue* (10), and *Gurdit Singh v. Munsha Singh* (11).

5. I have heard the learned counsel for the parties and have also gone through the relevant case law cited at the bar.

6. Exhibit P. 11, is the copy of the order dated May 20, 1971,—*vide* which the plaintiffs were allowed to withdraw the suit with liberty to file a fresh suit on the same cause of action. In the said order it is not stated at all as to what was the formal defect in the

- (2) A.I.R. 1922 Patna 44.
- (3) A.I.R. 1944 Nagpur 307.
- (4) A.I.R. 1960 Mysore 178.
- (5) A.I.R. 1968 Gujarat 229.
- (6) A.I.R. 1975 S.C. 67.
- (7) 1970 P.L.R. 385.
- (8) A.I.R. 1921 Patna 225.
- (9) A.I.R. 1965 Punjab 80.
- (10) A.I.R. 1985 S.C. 39.
- (11) A.I.R. 1977 S.C. 640.

frame of the suit though the trial Court has observed therein,—

“I am satisfied that there are some formal defects in the frame of the suit and by reason of those defects the suit is likely to fail...”.

Not only that, in paragraph 8 of the plaint as well, the plaintiffs did not give any reasons on account of which the suit was allowed to be withdrawn. Paragraph 8 thereof reads,—

“That there were some formal defects in suit No. 661 (six hundred sixty-one) of 1964 (one thousand nine hundred sixty-four) which the plaintiff had filed. The plaintiffs made an application for withdrawal of the suit with liberty to file a fresh suit on the same cause of action. The Sub-Judge allowed this suit to be withdrawn with liberty to file a fresh suit subject to payment of Rs. 100 (one hundred) as cost on 20th May, 1971 (Twentieth May one thousand nine hundred seventy-one).”

The averments made in this paragraph are admitted in the written statement. Surprisingly enough, the plaintiffs did not produce on record the application made for the withdrawal of the suit to enable the Court to see the alleged formal defects in the suit on account of which the permission to withdraw the same was sought. Not only that, no effort was made by the plaintiffs to bring any evidence in that behalf on the record at any stage of the suit till now. The main stress of the argument of the learned counsel for the appellants is that the Court could not go into the matter in the subsequent suit as to why the earlier suit was allowed to be withdrawn. This proposition is not contested on behalf of the defendants, nor there can be any dispute with the same.

7. It is to be seen whether the withdrawal of the previous suit with permission to file a fresh suit on the same cause of action is by itself sufficient to claim the benefit of sub-section (3) of section 14 of the Act, which reads as under:

“14. Exclusion of time of proceeding *bona fide* in Court without jurisdiction.

(1) * * * * *

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(2) * * * * *

(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of defect in the jurisdiction of the Court or other cause of a like nature.

Explanation.—For the purposes of this section,—

- (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
- (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
- (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

It is quite evident that if the said suit was allowed to be withdrawn on account of a formal defect in the jurisdiction of the Court or other cause of a like nature, only then the plaintiffs were entitled to claim the benefit of the above-said provision, or in view of clause (c) to the Explanation thereto, they could prove that the suit was allowed to be withdrawn due to the defect of misjoinder of parties or causes of action because that shall be deemed to be the cause of a like nature with defect of jurisdiction. As observed earlier, no effort was made by the plaintiffs to prove the formal defect on the basis of which the former suit was allowed to be withdrawn. The only ground given in the order, Exhibit P. 11, in this behalf is that there were some formal defects in the frame of the suit. Apart from that, there is no other evidence to come to the conclusion as to whether the earlier suit was bound to fail by reason of the defect in the jurisdiction of the Court or because of some other cause of a like nature. That being so, the authorities relied upon by the learned

counsel for the appellants have absolutely no applicability to the facts of the present case.

7-A. Moreover the present suit is not being contested on the ground that it was not maintainable because the earlier order was defective or was not passed by a competent Court. The plaintiffs were not being non-suited on the ground that the suit was not maintainable. Rather their suit was dismissed as barred by limitation. Moreover, rule 2 of Order XXIII of the Code of Civil Procedure provides that in any fresh suit instituted on permission granted under rule 1 of the Order, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. Thus, it is quite clear that the plaintiffs could not claim extension of limitation because the earlier suit was allowed to be withdrawn with permission to file a fresh suit on the same cause of action. Extension of time could be claimed under sub-section (3) of section 14 of the Act only, which the plaintiffs in the present case have failed to prove by leading any evidence much less cogent. It cannot be disputed that the time spent in prosecuting the earlier suit could be excluded if the permission to withdraw the suit was granted on the ground that the suit was bound to fail by reason of the defect in the jurisdiction of the Court or other cause of a like nature such as misjoinder of parties or the causes of action as provided in clause (c) to the Explanation to section 14 of the Act.

8. While dealing with sub-section (3) of section 14 of the Act, it was held by this Court in *Johri Mal Surian Singh* (supra) that the plaintiff before taking advantage of sub-section (3) of section 14 must establish all the essential conditions, namely, due diligence, good faith and that the suit would have failed by reason of the defect in jurisdiction of the court or other cause of the like nature. The expression "other cause of like nature" of howsoever wide amplitude has to be read *ejusdem generis* and along with the earlier part of the same provision which relates to defect of jurisdiction of the Court. It was further held therein that it was not possible to lay down an exhaustive list of all causes showing defect of jurisdiction and each case will depend on its own facts and circumstances. The legislature in clause (c) of the Explanation to section 14 of the Act has provided that misjoinder of parties or of causes of action shall be deemed to be a cause of the like nature with defect of jurisdiction. In the said case, it was contended on behalf of the plaintiff-appellant in this Court that the plea of *res judicata*

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was also involved and that was a defect which related to the jurisdiction of the Court. In this regard, it was observed by the learned Single Judge as follows:

"I am afraid, there is no merit in this contention. It is true that the words, 'other cause of a like nature', must be liberally construed but it has to be kept in mind that they have to be given a meaning *ejusdem generis* with and analogous to the words preceding them. They connote that the suit must be one which the Court could not entertain because of those defects. There must thus be a defect which affects the inherent capacity of the Court to entertain the suit and prevent it from trying the same. The mere fact that a plea of *res judicata* had been taken in the written statement would not have prevented the Court from entertaining the suit and deciding the same. The plea of her of *res judicata* is not such a question which can be said to relate to the jurisdiction of the Court or other cause of like nature within the meaning of section 14 of the Limitation Act."

9. In *Gurdit Singh case* and *Zafar Khan's case* (supra), it was sub-section (1) of section 14 of the Act which came up for consideration before the Supreme Court. While interpreting the same words "or other cause of a like nature" therein, in *Gurdit Singh's case* (supra) it was observed,—

"Now the words 'or other cause of a like nature' which follow the words 'defect of jurisdiction' in the above-quoted provision are very important. Their scope has to be determined according to the rule of *ejusdem generis*. According to that rule, they take their colour from the preceding words 'defect of jurisdiction' which means that the defect must have been of an analogous character barring the Court from entertaining the previous suit."

In this view of the matter, I do not find any infirmity or illegality in the findings of the Courts below as to be interfered within in second appeal. The suit has been rightly held to be barred by time as in this case, the plaintiffs were not entitled to claim extension of time under sub-section (3) of section 14 of the Act.

10. Consequently, this appeal fails and is dismissed with no order as to costs.

However, the C.M. is allowed.

R. N. R.

Before D. S. Tewatia & M. M. Punchhi, JJ.

KRISHNA KHETARPAL,—Appellant.

versus

SATISH LAL,—Respondent.

First Appeal from Order No. 131-M of 1984.

September 10, 1986.

Hindu Marriage Act (XXV of 1955)—Sections 13, 13-B (2), 23 and 28(1)—Code of Civil Procedure (V of 1908)—Section 96(3)—Divorce proceedings pending in trial Court—Parties filing compromise deed for dissolution of marriage by mutual consent—Court thereafter recording statements of the parties and passing decree thereon—Said decree—Whether appealable under Section 28 of the Act—Section 96 of the Code—Whether bars the maintainability of the appeal—Grant of divorce on the basis of compromise—Matrimonial Court—Whether required to strictly follow the procedure prescribed by Section 13B (2) before dissolving marriage—Court—Whether required to satisfy itself that such compromise is based on wilful consent as required by Section 23 of the Act.

Held, that an appeal against the decree of divorce by mutual consent distinctly is not merely on consent of the parties, for the matrimonial Court is involved in decision making so that it accords not only with the provisions of Section 13-B of the Hindu Marriage Act, 1955 but also Section 23 of the said Act. Thus a decree of divorce by mutual consent is not based merely on mutuality of the consenting parties but the Courts' involvement in decision making is inextricably a part of the decree. Since the possibility of an error, legal or factual, entering in the decision making cannot be ruled out, an appeal under Section 28 of the Act has been provided. Besides Section 21 of the Act says that subject to other provisions contained in the Act and to such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated as far as may be, by the Code of Civil Procedure, 1908. Thus