

the suit to proceed without striking out the name of defendant No. 6 from the array of defendants. This revision petition, therefore, fails and is dismissed with costs.

N. K. S.

APPELLATE CIVIL

Before H. R. Sodhi, J.

JOHARI MAL,—Appellant.

versus

SURJAN SINGH AND OTHERS,—Respondents.

Regular Second Appeal No. 1068 of 1968

September 24, 1969.

Limitation Act (XXXVI of 1963)—Section 14(3)—Code of Civil Procedure (V of 1908)—Section 11 and Order 23, Rule 1—Previous suit withdrawn with permission of the Court to file fresh suit—Period in prosecuting such previous suit—Whether to be excluded in computing period of limitation for subsequent suit—Conditions for such exclusion—Stated—Plea of resjudicata—Whether relates to jurisdiction of the Court or other cause of like nature.

Held, that a provision has now been made in the Limitation Act of 1963 for the first time whereby the plaintiff who withdraws a suit under Order 23, rule 1 of Code of Civil Procedure can in computing the period of limitation normally prescribed for the suit exclude the time spent in prosecuting the previous suit provided he prosecuted the same with due diligence and good faith and the suit was withdrawn as it was bound to fail because of defect in jurisdiction of the Court or other cause of a like nature. The defect must relate to the jurisdiction of the Court or a cause of the same type and not that for any other formal defect for which suit is withdrawn the plaintiff gets a right to deduct the period so spent. It is 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, however, 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.

(Para 5)

Held, that the words 'other cause of a like nature' in section 14(3) of the Act must be liberally construed but they have to be given a meaning *ejusdem generis* with and analogous to the words preceding them. They conote that the suit must be one which the Court cannot entertain because of those defects. There must thus be a defect which affects the inherent capacity of the Court to entertain the suit and prevents it from trying the same.

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The mere fact that a plea of *resjudicata* has been taken in the written statement, does not prevent the Court from entertaining the suit and deciding the same. The plea of bar of the *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(3) of the Act.

(Para 5)

Regular Second Appeal from the decree of the Court of Shri B. S. Yadav, Additional District Judge, Rohtak, dated the 29th day of February, 1968, reversing that of Shri Shiv Dass Tyagi, Sub-Judge, 1st Class, Jhajjar, dated the 26th August, 1966, and dismissing the plaintiff's suit.

D. S. KANG, ADVOCATE, for the Appellant.

GOKAL CHAND MITTAL, ADVOCATE, for the Respondents.

JUDGMENT

SODHI, J.—This second appeal is directed against the judgment and decree of Additional District Judge, Rohtak, who allowed the appeal of the defendant-respondent Surjan Singh on February 29, 1968, and dismissed the suit of the plaintiff. Facts are not in dispute and may be stated in a narrow compass so far as they are necessary for deciding the present appeal. Surjan Singh respondent in execution of a decree obtained by him against Banarsi Dass Judgment debtor respondent got attached the shop in question which was alleged to belong to the judgment debtor. The plaintiff appellant preferred objections under Order 21 rule 58, Code of Civil Procedure, which were dismissed by the executing Court on 8th of January, 1964. The plaintiff then instituted a suit on 10th February, 1964, under Order 21, rule 63 Civil Procedure Code to establish his right to the property in dispute. It was a suit for declaration to the effect that the plaintiff was the owner in possession of the shop and the same was, therefore, not liable to attachment and sale in execution of the decree of defendant-respondent Surjan Singh against the Judgment debtor Banarsi Dass, respondent 2. It was pleaded by the plaintiff that the shop in dispute originally belonged to Banarsi Dass, Judgment debtor who sold it to Hukam Chand, defendant and that the latter then gifted the same to the plaintiff as per gift deed dated 16th of July, 1962. The allegations further were that the decree in the execution whereof the shop was sought to be attached on 24th of January 1963 had been obtained collusively. The decree-holder contested the suit and filed written statement.

(2) A preliminary objection taken by decree-holder was that an earlier suit by Hukam Chand filed somewhere in the year 1955 claiming declaration that he was owner in possession of some property

including the shop in question was dismissed on 14th of November, 1956 under Order 17, rule 3 as per order of the Court Exhibit D-2 and the sui as instituted by the plaintiff successor-in-interest of Hukam Chand on 10th of February, 1964 was therefore not maintainable. A copy of the plaint in the suit of 1955 is exhibit D-3. The plaintiff in his plaint Exhibit D. 12 did not make any reference to the earlier litigation which ended in dismissal of the suit of Hukam Chand on 14th of November, 1956. He, therefore, made an application that he wanted to withdraw the suit on account of some formal defect and asked for permission of the Court to allow him to do so. The contesting defendant did not object to the withdrawal of the suit with the result that the same was withdrawn on 27th of March 1965 as per order of the Court Exhibit P. 9. This order seems to have been passed more on the basis of the statements of the parties than the satisfaction of the Court itself that the suit must have failed by reason of some formal defect and all that is stated in the operative part of the order of the Court is "that the plaintiff is allowed to withdraw the suit on account of formal defect with permission to file a fresh suit on the same cause of action." The plaintiff then filed the present suit on 6th of April 1965 claiming the same relief as he wanted in the earlier suit of 1964 but added in the plaint additional paras Nos. 5, 6 and 7, wherein reference has been made to the earlier suit filed by Hukam Chand. It is pleaded in these paras that the decree in that suit is not binding on the plaintiff. It is not necessary to state the reasons given by the plaintiff as they are not relevant in this appeal. On the pleadings of the parties the trial Court framed the following issues:—

- (1) Whether suit is within time?
- (2) Whether the plaintiff was the owner of the property in dispute at the time of attachment under the decree of defendant No. 1 against defendant No. 2?
- (3) Whether suit is barred by the rule of *resjudicata* ?
- (4) Whether suit is collusive? If so, to what effect.
- (5) Whether plaintiff is in possession of the shop in dispute? If not, is the suit maintainable in the present form.

It was held by the trial Court that the plaintiff's suit was within time. Issue No. 2 was decided in favour of the plaintiff and so was Issue No. 3. It was held under Issue No. 4 that the suit was not collusive and the same was maintainable. It was accordingly decreed

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by the trial Court on 26th August, 1966. An appeal was taken to the District Judge by Surjan Singh respondent. Judgment of the trial Court was reversed on appeal and it was held that the suit was barred by time; hence the present second appeal.

(3) The only question agitated before me by the learned counsel for the appellant is that of limitation. It is agreed between counsel for the parties that if the plaintiff is given under Section 14(3) Limitation Act, 1963 (Act No. 36 of 1963, hereinafter called the Act) the benefit of the period from 10th February, 1964 to 27th of March, 1965 during which he had been prosecuting the earlier civil suit, the present suit of the plaintiff will be within limitation. It is contended on behalf of the plaintiff-appellant that he acted in good faith and with due diligence in prosecuting the previous suit which he was compelled to withdraw under Order 23, rule 2 Code of Civil Procedure because the same was bound to fail on account of defect of jurisdiction or other cause of a like nature. The contention is that the plea of *resjudicata* had been raised in the written statement filed in that suit *res judicata* had been raised in the written statement filed the suit with permission to file a fresh one on the same cause of action. Reliance in this connection is placed by the learned counsel on sub-section 3 to section 15 of the Act and the explanations thereto which were added for the first time in the Act and did not exist in the earlier Act of 1908. It is necessary to reproduce at this stage the relevant sub-sections of Section 14, for facility of reference:—

“(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) * * * * *

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 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 a 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.”

(4) Reference to rule 2 of Order XXIII of the Code of Civil Procedure is also necessary to appreciate the true scope of section 14(3). The said Rule 2 reads as under:—

“In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.”

(5) Before the Act came into force, a plaintiff who withdrew his suit with the permission of the Court on the ground of some formal defect or on any other ground which the Court thought sufficient, could not in the subsequent suit get the benefit of the time spent by him prosecuting the earlier suit and by virtue of Rule 2 of order XXIII of the Code of Civil Procedure, he would be bound by the law of limitation in the same manner as if the first suit had never been instituted. In other words in computing the period of limitation the plaintiff, even if he was prosecuting in good faith and with due diligence another civil proceeding in a Court which from defect of jurisdiction or a cause of the like nature was unable to entertain it could not exclude the period spent in such litigation and it made no difference that he had withdrawn the suit with the permission of the Court under Order 23, rule 1. A provision has now been made in the present Act of 1963 for the first time whereby the plaintiff, who withdraws a suit under Order 23, rule 1, can in computing the period of limitation normally prescribed for the suit exclude

the time spent in prosecuting the previous suit provided, he prosecuted the same with due diligence and in good faith and the suit was withdrawn as it was bound to fail because of defect in jurisdiction of the Court or other cause of a like nature. The same thing expressed differently means that the formal defect must relate to the jurisdiction of the Court or a cause of the same type and not that for any other formal defect for which suit is withdrawn the plaintiff gets a right to deduct the period so spent. Sub-section 3 of section 14 of the Act is thus more in the nature of a proviso to rule 2 of Order 23 of the Code of Civil Procedure. The question that will, therefore, arise for determination in each case is whether the previous suit was prosecuted diligently and *bona fide* and had to be withdrawn because of it being likely that the same would have failed by reason of a defect in the jurisdiction of the Court or other cause of the like nature. The plaintiff before he takes 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 the like nature' of howsoever wide amplitude, has to be read *ejusdem generis* to and along with the earlier part of the same provision which relates to defect of jurisdiction of the Court. It is 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 referred to above 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. The plaintiff-appellant in the case before us has made no attempt to lead any evidence to show that the former suit was withdrawn by him because of defect in the jurisdiction of the Court or any other cause *ejusdem generis* or analogous thereto. He has placed on the record a copy of the order Exhibit P. 9 to which a reference has already been made above. It shows this much only that the parties agreed that the suit be withdrawn on the ground of a formal defect and the Court allowed the same. The contents of paras 6 and 7 of the plaint which did not find mention in the previous suit do not show that any question of jurisdiction was involved or that the defect could be said to be one relating to the jurisdiction of the Court. A few facts not mentioned in the earlier suit have been stated in the plaint filed in the present suit. The learned counsel for the appellant submits that the plea of *res judicata* was involved and this was a defect which related to the jurisdiction of the Court. 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 prevents 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 bar 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 Act. A similar view was taken by a Division Bench of the Patna High Court in *Braja Gopal Mukerji v. Tara Chand Marwari* (1), where while interpreting section 14(2) of the Limitation Act of 1908, learned Judge held that *res judicata* does not constitute 'other cause of a like nature' within the meaning of the said provision of law. My attention has been invited by the learned counsel to a Full Bench Judgment of the Lahore High Court in *Bhai Jai Kishan Singh v. Peoples Bank of Northern India* (2), where the words 'other cause of a like nature' were interpreted and the scope of this expression as it finds mention in Order 23, rule 1, Civil Procedure Code was considered. It was held by the learned Judges that these words denote that the defect must be of such a character as to make it impossible for a Court to entertain the suit or application either in its inception or subsequently or it may be prevented from deciding the case on its merits. The defect at any rate must be such which does not necessitate an examination of the merits of the case. If, as in the present case, the Court had to go into the merits before it could dismiss the same whether on ground of *res judicata* or otherwise it would not fall within the purview of these words. In *Munsha Singh Sunder Singh and others v. Gurdit Singh and others* (3), a Division Bench of this Court held that the provisions of section 14(1) would not be attracted where the trial Court came to the conclusion after trial that the cause of action had not arisen. It must, therefore, be held that the plaintiff is not entitled to the benefit of section 14(3) of the Limitation Act and the suit filed by him was rightly dismissed as barred by time.

(6) For the foregoing reasons, there is no merit in this appeal which stands dismissed with no order as to costs.

(1) A.I.R. 1921 Pat. 225

(2) A.I.R. 1944 Lah. 136

(3) A.I.R. 1965 Punjab. 80