

CASE NO.:
Appeal (civil) 2965 of 1992

PETITIONER:
DEENA (DEAD) THROUGH LRS.

Vs.

RESPONDENT:
BHARAT SINGH (DEAD) THR. LRS. & ORS.

DATE OF JUDGMENT: 29/07/2002

BENCH:
D.P.MOHAPATRA & K.G.BALAKRISHNAN.

JUDGMENT:

D.P.MOHAPATRA, J.

This appeal filed by the defendant is directed against the judgment dated 3.2.1992 of the High Court of Punjab and Haryana in Regular Second Appeal No.2040 of 1987 allowing the appeal filed by the plaintiffs who are respondents herein on reversing judgment of the first appellate court confirming the decision of the trial court.

On analysis of the case of the parties and findings recorded by the Courts below the question that arises for determination is whether on the facts found the plaintiffs are entitled to exclusion of the period from 21.3.1980 to 15.2.1982 under Section 14 of the Limitation Act, 1963 for computation of the period of limitation for filing the suit. The facts relevant for determination of the question, sans unnecessary details may be stated thus:

The appellant Deena (deceased represented by legal heirs) had mortgaged his land measuring 9 bighas 18 biswas (after consolidation 47 kanals 13 marlas) in Khewat No.39 Khasra No.34 situated in the village Manakwas, Tehsil Jhajjar in the State of Haryana, for Rs.2,500/- with possession, on 7.2.1947 with plaintiff no.2 and father of plaintiff nos. 15 to 19 and Khubi Ram @ Khushi Ram who is the predecessor in interest of plaintiffs 2 to 14. On 23.6.1978 Deena had filed an application for redemption of the land before Collector, Jhajjar which was accepted on 29.2.1980 and the land was ordered to be redeemed on payment of the mortgage money Rs.2,500/-. The plaintiffs filed a suit in the Court of the Sub-Judge Jhajjar titled Harkishan vs. Deena seeking a declaration that they had become owners of the property and that the order of the Collector dated 29.2.1980 was null and void. The said suit was decreed by the trial court and the decree was challenged in appeal by the defendant. During pendency of the appeal in the Court of the District Judge, Rohtak the plaintiffs withdrew the suit with permission to file fresh suit. Thereafter the present suit, Civil Suit No.115/82

was filed on 24.2.1982 seeking a declaration that the plaintiffs were owners of the suit property and that the order passed by the Collector was void and inoperative and did not affect their rights. In his written statement the defendant took the plea, inter alia, that the suit was barred by limitation.

The trial court framed 8 issues of which issue No.3 was whether the suit was barred by time and issue no.7 was whether the plaintiffs were entitled for exclusion of time during the period from 21.3.80 to 24.2.1982, if so, to what effect ?

In support of their claim of exclusion of the period the case of the plaintiffs was that they were prosecuting the previous suit in good faith which was permitted by the court to be withdrawn with leave to file fresh suit on the same cause of action; therefore, they were entitled to exclusion of the period from 21.3.80 to 15.2.1982 under the provisions of section 14 of the Limitation Act and considered on that basis the suit is not barred by limitation.

The case of the defendant on the other hand was that the plaintiffs cannot claim to have prosecuted the previous suit in good faith since in the written statement itself it was specifically stated that the suit was bad for non-joinder of necessary party, Smt. Ghogri who had been impleaded in the proceeding before the Collector as one of the mortgagors. The plaintiffs being aware of the objection had pursued the matter. The suit was decreed by the trial court. The defendant had challenged the judgment in appeal. During pendency of the appeal on the prayer of the plaintiffs seeking leave to withdraw the suit with permission to file fresh suit the court granted the prayer and the suit was withdrawn. In the circumstances the defendant contended the exclusion of the period sought under section 14 of the Limitation Act could not be granted.

The trial court answered the issues 3 and 7 in favour of the defendant holding inter alia that the plaintiffs did not pursue the proceedings of the previous suit with due diligence and good faith. In appeal the learned Additional District Judge, placing reliance on the decision of the Supreme Court in the case of Rabindra Nath Samuel Dawson vs. Sivakami and others AIR 1972 SC 730 held:

"Therefore in view of this authority of the Hon'ble Supreme Court and for the reasons discussed above, it cannot be said that plaintiffs had been prosecuting the earlier suit in good faith or with due diligence. Accordingly it is held that they are not entitled to take benefit of Section 14(1) and (III) of the Indian Limitation Act."

In the second appeal filed by the plaintiffs the High Court set aside the judgment of the first appellate court confirming the decision of the trial court and decreed the suit with the following observations:

"The order passed by the Collector is dated 29th of February, 1980. The first

suit for declaring order of the Collector as void was filed on 23rd of March, 1980 which was decreed by the trial court. The defendant respondent filed an appeal before the District Judge and on 15th February, 1982 the appellants were allowed to withdraw the suit which was decreed in their favour by the trial court with permission to file fresh one on the same cause of action. Fresh suit was filed on 24th February, 1982. After hearing counsel for the parties I hold that the suit filed by the appellants is within time and they are entitled for the exclusion of time from 21st March, 1980 to 15th February, 1982. The findings of the lower courts on issues No.3 and 7 are set aside. In view of the above mentioned discussion the judgment and decree passed by the lower courts are set aside and the suit filed by the plaintiff appellants is decreed. No order as to cost."

Shri Mahabir Singh, learned counsel appearing for the appellant strenuously urged that on the facts and circumstances of the case the High Court was clearly in error in upsetting the concurrent decision of the Courts below in exercise of its jurisdiction under section 100 of the Code of Civil Procedure. Elucidating the point Shri Singh submitted that prosecuting the previous proceedings in good faith is a pre-condition for application of section 14 of the Limitation Act. Whether the plaintiffs were prosecuting the previous suit in good faith is a question of fact. The first appellate court, which was the final court of fact, concurring with the finding recorded by the trial court had held that the plaintiffs had not been prosecuting the previous suit with due diligence and in good faith. The High Court in second appeal, Shri Singh contended, had no jurisdiction to disturb the concurrent finding of fact recorded by the appellate court.

Per contra Shri P.C.Jain, learned senior counsel appearing for the respondents contended that the plaintiffs are entitled to exclusion of the period between the date of withdrawal of the suit and the filing of the fresh suit under the provision in section 14(3) of the Limitation Act. Since the appellate court on being satisfied that the suit was likely to fail by reason of formal defect of non-joinder of a necessary party had granted leave to the plaintiffs to withdraw the suit with permission to file a fresh suit, the High Court rightly took the view that the plaintiffs were entitled to exclusion of the period under section 14 of the Limitation Act.

Order XXIII of the Code of Civil Procedure deals with withdrawal and adjustment of suits. In Rule 1 sub-rule (3) thereof it is laid down 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 or a part of the 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 the same subject-matter or part of the claim.

In rule 2 of Order XXIII it is provided that 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.

Section 14 of the Limitation Act so far as material for the purpose of the present case is quoted hereunder:

"14. Exclusion of time of proceeding
bona fide in court without jurisdiction

(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.

XXX XXX XXX

(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 a defect in the jurisdiction of the court or other cause of a like manner."

From the provisions it is clear that it is in the nature of a proviso to Order XXIII Rule 2. The non-obstante clause provides that notwithstanding anything contained in sub-rule (2) of Order XXIII of the Code of Civil Procedure the provisions of sub-section (1) of section 14 shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of Order XXIII. For applicability of the provision in sub-section (3) of section 14 certain conditions are to be satisfied. Before section 14 can be pressed into service the conditions to be satisfied are : (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party ; (2) the prior proceeding had been prosecuted with due diligence and good faith; (3) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature ; (4) the earlier proceeding and the later proceeding must relate to the same matter in issue, and (5) both the proceedings are in a court.

The main factor which would influence the Court in extending the benefit of section 14 to a litigant is whether the prior proceeding had been prosecuted with due diligence and good faith. The party prosecuting the suit in good faith in the court having no jurisdiction is entitled to exclusion of that period. The expression 'good faith' as used in section 14 means "exercise of due care and attention". In the context of section 14 expression 'good faith' qualifies prosecuting the proceeding in the Court which ultimately is found to have no jurisdiction. The finding as to good faith or the absence of it is a finding of fact. This Court in the case of *Vijay Kumar Rampal and others vs. Diwan Devi and others* AIR 1985 SC 1669 observed :

"The expression good faith qualifies prosecuting the proceeding in the Court which ultimately is found to have no jurisdiction. Failure to pay the requisite court fee found deficient on a contention being raised or the error of judgment in valuing a suit filed before a Court which was ultimately found to have no jurisdiction has absolutely nothing to do with the question of good faith in prosecuting the suit as provided in section 14 of the Limitation Act."

The other expressions relevant to be construed in this regard are 'defect of jurisdiction' and "or other cause of a like nature'. The expression "defect of jurisdiction' on a plain reading means the Court must lack jurisdiction to entertain the suit or proceeding. The circumstances in which or the grounds on which, lack of jurisdiction of the Court may be found are not enumerated in the Section. It is to be kept in mind that there is a distinction between granting permission to the plaintiff to withdraw the suit with leave to file a fresh suit for the same relief under Order XXIII Rule 1 and exclusion of the period of pendency of that suit for the purpose of computation of limitation in the subsequent suit under section 14 of the Limitation Act. The words "or other cause of a like nature" are to be construed ejusdem generis with the words 'defect of jurisdiction', that is to say, the defect must be of such a character as to make it impossible for the court to entertain the suit or application and to decide it on merits. Obviously section 14 will have no application in a case where the suit is dismissed after adjudication on its merits and not because the Court was unable to entertain it.

Coming to the case on hand, as noted earlier, the previous suit filed by the respondents was decreed by the trial court; and the defendant had filed appeal against the judgment and decree of the trial court. It does not appear from the discussions in the impugned judgment that there was any finding of the Court in the previous suit holding the suit to be not entertainable on any ground. The ground on which withdrawal of the suit was sought was that Smt. Ghogri, one of the mortgagors, had not been impleaded in the suit. It is not the case of the plaintiffs that the Court had found the suit to be not maintainable

on that ground. Non impleadment of Smt. Ghogri a necessary party, in the suit was a clear case of laches on the part of the plaintiffs. In such circumstances it could not be said that the plaintiffs were prosecuting the previous suit in good faith.

The trial court and the first appellate court based their findings on the question of good faith on the evidence led by the parties and the law laid down by this Court in the case of Rabindra Nath Samuel Dawson (supra) in which it was held that a person who has registered the objection regarding non-joinder of parties at the initial stage and also at the revisional stage and taken the risk of proceeding with the suit without impleading the necessary parties cannot be said to have acted in good faith taking due care and attention; consequently, such person will not be entitled to benefit of section 14 of the Act for excluding the time spent by him in that proceeding in a fresh suit. In the present case concededly the objection regarding non impleadment of necessary party was taken in the written statement. Despite such objection the plaintiffs chose to prosecute the suit. Indeed they succeeded in the trial court and the matter was pending before the first appellate court when the petition under Order XXIII seeking withdrawal of the suit with permission to file a fresh suit for the same relief was filed by them. Therefore, the trial court and the first appellate court were right in holding that the plaintiffs were not entitled to exclusion of the period between 21.3.1980 to 15.2.1982 under section 14 of the Limitation Act as claimed and that the suit was barred by limitation. The High Court in the impugned judgment has not discussed the materials on the basis of which the Courts below recorded the finding of fact relating to lack of good faith on the part of the plaintiffs. It has also not discussed the reason for taking a contrary view on that question. The concurrent decisions of the courts below have been reversed with a general observation that on the facts and circumstances of the case the plaintiffs were entitled to exclusion of the period under section 14 of the Limitation Act as claimed. Therefore, the judgment of the High Court is clearly unsustainable.

In the result the appeal is allowed with costs. The judgment of the High Court in Second Appeal No. 2040 of 1987 is set aside and the judgment of the Additional District Judge-III in CA No.3713/1986 confirming the judgment of the trial court in Civil Suit No.115/82 is restored. Hearing fee is assessed at Rs.10,000/-.