

PETITIONER:
BAKHTAWAR SINGH & ANR.

Vs.

RESPONDENT:
SADA KAUR & ANR.

DATE OF JUDGMENT: 28/08/1996

BENCH:
FAIZAN UDDIN (J)
BENCH:
FAIZAN UDDIN (J)
SINGH N.P. (J)

CITATION:
1996 SCALE (6)222

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

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, 1902 which has been affirmed by the First appellate Court and the High Court.

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, and Bakhtawar Singh, The defendant respondent herein was 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.

3. The plaintiff appellants who are two sons of late Gulab Singh filed a declaratory suit on 19.1.1992 by contending that they were in possession as owners of 2/3 share in the estate of Dalip Singh, the late husband of 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 1989 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, 1993 reversing the judgment and decree passed by the Trial court.

4. Thereafter the plaintiffs filed another suit against the defendant respondent No. 1 being civil suit No, 884 of 1984 to get back the possession of the suit land as according to them, in the mean-while the defendant had taken

forolble possession of the suit land.

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 High Court maintained the judgment and decree and dismissed the second appeal. The High Court, however, granted Certificate and leave to appeal to Supreme Court on the point whether a widow forfeits her rights or not by 'Karewa' marriage with her brother-in law.

6. Subsequently, on May 20, 1971 the plaintiffs withdrew their civil suit No. 881 of 1984 from the Court of sub-judge with liberty to file a fresh suit for possession of land.

7. On July 24 1990 the Supreme Court dismissed the appeal filed by the respondent Bada 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 20, 1990 the plaintiffs appellants again filed a fresh Civil Suit No. 661 of 1994. 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.

8. The contention of the learned counsel for the appellants is that since the plaintiffs has withdrawn their earlier suit (Civil Suit No. 661 of 1984) 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 plaintiffa were entitled to exclude the time spent in prosecuting the said earlier suit as provided under Section 14 of the Limitation Act, (hereinafter the Act), The question, therefore, that arises for our consideration is where 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 circumstance of the present case the plaintiffa appellants are entitled for exclusion of the time under Section 11 of the Act, Clause (3) of Order XXIII rule 1 of the Code contemplates that where the Court is satisfied that a suit must fail by reason of some formal defect, or (b) that there are sufficient ground 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 claim with liberty to institute a fresh suit in respect of subject matter of case all the courts below including the High Court concurrently found that the plaintiffs/appellants failed to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal the defect or 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 what was the 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 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 (2) 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 14 cannot be legitimately extended to 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.