

Jadunandan and ors. Vs. Sheobalak

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Court : Allahabad

Decided On : Feb-19-1915

Reported in : AIR1915All82; 28Ind.Cas.601

Judge : Rafique, J.

Appellant : Jadunandan and ors.

Respondent : Sheobalak

Judgement :

Rafique, J.

1. This appeal arises out of a suit for the recovery of profits. The plaintiffs-appellants are co-sharers and the defendant-respondent is the lambadar in the village of Arjunpur. The plaintiffs sued for the recovery of profits from 1317 to 1319 Fasli. One of the pleas in defence was that the claim was barred under Clause (3) of Rule 1, Order XXIII. The learned Assistant Collector, in whose Court the suit was tiled, disallowed this plea and disposed of the case on the merits. On appeal the learned District Judge held that the claim was barred under Order XXIII, Rule 1, Clause (3), and accordingly reversed the decree of the first Court. The plaintiffs have come up in appeal to this Court, and the only point raised in this appeal is whether their claim is barred under the order mentioned above. It appears that the plaintiffs had brought a similar suit in 1912 against the same defendant for the recovery of profits for the three years now in suit. During the pendency of the

former suit, both parties filed a joint application to the Assistant Collector asking for the dismissal of the suit, on the ground that the matters in dispute between them, both the claim for profits and other matters, had been referred to arbitration. The plaintiffs did not take the precaution of asking the Court then to allow them to bring a fresh suit in respect of the profits of 1317 to 1319 Fasli in case the arbitration fell through. The joint application of both parties was allowed and the suit was dismissed on the 20th of September 1912. The arbitrators mentioned by the parties for some reason or other declined to decide the dispute between them. On the 7th of April 1913, the suit out of which this appeal has arisen was instituted by the plaintiffs for recovery of profits for 1317 to 1319 Fasli. The cause of action alleged in the plaint of the present case is the same as that given in the plaint of the former case, namely, the dates on which the plaintiffs become entitled to recover the profits from the lambardar. It is true that the plaintiffs allege in their plaint that the arbitration has fallen through; but they do not state that the failure of the arbitration has given them a fresh cause of action. They, however, contended that their real cause of action accrued on the failure of the arbitrators to decide the disputes referred to them. The present suit is, therefore, based on a cause of action different from that alleged in the former suit. Moreover, it is said that as the defendant had joined in the application with the plaintiffs in asking the Court to dismiss the claim, Order XXIII, Rule 1, Clause (3), does not apply. In support of this last contention they rely on the case of *Juggobundo Chatterjee v. Watson & Co.* (1865) Bourke A.O.C. 162. That case was decided under Section 67 of Act VIII of 1859. One of the learned Judges in that case remarked: The section only applies when the plaintiff withdraws his suit without the consent of the defendants and then renews it without a cause and that it is intended to prevent his doing so ad libitum. The result of applying the section quoted to the present case is so startling as to show that the section does, not contemplate such a case as this, 'The case relied upon by the plaintiffs-appellants no doubt supports their contention. But on the other hand there is a case of this Court, namely that of *Niaz Ahmad v. Abdul Humid* 5 A.L.J. 278 : A.W.N. (1908) 131 : 30 A. 279 which is in favour of the contention of the respondent that where a case was withdrawn by the plaintiff without obtaining any permission to bring a fresh suit, a subsequent suit on the same cause of action in respect of the same property is barred. It seems to me

that the language of Order XXIII does not make any difference as to whether the application for withdrawal is made solely by the plaintiff or is made jointly by the plaintiff and the defendant. In the present case the defendant joining with the plaintiffs in asking the Court to dismiss the suit without any reservation would not bar the operation of the provisions of Order XXIII, Code of Civil Procedure. The contention that the present suit is based on a different cause of action is not borne out by the statement made in the plaint. It is distinctly told in the plaint that the cause of action accrued on certain dates, that is, dates on which the plaintiffs became entitled to claim their share of the profits from the defendant. In my judgment the decree of the lower Appellate Court is correct. The appeal fails and is dismissed with costs.

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