

## **L. Behu Mal vs Murli Dhar And Ors. on 1 September, 1955**

**Equivalent citations: AIR1956ALL5, AIR 1956 ALLAHABAD 5**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

### **JUDGMENT**

Raghubar Dayal, J.

1. Behu Mal and others had a decree against Roop Chand and Mehar Chand. In execution of this, decree certain property was attached. Murli Dhar filed a claim under Order 21, Rule 58, C. P. C., against the attachment of that property. His claim was dismissed in default on 15-4-1944.
2. Murli Dhar filed an application under Section 151, C. P. C. on 11-5-1944, for the setting aside of the dismissal order. This application was dismissed on 15-9-1945.
3. Murli Dhar then filed a regular suit on 2-8-1946. The decree-holders objected to the maintainability of the suit on the ground of limitation, it being urged that in view of Order 21, Rule 63, C. P. C., the suit should have been instituted within a year of the dismissal of the claim under Order 21, Rule 58, C. P. C. This objection was upheld by the trial court and the suit was dismissed.

On appeal the appellate Court did not agree with this objection and remanded the suit for further progress. It is against this order that Behu Mal, one of the decree-holders who had attached the property in suit in execution, has filed this appeal.

4. The sole question for determination in this appeal is whether Murli Dhar, the plaintiff of this suit, can take advantage of the provisions of Section 14 of the Limitation Act and therefore exclude the period between 11-5-1944, and 15-9-1945, spent in prosecuting the application under Section 151, C. P. C. from the period of limitation prescribed for such a suit under Order 21, Rule 63, C. P. C. Section 14 of the Limitation Act has two sub-sections.

We are concerned with the interpretation of Sub-section (1) as Sub-section (2) applies in connection with the limitation prescribed for any application and not to limitation prescribed for any suit. Sub-section (1) of Section 14 of the Limitation Act is:

"In computing the period of limitation prescribed 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 in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action 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."

This sub-section will apply to a case where three conditions are satisfied about the previous proceeding the period of whose pendency is sought to save limitation. These three conditions are: (i) the previous civil proceeding should be founded upon the same cause of action on which the later suit is founded; (ii) the earlier proceeding should have been prosecuted in good faith; and (iii) that proceeding should be in a court which could not entertain it on account of defect of jurisdiction or other cause of a like nature,

5. In view of the opinion I have formed of the effect of the first condition on the present case, I do not consider it necessary to record a finding on the effect of the other two conditions in the present appeal. I assume that Murli Dhar had prosecuted his application under Section 151, C. P. C., in good faith and that the court could not entertain it on account of some defect of jurisdiction or similar cause. It is, therefore unnecessary to refer to most of the rulings relied on for the respondent on the question of what amounts to good faith and defect of jurisdiction.

6. I am of opinion that the cause of action for the present suit for a declaration that Murli Dhar is the proprietor of the property in suit and that that property was not liable to attachment in the decree of Behu Mal and others is not identical or even mostly identical with the cause of action for the application under Section 151, C. P. C. and that, therefore, Murli Dhar, the plaintiff of the present suit, cannot get advantage of the provisions of Section 14, Sub-section (1), Limitation Act. It has been rightly pointed out for the respondent that cause of action is different from the relief which a party claims in any civil proceeding.

In fact so far as the question of relief was concerned, one may have been inclined to say that the relief claimed by the application under Section 151, C. P. C. and the present suit in effect was practically similar in so far as it amounted to the setting aside or nullifying the order of dismissal of Murli Dhar's objection under Rule 58, Order 21, C. P. C. The cause of action for any proceedings consists admittedly of such facts which it is necessary to establish before the party alleging those facts can be given the relief he claims.

The facts necessary for Murli Dhar to establish in a suit must be that he is the proprietor of the property in suit, that Roop Chand and Mehar Chand, the judgment-debtors of Behu Mal and others, have no interest in that property and that therefore those decree-holders cannot attach this property in execution of their decree.

It is not necessary for the purposes of a suit that the plaintiff should establish that he had filed a claim under Order 21, Rule 58; C. P. C., and had failed therein.

In fact such an allegation would be made if necessary by the decree-holders, defendants to the suit, in case the suit had been instituted beyond one year of the dismissal of the claim under Order 21, R, 58, C. P. C. None of the facts which can go to establish Murli Dhar's proprietary right in the present suit can by any stretch of imagination be necessary for the success of the application under Section

151, C. P. C. The necessary facts to allage and to establish for getting the relief claimed in that application must be that either the applicant did not know of the date of hearing and so could not attend on that date or that he knew of the date but due to some sufficient cause he could not attend the court. If he satisfies the court on these points he may succeed in getting an order in his favour to the effect that the order of dismissal in default be set aside and the claim or objection be heard on its merits.

It would appear, therefore, that the facts on which the reliefs in both the proceedings are claimed are not identical or even practically identical. They are very much different. This being the case, it cannot be said that the application under Section 151, C. P. C., was founded on the same cause of action on which the present suit is founded.

7. I may refer to the case of -- 'Chintaman v. Kisan', AIR 1929 Nag 219 (A) where it was held that where a suit is dismissed for want of prosecution under Order 9, Rule 2, the period covered by the restoration proceedings could not be excluded under Section 14, Limitation Act, while computing limitation for a suit brought under Order 9, Rule 4 for the cause of action in the restoration proceedings is not the same as that in the subsequent suit.

8. In view of the above I allow the appeal with costs against Murli Dhar, respondent 1, set aside the order of the court below and restore the decree of the trial court.