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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 283/2011

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Judgment Delivered on: 14.02.2012

MOHINDER PRAKASH

..... Plaintiff

Through: Mr.Subhash Oberoi, Advocate

versus

DLF COMMERCIAL DEVELOPERS LTD

..... Defendant

Through: Mr.Deepak Khurana and
Mr.Salil Seth, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

IA.No.1933/2011

1. This is an application filed by the plaintiff seeking condonation of 14 days delay in re-filing the suit. Counsel for the defendant does not oppose this application. Accordingly, the application is allowed and delay in re-filing the suit is condoned.

IA.No.1931/2011

2. This is an application filed by the plaintiff under Section 14 of the Limitation Act. The necessary facts to be noticed for disposal of this application are that on the basis of various advertisements released by the defendant in the month of March, 2006 with respect to sale of commercial property in Jasola, the plaintiff approached the defendant and booked a

commercial space measuring 1073 sq. ft. at the rate of Rs.12,000/- per sq. ft. in the Jasola Project. The plaintiff paid a sum of Rs.25,75,200/- on 18.03.2006 towards the first instalment, towards booking and as part sale price of the commercial space. The plaintiff thereafter was made to sign pre-typed blank documents. Subsequently the plaintiff learnt that the prices have been increased to Rs.16,000/- per sq. ft. The objection raised by the plaintiff was rejected, which led to the plaintiff approaching the MRTP Commission under Section 36A of the Act in the year 2006. The plaintiff subsequently on 16.03.2010 withdrew the said complaint as he wished to seek appropriate remedy.

3. The present suit was instituted on 22.12.2010. The plaintiff relies on Section 14 of the Limitation Act on the ground that he was diligently pursuing a wrong remedy before the MRTP Commission, and thus the time spent before the Commissioner which is 449 days, be condoned.
4. Mr.Oberoi, counsel for the plaintiff contends that plaintiff had at the first instance approached the MRTP Commission keeping in mind the monopolistic attitude and unfair trade practice being adopted by the defendant with regard to the allotment and cancellation of the agreement and thereby forfeiting huge amount of the plaintiff. Upon legal advice received, complaint under Section 36A of the MRTP Act was filed in October, 2006. The matter was pending till March, 2010 due to one

reason or the other. However, on account of the judgment passed by the Hon'ble Supreme Court in the case **Saurabh Prakash Vs. DLF Universal Ltd.** reported in (2007) 1 SCC 228, and on the basis of the objections taken by counsel for the defendant with regard to maintainability of the plaintiff's complaint in view of the judgment of the Supreme Court, on the advice of the new counsel the complaint was withdrawn with liberty to approach appropriate forum for adjudication of the loss suffered and the grievances of the plaintiff.

5. Counsel for the plaintiff has strongly contended before this court that the provisions of Section 14 have to be interpreted in a manner so as to advance the cause of justice rather than to abort the proceedings. Counsel further submits that it has been repeatedly held that the Court must take a liberal view in the matter to advance the cause of justice. In support of this argument, counsel for the plaintiff has relied upon the case of **J. Kumaradasan Nair & Anr. Vs. IRIC Sohan & Ors.** AIR 2009 SC 1333 and in the case of **M/s.Shakti Tubes Ltd. vs. State of Bihar** AIR 2009 SC 1200. In paragraph 14 of **J. Kumaradasan Nair (Supra)** the Supreme Court has extracted paragraph 22 of **Consolidated Engineering Enterprise vs. Principal Secretary, Irrigation Department and Ors.** [(2008) 7 SCC 167] which is reproduced below:

“22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.”

6. Mr.Oberoi, counsel for the plaintiff has also relied in the case **P. Sarathy vs. State Bank of India** AIR 2000 SC 2023 in support of his plea that the word ‘court’ used in Section 14 should be given a liberal meaning which would include not only a civil court, but also tribunals as well.
7. Counsel for the defendant has vehemently opposed this application

primarily on the ground that the plaintiff has failed to satisfy the ingredients of Section 14 of the Limitation Act. It is contended that no ground has been raised as to why the plaintiff did not approach the Civil Court at the very first instance or as to why the matter was kept pending from the year 2006 to 2010 whereas the defendant had taken the objection with regard to the maintainability of the complaint before the MRTP at the very first opportunity available in the year 2006-07 when the written statement was filed by the defendant herein. Counsel for the defendant next contends that the present application does not disclose that the plaintiff was pursuing the remedy before the MRTP Commission in good faith and thus onus of pursuing the wrong remedy is to be discharged by the plaintiff. It is also contended that the plaintiff had simpliciter withdrawn the complaint pending before the MRTP Commission and no liberty was granted or sought for, which is evident from a bare reading of the order dated 16.03.2010, which is reproduced below:

“COMPETITION APPELLATE TRIBUNAL
NEW DELHI

UTPE 125/2006
CORAM

Dr. Justice Arijit Pasayat
Chariman

Ms.Pravin Tripathi
Member

In the matter of:

Mohinder Prakash Complainant

Versus

DLF Commercial Developers Ltd. ... Respondent

Appearance: Sh.C.M. Gopal, counsel for the complainant.
Shri R. Narain with Shri Rajan Narain, Shri Subrat Deo
and Shri Siddharth Banthia, counsel for the respondent.

ORAL ORDER

16th March, 2010

Counsel for the applicant wants to withdraw the application stating that the application, if so advised and shall move the appropriate forum. The matter is accordingly disposed of.”

8. In support of his plea that the plaintiff was not pursuing his complaint before the MRTP diligently, counsel for the defendant contends that the judgment in the case of *Saurabh Prakash (Supra)* was rendered on 24.11.2006 on the basis of which plaintiff decided to withdraw the complaint, and this judgment was relied upon and mentioned by the defendant in the written statement, thus there is no explanation as to why the plaintiff waited from the year 2006 to 2010 to withdraw the complaint. It is thus contended that on this ground alone the present application should be dismissed as this would show that the plaintiff was not pursuing his complaint with due diligence or in good faith.
9. Counsel for the defendant has also contended that the withdrawal of the complaint cannot be based on the objections raised by the defendant in the

written statement and there should have been a finding of the Commission that the complaint was not maintainable, which would in fact have given rise to cause of action to the plaintiff to withdraw the complaint and approach this court. Mr.Khurana, further contends that the negligence and inaction on the part of the plaintiff is writ large on the face of the record and is evident from the fact that the complaint was withdrawn on 16.03.2010 and the present suit was instituted after a gap of nine months on 22.12.2010. The application is completely silent with regard to the delay between the period of March, 2010 and December, 2010. All the above facts can only lead to one conclusion that the plaintiff was not diligently prosecuting the complaint before the MRTP and even after the withdrawal of the complaint the plaintiff has taken a long period to approach this court, and thus, it cannot be said that the act of the plaintiff is either *bona fide* or honest in pursuing a wrong remedy. In support of his argument learned counsel for the defendant has relied in the case **Madhavrao Narayanrao Patwardhan vs. Ram Krishan Govind Bhanu & Ors.** AIR 1958 SC 767. Relevant portion of which reads as under:

“In order to bring his case within the section quoted above, the plaintiff has to show affirmatively:

- (1) that he had been prosecuting with due diligence the previous suit in the Court of the Munsiff at Miraj,
- (2) that the previous suit was founded upon the same cause of action,

(3) that it had been prosecuted in good faith in that Court, and,

(4) that that Court was unable to entertain that suit on account of defect of jurisdiction or other cause of a like nature.

There is no dispute between the parties here that conditions (2) and (4) are satisfied. But the parties differ with reference to the first and the third conditions. It has been argued on behalf of the appellants that the Courts below had misdirected themselves when they observed that there was no proof that the plaintiff had not been diligently prosecuting the previously instituted suit, or that it was not being prosecuted in good faith that the section requires that the plaintiff must affirmatively show that the previously instituted suit was being prosecuted in good faith and with due diligence; and that, viewed in that light, the plaintiff has failed to satisfy those conditions.

(7). xxxxxx

(8). There is another serious difficulty in the way of the plaintiff, He has not brought on the record of this case any evidence to show that he was prosecuting the previously instituted suit with "due diligence" as required by Section 14. He has not adduced in evidence the order-sheet or some equivalent evidence of the proceedings in the Sub-Judge's Court at Miraj, to show that in spite of his due diligence, the suit remained pending for over ten years in that Court, before he thought of having the suit tried by a Court of higher pecuniary jurisdiction. In our opinion, therefore, all the conditions necessary to bring the case within Section 14 have not been satisfied by the plaintiff. There could be no doubt about the legal position that the burden lay on the plaintiff to satisfy those conditions in order that he may entitle himself to the deduction of all that period between January 31, 1929, and July 4, 1940. It is also clear that the Courts below were in error in expecting the contesting defendant to adduce evidence to the contrary. When the plaintiff has not satisfied the initial burden which lay upon him to bring his case within Section 14, the burden, would not shift, if it ever

shifted, to the defendant to show the contrary. In view of this conclusion, it is not necessary for us to pronounce upon the other contention raised on behalf of the appellants that, even after giving the benefit of Section 14, the suit is still barred under Article 142 of the Limitation Act. This is a serious question which may have to be determined if and when it becomes necessary.”

10. Counsel for the defendant has also relied in the case **Deena (Dead) through LRs. Vs. Bharat Singh (Dead) through LRs and Ors.** (2002) 6 SCC 336 and more particularly paragraphs 14, 15, 16 and 17, which are reproduced below:

“14. 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 vs. Divan Devi* 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."

15. 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.

16. 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.

17. 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* 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.”

11. I have heard counsel for the parties and considered their rival contentions.

There is no quarrel to the proposition as raised by counsel for the plaintiff that the court must take a liberal view in considering an application under Section 14 of the Limitation Act, so as to advance cause of justice rather than to abort the proceedings, as laid down by the Supreme Court in (2008) 7 SCC 167. The short point which comes up for consideration before this court is as to whether the plaintiff was pursuing a wrong remedy, with due diligence and in good faith. The facts which have been narrated hereinabove which are undisputed would show that the plaintiff approached the MRTP Commission in the year 2006, in the written

statement which was filed by the plaintiff an objection was raised with regard to the non-maintainability of the complaint on account of a decision of the Supreme Court reported in *Saurabh Prakash (Supra)* which was rendered on 24.11.2006. This court deem it appropriate to reproduce the grounds taken by the plaintiff in the present application.

Paragraphs 8 and 9 of the application are reproduced below:

“8. It is stated that in view of the peculiar facts and circumstances of the case and keeping in mind the monopolistic attitude and unfair trade practice being adopted by the defendant with regard to the allotment and cancellation of the agreement, thereby forfeiting huge amount of the plaintiff, the plaintiff on legal advice as had been received by the plaintiff from his than Advocate had filed an application under Section 36A of the MRTP Act. It is stated that the said matter was pending till March, 2010 due to one reason or the other. However, in view of the judgment passed by the Hon’ble Supreme Court of India in *Saurabh Prakash Vs. DLF*, and on the basis of the objection as had been taken by the counsel for the defendant, regarding the maintainability of the plaintiff’s petition, in view of the judgment of the Hon’ble Supreme Court the plaintiff on the advice of his new counsel had withdrawn his petition/ application with liberty to approach the appropriate forum to get adjudicated his loss and grievances. Hence the plaintiff is constrained to approach this Hon’ble Court by filing the instant suit for recovery of the amount of Rs.25,75,200/- alongwith pendente lite and future interest, which has been illegally, high handedly and unauthorizedly retained by the defendant herein on the ground that it had been forfeited.

9. That it is stated that the plaintiff had been with due diligence and on legal advice received had been pursuing his case before the MRTP Commission till March, 2010 when the plaintiff had withdrawn the said petition with liberty to approach the appropriate forum. Hence there is a delay of 449 days in filing the present suit, which is unintentional and beyond the control of the plaintiff and for the reasons explained herein above.”

12. On reading of the aforesaid paragraphs of the application it shows that the plaintiff withdrew the complaint on account of objections raised by counsel for the defendant on the basis of decision in *Saurabh Prakash (Supra)* and on the advice of the counsel. This decision was rendered by the Apex Court in the year 2006 and was available to the plaintiff in the year 2006 and more so it was brought to the notice of the plaintiff when the objection was taken by the defendant in the written statement. If the stand of the plaintiff is to be taken as correct, then the plaintiff has been unable to discharge onus that he was prosecuting his complaint diligently before the MRTP, as the present application lacks particulars or any evidence on record be it the orders of the MRTP or any attempt on the part of the plaintiff to show that despite the judgment and the objection taken, he continued to prosecute the complaint diligently from the year 2006 to 2010. There is nothing on record to show as to why when the objection was raised in the written statement, at that stage, the plaintiff did not consider it appropriate to withdraw the complaint and file the suit or as to why the plaintiff decided to do so in the year 2010 as there is nothing on record to suggest any change of circumstances between the year 2006 to 2010 except the inaction on the part of the plaintiff. The order passed by the MRTP Commission also does not show that either the plaintiff sought liberty of the Commission or such liberty was granted as has been

pleaded in the application. The plaintiff simply withdrew the complaint and filed the present suit. Another factor which shows complete lack of bona fides and due diligence on the part of the plaintiff is the unexplained delay of nine months in filing the present suit after withdrawal of the complaint. There is also no explanation much less a cogent explanation in the application as to why the plaintiff did not approach this court at the earliest opportunity available, after withdrawing the complaint in the month of March, 2010 and waited till December, 2010, which would show the careless attitude of the plaintiff and the inaction on his part.

13. The law laid down by the Apex Court is to be applied to the facts of this case. The principles culled out would show that firstly the onus is on the plaintiff to show that he was pursuing a wrong remedy diligently and in good faith. The plaintiff must establish that while pursuing a wrong remedy there was an element of a mistake in the remedy or the selection of a wrong forum. Along with the above two elements the plaintiff must also establish that the wrong remedy was being pursued with due diligence and good faith. Good faith has been defined as “exercise of due care and attention”.
14. In this case, the objection with regard to the maintainability of the complaint before the MRTP was raised by the defendant in the written statement filed in 2006-2007. The defendant relied upon a decision of the

Supreme Court of India of the year 2006 in support of the objection raised. It is based on this objection that the plaintiff decided to withdraw the complaint in 2010. I am of the view that the plaintiff has failed to satisfy this Court and establish that he was pursuing a wrong remedy with due diligence and in good faith. Although Section 14 of the Limitation Act is to be construed liberally, but the application lacks all the basic ingredients which are to be considered while condoning the delay as per Section 14 of the Limitation Act, this court is left with no option but to dismiss the application.

CS(OS) 283/2011

15. In view of the order passed in the application [IA.No.1933/2011] present suit is dismissed.

G.S.SISTANI, J

FEBRUARY 14, 2012

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