

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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SECOND APPEAL No.243 OF 2011

JUDGMENT:

This appeal, under Section 100 of the Code of civil procedure, 1908 (for short, 'the Code'), is filed challenging the Decree and Judgment dated 15.04.2008 in A.S. No.176 of 2005 passed by the VIII Additional District Judge (FTC) Vijayawada, whereby the Decree and Judgment dated 02.11.2005 in O.S. No.324 of 1999 passed by the III Additional Senior Civil Judge, Vijayawada, was set aside and allowed the appeal directing the defendant to deliver the vacant possession of the schedule property to the plaintiffs within three months from the date of Judgment.

02. The appellant herein is the defendant and the respondents herein are the plaintiffs in O.S. No.324 of 1999. They will hereinafter be referred to as arrayed before the trial court, for convenience.

03. Heard the learned counsel for the appellant and the respondents at the stage of admission.

04. It is the case of the plaintiffs that they filed suit for recovery of the possession of the suit property after evicting the defendant and future profits, contending that the property was purchased by the plaintiffs and Venkata Rao under registered sale deed dated 09.09.1981. At the time of purchase, the mother of the defendant was in possession as a tenant on payment of monthly rent Rs.50/-. She was carrying on the milk business in the property. The plaintiffs informed about their purchase of the property to the mother of the defendant and requested her to pay rent to the first plaintiff, but she did not oblige. Hence the plaintiffs issued registered notice dated 29.10.1981, demanding payment of rent and to vacate the premises by 15.12.1981. The mother of the defendant got issued reply dated 27.11.1981. Thereupon the plaintiffs issued a rejoinder calling upon her to vacate the property on or before 31.01.1982. As mother of the

defendant did not vacate the schedule property, the plaintiffs and Venkat Rao filed O.S. No.175 of 1982 before the District Munsiff Court, Vijayawada, for eviction and recovery of rent and damages for use and occupation. After full-fledged trial, the said suit was decreed on 20.09.1982. The mother of the defendant carried the matter in an appeal and finally in the High court, the Decree was set aside and dismissed the second appeal preferred by the plaintiffs observing that the plaintiffs have to file a suit for possession on the basis of title. Hence, the plaintiffs filed the present suit.

05. The defendant resisted the claim on the ground that she perfected her title by adverse possession and that the plaintiffs are not entitled to claim any right and the claim of the plaintiffs is barred by limitation.

06. The trial court framed appropriate issues based on the pleadings and issue No.1 is relevant issue regarding the limitation and issue No.4 is regarding perfection of title by adverse possession to the defendant. No issue was framed by the trial court regarding saving of limitation period under Section 14 of the Act, but discussed at paragraph 9 of the judgment, while deciding issue No.1. The trial court dismissed the suit.

07. The plaintiffs, being aggrieved, preferred first appeal before the VIII Additional District Judge, FTC, Vijayawada, in A.S. No.176 of 2005. It was allowed by Decree and Judgment dated 15.04.2008 directing the defendant to vacate the premises within three months from the date of Judgment.

08. Aggrieved by the Decree and Judgment of the first appellate court ordering eviction, the defendant preferred the present second appeal on various grounds and the substantial question of law is,

“Whether the suit for eviction and recovery of possession of the property is maintainable when the defendant denied the title of the plaintiffs in the earlier round of litigation between the same parties, which was prosecuted by the plaintiffs therein were unsuccessful up to the High court, which ended in dismissal by Judgment dated 09.09.1996 and entitled to claim benefit under Section 14 of the

Limitation Act, 1963 (for short, 'the Act') for recovery of possession of the property?"

09. During hearing, Sri M.N. Narasimha Reddy, learned counsel for the appellant-defendant, contended that the suit is barred by limitation as the plaintiffs are not entitled to claim benefit of Section 14 of the Act having lost the claim in the earlier round of litigation in O.S.No.175 of 1982.

10. Undisputedly, earlier, the plaintiffs filed suit in O.S. No.175 of 1982, which ended in dismissal in SA No.210 of 1991 dismissing the suit for eviction of the mother of the defendant, observing that the plaintiffs therein are entitled to claim discretionary relief along with recovery of possession. Based on the observations, the plaintiffs filed the present suit claiming the benefit under Section 14 of the Act alleging that they prosecuted the litigation bonafidely and diligently from 01.02.1982 when they filed the suit, till disposal of the second appeal on 09.09.1998, thereby they are entitled to claim benefit under Section 14 of the Act. The trial court did not accept this contention, but the first appellate court excluded the time spent in the earlier suit in O.S. No.175 of 1982 till disposal of appeal in the High Court in S.A. No.210 of 1991.

11. Section 14 of the Act deals with 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.

(2) In computing the period of limitation for any application the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision against the same party for the same relief shall be excluded, where such proceeding 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.

12. Section 14 of the Act is wide in its application inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases of where prior proceedings have failed on account of other causes of like nature as held by this Court in **SYED HYDER SAHEB (DIED) PER L.R. V. DISTRICT COLLECTOR, KURNOOL AND OTHERS**^[1]

13. In fact, it is the contention of the defendant, from the beginning, that O.S. No.175 of 1982 on the file of District Munisiff, Vijayawada, was filed for eviction of her mother, the plaintiffs therein were not entitled to claim recovery of possession and denied their title. The trial court accepted the same, but the first appellate court reversed the finding of the trial court on the ground that the plaintiffs have prosecuted earlier proceedings in a court of defective jurisdiction. At paragraph 9 of the Judgment in O.S. No.324 of 1999, the trial court concluded the plaintiffs invoke sub-section (1) of Section 14 of the Act for exclusion of the period spent during which the earlier suit was pending.

14. It is not the case of the defendant that the Court in which the earlier suit was filed is of defective jurisdiction. Though the defendant denied the title, the plaintiffs in the earlier suit instead of converting the suit for recovery of possession after evicting mother of the defendant to a suit for declaration and recovery of possession, prosecuted the proceedings up to second appeal, which was dismissed denying the relief of recovery of possession and they did not specify any cause for prosecuting the proceedings before the trial court within the ambit of “any cause of a like nature”. Mere pendency of earlier suit filed for recovery of possession itself is not sufficient, to exclude the time spent in prosecuting the earlier suit, in the absence of any cause in prosecuting the suit in a court of defective jurisdiction or any other

cause of a like nature.

15. This Court, while dismissing the second appeal did not give liberty to the plaintiffs in the said suit to file a suit for declaration and recovery of possession. In the absence of such liberty, the time spent in the earlier suit cannot be excluded. The limitation for suit for recovery of possession and declaration is 12 years under Article 65 of the Act, it commences from the date when the possession of defendant is adverse to the plaintiffs. In fact, mother of the defendant denied the title of the plaintiffs by filing written statement in the year 1985 and also in reply dated 27.11.1981. From the date of such denial, the limitation would commence for the relief of declaration and recovery of possession, but prosecuted the earlier litigation in O.S. No.175 of 1982 without taking any steps to amend the plaint, which itself indicates that he was not diligent in prosecuting the proceedings in a court of defective jurisdiction or any other cause of like nature. But the trial court accepted this contention on the ground that intendment of exclusion of time from computing the limitation would not lead to fruitless litigation and extended benefit of sub-Section(1) of Section 14(1) of the Act. The trial court rightly observed that to claim benefit of sub-Section (1) of Section 14 (1) of the Act, the plaintiffs must not only prove that he prosecuted the proceedings bonafiedly before the Court of defective jurisdiction or of any other cause of a like nature, and especially plead and prove that he prosecuted the proceedings with due diligence. Want of due diligence would disentitle a person to get exclusion of the time occupied in prosecuting the civil proceedings.

16. In the present case, there is absolutely nothing on record to establish diligence of the plaintiffs in prosecuting the proceedings and apart from that in the reply notice dated 27.11.1981, the mother of the defendant denied the very title of the plaintiffs and right to claim recovery of possession, despite it the plaintiffs did not file appropriate suit for declaration of title and recovery of possession. Even after filing written statement, the plaintiffs did not chose to amend the plaint for

appropriate relief and prosecuted the proceedings up to second appeal, which ended in dismissal against the plaintiffs. Therefore, the conduct of the plaintiffs in prosecuting the earlier suit itself suffice to conclude that the plaintiffs did not prosecute the earlier proceedings in O.S. No.175 of 1982 with due diligence.

17. Hence, the finding of the trial court and the first appellate court that the plaintiffs exercised due diligence in prosecuting the proceedings in a court of defective jurisdiction is illegal and the same is liable to be set aside.

18. The limitation for recovery of possession is 12 years under Article 65 of the Act, which commenced in the year 1981. When the mother of the defendant got issued reply notice to the notice issued by the plaintiffs after purchase of the property, at best the plaintiffs have to file the suit before 1993, but filed the suit in the year 1999, taking advantage of sub-Section (1) of Section 14 of the Act. Hence, the time spent in a court of defective jurisdiction during earlier litigation cannot be excluded as the court in earlier litigation did not held that it has no jurisdiction and that the plaintiffs failed to establish due diligence in prosecuting earlier round of litigation. Consequently, the claim of the plaintiffs is hopelessly barred by limitation.

19. As discussed above, the plaintiffs are not entitled to claim the benefit of sub-Section (1) of Section 14 of the Act as they failed to establish that they prosecuted their proceedings in earlier litigation bonafidely and diligently in court of defective jurisdiction or for any other cause of a like nature. Hence, finding of the appellate court is ex-facie erroneous and whereas the trial court rightly dismissed the suit.

20. Accordingly, the point is held against the plaintiffs and in favour of the defendant, holding that the plaintiffs are not entitled to claim exclusion of time spent in prosecuting O.S. No.175 of 1982 up to second appeal. Consequently, the Decree and Judgment dated 15.04.2008 in A.S. No.176 of 2005 passed by the III Additional District Judge, FTC, Vijayawada, is set aside, restoring the Judgment dated

02.11.2005 in O.S. No.324 of 1999 passed by the III Additional Senior Civil Judge, Vijayawada.

21. In the result, the appeal is allowed at the stage of admission setting aside the Decree and Judgment in A.S. No.176 of 2005 on the file of VIII Additional District Judge (FTC), Vijayawada, restoring the Decree and Judgment in O.S. No.324 of 1999 passed by the III Additional Senior Civil Judge, Vijayawada. There shall be no order as to costs.

22. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 22.07.2016

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