* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 21st August, 2017**

\+ **C.R.P. 86/2017 & CM No.13036/2017**

JASWANT KAUR ..... Petitioner

Through: Mr. Sanjeev Soni, Adv.

Versus

SURJIT SINGH & ANR ..... Respondents

Through: Mr. Jitender Kumar Dhingra, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 24th January, 2017 in Civ/DJ/613824/2016 of the Court of Additional District Judge (ADJ)-05, West District, Tis Hazari Courts, Delhi] allowing the application of the respondent no.1 / plaintiff under Section 14 of the Limitation Act, 1963.

2. Notice of the petition was issued and the counsel for the respondent no.1 / plaintiff appears.

3. The respondent no.2 is informed to be *ex parte* in the suit and has not appeared before this Court despite service.

4. The counsel for the petitioner/defendant has argued i) that the petitioner had filed a suit against the respondent no.2 for ejectment of the respondent no.2 from an immovable property claiming that the respondent no.2 was a tenant under the petitioner at a rent in excess of Rs.3,500/- and his tenancy had been determined; ii) that the respondent no.2 was proceeded against *ex parte* in the said suit; iii) that the respondent no.1 / plaintiff filed an application under Order I Rule 10 of the CPC for impleadment in the suit but which application was dismissed and which order attained finality; iv)

that after an *ex parte* decree for ejectment of the respondent no.2 was passed in favour of the petitioner and the petitioner sought execution thereof, the respondent no.1 / plaintiff again filed objections in the execution and which objections were dismissed and the first appeal whereagainst was also dismissed and which order has also attained finality; v) that thereafter the respondent no.1 / plaintiff filed the suit from which this petition arises and the learned ADJ vide the impugned order has allowed the application under Section 14 of the Limitation Act filed along with the plaint in the suit.

5. Section 14 of the Limitation Act provides as under:

> **"14 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.
> (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
> Explanation.— For the purposes of this section,—
>
> (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
> (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
> (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

As would be noticed, the application of Section 14 is dependent upon the prosecution of any civil proceedings with due diligence and in good faith, which are questions of fact. I have thus enquired from both the counsels as to how an application under Section 14, if contested, could be decided without the parties being put to trial. No answer is forthcoming.

6. A Division Bench of this Court, in ***Firm Khushi Ram Behari Lal Vs. Firm Jagan Nath Kuthiala*** ILR (1969) Del 487 held that the question, whether a plaintiff had prosecuted an earlier proceeding in good faith and with due diligence is a question of fact, depending upon the circumstances of each case.

7. In my opinion, whenever a plaint is accompanied with an application under Section 14 of the Limitation Act and a question of the suit claim being within limitation without granting extension of time under Section 14 of the Limitation Act arises, an issue, whether the plaintiff is entitled to exclusion of time under Section 14 has to be framed and decided at the time of final adjudication of the suit. Only if, on admitted facts, the application can be allowed or dismissed, would the question of deciding the same without trial arise.

8. Neither counsel has made out a case for allowing or dismissing application under Section 14 of the Limitation Act without evidence.

9. The counsel for the petitioner / defendant has however argued that in the present case, there was a delay of 74 days which was unexplained.

10. Even if that be so, the matter, in my opinion, cannot be decided without trial and the order impugned is liable to be set aside on this ground alone with liberty to the respondent no.1 / plaintiff to, if the occasion for framing issues in the suit arises, press an issue qua Section 14 of the Act.

11. The counsels state that the issues have already been framed and no issue qua limitation has been framed. If that be so, then the learned ADJ in view of this order, is required to amend the issues.

12. I have hereinabove observed that "if the occasion for framing issues arises" because it is the contention of the counsel for the petitioner / defendant no.1 that the suit was not maintainable because the order of dismissal of objections in the execution has attained finality. It is also the argument of the counsel for the petitioner / defendant no.1 that the suit is misconceived inasmuch as the respondent no.1 / plaintiff has sought setting aside of the decree and not declaration of any rights claimed by him in the property.

13. On enquiry, it emerges that while the petitioner / defendant no.1 claims title to the property under Agreement to Sell, Power of Attorney, Will etc. executed by respondent no.2, the respondent no.1 / plaintiff claims title to the property on the basis of some receipts of payment of sale consideration issued by one Roshan Lal.

14. I refrain from entering into the said controversy inasmuch as the same is not the subject matter of the impugned order.

15. The counsels would have liberty to take appropriate steps in the suit in this regard.

16. Resultantly, the petition succeeds. The order dated 24th January, 2017 is set aside with liberty aforesaid.

No costs.

17. The counsel for the petitioner / defendant no.1 at this stage states that vide another order of the same date i.e. 24th January, 2017, the parties have

been directed to maintain *status quo* on an application of the respondent no.1 / plaintiff under Order XXXIV Rules 1&2 CPC.

18. However admittedly, neither has that order been placed before this Court (meaning that the same is not impugned in this proceeding) nor would Revision Petition under Section 115 of the Act lie thereagainst, the same being appealable under Order XLIII Rule 1(r) of the CPC.

19. The petitioner / defendant no.1 is at liberty to take appropriate remedy with respect thereto.

RAJIV SAHAI ENDLAW, J.

AUGUST 21, 2017
'gsr'..