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

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Judgment delivered on: 28.02.2018

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RSA 219/2016

BHAGWAT PRASAD

..... Appellant

Through: Ms. Nishtha Garg, Advocate.

Versus

RAMESH CHAND

..... Respondent

Through: Mr. Rajat Aneja and Ms. Nisha
Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

RSA 219/2016 & CM APPL. 29381/2016

1. The appellant had filed a suit for possession of the property bearing no. 1/4279-B-1, Ram Nagar Extension, Mandoli Road, Shahdara, Delhi-110032 admeasuring 20 sq. yds. The suit was decreed on 17.04.2010. In appeal, the First Appellate Court set aside the decree. The latter decision was upheld by this Court but in an SLP, the Supreme Court held that the Trial Court lacked jurisdiction and it permitted the appellant/plaintiff to initiate proceedings for specific performance of the contract. A second round of litigation ensued. The suit was dismissed on the grounds that it was in contravention to Order 2 Rule 2 of the CPC, that it was barred by limitation and it was hit by the principles of *res-judicata*. The First Appellate Court dismissed the plaintiff's appeal and held that *res-judicata*

would not be applicable. This Court in the appeal set aside the impugned order and remanded the case back for adjudication. However, the Trial Court held that the case was barred by limitation. It is the appellant's contention that once the Supreme Court had granted permission to the appellant to initiate proceedings for an appropriate relief, i.e., specific performance of the contract, there is an implied condonation of delay, therefore limitation under the Limitation Act, 1963 ('Act') would be exempted, especially under section 14 of the Act which reads 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”.

2. The learned counsel for the appellant contends that by virtue of section 14 (1) and Explanation (c) of the Limitation Act, 1963, the limitation would not be applicable in the suit for specific performance which was filed within 12 days of the Supreme Court granting permission to the appellant. She further relies upon the judgment of the Supreme Court in **India Electric Works Ltd. v. James Mantosh and another** AIR 1971 SC 2313, which held as under:-

“5. Section 14 in so far as it is material for our purpose runs as follows:-

Section 14(1) "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".

(2) . . .

Explanation I . . .

Explanation II . . .

Explanation III.- For the purpose of this section misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

The High Court having found that the present claim of the plaintiffs was also included in the previous suit the condition that the previous proceeding should be founded upon the same cause of action must be held to have been satisfied. The High Court has further held that the previous suit had been prosecuted in good faith and with due diligence. In order to attract the applicability of Section 14(1), therefore, all that has to be determined is whether the court in which the previous suit was filed was unable to entertain the claim relating to future mesne profits "from defect of jurisdiction" or "other cause of a like nature". It is common ground and indeed cannot be argued nor has any attempt been made to urge such a contention before us that the court trying the previous suit was unable to entertain it from defect of jurisdiction. The only question for determination is whether the court was unable to entertain the previous suit from "other cause of a like nature". In Jaikishan Singh v. The Peoples Bank of Northern India I.L.R. [1944] Lah. 451 it was pointed out that Section 14 of the Act will have no application where failure on the part of the petitioner or the plaintiff to get the reliefs which he asked for was not attributable to anything connected either with the jurisdiction of the court or with some other defect which was like that of jurisdiction. It was observed that the words "or other cause of a like nature", however, liberally construed must be read so as to convey something ejusdem generis or analogous to the preceding words relating to the defect of jurisdiction. If these words were read along with the expression "is unable to entertain", they would denote that the defect must be of such a character as to make it impossible for the court to entertain the suit or application in its inception or at all events as to prevent it from deciding it on the merits. In

other words, if the defects were of such a nature that they had to be decided before the case could be disposed of on merits or if they did not necessitate an examination of the merits of the case they would be defects of a "like nature". The cases which were decided on the principle that if a plaintiff or a petitioner failed to establish a cause of action in himself no deduction of time could be allowed under Section 14 were noticed and it was accepted that they proceeded on a correct view. Illustration of the facts which would be covered by the words "or other cause of a like nature" as given in the decided cases were: (i) if a suit had failed because it was brought without proper leave; (ii) if it had failed because no notice under Section 80, Civil Procedure Code, had been given; (iii) where it would fail for non-production of the Collector's certificate required by Section 7 of the Pensions Act. In each one of these cases the court did not lack jurisdiction in its inception but the suit could not be proceeded with and disposed of until the statutory conditions laid down had been satisfied or fulfilled.

6. Mention may be made of two cases which are apposite out of the numerous decisions relating to the point under consideration. In Shrimati Nriyamoni Dassi and Ors. v. Lakhan Chandra Sen I.L.R. [1916] 43 Cal. 660 the plaintiffs were defendants in a suit brought at a prior stage. In that suit they associated themselves with the plaintiffs and prayed for adjudication of their rights. Henderson J. of the Calcutta High Court who tried the suit decreed the claims of the plaintiffs and made a similar decree in favour of the defendants. The High Court in its appellate jurisdiction, while affirming the findings of Henderson J., held that the decree granted by him in favour of the defendants could not be maintained. The decree was consequently varied and the defendants in that suit were relegated to a fresh suit for the relief to which they were clearly entitled. In the subsequent suit the question of the bar of limitation arose. This is what was observed by their Lordships with regard to the claim that the prior period could be deducted for the purpose of limitation :

It was an effective decree made by a competent court

and was capable of being enforced until set aside. Admittedly if the period during which the plaintiffs were litigating for their rights is deducted their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

In Sarojendra Kumar Dutt v. Purnachandra Sinha A.I.R. [1949] Cal. 24 S.R. Das, J. (as he then was) expressed the view that the principle of Section 14 was applicable not only to cases where the person brought his suit in the wrong court but also applied where he brought his case in the right court although he was prevented from getting a trial on the merits by something which, though not a defect of jurisdiction, was analogous to that defect. There an attorney had made an application under Chapter 38, Rule 48, Original Side Rules of the Calcutta High Court, for an order against his client for payment of the sum allowed on taxation. As discretion was conferred by the Rule to either make an order for payment or to refer the parties to a suit the matter was referred to a suit in view of the facts of the case. The learned judge held that the plaintiff's right had not been investigated in the Chamber Application because it was considered that it was a proper case where the attorney should be relegated to a suit. It was, therefore, by reason of an infirmity or defect of jurisdiction that the order for payment could not be made. The defect of jurisdiction was in no way brought about by the plaintiff or by any absence of diligence or good faith on his part. He was found entitled to the benefit of Section 14 of the Act.

7. It is well settled that although all questions of limitation must be decided by the provisions of the Act and the courts cannot travel beyond them the words "or other cause of a like nature" must be construed liberally. Some clue is furnished with regard to the intention of the legislature by the Explanation III in Section 14(2). Before the enactment of the Act in 1908 there was a conflict amongst the High Courts on the question whether misjoinder and non-joinder were defects which were covered by the words "or other cause of a like nature". It was to set at rest this conflict that Explanation III was added. An extended meaning was thus given to these

words. Strictly speaking misjoinder or non-joinder of parties could hardly be regarded as a defect of jurisdiction or something similar or analogous to it.

8. In our judgment the present case is very similar to the one decided by the Privy Council in Shrimati Nrityamoni Dassi and Ors. v. Lakhan Chandra Sen I.L.R. [1916] Cal. 660. There an effective decree had been made by Henderson J., of the Calcutta High Court which enured to the benefit of the defendants but the appellate court considered that such a decree could not have been legitimately made and set it aside. The period of the previous litigation was held to be deductible apparently under the provisions of Section 14(1) of the Act. In the case before us the trial court had passed a decree in the money suit of 1948 for recovery of future mesne profits. The High Court on appeal set aside that decree on the ground that no such decree could have been passed in a pure suit for recovery of money. The benefit of Section 14(1), therefore, was rightly allowed by the High Court in the judgment under appeal. Even if the test propounded in the Lahore full bench decision in Jai Kishan Singh v. The Peoples Bank of Northern India I.L.R. [1944] Lah. 451 is to be applied there can be no manner of doubt that the defect in the suit of 1948 was of a nature which had to be decided before the claim could be disposed of on the merits. The High Court there was called upon to decide whether the claim was at all entertainable on the frame of the suit and it came to the conclusion that the court was not competent to pass any decree for recovery of future damages or mesne profits in the suit as laid. The defect was of a nature which had to be decided before the merits of the claim could be adjudicated upon nor did any occasion or necessity arise of going into or examining the merits of the aforesaid claim. It could hardly be said that the previous money suit of 1948 was altogether misconceived. As has been pointed out by the High Court, in a later decision of the same court in Makhan Lal Madak v. Girish Chandra Jana MANU/WB/0368/1961 : 66 C.W.N. 692. the view taken was that a claim for mesne profits even without a suit for recovery off possession might well be entertainable. The plaintiffs' claim

had not been investigated in that suit because the High Court considered that the court was not competent to decree such a suit. It was by reason of an infirmity or defect of jurisdiction that there could neither be adjudication of the claim on the merits nor could it be decreed. The defect of jurisdiction had in no way been brought about by the plaintiffs or by any absence of diligence or good faith on their part. They were thus fully entitled to the benefit of Section 14(1) of the Act.

9. Another principle which has been enunciated in certain decisions of the Privy Council and which is stated to be one of general application has been invoked on behalf of the plaintiff-respondents. Rangnekar, J., in delivering the judgment of the Division Bench in *Narayan Jivaji Patil and Anr. v. Curunsthgouda Khandappagouda Patil and Anr.* I.L.R. [1939] Bom. 173. discussed at length the various pronouncements of the Privy Council and deduced the principle that where a claim was satisfied either by agreement of parties or by decree of the court and if the satisfaction or decree was set aside subsequently in a judicial proceeding a fresh cause of action would accrue in favour of the claimant. In the present case it could be said that the cause of action for future mesne profits was satisfied by the decree which had been granted by the trial court in the money suit of 1948. The High Court, however, in the appeals decided by it by means of the judgment in *India Electric Works Ltd. v. Mrs. B.S. Mantosh and Ors.* MANU/WB/0048/1956 : AIR1956Cal148 . delivered on June 30, 1955 had set aside that decree. A new cause of action accrued in favour of the plaintiffs from the date of that judgment. It is, however, unnecessary to rest our decision on the principle relied upon by Rangnekar J. in the Bombay case because we are satisfied that the plaintiffs were entitled to deduction of time under Section 14(1) of the Act”.

3. The learned counsel for the respondent states that before the Supreme Court, the appellant's SLP was permitted to be withdrawn and simultaneously permission was granted to them to take appropriate steps. This cannot be construed to mean that the Supreme Court had implicitly

condoned such delay as may have arisen in the appellant's instituting a suit for specific performance. He relies upon a judgment of the Punjab and Haryana Court in **Zile Singh and Anr. vs. Avtar Singh and Ors.** AIR 2010 P&H 42, the relevant paras read as under:-

"4. The application for exclusion of time spent in prosecuting the previous suit has been dismissed by the learned trial court on the ground that no liberty was granted to the plaintiff in the order dated 11.2.2002, to file the suit for specific performance. The Court has found that time spent in prosecuting the suit can be condoned if the delay was due to inadvertence and despite due diligence. It was found that the cause of action arose to plaintiff on 1.6.1991, that is the target date for execution of the sale deed but the plaintiff did not institute the suit for specific performance, within a period of limitation, therefore, the plaintiff cannot seek condonation of delay.

18. In the present case, the cause of action to seek specific performance arose to plaintiff on 1.6.1991, i.e., the target date for execution of the sale deed. Even though, the cause of action arose to the plaintiffs, no steps were taken either to seek the amendment of the plaint of a suit for permanent injunction so as to claim specific performance or to file a fresh suit to claim specific performance of the agreement within the period of limitation. Thus, the prosecution of the suit for permanent injunction cannot be said to be under mistaken belief and /or that such suit was being prosecuted with due diligence and good faith".

4. He also relies upon the judgment of the Supreme Court in **Deena (Dead) through LRs. vs. Bharat Singh (Dead) thr. LRs. and Ors.** AIR 2002 SC 2768, which held, *inter alia*:-

"14. From the provisions it is clear that it is in the nature of a proviso to Order XXIII Rule 2. The non-obstante clause provides that notwithstanding anything contained in Sub-rule (2) of Order XXIII of the Code of Civil Procedure the

provisions of Sub-section (1) of Section 14 shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of Order XXIII. For applicability of the provision in Sub-section (3) of Section 14 certain conditions are to be satisfied. Before Section 14 can be pressed into service the conditions to be satisfied are: (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; (2) the prior proceeding had been prosecuted with due diligence and good faith; (3) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; (4) the earlier proceeding and the later proceeding must relate to the same matter in issue, and (5) both the proceedings are in a court”.

5. The learned counsel for the respondent states that earlier proceedings were suffered for want of jurisdiction, the plaintiff consciously chose to pursue the relief as sought therein. Having suffered consistent adverse orders against the relief sought, they cannot now seek to raise a ground of error of jurisdiction, so as to grant them exemption under section 14 of the Limitation Act. Hence, the judgment in ***India Electric Works Ltd.*** (supra) relied upon by the appellant would not be applicable, in the facts of the present case.

6. He submits that after remand of the case by this Court, the issue of limitation had been adjudicated against the appellant by the Trial Court. That order has become final, since it was never impugned. The dismissal of the application under section 14 of the Act was never challenged, hence that cannot be the ground for challenge in the present appeal. Indeed this has been so noted in the impugned order:-

“Ld. Trial Court in compliance of above orders then firstly decided the application under Section 14 (1) of the Limitation Act and the same was dismissed on 03.09.2015 by holding that no benefit of extension of period of limitation can

be given to the plaintiff for the period during which his earlier suit for possession and injunction was pending. This order of the Ld. Trial Court dated 03.09.2015 became final as it was not challenged further by the plaintiff in any higher court”.

7. The learned counsel further submits that the first suit was for possession and the second suit was for a specific performance. The cause of action admittedly occurred on 02.01.2008, therefore any cause of action may be pressed within three years, i.e., by 01.01.2011 under Article 54 of the Limitation Act. In filing the suit there is a delay of 2½ months. The learned counsel for the respondent states that section 14 of the Limitation Act is premised on defect of jurisdiction. Therefore, the phrase “*other cause of like nature*” would have to be adjudicated i.e. defect of jurisdiction and Explanation (c) have to be read in the context. The condonation of delay cannot be granted and time cannot be extended in circumstances where a party knowingly does not seek proper relief at any stage, right up to the Supreme Court or chooses to continue with the wrong or incomplete remedy. In the present case, the jurisdiction of the Court was never in doubt or under challenge. Instead what petitioner/appellant has now sought, is a fresh adjudication for a relief which was always available to him earlier. This according to the learned counsel for the respondent would be barred under the Limitation Act. He submits that the Trial Court has dealt with this issue in detail under paras 8,9,10 & 11 which has not been challenged, therefore the appeal lacks substance and should be dismissed.

8. The respondent contends that the choosing of wrong remedy will not entitle a party for suspension of the provisions of the Limitation Act. He further submits that ***India Electric Works Ltd. v. James Mantosh and another*** would not be of any assistance to the appellant, because in that case

the subsequent suit was before a different Court. The suit was decreed for the period prior; it had also claimed future damages. The decree was granted, however, the High Court set it aside on the ground that no decree can be passed for recovery of compensation after the date of the suit upto the date of the decree or after the date of the decree until recovery of possession in a pure suit for recovery of money. Subsequently, a suit was filed for recovery of damages in the regular suit. The subsequent suit for future damages had been allowed by the Supreme Court on the ground that the first Court did not have the jurisdiction to try to adjudicate the relief now sought, i.e, it was a different Court. In the present case, however, the same Court could have adjudicated both for possession as well as for a specific performance. Therefore, there is no defect of jurisdiction and it was the conscious option of the appellant not to seek the relief of specific performance. The appellant is also required to pursue with due diligence and in good faith but nothing is on the record in the contrary.

9. It is the appellant's case that the suit for possession was filed on the basis of advice rendered by counsel for which, the appellant cannot be led to suffer precipitately and she further submits that wrong advice would not lead to the suspension of applicability of the Limitation Act. The Court is unable to agree with the contention.

10. The Court does not find any merit in the case. Accordingly, it is dismissed.

NAJMI WAZIRI, J.

FEBRUARY 28, 2018

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