

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No.1598 of 2020

Supratik Ghosh

Vs.

Aliroma Chemicals Pvt. Ltd. and others

For the petitioner	:	Mr. Tapas Dutta, Mr. Mrityunjoy Halder
For the opposite party no.3	:	Mr. Pranit Bag, Mr. Tapas Saha
Hearing concluded on	:	16.08.2021
Judgment on	:	26.08.2021

Sabyasachi Bhattacharyya, J:-

- 1.** The revisionist-petitioner instituted a suit, bearing Money Suit No.1 of 2003, in the Eighth Court of Civil Judge (Senior Division) at Alipore, District – South 24-Parganas, which was dismissed by the judgment and decree dated April 26, 2012, primarily on the ground of non-production of the documents on which the plaintiff relied.
- 2.** The plaintiff preferred a first appeal, bearing FAT No.386 of 2012, in this Court against such dismissal.
- 3.** There was a deficit in the court fees deposited by the plaintiffs/appellants/petitioner in FAT No.386 of 2012. Accordingly,

the petitioner filed an application, bearing CAN 2243 of 2012, for furnishing security in place of deficit court fees, which was dismissed *ex parte* on September 9, 2013 by a Division Bench of this Court, which further directed the petitioner to deposit the deficit court fees within one week from that date; in default, the first appeal was to stand dismissed automatically.

4. The petitioner, however, failed to deposit such deficit court fees within the stipulated period but filed CAN 10376 of 2013 for recall of the order dated September 9, 2013, which remained pending.
5. Thus, by operation of the Division Bench operation dated September 9, 2013, the first appeal stood dismissed automatically.
6. Another application, bearing CAN 4617 of 2016, was subsequently filed by the petitioner for non-prosecution of FAT No.386 of 2012 with liberty to file a review application. CAN 14617 of 2016, however, was dismissed by another Division Bench on June 23, 2016, since it was not maintainable in view of the appeal itself having already been dismissed in view of non-deposit of deficit court fees pursuant to the order dated September 9, 2013.
7. On July 1, 2016, the petitioner took out an application for review of the original decree dated April 26, 2012, whereby Money Suit No.1 of 2003 had been dismissed by the trial court. In the said application for review, the petitioner took the ground that photocopies of the documents relied on by the petitioner in the suit had been traced out

subsequently and ought to be accepted as secondary evidence under Section 65 of the Indian Evidence Act, 1872.

8. In the meantime, a writ petition bearing WP No.31667 (W) of 2013 was preferred by the petitioner for compensation against the police authorities for the latter's alleged failure to hand over the originals of the documents lying with such authorities in connection with a proceeding under Section 138 of the Negotiable Instruments Act, which allegedly resulted in loss being suffered by the petitioner, inter alia for dismissal of the petitioner's suit.
9. *Vide* order dated June 26, 2018, a co-ordinate Bench of this court disposed of the writ petition, recording that, since the State was making over photocopies of the documents seized by the police authorities on the date of that order, that is June 26, 2018, and since the State certified them to be the exact photocopies of the documents seized, it would be open to the petitioner to produce such documents before the appropriate authority, in accordance with law. It was further held by the learned Single Judge that as the petitioner, in law, was then in a position to lead secondary evidence in support of his claim before the adjudicating authorities, the claim for compensation need not be assessed at that stage.
10. Meanwhile, a review application under Order XLVII Rule 1, read with Section 114 of the Code of Civil Procedure, bearing Miscellaneous Case No.08 of 2016, was filed by the petitioner after about 1380 days' delay, due to which the same was accompanied by an application

under Section 5, read with Section 14, of the Limitation Act, 1963. By the impugned order dated June 15, 2019, the said application under Section 5, read with Section 14, of the Limitation Act was rejected on contest and the review application was also dismissed accordingly.

11. Upon hearing learned counsel for both sides, this court arrives at the following decision:

Rashiklal Manikchand Dhariwal and another Vs. M.S.S. Food Products, reported at (2012) 2 SCC 196, cited by the petitioner, laid down the proposition that if the original documents, relevant for adjudication, could not be produced during trial, the proper course of action would be to file a review application for acceptance of secondary evidence, not an appeal. In reply, learned counsel appearing for the opposite parties argues that the said judgment was rendered in respect of the doctrine of proportionality and Order XVIII Rules 4 and 5 of the Code of Civil Procedure and not in the context of review. That apart, it is argued that paragraph no.64 of the cited report deals with the withdrawal of an application to follow procedure of examination, which is different from the instant case.

M.P. Steel Corporation Vs. Commissioner of Central Excise, reported at (2015) 7 SCC 58, also cited on behalf of the petitioner, deals with the proposition that the the date of cause of action for the appeal and the day on which it ends are to be excluded under Section 14 of the Limitation Act, 1963 if the appellate proceedings did not result in an order on the merits of the case.

12. In reply, it is argued on behalf of the opposite parties that the several ingredients of Section 14, as laid down in the case of *Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others*, reported at (2008) 7 SCC 169, was not fulfilled.
13. The cited judgment clarifies that the previous proceedings are to be deemed as abortive, only when the same were filed beyond jurisdiction; however, the appeal filed by the petitioner was filed before this court, which had full jurisdiction to take up the appeal. It was not a *bona fide* pursuance of a legal remedy by the petitioner in the present case. As such, the essential ingredient of *bona fides* on the part of the petitioner, as envisaged in Section 14 of the Limitation Act, was not fulfilled in the instant case.
14. *Bakshi Dev Raj Vs. Sudhir Kumar*, reported at (2011) 8 SCC 679, was primarily on the doctrine of merger and the right of review. It was held therein that, even after dismissal of a Special Leave Petition (SLP) without deciding the appeal on merits, there is no merger and a review application is maintainable. Even if an SLP is dismissed on merits by a non-speaking order, it was further observed, such order does not culminate in merger of the impugned order, thus leaving a review application to be maintainable.
15. However, the opposite parties argue that such proposition does not apply in the present case, since no separate leave is required to file an appeal under Order XLI of the Code of Civil Procedure. In the present case, it is argued, the several attempts of the petitioner to

abort/withdraw the appeal had failed. Not only did the appeal stand dismissed for non-payment of deficit court fees as per direction of a Division Bench of this Court, the specific subsequent prayer of the petitioner, not to proceed with the appeal, with liberty to file a review application, was categorically rejected by another Division Bench in connection with the appeal. As such, the ratio of *Bakshi Dev Raj* (supra) has no application in the instant case.

16. Upon considering the said judgments in the context of the instant *lis*, certain salient features stand out.
17. First, Section 14(2) of the Limitation Act clearly stipulates that, in computing the limitation for any application, the period during which the applicant has been prosecuted with due diligence another civil proceeding, whether in a Court of first instance or an appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is proceeded with in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it.
18. As such, there are several ingredients of Section 14(2) which have to be satisfied for the said provision to be applicable in a case, as also reiterated in *Bakshi Dev Raj* (supra).
19. Thus, in order to attract the benefit of Section 14 (2) of the Limitation Act, the applicant has to prosecute “with due diligence” another civil proceeding and the sub-section comes into operation only where such proceeding is prosecuted “in good faith”. The Court in which the

matter was previously proceeded has to be unable to entertain it from defect of jurisdiction or other cause “of a like nature”, the last expression having to be read in the light of the principle of *ejusdem generis*.

- 20.** It also has to be kept in mind that Section 114 of the Code of Civil Procedure, which provides for review, clearly stipulates that, if an appeal is allowed by the Code of Civil Procedure, but the person aggrieved does not prefer such an appeal from the decree or order under review, only then a review application is maintainable.
- 21.** Order XLVII Rule 1 of the Code, which also governs the procedure regarding applications for review, reiterates the same proposition. It is to be noted that the language used in both the aforesaid provisions is “preferred”, and not “dismissed” or “disposed of”, to qualify the previous appeal.
- 22.** There cannot be any doubt in the instant case that the petitioner had indeed preferred an appeal, irrespective of the fate of the same.
- 23.** The contention of the petitioner, that the appeal was *non est* in view of deficit court fees having been paid, is not sustainable. There might have been some logic behind the said argument in the event the appellant had not been given an opportunity by the Division Bench of this Court to deposit the deficit court fees. In the present case, despite having been granted such opportunity by the specific order of a Division Bench of this court, the petitioner deliberately failed to avail the same.

- 24.** That apart, the petitioner's subsequent application for non-prosecution of the appeal with liberty to file a review application, as held by another Division Bench, was *non est* in the eye of law since the appeal already stood dismissed automatically due to non-deposit of requisite court fees within a week from the previous order of the Division Bench even as per the specific language of such previous order. Hence, the application for non-prosecution was a mere eye-wash to create a ground for explaining the delay in filing the review application.
- 25.** Moreover, the scope of an appeal and a review application are entirely different. As such, it cannot be said that the petitioner had been prosecuting the appeal "for the same relief" as prayed in the review application, which is a pre-requisite of applicability of Section 14 (2) of the Limitation Act.
- 26.** Section 14(2) of the Limitation Act clearly stipulates that the relief claimed before both the previous and the current forums have to be the same. Thus, such essential pre-requisite of Section 14(2) is not satisfied in the present case.
- 27.** In view of the specific language of Section 114 as well as Order XLVII Rule 1 of the Code of Civil Procedure, there is no scope of any doubt that the petitioner, after having preferred the first appeal and the same being dismissed for the own laches of the petitioner, could not turn back and shop for forums by approaching the trial court afresh for review.

- 28.** The petitioner clearly awaited the fate of the appeal and, upon having failed due to the petitioner's own fault, resorted to the review application after a prolonged period of time.
- 29.** Within the contemplation of Section 114 and Order XLVII, the aggrieved party as an alternative remedy before an Appellate Court or by way of an a review application. Since the petitioner exhausted the remedy of appeal by preferring the same and having it dismissed by operation of the order of the Division Bench for non-compliance of its specific direction to deposit deficit court fees within one week from the date of order, it cannot, by any stretch of imagination, be said that the petitioner had either prosecuted in good faith before the Appellate Court or that the petitioner proceeded with due diligence in the appeal.
- 30.** The legal position being clear in the matter, no benefit of doubt could be attributed to the petitioner for having deliberately chosen the appellate court and, having failed therein, having approached the Trial Court for review of its own order.
- 31.** The principle laid down in *Bakshi Dev Rai* (supra) is not applicable at all to the instant case, since an SLP contemplates a prior leave to be granted for the purpose of presentation of an appeal before the Supreme Court. Refusal to grant such leave does not give rise to any occasion for such an appeal being registered at all, thereby excluding the scope of any merger with the impugned order. However, a first appeal is governed by Section 96 and Order XLI of the Code of Civil

Procedure, which contemplates a challenge both on facts as well as law. No previous leave is required to file a first appeal, unlike a second appeal, where the appellant has to satisfy the Court regarding involvement of a substantial question of law as a prerequisite for entertaining and admitting the second appeal for hearing.

- 32.** Hence, the petitioner had consciously exercised the option to prefer an appeal, which precluded the petitioner from taking out a further subsequent application for review of the decree challenged in the appeal itself, by operation of Order XLVII and Section 114 of the Code of Civil Procedure.
- 33.** In such view of the matter, none of the ingredients of Section 14(2) of the Limitation Act are applicable in the present case.
- 34.** In view of the above developments, it cannot be said that the petitioner had sufficient cause for occasioning the protracted delay of 1380 days in preferring the review, which could have entitled the petitioner to the benefit of Section 5 of the Limitation Act.
- 35.** Such being the case, the Trial Court acted well within its jurisdiction in rejecting the application filed by the petitioner for condonation of delay of 1380 days in filing the review. Hence, there is no scope of interference with the impugned order.
- 36.** Accordingly, C.O. No.1598 of 2020 is dismissed on contest, thereby affirming the impugned order dated June 15, 2019 passed in

Miscellaneous Case No.08 of 2016 by the Civil Judge (Senior Division),
Eighth Court at Alipore, District – South 24-Parganas.

- 37.** There will be no order as to costs.
- 38.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)