

\$~109

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

% *Date of Decision: 19th May, 2023*

+ C.R.P. 293/2019

KAMLESH KUMARI & ANR Petitioners

Through: Mr. Ankit Jain, Advocate.

versus

SETH BHAGWAM DASS EDUCATIONAL SOCIETY

& ORS

..... Respondents

Through: Mr. Vidit Gupta and
Mr. Chetan Singh, Advocates for R-1 and
R-2.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. Present petition has been filed by the Petitioners laying a challenge to the impugned order dated 21.10.2019 passed by the Trial Court in Case No. 10505/2016, whereby their application under Order VII Rule 11 CPC has been dismissed. Petitioners are Defendants before the Trial Court and Respondents No. 1 and 2 herein are the Plaintiffs and parties hereinafter are referred to by their litigating status before the Trial Court.

2. At the outset, it needs to be mentioned that while the application was filed by the Defendants raising numerous grounds for rejection of the plaint, learned counsel for the Defendants submits that he would restrict his arguments to the objection relating to the bar of limitation.

3. Plaintiff No. 2 is the real brother of late Sh. Shyam Sunder Goyal and at the time of inception of Plaintiff No. 1 Society in 1986, Plaintiff No. 2 was the President of the Society. As per the

Defendants, Plaintiff No. 2 remained as a President for only one year and thereafter the Governing Body of the Society represented by Defendant No. 1 as President of the Society has been managing affairs of the Seth Bhagwan Dass School set up by Plaintiff No. 1. Disputes are stated to have arisen between the parties after the death of late Sh. Shyam Sunder Goyal on 18.12.2011 with respect to the property as well as management of the Society and the School.

4. Plaintiffs earlier filed a suit being Suit No. 500/2014. In the said suit, Ms. Kamlesh Kumari filed an application under Order I Rule 10 CPC for impleadment as a party. Defendant therein filed a written statement taking a plea that the suit was not maintainable as it suffered from the defect of non-joinder of necessary parties. Plaintiff filed an application under Order XXIII Rule 1(3) CPC seeking withdrawal of the suit. Vide order dated 05.04.2016 Trial Court, taking into consideration the nature of suit, defence taken by the Defendant and material on record, dismissed the suit as withdrawn with liberty to the Plaintiffs to file fresh suit as per law, on the same cause of action. In terms of the liberty granted by the Trial Court, the present suit was filed in July, 2016.

5. Written statement was filed by the Defendants upon receipt of summons. Thereafter, an application was filed under Order VII Rule 11 CPC by the Defendants seeking rejection of the plaint on numerous grounds including the bar of limitation, with which this revision petition concerns. Trial Court has dismissed the application rejecting the other grounds raised by the Defendants and concluded that the suit is not barred by limitation.

6. While the stand of the Defendants was that the alleged cause of action for filing the suit arose on 19.12.2011 and thus the suit filed in July, 2016 is barred by limitation, Plaintiffs had urged that the suit is

within limitation since Plaintiffs had filed suit bearing No. 500/2014 in 2014, which was disposed of as withdrawn on the ground of defect of non-joinder of necessary parties by filing an application under Order XXIII Rule 1(3) CPC and the Court had granted liberty to file a fresh suit on the same cause of action. Trial Court dismissed the application and on the aspect of limitation rendered a finding that as per the averments in the plaint the suit is not barred by limitation since the Court had granted permission to withdraw the suit and the period of earlier litigation has to be excluded under Section 14 of the Limitation Act, 1963 (hereinafter referred to as the 'Act').

7. Counsel for the Defendants contends that the Trial Court has erroneously placed reliance on Section 14 of the Act which was inapplicable to the present case. A plain reading of the said provision shows that Section 14 comes into effect only when the earlier proceeding was not maintainable on account of defect of jurisdiction or other causes of a like nature and it is not even the case of the Plaintiffs that the earlier suit was filed in the Court not having jurisdiction to entertain the suit. Trial Court has not appreciated the provisions of Order XXIII Rule 2 CPC which provides that in any fresh suit instituted on permission granted under Rule 1 of Order XXIII, Plaintiff shall be bound by law of limitation in the same manner as if the first suit had not been instituted. It is further submitted that even assuming that Section 14 applies, the Trial Court has not addressed the issue if the Plaintiffs were prosecuting the prior proceedings in good faith and without rendering a finding on the exercise of due care and attention has straightaway come to a conclusion that from the averments in the plaint the period of litigation has to be excluded. The exercise of power is therefore in violation of the explicit provisions of Section 14 and the law interpreting the said

provision. Learned counsel relies on the judgment of the Supreme Court in *Deena (Dead) Through LRs. v. Bharat Singh (Dead) Through LRs. and Others, (2002) 6 SCC 336*, where the Supreme Court held that the party seeking the benefit of Section 14 is required to establish that the prior proceedings were being prosecuted with due diligence and good faith as also 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 1CPC and exclusion of the period of pendency of the suit for computation of limitation in the subsequent suit under Section 14 of the Act.

8. *Per contra*, counsel for Plaintiffs defends the impugned order and submits that there is no infirmity in the finding of the Trial Court that the suit is not barred by limitation while deciding the application under Order VII Rule 11 CPC. Principles for adjudicating an application under the said provision are well-settled and at this stage Court is only required to examine the plaint and the documents appended thereto. Pleas taken in the written statement are wholly extraneous and irrelevant at this stage and if the averments in the plaint make out a case that the suit is within limitation, no further exercise is required to be carried out by the Court adjudicating the application. It is further submitted that Plaintiffs had filed a suit being Suit No. 500/2014, in which an objection was taken by the Defendant therein of non-joinder of necessary party. Since this was a technical defect, an application was filed under Order XXIII Rule 1(3) CPC for withdrawal of the suit and Trial Court permitted the withdrawal with liberty to file a fresh suit for the same cause of action. Plaintiffs filed present suit pursuant to the said liberty and for the same cause of action and since prior proceedings had been prosecuted with due diligence and in good faith, Trial Court rightly excluded the period

spent in the litigation for computing the period of limitation for filing the suit. Reliance is placed on the judgment of this Court in ***Babu Ram and Others v. Ran Singh and Another, 2019 SCC OnLine Del 8714***, where Court has held that Section 14 provides an exclusion of a particular period of time from the computation of limitation and consequently a party entitled to benefit of Section 14 is not seeking extension of time or condonation of delay but is relying on calculation of limitation which itself affords to the party exclusion of time spent in prosecuting a *bona fide* litigation which has been dismissed on grounds of jurisdiction or other cause of allied nature.

9. I have heard the learned counsels for the parties and examined their respective contentions.

10. Present revision petition involves an interplay and a hiatus between Order XXIII Rule 1(3)(a) CPC and Section 14 of the Act. Order XXIII CPC deals with withdrawal and adjustment of suits. Sub-Rule 3 of Rule 1 thereof lays down that where the Court is satisfied that: (a) a suit must fail by reason of some formal defect; or (b) there are sufficient grounds for allowing the Plaintiff to institute a fresh suit for the subject matter of the suit or part of the claim, it may on such terms as it thinks fit, grant the Plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of subject matter of such suit or such part of the claim. Section 14 provides for exclusion of time of proceeding *bona fide* in Court without jurisdiction. Sub-Section (1) lays down that 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 same matter in issue and is prosecuted in good

faith in a Court which from the defect of jurisdiction or other cause of a like nature, is unable to entertain it. Sub-Section (3) begins with a non-obstante clause and provides that notwithstanding anything contained in Rule 2 of Order XXIII CPC, 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. Rule 2 of Order XXIII CPC lays down that in any fresh suit instituted on permission granted under Rule 1, Plaintiff shall be bound by law of limitation in the same manner as if the first suit had not been instituted.

11. From a conjoint reading of the aforesaid provisions, it is palpably clear that Section 14(3) is in the nature of exception/proviso to Order XXIII Rule 2 CPC. The Supreme Court in ***Deena (Dead) Through LRs. (supra)*** held that for applicability of Section 14(3), conditions that are required to be satisfied are: (a) both the prior and subsequent proceedings are civil proceedings; (b) prosecuted by the same party; (c) prior proceeding had been prosecuted with due diligence and in good faith; (d) failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; and (e) both proceedings relate to the same matter and are in a Court. The Supreme Court further held that the main factor which would influence the Court in extending the benefit of Section 14 of the Act to a litigant is whether the prior proceeding was prosecuted with ‘due diligence and good faith’. The expression ‘good faith’ means exercise of due care and attention. Finding as to good faith or absence of it is a finding of fact. The Supreme Court also ruled that ‘defect of jurisdiction’ on a plain reading means that the Court must lack jurisdiction to entertain

the suit or proceeding. The words ‘or other cause of a like nature’ are to be construed *ejusdem generis* with the words ‘defect of jurisdiction’. Relevant paras are as follows:-

“13. From the provisions it is clear that it is in the nature of a proviso to Order 23 Rule 2. The non obstante clause provides that notwithstanding anything contained in Rule 2 of Order 23 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 23. 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.

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 the 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 v. Diwan Devi [AIR 1985 SC 1669] observed : (AIR p. 1670, para 3)

“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 23 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.”

12. In facts of the said case, the Supreme Court found that the Plaintiff had chosen to prosecute the suit despite the objection taken by the Defendant of non-impleadment of necessary party in the written statement and the prosecution was not in good faith and therefore upheld the judgment of the Trial Court dismissing the suit declining to grant benefit of provisions of Section 14 for computing the limitation period.

13. In the present case, Defendants have taken an objection to the suit being barred by limitation on the ground that the cause of action for filing the present suit had allegedly arisen on 19.12.2011 and the benefit of Section 14 cannot be granted as Plaintiffs had failed to prosecute the earlier suit with due diligence and had not even taken care to implead the necessary parties, being conscious of the nature of the disputes involved. It is true that Section 14 provides for exclusion of a particular period spent in prosecuting a *bona fide* litigation and is not really in the nature of extension of time or condonation of delay provisions. It is equally settled that Section 14 is wide in its application and is not confined in its applicability to defect of jurisdiction but also includes cases where prior proceedings have failed on account of other causes of like nature. In ***Union of India & Others v. West Coast Paper Mills Ltd. and Another (III)***, (2004) 3 SCC 458, the Supreme Court held as follows:-

“14....

However, Section 14 of the Limitation 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 where the prior proceedings have failed on account of other causes of like nature. The expression “other cause of like nature” came up for the consideration of this Court in Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi [(1975) 4 SCC 628] and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.”

14. Therefore, a defect of the nature as in the present suit where the Plaintiffs had failed to implead the necessary parties could well be covered under Section 14 in the facts and circumstances of a given case. This Court cannot agree with the counsel for the Defendants that the benefit of Section 14 is not available to the Plaintiffs as the withdrawal of the suit was under Order XXIII Rule 1(3)(a) i.e. formal defect and not on lack of jurisdiction. As held by the Supreme Court in ***Deena (Dead) Through LRs. (supra)***, Section 14(2) is in the nature of proviso to Order XXIII Rule 2 CPC and where it is shown that the prior proceeding was prosecuted with due diligence and good faith, the benefit of exclusion of the said period can be given for computing limitation period for filing the suit. What was however required to be shown by the Plaintiffs and tested by the Trial Court was whether the prior proceeding was prosecuted with due diligence and good faith.

15. From a reading of the impugned order of the Trial Court on the aspect of limitation, it is clear that the Trial Court has merely gone by the averments in the plaint and simply recorded that Plaintiffs are entitled to exclusion as per Section 14 of the Act and the suit is not barred by limitation. No doubt while adjudicating an application under Order VII Rule 11 CPC, Trial Court has to confine itself to the averments in the plaint, however, where issue is raised with regard to exclusion of time under Section 14 an exercise is required to be

carried out with regard to ‘good faith’ and ‘due diligence’, in prosecuting the prior litigation. The impugned order shows that no such exercise was carried out by the Trial Court and in the absence of a finding of good faith in prosecuting the earlier suit, it was not open to the Trial Court to render a finding that the suit is not barred by limitation. If the Trial Court did think it appropriate at this stage to decide the question of limitation then it ought to have dealt with the ingredients of Section 14 of the Act and examined if the Plaintiffs were prosecuting the earlier suit with due diligence with regard to non-impleadment of necessary parties etc. In the alternative, Trial Court could have adopted the course of deciding the issue of limitation after evidence, as a mixed question of fact and law. The order impugned herein cannot be sustained for the reasons that it is not in consonance with Section 14 of the Act read with Order XXIII Rules 1 and 2 CPC and the law laid down by the Supreme Court in ***Deena (Dead) Through LRs. (supra)***, as the Trial Court has not followed either of the two permissible courses of the action.

16. The judgment in the case of ***Babu Ram and Others (supra)*** relied upon by the Plaintiffs is distinguishable for the reason that perusal of the Trial Court order in the said case, which is extracted in the judgment, shows that the Trial Court had entered into the merits of the facts and dates brought forth by the Plaintiffs for seeking benefit of Section 14 and had rendered a finding in the given facts that the time spent in prosecuting the earlier litigation was in good faith and was liable to be excluded for computing limitation. Despite entering into this exercise and coming to a *prima facie* finding in favour of the Plaintiffs, the Trial Court held that being a mixed question of law and fact, limitation cannot be decided without proper evidence and on this ground dismissed the application under Order VII Rule 11 CPC. Quite

in contrast to this, the course of action followed by the Trial Court in the present case. Quite in contrast to the said cause of action, in the present case, the Trial Court has not examined the issue on merits and has straightaway concluded that the earlier suit was prosecuted in good faith and therefore the present suit is within the limitation. Either, the Trial Court should have examined the issue on merits to come to a finding that the earlier suit was prosecuted in good faith or should have left the issue of limitation to be decided after evidence, being a mixed question of law and fact. Therefore, in my view, the finding that the suit is not barred by limitation cannot be sustained and to this extent the impugned order deserves to be set aside, directing the Trial Court to re-hear the application under Order VII Rule 11 CPC.

17. The revision petition is accordingly allowed to the limited extent of the plea of bar in limitation, leaving it open to the Trial Court to decide the course of action with respect to the limitation issue, in accordance with law. Liberty, as sought, is granted to the Defendants to press other issues raised in the application under Order VII Rule 11 CPC at the appropriate stage.

18. It is made clear that this Court has not expressed any opinion on the merits of the application under Order VII Rule 11 CPC or any other issue arising in the suit and the observations in the present order are limited to disposal of the present revision petition.

JYOTI SINGH, J

MAY 19, 2023/shivam