

(1985) 09 AHC CK 0026
In the Allahabad High Court
Case No : Second Appeal No. 2062 of 1964

Chait Ram Saini (deceased by L.Rs)	Vs	APPELLANT
Ghasi Ram (deceased by L.Rs) and Others		RESPONDENT

Date of Decision : 05-09-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103
Limitation Act, 1963 — Section 14

Citation : AIR 1986 All 50

Hon'ble Judges : N.N. Mithal, J

Bench : Single Bench

Advocate : A.K. Banerjee, Ashok Gupta, Swami Dayal, V.D. Ojha and Santosh Kumar, for the Appellant; K.B.L. Gaur and A.B.L. Gaur, for the Respondent

Final Decision : Allowed

Judgement

N.N. Mithal, J.—This is defendants' second appeal and the only question of importance raised is about limitation. How this question arises would be clear only from the narration of facts. The defendant-appellant had filed Suit No. 279 of 1950 against one Chhuttan for rent and ejection. The suit was decreed after contest and execution proceeding No. 331 of 1951 ensued. The matter took a tortuous route, several objections were filed, attempts were made to avoid delivery of possession and ultimately all these attempts failed and time came for executing the decree again. On an application made by the defendant appellant (the plaintiff decree-holder in that suit) the Amin was directed to deliver possession. This time he was obstructed by the plaintiff-respondent and an application under Order 21, Rule 27 C.P.C. was made. The respondent filed objections pleading inter alia that an earlier application for execution had been dismissed and, therefore, a second application was barred by res judicata. He also set up his right to present possession over the property. After hearing the objections, the application under Rule 97 C.P.C. was allowed on 3-2-1956 and the objections raised by the plaintiff-respondent were dismissed. He had a remedy of filing a suit under Rule 103 of Order 21 but instead he filed a revision

before the High Court on 9-2-1956 which was dismissed on 30-10-1957 holding that the application is not barred by res judicata and the other matter was not even looked into. After the dismissal of the revision, the present suit No. 390 of 1958 was filed on 26-9-1958 by the respondent under Order 21, Rule 103 C.P.C. It was pleaded that the time spent by the plaintiff before the High Court was liable to be excluded and the suit was within limitation. This position was contested by the present appellant and it was urged that u/s 14 of the Limitation Act, no such benefit could be availed by the plaintiff since the revision was heard and decided on merits and the Court did not lack jurisdiction in the matter. Both the Courts below have, however given benefit of Section 14 to the plaintiff and on merits the suit has been decreed holding that the plaintiff was a co-sharer in the property.

2. In appeal, it is conceded by both the sides that if merits are gone into, then the shares of the parties may not be determined as was done by the Court below for it would be sufficient to uphold the plaintiffs right if he had even a smallest possible share in the property. They also concede that in such an event, the finding about share recorded by the Court below should be set aside and be left to be decided in a proper suit for partition if such a situation arises.

3. Thus the foremost question which needs determination in the appeal was whether the suit of the plaintiff was within time and this will primarily depend on the question whether the plaintiff would be entitled to exclude the time spent by him in filing the revision. According to Sri Swami Dayal, learned counsel appearing for the appellant, Section 14 of the Um. Act did not apply in terms to the present case. It is, however, contended by Sri K. B. L. Gaur for the respondent that firstly the revisional order was not on merit but merely decided the question of res judicata and the revisional Court had no jurisdiction to decide any matter on the facts of the dispute and as such had no jurisdiction to that extent. The High Court, therefore, suffered from a disability to adjudicate in the matter for a cause of the like nature, and, therefore, the time spent in revision was liable to be excluded. Secondly, it is submitted that the order of the executing Court became merged in the order of the revisional Court and since that order was passed on 30-10-1957, the suit was well within time.

4. The Lim. Act of 1908 has been repealed and replaced by the Lim. Act of 1963. Since the suit was brought in 1958, the provision of the old Act would be applicable, Section 14 at that time as is relevant for our purposes was in the following terms :

"14. Exclusion of time of proceeding bona fide in Court without jurisdiction. --(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.-- In excluding the time during which a former suit or application was pending the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II-- For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding."

5. It is the consistent view prevailing now that to attract the application of Section 14(1) the parties seeking its benefit must satisfy the Court (1) that the plaintiff was prosecuting another civil proceeding with due diligence (2) that the earlier proceedings were based on the same cause of action and (3) the former proceeding was being prosecuted in good faith in a Court which from the defect of jurisdiction or other cause of like nature was unable to entertain it. At the relevant time, the word "revision" was not used along with civil proceedings in the Court of first instance or the Court of appeal but the consistent view of this Court had been that the Court of revision was included therein. (See B. Chhuttan Lall Vs. B. Dwarka Prasad . Due diligence is not disputed before me. It is also not disputed that the plaintiff had been prosecuting another civil proceeding against the appellant which was founded on the same cause of action. However, what is contended is that the Court where the proceeding was being taken was not one which was unable to entertain it (1) from defect of jurisdiction or (2) other cause of a like nature. For the appellant it is urged that although a revision had been filed while the plaintiff had a remedy of filing a suit open to him, the revision was not dismissed by the Court for lack of jurisdiction or such other cause of like nature. In fact the revision was heard by the Court on merits and was decided against the plaintiff. In such circumstances, it is urged that the plaintiff cannot take the benefit of Section 14 for extending the limitation. In a Full Bench decision, the Lahore High Court in the case of Jai Kishen Singh v. Peoples Bank of Northern India, AIR 1944 Lahore 136 had occasion to deal with a matter of this kind. The view taken by that Court was later endorsed by the Supreme Court also in India Electric Works Ltd. Vs. James Mantosh and Another, . It will, however, be proper here to extract the relevant portion of the Lahore decision on the question : --

"The words "or other cause of like nature," in Section 14 must be read so as to convey something ejusdem generis or analogous with the preceding words relating to the defect of jurisdiction. If these words are 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 a Court to entertain the suit or application either in its inception or at all events as to prevent it from deciding it on its merits. It is not possible to give an exhaustive list of defects that these words may be taken to cover. But if they are such as have got to be decided before the merits of the case can be gone into and if they do not necessitate an examination of the merits of a case, they may fall within the purview of these words."

6. This case was referred with approval in the case of India Electric Works Limited (supra) although on the facts of the case it was found that the defect in the earlier suit was of such a nature which had to be decided before the claim could be disposed of on merits and, therefore, benefit of Section 14 was given.

7. Much to the same effect is a decision of the Calcutta High Court in Corporation of Calcutta Vs. Pulin Chandra Daw and Others, . There also the words "or other cause of like nature" came in for interpretation and it was held that since the claim of the plaintiff in the prior suit had been adjudicated upon and disposed of on merits, it could not be said that the previous suit was misconceived or that the Courts were under any infirmity or there was any defect of jurisdiction or any defect of like nature which prevented the Courts from entertaining the earlier suit.

8. The latest case on the point is Zafar Khan and Others Vs. Board of Revenue, U.P. and Others, where a previous proceeding u/s 144 had been dismissed whereafter the suit giving rise to the appeal was filed. It was held that time spent by the plaintiff in prosecuting the proceedings u/s 144 could not be excluded with the aid of Section 14(1) of the Lim. Act. Explaining the term "cause of like nature", it was observed that it must take its colour and content from the just preceding expression, "defect of jurisdiction". Prima facie it appears that there must be some preliminary objection which if it succeeds, the Court would be incompetent to entertain the proceeding on merits, such defect could be said to be "of the like nature" as defect of jurisdiction.

9. In the light of this, it must be examined whether the revision was dismissed by the High Court for some cause which may be termed as a cause of a like nature. As already observed, the revision was dismissed after deciding the question of res judicata on merits and the Court refused to enter into the other question on merits as u/s 115 C.P.C. it could only enter into the question relating to exercise of jurisdiction by the Court below. It has been urged that it was necessary for the plaintiff to raise the question of res judicata and it was possible to defeat the decree-holder only on that ground. That may be so but it has not been contended, and rightly so, that this question of res judicata could not be raised by the plaintiff while instituting a suit under Rule 103 of Order 21 C.P.C. If that was so, why after all was it necessary to file a revision? The whole matter including the question of res judicata and facts could be assailed by the plaintiff in that suit. Even if an attempt was made to get the finding on res judicata reversed in revision, the plaintiff ought to have filed suit within a period of one year as provided under Article 11-A of the Lim. Act. When a suit is filed beyond time, it is for the plaintiff to satisfy the Court that he can avail the benefit of Section 14 and that grounds existed for excluding certain period spent by him in pursuing an earlier civil proceeding. That earlier civil proceeding in the present case is the revision that was filed against an order passed by the Executing Court under Rule 97 C.P.C. As we have seen that revision was entertained and disposed of on merits and was not either dismissed in limine or for any reason touching upon the jurisdiction of the Court or for such other reasons. It is true that the

words "is unable to entertain it" do not necessarily mean that want of jurisdiction or other cause of like nature must exist at the very time of institution of civil proceeding but may even arise later on or at the time of dismissal of the same and the mere fact that the revision was initially entertained by the Court will not come in the way of the plaintiff. However, even ultimately the revision was not dismissed for want of jurisdiction or cause of like nature but on merits.

10. In *Radha Kishun and Others Vs. Firm Sri Niwas Ram Kumar and Others*, a situation very similar to the one in the present case had arisen. There also an application under Order 21 Rule 100 C.P.C. was decided against the plaintiff against which a revision was filed which failed. Thereafter the suit under Order 21 Rule 103 C.P.C. was filed and it was held that limitation would run not from the date when the revision was dismissed but the date on which order under Rule 100 C.P.C. was passed.

11. I am, therefore, not inclined to agree with the submission of the respondent that the plaintiff was entitled to the benefit of Section 14 only because the revision filed by him had not been decided on merits as the Court had no jurisdiction to entertain the question of fact involved in the order passed in proceedings under Order 21 Rule 97 C.P.C. When a clear provision exists for challenging such an order by means of a suit, the plaintiff had taken a calculated risk in challenging the order in revision u/s 115 C.P.C. knowing fully well that in such a revision the Court would be concerned only with the limited question of exercise of jurisdiction by the Court below. This was assailed only on the question of res judicata which was dealt with by the revisional Court and decided against the plaintiff. As said above, the question of res judicata, even if wrongly decided by the executing Court, could have been effectively raised by the plaintiff in the regular suit also and it was not at all necessary to go up in revision. Even if the plaintiff wanted to assail the finding on the question of res judicata in revision, there was nothing that should have prevented him from filing a suit under Order 21 Rule 103 C.P.C. within a period of one year from the date of the order. I am, therefore, clearly of the view that in this case there existed no other cause of a like nature for the High Court while dismissing the revision. The High Court did entertain it and after hearing decided to dismiss it on merits. Thus benefit of Section 14 cannot be had by the plaintiff.

12. Apart from this, although the respondent may have prosecuted the civil proceedings in the Court diligently, but his action cannot be termed as bona fide. Rr. 96 and 97 lay down a special provision to investigate the claims of parties not bound by the decree and the summary decision of the executing Court was final subject only to the result of a suit under Rule 103 thereof. When law itself provides a certain remedy for assailing the adverse order recourse to revision must be deemed to be ill advised. Even though a revision may lie yet the aggrieved party cannot let go its remedy by way of suit.

13. The Courts below while considering this aspect appear to have committed mistake that after holding that a revision could lie against the adverse order both

of them failed to further examine whether the plaintiff had satisfied the remaining conditions necessary for the applicability of Section 14 i.e. whether the Court was unable to entertain it for want of jurisdiction etc. Unless this further question had been examined, it was not right for the Court to hold that Section 14 would apply and time spent in such proceedings could be excluded while computing the period of limitation. As seen earlier, the revision not having been filed for reasons of defect in jurisdiction or any other cause of a like nature, benefit of Section 14 could not be legally availed by the plaintiff. The suit having been brought more than one year after the suit was barred by time.

14. The other ground to extricate the case was that the order of the executing Court had merged in the order of the revisional Court. That is not so. All orders passed by inferior Courts do not get merged in the orders of the higher Courts. The principle of merger applies when the order of the lower Court is subject to appellate or revisional jurisdiction of the higher Court. Here the order of the Executing Court was not amenable to any appeal or revision but could be reversed in a regular suit filed under Rule 103 only and as such the plaintiff cannot get any such benefit either.

15. In view of the fact that the appeal can be allowed on this legal question alone, it would be quite unnecessary to enter into the merits of the matter.

16. Thus, I find force in the appellant's contention and hold that the plaintiff-respondent was not entitled to avail the benefit of Section 14 Lim. Act for the reasons given earlier and the suit was barred by time.

17. The appeal succeeds and is hereby allowed. The plaintiff's suit shall stand dismissed with costs throughout.