
(2001) 09 BOM CK 0020
In the Bombay High Court
Case No : Civil Application No. 4574 of 2001

Lalchand Manakchand Mehta	Vs	APPELLANT
Neelamchand Harakchand Mehta and Others		RESPONDENT

Date of Decision : 25-09-2001

Acts Referred:

Limitation Act, 1963 — Section 14, 5

Citation : (2002) 2 ALLMR 795 : (2003) 51 BOMLR 17

Hon'ble Judges : B.B. Vagyani, J

Bench : Single Bench

Advocate : S.P. Brahme, for the Appellant; V.T. Chaudhari, for Respondent Nos. 1 and 2, N.R. Katneshwarkar, for Respondent Nos. 3(A) to 3(C), for the Respondent

Final Decision : Dismissed

Judgement

B.B. Vagyani, J.—Heard. Rule. Rule returnable forthwith. With consent of parties, taken up for final hearing forthwith.

2. The petitioner has filed this civil application for condonation of delay caused in filing the first appeal. According to the petitioner, there is a delay of 402 days in filing the first appeal.

3. The petitioner (original defendant No. 1 in Special Civil Suit No. 66 of 1980) and respondent Nos. 1 and 2 (original plaintiffs) are brothers. The respondent Nos. 1 and 2 had filed Special Civil Suit No. 66 of 1980 for partition and separate possession of the property. On 31-10-1984, a preliminary decree was drawn. The respondent Nos, 1 and 2 are declared to have 1/2 share in the suit properties. The Court Commissioner was appointed to suggest partition. The Court Commissioner submitted his report. The learned trial Court thereafter passed final decree on 24-12-1999. The Commissioner's report Exh. 207 is made part and parcel of the final decree.

4. The petitioner then filed Civil Revision Application No. 94 of 2000 in this Court

on 22-6-2000 along with an application for condonation of delay. This Court condoned the delay by order dated 1-2-2001, According to the petitioner, the civil revision application has been rejected as not maintainable by order dated 23-4-2001.

5. The petitioner then applied for certified copy of the final decree on 20-3-2001. He received copy of final decree on 27-4-2001 and filed first appeal on 2-5-2001 along with application for condonation of delay. The petitioner has mainly relied upon Section 14 of the Limitation Act, 1963 and claimed the benefit of exclusion of time consumed in Civil Revision Application No. 94 of 2000.

6. The respondent Nos. 1 and 2 who are the original plaintiff, filed affidavit in reply and thereby contested the application filed by the petitioner for condonation of delay. It is contended by the respondent Nos. 1 and 2 that there is inordinate delay of 402 days in filing the first appeal. It is further contended that the petitioner has not satisfactorily explained the delay. The respondent Nos. 1 and 2 pointed out that the Civil Revision Application No. 94 of 2000 was filed by the petitioner to challenge report of the Court Commissioner. The final decree has not at all been challenged by the petitioner by filing civil revision application. Moreover, it is also pointing out by the respondent Nos. 1 and 2 that this Court has not rejected the civil revision application on account of lack of jurisdiction. It is made clear that the civil revision application was allowed to be withdrawn by the Court and therefore, the application for condonation of delay is liable to be rejected. A serious grievance is made by respondent Nos. 1 and 2 to the effect that the petitioner is in exclusive possession of the property to be partitioned for the last so many years and, therefore, the petitioner is trying to protract the litigation. The respondent Nos. 1 and 2 prayed for dismissal of the application for condonation of delay.

7. The learned Advocate Mr. Brahme vehemently submitted that the case of the petitioner submitted that the case of the petitioner attracts Section 14 of the Limitation Act and, therefore, the time consumed in prosecuting Civil Revision Application No. 94 of 2000 is liable to be excluded. The learned Advocate Mr. Brahme further submits that there was delay in filing the civil revision application and therefore, the civil revision application was filed along with an application for condonation of delay. Before entertaining the civil revision application, this Court by order dated 1-2-2001, condoned the delay and thereafter the civil revision application has been rejected on the ground of lack of jurisdiction. According to learned Advocate Mr. Brahme, the provisions of Section 14 of the Limitation Act are required to be construed liberally in order to save the remedy and not to destroy the remedy. In order to buttress his submissions, the learned Advocate Mr. Brahme relied upon decision of this Court in the case of Surajmal Dagduamji, Shop Vs. Shrikisan Ramkisan, .

8. The learned Advocate Mr. Chaudhari for respondent Nos. 1 and 2 urged that the requirements contemplated in Section 14 of the Limitation Act are not at all satisfied and, therefore, Section 14 of the Limitation Act cannot be pressed into

service.

9. The law of limitation is made to advance justice and not to destroy the rights of parties. While considering the prayer for condonation of delay, the Court is required to take liberal and pragmatic approach. The Court cannot reject the prayer for condonation of delay on hypertechnicalities. In the case of Surajmal (cited supra), this Court has observed that Section 14 of the Limitation Act must be liberally construed. This Court relying on the observations made in the case of AIR 1939 150 (Nagpur) , has held that the liberal approach must be adopted while construing the provisions of Section 14 of the Limitation Act, In the light of ratio of Surajmal (cited supra), legal position boils to this that while interpreting the provisions of Section 14 of the Limitation Act, proper approach is required to be taken so to save the remedy than bar the proceeding.

10. The learned Advocate Mr. Brahme then submits that the present petitioner prosecuted Civil Revision Application No. 94 of 2000 with due diligence and in good faith and, therefore, the delay has to be condoned. The learned Advocate Mr. Brahme, during course of his submissions, drew my attention to the definition of "Good faith" as provided in Section 2(h) of the Limitation Act, 1963. Pointing out the definition of God Faith, the learned Advocate Mr. Brahme urged that the petitioner's statutory right of first appeal cannot be aborted at the initial stage. In order to support his submission, he heavily relied upon the case of Ghasi Ram and Others Vs. Chait Ram Saini and Others, .

11. On the other hand, the learned Advocate Mr. Chaudhari argued that the petitioner is well versed with the Court proceedings. The litigation is pending since 1980. The petitioner is not illiterate person. He also points out that the petitioner sought legal advice of Senior Advocate of the Bar and, therefore, it cannot be said that the petitioner prosecuted the previous litigation with due diligence and in good faith. He points out that correctness of Commissioner's report was challenged by filing Civil Revision Application No. 94 of 2000. The petitioner did not file first appeal. Therefore, it cannot be said that the earlier proceeding and the subsequent proceeding relate to the same issue. The issue involved in civil revision application was quite different and the issue involved in this first appeal is altogether different. He also points out that the earlier proceeding i.e. Civil Revision Application No. 94 of 2000 was withdrawn at the request of the petitioner and it was not rejected because of lack of jurisdiction. Pointing out these infirmities, the learned Advocate Mr. Chaudhari urged that the petitioner cannot take benefit of rule of exclusion as contemplated in Section 14 of the Limitation Act, 1963.

12. In order to support his submissions, the learned Advocate Mr. Chaudhari relied upon following case :

(1) Madhavrao Narayanrao Patwardhan Vs. Ramkrishna Govind Bhanu and Others, , and

(2) Vijay Kumar Rampal and Others Vs. Diwan Devi and Others, .

13. No doubt, while construing the provisions of Section 14 of the Limitation Act, proper approach is required to be adopted and the Court is required to exercise its jurisdiction so as to advance justice rather than abort the proceedings. However, it does not mean that the Court should ignore the element of due diligence and good faith. These two words "due diligence" and "in good faith" are incorporated in Section 14 with a special intention. If the delay is caused in prosecuting the proceeding in a wrong Forum and because of defect of jurisdiction or other cause of a like nature, the Court is unable to entertain the proceeding filed in a wrong Forum, the time consumed in such litigation is required to be excluded by virtue of Section 14 of the Limitation Act. On number of occasions, because of widespread illiteracy and because of ill-advice, the proceedings are initiated in a wrong Forum and because of defect of jurisdiction, ultimately the proceedings are dismissed. Under such circumstances, the person prosecuting the earlier proceedings cannot be punished simply because he chose a wrong Forum. Therefore, in order to save his remedy, the theory of exclusion of time has been introduced by Section 14 of the Limitation Act, Therefore, true spirit behind exclusion of time theory is required to be given effect to.

14. In order to revoke the exclusion of time theory, as envisaged in Section 14 of the Limitation Act, the party claiming benefit of exclusion of time must show that he acted with due diligence in prosecuting the proceedings filed in wrong Forum. The matter does not rest here, The party claiming exclusion of time must further show that he prosecuted earlier proceeding in good faith in a Court which from defect of jurisdiction or other cause of a like nature, was unable to entertain the said proceeding. Unless these pre-requisites i.e. due diligence, in good faith, defect of jurisdiction and same matter in issue are satisfied, the party claiming exclusion of time cannot succeed.

15. The burden of showing presence of element of due diligence and in good faith is on the party claiming exclusion of time. Therefore, in this particular case, burden is on the petitioner to show that he prosecuted Civil Revision Application No. 94 of 2000 with due diligence and in good faith. In addition, the petitioner has to prove that the Civil Revision Application No. 94 of 2000 was rejected because of defect of jurisdiction. In case of Madhavrao Patwardhan (cited supra), the Supreme Court has held that the burden of bringing the case within Section 14 of the Limitation Act is on the plaintiff. If the plaintiff does not discharge the initial burden, which lay upon him, the burden does not shift to the defendant to show contrary. The Supreme Court has also observed that the question involved in a proceeding claiming benefit of exclusion of time is not as to whether the plaintiff acted dishonestly but the question is whether given due care and attention, the plaintiff could have discovered the omission. In the case in hand, with slight care and attention the petitioner could have discovered the omission of filing an appeal if really he intended to challenge the final decree.

16. In the case of VijayakumarRampal(cited supra), the Supreme Court observed that the expression "good faith" qualifies prosecuting the proceedings in the

Court which ultimately is found to have no jurisdiction. The Supreme Court has observed that Section 14 of the Limitation Act provides for exclusion of time of proceedings bona fide in Court without jurisdiction. It is further said 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 against the defendant, shall be excluded where the proceeding relates to the same matter in issue and is prosecuted in a good faith in a Court which from a defect of jurisdiction, is unable to entertain it.

17. After subjecting the factual position to close scrutiny, I am of the clear opinion that the petitioner challenged correctness of Commissioner's report by filing Civil Revision Application No. 94 of 2000. The Civil Revision Application No. 94 of 2000 is not at all rejected on account of defect of jurisdiction. After having read the order dated 23-4-2001 passed by this Court in Civil Revision Application No. 94 of 2000, it is clearly seen that during pendency of civil revision application, wherein correctness of Commissioner's report was challenged, the trial Court already disposed of the matter by drawing final decree. Having witnessed this development, the Advocate for the petitioner requested for withdrawal of the Civil revision application and on acting on the request, the petitioner was allowed to withdraw the civil revision application and the civil revision application ultimately came to be disposed of as withdrawn on 23-4-2001. Therefore, it is beyond doubt clear that Civil Revision Application No. 94 of 2000 is not at all rejected on account of defect of jurisdiction or other cause of like nature.

18. The petitioner challenged correctness of Commissioner's report in Civil Revision Application No. 94 of 2000. From perusal of the order passed by this Court dated 23-4-2001, it is clear that the legality of a final decree was not at all challenged by the petitioner in Civil Revision Application No. 94 of 2000. Therefore, the earlier Civil Revision Application No. 94 of 2000 and the present appeal, which is filed against the final decree, cannot be said to be identical matters. Under the circumstances, it cannot be said that the petitioner has satisfied the element of same matter in issue.

19. Even otherwise, it cannot be said that the petitioner prosecuted Civil Revision Application No. 94 of 2000 with due diligence and in good faith. The litigation is pending since 1980, The petitioner is not illiterate. The petitioner has got worldly knowledge. He is well versed with the Court proceedings, because in the past, the petitioner had filed Writ Petition No. 545 of 1986. The petitioner prosecuted Civil Revision Application No. 94 of 2000 through Senior Advocate of the Bar. Therefore, it cannot be said that the petitioner is ill-advised for filing civil revision application instead of filing first appeal. In case in hand, the element of "due diligence" and "in good faith" are totally absent. Therefore, the petitioner cannot claim benefit of exclusion of time, as contemplated in Section 14 of the Limitation Act. The case of Ghasi Ram (referred supra) does not come to the rescue of the petitioner.

20. There is inordinate delay of 402 days. The delay is explained properly. The petitioner has committed highest degree of negligence. A reference with profit can be made to the case of Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., . The Supreme Court has observed that expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties and this legal right which has accrued to the decree-holder by lapse of time, should not be lightly disturbed. It is further observed by Apex Court that even after sufficient cause has been shown, a party is not entitled to the condonation of delay as a matter of right. The proof of a sufficient cause is a condition precedent for exercise of the discretionary jurisdiction vested in the Court by Section 5. If sufficient cause is not proved, nothing further has to be done and the application for condoning the delay has to be dismissed on that ground alone. If sufficient cause is shown, then the Court has to enquire whether in its discretion it should condone the delay. The Supreme Court further observed that the considerations of bona fide or due diligence are always material and relevant when the Court is dealing with the applications made u/s 14 of the Limitation Act. In dealing with such applications, the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14.

21. In the instant case, the petitioner has not shown that he had sufficient cause in not filing the first appeal within limitation. Therefore, I am of the view that this is not a fit case for exercising discretionary jurisdiction in favour of the petitioner. He has also failed to show that he prosecuted Civil Revision Application No. 94 of 2000 with due diligence and in good faith. In earlier proceedings i.e. Civil Revision Application No. 94 of 2000, the correctness of Commissioner's report was challenged. In the present proceedings, the petitioner has challenged the final decree. Therefore, the test of same matter in issue is also lacking.

22. In the result, Civil Application must fail and accordingly, it stands rejected with a direction to pay costs of Rs. 2,000/- to the contesting respondent Nos. 1 and 2. Rule discharged.