

(1943) 10 PAT CK 0002
In the Patna High Court

Radha Kishun and Others

APPELLANT

Vs

Firm Sri Niwas Ram Kumar and Others

RESPONDENT

Date of Decision : 14-10-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Article 11A, 14

Citation : AIR 1944 Patna 225

Hon'ble Judges : Fazl Ali, C.J.;Chatterji, J

Bench : Full Bench

Judgement

Fazl Ali, C.J.—This is an appeal by the plaintiffs in a suit brought by them under Order 21, Rule 103, Civil P.C., and is directed against the decree of the Subordinate Judge of Monghyr dismissing that suit. The suit has been dismissed on the ground of limitation and therefore the facts of the case which are somewhat complicated need not be set out in detail but reference will be made only to such facts as have a direct bearing upon the question which is vital to the decision.

2. The plaintiffs and the defendants first party purchased the same property at two different sales. The plaintiffs purchased the property in execution of a decree on 6th April 1938 and they allege to have obtained delivery of possession on 2nd July 1938. The defendants, first party on the other hand, purchased it on 25th August 1938 and they obtained delivery of possession on 25th December 1938. The plaintiffs' case is that as a result of the latter event they were dispossessed and upon this allegation they made an application under Order 21 Rule 100 before the executing Court, but that application was rejected on 26th June 1939. The present suit was brought on 6th j December 1940, that is to say, more than a year after the order made by the executing Court in the Miscellaneous Case under Order 21 Rule 100. It is common ground that Article 11A, Limitation Act, applies to the present suit and inasmuch as the period of limitation provided in that article is one year from the date of the order passed by the executing Court, prima facie the plaintiffs' suit is barred by limitation.

3. The plaintiffs, however, seek to save limitation by pleading that they are entitled to the benefit of Section 14, Limitation Act, and claim the benefit of this section upon the following facts. After the order of the Court which had delivered possession to the defendants the plaintiffs filed an appeal against that order on 13th September 1939. The order that was passed by this Court upon their memorandum of appeal was in these terms:

Issue notice. In case it is found at the time of the hearing that no appeal lies, this application may be treated as an application for revision.

4. On 20th September 1940 the plaintiffs' appeal was dismissed on the ground that the appeal was not competent. At that time the learned advocate for the plaintiffs urged that the memorandum of appeal should be treated as an application in revision but it was held that there was no such error in the judgment of the Court which was the subject of the appeal as would attract the operation of Section 115, Civil P. C. Now the plaintiff-appellants contend that the period of limitation should be computed not from 26th June 1939, which was the date of the order of the first Court, but from 20th September 1940 which is the date of the order passed by the High Court, and it is pointed out that if this view is accepted, the suit was within time. Dr. Mitter, who appears on behalf of the appellants, contends that Section 14 should be liberally construed and one of the points raised by him is that the expression "prosecuted in good faith" which occurs in the section is wide enough to cover a case where another litigant has been misled by a wrong advice given bona fide by his lawyer. This, in my opinion, is a very debatable proposition, but assuming for the time being that the view put forward by Dr. Mitter is correct, it seems to me that Section 14 can have no application to the present case, because the second important element of that section is that the civil proceeding which proves infructuous does not succeed "owing to defect of jurisdiction of the Court before which it is prosecuted or other cause of a like nature." Now, let us analyse the facts of this case.

5. What has happened is that though in fact no appeal lay, yet the plaintiffs preferred an appeal against an order of the executing Court. The appeal failed because it was found that it was incompetent. Now, can it be said that this Court did not entertain the appeal owing to defect of jurisdiction? In fact the defect was not in the jurisdiction but it was in the procedure followed by the plaintiffs. Again, it seems to me that it cannot be argued that this Court was unable to entertain the appeal owing to "a cause of like nature." The fact that an appeal fails because a litigant is wrongly advised can by no stretch of reasoning be regarded as a "cause of a like nature."

6. This view is supported by the decision of a learned Judge of the Calcutta High Court in *Meghmala Debi Chakravarti Vs. Saday Parhya and Others*, as well as by the decision of a Division Bench of the Rangoon High Court in *S.R.M.M.A. Firm v. Maung Po. Saung* AIR 1929 Rang. 297. The propositions which were laid down in the former case were these: (1) When the High Court has refused to interfere in revision with an order passed in a claim case, the period of limitation provided

for by Article 11A, Limitation Act, for a suit under Order 21 Rule 103, Civil P.C., would run from the date of order in the claim case and not from the date of the High Court's order discharging the rule and (2) The plaintiff would not be entitled in such a case to an extension of time u/s 14(1), Limitation Act, inasmuch as even if the words "Court of appeal" be deemed to include a Court of revision, the refusal of the High Court to interfere is not due to a defect of jurisdiction or any cause of a like nature.

7. In *S.R.M.M.A. Firm v. Maung Po. Saung* (AIR 1929 Rang. 297 the learned Judges of that Court held as follows: The High Court does not ordinarily interfere in revision with orders made under Order 21 Rule 63, Civil P.C. Such orders are conclusive and the rule itself provides a remedy by way of a suit. If a person or his advocate chooses nevertheless to apply for revision of such an order and after the dismissal of his revision application files a declaratory suit more than a year after the passing of the order under Order 21 Rule 63, he cannot claim the benefit of Section 14, Limitation Act, and ask for the exclusion of the time taken up in the revision proceedings. Dr. Mitter has relied on the decision of a learned Judicial Commissioner of Nagpur in *Laxmandas v. Chunnilal* AIR 1931 Nag. 17 but for the reasons I have already stated I would prefer to follow the two decisions to which I have already referred.

8. There is another matter which adds to the difficulty of the appellants. I have already quoted the order which was made by this Court at the time the plaintiffs' appeal against the order of the executing Court was admitted. The terms of the order which was passed on that occasion were sufficient in themselves to put the plaintiffs on their guard and if the plaintiffs knowing that their appeal may ultimately fail because it was incompetent, continued to prosecute the appeal and did not take the course indicated in Rule 103 of Order 21, they were obviously doing so at their own risk and they cannot be said to have been prosecuting any civil proceeding either in good faith or with due diligence. The mere fact that they were told that eventually they might have to fall back on the provisions of Section 115 of the Code cannot improve their position, because they did not ask the Court to treat it as an application in revision until the last moment when the appeal was going to fail.

9. In my opinion the decision of the learned Subordinate Judge is correct and I would dismiss this appeal with costs.

Chatterji J.

I agree.