

10. 21.01.2015 This appeal has been filed against the order of the learned District Judge, Cuttack in RFA No.23 of 014 refusing to condone delay in presenting the memorandum of appeal challenging the judgment and decree passed by learned Civil Judge (Senior Division), 1st Court, Cuttack in C.S. No.669 of 2009 by dismissing the same after hearing it analogously with C.S. No.534 of 2010.

2. The aforesaid suit was dismissed by judgment dated 15.05.2012. The appeal was presented on 14.02.2014 along with a petition under order 41 rule 5 of the Code of Civil Procedure which if correctly stated is one under order 41 rule 3-A of the Code. In the process there has been a delay of 600 days. The ground taken in the petition in order to show the sufficient cause for not filing the appeal in time being prevented thereof is that the appellant was prosecuting a review application vide CMA No.427 of 2012 and that got dismissed for default. So it is stated that the period spent there should be taken as sufficient cause for non-filing of the appeal in time.

3. The move was resisted by the respondents mainly stating that the said period spent after the review application which was also not finally pursued for disposal on merit but was allowed to be dismissed for non-prosecution, cannot be saved by application of the provision of section 14 of Limitation Act and it cannot be said that for that pendency of review petition, the appellant was prevented by sufficient cause and could not file the appeal in time.

4. Learned counsel for the appellant submits which is also indicated in the memorandum of appeal that the substantial question of law involved in this appeal is:-

(a) Whether the period spent in prosecuting the review petition can save the limitation for filing the appeal as per the provision of section 14 of the Limitation Act?

5. Learned counsel for the respondents submits that the review application in the present case cannot be said to be a proceeding in good faith. He banks upon the decision in case of Rabindra Nath Samuel Dawson v. Sivakami & others AIR 1972 SC 730.

6. As provided in order 41 rule 3-A of the Code for the appeal filed beyond the period of limitation to be admitted, the appellant has to satisfy the court that he had sufficient cause for not filing the appeal within such period. The law has been fairly well settled that the expression sufficient cause should be understood and applied in a reasonable, practical and liberal manner depending upon the facts and circumstances of the case, and the type of case. It should receive a liberal construction so as to advance the substantial cause of justice, when the delay is not on account of dilatory tactics, want of bona fides deliberate inaction or negligence on the part of the appellant.

7. Section 14 of the Limitation Act excludes the time of proceeding bona fide in the court without jurisdiction. In the case in hand the appellant has come up with the case that the time spent in the proceeding of review be excluded and that be treated as sufficient cause for being prevented for not filing the appeal in time. Law has also been well settled that in order to get the benefit of exclusion the proceeding being pursued it must be a proceeding bona fide and it must be in a court having no jurisdiction. The conditions required to be satisfied are

- (i) both the proceeding must be civil proceeding prosecuted by the same party;
- (ii) the prior proceeding had been presented with due diligence and good faith;
- (iii) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
- (iv) earlier and later proceeding must relate to the same cause of like nature, and
- (v) both proceedings are in a court.

The decision cited by the learned counsel for the respondent lays down that a proceeding contrary to the expressed provision of law cannot be regarded as a proceeding in good faith. The principle per se is not applicable to the case in hand.

8. Adverting to the factual aspects as regards the history of litigation, the review petition being filed in the court which had passed the judgment cannot be said to be a proceeding in a court without jurisdiction as the appellant having not filed any appeal had filed

the review petition before the court which had passed the judgment and decree and it appears to be in consonance with the provision under order 47 rule 1 of the Code when such a remedy was also available to her.

The court had entertained it and therefore the question of being not further pursued for defect of jurisdiction or other cause of a like nature does not arise. Moreover, in the case the review application having been

dismissed for default, it was no more pursued therein shows the lack of due diligence on the part of the appellant.

9. Furthermore, the appellant here having concurrent remedies and having availed one remedy and then after running for a long time chooses no more to continue with it for its logical end in accordance with law, is not entitled to the benefit of the provision of Section 14 of the Act when instituting the next alternative remedy.

10. Given a plain and simple reading to the provision of section 14 of the Limitation Act and in the facts and circumstances of the case as per the above discussion, the period spent for the purpose does not survive for consideration of exclusion under said section. Moreover, the appellant having chosen the remedy available for review and that having been allowed to be dismissed for default, being not further pursued, the claim that for that period, the appellant was prevented by sufficient cause is not acceptable.

In view of aforesaid this court being unable to accept the submission of the learned counsel for the appellant finds no such substantial question of law for being formulated so as to admit this appeal.

11. In the result, the appeal is not admitted and thus is accordingly dismissed.

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