

Law Of Limitation And Exclusion Of Time When Defendant Is Absent From India : Need For Reconsideration

Narinder Kumar *

Section 15 of Limitation Act, 1963

Under the Limitation Act, 1963 where period of limitation for filing of suit, appeal or application has been specified, provision has also been made for exclusion of certain period in certain situations. Section 15 of the Limitation Act, 1963 is one of such provisions.

Sub-section (5) of Section 15

Sec. 15 (5) provides for exclusion of time, while computing the period of limitation for the purposes of a suit. It deals with a situation when the defendant has been absent from India or from the territories outside India under the administration of the Central Government.

No doubt, Sec. 15 (5) provides for exclusion of the period during which the defendant has been so absent i.e. absent from India and from the territories outside India (under the administration of the Central Government), the question arises as to why this period should be allowed to be excluded while computing period of limitation, when much progress has been made in technology, and as a result it has become easier to get the defendant served with the summons, wherever he or she is, at the relevant time.

Suggestion

The suggestion is that having regard to the technological advancements when it is no more difficult to get the summons served on such a defendant (who is absent from India or from the territories outside India), at least in particular category of cases like a suit for specific performance or where time is essence of the contracts, plaintiff should not be given any benefit by way of exclusion of time as provided under Sec. 15 (5) of Limitation Act.

* Special Judge-2, Central District, Tis Hazari Courts, Delhi.

Case law

This very question cropped up before Hon'ble High Court of Delhi in *Satya Jain v. Anis Ahmed.*¹

Facts

As per factual matrix, plaintiff was inducted as a tenant in respect of half portion of suit property on a monthly rent of Rs. 300/- w.e.f. 20.12.70 by the defendant. On 22.12.70 the defendant executed an Agreement to Sell the suit property to plaintiff for a sum of Rs.3,75,000/-, out of which a sum of Rs.50,000/- was paid by the plaintiff to the defendant, as part payment on the same day.

Under the agreement to sell dated 22.12.1970, the defendant was to obtain necessary certificate permitting sale by the income tax authorities was also not in dispute. The parties had agreed for sale to be completed within 3 months of the income tax clearance certificate being obtained and that the income tax clearance certificate was to be obtained within 12 months of the agreement to sell was also not disputed by the parties. So, the defendant was to obtain the income tax clearance by 23.12.1971 and the sale deed was to be executed within 3 months thereafter.

Clause (7) of the agreement enjoined upon the plaintiff No. 1 to pay to Income tax authorities such money as may be desired by the vendor i.e. the defendant. On 03.11.77 the plaintiff filed suit for specific performance of agreement dated 22.12.70 alleging that he had written a letter dated 27.12.71 to the defendant enquiring about the necessary Tax Clearance Certificate. On failure of defendant to reply to the said letter, he had issued a legal notice dated 16.11.72 reiterating his readiness to tender the balance consideration and asking the defendant to fulfill his part of obligation and execute the sale deed.

The defendant vide notice dated 18.09.77 is stated to have terminated the tenancy of plaintiff qua half portion of the suit property.

It was specific plea of the plaintiff that the suit for specific performance of agreement to sell dated 22.12.70 could not be instituted earlier, as defendant was all along residing in London.

In written statement, the defendant admitted execution of Agreement to Sell dated 22.12.70 but claimed that the plaintiff was not entitled to any relief, as he had himself breached conditions of the Agreement.

As regards plea of plaintiff that defendant was not in India from December 1970 till September 1977, the defendant claimed that he was in India during following periods:

¹ 2011 SCC Online Del 4564

1. 19.12.70 to 30.12.70
2. 18.08.71 to 13.09.71
3. 31.10.72 to 12.11.72
4. 04.09.77 to 03.10.77

It emerged from evidence that the stand taken by the plaintiffs was that the defendant neither applied for an income tax clearance certificate nor ever informed the plaintiff No. 1 that the income tax officer had desired a bank guarantee to be furnished in the name of the Commissioner Income Tax to secure a tax demand if any determined and alternatively that the only obligation of plaintiff No. 1 was to pay, on behalf of the defendant and to his credit, such sum as may be found payable to the income tax authorities, but within the limits of the balance sale consideration.

The stand taken by the defendant was that he did so and for this he relied upon the letter dated 09.09.1971 and admissions made by Lajjya Ram Kapur (PW-3). It was in this context that letter dated 9.9.1971 with reference to it being delivered to plaintiff No. 1 gained significance.

The letter dated 27.12.1971 written by plaintiff No. 1 to the defendant, qua it being received by the defendant became relevant in the context of the defendant not having responded thereto.

Plaintiff No. 1 not only deposed, but made good his deposition with reference to the letter dated 27.12.1991 by proving postal receipt Ex.P-12, evidencing his having sent a registered letter dated 27.12.1971 to the defendant at the correct address of the defendant at London.

Contentions

As regards application of provisions of Sec. 15(5) of Limitation Act, before Learned Single Judge, it was contended on behalf of the plaintiffs that irrespective of the nature of suit, the entire period during which defendant was absent from India had to be excluded while computing limitation.

On the other hand, the defendant's plea was that Section 15(5) of the Act had no role in a suit for specific performance where decree could be enforced without defendant requiring to execute the sale deed in person. In the alternative, it was submitted that the said sub-Section had no play when the defendant was not in India at the time the suit was filed.

In the suit, (deceased appellant), Anis Ahmed Rushdie was the defendant and Bhiku Ram Jain and others (the respondents Nos. 1, 2 and 3) were plaintiffs Nos. 1, 2 and 3 respectively.

Findings

Learned Single Judge held that when cause of action accrued to the plaintiffs, the defendant was in a foreign country, and as such the plaintiffs were entitled to the benefit of Sec. 15 (5) of the Limitation Act 1963.

In this regard, reference was made to the decisions in *Turner Morrison & Co Ltd. v. Hunger Investment Trust*,² *Atul Kristo Bose v. Lyam & Co Ltd*,³ *Dial Singh v. Devinder Singh*,⁴ *Pariva Akkaali Shetty v. Rethinagiri Chetty*,⁵ and *P.C. Muthia Chettiar v. F.S. Shanmugham Chettiar (dead)*.⁶

Regular First Appeal

It was observed by Hon'ble High Court in Regular First Appeal that the Agreement to Sell was admittedly dated 22.12.1970. Parties were not at variance that the sale has to be completed within 15 months i.e. within 12 months of the Agreement to Sell, the defendant to obtain the necessary sale permission and within 3 months thereafter the plaintiff No. 1 to tender the balance sale consideration to the defendant, with defendant's reciprocal obligation to execute the sale deed being discharged.

The suit was admittedly filed on 03.11.1977. Hon'ble Court observed that the cause of action thus accrued on the 22nd March 1972. Period of limitation to seek enforcement of an agreement to sell being 3 years, limitation expired on the 21st March 1975.

As to applicability of this provision, Hon'ble Court went on to observe that the only aid which plaintiffs could take was under Sec. 15 (5) of the Limitation Act.

Hon'ble Court while referring to the origin of Sec. 15(5) of the Limitation Act 1963 observed that same could be traced to the rule of private international law as discussed in *Dicey's Conflict of Laws*⁷ and *Halsbury's Laws of England*⁸ that Courts of any country would have jurisdiction to entertain actions in personam in respect of any cause of action or relating to contract wherever the cause might have arisen or wherever the contract was made, provided that at the commencement of the action the defendant was resident or present in that country and the provisions of the Statute of Limitation in force in the country where the action was instituted i.e. '*Lex Fori*' would apply to such actions and for that, the period during which the defendant was not present in the country where action was initiated, would be excluded while computing limitation.

However, Hon'ble Court observed that those were the days when means of communication were poor and it was difficult to serve a party and further that that when aforesaid jurisprudence was developed, there was no internet, there

² AIR 1972 SC 1311

³ 14 Cal 457

⁴ AIR 1933 Lahore 741

⁵ AIR 1945 Madras 315

⁶ AIR 1969 SC 552

⁷ 5th Edition, p. 398

⁸ Vol. VI, 2nd Edition, p. 256

was hardly any postal facility, transportation to foreign shores was by ships which would sail on the oceans and the seas with painfully slow speed. It was in that era that aforesaid jurisprudence relating to exclusion of time while computing limitation was conceived of.

Where the globalized world has shrunk to a village in the era of telecommunication, while reflecting more on the relevance of Sec. 15(5) of the Limitation Act 1963, Hon'ble Court proceeded to consider if in the instant case, the plaintiffs were entitled to the benefit thereof.

During consideration, Hon'ble Court also referred to the decision of *Rajamani v. Meenakshisundaram*⁹ in which provision of Sec. 15(5) of the Limitation Act 1963 was examined in detail by Hon'ble Madras High Court.

Therein, the facts of the said case were that the appellant/defendant borrowed 2000 Singapore dollars from one R.S. Sundaram at Singapore, on 09.11.1975, promising to repay the same on demand to him with interest @ 18% per annum and executed a promissory note Ex.A-5 in this regard.

On 03.07.1979, the promissory note Ex.A-5 was assigned in favour of the plaintiff, and on 11.07.1979 the plaintiff issued a notice to the defendant intimating him the factum of the said assignment and demanding payment of entire dues to him.

When the defendant did not pay the amount the plaintiff filed a suit for recovery of money. All this happened while the defendant was residing in Singapore and did not visit India even once and was not present in India when the suit was instituted.

On behalf of the defendant, it was contended that the suit was barred by limitation.

Per contra, it was submitted on behalf of the plaintiff that since the defendant was absent from India, the period of absence in its entirety had to be excluded while computing limitation as per Sec. 15(5) of the Limitation Act 1963.

Hon'ble Madras High Court, while adjudicating that the presence of the defendant in India on the date when the suit was filed, is a sine qua non for the application of Sec. 15 (5) of the Limitation Act 1963, held that the suit was barred by limitation. In arriving at such a conclusion, Hon'ble High Court observed in the manner as:-

“15. So, it has to decided whether the plaintiff can sustain the suit, though the defendant had not returned to India on the date of filing of the suit. In the present case, admittedly, the cause of action had arisen in foreign country when the defendant was in Singapore. Even according to the plaintiff, the defendant was in Singapore on the date

⁹ (1999) 3 MLJ 757

of the filing of the suit. The plaintiff himself has given the Singapore address of the defendant in the plaint.

The Full Bench of this Court in *Muthukannai v. Andappa Pillai* AIR 1955 Mad 96 has found in this regard that “the Courts in a country have jurisdiction to entertain action in personam in respect of any cause of action or wherever the contract has been made provided that at the commencement of the action the defendant was resident or present in that country.”

Again in the conclusion, the same has been insisted by the Full Bench of this Court.

“Moreover, the words used in Section 15(5) of the Limitation Act themselves suggest that the defendant should be present in India on the date of filing of the suit. Otherwise, the question of computing the period of limitation taking into consideration of the defendant's absence would not arise. If the defendant continues to be absent such a calculation is impossible for the purpose of limitation....”

Accordingly, it was held that the respondent/plaintiff could not take advantage of the provisions of Section 15(5) of the Limitation Act, 1963 for the purpose of computing the period of limitation, and to say that the suit is not barred by limitation.”

In case, *Satya Jain v. Anis Ahmed*,¹⁰ the suit was admittedly filed on 03.11.1997, on which day the defendant was not present in India.

While dealing with Regular First Appeal, as regards the fact that the defendant was not present in India on the date when the suit was filed, Hon'ble High Court held that the plaintiff was not entitled to the benefit of Sec. 15(5) of the Limitation Act 1963.

Before bringing the curtain down on the subject, Hon'ble High Court observed that the learned Single Judge had ignored that after the cause of action accrued on 22.3.1972, the defendant was in India on 29.10.1972 till 10.11.1972.

Hon'ble Court observed that the cause of action having accrued, limitation had to continuously run as per the mandate of Sec. 9 of the Limitation Act 1963.

Sec. 9 reads as under:-

“9. Continuous running of time.— Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stop it :

¹⁰ *Supra* n. 1.

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues.”

However, for the benefit of guidance of the executive, Hon’ble High Court questioned the relevance of Sec. 15(5) of the Limitation Act 1963 by observing :

“In today's era of globalization and means of communication and serving parties, what is the relevance of the jurisprudence underlining sub-Section 5 of Section 15 of the Limitation Act 1963?”

Hon’ble High Court also referred to Hon’ble Superior Court of Los Angeles County, in the decision of *O' Laskey v. Sortino*,¹¹ while dealing with Sec. 351 of Code of Civil Procedure of California, (which Section is pari-materia with Sec. 15(5) of the Limitation Act 1963) observed as under:-

“For the record, we also note that but for the anachronism of section 351 of the Code of Civil Procedure, O' Laskey's complaint would have been untimely as a matter of law. We agree with the concurring opinion of *Justice King in Mounts v. Uyeda* (1990) 223 Cal. App. 3d 474 [272 Cal. Rptr. 876]: “I....write separately to suggest that the Legislature repeal Code of Civil Procedure section 351. This section, adopted in 1872, may have made sense when there was no long-arm statute and no ability to serve an absent defendant by substituted service or by publication. It makes no sense today and should be repealed.” (*Emphasis Supplied*)

56. Likewise, in its report dated 02.11.1995, California Law Revision Commission also recommended the repeal of Section 351 of Code of Civil Procedure of California.

The relevant portion of the recommendation of California Law Revision Commission reads as under:-

“This recommendation proposes the repeal of Code of Civil Procedure Section 351, which tolls statutes of limitations when the defendant is out of the state. Section 351 is based on outdated notions of personal jurisdiction and service of process, and it is unconstitutional as applied to cases involving interstate commerce. Repeal of Section 351 would further the policies underlying statutes of limitation, protect courts from having to adjudicate stale claims lacking any meaningful connection to the state, and eliminates inequities that may arise when tolling is applied to brief periods of absence.”

¹¹ (1990)224 Cal. App. 3rd 241; 273 Cal. Rptr. 674

In India, as regards service of summons, Sec. 27 of Code of Civil Procedure provides as to how summons may be served on defendants. It postulates that summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed. Order V deals with issue and service of summons.

Rule 10, Or. V provides that service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, summons are to be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

Service of summons may be made by delivering or transmitting a copy thereof by:

- (a) registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service; or
- (b) speed post or
- (c) such courier service as are approved by the High Court or by the Court referred to in sub-rule (1) of rule 9 or
- (d) any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court.

Rule 25, Or.V provides as to how service is to be effected where defendant resides out of India and has no agent. It provides that where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

It also specifically provides as to how service is to be effected where any such defendant resides in Bangladesh or Pakistan or is servant of a railway company or local authority in that country.

As noticed above, there is provision for service of summons on the defendant by Registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service; or by speed post or by such courier service as are approved by the High Court or by the Court referred to in Rule 9 (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court. Having regard to the technological development or advancements, and their use in service of summons on the defendant, who is not in India, but available beyond India, would it not be in the interest of justice that Law Commission of India makes recommendation to the Legislature for amendment in the law of limitation so as to do away with the provisions of Sec. 15(5) of Limitation Act.

Even otherwise, in suchlike suits, for example suit for specific performance of contract, when defendant shall also be fully aware of the legal obligations to be discharged by him and the legal obligations to be discharged by the opposite party, and time would generally be essence of the contract, parties are expected to be, more diligent either to discharge their respective legal duties or resort to lawful remedies or contest the claim of the opposite party by taking appropriate steps, wherever they are, as on the date of institution of the proceedings.

In other words, there is no need to retain on the statute provision like Sec. 15(5) to wait for the other party for the purpose of institution of suit or for exclusion of such a period i.e. the period when the defendant is out of India or territories outside India under the administration of the Central Government. Therefore, it is for the legislature to ponder over the matter and to take appropriate steps for amendment of law of limitation so that the aggrieved person gets justice quickly and without loss of any time.