IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL(L) NO. 26032 OF 2023

WITH

INTERIM APPLICATION NO. 18004 OF 2023

M/s R. P. Enterprises ***...Appellant***

: Versus :

Sunanda Mukund Deshmukh & Ors. ***...Respondents***

Mr. Kaustubh Thipsay with Ms. Aishwarya Shinde & Mr. Prasad Nagargoje, for the Appellant.

Mr. Sagar A. Joshi for Respondents.

CORAM: SANDEEP V. MARNE, J.

Reserved On: 6 November 2026.

Pronounced On: 26 November 2026.

JUDGMENT:

1) By this Appeal, the Appellant/original Plaintiff has challenged the judgment and order dated 11 April 2023 passed by the District Judge-3, Thane dismissing Regular Civil Appeal No.21 of 2016 and confirming the Order dated 3 February 2015 passed by the 3rd Joint Civil Judge Senior Division, Thane dismissing Special Civil Suit No. 292 of 2012. The Suit was instituted by the Plaintiff seeking a declaration

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that the Agreement for Sale and the Power of Attorney dated 29 June 2000 executed in its favour are valid, legal and subsisting and for specific performance thereof. In the Suit, the Trial Court framed a preliminary issue of limitation at the instance of the Defendants and by order dated 3 February 2015, the Trial Court held that the Suit is barred by limitation and accordingly proceeded to dismiss the Suit. The first Appellate Court has confirmed the decree of the Trial Court by impugned judgment and order dated 11 April 2023, which is the subject matter of challenge in the present Second Appeal filed under the provisions of Section 100 read with Order XLII of the Code of Civil Procedure, 1908 **(Code).**

2) Plaintiff is a partnership firm registered under the provisions of the Indian Partnership Act, 1932 **(Partnership Act)**. It was registered on 29 January 2005 and is engaged in the business of real estate. Respondents/Defendant Nos.1 to 10 are the owners of land bearing Survey No.31, Hissa No.1(p), Tika No.22, CTS No. 27/1B, admeasuring 395.3 sq.mts. alongwith the building standing thereon known as Parvati Niwas situated opposite to Bedekar School, Bajiprabhu Deshpande Road, Naupada, Thane **(suit property)**. Defendant No.1, husband of Defendant No.2 (*who is also the father of Defendant Nos.3 to 6*) viz. Kamlakar Mukund Deshmukh and the husband of Defendant No.7 (*who is also father of Defendant Nos.8 to 10*) viz. Ravindra Haribhau Patil executed an Agreement for Sale in favour of the Plaintiff on 29 June 2000 for consideration of Rs.3,00,000/-. The Agreement was for development of the suit property. Plaintiff claims to have paid the entire agreed consideration of Rs.3,00,000/- and also claims to have secured possession of the suit property.

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3) There are 24 tenants in the suit property and Plaintiff took upon itself the responsibility of providing accommodation to the tenants and it is claimed that the Plaintiff negotiated with the tenants and incurred huge expenditure for development of the suit property. Plaintiff alleged that Defendant Nos.1 to 10 avoided executing sale-deeds and were attempting to negotiate with third parties by issuing public notice dated 30 September 2004. Plaintiff objected to the public notice. Plaintiff claims that Defendant Nos.1 to 10 extracted additional amount of Rs.5,00,000/- from the Plaintiff but did not execute the sale-deed. By notice dated 6 March 2002, the Agreement for Sale was terminated by Defendant Nos.1 to 10. Defendant Nos.1 to 10 thereafter executed a Development Agreement and Power of Attorney in favour of Defendant No.11 on 28 May 2004.

4) Therefore, Special Civil Suit No. 555 of 2004 **(former suit)** was filed in the name of M/s. R.P. Enterprises describing it to be a partnership firm and seeking specific performance of the Agreement for Sale dated 29 June 2000. Defendant Nos.1 to 10 appeared in the Suit and sought framing of a preliminary issue relating to maintainability in view of provisions of Section 69 of the Partnership Act and Section 9A of the Code. During the pendency of the former Suit, Plaintiff-firm was registered under the Partnership Act on 29 January 2005. Defendant Nos.1 to 10 filed an application under Order VII Rule 11 of the Code seeking rejection of the plaint in the former suit. Plaintiff sought withdrawal of the former suit. By order dated 17 November 2007, the Trial Court permitted withdrawal of the suit while rejecting the application of Defendant Nos.1 to 10 for rejection of the plaint under

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Order VII Rule 11 of the Code. Liberty was granted to the Plaintiff to file a fresh suit subject to the provisions of the Limitation Act, 1963.

5) On 15 March 2008, Plaintiff filed Special Civil Suit No. 292 of 2012 **(present suit)** before the Civil Judge Senior Division, Thane seeking specific performance of the Agreement dated 29 June 2000. Plaintiff also filed Misc. Civil Application No. 155 of 2008 under Section 14 of the Limitation Act seeking exclusion of period between institution of the former suit and its withdrawal on 17 November 2007. Misc. Civil Application No.155 of 2008 was initially rejected by the Trial Court by order dated 4 December 2010. Plaintiff filed Writ Petition No. 546 of 2011 in this Court challenging Trial Court's order dated 4 December 2010. By order dated 7 March 2012, this Court permitted the Plaintiff to withdraw Misc. Civil Application No. 155 of 2008 and directed the Trial Court to register the Suit. The Suit was accordingly registered as Special Civil Suit No. 292 of 2012.

6) Defendant Nos.1 to 10 filed application under Order XIV Rule 2 of the Code seeking framing of preliminary issue relating to limitation. By order dated 3 March 2014, the Trial Court framed the preliminary issue of limitation. By order dated 3 February 2015, the Trial Court held that the suit was barred by limitation and dismissed the same. Plaintiff filed First Appeal (St.) No. 14119 of 2015 in this Court challenging Trial Court's order dated 3 February 2015. The Appeal was later transferred to District Court, Thane and was registered as Regular Civil Appeal No. 21 of 2016. The District Court has however dismissed

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Regular Civil Appeal No. 21 of 2016 by its judgment and order dated 11 April 2023.

7) Aggrieved by the concurrent findings recorded by the Trial and the First Appellate Court on the issue of limitation, Appellant/Plaintiff has filed the present Second Appeal. By order dated 24 July 2024, this Court has formulated substantial questions of law. The learned counsel for the Appellant has filed a private paper-book. Accordingly, with the consent of the learned counsel appearing for the parties, the Appeal is taken up for final hearing and disposal.

8) Mr. Thipsay, the learned counsel appearing for the Appellant, submits that the Trial and the First Appellate Courts have grossly erred in answering the issue of limitation against the Appellant. He submits that the period between the date of institution of the former suit till the date of its withdrawal is required to be excluded as per Section 14 of the Limitation Act. He submits that a partnership firm instituting the suit prior to its registration under the Partnership Act is entitled to withdraw such a suit and file a fresh suit after registration by seeking benefit under Section 14 of the Limitation Act. He relies on judgment of this Court in ***Surajmal Dagduramji, Shop Versus. M/s. Shrikisan Ramkisan***[1] in support of his contention that an unregistered firm instituting a suit suffers from a defect relating to the nature of jurisdiction within the meaning of Section 14 of the Limitation Act and is, therefore, entitled to claim the benefit of exclusion of the period of time spent in pursuing such proceedings. That this principle is affirmed

1 1972 SCC Online Bom 75

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by the Apex Court in ***Haldiram Bhujiawala & Anr. Versus. Anand Kumar Deepak Kumar & Anr.***[2].

9) Mr. Thipsay further submits that the period during which the Court retains a case before discovering that it ought to have been instituted before another Court is liable to be excluded under Section 14 of the Limitation Act. In support of his contention, he relies upon judgment of the Apex Court in ***Consolidated Engineering Enterprises Versus. Principal Secretary, Irrigation Department and Ors.***[3]. He submits that since the Appellant is entitled to seek benefit under Section 14 of the Limitation Act, the period up to the point at which the Court discovered that the suit was barred under Section 69 of the Partnership Act needs to be excluded. That the Appellant filed an Application for withdrawal of the former suit within 3 months of filing of the application below Order VII Rule 11 by the Defendants, with a view to avoid technical objections.

10) Mr. Thipsay further submits that Section 14 of the Limitation Act must be construed liberally particularly when there is no challenge to the Appellant's bonafides. He submits that the power to excuse delay and grant extension under Section 14 is mandatory as opposed to Section 5 which is merely discretionary and in support of this contention, he relies on judgment of the Apex Court in ***Consolidated Engineering Enterprises*** (supra) and ***M.P. Steel Corporation Versus. Commissioner of Central Excise***[4]. That the object of Section 14 is to put

2 (2000) 3 SCC 250
3 (2008) 7 SCC 169
4 (2015) 7 SCC 58

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the Applicant in the same position as he was when he started the abortive proceeding. That in the present case, the Trial Court had specifically held that the former suit was within limitation. In such a case, Section 14 of the Limitation Act ought to have been applied by excluding the period during which the earlier Trial Court was seized of the former suit. He relies on judgment of the Apex Court in ***Laxmi Srinivasa R and P Boiled Rice Mill Versus. State of Andhra Pradesh***[5] and ***Purni Devi and Anr. Versus. Babu Ram & Anr.***[6] in support of his contention that in absence of an averment to indicate that the unregistered firm filed a suit with a malafide intention or in absence of challenge to the bonafides of the Appellant, the benefit of Section 14 ought to have been granted to the Plaintiff. He submits that both the Courts have incorrectly doubted Appellant's bonafides in continuing the former suit merely on the basis of a stray admission in the cross-examining regarding the objection filed before the Municipal Corporation. On above broad submissions, Mr. Thipsay would pray for setting aside the impugned orders and decrees passed by the Trial and the First Appellate Courts.

11) Mr. Joshi, the learned counsel appearing for Respondents, opposes the Appeal submitting that both the Courts have concurrently answered the issue of limitation against the Appellant and that in absence of perversity in the findings recorded by both the Courts, there is no warrant for interference in the impugned decrees in exercise of second appellate jurisdiction of this Court. He submits that when the

5 2022 SCC Online SC 1790
6 2024 SCC Online SC 482

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former suit was filed seeking specific performance, the partnership firm was not registered. It is only after the Defendants raised objection about maintainability of the suit, steps were taken by the Plaintiff/Appellant for registration of the firm. After registration of the firm, Plaintiff/Appellant continued with the former suit for 3/4 months and prosecuted the suit right upto the stage of recording of evidence. It is only after realising that the Plaintiff would not succeed in the suit, the same was withdrawn. In the withdrawal application, except mentioning the word '*technicality*' no other convincing ground was pleaded. That though the learned Trial Court granted liberty to withdraw the suit, the issue of limitation was kept open in view of Order XIII of the Code. That in the subsequent suit, the Appellant filed an application seeking exemption/condonation of delay which was not maintainable and was hit by the provisions of Order VII Rule 6 of the Code. That the Trial Court therefore rejected the said application. After rejection, Writ Petition was filed by the Appellant and in paragraph 4 of the order dated 7 March 2012, this Court recorded that the suit itself was not registered and numbered. This Court further held that filing of application seeking exclusion was not proper. That until the year 2012, no plaint had been duly instituted in accordance with and/or as required under Order IV of the Code. It is only on 8 May 2012 that the Trial Court passed an order to register the plaint. That therefore the present suit was clearly barred by limitation.

12) Mr. Joshi further submits that the Trial Court, as well as the First Appellate Court have considered oral evidence of the Plaintiff and both the Courts have come to the conclusion that the Appellant is not

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entitled to the benefit of Section 14 of the Limitation Act. He relies on judgment of the Apex Court in ***Madhavrao Narayanrao Patwardhan Versus. Ram Krishna Govind Bhanu & Ors.***[7] in support of his contention that the burden lies on the Plaintiff to establish that the previous suit was prosecuted 'in good faith'. He relies on judgment of the Apex Court in ***Ghasi Ram & Ors. Versus. Chait Ram Saini & Ors.***[8] in support of his contention that Plaintiff has neither established 'good faith' nor 'due care' for availing the benefit of Section 14 of the Limitation Act. He also relies on judgment of this Court in ***Kolhapur Ice and Cold Storage Co., through Partner Versus. Rajput Dairy Through Brijlal Uddip Singh***[9] in support of his contention that subsequent registration of the Plaintiff-firm renders the suit filed on behalf of an unregistered firm not maintainable. Mr. Joshi prays for dismissal of the Appeal.

13) Rival contentions urged on behalf of the parties now fall for my consideration.

14) The Appeal involves a short issue regarding limitation in filing the subsequent suit. The former Suit (Special Civil Suit No. 555 of 2004) was instituted in the name of an unregistered firm, seeking specific performance of the Agreement dated 29 June 2000. After Defendant Nos. 1 to 10 filed an application seeking the framing of a preliminary issue under Section 69 of the Partnership Act, the firm came to be registered on 29 January 2005. However, the former suit was not withdrawn

7 AIR 1958 SC 767
8 (1998) 6 SCC 200
9 2014 (1) Mh.L.J. 367

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immediately and was apparently prosecuted until the evidence was recorded. It is only after Defendant Nos.1 to 10 filed application at Exh-20 for rejection of the plaint in the former suit under Order Vii Rule 11 of the Code that the unregistered firm filed application at Exh-25 on 11 September 2007 seeking withdrawal of the former suit. The Trial Court permitted withdrawal of the former suit by order dated 17 November 2007 granting liberty to the registered firm to file a fresh suit. This is how Special Civil Suit No. 292 of 2012 came to be instituted by the registered firm on 15 March 2008. The Plaintiff seeks exclusion of the period commencing from the date of institution of the former suit until the date of its withdrawal, i.e., from 2 November 2004 to 17 November 2007, while computing the period of limitation for institution of the present suit. Therefore, the Appeal also raises a question as to whether the Plaintiff is entitled to seek benefit of exclusion of time under Section 14 of the Limitation Act. This is how this Court has formulated the two questions by order dated 24 July 2024 relating to provisions of Section 14 of the Limitation Act. I proceed to answer the same.

15) The first substantial question of law formulated vide order dated 24 July 2024 is whether the Plaintiff has made out a case for exclusion of time between the date of institution of previous suit (2 November 2004) till its withdrawal (17 November 2007) while computing the period of limitation for institution of the present suit. The second question is about appreciation of settled principles of law by the First Appellate Court while deciding the issue of exclusion of time under Section 14 of the Limitation Act.

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16) Since both questions are interrelated and arise out of the applicability of Section 14 of the Limitation Act, they may be taken up together for consideration.

17) As observed hereinabove, the Plaintiff was required to withdraw the previous suit as it suffered from the defect of having been instituted by an unregistered partnership firm. Although the Plaintiff in the previous suit subsequently got itself registered as a partnership firm under the provisions of the Partnership Act on 29 January 2005, such subsequent registration did not cure the defect, since the Plaintiff firm was unregistered on the date of institution of the former suit, i.e., 2 November 2004. In ***Kolhapur Ice and Cold Storage Co.*** (supra) Co-ordinate Bench of this Court has held that subsequent registration of the Plaintiff-firm does not cure the illegality and the Suit cannot be deemed to have been filed on the date on which the firm was registered. This Court held in paragraphs 6 to 8 of the judgment as under:

> 6. Having heard the Learned Counsel for the parties, I have considered the rival contentions. In so far as the issue which is involved in the above Petition namely whether the subsequent registration of the partnership deed would cure the defect of filing of the Suit in the name of an unregistered firm and whether the Suit can be deemed to have been filed on the date when the firm has been registered, the said issue is no more res integra and is covered by the judgment of the Apex Court in Shriram Finance (supra). The Apex Court in the said case was concerned with a partnership firm wherein a partner was inducted and two minors had been admitted to the benefit of the partnership, notice of which was not given to the Register of Firms till much after the filing of the Suit. It is in the said context the Apex Court held that though the cognizance of the new partners has been taken by the Register of Firms later on, however, in view of the fact as on the date when the suit was filed the persons who had ceased to be partners were on record, the bar of Section 69(2) would apply.

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7. In so far as Judgment in Raptakos Brett (supra) is concerned, The said case concerns a suit for possession filed by an unregistered firm against the erstwhile lessee. The said claim was based on breach of the covenant to restore possession in the lease deed as well as right of lessor to get possession under the law of the land i.e Section 108(q) read with Section 111(9) of the Transfer of Property Act. An objection was raised to the maintainability of the suit on the ground that the partnership firm was not registered.

The Apex Court framed two issues which are found in paragraph 8 of the Judgment viz:

> (i) Whether the suit filed by the respondent was barred under Section 69, subsection (2) of the Partnership Act either wholly or in part.
>
> (ii) if the suit was so barred, whether subsequent registration of the Plaintiff's firm under the Partnership Act could revive the suit or to make it competent at least from the date on which such registration is pending the suit was obtained by the respondent firm.

The Apex Court held that since the plaint as framed by the Plaintiff on a composite cause of action having two parts one part refers to the breach of covenant on the part of the defendant being covenants 14 and 17 of the lease deed and the second part of the cause of action being based on the statutory obligation of the defendant when it failed to comply with its statutory obligation under Section 108(q) read with Section 111(1) of the Transfer of Property Act. The Apex Court held that in so far as the second cause of action is concerned, it definitely does not arise out of the erstwhile contract as what the Plaintiffs are seeking was enforcement of the legal right to possession against the erstwhile lessee under the provisions of Section 108(q) read with Section 111(a) of the Transfer of Property Act and the corresponding statutory obligation of the defendants under the same statutory provisions. Hence in so far as the said cause of action is concerned, the Apex Court held that the same stands completely outside the sweep of Section 69(2) of the said Act and the suit was maintainable. The Apex Court accordingly partly answered issue No.1 in favour of the Plaintiff and partly in favour of the Defendant No.1. After so answering issue No.1 the Apex Court held that it was not necessary for it to express any final opinion on the second issue in the facts of the said case. In fact, the Apex Court has specifically observed in paragraph 30 of the Judgment that it does not wish to make a reference to a larger bench for reconsideration of the decision in Shriram Finance (supra). The Apex Court lastly observed that with the said observations it brings down the curtains on the said controversy. Hence though some observations have

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> been made by the Apex Court in Raptakos Brett (supra) as rightly contended by the Learned Counsel Mr. Borkar, the said observations can be said to be obiter. It is also required to be noted that the said observations were made by the Apex Court having regard to the practical difficulties that a party would face after litigating for a period of time and then being told that the suit was not maintainable.
>
> 8. In my view, in the light of the Judgment of the Apex Court in Shriram Finance (Supra), which is directly on the point, the obiter of the Apex Court in Raptakos Brett (supra) would not further the case of the Petitioners in so far as the relief which it has sought namely that the Suit be deemed to have been filed on the date when the firm was registered. Hence the order passed by the Trial Court rejecting application Exhibit 136 cannot be faulted with. No case for exercise of Writ Jurisdiction is made out. The Writ Petition is accordingly dismissed. Rule discharged with no order as to costs.

18) The Plaintiff took substantial time to realise that the former suit was not maintainable and kept on prosecuting the same till recording of evidence was virtually complete. In fact, registration of the Plaintiff-firm is essentially attributable to the objection raised by Defendant Nos.1 to 10 about maintainability of the Suit vide application dated 23 November 2004. After noticing the objection, the Plaintiff got itself registered on 29 January 2005. Though the law is well settled that subsequent registration does not cure the inherent defect in the suit, the Plaintiff did not take any corrective step and kept on prosecuting the Suit until Defendant Nos.1 to 10 filed one more application on 5 June 2007 seeking rejection of the Plaint under Order VII Rule 11 of the Code. It is only after realising that the Plaint in the suit was liable to be rejected, the Plaintiff ultimately applied for withdrawal of the Suit by the application dated 11 September 2007. In its application dated 11 September 2007, the Plaintiff pleaded in paragraph 1 as under:-

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> 1) The plaintiff states that plaintiff have filed this suit for the specific performance & declaration and injunction. The plaintiff states that plaintiffs is registered partnership and same has been registered pending the suit therefore it is necessary to withdraw the suit by plaintiff and file the fresh suit on same cause of action **to avoid any technicality**.
>
> *(emphasis and underlining added)*

19) Plaintiff's application dated 11 September 2007 (Exhibit-25) was allowed by the Trial Court while rejecting Application of Defendant Nos.1 to 10 filed under Order VII Rule 11 of the Code by order dated 17 November 2007 by holding in paragraphs 8 to 10 as under:

> 8. Order 23 Rule 1 speaks about withdrawal of suit. Sub Rule 3 of Rule 1 of Or 23 permits a court to allow plaintiff to withdraw with the permission to institute a fresh suit in respect of the subject matter of said suit subject to the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to Institute a fresh suit for the subject matter of the suit or part of the claim. Ld. Advocate Shri. Vaishampayan vehemently submitted that the defect in the present suit at hand is not a formal defect. Therefore on this count alone permission of withdrawal with leave to file 'fresh suit deserves to be rejected. I would like to refer here a case of Vilas Shriram Mahale Vs. Rajdhani Prasad Tiwari, 2005 (1) MH.L.J. wherein their Lordship atter referring a case of Haldiram Bhujiawala Vs. Anandkumar Deepak Kumar. held that:-
>
> Even If the suit was barred U/sec.69 of Indian Partnership Act it will be opened to the plaintiff to seek withdrawal of plaint with leave to fite fresh suit after registration of the firm.
>
> 9. Moreover Or.7 Rule 13 of CPC not preclude the plaintiff from presenting a plaint in respect of same cause of action after rejection of the plaint on any grounds referred in Rule 11 of CPC.
>
> 10. Therefore in view of law laid down in the case of Vilas Mahale coupled with Or.7 Rule 13 in my humble judgment though there is a bar for unregistered firm to institute a suit, plaintiff after registration of firm can seek withdrawal and file a fresh plaint **but it is to be noted that the same should be subject to the course to and provisions of Law of Limitation**. Accordingly I proceed to pass following order.

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ORDER

1. Application Exh.20 of defendant for rejecting the plaint Under Or.7 Rule 11 stands rejected.

2. Plaintiff is permitted to withdraw a suit with a leave to file a fresh suit subject to provisions of Limitation Act.

3. Accordingly order is passed below Exh.1.

(emphasis added)

20) After withdrawal of the former suit, the Plaintiff merely lodged the present Suit on 15 March 2008, which was not even registered. The Plaintiff thereafter filed an application bearing M.C.A. No.155 of 2008 seeking exclusion of time from 2 November 2004 to 17 November 2007 under Section 14 of the Limitation Act, which was dismissed by Order dated 4 December 2010. The Plaintiff filed Writ Petition No.546 of 2011 challenging the Order dated 4 December 2010, in which this Court passed following order on 7 March 2012:

1. The petitioners herein filed a suit in the Court of Civil Judge, Senior Division, Thane. The said plaint was not registered and not numbered. Despit this factual situation, the petitioners filed Misc. Application No.155 of 2008 praying for excluding the period consumed in earlier suit so as to compute the period of limitation for instituting the aforesaid suit. That application was entertained by the learned Joint Civil Judge, Senior Division, Thane and by order dated 4th December, 2010 the said Misc. Application No.155 of 2008 was dismissed.

2. The present petition is filed against the said order dated 4th December, 2010.

3. As the matter was called out, learned advocate Mr. Dani appearing on behalf of the petitioners submitted that filing of said Misc. Application No.155 of 2008 was not proper and he further submitted that it was in the peculiar circumstances. He sought permission to

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withdraw the said application. Since the request is made by the petitioners themselves, this application is allowed to be withdrawn. Consequently, order dated 4th December, 2010 shall not stand any more.

4. **Since, the plaint is not registered and numbered, the concerned officer of the learned Civil Judge, Senior Division, Thane shall peruse the plaint, process it, raise objections if there be any and after this stage is completed and if there are some objections, petitioners original plaintiffs are free to attend to the said objections in accordance with the provisions of law. The concerned officer of the Court of learned Civil Judge, Senior Division, Thane shall not get influenced by order dated 4th December, 2010 or whatever is stated in this order. Petition stand disposed of in above terms with no order as to costs.**

(emphasis added)

It is only after the order passed by this Court on 7 March 2012 that the present Suit was ultimately registered on 8 May 2012.

21) In the light of the above position, the Trial Court took up the issue as to whether Special Civil Suit No.292 of 2012 was within limitation. For answering the issue, the Trial Court framed following two core questions:

(a) Whether institution of Spl.C.S. No. 555/2004 without the certificate of registration of firm partners and its lis would be available to plaintiff for seeking exclusion of time as contemplated by Section 14 of the Limitation Act ?

(b) For the purpose of exclusion of time as contemplated by section 14 of the Limitation Act, whether plaintiff is entitled to include therein period of lis from the date 29/01/2005 to 17/11/2007 i.e. the day on which it got its registration, but remained silent or dormant to bring to the notice of the Court or any person having concern with the suit, the factum of its registration till 11/09/2007 i.e. the day when it made application for withdrawal of the suit and 17/11/2007, the day on which Court passed order for permission to plaintiff to withdraw that suit with liberty to file fresh subject to law of limitation ?

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22) Thus, the principal issue for consideration before the Trial Court was whether the period commencing from the date of registration of the previous Suit (29 January 2005) and ending on the date of its withdrawal (17 November 2007) could be excluded while computing the period of limitation under Section 14 of the Limitation Act.

23) The Trial Court held that following the registration of the firm on 29 January 2005, the prosecution of the former suit was not bona fide. The Trial Court further observed that the Plaintiff had taken 108 days from the date of withdrawal of the previous suit to institute the present suit. On this basis, the Trial Court refused to exclude, under Section 14 of the Limitation Act, the period commencing from the date of registration of the firm and ending on the date of filing of the application for withdrawal of the previous suit.

24) The First Appellate Court has confirmed the order of the Trial Court by agreeing to exclude the period from 2 November 2004 (date of institution of the earlier Suit) to 29 January 2005 (date of registration of the partnership firm) under Section 14 of the Limitation Act. However, the further period of 34 months from 29 January 2005 to 17 November 2007 has not been excluded by the First Appellate Court by holding in paragraphs 45 and 46 of its order as under:

> 45] Now, coming to the present case as stated above, after around 34 months of registration of partnership firm the plaintiff withdrew the earlier suit. No plausible explanation is given by the plaintiff as to why for around 34 months he continued the earlier suit when he

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wanted to withdraw the same. It has come in the crossexamination of plaintiff that someone else proposed building over the suit property and he objected the proposal before the Municipal Corporation The Municipal Corporation sustained that objection holding that until disposal of Special Civil Suit No.555/2004 proposal for construction would not be considered. Thus, I find substance in the submission of learned advocate Shri S.B. Vaishampayan that in order to delay the building proposal given by someone else before Municipal Corporation, the plaintiff kept pending earlier suit.

46] Due to long delay of around 34 months in withdrawing the earlier suit after registration of partnership firm, it cannot be said that plaintiff was diligent after registration of partnership firm. Therefore, in my opinion, the period after the date of registration of partnership firm up to date of withdrawal of suit cannot be excluded under Section 14 of the Limitation Act while reckoning limitation period for the fresh suit. In this way, the present suit being filed after limitation period of 3 years is barred by law of limitation. Hence, finding on point No.1 is recorded in the affirmative.

25) Section 14 of the Limitation Act provides for exclusion of time of proceeding bonafide in a Court without jurisdiction. Section 14 of the Limitation Act provides thus:

14. Exclusion of time of proceeding bona fide in court without jurisdiction.—

(1) In computing the period of limitation 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 of appeal or revision, against the defendant shall be excluded, **where the proceeding relates to the same matter in issue 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) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding 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.

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> (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
>
> Explanation.—For the purposes of this section,—
> (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
> (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
> (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.
>
> *(emphasis added)*

Thus, the period spent in prosecuting the previously instituted proceedings can be excluded only if such proceedings were prosecuted in good faith before a Court which, owing to a defect of jurisdiction or any other cause of a like nature, was unable to entertain them. The three essential requisites for the application of Section 14 are: (i) identity of the cause of action, (ii) absence of jurisdiction or the cause of a like nature in the Court which entertained the prior litigation, and (iii) that the Plaintiff ought to have prosecuted the earlier proceeding with due diligence and ought to have acted in good faith.

26) In ***Surajmal Dagdumarj Shroff*** (supra) this Court has held that when unregistered firm institutes a Suit, the same suffers from the '*defect of a like nature*' within the meaning of Section 14 of the Limitation Act. It is held in paragraphs 15,16 and 26 of the judgment as under:

> 15. There is, however, considerable substance in the other pleas advanced on behalf of the Appellant in this appeal. **The three**

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essential requisites for the application of Section 14 are : (1) identity of the cause of action, (2) absence of jurisdiction or their cause of a like nature in the Court which entertained the prior litigation, and (3) that the Plaintiff must be prosecuting the earlier proceeding with due diligence and must have acted in good faith. The first point is not in dispute in this case, because it is the admitted position that the cause of action on which Regular Civil Suit No. 245 of 1961 was based was the very same cause of acting on which the former suit viz. Regular Civil Suit No. 54 of 1961 was instituted. However, there is serious dispute as to the satisfaction of the other two conditions. It was urged that the former proceeding did not suffer from the defect of jurisdiction or a defect of a like nature. It was further urged that the Plaintiff had not acted in good faith and with due diligence.

16. Now, the earlier proceeding in this case viz. Regular Civil Suit No. 54 of 1961 did not suffer from any defect of jurisdiction, but it was submitted - and this submission was accepted by the lower appellate Court - that it did suffer from a "defect of a like nature" within the meaning of Section 14 of the Indian Limitation Act. This expression "defect of a like nature" has been the subject of much judicial comment. In 40 BomLR 1169 = MANU/MH/0071/1938 : AIR 1939 Bom 26 it was observed that the question what is a "defect of a like nature" within the meaning of Section 14 of the Indian Limitation Act, 1908, must depend on the facts of each case. These words "defect of a like nature" must mean and connote something which is quite distinct from defect of jurisdiction. It was further observed that S. 14 of the Act must be liberally construed. If on the facts of a particular case the Court finds that the Plaintiff was prosecuting in good faith another civil proceeding against the same defendant founded on the same cause of action, the time taken by any such proceeding will have to be excluded. In the above decision the Division Bench referred to and followed a Privy Council decision viz. Hem Chunder Chowdhry v. Kali Prosunno Bhaduri, (1903) 30 Ind App 177 . In Mathura Singh v. Bhawani Singh, MANU/UP/0011/1900 : ILR (1900) All 248, a Full Bench of the Allahabad High Court was considering a former suit filed by the Plaintiff which was held to be bad on account of mis-joinder of Plaintiffs and causes of action. It was held that under the provisions of Section 14 of the Indian Limitation Act, 1908, the Plaintiff was entitled to the benefit of exclusion of the time during which he was prosecuting the former suit. It was observed " "..... if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff that cause is of like nature to defect of jurisdiction within the meaning of Section 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff."

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> 26. Applying the principles enunciated in ILR All 248 and MANU/BH/0068/1949 : AIR1949Pat293 and bearing in mind the general approach commended in 40 BomLR 1169 : MANU/MH/0071/1938 : AIR 1939 Bom 26, that the provisions of Section 14 must be liberally construed. **I am of opinion that the earlier suit filed by the plaintiff viz. Regular Civil Suit No. 54 of 1961 did suffer from a defect which was within the meaning of the expression "defect of a like nature" in Section 14 of the Indian Limitation Act, 1908, and that the plaintiff would be entitled to take advantage of the provisions of that section provided that it is possible to hold that the plaintiff had acted in good faith or with due diligence.**

Thus, this Court held that the statutory bar under Section 69(2) of the Partnership Act precludes a Court from entertaining a suit on its merits and, therefore, constitutes a cause analogous to a defect of jurisdiction within the meaning of the expression “other cause of a like nature” under Section 14 of the Limitation Act.

27) The above principle is affirmed by the Apex Court in ***Haldiram Bhujiawala*** (supra) in which it is held in paragraph 26 of the judgment as under:

> 26. In fact, the Act has not prescribed that the transaction or contracts entered into by a firm with the third party are bad in law if the firm is an unregistered firm. On the other hand, if the firm is not registered on date of suit and the suit is to enforce a right arising out of a contract with the third party-defendant in the course of its business, then it will be open to the plaintiff to seek withdrawal of the plaint with leave and file a fresh suit after registration of the firm subject of course to the law of limitation and subject to the provisions of the Limitation Act. This is so even if the suit is dismissed for a formal defect. Section 14 of the Limitation Act will be available inasmuch as the suit has failed because the defect of non-registration falls within the words "other cause of like nature" in Section 14 of the Limitation Act, 1963. (See Surajmal Dagduramji Shop v. Srikishan Ram Kishan MANU/MH/0080/1973 : AIR1973Bom313 .

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28) In ***Vilas Shriram Mahalle*** (supra) co-ordinate Bench of this Court has held in paragraph 9 of the judgment as under:

> 9. The Supreme Court has expressly held that even if the suit is barred under Section 69 of the Act, it will be open to a plaintiff to seek withdrawal of the plaint with leave to file a fresh suit after registration of the firm. The ratio of the judgment of this Court in M. L. Chaturvedi v. Sanjay Finance Corporation (supra) is therefore contrary to the judgment of the Supreme Court. The observations at the very leas constitute obiter-dicta of the Supreme Court and are therefore binding on the High Court. They cannot be brushed aside as merely casual observations. Mr. Agrawal was unable to distinguish the judgment of the Supreme Court from the facts of this case.
>
> It must therefore, with great respect, be held that the judgment of this Court in M. L. Chaturvedi v. M/s Sanjay Finance Corporation (Supra) and the judgment of the Orissa High Court in Khatunna v. Ramsewak Kashinath (supra) are impliedly overruled by the judgment of the Supreme Court in Haldiram Bhujiawala v. Anand Kumar Deepak Kumar MANU/SC/0144/2000 : [2000]1SCR1247.

29) Thus, there is no dispute about the proposition that a partnership firm instituting a Suit prior to its registration is entitled to withdraw the Suit and file a fresh Suit after registration by ordinarily seeking benefit of Section 14 of the Limitation Act. Therefore, in ordinary circumstances what Plaintiff contends could have been accepted and benefit of exclusion of time under Section 14 of the Limitation Act could have been offered to the Petitioner. However, Section 14 of the Limitation Act uses the expression 'good faith', which term has been defined under Section 2(h) of the Limitation Act as under:

> **"good faith"**—nothing shall be deemed to be done in good faith which is not done with due care and attention;

30) Thus, under Section 2(h) of the Limitation Act nothing can be deemed to be done in good faith which is not done with due care and

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attention. In paragraph 20 of the judgment in ***Surajmal Dagduramji*** (supra) this Court has held that the expression 'good faith' contemplated in sub-sections (1) and (2) of Section 14 of the Limitation Act is not the same as the expression 'good faith' as contemplated under the General Clauses Act. This Court held in paragraph 28 of the judgment as under:

> 28. It is well settled that 'good faith' as contemplated by sub-sections (1) and (2) of Section 14 of the Indian Limitation Act, 1908, is not he same 'good faith' as contemplated under the General Clauses Act. We have a special definition of the expression 'good faith' in the Limitation Act and Section 2(7) provides that nothing shall be deemed to be done n good faith which is not done with due care and attention. When we turn to the definition of 'good faith' in the General Clauses Act, the definition is that a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. Therefore, while the General Clauses Act emphasises 'honesty' and ignores the factor of negligence, the Indian Limitation Act emphasizes not 'honesty' but that a party has acted with due care and attention. Now, this question is principally one of correct conclusion to be arrived at from the facts which are found. I have already earlier referred to the fact that the lower appellate Court found the plaintiff's partner's evidence to be trustworthy and has accepted the same in toto.

31) Furthermore in ***Surajmal Dagduramji*** this Court upheld the order of the Trial Court excluding the period of prosecution of the previous suit after being satisfied that the previous suit was instituted by the Plaintiff therein under a bonafide belief that registration of the firm under the Income Tax Act was sufficient and the moment he noticed the requirement of registration of the firm, the same was registered and instructions were given to the pleader for withdrawal of the previous suit. This is clear from the following findings recorded by this Court:

> 35. For instance, if the suit had gone for regular trial and after framing the issues it had been discovered that the plaintiff's firm was not registered under

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> the Indian Partnership Act, 1932, which would have resulted in the dismissal of his suit, then it would have been a moot point whether the plaintiff's conduct in that proceeding could be regarded as bona fide. In the case before me it has been held that the plaintiff's firm was registered under the provisions of s. 26(A) of the Indian Income-tax Act. The plaintiff instituted the previous suit under an erroneous belief that registration of the firm under the provisions of the Indian Income-tax Act was sufficient in law and would amount to compliance with the requirements of s. 69 of the Indian Partnership Act. **When the plaintiff's pleader was put up on an inquiry as a result of the general plea taken in the written statement, it has been found that the plaintiff's partner took effective steps, ascertained the true position and immediately brought it to the notice of the plaintiff's pleader. Thereafter an application for registration of the firm was made and a Purshis was thereafter immediately filed in Court conceding the true position, which resulted in the dismissal of the earlier suit**. I am not prepared to hold such conduct as showing lack of bona fides or to characterise the plaintiff as a person who has acted without due diligence.
>
> *(emphasis added)*

32) In ***Madhavrao Narayanrao Patwardhan*** (supra) the Apex Court has drawn a distinction between the meaning of the term 'good faith' under the Limitation Act and the General Clauses Act, holding that the definitions of the term under the two enactments are different and distinct. The Apex Court has further held that, for the purposes of Section 14 of the Limitation Act, the relevant consideration is not whether the Plaintiff was dishonest or had a mala fide intention in prosecuting the previous proceedings, but whether, with due care and attention, the Plaintiff could have discovered the defect or omission. It is held by the Apex Court in paragraphs 7 and 8 of the judgment as under:

> 7. The conclusion of the learned trial judge on this part of the case, is in these words :-
>
> "The plaintiff's mala fides are therefore not established and the period occupied in prosecuting the former suit must be excluded under section 14 of the Limitation Act."

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The observations of the High Court are as follows :-

"We do not see our way to accuse the plaintiff of want of good faith or any mala fides in the matter of the filing of the suit in the Subordinate Judge's Court at Miraj. There is nothing on the record to show that he was really guilty of want of good faith or non-prosecution of the suit with due diligence in the Court of the Subordinate Judge at Miraj." Both the courts below have viewed the controversy under section 14 of the Limitation Act, as if it was for the defendant to show mala fides on the part of the plaintiff when he instituted the previous suit and was carrying on the proceedings in that court. In our opinion, both the courts below have misdirected themselves on this question. Though they do not say so in terms, they appear to have applied the definition of "good faith" as contained in the General Clauses Act, to the effect that "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." But the Indian Limitation Act contains its own definition of good faith to the effect that "nothing shall be deemed to be done in good faith which is not done with due care and attention" - (section 2(7)). We have, therefore, to see if the institution and prosecution of the suit in the Munsiff's Court at Miraj, was done with due care and attention. We know that the plaint in the Tikoni suit filed by the same plaintiff in the same court, did contain a statement as to the value of the subject-matter, but it was conspicuous by its absence in the plaint in the suit as originally filed in the Munsiff's Court at Miraj. All the facts alleged in the plaintiff's petition for the return of the plaint, were known to the plaintiff ever since the institution of the suit. Nothing fresh was discovered in 1940. On the other hand, we know definitely that the Tikoni suit had been dismissed by the trial court on merits. The suits were of an analogous character in the sense that the controversy was similar in both of them. The appellant's contention that on the dismissal of the plaintiff's Tikoni suit in November, 1939, he, naturally, became apprehensive about the result of the other suit, and then moved the court for the return of the plaint on the ground of pecuniary jurisdiction, appears to be well-founded. The plaintiff knew all the time that the value of the properties involved in the suit, was much more than Rs. 5,000 which was the limit of the pecuniary jurisdiction of the Subordinate Judge's Court. Can an omission in the plaint to mention the value of the properties involved in the suit, be brought within the condition of 'due care and attention' according to the meaning of "good faith" as understood in the Limitation Act ? It has to be remembered that it is not one of those cases which usually arise upon a revision of the valuation as given in the plaint, on an objection raised by the defendant contesting the jurisdiction of the court to entertain the suit. Curiously enough, the defendant had not raised any objection in his written statement to the jurisdiction of the court to entertain the suit. Apparently, the plaintiff was hard put to it to discover reasons for having the case transferred to

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another court. The question is not whether the plaintiff did it dishonestly or that his acts or omission in this connection, were mala fide. One the other hand, the question is whether, given due care and attention, the plaintiff could have discovered the omission without having to wait for about 10 years or more. The trial court examined the plaintiff's allegation that the omission was due to his pleader's mistake. As that court observed "he makes this contention with a view to shield himself behind a wrong legal advice." That court has answered the plaintiff's contention against him by observing that the plaintiff was not guided by any legal advice in this suit; that the plaint was entirely written by him in both the suits, and that he himself conducted those suits in the trial court "in a manner worthy of a senior counsel." The court, therefore, rightly came to the conclusion that the plaintiff himself was responsible for drafting the plaint and for presenting it in court, and that no pleader had any responsibility in the matter. No reason was adduced why, in those circumstances, the value of the subject-matter of the suit, was mentioned in the plaint in the Tikoni suit but not in the plaint in respect of the present suit.

8. There is another serious difficulty in the way of the plaintiff. He has not brought on the record of this case any evidence to show that he was prosecuting the previously instituted suit with "due diligence" as required by section 14. He has not adduced in evidence the order-sheet or some equivalent evidence of the proceedings in the Sub-Judge's Court at Miraj, to show that in spite of his due diligence, the suit remained pending for over ten years in that court, before he thought of having the suit tried by a court of higher pecuniary jurisdiction. In our opinion, therefore, all the conditions necessary to bring the case within section 14, have not been satisfied by the plaintiff. There could be no doubt about the legal position that the burden lay on the plaintiff to satisfy those conditions in order that he may entitled himself to the deduction of all that period between January 31, 1929 and July 4, 1940. It is also clear that the courts below were in error in expecting the contesting defendant to adduce evidence to the contrary. When the plaintiff has not satisfied the initial burden which lay upon him to bring his case within section 14, the burden would not shift, if it ever shifted, to the defendant to show the contrary. In view of this conclusion, it is not necessary for us to pronounce upon the other contention raised on behalf of the appellants that, even after giving the benefit of section 14, the suit is still barred under Art. 142 of the Limitation Act. This is a serious question which may have to be determined if and when it becomes necessary.

33) Thus, in ***Madhavrao Narayanrao Patwardhan*** (supra) the Apex Court has held that burden is on the Plaintiff to prove that in spite

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of due diligence, the previous suit remained pending. If the ratio of the judgment of the Apex Court in ***Madhavrao Narayanrao Patwardhan*** is applied to the present case there is absolutely no material on record to hold that despite Plaintiff's due diligence, the Suit remained pending for 34 months. In my view, the First Appellate Court has rightly applied the ratio of the judgment in ***Madhavrao Narayanrao Patwardhan*** (supra) to the facts of the present case.

34) In ***Ghasi Ram*** (supra) the Apex Court has considered definition of the term 'good faith' appearing in Section 2(h) of the Limitation Act and has held that when the Plaintiff is illiterate and not acquainted with procedural law it can be held that earlier proceedings were prosecuted in 'good faith'. The Apex Court held in paragraph 10 as under:-

> 10. Learned counsel appearing for the respondents urged that, assuming the High Court suffered from disability to decide the rights of party on facts, the plaintiff appellant did not prosecute the revision petition before the High Court in good faith, therefore, the appellant cannot derive any benefit of Section 14 of the Act. Before the High Court it was not disputed that the plaintiff-appellant has prosecuted the other civil proceeding with due diligence. What is disputed is that the plaintiff did not prosecute the civil proceeding in good faith. "Good faith" is defined in the Act as under:
>
> "2 (h) "good faith" - nothing shall be deemed to be done in good faith which is not done with due care and attention;..."
>
> The aforesaid definition shows that an act done with due care and attention satisfies the test of "good faith". "Due care" means that sufficient care was taken so far as circumstances demanded and there was absence of negligence. In other words, plaintiff has taken sufficient care which a reasonable man is expected to take in order to avoid any injury. It is not shown here that the plaintiff-appellant has not taken sufficient care in prosecuting the remedy. Where a plaintiff is illiterate

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> and is not acquainted with the procedural law, the only thing that he can do is to consult some lawyer for advice. It is not disputed that the plaintiff-appellant filed the revision before the High Court on the advice of his counsel, although it may be that he was ill-advised. Learned counsel for the respondents contended that any act done in violation of law cannot be described as act done with due care. No doubt, when a party proceeds contrary to a clearly expressed provision of law, it cannot be regarded as prosecuting the other civil proceeding in good faith. It is based on sound principle of law. But the said rule can not be enforced in rigidity in every case. Each case has to be judged on its own merits. In the present case the plaintiff-appellant is not a legally trained person and thus he sought advice of his counsel for future course of action. The counsel advised him to file revision in the High Court instead of bringing a fresh suit under Order 21 Rule 103 C.P.C. It is also true that at that time there was no unanimity about remedy of revision amongst various High Courts. Plaintiff-appellant's revision was entertained for hearing by the high Court and that gave expectation to the plaintiff-appellant that order of the executing court may be set aside and further there was no inordinate delay in filing the suit Under Rule 103. If, on examining the facts, it is found that there was no lack of due care, there is no reason why the plaintiff-appellant should not be accorded the benefits of Section 14 of the Act. Does the interest of justice demand that plaintiff should be refused benefit of Section 14 of the Act on account of the negligence on the part of his counsel, ill advising him to file a revision instead of filing a fresh suit? An illiterate litigant cannot be made to suffer when he is ill-advised by his counsel. On the facts and circumstances of this case, we are satisfied that the plaintiff-appellant prosecuted the earlier civil proceeding in good faith.

35) In the present case, the Plaintiff /Appellant is a professional developer, well versed with remedies available to it. It acquired knowledge that the former suit would not be maintainable on account of absence of registration and accordingly took steps for its registration. However, instead of withdrawing the former suit it continued prosecuting the same for 34 long months. In ***Surajmal Dagduramji*** the Plaintiff therein had immediately taken steps to withdraw the previous suit, which is not the case here. The Plaintiff continued prosecuting the previous suit for 34 long months and took the same upto the stage of

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recording of evidence. It therefore cannot be held that the period after registration of the firm was spent by the Plaintiff in good faith.

36) Both the Courts below have concurrently held that the prosecution of the previous suit, from the date of registration of the firm until the filing of the application for withdrawal of the suit, cannot be regarded as bona fide prosecution undertaken in good faith. I am in agreement with the concurrent findings recorded by both the Courts below.

37) It is contended on behalf of the Plaintiff, relying upon the judgment of the Apex Court in ***Consolidated Engineering Enterprises*** (supra), that the entire period during which the Court entertained the proceedings before discovering that the matter ought to have been instituted before another Court must be excluded for the purposes of limitation. The judgment does not really assist the case of the Petitioner. It draws a distinction between provisions of Section 5 of the Limitation Act which involve the exercise of discretion by the Court and Section 14, which provides for mandatory exclusion of time without any discretion. However, in paragraph 31 of the judgment, the Apex Court has ultimately held that condition of good faith and due diligence must be satisfied for claiming benefit of Section 14 of the Limitation Act. The Apex Court further held that there can be no hard-and-fast rule about what amounts to good faith and matter needs to be decided on facts of each case. The Apex Court held in paragraph 31 of the judgment as under:

> 31. To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this Judgment have to co-

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> exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essentially pre-requisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith.

38) It therefore, cannot be contended that in every case where prosecution of the previous Suit/proceedings is demonstrated, entire period of such prosecution must necessarily be excluded. The Plaintiff must establish by leading evidence that prosecution of the previous proceeding was in good faith and with due diligence. In the present case, the Plaintiff has failed to establish this important factor and both the Courts have rightly held that prosecution of such suit post registration of the firm was not in good faith as Plaintiff had already discovered the defect in previously instituted Suit and had taken steps for registration of the firm.

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39) Reliance by Mr. Thipsay on judgment of the Apex Court in ***M.P. Steel Corporation*** (supra) which essentially follows the judgment in ***Consolidated Engineering Enterprises*** (supra), does not assist his case. The judgment in ***M.P. Steel Corporation*** once again addresses distinction between statutory schemes under Sections 5 and 14 of the Limitation Act. The judgment however cannot be cited in support of abstract proposition that in every case the entire period during which previous proceedings are prosecuted, must necessarily be excluded. Mr. Thipsay relies upon the judgments of this Court in ***Laxmi Srinivasa R and P Boiled Rice Mill*** (supra) and ***Purni Devi*** (supra) in support of his contention that, in the absence of a specific averment that the previous suit was instituted by the unregistered firm with a mala fide intention, and in the absence of any challenge to the bona fides of the Plaintiff, the benefit of Section 14 of the Limitation Act must necessarily be extended to the Plaintiff. Both the judgments in ***Laxmi Srinivasa R and P Boiled Rice Mill*** *and* ***Purni Devi*** follow the ratio of the judgment in ***Consolidated Engineering Enterprises*** and ***M.P. Steel Corporation.*** The two judgments in ***Laxmi Srinivasa R and P Boiled Rice Mill*** and ***Purni Devi*** cannot be read in support of an abstract proposition that in absence of establishment of good faith and due diligence, the entire period of previous litigation must be excluded. It is not always for the Defendant to establish malafide intention in prosecution of previous proceedings. On the other hand, the burden lies on Plaintiff to establish existence of good faith and due diligence in prosecution of the previous proceedings. The moment it is established that by exercise of due diligence the Plaintiff was in a position to withdraw the earlier proceedings, the period

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post discovery of that knowledge cannot be excluded under Section 14 of the Limitation Act.

40) In my view, therefore, both the Trial Court as well as the First Appellate Court have correctly refused to exclude the period of 34 months after 29 January 2005 (date of registration of the firm) till 17 November 2007 (date of withdrawal of the Suit) under Section 14 of the Limitation Act.

41) The questions framed can accordingly be answered by holding that the Plaintiff did not make out grounds within the parameters of Section 14 of the Limitation Act for exclusion of entire period from 2 November 2004 to 17 November 2007. Only the period from date of institution of former suit (2 November 2004) till registration of the firm (29 January 2005) could have been excluded under Section 14 of the Limitation Act. The First Appellate Court has rightly appreciated the settled principles of law by refusing to exclude the period from 29 January 2005 to 17 November 2007 under Section 14 of the Limitation Act.

42) In view of the above discussion, there is no warrant for interference in the concurrent findings recorded by the Trial and the Appellate Courts on the issue of limitation. Second Appeal is devoid of merits and it is accordingly **dismissed** with costs. All pending Interim Applications are disposed of.

NEETA SHAILESH SAWANT
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[SANDEEP V. MARNE, J.]

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