

**HEADING OF DECISION IN CIVIL SUITS
IN THE COURT OF 1st ADDL.SENIOR CIVIL JUDGE, BHUBANESWAR**

***Present :- Pranab Kumar Routray, LL.M,
1st Addl. Senior Civil Judge,
Bhubaneswar***

C.S. no.4/1502 of 2012/2011(Money)

M/S Ortel Communications Ltd.,
A company incorporated under the
provision of Companies Act, 1956,
having its registered office at B-7/122A,
Safdarjung Enclave, New Delhi, and
Corporate Office at C-1,
Chandrasekharapur, Behind RMRC,
Bhubaneswar, Dist.Khurda.
Represented through its Company
Secretary Mr. Lalit Kumar Mohanty.

... **Plaintiff**

-Versus-

Giant Wheel Animation Production and
Research Pvt. Ltd., A company incorporated
under the provision of Companies Act, 1956,
having its registered office At 623, BJB Nagar,
Lewis Road, P.S.Badagada, Bhubaneswar-751014,
Dist.Khurda. Represented through its
Managing Director Mr. Bibekananda Jena.

... **Defendant**

COUNSEL APPEARED

For Plaintiff : Sri Sourya Sundar Das and associates

For Defendant : Sri Purna Chandra Swain and associates

Date Of Conclusion Of Argument : **07-03-2015**

Date Of Judgment : **19-03-2015**

JUDGMENT

This is a suit for realisation of Rs.1,50,000/- with interest.

2. The case of the plaintiff in brief is that it is a company incorporated under provisions of Companies Act, 1956 having its corporate office at C-1, Chandrasekharpur, Bhubaneswar engaged in running of cable television network service all over the State of Odisha and also outside the State. The plaintiff is also running Broadband service through its cables. The defendant company works on production of 3D development with Animation for commercial films. The plaintiff was desirous for preparing commercial advertisement and getting such information the defendant approached the plaintiff with commitment for developing a 3D development with animation for 30 seconds commercial film as per the plaintiff's requirement which includes concept of development, story board and script to final output. Defendant submitted its quotation on 18-02-2010 quoting an amount of Rs.3,00,000/- for the entire assignment assuring to provide the desired project within specified time. Plaintiff required the TV commercial by April 2010. Accordingly defendant was informed who also agreed to it and accordingly mentioned the time frame in its quotation as 15 to 20 days for concept development and 10 days for script thereby completion of work was fixed by April, 2010. Defendant vide its e-mail dtd.01-04-2010 have given the mode of payment i.e. 40% of the total amount to be paid in advance, 40% after animation is over and balance 20%

after delivery of the commercial advertisement. Further the defendant had also demanded an amount of Rs.30,000/- for story board and script. The plaintiff had paid Rs.1,20,000/- as advance vide cheque dtd.14-04-2010 and also completed its part by paying another Rs.30,000/- for story board and there was nothing to be complied by him till completion of animation. In spite of due payment the defendant failed to fulfill its part and failed to complete the work within stipulated period thereby it affected the growth of Broadband service of the plaintiff. So, the plaintiff issued a letter through e-mail to the defendant on dtd.28-07-2010 asking to refund the amount of Rs.1,50,000/- but defendant did not respond to the said letter. Thereafter plaintiff sent legal notice on dtd.03-09-2013 to which the defendant replied admitting the claim of the plaintiff but refused to pay back the amount. Hence, the plaintiff filed this suit for realisation of Rs.1,50,000/- with interest.

3. Defendant appeared and filed written statement challenging the suit on its maintainability, cause of action, limitation, non-joinder and mis-joinder of necessary party. It is admitted that the defendant has been working in the animation commercial which included development, character and location, designs of 3D development, sounds and animations excluding story board development for which the plaintiff approached the defendant company for developing a 3D development with animation for 30 seconds commercial film including concept development at the cost of Rs.3,00,000/- for the entire assignment. Payment of terms was specified by the parties and it was agreed that the plaintiff would pay 40% of the

total assignment in advance, another 40% after animation was over and rest 20% after delivery of the commercial advertisement. Defendant denied to have assured to provide the desired project within specified time and that it was required by the plaintiff by April, 2010 rather plaintiff has never asked the defendant to complete the entire assignment within a time frame because the defendant was only concerned with the work for 3D concept development and it has no relation with the script work. It is denied to have ever demanded Rs.30,000/- for any further payment from plaintiff. The defendant categorically mentioned that the total charges for its assignment was Rs.3,00,000/- including sound and voice for the film and the aforesaid mode of payment was intimated to plaintiff on 1st April, 2010 to which the plaintiff agreed. Defendant admits to have received a cheque dtd.14-04-2010 of Rs.1,20,000/- from the plaintiff towards advance payment but denies to have instructed to make further payment of Rs.30,000/- for story board and script. The defendant specifically mentioned that on 1st April 2010 it forwarded the quotation for the concept of 3D development and received reply from the plaintiff with remark “ Go ahead, Thanks ” but plaintiff failed to make any advance payment till 14-04-2010. Defendant completed the work of second stage of assignment and sent the final jingle for approval on 23rd April 2010 requesting the plaintiff for payment of further 40% of the project cost as agreed earlier. On the next day plaintiff intimated that some correction was required by some Hindi speaking person and the jingle be approved basing upon an audio file and not on the script basis and avoided to

make further payment and sought for commercial changes in the project repeatedly and compelled the defendant to do the same. On 16th June, 2010 defendant intimated the plaintiff that the project was already finished and the same was ready for delivery after receiving the remaining payment but instead of making payment of rest amount plaintiff issued notice on flimsy ground. Hence, it is prayed that the plaintiff is liable to pay Rs.1,80,000/- to the defendant as per agreement made between the parties and the suit be dismissed with heavy cost.

4. With the aforesaid pleadings on record, the following issues have been settled :

ISSUES

- 1) Whether the suit is maintainable ?
- 2) Whether there is cause of action to file the suit ?
- 3) Whether the suit is barred by the law of limitation ?
- 4) Whether the suit is bad for non-joinder and mis-joinder of necessary parties ?
- 5) Whether the plaintiff is entitled for a decree for realisation of Rs.1,50,000/- with interest from the defendant as prayed for ?
- 6) To what other relief (s), the plaintiff is entitled ?

5. One Lalit Kumar Mohanty, the company secretary of plaintiff company is examined as the sole witness from the side of plaintiff as P.W.1 and the Managing Director of the defendant company is examined as the sole witness from the side of defendant as D.W.1. Documents vide Exts.1 to 9 are

marked from the side of plaintiff and Exts.A to K are marked from the side of defendant, list of which is appended at the foot of the judgment.

With the aforesaid evidence on record the issues as framed are to be answered.

FINDINGS

Issue no.5

6. This being the principal issue is taken up first for decision. At the outset, it is said that there is no dispute about the work entrusted to the defendant by the plaintiff. So far as payment is concerned, there is no dispute about payment of Rs.1,20,000/- by the plaintiff to the defendant but there is dispute on payment of amount of Rs.30,000/-. The plaintiff claims that he has paid Rs.1,50,000/- to the defendant whereas defendant says that they have received only Rs.1,20,000/-. At the outset on this issue, it is further required to be reflected that though defendant has claimed further amount of Rs.1,80,000/- from the plaintiff in pleadings but have not filed any counter claim to that effect nor they have claimed the said amount while adducing evidence during examination-in-chief filed in shape of affidavit. Hence, the defendant is not liable to get Rs.1,80,000/- from the plaintiff.

7. It is claimed by the plaintiff that the defendant was to deliver the complete work by the end of April, 2010 as per the quotation and the same was required for urgent promotion of broadband service of their company but defendant could not complete the work within the time frame which affected the growth of their broadband service and hence

defendant is liable to pay back the amount of Rs.1,50,000/- paid to them. On the other hand, it is claimed that the plaintiff made delay in paying first phase of advance money and paid Rs.1,20,000/- on 14-04-2010, defendant completed the work of second phase and sent for approval on 23-04-2010 and requested the plaintiff to make further payment of 40% of the project cost but it was not paid and hence he is not liable to pay back the advance money paid by the plaintiff. Now it is required to delve into the evidence to find out whether the plaintiff is entitled for the claim amount.

8. Documentary evidence adduced from both sides plays more vital role than oral evidence to decide the dispute. Let me first look into the evidence with regard to the disputed amount of Rs.30,000/-. Ext.2 is the quotation given by one C MENT company to the plaintiff company for concept/script development and the project cost is Rs.30,000/- and mode of payment for the project as reveals from the said document is 50% as advance and 50% to be paid on delivery. P.W.1, the sole witness of plaintiff deposed in para 18 of his evidence that as per the terms and conditions of Ext.2, the plaintiff has to issue all the cheques in favour of C MENT Media Forms Pvt. Ltd. He also admitted the term of payment to be made that 50% to be paid as advance and rest 50% on delivery of work. The plaintiff has marked the bank statement vide Exts.6 and 7 showing credit of Rs.15,000/- and Rs.14,700/- to the account of defendant. On perusal of Ext.6 it is found that Rs.15,000/- was paid to C MENT Media Forms Pvt. Ltd. on 26-02-2010 and Rs.14,700/- was paid to the said company on 17-05-2010. It is also admitted

by P.W.1 that they have paid total amount of Rs.30,000/- to the said company. It is further admitted by him that the plaintiff company has not made demand to the said company as they have made correspondence with the defendant company. It is the pleadings of the plaintiff that the plaintiff also complied its part by paying Rs.30,000/- as per the instruction of the defendant for story board and script and there was nothing to be complied by the plaintiff till completion of the animation. Whereas P.W.1 in his examination-in-chief deposed that the defendant had demanded an amount of Rs.30,000/- for story board and script vide letter dtd.18-02-2010 and after making payment of Rs.1,20,000/- through cheque dtd.14-04-2010 the plaintiff also complied its part by paying another Rs.30,000/- as per the instruction of the defendant for story for the said purpose and after the said payments, there was nothing to be complied by him till completion of the animation work. On perusal of the documents filed by the plaintiff it is found that communication between the defendant and plaintiff starts from 26th March, 2010. The letter dtd.18-02-2010 was from C MENT company. Ext.4 is the e-mail correspondence between plaintiff and defendant of dtd.01-04-2010, 05-04-2010 and 06-04-2010 and it reveals that on 05-04-2010 the defendant intimated the plaintiff that they have started the work as per their planning and requested the plaintiff to pay 40% as advance as soon as possible and in the said letter it is also requested to make payment to C MENT company of Rs.15,000/- which is pending for script. It is the only letter which reveals that defendant has requested the plaintiff to make payment of Rs.15,000/- to

C MENT company. But there is no letter of defendant of dtd. 18-02-2010. The letter dtd.18-02-2010 is Ext.2 which is quotation of C MENT company sent to plaintiff for concept creation and script development and the project cost was Rs.30,000/-. The bank statement vide Ext.6 reveals that on 26-02-2010 plaintiff company paid Rs.15,000/- to C MENT company. The quotation of the defendant company is Ext.3 which is of dtd.01-04-2010. Hence, the available materials on record reveal that prior to commencement of correspondence by the plaintiff with the defendant, the plaintiff has paid Rs.15,000/- to C MENT company. The next payment to C MENT company was made on 17-05-2010 as reveals from Ext.7. The document filed from the side of plaintiff do not reveal that any payment was made to the defendant after 14-04-2010. Considering the admission of P.W.1 that an amount of Rs.30,000/- was paid to C MENT Media Forms Pvt. Ltd. and considering the fact that there was no payment of Rs.30,000/- to the defendant and also considering the fact that an amount of Rs.15,000/- was made prior to filing of quotation by the defendant, it cannot be held that defendant is liable to pay back Rs.30,000/- to the plaintiff.

9. Now the rest evidence is to be scanned to find out whether plaintiff is entitled to get back Rs.1,20,000/- from defendant. Ext.3 is the e-mail letter of defendant dtd.01-04-2010 which is the quotation. It reveals about project cost, from concept development, story building, 3D development to final output the charges would be Rs.3,00,000/- including sounds and voice over for the film. The

defendant also mentioned therein that they would like to get atleast 40% as soon as possible to start the work and another 40% once the 3D pre-production is over and remaining 20% within seven days of delivery of job. There is no dispute about this mode of payment. Ext.4 is e-mail correspondence of dtd. 06-04-2010 which reveals that on the said date the plaintiff asked the defendant about the deadline to complete the job and immediately on the same day defendant replied that they were targetting to finish by the end of that month and also questioned the plaintiff that whether such deadline would be acceptable by them or not. Ext.4 further reveals that the plaintiff agreed to it and suggested to start the job immediately and he was getting the payment processed. The quotation of dtd.01-04-2010 vide Ext.3 does not reveal that it was agreed by the defendant to complete the job and to deliver the same by the end of April, 2010 rather on 06-04-2010 on being asked by the plaintiff, the defendant replied that they have targetted to finish the job by the end of April, 2010. In that letter it is also found that the defendant wanted to start full fledged work once they get the advance payment. The plaintiff also suggested to start the job and he was getting the payment processed. But the evidence of P.W.1 in para 9 reveals that they made first payment to the defendant on 14-04-2010. Such evidence is admitted by D.W.1 but it is deposed that the amount of Rs.1,20,000/- was deposited on 16-04-2010 in his ICICI Bank account which is also evident from Ext.C. Such evidence on record establishes that the plaintiff has delayed much in making payment of first phase 40% of project cost. It is evidence of D.W.1 that on

receiving the aforesaid advance amount, his company started the work and on dtd.23-04-2010 he sent the final jingle after changing and modifying the same as per the comments and suggestion of the plaintiff and also showed their intention to proceed on audio on the said jingle. He has further deposed that they have asked the plaintiff company for final approval on the jingle. The correspondence in this regard between the parties is Exts.D, E, F, G, H and J. But all these documents vide Exts.D to J are marked with objection raised by plaintiff.

10. Ext.D is the letter of defendant dated 23rd April, 2004 to plaintiff which reveals about sending of final jingle after changing and modifying on the basis of comments and suggestions of the plaintiff and the intention of the defendant to go for audio on the jingle and in the said letter defendant also requested the plaintiff to give his final approval. On the same day vide Ext.E the plaintiff replied that they are getting it corrected by some Hindi speaking person and the jingle will be approved based on audio file and not on the script basis. His next communication is Ext.F which is e-mail letter dated 24th April, 2010 which also reveals about correspondence in that regard. Similarly Ext.G, the e-mail letter dtd.26-04-2010 sent by defendant to plaintiff requesting the plaintiff to look at the corrected copy and Ext.H reveals that the defendant requested the plaintiff to make another 40% payment so that they can do the renders and complete the film. The next document is Ext.J, e-mail correspondence between the parties of dtd.26-05-2010, 27-05-2010 and 29-05-2010. It reveals that plaintiff asked the defendant to make necessary change in the

commercial as per their telecon. Ext.J also reveals that on dtd.27-05-2010 the defendant explained the plaintiff as to how certain changes are manageable and certain are not without extra charges of Rs.40,000/-. The said letter further reveals that the defendant requested the plaintiff for payment of another 40%. However, evidence does not reveal that further payment of 40% was made by the plaintiff to the defendant but defendant was repeatedly requesting the plaintiff to make further payment. The documents further reveal that defendant has sent the jingle as per the modification of the plaintiff and there was communication between the parties after end of month of April, 2010 which seems that there was extension of deadline for completion of job and no particular date was fixed to deliver the job.

11. Learned counsel for the plaintiff argued that the documents vide Exts.D to J being documents of electronic records are not admissible as per Section 65-B of Indian Evidence Act as the said documents have not been accompanied by certificate in terms of the said section obtained at the time of taking the document. On this point, learned counsel for the defendant argued that the e-mail correspondence filed by the plaintiff was also not accompanied by certificate and if those documents are admitted into evidence, there is no reason to discard Exts. D to J. He further argued that Section 85-B of the Evidence Act says that the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status

relates. It is further submitted that the plaintiff fails to prove the contrary that the electronic record has been altered.

12. On perusal of evidence of P.W.1 it is found that he has admitted in para 9 of his evidence that the last correspondence with defendant relating to execution of work was on 28-07-2010. The said last letter is marked as Ext.5 wherein the plaintiff has asked the defendant to refund the amount of Rs.1,50,000/- paid as advance. The just previous letter to Ext.5 as produced by plaintiff is the correspondence between the parties on dtd.06-04-2010 vide Ext.4. So, as per the plaintiff, after correspondence between the parties on dtd.06-04-2010 by e-mail, there was no e-mail correspondence from their side till 28-07-2010 because the plaintiff do not admit the correspondence vide Exts.D to J. Here, question arises when the plaintiff was in urgent need of the work and wanted it to be completed by end of April, 2010 then how could they refrain from making any correspondence through e-mail with defendant till 28-07-2010 whereas the quotation, mode of payment etc. was finalised through e-mail correspondence. This shows that plaintiff company has suppressed some e-mail correspondence for which adverse inference is to be drawn. That apart, the moot question arises that genuineness, veracity or reliability of the evidence is seen by the Court only after the stage of relevancy and admissibility which are some of the first principles of evidence. It is held by Hon'ble Apex Court in a decision of three Judge Bench reported in AIR 2015 SC 180 that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under

Section 65-B of Evidence Act are satisfied. In the present case Exts.2 to 5 are electronic records which are printed on papers produced by a computer but those documents are not accompanied by certificate in terms of Section 65-B. Similarly Exts.A and B also do not bear certificate in terms of the said section but learned counsel for the plaintiff in course of argument has taken the plea that no objection has been raised by any party on these documents and therefore the said documents are admissible. So as per the plaintiff Exts.D to J are not admissible because objection is raised on admissibility of the said documents and the objection is that those documents are not accompanied by certificate in terms of Section 65-B of Evidence Act. In view of the said section and in view of the aforesaid decision of the Hon'ble Apex Court it can be said that all the documents produced from the side of plaintiff cannot be admissible in evidence as those documents are not accompanied by certificates in terms of Section 65-B and therefore the secondary evidence are inadmissible. The genuineness, veracity or reliability of those evidence can only be seen after the stage of admissibility of evidence. Here it may be said that, if those documents vide Exts.1 to 5 are not admissible in evidence then the plaintiff has no case at all. If the plaintiff relies on some documents produced by the defendant and does not raise question on admissibility of those documents but at the same time raising objection on other e-mail correspondence without proving contrary to it seems that the plaintiff is taking advantage of law which is suitable to him. This apart, nothing

has been proved by the plaintiff to hold that Exts.D to J have been altered.

13. The evidence on record reveals that plaintiff has delayed in making first phase of 40% amount even though quotation was submitted on 01-04-2010 but plaintiff was expecting to get the complete work by the end of April 2010. The evidence further reveals first phase of work was over but plaintiff did not take step for payment of second phase amount. Considering the correspondence between the parties it is held that end of April, 2010 was not the dead line for completion of the work. It is undisputed that the work has not been completed and the defendant has not delivered the complete work. But the reasons assigned by the defendant found to be justified. Hence, it is held that defendant is not liable to repay Rs.1,20,000/- to the plaintiff. This issue is answered accordingly.

Issue no.3

14. It is claimed by the defendant that the suit is barred by law of limitation. Such plea seems to be an evasive plea. The defendant admits to have received money on 16-04-2010. Suit is filed on 05-09-2011. Hence, the suit is well within the period of limitation.

Issue no.4

15. The defendant claims that the suit is liable to be dismissed due to non-joinder and mis-joinder of necessary party. The plaintiff claim Rs.1,50,000/- with interest from the defendant whereas the plaintiff has entered into agreement with one C MENT company for execution of some portion of the said project for Rs.30,000/-. Hence, the C MENT company is a

necessary party in the suit and therefore the suit is bad for non-joinder of necessary party.

Issue nos.1, 2 and 6

16. These issues are formal in nature. In view of findings under issue no.5 there is no cause of action to file the suit and the suit so filed is not maintainable. The plaintiff is neither entitled to get the relief prayed for nor for any other relief.

Hence, it is ordered.

ORDER

The suit be and the same is dismissed on contest against the defendant but under the circumstances without any cost.

***1st. Addl. Senior Civil Judge,
Bhubaneswar.***

The judgment is typed to my dictation by the typist attached to this Court directly on the computer provided under E-Court Project, corrected and pronounced by me in the open Court today i.e. on the 19th day of March, 2015 under my seal and signature.

***1st. Addl. Senior Civil Judge,
Bhubaneswar.***

List of Witnesses examined for the Plaintiff:

P.W.1: Lalit Kumar Mohanty

List of Witnesses examined for the Defendant :

D.W.1: Bibekananda Jena

List of Documents marked as Exhibits for the Plaintiff:

- Ext.1: Authorisation letter given to P.W.1 by Board of Directors to file the case and to depose evidence ;
- Ext.2(with objection): Quotation dtd.18-02-2010 issued by the defendant ;
- Ext.3: Letter dtd.01-04-2010 issued by the defendant through E-mail ;
- Ext.4: Letter dtd.06-04-2010 issued by the defendant through E-mail ;
- Ext.5: E-mail dtd.28-07-2010 of P.W.1 and defendant ;
- Ext.6: Bank statement showing credit to the account of defendant of Rs.15,000/- ;
- Ext.7: Bank Statement showing credit of Rs.14,700/- to the account of defendant ;
- Ext.8: Office copy of P.W.1's Advocate's notice dtd.03-09-2010;
- Ext.9: Reply by the defendant sent through e-mail;

List of Documents marked as Exhibits for the Defendant:

- Ext.A (with objection) : Final Quotation submitted by D.W.1 on 01-04-2010 ;
- Ext.B: E-mail sent by the plaintiff to D.W.1 dtd.06-04-2010 ;
- Ext.C: Bank Statement of account of defendant company ;
- Ext.D(with objection): E-mail dtd.23-04-2010 sent by D.W.1 to plaintiff ;
- Ext.E(with objection): E-mail dtd.24-04-2010 sent by plaintiff to D.W.1 ;
- Ext.F(with objection): E-mail dtd.24-04-2010 sent by D.W.1 to plaintiff ;
- Ext.G(with objection): E-mail dtd.26-04-2010 sent by D.W.1 to plaintiff ;
- Ext.H(with objection): E-mail dtd.12-05-2010 sent by D.W.1 to plaintiff reminding for second phase payment ;
- Ext.J(with objection): E-mail dtd.26-05-2010 sent by plaintiff to D.W.1 regarding connection of jingle;
- Ext.K(with objection): Reply of legal notice sent through E-mail dtd.16-09-2010.

***1st. Addl. Senior Civil Judge,
Bhubaneswar***