

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT
BHUBANESWAR.**

Present:

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 15th Sept. '14.

R.F.A. No. 05 of 2014.

[Arising out of the judgment dated 28.11.2013 & decree dated 07.12.2013 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in C.S. No.273 of 2013.]

Shreekanta Pattajoshi, aged about 39 years, S/o. Sri Raghunath Pattajoshi, At - Qrs. No.2RA-49, Road No.3, Unit-IX, P.S. - Kharavela Nagar, Bhubaneswar, Dist. - Khurda.

... **Appellant.**

-V e r s u s-

Municipal Commissioner, Bhubaneswar Municipal Corporation,
Bhubaneswar.

... **Respondent.**

Counsel :

For Appellant -- Shri S. Mishra & Associates.
For Respondent -- Shri S.S. Panda.

Date of argument : 20.08.2014.

Date of judgment : 15.09.2014.

J U D G M E N T

This appeal is directed against the judgment dated

28.11.2013 & decree dated 07.12.2013 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in C.S. No.273 of 2013, dismissing the suit of the plaintiff (the appellant herein).

2. The parties hereinafter have been referred to as they have been arrayed in the Court below for the sake of convenience and proper appreciation.

FACTS :

3. The case of the plaintiff is that he being a 'C' Class Contractor has been empanelled as one of the Contractors under Bhubaneswar Municipal Corporation since last six years. He has performed several civil works being entrusted to him by the defendant. It is averred that he has completed different civil works satisfactorily and, after disbursement of final bills against those works, the defendant has not paid the security amount already deposited with them. The plaintiff intimated several times in writing on 25.10.2011, 14.11.2011 & 14.12.2011 to the defendant to release his security deposit; but the defendant turned a deaf ear to such request and, finally, on 21.05.20-12, the plaintiff issued notice to the defendant through his advocate. Nonetheless, no reply was sent by the defendant. Although in other cases, the defendant is releasing the security deposit after expiry of six months from the date of payment of final bill, but in the case of

the plaintiff, the defendant is not adopting the same procedure. Hence, the plaintiff was compelled to file the suit against the defendant with prayer to direct the defendant to release the security deposit, as narrated in Annexure-1, within a definite period. Hence the suit.

4. The defendant appeared, but did not file written statement. The defendant participated in the hearing of the suit.

5. The learned trial Court examined one witness, who is none other than the plaintiff himself, and also perused the documentary evidence produced by him and, finally, dismissed the suit by giving finding that the plaintiff has not been able to prove the amount of security to be refunded to him.

CONTENTIONS :

6. Learned counsel appearing for the appellant submitted that the learned trial Court has erred in law by dismissing the suit when the respondent has not filed written statement and even when he has not adduced any evidence. He further submitted that the learned trial Court ought to have understood the mandatory provisions of Orissa Public Works Department Code (hereinafter called “the Code”), which speaks that the defendant is to release the security deposit from the final bill amount after completion of the statutory

period of six months from the date of final bill being paid. The learned trial Court has erred in law by not applying her judicial mind to the facts and circumstances of the case. He further argued that the learned trial Court has discussed about the ISD to the tune of Rs.650/- and Rs.700/-, which has not been pleaded by the plaintiff because ISD relates to Initial Security Deposit, but not the security deposit, as prayed for by the plaintiff. The learned trial Court ought to have allowed the suit basing on the provisions of law, as enshrined in the Code, for return of the security deposit made by the plaintiff. On the other hand, he submitted that the impugned judgment and decree are bad in law and it should be set aside.

7. On the contrary, learned counsel appearing for the respondent submitted that even if the defendant has not adduced any evidence, but they have participated in the hearing of the suit. It was further submitted that the learned trial Court has rightly dismissed the suit, as the plaintiff could not discharge his onus. He supported the findings of the learned Court below and submitted to dismiss the appeal.

DISCUSSIONS :

8. Being the Appellate Court, this Court has to go through the entire materials on record, including the evidence, as the first appeal is in continuation of the suit in the appeal

and there the procedural aspect has to be gone through. The First Appellate Court has got its duty to see whether justice has been meted out with proper perspective by the learned Court below. Accordingly, this Court has got enormous duty to award even justice.

9. It is the cardinal principles of onus probandi that if neither of the parties will adduce evidence, the suit of the plaintiff will fail. On the other hand, it is always the duty of the plaintiff to discharge onus by leading evidence.

10. In the instant case, on going through the pleading, it appears that the plaintiff has based his case on work orders issued to him and deposit of security amount at his instance with the defendant. So, it is his duty to produce the documents relied on. The learned trial Court has also formulated point No.(iii), even if no written statement is filed, to the extent that whether the plaintiff is entitled to the relief for mandatory direction to the defendant directing them to release the security deposit, as specified in Annexure-1 ? Annexure-1 is the copy of letter of his Advocate annexed to the plaint. It has contained descriptions of civil work orders right from 2004 till 2012 issued to the plaintiff. The plaintiff in order to meet the main point has examined himself and produced the copy of notice issued by his Advocate vide Ext.1 and postal

acknowledgement receipts vide Ext.2 series. On going through his evidence, it appears that he being a 'C' Class Contractor has completed civil works under the defendant; but the defendant has deducted the security amount even after completion of the said works. Consequently, he intimated the defendant several times in writing; but all his efforts went in vain. Of course, the defendant declined to cross-examine him. He has not proved the work order and deposit of the security amount with the defendant. On going through the pleading, it appears that he has relied upon Advocate's notice, which has already been marked as Ext.1 and about 13 different work orders right from 28.02.2004 till 23.03.2006 and, in fact, those 13 work orders were filed by the plaintiff on the date of presentation of the plaint in the Court below. Order 13, Rule 1 of the C.P.C. speaks that documentary evidence, in original, must be filed along with plaint and written statement. Order 13, Rule 2 of the C.P.C. casts duty on the Court to receive the documents so produced. Now, the documents have been filed along with the plaint and they have been received by the Court below. Proviso to Order 18, Rule 4 of the C.P.C. says that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the

orders of the Court. In the case at hand, neither orders of the Court nor any remark in the evidence has been made by the learned Court below to show why the documents received under Order 13, Rule 2 of the C.P.C. from the plaintiff were not exhibited by the plaintiff. If the plaintiff does not want those documents to be produced, there must be memo or petition to exclude them from the record. Now, the duty casts on the Court to ask the party whether to rely upon those documents or not. But, in the instant case, the learned trial Court has observed that although the documents are in the record, the same were not proved by the plaintiff, for the reasons best known to him. In my considered view, the observation of the learned trial Court is not justified and it is for the Court to accept the documents in evidence subject to their relevancy and admissibility. Apart from this, the learned trial Court has compared the entry Nos.1 & 2 in Ext.1 with some work orders, which have not been exhibited, and observed that those work orders do not prove the amount to be deposited, as they do not tally with Ext.1. When the work orders have not been exhibited and accepted in evidence, it is not proper for the learned trial Court to take the same into consideration and come to a conclusion. On the other hand, it is found that the plaintiff has not been given reasonable opportunity to produce

the documentary evidence in his support to prove the work order and the security deposit made by him. The finding of the learned Court below on this score, as discussed above, is not sustainable in law and I do not agree with such finding.

11. The learned trial Court has also discussed about point Nos.(i), (ii) & (iv), as formulated by her. Those points are whether the suit is maintainable; whether there is cause of action to file the suit; and to what other reliefs is the plaintiff entitled ? In a single sentence, she has maintained that in view of point No.(iii), as discussed above, such points need no determination. On going through the pleading, it appears that the plaintiff has prayed for release of security deposit, as narrated in Annexure-1. On the other hand, the suit is for recovery of security deposits and not for declaration that he is entitled to such security deposits. On going through Ext.1, which is Annexure-1, it shows that the total security deposit amount exceeds the pecuniary jurisdiction of the learned trial Court. At least, at the time of admission, this aspect should have been verified by the learned trial Court. When recovery of the security deposit amount exceeds the pecuniary jurisdiction of the learned trial Court, the suit is not maintainable there. In this regard, the learned trial Court should have given her finding.

12. Not only this, but also the security deposit relates to the years 2004 till 2006 as per Ext.1; but the suit is filed in 2013. It should have been observed by the learned trial Court whether the suit is barred by limitation when it is filed for recovery of the monetary value. Considering all such aspects, I find that the observation of the learned trial Court that in view of the finding at point No.(iii) other points need no determination is not sustainable in law. So, the finding of the learned Court below on these points is untenable.

13. In this case, it is found that the order dated 07.11.2013 of the learned trial Court does not show that any step was taken by the defendant. So, the defendant should have been set ex parte; but the learned lower Court observed that no written statement is filed and the matter is fixed for hearing of the suit. There is no memo from the side of the defendant that the defendant does not want to file written statement and wants to participate in the hearing, although such observation has been made by the learned trial Court. So, the learned trial Court, without any sort of submission of the defendant, has observed to make it a case as contest. In fact, the defendant has neither adduced evidence nor cross-examined P.W.1. But, the order-sheet dated 22.11.2013 shows that P.W.1 was cross-examined. Thus, practically, the suit is

dragged as ex parte, but disposed of showing it on contest. The manner of dealing with the suit is not proper and for that the suit should be remanded to the trial Court for hearing afresh.

14. For the foregoing reasons, I find that both parties are required to be given reasonable opportunity to file fresh pleadings, if any, and lead evidence. At the same time, the learned trial Court is required to hear the suit afresh and dispose of the same according to law. Hence ordered :

O R D E R

The appeal is allowed on remand without cost and the judgment dated 28.11.2013 & decree dated 07.12.2013 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in C.S. No.273 of 2013, are hereby set aside.

With the observations, as indicated above, the suit is remanded to the lower Court for fresh disposal according to law. The learned trial Court would do well to dispose of the matter within a period of four months from the date of receipt of this judgment after giving reasonable opportunity to both parties to file their pleadings and to adduce evidence, if any.

It is expected that both parties will co-operate for early adjudication of the matter on merit without keeping any flaw in the proceeding and disposal of the suit.

**District Judge, Khurda
at Bhubaneswar.**

15.09.2014.

Dictated, corrected by me and pronounced in the open Court this
day the 15th September, 2014.

**District Judge, Khurda
at Bhubaneswar.**

15.09.2014.