

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

Present:

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

*Dated, Bhubaneswar the 18<sup>th</sup> Nov. '14.*

**R.F.A. No. 77 of 2013.**

[Arising out of the judgment dated 29.06.2013 & decree dated 05.07.2013 passed by the learned 1<sup>st</sup> Addl. Sr. Civil Judge, Bhubaneswar in C.S. No.143 of 2002.]

1. Vice Chairman, BDA, Akash Sobha, Sachivalaya Marg, Bhubaneswar, District - Khurda.
2. Executive Engineer, BDA, Division No.IV, Akash Sobha, Sachivalaya Marg, Bhubaneswar, District - Khurda.

... **Appellants.**

***-V e r s u s-***

Shri Pradeep Kumar Swain, aged about 51 years, S/o.  
Dhusasan Swain, At/P.O. - Sundarpada, P.S. - Airfield,  
Dist. - Khurda.

... **Respondent.**

**Counsel :**

For Appellants    --    Shri T.K. Biswal & Associates.  
For Respondent    --    Shri S.S. Kabi & Associates.

Date of conclusion of arguments : 17.11.2014.

Date of judgment : 18.11.2014.

**J U D G M E N T**

This appeal is directed against the judgment dated 29.06.2013 and decree dated 05.07.2013 passed by the learned 1<sup>st</sup> Addl. Sr. Civil Judge, Bhubaneswar in C.S. No.143 of 2002, decreeing the suit of the plaintiff in part. Appellants are the defendants and respondent is the plaintiff before the Court below.

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. Backdrop of the case of the plaintiff is that he being a Contractor got a work order from the defendants for external water supply distribution system to plotted development scheme at Kalinga Nagar. Accordingly, an agreement was executed between the parties on 03.07.1995. It was stipulated therein that the plaintiff has to complete the work within four months from the date of agreement. Plaintiff started the work, but could not get technical guidance from the defendants in spite of his approach. He suffered loss of Rs.2,30,923/-, including deposit of Rs.11,000/- towards ISD & EMD for execution of the work, because of stacking of materials and engaging labourers. Despite the best efforts of the plaintiff, the defendants did not pay the money spent by

him. So, he filed the suit to recover the amount of Rs.2,26,500/- along with pendente lite and future interest from the defendants.

4. The defendants filed written statement stating that the suit is not maintainable and the same is also barred by limitation. It is the case of the defendants that the plaintiff, without obtaining approval of Engineer-in-charge as per terms and conditions, started the work for which he is not entitled to any cost of the materials or labourers. It is further averred in the written statement that letter was issued by the Engineer-in-charge to the plaintiff asking not to undertake the work as there was no funds available with the defendants. Moreover, there is no cause of action to file the suit. So, it was prayed to dismiss the suit.

5. Basing on the plaint and written statement, the following issues were framed by the learned trial Court.

- i) Is the suit maintainable ?
- ii) Whether there is cause of action to bring the suit ?
- iii) Whether the plaintiff is entitled to realization of Rs.2,41,854/- along with pendente lite and future interest from the defendants, as prayed for ?
- iv) To what reliefs, if any, the plaintiff is entitled ?

6. The learned trial Court examined one witness, who is none other than the plaintiff himself, and also perused the documentary evidence produced by him. No witness was examined from the side of the defendants, nor any document was exhibited on their behalf. Finally, the learned trial Court disposed of the suit by giving finding on issue No.(iii) that the plaintiff is entitled to realize a sum of Rs.91,000/- from defendant No.1. Further, the learned trial Court gave findings on issue Nos.(i), (ii) & (iv) to the effect that the suit is found maintainable and there is valid cause of action to file the suit and, as such, the plaintiff is entitled to the above relief. On the whole, the learned trial Court decreed the suit in part on contest against the defendants with cost by directing defendant No.1 to pay the plaintiff Rs.91,000/- with pendente lite interest @ 6% per annum till realization of the same.

**CONTENTIONS :**

7. Learned counsel appearing for the appellants submitted that during course of hearing, the learned Court below has not given sufficient opportunity to the defendants to cross-examine P.W.1 and to examine the witnesses in support of the written statement filed by them, for which the judgment and decree passed by the learned trial Court is bad and illegal. He further submitted that the learned trial Court should have

taken into consideration Cl.12 of the Agreement which enshrines that the Authority has got right to stop the work. The learned trial Court has erred in law by not taking the letter of the defendants into consideration directing the plaintiff not to commence the work. The learned trial Court has also erred in law by not considering Cl.5 of the Agreement. The learned Court below ought to have considered the jurisdiction aspect as pleaded by the defendants in their written statement. On the whole, learned counsel for the appellants submitted to set aside the judgment and decree of the learned Court below.

8. Per contra, learned counsel appearing for the respondent submitted that in view of the Agreement that the work has to be completed within four months from the date of issuance of work order, the plaintiff undertook the work but the defendants were at fault by not providing technical guidance in spite of request made by him. Thus, he submitted that the order passed by the learned trial Court is quite legal and correct and there is no occasion to interfere with the same. He fully supported the judgment and decree of the learned Court below and prayed to dismiss the appeal.

**DISCUSSIONS :**

9. 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.

10. 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.

11. Perused the pleadings of both parties, issues settled, impugned judgment and decree, documents, lower Court record, Memorandum of Appeal, and other materials on record. Let me first of all take up issue No.(iii). This issue relates to whether the plaintiff is entitled to realization of Rs.2,41,854/- along with pendente lite and future interest from the defendants ? In this regard, plaintiff has examined himself as P.W.1 and proved some documents. On going through his evidence, it appears that he has filed the evidence affidavit and the learned Court below has also exhibited documents like Agreement, letters of the defendants, etc. vide Exts.1 to 13. But, surprisingly, this witness has not been cross-examined by

the defendants. From the record, it appears that written statement has been filed by the defendants. The order-sheet dated 16.03.2013 shows that affidavit evidence under Order 18, Rule 4 of the C.P.C. was filed by the plaintiff, but the same could not be served on the defendants for which hearing was adjourned to 19.03.2013. On the later date also, none appeared from the side of the defendants on repeated calls and copies of documents could not be served on learned counsel for the defendants; but the learned trial Court accepted the documents. On that day, it was observed by the learned trial Court that on repeated adjournments the defendants have failed to take steps. In the absence of the defendants, hearing was taken up, P.W.1 was examined and documents were marked; but cross-examination could not be made. On the same day, evidence from the side of the plaintiff was closed. Thereafter, no step was taken by the defendants and, finally, the matter was disposed of decreeing the suit. As a matter of fact, answer to issue No.(iii) was given basing on the evidence of P.W.1 and documents filed by him. On going through issue Nos.(i), (ii) & (iv), it appears that the same have been answered basing on the finding on issue No.(iii).

12. At this juncture, let me find out as to what should be the course of action for the trial Court to proceed and

dispose of the matter when defendants do not take step on the date of hearing. Order 17, Rule 3 of the C.P.C. speaks in the following manner :

**“Court may proceed notwithstanding either party fails to produce evidence, etc.** – Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, –

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2.”

13. So, when the defendants were absent on calls and the evidence of P.W.1 was taken up, the next course of action is in terms of Order 17, Rule 2 of the C.P.C., which is as follows :

**“Procedure if parties fail to appear on day fixed.** – Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

*Explanation.* – Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.”

14. In view of the above position of law, I find that the learned trial Court has disposed of the matter by closing the evidence of P.W.1 for which this case is necessarily to be taken up as disposal under Order 9 of the C.P.C. because without any adjournment the evidence of the plaintiff has been closed and no cross-examination has been made to him. Their Lordships of the Hon'ble Apex Court in the case of ***Prakash Chander Manchanda and Anr. Vs. Smt. Janki Manchanda*** (AIR 1987 SC 42) have been pleased to observe that :

“In cases where a party is absent, only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. The language of amended Rule 2 also lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The Explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in case where a party which is absent has led some evidence or has examined substantial part of their evidence. Therefore, if on a date fixed, one of the parties remains absent and for that party no evidence has been examined upto that date the court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure”.

15. With due respect to the said decision, I find the findings rendered by the learned trial Court on issue No.(iii) or other issues are only *ex parte* under Order 9 but not as a contested one as per Order 20, Rule 5 of the C.P.C. So, the

judgment and decree, as passed by the learned trial Court, cannot be said to be on contest. It was submitted by learned counsel for the appellants that due to engagement of Advocate for the defendants, he could not remain present during the course of hearing of the suit. Engagement of an Advocate in other Courts cannot be a ground to adjourn the case. Even if it is not a ground, the suit can be taken as decreed ex parte but not on contest. So, this appeal can be taken as an appeal to set aside the ex parte decree. Although the ground taken by the appellants is not justifiable, but natural justice demands that opportunity should be given to the appellants to cross-examine the witness for effective disposal of the lis on merit. Hence, I am of the view that the matter should be dealt with on merit and in accordance with law by the learned Court below so as to arrive at a just and proper conclusion. Hence ordered :

### **O R D E R**

The appeal is allowed on remand without cost and the judgment dated 29.06.2013 and decree dated 05.07.2013 passed by the learned 1<sup>st</sup> Addl. Sr. Civil Judge, Bhubaneswar in C.S. No.143 of 2002, 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 suit by the end of December, 2014 by taking up hearing of the same on day-to-day basis after giving reasonable opportunity to the defendants to cross-examine P.W.1 and both parties to adduce their respective evidence, if any.

Both parties are directed to appear before the trial Court on 27.11.2014 to receive further direction in the matter.

**District Judge, Khurda  
at Bhubaneswar.**

18.11.2014.

Dictated, corrected by me and pronounced in the open Court this day the 18<sup>th</sup> November, 2014.

**District Judge, Khurda  
at Bhubaneswar.**

18.11.2014.