

IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE -CUM-
SPECIAL JUDGE, CBI-II, BHUBANESWAR.

PRESENT: **Dr.A.K.Mishra,**
Addl. District Judge -cum-
Special Judge, CBI-II,Bhubaneswar.

R.F.A. No. 4/636 of 2015/2014.

Arising out of Judgment and decree
dated 04.09.2014 passed by 2nd Addl.
Senior Civil Judge, Bhubaneswar in M.S. No.
157/1907 of 2012/2010 (Money).

The Secretary, Orissa State Council

For Child Welfare

Qrs. No.Type VIMR-11,

Unit-VI, Bhubaneswar.

... Appellant.

Versus.

1. M/s. Tasty Food Products,
Represented through its Proprietor
Shri Aswini Kumar Jena, aged about 46 years,
S/o. Late Brajabandhu Jena,
Plot No.L-3-118, Acharya Vihar,
P.S.Saheednagar, Bhubaneswar.

...Respondent.

2. State of Orissa, Represented through
The Secretary, Women and Child Development
Department Secretariat Building, Bhubaneswar.

... Proforma Respondent.

For the Appellant

: Sri A.K.Mohanty & associates.

For the Respondent No.1 : Sri B. Satapathy & associates
For the Respondent No.2 : Sri R.P.Nanda, Govt. Pleader.

Date of argument : 10.02.2016

Date of Judgment : 17.02.2016.

JUDGMENT.

The defendant No.2 as appellant has assailed the judgment and decree dtd. 04.09.2014 in M.S. No. 157/1907 of 2012/2010(Money) by learned 2nd Addl. Senior Civil Judge, Bhubaneswar wherein and whereby a money decree was passed for payment of Rs.2,32,426/- with PI and FI @ 6% per annum in favour of plaintiff .

2. The plaintiff is the respondent No.1 while the defendant No.1 is the proforma-respondent No.2. The suit against this respondent No.2 as defendant No.1 was dismissed.

3. The facts necessitating this appeal may be recapitulated referring the ranks of the parties in the suit, thus. On 12.11.2010 the plaintiff through its proprietor filed the suit claiming a decree for Rs.4,71,825/- with interest against the defendants. The plaintiff was a supplier of bread (Bun) and its offer dtd. 25.01.2001 to supply the same for Street Children Programme of defendant No.2 was accepted on 3.2.2001. He was asked to supply to six centers till the

end of year 2001. Accordingly, the plaintiff supplied the same and submitted eleven bills amounting to Rs.2,67,426/-. The defendant No.2 made part payment in the shape of cash of

Rs.10,000/- on 13.06.2001, Rs.20,000/- and Rs. 5000/- in cheques on 04.10.2001 and 15.3.2002 respectively. For the balance amount of Rs.2, 32,426/-, the plaintiff made several requests, but was in vein. On the request of plaintiff, defendant No.1 had instructed defendant No.2 to clear up the outstanding dues vide letter dtd.30.07.2003. When the same yielded no fruit, the plaintiff filed a Writ Petition bearing No.WP© 6993 of 2004 before the Hon'ble High Court which was disposed of directing defendant No.2 to dispose of the representation of plaintiff within two months. On 26.9.2007, the plaintiff presented the copy of Hon'ble Court's order dtd.18.9.2007 before defendant No.2. The plaintiff was asked to submit the relevant papers as the file was found missing. The plaintiff submitted all the attested copies of documents on 12.10.2007. The defendant No.2 rejected the claim without assigning any reason on 22.11.2007. During pendency of the writ application, the plaintiff had approached the Hon'ble Lokpal of Odisha and on 22.6.2006 in Case No.228-LY(G) 2005 Hon'ble Lokpal expressed dissatisfaction on the discharge of duty by the Secretary. Lastly on 9.8.2010 ,the plaintiff issued statutory notice under Sec.80 C.P.C. and for having received no response, filed this suit.

4. Both the defendants filed written statement separately, but the commonality is found for the pleas regarding maintainability , cause of action and limitation . The defendant No.1-State has specifically averred that defendant No.2 was appointed by the Chairperson of the Odisha State Council for Child Welfare under Rule 15(6) of the Orissa State Council for Child Welfare (Amendment Rules 1996). The status

of defendant No.2 being an autonomous and independent body, the defendant No.1-State has no jurisdiction over the same. As the grievance petition for arrear claim of plaintiff was received on 22.7.2003 , the Secretary of the Women and Child Development Department had transmitted the same to OSCCW for payment of the admissible dues, if any. The defendant No.1-State has specifically disowned any contractual relationship with plaintiff and thereby any liability to the claim raised in the plaint.This has been somehow accepted to dismiss the suit against him in as much as plaintiff as p.w-1 testified in the same tone and tenor.

The defendant No.2 asserting its autonomous status working for the interest of children, has categorically pleaded that plaintiff had not supplied the bread as claimed. The genuineness of the receipts/bill submitted was denied. The payment of Rs.35,000/- in the year 2001 was stated to be towards the supply made in the year 2000, but not for the year 2001. It is specifically stated that in response to the direction of Hon'ble High Court, the defendant had rejected the claim of plaintiff after thorough verification of the documents as the claim of plaintiff was illegal, forged and fabricated. Accordingly, the suit was sought to be dismissed.

5. Learned lower Court framed as many as five issues including the issues on point of limitation and entitlement of plaintiff to the money claimed.

The plaintiff was the sole witness from his side who had proved office copy of quotation, supply order dtd.3.2.2001, copies of bills as well as notice under Sec.80 C.P.C amongst

others. On behalf of defendant No.2, Joint Secretary, and Child Welfare Officer are examined as D.W.1 and 2. A copy of letter dtd.30.5.2007 addressed to Officer-in-charge, Capital Police Station about missing of file is exhibited vide Ext.B. In answering issue No.4 regarding entitlement of plaintiff, the learned lower court found that, defendant No.2 has failed to discharge his burden regarding allegation of fraud and having withheld best evidence, the plaintiff is entitled to the claim as he had not only supplied the bread but also submitted the bill for payment. With regard to limitation, learned lower court held that in view of filing of Writ in the Hon'ble Court and proceeding before Hon'ble Lokpal, the time is saved under Sec.14 of the Limitation Act. Accepting the evidence of P.W.1 that he had no claim against defendant No.1-State, the learned lower court while dismissing the suit against defendant No.1, decreed the claim as aforesaid

6. The Appellant has impeached the impugned judgment on the ground that not only the plaintiff has failed to establish any contract between him and defendant No.2, but also there is no evidence that bread was in fact supplied, and for that, learned lower court has committed mistake in fixing contractual liability against defendant No.2. On his second ground, it is vehemently urged that the suit was barred by limitation because in absence of any direction from the Hon'ble Writ Court, no period can be excluded under Sec.14 of the Limitation Act. In support of above contention, learned counsel for appellant has relied upon a decision reported in ***AIR 2002 SC 1210, M/s. Keral Agro Machinery Corporation Ltd. Vrs. Bijoy Kumar Roy and Others.***

7. Learned counsel for the plaintiff-respondent No.1 repelled the above contention supporting the impugned judgment on the point of limitation. Reliance is placed in the decision reported in **2001(10) SCC - 513 "World Tel.Inc Vrs. Union of India"**.

8. On the conspectus of contentions urged, the following two points arise for determination :

1. Whether plaintiff has supplied the bread to the defendant No.2 under any contract in the year 2001 ?
2. Whether the suit is barred by limitation ?

9. ANSWERS TO POINT NO.1 :

It is admitted that plaintiff was supplying the bread in the year 2000 on the order of defendant No.2 for Street Children Programme. Plaintiff has relied upon Ext.1,2 and bills Ext.3 series in support of his plea that under a supply/contractual order, he had supplied the bread in the year 2001. Ext.1 is an unsigned letter offering quotation dtd.25.01.2001 addressed to the Secretary, State Council for Child Welfare. No evidence is available as to why the same was not signed. Ext.2, a letter by one Sabitri Sahoo signed on 2.2.2001 to the Proprietor, Tasty Food Products informing that Council had accepted the quotation for supply of bread to the Street Children Centers running in the six centers and to make necessary arrangement to supply the bread w.e.f. 1.2.2001. In the said letter against each center, 50 numbers has been mentioned which may refer to quantity of bread. No document is available to prove the terms and conditions of supply of bread.

10. P.W.1 has admitted in his cross-examination para-20 that he distributed the Bun in six children centers by handing over to the Street educators of the concerned centers. He testified that he had not produced any document in the court showing actual distribution of Bun at the concerned centers. He has admitted that he was maintaining the daily supply register showing the supply of bun, but the same was not produced in the Court. He has further admitted that he had not submitted the original documents in support of his claim before the authority of defendant No.1.

11. On careful reading of Ext.2, the letter accepting quotation, it cannot be said that a contract was entered into between plaintiff and defendant No.2 having all stipulations regarding supply and payment. The copy of bills vide Ext.3 series suffers from inherent infirmity which in all probability belies the claim of plaintiff. The bill for the month of March i.e. from 1.3.2001 to 31.3.2001 was found to have been signed on 26.3.2001, thereby prior to actual supply of bread the bill was submitted. The bill for the month of April was submitted on 4.4.2001 mentioning the supply of bread from 3.4.2001 to 30.4.2001. These two bills clearly prove that plaintiff prior to actual supply had drawn the bills and it goes against his claim that for actual supply, he had submitted the bills ext-3 series before defendant No.2. The above infirmity was pleaded by defendant No.2 specifically in the written statement and plaintiff is found to have not clarified the same in his evidence. When a contract for supply is found to have been not executed in expressive words stipulating the terms and conditions, the above infirmity in the bills magnifies that the plaintiff has not come in clean hands. Reasons run riot to conclude that the

plaintiff has failed to discharge his initial onus that he had supplied the bread to defendant No.2 in the year 2001.

12. There is no evidence that payment of Rs.35,000/- was a part payment towards claim of the plaintiff for the year 2001. Further, when the quotation acceptance letter Ext.2 indicates the quantity of bread to be $50 \times 6 = 300$, there was no occasion to submit bill for quantities more than 5000 packets in a month. Learned lower court has over looked this infirmity which strikes at the root of the contract and actual supply and for that the finding of learned lower court cannot be supported.

13. Once the actual supply of bread is found not proved, a letter of acceptance cannot be the basis to make claim for price for which, no stipulation is available. Sequentially the money claim of plaintiff towards the price of bread supplied is found not proved.

14. ANSWER TO POINT NO.2:

The suit was filed on 12.11.2010. The claim of money became due as per plaintiff on 14.12.2001. The limitation for filing of the suit was three years which expired on 13.12.2004. The limitation is sought to be saved under Sec.14 of the Limitation Act 1963 adverting that the plaintiff was prosecuting his claim in the Hon'ble High Court filing Writ Petition (c) No.6993 of 2004. The date of filing of that Writ Petition is not mentioned. The copy of final order dtd.18.9.2007 is available in the record. The following order passed therein is relevant to be extracted here :

“Without going into the merit of the case one way

Or the other, this writ petition is disposed of with a Direction to the Secretary, Orissa State Council for Child Welfare, opposite party No.2 to dispose of the representation of the petitioner as expeditiously as possible, preferably within a period of two months from the date of production of a certified copy of this order along with a copy of the representation.”

15. The representation of plaintiff as per Hon'ble High Court was disposed of on 22.11.2007 by the Secretary of Orissa State Council for Child Welfare vide Ext.10. The said letter Ext.10 does not disclose that the claim of plaintiff in any manner was accepted for any purpose. Similarly the order dtd.22.6.2006 of Hon'ble Lokpal, Odisha in Case No.228-LY(G) of 2005, Ext.7, reveals that the claim of plaintiff was not investigated as the Council was found to be a registered society. The date of filing of claim before Hon'ble Lokpal is not also stated by the plaintiff.

16. So, the meat of the matter is whether filing of grievance before Hon'ble Lokpal and Writ Petition before Hon'ble High Court could attract Sec.14 of the Limitation Act for filing of this suit. The above provision interalia provides that for exclusion of time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day of which it ended shall both be counted. The commencement of proceeding before Hon'ble High Court and before Hon'ble Lokpal is not provided by the plaintiff. In the Bijoy Kumar Roy and others decision cited by learned counsel for appellant, it is observed that--

“There seems to be no justification for negating the plea of limitation which such cursory and passing

observations. The question of stage of the proceeding has no relevance so far question of limitation is concerned. The claim has been filed beyond the period of limitation say more than four years after defects were pointed out."

17. In the World Tel.Inc Vrs. Union of India decision, Their Lordships have given direction for filing of Civil Suit and observed as flows :

"3. At the same time we do not wish to enter into the controversy as the SLP arose from a writ petition filed under [Article 226](#). We dispose of this appeal without prejudice to the right of the appellant for filing a civil suit and obtaining a decree for the money claimed by him, if the same can be established in law.

4. Mr. P. Chidambaram, Id. Senior counsel submitted that the respondent is likely to raise the question of limitation if any civil suit is filed and in which case they are entitled to resort to [Section 14](#) of the Limitation Act. The appellant can then raise the plea based on [Section 14](#) of the Limitation Act. If any resistance is offered by the respondent to such plea we leave it to the civil court to decide that issue also"

18. In the case at hand in the writ petition, no direction has been given to the party for filing of suit. What is illuminating like noon is that even after three years of the disposal of writ petition on 18.9.2007, this suit was filed on

12.11.2010. So, on any consideration of facts, the claim made due on 13.12.2001 for which suit could have been filed by 13.12.2004, the filing of suit on 12.11.2010 is barred by limitation and the exclusion of time during which period the Writ Petition No.6993 of 2004 was pending under Sec.14 of the Limitation Act does not save the limitation.

Resultantly, the suit was barred by limitation and learned lower court has committed error in not considering the facts in proper perspective.

19. On the analysis of the evidence on record to the points posed, the impugned judgment is found unsustainable under law. The suit should have been dismissed.

ORDER

In the result, the appeal is allowed on contest without cost. The Impugned judgment and decree dtd. 04.09.2014 in M.S. No.157/1907 of 2012/2010 passed by learned 2nd Addl. Senior Civil Judge, Bhubaneswar is set aside and the suit be and same is dismissed.

Addl. District Judge-cum-Special Judge,
C.B.I.-IV, Bhubaneswar.

Typed to my dictation and corrected by me.
Judgment is pronounced in the open Court today, this the 17th February, 2016.

Addl. District Judge-cum-Special Judge,
C.B.I.-IV, Bhubaneswar.