

Oscar Vs. Barbil Municipality

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Court : Orissa

Decided On : Sep-18-1989

Reported in : AIR1990Ori207

Judge : S.C. Mohapatra, J.

Acts : [Orissa Municipal Act, 1950](#) - Sections 9, 87, 92, 130 and 349; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 79 - Order 22, Rule 1 - Order 29, Rule 2

Appeal No. : First Appeal No. 40 of 1988

Appellant : Oscar

Respondent : Barbil Municipality

Advocate for Def. : S.K. Rahenoma, ;Sk. Enomur Rahenoma and ;N.C. Ray, Advs.

Advocate for Pet/Ap. : Sarat Chandra Ghose, ;Raj Kishore Sahoo, ;Subrat Ghose and ;Sanjaya Kumar Das, Advs.

Disposition : Appeal partly allowed

Judgement :

S.C. Mohapatra, J.

1. Plaintiff is the appellant against dismissal of the suit for realisation of -- (i) balance consideration towards supply of mild steel grills and gates to the defendants; (ii) interest at 18% from the date of notice under Section 349 of the [Orissa Municipal Act, 1950](#) (hereinafter referred to as 'the Act'); (iii) costs of notice and (iv) pendente lite and future interest.

Quotations were invited by Executive Officer of defendant-Municipality for supply of mild steel grills and gates on the basis of which plaintiff and two other suppliers gave quotations of rates. Those rates not being accepted, plaintiff was called for negotiation and on that basis rate was fixed at Rs. 18,50paise per kilogram of mild steel grills and gates to be supplied. Plaintiff supplied the articles which were received by the Sub-Assistant Engineer of the Municipality and an amount of Rs. 20,000/- was paid in part towards consideration amount by the defendant-Municipality. Balance amount of Rs. 22,069/- not having been paid, suit was filed.

3. While not disputing the facts, defendant contested the suit on the ground that plaintiff played fraud with the Municipality in accepting letters of two of the three suppliers and same person wrote the three quotations. When the same was detected Municipal Council resolved to refer the matter to Vigilance Department and investigation in that regard is pending. It challenged the suit on the ground that notice under Section 80, C.P.C. has not been served, and Executive Officer has no power to represent the Municipality in the suit. It also contested the suit to be not maintainable since all the members of the Municipal Council have not been made parties.

Trial Court held that plaintiff is to receive the balance amount of Rs. 22,069/ -. It however, dismissed the suit on the ground that Executive Officer cannot represent the Municipality and all the members of the Municipal Council are not made parties to the suit.

5. Suit has been filed by describing the plaintiff in a Trade name. A trade name is not a juristic person. Proprietor of the business ought to have been described as the plaintiff. This defect however, is not fatal since plaintiff is stated to be represented by its Proprietor D.W. 1 has also understood the Proprietor to be the plaintiff. He stated 'I know the plaintiff Sri P. K. Bhowsinka'.

D.W. I stated that materials were received in good condition and in full quantity. Ext. 3 indicates that the mild steel grills and gates are required to be supplied for S. Lal Park (Municipal Park) of Barbil which is one of the functions of the Municipality in absence of any material, otherwise, conclusion is irresistible that the grills and gates were utilised by the Municipality. Neither in the pleading nor in evidence it has been stated that rate of Rs. 18.50 paise per kilogram was higher than the market rate which was fixed on account of fraud practised by the plaintiff by receiving two of the three letters and submission of the three quotations written by the same person. Accordingly, merely on the suspicion that three quotations were written by the same person which has no effect on the quality of the articles supplied and price charged therefor, plaintiffs claim cannot be defeated when rates as per the quotations were not accepted for which there was negotiation to fix the same and when the articles have also been utilised. If the defendant would have intimated plaintiff to take back the articles supplied, question might have been considered differently. This has not been pleaded nor proved. It is also not pleaded that there are other irregularities in entering into the contract with the plaintiff.

7. In this case assuming the contract is void on account of fraud or misrepresentation as alleged, defendant-Municipality has received advantage from the plaintiff. Supply by the plaintiff was not intended to be gratuitous. Accordingly, plaintiff is to be compensated as provided for under Section 65 of the Contract Act. No other ground for nonenforceability of the contract has been made put in the written statement. Balance price of the goods would be the adequate compensation in the present case since the rate is not challenged to be higher than the market rate.

8. Suit has been filed against the Municipality under Section 9 of the Act. Municipal Council is a body corporate. It reads as follows :

'9. Incorporation of Municipality -- The Councillors of a Municipal Council shall be a body corporate by the name of the Municipality by reference which it is known, shall be perpetual succession and a common seal and subject to any restriction and qualification imposed by or under this or any other enactment shall have

power to acquire and hold property, both movable and immovable, and subject to any rules prescribed to transfer any such property held by it, or enter into contracts and to do all other things necessary, proper or expedient for the purpose of this Act and may sue and be sued in its corporate name'.

Being a body corporate Municipal Council can be sued in its Corporate name i.e. the Municipality. Municipality accordingly is not required to be represented. Wrong description in the cause title when parties understood who the real plaintiff and defendant are, cannot be a ground to defeat the suit.

Observance of principles of natural justice is the basic pre-conditions for any adjudication of right and liabilities. Audi alteram partem is one of such principles. Where a person is not capable to effectively put his case, he requires representation. This is true both in cases of juristic persons who have no living mind and individuals. Principle of natural justice is subject to the provisions of law. When Section 9 of the Act requires no representation of the Municipality to insist upon such representation would be beyond the scope of the Act. This is also the same as regards State Government and Central Government as has been provided in Section 79, C.P.C.

10. However, legislation requires that before any litigation is initiated against a Municipal Council as provided in Section 349 of the Act. It reads as follows :--

'349. Notice of action against municipal council. (1) No suit or other legal proceeding, shall be brought against any municipal council, the Chairman, Executive Officer, any councillor; officer or servant, in respect of any act done or purporting to be done in execution or intended execution of this Act or any rule, regulation, bye-law, or order made under it or in respect of any alleged neglect or default in the execution of this Act or any such rule, regulation, bye-law or order, until the expiration of two months next after notice in writing, stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and name and place of residence of the intended plaintiff has been left at the office of the municipal council and if the proceeding is intended to be brought against any such Chairman, Executive Officer, Councillor, Officer, servant or person, also delivered to him, or left at his place of residence. And unless such notice be

proved, the Court shall find for the defendant.

(2) Every such proceeding shall, unless it is a proceeding for the recovery of immovable property or for a declaration of title thereto, be commenced within six months after the date on which the cause of action arises or in case a continuing injury or damage during such continuance within six months after the ceasing thereof.

(3) If any municipal council or person to whom notice is given under Sub-section (1) shall, before the proceedings commenced, tender amends to the plaintiff and if the plaintiff does not in any such proceeding recover more than the amount so tendered, he shall not recover any costs incurred by him after such tender. The plaintiff shall also pay all costs incurred by the defendant after such tender.

(4) No suit or other legal proceeding shall be brought against the Chairman, the Executive Officer or any councillor, officer or servant of a municipal council or any person acting under the direction of a municipal council, or such Chairman, the Executive Officer, Councillor, officer, or servant in respect of any act done, in execution or intended execution of this Act or any rule, regulation, bye-law or order made under it, or in respect of any alleged neglect or default on his part in the execution of this Act or any such rule, regulation, bye-law or order, if such act was done, or if such neglect or default was made in good faith; but any such proceeding shall, so far as it is maintainable in a Court, be brought against the Municipal Council except in the case of suits brought under Section 375'.

It provides that such notice shall be left at the office of the Municipal Council. Leaving the notice does not mean that the same shall be thrown on the varendah or dustbin of the office. It has to be given to a person competent to receive the same. There is no provision under the Act as to who would be competent to receive the same. According, the same has to be interpreted. Under Section 87 of the Act, Executive Officer is to exercise the executive power of the Municipality subject to exception provided therein. It reads as follows :--

'87. Executive power vested in Executive Officer-

(1) The resolutions of a Municipal Council shall be carried into effect by the Executive Officer in whom the executive power of the Municipal Council shall be vested.

(1-a) Unless the Director otherwise directs the Executive Officer shall have power to supervise the work of the Health Officer and the Engineer.

(2) It shall not be lawful for the Executive Officer to exercise any power which this Act expressly declares shall be exercised by the Chairman or the Municipal Council, unless such power is delegated to him by either of them under Section 92 or rules framed there under'.

Power of receiving notice under Section 349 of the Act not having been expressly declared to be exercised by the Chairman of the Municipality Council under Section 92 of the rules made thereunder as provided under Sub-section (2) of Section 87. Executive Officer being vested with the executive powers is competent to receive the same which shall be treated to be sufficient service of notice under Section 349 on the Municipal Council. It is for the Executive Officer to place the matter before the council. A party giving notice cannot suffer if the Executive Officer does not discharge his duty. In the present case, this requirement is satisfied.

11. After complying with requirement under Section 349, suit can be filed against the Municipality in its own name as provided under Section 9. But principle of natural justice requires that process of the suit is to be served on the defendant. Order 29, C.P.C. provided for the procedure to be followed in respect of suits against corporation. Word 'Corporation' has not been defined. Accordingly, any body corporate can safely held to be a corporation. Order 29, Rule 2, C.P.C. provides for service of process on corporation. It reads as follows:--

'Rule 2. Service on corporation.

Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served.

(a) on the Secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business'.

There is no statutory provision for service of process on Municipal Council. Accordingly, general provision in Order 29, Rule 2, C.P.C, shall be applicable. There is no Secretary of a Municipality. Under the scheme of the Act Executive Officer discharges the functions of a Secretary. He is also the Principal Officer. Accordingly, service of process on him is service of notice of the suit on the Municipality.

12. On service of notice, Municipal Council is to file its written statement. Such pleading requires verification. Order 29, Rule 1, C.P.C. provides that the pleadings can be verified by the Secretary, Director or Principal Officer who is able to depose to the facts of the case. It reads as follows :--

'Rule 1. Subscription and verification of pleading. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the Secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case'.

Executive Officer is to enter into contracts as provided in Section 130 of the Act. Accordingly, he is able to depose to the facts of the case in a suit based on contract and is competent to verify a pleading. In the present case, Executive Officer has also verified the written statement and he has also deposed to the facts of the case as D.W. 1. Accordingly, suit is not incompetent for service of notice of the suit on the Executive Officer.

13. Learned counsel for the respondent relied upon a decision of this Court reported in ILR (1979) 2 Cut 77 : (AIR 1980 Orissa 79) (Ashirbad Behera v. State of Orissa) and submitted that Executive Officer is not competent to represent the Municipality. In the said decision cancellation of a resolution of the Municipality

Council by State Government was assailed in a petition for exercise of power by this Court under Article 226 of the Constitution to quash the same. Municipality was made a party through its Chairman. State Government issued notice under Section 398(2) of the Act to the Municipality through its Chairman. Resolution is passed by the Council in a meeting presided over by the Chairman who has power to depose with regards to the passing of such resolution. Executive Officer cannot speak effectively with regard to a resolution of the council. Accordingly, preliminary objection by the State Government that the writ application was not competent against the Municipality through its Chairman was turned down. There can be no dispute that Chairman can effectively receive notice under Section 349 of the Act and under Order 29, Rule 2, C.P.C. That, however, does not deprive the Executive Officer of the power to receive such notice verifying the pleading and depose with regard to contracts with Municipality. Accordingly, when law does not require representation of a Municipality in a suit and the other provision empowered the Executive Officer to act on behalf of the Municipality the suit cannot be held not to be maintainable on that account. I am not able to accept the finding of the trial Court and the same is reversed.

14. Mr. Rahenama relied upon a decision reported in (1975) 41 Cut LT 1037 (Smt. Suryamani Nayak v. Rakhal Chandra Mohapatra) where it was held that in view of the challenge to the resolution of the Managing Committee of an aided educational institution, the Chairman and the members of the Managing Committee would be necessary parties in the suit. The said decision was rendered in respect of a dispute under the Orissa Education Act, 1969. Managing Committee is not an incorporated body under the said Act. Accordingly, the said decision is not applicable to the present case. Besides, in the said decision, the Division Bench decision reported in ILR (1974) Cuttack 1232 (The Managing Committee of Bhakta Madhu Bidyapitha v. State of Orissa) was not considered where it has been held that a Managing Committee can sue and be sued through its Secretary.

15. since there is no agreement for payment of interest, trial Court is justified in rejecting such a prayer. There was no necessity to engage a lawyer for issue of notice under Section 349 of the Act. Accordingly, cost for the same is not to be paid to the plaintiff.

16. In the result, appeal is allowed in part. In case the defendant does not pay the amount of Rs. 22,069 / to the plaintiff by end of 31st January, 1990, it shall pay interest @ 12% per annum from the date of suit till payment. Parties shall bear their own costs throughout.

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