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**Orissa Cement Ltd. Vs. Union of India (Uoi) Represented by the General Manager, South Eastern Railway**

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**Court :** Orissa

**Decided On :** Jan-10-1967

**Reported in :** AIR1967Ori160

**Judge :** R.K. Das and ;G.K. Misra, JJ.

**Acts :** Limitation Act, 1908 - Sections 14(1); [Limitation Act, 1963](#) - Sections 14(1); [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 80

**Appeal No. :** First Appeal No. 3 of 1964

**Appellant :** Orissa Cement Ltd.

**Respondent :** Union of India (Uoi) Represented by the General Manager, South Eastern Railway

**Advocate for Def. :** B.K. Pal and ;Bijoy Pal, Advs.

**Advocate for Pet/Ap. :** Govinda Das and ;D.P. Mohanty, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**Misra, J.**

1. The only question involved in this appeal relates to limitation Defendant does not challenge the merit of the plaintiff's claim. Facts relevant to the question of limitation need only be mentioned There was a shortage in the consignment for 264 M S Rounds worth Rs. 4,655.10 paise A short delivery certificate (Ext 6) was furnished to the plaintiff on 23-2-1957 Plaintiff addressed letters (Exs 7 and 9 to 9/b) to the railway authorities on 26-6-1957 17-7-1957. 11-10-1957 and 24-12-1957 claiming compensation for the shortage incurred Defendant repudiated the claim for compensation by a letter (Ex 10) on 10-1-1958. Plaintiff sent a notice (Ex. 11) under Section 80 C. P C on 14-2-1958 to the defendant. On 21-2-1958 plaintiff reiterated its claim for shortage by a letter (Ex 12). Defendant repudiated the claim by a reply (Ex 13) dated 22-3-1958

On 14-4-1958 plaintiff filed Money Suit No 10/58 By then the period of 60 days from Ex. 11 had not expired The 60 days' time was to expire on 16-4-58 The limitation for the suit was to expire on 22-4-58. Though on merits plaintiff's claim was upheld, the suit was dismissed on 3-10-1959 on the sole ground that it was filed before the expiration of two months next after notice in writing had been delivered contrary to the provisions of Section 86, C. P. C. Against the judgment, F. A No. 6 of 1960 was filed in the High Court. On 27-4-1962 the High Court passed an order to the effect 'The plaint should stand rejected under the provisions of Order 7 Rule 11. Clauses (a) and (d) C P. C. The plaintiff will however be at liberty to file a fresh suit according to law.'

On 28-4-1962, just a day after, a fresh suit was filed on the same cause of action The learned Subordinate Judge upheld the claim for compensation but dismissed the suit holding that the plaintiff was not prosecuting the previous suit and the appeal in good faith and was not entitled to exclusion of time under Section 14(1) of the Limitation Act. 1908 (Act IX of 1908). Plaintiff has filed the appeal against this judgment

2. The sole point for consideration is whether the plaintiff is entitled to exclusion of time under Section 14(1). It is the common case of the parties that limitation expired on 22-4-1958. The present suit was filed on 28-4-1962 In order that the suit would be within limitation the period of about 4 years from 22-4-1958 to 28-4-

1962 must be excluded under Section 14(1) This necessitates examination of the scope and ambit of Section 14(1). It runs thus

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it That the plaintiff has been prosecuting another civil proceeding in M.A 10/58 and F.A. 6/60 against the defendant is well established That proceeding was founded upon the same cause of action which is involved in the present suit. That proceeding was held not to be maintainable not from defect of jurisdiction but as it was premature being filed before the expiration of two months next after notice in writing had been delivered to the defendant in violation of the mandatory provision in Section 80. C. P C. Thus three of the essential requirements under Section 14(1) have been fulfilled

Before plaintiff gets benefit of Section 14(1) another condition that the previous proceeding had been prosecuted with due diligence and in good faith, is to be satisfied.

3. It is now well settled that the tests under Section 14 are stiffer than those under Section 5 of the Act AIR 1965 Orissa 193. Bhagirathi v. Achuta. Both the sections are, however, to be liberally construed AIR 1929 PC 103. Ramdutt Ramkissen v. E. D. Sassoon and Co

'Good faith' under Section 2(vii) of the Act has been defined thus-

Nothing shall be deemed to be done in good faith which is not done with due care and attention

Under the General Clauses Act, a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. Thus the test of 'good faith' under Section 2(7) of the Act is stiffer than the one under the General Clauses Act. In ILR 1956 Out. 135: AIR 1956 Orissa 124, Tirumala

Bhaskara v. Panasa a Bench of this Court observed as follows:--

'According to the settled views we are still to examine, scrutinise and scan the conduct of the lawyer. If from such scrutiny it is found that the conduct of the lawyer was palpably negligent and that the view taken by him was unreasonable, plaintiff has got to suffer for the conduct of his counsel But if our finding is otherwise that in the position of law then existing, the counsel could reasonably take this view, as he had done, even though mistaken, that is to say if the lawyer was not palpably negligent, the plaintiff is to be allowed protection under Section 14 of the Act.' Reliance was placed on AIR 1937 P.C. 276, Rajendra v. Rajeshwar Bali in support of the aforesaid proposition.

It is necessary to examine whether the advice given by the advocate for the plaintiff in prosecuting the previous suit and the appeal was palpably negligent and unreasonable. The necessitates an examination of the scope of Section 80, C P. C. due to non-compliance of which the previous proceeding was considered to be premature.

4. Section 80. C. P. C., so far as relevant, lays down that no suit shall be instituted against the Government or a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered. The language of the section is plain and is incapable of two answers. The terms are imperative and admit of no exceptions or implications. If the suit is filed before the expiration of the prescribed two months lime, the plaint must be rejected in limine under Order 7. Rule 11 (d), C. P. C. AIR 1960 SC 1309. State of Madras v. C. P. Agencies. The legal advice of the counsel for instituting and prosecuting the former suit and the appeal was palpably negligent and unreasonable

That apart, the previous suit was dismissed on 3-10-1959 on the ground that it was premature having been filed before the expiration of the requisite period of two months. In his judgment dated 3-10-1959 (Ex. A), the learned Subordinate Judge concluded his opinion thus-

'In any view the suit has been filed during the currency of the notice period, i.e. before expiry of 60 days beginning from the date following the date of delivery of the notice. Such a suit is under law premature and cannot be instituted as laid down in Section 80 of the Civil Procedure Code.'

After this matter was pointedly brought to the notice of the plaintiff by the judgment (Ex. A), plaintiff did not act with due diligence and in good faith in prosecuting First Appeal No. 6/60. which remained pending for a period of about two years Even assuming that the plaintiff is entitled to the benefit of Section 14 from the date of the filing of the plaint till the disposal of that suit, he is not entitled to the exclusion of the period of two years covered by the first appeal. Such a view is fully supported by AIR 1949 Pat. 362. Ramanand Prasad v. Gaya Prasad Ram. Their Lordships observed thus-

'The second reason why exclusion of time claimed in this case cannot be allowed is that it cannot be said that the plaintiff was pursuing the previous litigation with due diligence after his appeal had been dismissed by this Court and it had been pointed out to him that the proper remedy was by way of an application to set aside the sale, in as much as even after that the appellant proceeded in attempting to obtain a review of that decision instead of adopting the course that was pointed to him.'

Mr. Das placed reliance on AIR 1951 Pat. 382. Governor-General-in-Council v. Gourishankar Mills Ltd The facts of that case are almost identical with those of the present case with the only difference that that suit was withdrawn while it was pending and was not allowed to the stage of judgment and no first appeal had been filed. Their Lordships observed thus-

'The plaintiff originally brought the suit on 11-9-1943 with respect to all the consignments. On 15-11-1944 the plaintiff withdrew the suit with the leave of the Court to sue afresh on the same cause of action. The reason was that the suit had been filed within two months of the service of notice under Section 80, C.P.C. The plaintiff instituted the present suit on 16-11 1944. Upon these facts it is patent that under Section 14. Limitation Act, the plaintiff is entitled to exclude the period during which the previous suit was pending in Court.'

The conclusion reached in this decision supports the plaintiff's contention that the initial filing and the subsequent prosecution of the suit upto the stage of withdrawal were done with due diligence and in good faith and the plaintiff was entitled to the benefit of this period. With great respect we are unable to accept this decision as laying down the correct law. No analysis was given as to why the plaintiff was entitled to the protection of Section 14(1) despite palpable negligence committed by the advocate in construing the meaning of Section 80, C. P. C. which is incapable of two constructions. That apart, it is not a case dealing with subsequent filing of an appeal after the mistake was pointed out to the plaintiff by the judgment (Ex. 4). It does not conflict with the principles laid down in AIR 1949 Pal 362.

5. Mr. Das advanced another contention that as the defendant on 22-3-1958 gave a further reply under Ex. 13 repudiating plaintiff's claim, the plaintiff took the view that notice under Section 80 was waived. Though waiver was pleaded in paragraph 11 of the plaint, no evidence was given in support of the averment. All that PW 3 stated in his deposition regarding due diligence and good faith was to the following effect--

'It was in charge of M.S. 10/1958 and of this suit. This is the plaint filed in M.S. 10/1058 under my instructions and signature of K S. Dutta, Secretary of the camp.'

Pleadings do not constitute evidence and no evidence was given in support of the case of waiver. Ex 18 repudiating plaintiff's claim does not amount to a waiver of notice under Section 80. No senior lawyer could tender an advice that Ex. 18 constituted waiver. The Company has a law officer and he has not been examined to support the case of waiver, On the aforesaid analysis plaintiff is not entitled to the protection of Section 14(1) of the Limitation Act. The suit is accordingly barred by limitation.

6. In the result, the appeal fails and is dismissed, but in the circumstances parties to bear their own costs throughout.

Das. J.

7. I agree

