
Shankarlal Jhawar Vs State of Assam and Others

Regular First Appeal No. 14 of 2008

Court: Gauhati High Court

Date of Decision: Aug. 20, 2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 30 Rule 1, Order 30 Rule 1(1), Order 30 Rule 10, 80, 80(1)#Limitation Act, 1963 – Article 14#Penal Code, 1860 (IPC) – Section 420, 468, 471

Citation: (2010) 4 GLT 378

Hon'ble Judges: Ranjan Gogoi, J; C.R. Sharma, J

Bench: Division Bench

Advocate: O.P. Bhatti, for the Appellant; P. Deka, for the Respondent

Final Decision: Allowed

Judgement

C.R. Sarma, J.

This appeal is directed against the judgment and decree, dated 14.11.2007, passed by the learned Civil Judge (Sr. Div.)

No. 2, Guwahati, in Money Suit No. 72/2004.

2. The Plaintiff's case in brief, may be stated as follows:

On the basis of a supply order, issued by the Defendant No. 3, the Plaintiff supplied ration item to the Defendant No. 3 and the total bill amount,

towards the supply of ration, during the period from June, 2001 to May, 2002, came to Rs. 52,06,781/-. Against the said bill amount, the Plaintiff

received payment, for the supply made, for the months of September, 2001 to March, 2002 and thus an amount of Rs. 20,73,522/-, being the bill

amount for supply of goods in the months of June 2001, July 2001, August 2001, April 2002 and May 2002 remained unpaid. In spite of

demanding the payment of the said balance amount, as the Defendant No. 3 failed to respond, the Plaintiff served a pleader's notice, dated

17.3.04, on the Defendants by registered post with A/D. The notices were duly received by Defendant Nos. 1, 2 and 3 on 19.3.04, 20.3.04 and

28.3.04 respectively. By the said notice, the Plaintiff demanded immediate payment of Rs. 20,73,522/- together with interest @18% from the date

of the bill till actual payment, and Rs. 5000/- towards the cost of notice and Rs. 1,00,000/- as compensation for causing harassment and mental

agony. As the Defendants failed to respond to the said notice, the Plaintiff instituted the suit for realisation of an amount of Rs. 25,39,028/- with

interest thereon at the rate of Rs. 18% with cost of the suit.

3. The Defendants contested the suit, by filing written statement. In their written statement, the Defendants contended, inter alia, that the suit was

not maintainable on facts and law and also for non-service of notice u/s 80 of Code of Civil Procedure. Admitting the Plaintiff's claim, regarding

existence of a contract and the supply of ration items by the Plaintiff to the Defendant No. 3 for the period from June, 2001 to May, 2002 as per

the conditions laid down in the supply order, the Defendants averred that, against the supply of dry ration for the month of June, 2001 to August,

2001, an amount of Rs. 12,03,430/- was paid by the Defendant No. 3 to M/s Manoj Enterprises, Chatribari, Guwahati by Govt. Draft No.

007273, dated 4.12.01, which was received by one Shri S.R. Bagree, on behalf of M/s Manoj Enterprises on 4.12.01, and that again payments of

Rs. 18,05,982/- and Rs. 13,20,388/-, towards supply of dry ration for the months of September, 2001 to March, 2002, were also made by the

Defendant No. 3 in favour of the M/s Manoj Enterprises, vide Pay Cheque No. 37 dated 30.2.02 and Pay Cheque No. 59 dated 29.6.02 and

that the said payment was received by one Prahlad Singh Tanwar, on behalf of M/s Manoj Enterprises. It is contended by the Defendants, in their

written statement, that the payment in respect of the bills for the month of April, 2002 and May, 2002 were held up on the basis of the letter No.

S/V III-101/1999-2000/Pt/143 dated Guwahati the 1st March, 2003, issued by Defendant No. 2 thereby directing the Defendant No. 3 not to

release any payment to the Plaintiff for the period from April, 2002 to May, 2002, due to the latter's involvement in forgery. It is stated, in the

written statement, that due to involvement of the Plaintiff in forgery and production of false documents regarding Sales Tax Registration Certificate,

at the time of submitting the tender paper for obtaining the supply order, a FIR was lodged by the Deputy Superintendent of Police, CID, Assam

and that CID P.S. Case No. 18/04, u/s 420/468/471 IPC, was registered against the Plaintiff. According to Defendants, the payment for supply of

dry ration for remaining two months i.e. April, 2002 and May, 2002, amounting to Rs. 8,60,977/- was held up by the Assam Police HQRs. for

involvement of the Plaintiff in forgery and production of false documents regarding AGST registration certificate.

4. Upon pleadings of both the parties, the learned trial Judge framed the following issues:

(i) Whether the suit is bad for non-service u/s 80 Code of Civil Procedure?

(ii) Whether the suit is maintainable?

(iii) Whether the suit is barred by limitation?

(iv) Whether the Plaintiff is entitled to get decree for Rs. 20,73,522/-?

(v) Whether the Plaintiff is entitled to get interest @ 18% per annum as prayed for?

(vi) To what other relief/or reliefs, the parties are entitled?

5. The Plaintiff examined himself as P.W. 1 and he was cross-examined on behalf of the Defendants. The Defendants did not adduce any

evidence. The learned trial Judge, by the impugned judgment and order under appeal, dismissed the Plaintiff's suit resulting in this appeal.

6. We have heard Mr. O.P. Bhatti, learned Counsel appearing for the Appellant-Plaintiff and Mr. P. Deka, learned Govt. Advocate appearing on

behalf of the Respondents-Defendants.

7. Mr. Bhatti, learned Counsel for the Appellant, taking us through the pleadings of the parties, as well as the evidence on record, submitted that

the learned trial Judge committed error by deciding that the suit was bad for want of proper notice, u/s 80 Code of Civil Procedure, and that the

suit was not maintainable in the eye of law. It is also submitted that the learned trial Judge committed error by holding that the Plaintiff was not

entitled to get payment towards supply of goods, on the ground that the supply order was obtained fraudulently. It is further submitted, by the

learned Counsel, that, as the Respondents-Defendants had duly received the good supplied and admitted the withholding of an amount of Rs.

8,60,977/- being the bill amount for supply of goods for the month of April, 2002 and May, 2002, there could be no reason to deny payment, in

respect of the goods received, by the Defendants on the ground that the supply order was obtained by the Appellant-Plaintiff by playing forgery,

producing false document regarding AGST registration and that the learned trial Judge committed error by refusing to pass a decree in favour of

the Plaintiff. It is also submitted, that as the claim arose out of a commercial transaction, the Appellant-Plaintiff was entitled to get interest at the

commercial rate charged by the Bank and as such the learned trial Judge committed error by holding that the Appellant-Plaintiff was not entitled to

claim interest for want of any agreement towards the payment of interest. Summing up his argument, the learned Counsel for the Appellant

submitted that, as the Appellant-Plaintiff, in his capacity, as the sole Proprietor of M/s Manoj Enterprises, supplied goods to the Respondents-

Defendants, he was entitled to get payment being the price of the goods supplied, along with interest.

8. Refuting the argument, advanced by the learned Counsel appearing for the Appellant-Plaintiff, Mr. P. Deka, learned Govt. Advocate submitted

that, as the notice u/s 80 CPC was issued by the Appellant-Plaintiff on behalf of M/s Manoj Enterprise the Suit having been filed by the

Appellant-Plaintiff in his capacity as the Proprietor of Manoj Enterprises, was bad for want of notice, inasmuch as no notice for and on behalf of

the Plaintiff was issued, as the Proprietor of M/s Manoj Enterprises. Supporting the impugned judgment and decree, the learned Govt. Advocate

submitted that the Appellant-Plaintiff obtained the supply work by producing false and forged document and as such the Respondents-Defendants,

after coming to know about such forgery, withheld the payment of Rs. 8,60,977/- being the bill amount for the months of April and May, 2002. It

is also submitted that the payment for the period w.e.f. 2001 to March, 2002 has already been made in the name of M/s Manoj Enterprises and

the Government Drafts towards the said payment were received by one Mr. Bagri, on behalf of M/s Manoj Enterprises. It is also contended by the

learned Govt. Advocate, that there is no outstanding amount payable to the Appellant-Plaintiff, except the said amount of Rs. 8,60,977/-, which

has been rightly withheld on the grounds aforesaid.

9. The Appellant-Plaintiff instituted the suit in his capacity as the sole Proprietor of M/s Manoj Enterprises. The Respondents-Defendants, in their

written statement, at paragraph-6, admitted that order was issued in favour of the Appellant-Plaintiff for supply of ration items for the period from

June, 2001 to May, 2002 to the Respondent-Defendant No. 3 on the basis of tender. It is also admitted by the Respondents-Defendants that an

amount of Rs. 12,03,430/- was paid to M/s Manoj Enterprises against the supply of goods for the period w.e.f. June, 2001 to August, 2001 and

that the said payment was received by Sri Bagri on behalf of M/s Manoj Enterprises. The Appellant-Plaintiff, in his plaint has pleaded that he is the

Proprietor of the firm, namely, M/s Manoj Enterprises. The Respondents-Defendants have not denied the said claim. Therefore, there is no dispute

that the Appellant-Plaintiff is the sole Proprietor of M/s Manoj Enterprises.

10. Mr. O.P. Bhatti, learned Counsel for the Appellant, relying on the decision held in the case of M/S Auto Engineering Works v. Bansal Trading

Co. and Ors. reported in 1998 (I) GLT 181, and referring to Order 30, Rule 10 of Code of Civil Procedure, has submitted that the Plaintiff, being

the sole proprietor of M/s Manoj Enterprises, has rightly instituted the suit in his name and that the learned trial Judge committed error, in law, by

deciding that the suit, not being filed in the name of M/s Manoj Enterprises, was not maintainable and that the notice u/s 80 Code of Civil

Procedure, having been issued in the name of M/s Manoj Enterprises and the suit, being filed by the Plaintiff, was bad for want of proper notice.

In the case of M/s Auto Engineering (supra), which was a sole proprietorial firm, the suit was filed in the name of the said firm. The trial Court

dismissed the suit for want of territorial jurisdiction. On appeal, while dismissing the appeal, a Division Bench of this Court, referring to the

provision of Order 30, Rule 10 of Code of Civil Procedure, held that the sole proprietor of the said firm should have filed the suit in his capacity as

the representative or Proprietor of the firm. In the above referred case, this Court observed as follows:

...In the instant case M/s. Auto Engineering Works may not be a firm but admittedly the said trade is run in the name of M/s. Auto Engineering

Works by Shri Brajalal Banik claiming himself to be the sole proprietor of the trade running in the name and style of M/s. Auto Engineering Works.

That being the position, the mischief of Order 30, Rule 10 comes into operation even in the instant case and by going through Rule 10 with that of

the reported case so cited Bhagvan Manaji Marwadi Vs. Hiraji Premaji Marwadi, we are constrained to hold that in such circumstances it was

incumbent on the part of Shri Brajalal Banik as to file the suit in the capacity of his being the representative or Proprietor of the said trade M/s

Auto Engineering Works which in the instant case has not been done....

11. In the case of Bhagvan Manaji Marwadi Vs. Hiraji Premaji Marwadi, a Division Bench of Bombay High Court observed that a person

trading himself or as a firm or in an assumed or trading name can be sued in his trading name under Order 30, Rule 10 Code of Civil Procedure,

but he cannot sue in that name. Order 30, Rule 10, CPC reads as follows:

OrderXXX (10). Suits against person carrying on business in name other than his own.

Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name,

may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply

accordingly.

Order 30, Rule 1 of Code of Civil Procedure, which provides the provision for filing suits in the name of firms reads as follows:

Order XXX (1). Suing of partners in name of firm.

(1) Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if

any) of which such persons were partners at the time of the accruing the cause of action, and any party to a suit may in such case apply to the court

for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be

furnished and verified in such manner as the court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under Sub-rule (1), it shall, in the case of any pleading or other document

required by or under this Code to be signed, verified or certified by the Plaintiff or the Defendant, suffice if such pleading or other document is

signed, verified or certified by any one of such persons.

12. A comparative study of the Rule 1 and 10 of Order 30 reveal that a single person, is the sole proprietor of firm, can't sue in the name of the

firm, in which name he carries on business. Therefore, in case of sole proprietorial firm, even if the business is run in the name of a firm, the suit is

required to be filed by the proprietor in his own name as the representative or proprietor of the firm, but such business firm can be sued. In view of

the above, we respectfully agree with views taken by the Division Bench of this Court and the Bombay High Court aforesaid.

13. In the back-drop of the above law, we have no hesitation in holding that the suit was rightly instituted by the Plaintiff, in his name as the sole

proprietor of the firm, in which name he, as the proprietor used to run his business of supplying goods to the Respondents. Therefore, the suit,

being brought in the said capacity, was in conformity with the provision of Order 30, Rule 10 of Code of Civil Procedure.

That apart, the notice, issued by the Plaintiff in the name of M/s Manoj Enterprises, was received by the Defendants and the suit has been filed

after the expiry of the statutory period. In the notice, as required by Section 80(1) of Code of Civil Procedure, the cause of action, the name,

description and place of residence of Plaintiff and the relief, which he claims is required to be mentioned and the Plaintiff should confirm a statement

that such notice has been so delivered or left. There is nothing on record to show that the said notice, issued by the Plaintiff, did not contain the

above requirements. As the Plaintiff carried on his business in the name of the said firm, which fact was known to the Defendants and not denied

also, the issuance of the notice, in the name of the sole proprietorel firm i.e the Plaintiff was not fatal. Therefore, issuance of the notice u/s 80 CPC

in the name of the firm, by the Plaintiff was sufficient compliance of the statutory requirement. In view of the above discussion, we find no difficulty

in holding that the learned trial Judge committed error by deciding that the suit, having been filed by the Plaintiff in his name, was not maintainable

and that the same was hit by Section 80 Code of Civil Procedure. In our considered opinion the Issue Nos. 1 and 2 should have been decided in

favour of the Plaintiff and accordingly we reverse the said decisions of the learned trial Judge.

14. Taking up the question of limitation, it is found, from the pleadings of the Plaintiff, that the suit was filed claiming payment of price of goods

supplied in the month of June (i.e. on 07.06.2001), on 13.07.2001 and lastly on 28.03.2004. The date of filing of the suit is 30.06.2004.

According to the Plaintiff, cause of action arose on 07.06.2001, 13.07.2001, August 2001, September 2001, April 2002, on 08.05.2002,

31.06.2002, 12.01.2004, 13.01.2004 and on such other subsequent dates. Record does not reveal that there was any fixed period of credit.

Therefore, the claim being for the price of the goods sold and supplied, under the provision of Article 14 of the Limitation Act, 1963, the Plaintiff's

right to sue accrued from the date of delivery of goods and the period of limitation, prescribed by Article 14 aforesaid, is 3 (three) years from the

date of delivery of the goods. According to the Plaintiff, he supplied goods every month and cause of action arose on 07.06.2001, 13.07.2001

and such other subsequent dates. Therefore, the suit, having been filed on 30.06.2004 i.e. three years after 07.06.2001, appears to be brought

after the expiry of the period of limitation prescribed by the law. The learned trial Judge, in deciding this issue, came to contradictory findings. At

one stage, the learned trial Judge held that the suit was barred by law of limitation in respect of the claim for the month of June 2001 and not

barred in respect of the claims for the months of July 2001 to May 2002. But the learned trial Judge committed error, by again deciding that the

suit was barred by limitation in respect of the unpaid bills relating to July 2001, August 2001, April 2002 and May 2002. Apparently, the claims

for the months of July, 2001 to May, 2002 were not barred. Therefore, the question is whether the claim for the months of June, 2001 was hit by

the law of Limitation.

15. A Seven Judges Bench of Supreme Court, in the case of S.S. Rathore Vs. State of Madhya Pradesh, observed that

... The 60 days" time spent for complying with the requirement of notice u/s 80 of the CPC was available to the Plaintiff in addition to the period of

three years....

In view of the above law, laid down by the Supreme Court, in cases, where 60 days notice u/s 80, CPC is to be issued, the said period of notice

(i.e. 60 days) is required to be added in favour of the Plaintiff, thereby extending the statutory period of limitation by 60 days. Therefore, in the

present case as the statutory notice, u/s 80 Code of Civil Procedure, was issued to the Defendants, the said period of 60 days should be added to

the prescribed period of limitation i.e. 3(three) years. In that view of the matter, the Plaintiff's claim for the month of June, 2001 will also be well

within time. Therefore, we find that the Plaintiff's suit was not barred by the law of Limitation.

16. Issue No. 4 relates to the Plaintiff's substantial claim. The Plaintiff has claimed Rs. 20,70,522/- towards the supply of goods in the months of

June 2001, July, 2001, August 2001, April 2002 and May 2002. The Defendants, in their written statement, categorically stated that payment, for

the period commencing from the month of June 2001 and ending on August 2001 amounting to Rs. 12,03,430/- was made by the Defendant No.

3 in favour of M/s Manoj Enterprises, Chatribari, Guwahati, vide Government Draft No. 007273, dated 04.12.2001, which was received by one

Shri S.R. Bagri on behalf of M/s Manoj Enterprises on 04.12.2001. The Defendants admitted that payment for the month of April, 2002 and May,

2002 was withheld due to involvement of the Plaintiff in at the time of while obtaining the contract for supply of the goods. Admittedly, the payment

for the months of September, 2001 to March, 2002, was also made in favour of M/s Manoj Enterprises vide cheque No. 37, dated 30.02.2002

and cheque No. 59, dated 29.06.2002 and the said payment was received by one Sri Pralhad Singh Tanwar on behalf of M/s Manoj Enterprises.

The Plaintiff, who examined himself as P.W. 1, stated that except the payment for the months of June, July, August, 2001 and April, May, 2002,

all other payments were received by the Plaintiff. Therefore, if the earlier payment, made vide cheques in the name of M/s Manoj Enterprises and

received by Sri Pralhad Singh Tanwar, was credited in the account of M/s Manoj Enterprises, it is difficult to believe that the subsequent payment

made vide Government Draft No. 007273, dated 04.12.2001 and received by Sri S.R. Bagri, on behalf of M/s Manoj Enterprises, was not

credited to the account of M/s Manoj Enterprises. Admittedly, the said Government draft, dated 04.12.2001, was issued in the name of M/s

Manoj Enterprises. The Plaintiff, who denied the receipt of the said payment in the name of M/s Manoj Enterprises, failed to substantiate his plea

by producing Bank documents, more particularly the statement of account standing in the name of M/s Manoj Enterprises. In his cross-

examination, the Plaintiff stated that he did not have any account in the State Bank of India, Pan Bazar Branch, in the name of M/s Manoj

Enterprises. He denied the suggestion that the payment, received from the Defendants, were deposited by him in the account of M/s Manoj

Enterprises with the State Bank of India. He further stated that he had no person named Mr. Bagri in his Enterprise.

17. In order to establish that the Plaintiff did not have any Bank account in the name of M/s Manoj Enterprises and that the drafts alleged to be

issued by the Defendant No. 3 was not credited in the account of M/s Manoj Enterprises, he could have obtained a certificate from the Bank

authority regarding non-existence of any account in the name of M/s Manoj Enterprises with the State Bank of India, Pan Bazar Branch. The

failure of the Plaintiff to discharge the said burden raises suspicion about the veracity of his statement that he did not have any account in the name

of M/s Manoj Enterprises with the State Bank of India, Pan Bazar Branch and that the said Government Draft was not credited into the account of

M/s Manoj Enterprises. The fact that the Plaintiff received the earlier payment made by Cheque No. 37, dated 30.02.2002 and Cheque No. 59,

dated 29.06.2002, in the name of M/s Manoj Enterprises, lends sufficient support in favour of the contention of the Defendants-Respondents that

they had made payment for the month of June, July and August, 2001 by Government Draft No. 007273, dated 04.12.2001. Therefore, in our

considered opinion, the learned trial Judge committed no error by holding that the Plaintiff received payment for the months of June, July and

August, 2001.

The plea of the Defendants-Respondents" regarding withholding of an amount of Rs. 8,60,977/- as the price of the goods supplied in the months

of April, 2002 and May, 2002 is that the Plaintiff committed forgery at the time of obtaining the contract. Admittedly, on the allegation of

committing forgery, a case under Sections 420/468/471 of the Indian Penal Code has been registered against the Plaintiff and the same is pending.

There can be no dispute that the allegation of involvement in forgery, in obtaining the contract, and pendency of a criminal case cannot be

reasonable ground for withholding the payment towards the supply of goods. There is no denial that the Defendants-Respondents received the

goods supplied by the Plaintiff in good and proper condition, under the terms of the contract. If the Plaintiff is found guilty of committing fraud or

any other criminal offence in obtaining the contract aforesaid, law will take its own course. There was no agreement that in the event of detection of

any fraud in obtaining the contract, the payment due on account of the supply of goods would be withheld. Therefore, the payment of price of the

goods supplied by the Plaintiff as per terms of the contract, could not have been withheld thereby causing monetary loss to the Plaintiff.

18. In view of the above discussion and in the absence of any legal bar, we are of the considered opinion that the Plaintiff is entitled to get payment

in respect of the goods supplied in the month of April, 2002 and May, 2002. Therefore, in our considered opinion, the learned trial Judge

committed error by deciding the Issue No. 4 in negative and against the Plaintiff. Accordingly, while reversing the said findings recorded by the

learned trial Judge, we hold that the Plaintiff is entitled to realise an amount of Rs. 8,60,977/- being the price of goods supplied during the months

of April, 2002 and May, 2002.

19. While deciding Issue No. 5, the learned trial Judge held that in the absence of any agreement to pay interest, the Plaintiff was not entitled to get

interest as claimed by him. There is no dispute regarding absence of any contract, between the parties, with regard to payment of interest. The

supply of goods by the Plaintiff was made in course of his business. Therefore, in the commercial parlance, unless there is anything to the contrary,

price of goods supplied is required to be paid without unreasonable delay. The claim for payment arises immediately after the date of supply. That

apart, the period of limitation also starts to run from the date of supply. Admittedly, the Plaintiff made the supply in the month of April, 2002 and

May, 2002. In spite of making demand, the Defendants-Respondents refused to make the payment on the ground that the contract was obtained

by playing fraud and thus, the Plaintiff has been compelled to institute the Money Suit for realisation of the amount due. Withholding of payment

from April, 2002 and May, 2002, certainly caused financial loss and injury to the Plaintiff. Therefore, the transaction being a commercial one, the

Plaintiff is entitled to be compensated for the loss incurred by him due to withholding of payment and the compensation may be granted by way of

interest. The Plaintiff has claimed interest @ Rs. 18% per annum w.e.f. 01.04.2003. Hence, we are of the considered opinion that the learned trial

Judge committed error by refusing to grant interest on the ground of absence of any agreement towards the payment of interest.

20. Considering the entire facts and circumstances and the nature of loss suffered by the Plaintiff, we unhesitatingly hold that the Plaintiff is entitled

to get interest, at the commercial rate as claimed by the Bank. Considering the fluctuation of rate of interest, claimed by the Bank in commercial

transactions, we hold that the Plaintiff shall get interest @ 12% on the principal amount awarded aforementioned from 01.04.2003.

21. In view of the above discussions, we find sufficient merit in this appeal, requiring interference with the impugned judgment and decree passed

by the learned trial Judge. Accordingly, the impugned judgment and decree is set aside and quashed.

22. The appeal is allowed with cost, directing the Defendants-Respondents to pay an amount of Rs. 8,60,977/- (Rupees eight lakh sixty thousand

nine hundred and seventy seven) only being the bill amount towards the supply of goods in the months of April, 2002 and May, 2002, with interest

thereon @ 12% per annum from 01.04.2003 till realisation.

23. Decree be prepared accordingly. Send back the record of the trial Court.