

(1961) 03 PAT CK 0018
In the Patna High Court
Case No : A.F.O.D. No. 228 of 1956

Firm Pursottam Das Ganpati Rai

APPELLANT

Vs

Gulab Khan

RESPONDENT

Date of Decision : 14-03-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10
Contract Act, 1872 — Section 128, 182
Evidence Act, 1872 — Section 114
Limitation Act, 1908 — Section 14

Citation : AIR 1963 Patna 407

Hon'ble Judges : S.C. Misra, J;G.N. Prasad, J

Bench : Division Bench

Advocate : Lalnarayan Sinha and Hari Lal Agrawal, for the Appellant; A.B.N. Sinha and N.P. Agarwala, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—The plaintiff-respondent, Gulab Khan, instituted the suit for recovery of a sum of Rs. 16, 979/- together with costs, interest pendente lite and future interest, on the allegation that he placed an order with the defendant for supply of 352 tins of mustard oil, weighing 154 maunds, to be despatched from Kanpur to Motihari. The oil to be supplied, however, was stipulated to be of pure and unadulterated quality. On the 16th of June, 1950, the defendant sent the goods ordered for from Kanpur, not to Motihari, but to Bettiah railway station. The plaintiff had to incur some costs in bringing the oil from Bettiah to Motihari. The plaintiff took delivery of the railway receipt from the Central Bank of India, Bettiah Branch, on payment of a sum of Rs. 13,720/-. He went to the railway station to take delivery, but he was informed by the Goods Clerk that he could be given delivery only when the railway receipt was signed by the Sub-divisional Officer, Bettiah. The plaintiff approached the Sub-divisional Officer, Bettiah, who directed a Government doctor to examine the oil first, and it was only when the doctor reported that the oil was pure and unadulterated that permission could be

granted for delivery. The doctor went to the railway godown, took small quantities of oil from several tins, and reported that the oil contained in the tins was not pure. He also sent samples of the oil to the Government Chemist at Patna for examination. The latter also found the oil to be adulterated, and reported to that effect. The Sub-divisional Officer, accordingly, got the entire consignment kept in the godown of the plaintiff and had it locked and sealed by a Deputy Magistrate, and the key of the godown was kept in charge of the Sub-divisional Officer.

2. A criminal case was started thereafter against the plaintiff and the defendant. They were both convicted and fined Rs. 500/- each. They preferred appeals against their conviction and sentence. The appellate Court, however, upheld the conviction and sentence of the defendant, but acquitted the plaintiff. It seems, however, that the defendant also came up in revision to this Court, and his conviction was also set aside. The plaintiff addressed, thereafter, several letters to the defendant for payment of the price of the oil, with damages and interest, railway freight, cartage and other incidental expenses. The defendant, however, did not pay any heed to the notices, and, accordingly, the present suit had to be instituted on the allegation that it was the defendant who dishonestly supplied adulterated mustard oil. On these allegations, as stated above, the present suit was instituted, and the plaintiff claimed the aforesaid amount, which comprised the price of the 352 tins of mustard oil as also the other incidental expenses incurred by him in connection with the consignment despatched to him.

3. The defendant denied the right of the plaintiff to the amount claimed. It was admitted, no doubt, that the firm of the plaintiff placed an order with the defendant at Kanpur to purchase 352 tins of mustard oil and despatch it to Bettiah. It was denied that the order for supply of oil was placed by the plaintiff at Motihari. It was stated further that the defendant acted as commission agent on behalf of the plaintiff in executing the order placed and purchased 352 tins of mustard oil from the Ganges Oil Mills at Kanpur (which was defendant No. 2 to the suit then) and instructed the Ganges Oil Mills to despatch the oil to Bettiah. The defendant obtained the railway receipt from the Ganges Oil Mills against payment. The railway receipt was "self", which meant that the consignor and the consignee were the Ganges Oil Mills. The necessary documents were sent to the plaintiff by the defendant through the Central Bank of India, Bettiah Branch, for payment. The goods in question were purchased at first by Messrs. Shrikrishna Ram of Narkatiyaganj from the Ganges Oil Mills. The defendant had no occasion to see the goods. The Ganges Oil Mills certified that the oil purchased was free from argemone oil. The certificate issued by the manufacturer, along with the sample, was forwarded to the plaintiff. It was denied that the defendant had undertaken to supply pure mustard oil fit for human consumption. The plaintiff had not divulged for what purpose the oil in dispute was required. According to the defendant, the goods were despatched to Bettiah according to the instruction of the plaintiff, and it was wrong to suggest that the plaintiff ordered the goods to be supplied to him at Motihari. The defendant was not aware of the real

quality of the mustard oil supplied, and it was the Ganges Oil Mills (defendant No. 2) which was responsible for the quality of the oil. It was the Ganges Oil Mills which guaranteed the quality of the oil as pure, and this defendant had no reason to suspect the bona fides of defendant No. 2. If, therefore, on chemical examination of the oil, it was discovered that it was not of pure quality, the liability for it would fall on the shoulders of the Ganges Oil Mills, and not on the defendant No. 1. This in substance, is the tenor of the written statement filed on behalf of the defendant.

4. The plaintiff instituted a suit for recovery of the aforesaid amount at Motihari in the court of the Subordinate Judge on the 8th of November, 1951. The Subordinate Judge, by his judgment dated the 25th of April, 1953, held that he had no jurisdiction to try the suit as defendant No. 2, the Ganges Oil Mills could not be amenable to the jurisdiction of that court inasmuch as it had no place of business within the jurisdiction of that court. It appears that, on the 27th April, 1953, the plaintiff put in applications for withdrawal of the suit with permission to institute a fresh suit or to dismiss it as against defendant No. 2 or to delete its name and proceed with the trial. On the 28th of April, 1953, the court ordered the name of defendant No. 2 to be expunged from the plaint. The defendant No. 1 came up in revision to this Court, which was numbered as Civil Revision No. 596 of 1953. A Division Bench of this Court, by judgment dated the 5th of November, 1951, allowed the application in revision and set aside the order of the court below in so far as it directed the name of defendant No. 2 to be expunged and the suit to proceed as against defendant No. 1. This Court held that the learned Subordinate Judge became functus officio in regard to this matter after the order was passed on the 25th of April, 1953 that the court had no jurisdiction as against defendant No. 2 and that the plaint was to be returned to the plaintiff for presentation in the proper Court. The plaintiff filed the present suit, thereafter, on the 14th of December, 1954. According to the date of the cause of action mentioned in the plaint, the last due date for filing the suit was the 16th of June, 1953.

5. The court below, on a consideration of the evidence led on behalf of the parties, came to the conclusion that the defendant appellant was liable for reimbursing the plaintiff to the extent of the amount of price of the oil paid by him for obtaining the railway receipt and that the plaintiff could not be entitled to any other amount. The finding of the Court below rests on the ground that the defendant appellant was the real vendor of the plaintiff and that this defendant purchased the oil from the Ganges Oil Mills and supplied the same to the plaintiff, and, as such, the defendant appellant must be answerable for the quality of the oil. It was held that the case of the plaintiff that the appellant undertook to supply the mustard oil of pure quality fit for human consumption was true and that the case of the defendant that there was no such agreement between the parties was false. The court below, however, has not passed a decree in favour of the plaintiff for other items of the claim set out in the plaint.

6. In this appeal before us by the defendant, two questions have been raised by the learned Counsel for the parties. The first question is as to whether the present suit by the plaintiff is barred by limitation as having been filed beyond the time mentioned above, being the 16th of June, 1953; and, secondly, whether the defendant appellant entered into a contract with the plaintiff for supply of 352 tins of mustard oil on its own account as the vendor of the defendant undertook to supply the same only as a commission agent and did not hold out any guarantee for the purity of the stuff to be supplied and it was interested only in its commission, and, as such, could not be answerable for any adulteration of the oil which was detected later on chemical analysis under the direction of the Sub-divisional Officer, Betiah.

7. On the first question, the court below has held in favour of the plaintiff, relying on Section 14 of the Limitation Act. It is not denied that, if Section 14 of the Limitation Act cannot be invoked in support of the plaintiff's case, the suit must be held to have been filed beyond time. The only question is whether the period from the 8th of November, 1951, when the suit was instituted, to the date of the endorsement by the court below ordering the return of the plaint, which was on the 10th of December, 1954, and four days thereafter, when the suit was actually instituted, being the 14th of December, 1954, can be excluded in computing the period of limitation in terms of Section 14 of the Limitation Act. Learned Counsel for the appellant contends that, although the suit must be held to have been prosecuted with due diligence in a wrong court from the date of the institution, namely, the 8th of November, 1951 to the 25th of April, 1953, when the learned Subordinate Judge held that he had no jurisdiction to try the suit as against defendant No. 2, yet the period thereafter cannot be taken into account for extending the period for the institution of the suit in the proper forum thereafter. On the other hand, learned Counsel for the respondent contends that, after the order passed by the learned Subordinate Judge on the 25th of April, 1953, a bona fide application was put in by the plaintiff for withdrawal of the suit with liberty to institute a fresh one or to dismiss it as against defendant No. 2 and another for deleting the name of defendant No. 2 from the plaint. The two applications were filed on the 27th of April, 1953, and the court, in fact, entertained the application and ordered expunction of the name of defendant No. 2. This is no reason not to consider this period also as a part of the bona fide prosecution of the suit. When defendant No. 1 came up in revision to this Court, and this Court allowed the application pronouncing an opinion that the order passed by the trial court on the application of the plaintiff dated the 27th of April, 1953 was beyond jurisdiction, this also must be considered as a part of the proceeding of a definitely bona fide character inasmuch as it was the defendant No. 1 who came up in revision to this Court aggrieved by the order passed by the learned Subordinate Judge. The judgment of this Court, as already stated, in Civil Revision No. 596 of 1953 was delivered on the 5th of November, 1954. The plaintiff respondent filed an application for return of the plaint on the 29th of November, 1954, and the court passed an order for return of the plaint on the

10th of December, 1954 with an endorsement that "the plaint be returned to the plaintiff's pleader for re-filing to the proper Court". This being a necessary part of the duty of the Court in returning the plaint, there is no reason why this also should not be considered as bona fide prosecution of suit. Within four days of that endorsement, the present suit was instituted which cannot be regarded as unreasonable in the circumstances of the case.

8. Mr. Lal Narayan Sinha, for the appellant, has referred to the cases of AIR 1935 85 (Privy Council) and *East India Co. v. Uditchurn Paul* 5 Moo Ind App 43 at p. 68 (PC); and Mr. Harilal Agarwal, who has followed Mr. Lalnarayan Sinha, has referred to the case of *Firm Jiwan Ram Ramchandra Vs. Jagernath Sahu and Another*, in support of the contention that the plaintiff could not be entitled to the exclusion of the period claimed by him in terms of Section 14 of the Limitation Act. In the case reported in AIR 1935 85 (Privy Council) the real point for consideration was that where the period of limitation expired on a date when the Court was closed that period would be available only when such an application had to be filed in the proper Court, and not in a court which had no jurisdiction. In my opinion, therefore, the point which arises for consideration in the present case did not call for consideration in that case, and, accordingly, that decision is of no assistance in deciding the point in controversy. The case of 5 Moo Ind App 43 (PC), however, does not seem to be relevant so far as the construction to be placed upon Section 14 of the Limitation Act is concerned, and it is not necessary to deal with it. The case of *Firm Jiwan Ram Ramchandra Vs. Jagernath Sahu and Another*, is a case where the plaintiff filed a suit on the last date of limitation available to it, and the Court found that it had no jurisdiction to pass an order to the prejudice of one of the parties. The plaintiff who filed a suit on the last date could not be considered to be a person who was diligent in pursuing his right. When the Court, therefore, fixed a date on which to present the plaint in the proper Court, it was proceeding in a manner which was not authorised under Order VII, Rule 10, of the Code of Civil Procedure. The only period therefore, in the circumstances, which a plaintiff, would be entitled to in computing the period of limitation was the period during which the plaint was pending in the Court returning the plaint. Considerable stress has been laid on this case by Mr. Harilal Agarwal on behalf of the appellant. This case, however, is distinguishable on more than one ground. In the first place, the plaintiff in this case filed its suit on the last date of limitation which was construed by this Court as a lack of diligence on its part which disentitled it to the relief which it might in equity be open to it if it had been proceeding in a bona fide way. The plaintiff was, accordingly, restricted to the right open to it in law u/s 14 of the Limitation Act which could be the pendency of the suit in a Court having no jurisdiction in the narrow sense, and this Court did not approve of the order passed by the trial Court fixing a date for presentation of the plaint in the, proper Court, thus extending the period which would be available to the plaintiff for presentation of the plaint. In the present case, however, this consideration does not arise. The suit was filed by the plaintiff much before the last date of limitation, which, as mentioned above,

was the 16th of June, 1953, whereas the suit was instituted against both the defendants on the 8th of November, 1951. In the circumstances, it cannot be said that it showed any lack of bona fides or diligence on the part of the plaintiff. In the second place, the learned Subordinate Judge ordering the return of the plaint had not fixed a date for presentation of the plaint which would exempt the plaintiff from bona fide prosecution of the suit or presenting the plaint in a proper Court with due diligence; but, on the contrary, the order was passed by the Court returning the plaint on the 10th of December, 1954, and within four days thereof the suit was instituted in the proper Court. None of the considerations which weighed there with the learned Judges in this case really arise in the present contest. Mr. A.B.N. Sinha, for the respondent, has drawn our attention to the case of Neerendrabhooshan Lahiri Vs. Berhampur Oil Mills, Ltd., wherein a Division Bench of the Calcutta High Court laid down a proposition which supports the contention of learned Counsel. The observation of Mukherji, J., on this point runs as follows:

"This being the state of authorities on the subject the correct view, in my judgment, to take of the matter is that the proceedings cannot be regarded as having ended until the Court, in whom the duty lies of conforming to the provisions of Order VII, Rule 10, Civil Procedure Code, is in a position to carry out the order of return of the plaint. Till that point of time, no question can possibly arise as regards the plaintiff not being entitled to exclusion of time u/s 14. When that point of time is reached, the question whether the plaintiff would or would not be entitled to a further deduction of time thereafter would depend upon various factors. Ordinarily no further time would be excluded. But it is not inconceivable that in exceptional circumstances, even subsequent to such point of time, the proceedings may have to be regarded as still continuing. And, in determining whether they should be so regarded or not, the question, of the plaintiff's diligence or otherwise may have to be considered."

In my opinion, therefore, the delay of four days thereafter, in considering diligence with which the suit was prosecuted, cannot be regarded as anything but part of due diligence exercised by the plaintiff, and the plaintiff is entitled to the exclusion of this period of four days as well, and the same view has been laid down in the case of Sinna Karuppan and Others Vs. R.M.P.S. Muthiah Chettiar and Others, wherein it has been held by a learned Single Judge of the Madras High Court that in a case where the plaint is ordered to be returned the proceedings terminate not on the date of the order directing the plaint to be returned but on the date of the actual return with the endorsement on the plaint in accordance with the provisions of Order VII, Rule 10, of the Code of Civil Procedure. There is nothing inconsistent between the propositions of law laid down in the above two cases relied on by learned Counsel for the respondent, and in my opinion, the Court below was right in holding that the suit was not barred by limitation.

9. The second point with regard to the relationship between the plaintiff and the

defendant is as to whether the defendant was a mere commission agent of the plaintiff and, as such, could not be held liable for the bad quality of the oil supplied by the Ganges Oil Mills or was to be regarded as the vendor. The Court below, as I have mentioned above, on a consideration of the various circumstances in the case, has found that the defendants must be treated as the vendor of the plaintiff, and not merely as a commission agent for supplying the commodity. The learned Subordinate Judge has rested his conclusion on the ground that, although the defendant pleaded that the contract was entered into between the parties on the strength of a letter sent by the plaintiff to the defendant at Kanpur, no such letter was produced, nor was any register of accounts produced by the defendant which would show in what terms the order was placed by the plaintiff for supply of the goods concerned. The defendant appears to be a firm carrying on considerable business, and it is difficult to imagine that the letter sent by the plaintiff, if one were sent, would not be preserved, nor that the fact would not be noted in some Bahi of the defendant. If the defendant did not produce the relevant documents, that would only lead to an inference against the defendant and in favour of the plaintiff. In my opinion, the inference drawn by the Court below against the defendant cannot be held to be unreasonable in the circumstances. Mr. Harilal Agarwal, for the appellant, however, contended that, although the inference of the Court below may be considered as well grounded, as it stands, yet a reference to the plaint itself shows that the plaintiff was aware all the time that the defendant was merely a commission agent. The defendant was a supplier and was interested only in the commission charge. There is force, no doubt, in this contention because the plaint, read in a plain manner, seems to proceed on the footing that the defendant was acting as a commission agent and, as such, could not be regarded as a person responsible for the quality of the stuff supplied. Mr. A.B.N. Sinha, for the respondent, has referred to the cases of *Ex parte White In re Nevill* (1871) 6 Ch A 397 and *Superintendent of Stamps Vs. Breul and Co.*, in support of his contention that, although the word used is "commission agent" yet that in itself would not be conclusive to determine the correct relationship between the parties. It has been held in the above cases that, even where the word "agent" is used, the relationship between the parties may be still of two principals contracting with each other. The actual status of the parties must be determined with reference to all the circumstances, and not merely with reference to the word used. In my opinion, there is substance in this contention. The Court below also has proceeded to examine all the circumstances, and has found the defendant to be the vendor, and not merely a commission agent, in the first place, as I have said, for non-production of the relevant documents and, in the second place, on the circumstance that it was the defendant who paid the price to the Ganges Oil Mills, the manufacturer of the mustard oil, and it was the defendant who received the price of the goods under the railway receipt which was delivered to the plaintiff by the Bettiah Branch of the Central Bank of India after having received the amount chargeable for the railway receipt. It was, therefore, the defendant which was substantially moving in the matter. No nexus

was established between the Ganges Oil Mills and the plaintiff. The entire dealing, therefore, makes out the defendant to be the supplier of the goods and, as such, in the circumstances of the present case, the defendant must be treated as the principal vis-a-vis the plaintiff, and not merely a commission agent. The reference in the invoice to the amount of commission could not alter the hard fact that nowhere the defendant referred to the Ganges Oil Mills being the supplier of the goods to the plaintiff unless, of course, it was in course of the criminal case itself that the proprietor of the defendant firm found himself in difficulty in regard to the quality of the oil supplied. A reference to Exhibits 5, 5(a) and 5(b) also leads to the same conclusion inasmuch as in exhibit 5, which is a post card from the defendant to the plaintiff, dated the 12th of June, 1950 the following passage occurs: -

"In accordance with the letter of Babu Sukhdeo Prasad we have purchased one wagon of mustard oil 352 tins (weight 154 mds.) at Rs. 84/- per maund bilti cut, ready and sent a telegram to Bettiah gadi asked for advance of Rs. 1000/- only to be sent by T.T. which must be sent."

In exhibit 5 (a), which is another post card written by the defendant to the plaintiff, dated the 14th of August, 1950, the following occurs:-

"We had purchased ready goods of 352 tins of Ganga brand mustard oil, we have sent to your Bettiah Gadi Railway receipt with hundi for Rs. 13,720/-."

In exhibit 5 (b) which is a letter from the plaintiff to the defendant, dated the 25th of August, 1950, the following occurs:-

"I am to inform you that 352 tins of mustard oil, which I have purchased from you, has not been passed by the Government."

In my opinion, all these three documents also lead to the conclusion that it was the defendant who was the vendor of the oil in question to the plaintiff. His original status was that of a commission agent, but in the present transaction the defendant held itself out as the vendor and the deal was complete on that footing. The Court below, therefore, came to the correct conclusion in holding that the defendant must be held responsible for the quality of the oil supplied, and, if there was any adulteration, the defendant must suffer for that and must be answerable to the plaintiff on that account.

10. There is another aspect of the question, which, although canvassed in the Court below, so far as facts are concerned, was not brought out in proper perspective. It is that, even if the defendant were merely a commission agent, the plaintiff states that the defendant undertook to supply mustard oil of pure quality. If the defendant, as is stated, had not undertaken to do so, relevant documents should have been put before the Court to show on what terms the contract was entered into. In the absence of the relevant documents, as I have stated above, it must be held that, even if the defendant was interested only in charging commission, the defendant certainly undertook to supply the mustard

oil of pure quality and the defendant must be held to be the guarantor of the quality. If that be so, the defendant must be answerable for the quality of the oil and the right of the plaintiff against the defendant in accordance with Section 128 of the Contract Act would be co-extensive with the liability of the manufacturer. If the defendant's case were established that no such liability were undertaken, the position would certainly be different. In view of a different conclusion, however, on this point, the defendant must be held liable also as a guarantor u/s 128 of the Contract Act and must be responsible for the bad quality of the oil which led to its forfeiture by the Sub-divisional Officer as a result of the judgment in the case under the Bihar Prevention of Food Adulteration Act, 1947.

11. Learned Counsel has endeavoured to make small point that, in any case, the plaintiff could only look to the Ganges Oil Mills, the manufacturer, and, if the defendant in a bona fide manner accepted the goods, which were meant for despatch to another customer, the defendant cannot be liable. In my opinion, this point is covered by the discussion about the liability mentioned above.

12. Learned Counsel has also endeavoured to make a point in regard to the amount decreed in favour of the plaintiff by the Court below. He has contended that the oil was still lying with the plaintiff in his godown and it was his duty to diminish the loss in a reasonable manner. He has given no evidence as to what he has done in regard to that, and, in that view, he could not be held entitled to the sum decreed. I have already stated that the Court below has not allowed the plaintiff any damages, but only the price paid by him. It appears on an examination of the judgment of the High Court in revision filed against the conviction of the defendant that all the tins were forfeited to Government. It is, no doubt, true that the plaintiff obtained an order from the Sub divisional Officer not to have them destroyed until the decision of the civil suit. That, however, does not alter the position that the oil was forfeited to the Government, and the plaintiff has no manner of right to deal with that commodity. A presumption, therefore, that the plaintiff should have sold the oil or taken some step to diminish his loss does not arise inasmuch as the entire quantity, according to the judgment of the Criminal Court, was beyond his control and has become the property of the Government.

13. In the result, therefore, the appeal must be dismissed with costs.

G.N. Prasad, J.

14. I agree.