
(1998) 09 GAU CK 0040
In the Gauhati High Court
Case No : First Appeal No. 83 of 1994

Anil Debnath

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 05-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6, Order 8 Rule 6A, 34, 80, 96
Contract Act, 1872 — Section 62
Interest Act, 1978 — Section 3(1)
Tripura Co-operative Societies Act, 1974 — Section 164

Citation : (2000) 2 GLT 179

Hon'ble Judges : H.K.K. Singh, J; A.K. Patnaik, J

Bench : Division Bench

Advocate : B. Das and P.K. Dhar, for the Appellant; U.B. Saha, T. Dutta and G.S. Das, for the Respondent

Judgement

A.K. Patnaik J.

1. This First Appeal has been filed u/s 96 of the Code of Civil Procedure, 1908 against the judgment and decree dated 29.4.94 of the learned Assistant District Judge No. 2, West Tripura, Agartala in Money Suit No. 62/91.

2. The Appellant filed the aforesaid Money Suit against the Respondents. The case of the Appellant in the said Money Suit was that he was the proprietor of M/s Pioneer Trading Corporation which carries on business of clearing, forwarding and transportation contract. By short notice dated 22.1.88 the Chief Executive Officer, Tripura State Cooperative Consumers Federation Limited (for short "the Federation") invited quotations for transporting of sugar from time to time from the godown of Food Corporation of India (for short "FCI") at Dharmanagar to Hitasadani Co-operative Marketing Society Limited at Dharmanagar and from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala. The Appellant submitted his quotation and was entrusted with the work of transportation at the rate of Rs. 4.00 per quintal for transportation of sugar from

the godown of FCI at Dharmanagar to the godown of Hitasadani Co-operative Marketing Society Limited, Dharmanagar and at Rs. 23.00 per quintal for transportation of sugar from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala. Thereafter the Tripura Truck Owners Syndicate, from whom the Appellant had hired the truck for transportation, increased the rates and, in the circumstances, the Appellant increased his rate for transportation of sugar from the godown of FCI, Dharmanagar to the godown of Hitasadani Co-operative Marketing Society Limited, Dharmanagar from Rs. 4.00 per quintal to Rs. 5.00 per quintal and for transportation of sugar from the godown of FCL Dharmanagar to the godown of the Federation at Agartala from Rs. 23.00 per quintal to Rs. 29.00 per quintal with effect from April, 1989 and submitted bills for payment to the Federation. The Federation paid the said bills for 10 months from April, 1989 to January, 1990 but did not pay the bills of the Appellant for the months of February, 1990 and March, 1990 amounting to Rs. 2.61,823.00. As a result, the Appellant suffered financial losses and damages and became liable to pay interest to the Vijaya Bank from whom the Appellant had taken loans for the said business. The Appellant issued notices u/s 80 of CPC and u/s 164 of the Tripura Co-operative Societies Act on the Respondents demanding an amount of Rs. 2.61,823.00 with interest at the rate of 18% per annum from the date of submission of the bills till the date of realisation. When the Respondents did not respond to the said notices, the Appellant filed the suit claiming the said amount of Rs. 261.823.00 towards bill Nos. 771, 772, 801, 802, 803 and 804 dated 27.2.90 and 23.4.90 for the transportation of sugar during the months of February and March, 1990 and interest at the rate of 18% per annum amounting to Rs. 58,000/- and compensation at the rate of Rs. 100.00 per month from the date of notice dated 9.1.91 for business loss and damages till the filing of the suit amounting to Rs. 700.00. In the suit, the Appellant claimed for an amount totalling to Rs. 3,20,523.00. The Appellant also claimed for compensation interest and costs of the suit.

3. The Federation contested the said suit by filing written statement through the Defendant Nos. 5 and 6, the Administrator and the Chief Executive Officer of the Federation, and pleaded that there was an understanding between the Appellant and the Federation that the Appellant would be paid for transportation work carried out from April, 1989 onwards at the rates as approved by the Government. Accordingly, the enhanced rate of Rs. 5.00 per quintal for transportation of sugar from the godown of FCI at Dharmanagar to the godown of Hitasadani Co-operative Marketing Society Limited at Dharmanagar and the enhanced rate of Rs. 29.00 per quintal for transportation of sugar from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala was referred to the Government. Food and Civil Supplies Department and after several reminders and persuasion, the Federation received the approval from the said department at the fag end of the year 1989-90 in February-March, 1990 to a rate of Rs. 26.50 per quintal for transportation from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala. Regarding the

enhanced rate for transportation of sugar from the godown of FCI at Dharmanagar to the godown at Hitasadani Co-operative Marketing Society Limited at Dharmanagar, the department of Food and Civil Supplies did not agree to the enhanced rate. In these circumstances, the Federation was not liable to make payment of the bills of the Appellant for the months of February and March, 1990 and was entitled to recover excess payment made for the period of 10 months from April, 1989 to January, 1990. The Federation has further pleaded that it was functioning as the nominee of the State Government for lifting of levy sugar and that transportation cost of levy sugar was being reimbursed by the department of Food and Civil Supplies and the Federation cannot make payment of the bills at the enhanced rates unless and until the enhanced rates are approved by the State Government. The State Government of Tripura also contested the suit. In the written statement the Defendant Nos. 3 and 4, the Secretary, Cooperation, Govt. of Tripura and the Registrar, Co-operative Societies, have reiterated that the Federation cannot make payment of the bills at the enhanced rates as claimed by the Appellant since the Government of Tripura, Food and Civil Supplies Department has not approved such enhanced rates. The said Defendant Nos. 3 and 4 have reiterated that the Federation was functioning as the nominee of the State Govt., for lifting levy sugar as per the prevailing system and the transportation cost for levy sugar was to be reimbursed by the Director of Food & Civil Supplies and. therefore, before payment of the said transportation cost, the Federation should have obtained approval from the Department of Food & Civil Supplies. Defendant Nos. 3 and 4 have further pleaded that the payment of the bills of the Appellant for 10 months was made to the Appellant pending approval of the enhanced rates by the Govt. but since the rate of Rs. 26.50 per Qntl. for transportation of levy sugar from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala for the year 1989-90 was approved by the Government, the payment made against the earlier bills at the higher rate became excess and were recoverable. The learned Assistant District Judge framed issues, recorded the evidence led by the Appellant and the Defendants and finally dismissed the suit by the impugned judgment and decree dated 29.4.94 after holding that there was no contract between the Appellant and the Federation for payment at the enhanced rates and that the Appellant should accept the approved rate of the Government of Tripura and the excess amount which was paid to the Appellant should be adjusted against the bills submitted by the Appellant.

4. At the hearing of the appeal, Mr. P.K. Dhar, learned Counsel for the Appellant, submitted that admittedly the Appellant had transported the sugar from the godown of FCI at Dharmanagar to Hitasadani Consumers Marketing Society Limited at Dharmanagar and from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala during the months of February and March, 1990 and admittedly for the period of 10 months from April, 1989 to January, 1990 the Federation had paid the Appellant at the enhanced rates for the said transportation work as claimed by the Appellant and the Respondents cannot

now refuse to make payment of the bills of the Appellant for the months of February and March, 1990 at the enhanced rates on the ground that the enhanced rates as claimed by the Appellant in the bills have not been approved by the State Government. He further argued that no plea has been taken by the Respondents in the written statement that they even offered to pay to the Appellant for the transportation work carried out by the Appellant for the months of February and March, 1990 from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala at the rate of Rs. 26.50 per quintal as approved by the State Government and no documentary evidence was produced by the Respondents in the trial to show that such offer was made by the Federation to the Appellant. Mr. Dhar further contended that Ext-1 would show that it was a short notice inviting quotations for the period 1988-89 and thus the rates as quoted by the Appellant were for the period 1988-89 and were not applicable to the period from 1.4.89. He argued that in his letter dated 15.4.89 (Ext-3), the Appellant demanded higher rates on the basis of the rates fixed by the Truck Owners Association from whom the Appellant had hired the truck and, therefore the enhanced rates of transportation claimed by the Appellant were reasonable and should have been paid by the Respondents. Mr. Dhar contended that Ext-5 would show that the Appellant had taken over-drafts from the Vijaya Bank for his business and was liable to pay interest at the rate of 18% per annum in addition to the amount claimed by the Appellant towards the bills of February and March, 1990, and as the Appellant was unable to repay the said overdraft to the Bank and was liable to interest, the Appellant was entitled to interest and costs from the Respondents.

5. In reply, Mr. U.B. Saha, learned Counsel for the Respondent Nos. 1 and 2. submitted that as per the terms of the contract between the Appellant and the Respondents, the Respondents were liable to pay for the period from April, 1989 to March, 1990 at the rate of Rs. 26.50 per quintal for transportation of sugar from Dharmanagar to Agartala as approved by the State Government and not at the high rate as claimed by the Appellant and that for the period of 10 months with effect from April, 1989 to January, 1990, the Respondents had already paid in excess over the said approved rate of Rs. 26.50 per quintal and, therefore, the learned trial Court had rightly dismissed the suit of the Appellant. Mr. Saha further contended that the Respondents offered to pay at the said approved rate of Rs. 26.50 per quintal for transportation from Dharmanagar to Agartala to the Appellant as would be clear from the evidence of DW-1 the Chief Executive Officer of the Federation, and yet the Appellant refused to accept the said rate and on these facts, the Respondents were not liable to pay any interest to the Appellant. Mr. G.S. Das, learned Counsel for the Respondent No. 5 and 6, adopted the said arguments of Mr. Saha.

6. In view of the aforesaid contentions raised by the learned Counsel for the parties, the following points arise for determination in this appeal:

(i) Whether there was any contract between the Appellant and the Respondents

for payment of transportation charges at the enhanced rate of Rs. 5.00 per quintal from the godown of FCI at Dharmanagar to the godown of Hitasadani consumers Marketing Society Limited and at the enhanced rate of Rs. 29.00 per quintal from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala.

(ii) Whether the Respondents were at all liable to pay the Appellant for transportation of sugar from the godown of FCI at Dharmanagar to the godown of Hitasadani Consumers Marketing Society Limited at Dharmanagar and from the godown of FCI at Dharmanagar to the godown of the Federation at Agartala and, if so, at what rates.

(iii) Whether the Respondents were liable to pay any interest to the Appellant on the amount that was due and payable by the Respondents to the Appellant and, if so, at what rate.

7. On the question as to whether there was any contract between the Appellant and the Respondents for payment of transportation charges at the enhanced rate as claimed by the Appellant, from a reading of the short notice dated 22.1.88 of the Federation inviting quotations marked as Ext-1 by the trial Court, we find that by the said short notice "terms and conditions for transportation of sugar from time to time as allotted by the Government from FCI godown at Agartala to TSCCF Limited godown (Ashulal compound), Agartala and FCI godown, Dharmanagar to Hitasadani Co-operative Marketing Society Limited, Dharmanagar and to TSCCF godown, Agartala" were invited. There is, therefore, nothing in the said short tender notice to indicate that by the said short notice quotations were invited for the period of 1988-89 and that the said short notice and the quotations in response thereto were not to apply to the period from 1.4.89 onwards. Clause-06 of the said short notice is extracted herein below.

6. Sugar will have to be carried at the approved rate which will include loading at FCI, godown and unloading and staking at Ashulal godown, TSCCF Limited/ Hitasadani Consumers Marketing Society Limited, Dharmanagar and weighment charges will be borne by the Federation.

Thus it is clear that sugar was to be transported at the approved rate as per the said Clause-06 of the short notice (Ext-1). In response to the said short notice, the Appellant submitted his quotation and carried out transport work. There was, therefore, a contract between the Appellant and the Federation that the Appellant would be paid for transportation of sugar at the approved rate and the said contract for transportation of sugar from time to time allotted by the Government was to remain in force unless the said contract was altered. Section 62 of the Indian Contract Act, 1872 states that if the parties to the contract agreed to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. It is thus clear that for any alteration of the contract, it must be established that all the parties to a contract agreed to such alteration of the contract. In the instant case the Appellant appears to have

agreed to carry on transport work from 1.4.89 only at the enhanced rates as claimed by him, but the evidence on record adduced at the trial does not show that the Federation agreed to the alteration of the stipulation of the aforesaid Clause-06 of the short notice (Ext-1) that the sugar will be carried at the approved rate. It is true that the Federation has paid the bills of the Appellant for the period from April, 1989 to January, 1990 at the enhanced rates as claimed by the Appellant but it is also true that the Federation had in its letters dated 26.4.89 (Ext-A/1) and 14.3.90 (Ext-C) had sought for approval from the Government in the Food and Civil Supplies Department to the said enhanced rates as claimed by the Appellant. From the aforesaid conduct of the Federation it is difficult to hold that the Federation had agreed to alter the stipulation in Clause-06 of the short notice (Ext-1) that sugar will have to be carried at the approved rate. In the absence of any such agreement on the part of the Federation, it is not possible to hold that there was any alteration to the contract between the Appellant and the Federation for transportation of sugar at the approved rate and that the Appellant was entitled to the enhanced rates of transportation as claimed by him in his bills for the months of February and March, 1990.

8. From the letter dated 21.1.90 of the Under Secretary to the Govt., of Tripura, Food and Civil Supplies Department to the Director of Food and Civil Supplies Government of Tripura (Ext-B), it is, however, clear that for the year 1989-90, the Government has approved the rate for transportation of sugar from Dharmanagar to Agartala at Rs. 26.50 per quintal. But in the said letter, the Government has not approved any higher rate for transportation of sugar from FCI godown at Dharmanagar to Hitasadani Co-operative Marketing Society Limited, Dharmanagar. The Appellant, therefore, would be entitled to original rate of Rs. 4.00 per quintal for transportation of sugar from the FCI godown at Dharmanagar to Hitasadani Co-operative Marketing Society Limited. Dharmanagar and to the approved rate of Rs. 26.50 per quintal for transportation of sugar from the FCI godown at Dharmanagar to the godown of the Federation at Agartala for the months of February and March, 1990.

9. Admittedly, the Appellant had transported sugar from time to time during the months of February and March, 1990 for the Respondents and. therefore, was entitled to be paid for the said work of transportation at the rate of Rs. 4.00 per quintal for transportation of sugar from the FCI godown at Dharmanagar to Hitasadani Co-operative Marketing Society Limited, Dharmanagar and at the rate of Rs. 26.50 per quintal for transportation of sugar from FCI godown at Dharmanagr to the godown of the Federation at Agartala. The Defendants, however, have taken a plea in the written statement that for the months of April, 1989 to January, 1990 the Federation has already paid in excess of the aforesaid rate of Rs. 4.00 per quintal and Rs. 26.50 per quintal and was thus entitled to recover the excess payment from the Appellant. Order VIII, Rule 6 of the CPC clearly provides that where in a suit for the recovery of money the Defendant claims to set-off against the Plaintiff's demand any ascertained sum of money

legally recoverable by him from the Plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the Plaintiff's suit, the Defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off. In the instant case, although the Defendants have in the written statements sought to resist the claim of the Appellant for transportation charges for the months of February and March, 1990 by pleading that excess payment towards transportation charges paid to the Appellant during the months of April, 1989 to January, 1990 are recoverable from the Appellant, they have not stated in their written statements the particulars of such excess payment made to the Appellant during the months of April, 1989 to January 1990. There is therefore, no plea of set-off raised by the Defendants in their written statements in accordance with Order VIII, Rule 6 of the CPC Order VIII, Rule 6A of the CPC similarly provides that a Defendant in a suit may in addition to his right of pleading a setoff under Rule 6 set up. by way of counter claim against the claim of the Plaintiff, any right or claim in respect of a cause of action accruing to the Defendant against the Plaintiff either before or after the filing of the suit but before the Defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. But in the present case, no such counter-claim has been made by the Defendant in the suit in accordance with Order VIII, Rule 6(a) of the Code of Civil Procedure. In absence of such a plea of set off or counterclaim by the Respondents in their written statements, the suit of the Appellant for recovery of the dues payable to him on account of transportation of sugar carried out by the Appellant for the Respondents cannot be defeated. Further since according to stand taken by both the Federation and the State Government, such transportation charges were to be paid by the Federation to the Appellant and were to be reimbursed by the State Government to the Federation, the Appellant was entitled to a decree for payment of the transportation charges for the months of February and March, 1990 at the aforesaid rate of Rs. 4.00 per quintal and Rs. 26.50 per quintal from both the Federation and the State Government. This determines the second point raised in this appeal.

10. Coming now to the third point which arises for determination in this appeal as to whether the Respondents were liable to pay any interest to the Appellant on the amount that was due and payable by the Respondents to the Appellant and, if so, at what rate, although Mr. Saha, learned Counsel for the State Respondents, contended that no such interest should be awarded as the Respondents were willing to pay the bills of the Appellant at the approved rate but the Appellant refused to receive such payment, we do not find that such a plea has been taken by the Defendants in their written statements. In the absence of a plea of this material fact in the written statements of the Respondents the oral testimony of the DW, that the Defendants made an offer to make payment to the Appellant at the approved rate is of no help to the

Respondents. The award of interest for the period prior to the filing of the suit is governed by the provisions of the Interest Act, 1978 Sub-section (1) of Section 3 of the Interest Act, 1978 which is relevant for this case is quoted herein below:

3.Power of Court to allow interest. - (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say:

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings.

(b) If the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

Thus Sub-section (1) of Section 3 of the Interest Act, 1978 provides that in any proceedings for recovery of any debt, the Court may if it thinks fit allow interest to the person entitled at the rate not exceeding the current rate of interest for the whole or part of the period from the date the debt is payable to the date of institution of the proceedings, if the proceedings related to debt payable by virtue of a written instrument at a certain time. In the instant case, the Appellant has not proved any written instrument whereunder the bill for transportation charges for the months of February and March, 1990 were to be paid by the Respondents at a certain time. The said Sub-section (1) of Section 3 further provides that the Court may if it thinks fit allow interest to the person entitled to debt at the rate not exceeding the current rate of interest for the whole or part of the period from the date mentioned in that regard in written notice by the person entitled to from the person making the claim to the person liable that interest would be claimed to the date of institution of proceedings. In the present case, in the written notice dated 9.1.91 of the Advocate of the Appellant to the Respondents (Ext-6), the Appellant had clearly stated in paragraph-9 that it was expected that the payment of the bills of the Appellant would be made within 2 months from the date of receipt of the notice failing which the Appellant would be compelled to take shelter of law and the Respondents would be liable for making payment of interest at the rate of 18% per annum on the amount due to him from the date of submission of bills till realisation. Despite the said notice, the Respondents did not pay the amount due to the Appellant and the Appellant had to institute the suit on 12.8.91. Ext-5 is the certificate in which the Branch

Manager of the Vijaya Bank at Agartala has certified that the Appellant had overdraft account with the said Bank and that it had a balance of Rs. 2,13,223/- outstanding in the ledger of the Bank which attracted interest at the rate of 18% per annum with effect from 23.4.90 which was the last date of submission of the bills for February and March, 1990 by the Appellant to the Federation. On these facts, we are of the opinion that we should allow on the amount due to the Appellant interest at the current rate of 18% per annum from 23.4.90 till institution of the suit on 12.8.91. Award of interest by the Court after the institution of the suit is governed by Section 34 of the CPC which provides that in a decree for money, the Court may award interest at such rate as the Court may deem reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree fit and further interest on such principal sum from the date of decree till the date of payment not exceeding 6% per annum as the Court deem reasonable. The proviso to said Section 34 further stipulates that where liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed 6% per annum, but shall not exceed contractual rate of interest or where there is no such contractual rate, the rate at which money are lent or advanced by nationalised banks in relation to commercial transactions. The transaction between the Appellant and the Federation in the instant case was commercial transaction and Ext-5 indicates that Vijaya Bank had advanced overdrafts to the Appellant for his business at the rate of 18% per annum. We are, therefore, of the view that in addition to the interest on the principal amount found due to the Appellant from the Respondents for the period prior to institution of the suit, the Court should award interest at the rate of 18% per annum on the said principal sum from the date of institution of the suit till realisation of the said principal sum.

11. In the result, the impugned judgment and decree dated 29.4.94 passed by the learned Assistant District Judge No. 2, West Tripura, Agartala, in Money Suit No. 62/91 is set aside and the said Suit is remanded to the trial Court who after hearing the parties and receiving further evidence in addition to the evidence already on record determine the principal sum payable by the Respondents to the Appellant for the months of February and March, 1990 for transportation of sugar at the rate of Rs. 4.00 per quintal from the FCI godown, Dharmanagar to Hitasadani Cooperative Marketing Society Limited, Dharmanagar and at the approved rate of Rs. 26.50 per quintal from the FCI godown at Dharmanagar to the godown of the Federation at Agartala and also determine the interest on such principal amount at the rate of 18% per annum from 23.4.90 till realisation and accordingly draw up a decree against the Respondents. It is made clear that the trial Court will confine itself to the directions given in this remand and will not expand scope of the remand by entertaining fresh questions. The trial Court will also assess the costs of the suit at the prescribed rate and award the same in favour of the Appellant. The appeal is allowed to the extent indicated above. But considering the fact that the Appellant will be awarded interest and costs of the suit, we do not award any further costs in this appeal.