

(1999) 12 KAR CK 0008

In the Karnataka High Court

Case No : Regular First Appeal No. 258 C with 315 of 1995

Indian Telephone Industries Ltd.

APPELLANT

Vs

M/s. Bansons Engineering Company

RESPONDENT

Date of Decision : 17-12-1999

Acts Referred:

Citation : AIR 2000 Kar 161 : (2001) 2 CivCC 600 : (2001) 2 KarLJ 351

Hon'ble Judges : T. N. Vallinayagam, J

Bench : Single Bench

Advocate : Udaya Holla, for the Appellant; Madhusudan R. Naik, for the Respondent

Final Decision : Dismissed

Judgement

T. N. Vallinayagam, J.—Both the above regular first appeals have been preferred by the defendant in O.S. No. 10777/1987 and O.S. No. 10778/1987 on the file of the 3rd Additional City Civil Judge, Bangalore City. Both the suits were for recovery of money being the Indian Agency Commission payable to the plaintiff. O.S. No. 10777/1987 was decreed for a less sum than what has to be paid for. While, O.S. No. 10778/1987 was decreed as prayed for. Aggrieved by the same, the above regular first appeals have been filed by the defendants. As the facts are common, both the appeals are taken up together and a common judgment is delivered. Both the appeals are confined only against the grant of pre suit interest.

2. The facts of the case in respect of both the suits are same and which is as follows:-

The appellant is a public limited company incorporated under the Companies Act, 1956. The respondent is a registered partnership firm represented by its partners. The respondent is an Indian agent of their foreign Principal M/s. Holzel Schnitt Und Stanzenbau KG, Post Fach 41, 7277, Wild Berg, West Germany. The appellant has all along been purchasing its requirements from the said foreign

principal through the respondent. The Purchase amount included agency commission payable to the respondent in non-convertible Indian currency. The, appellant placed orders on different dates on the said foreign principal of the respondent through the respondent. The respondent claims that in respect of the purchase orders for tools, agency commission is payable against raising debit note against the buyer and on proof of shipment. The respondent claims that in respect of each purchase order, the respondent raised debit notes for specified sum and the appellant failed to pay the same. The respondent on the basis of the above filed a suit claiming a total sum of Rs. 98,402-90 paise (in O.S. No. 10777/1987, out of which, RFA, No: 258/95 arisen) and Rs. 38,214-55 paise towards principal and a sum of Rs. 17,991-45p towards (in O.S.No. 315/1995. out of which RFA. No: 315/1995 arisen).

3. The appellant herein who was defend-ant before trial Court filed a detailed written statement contending that there is no privity of contract between the parties; in view of the fact that the appellant had placed orders directly on the foreign Principal and dispatch instructions were also given. It is also claimed by the appellant that under the terms of the contract, the commission payable to the agents of the foreign principal was included in the price payable to the foreign principal and therefore, the respondent had neither direct nor indirect claim against the appellant. The suit was also resisted on the ground that the claim of the respondent is premature in view of the fact that as on the date of the suit the goods had not even reached the appellant. It was also contended that the appellant had paid a sum of Rs. 87,047-04 paise to the respondent/ plaintiff which had been accepted by the respondent without any demur. On the basis of the decree passed by the trial Court for Rs. 11,355-86 paise with interest at the rate of 19.5% p.a. on the balance commission amount of Rs. 3,501-86, the appellant deposited the principal amount of Rs. 3501-86 paise (in respect of O.S. No: 10777/87) along with Court costs before the trial Court. 4. The contention of the defendant/ respondent herein in O.S. No: 10778/1987 was that the suit was not maintainable u/s 230 of the Indian Contract Act. The Foreign principal of the respondent submitted tenders for the supply, erection, commissioning and maintenance of a fully automatic contract building line and thereafter a revised offer was made to the appellant directly at Bangalore, and the same was accepted on 3-12-1980. Under the terms of the contract out of the price payable to the foreign company, the Commission due to the agent i.e., the respondent would be paid and in view of this the commission payable to the respondent was only out of the monies of the German Company and the respondent had neither direct nor indirect claim against the appellant/defendant. The further contention of the appellant/defendant was that the foreign principal of the respondent did not rectify the defects in the goods supplied nor the respondent took any step to see that the contract is properly executed. The appellant also denied its liability to pay interest.

4. In pursuant to the decree passed by the trial Court with interest at 14% p.a. on Rs. 38,214-55, the appellant/defendant deposit of the principal amount of Rs.

38,214-55 Ps. in the trial Court. In both the first appeals, the appellant/defendant challenges the decree only in respect of interest of Rs. 11,355.86 (in O.S. No : 10777/1987, RFA, 258/95) and also future interest @ 19.5% p.a. and Rs. 17,991-45 paise (in respect of O.S. No. 10778/1987, RFA. 315/95) respectively.

5. The issue framed by the Court below regarding the interest is issue No. 3 in both the suits, which is :-

"Whether the plaintiff is entitled for interest and if so, at what rate ?."

The finding rendered by the Court below on interest in O.S. No: 10777/1987 was at the rate of 19.5% p.a. and 14% p.a. per annum in O.S. No: 10778/1987.

6. In O.S. No: 10777/1987 the plaintiff have pleaded and claimed interest at the rate of 19.5% p.a. from 24-12-1982 to 11-7-1983 in respect of the first purchase order dated 7-5-1982. 19.5% interest p.a., from 31-3-1983 to 11-7-83 in respect of the 2nd and 3rd and 4th purchase orders dated 1 -9-1982, 29-9-1982, 17-8-1982 respectively. The interest claimed was Rs. 5,973-00,417-73,-621-90 and 841-37 paise.

7. In the written statement, legal submission like Section 69 of the Partnership Act and Section 230 of the Indian Contract Act, the premature nature of the suit and payment of agency Commission only after the acceptance of the goods was raised. Apart from that, the placing of Order through the plaintiff was denied in to-to. The final submission was that they have paid a sum of Rs. 37,047-04 paise which was accepted by the plaintiff without any objections. This is the defence taken in O.S. No: 10777/87.

8. In O.S. No. 10778/1987, interest was claimed at 19.5% p.a., from 10-6-1982 to 10-8-1982 on the agency commission on Rs. 3,43,414-58 paise and on Rs. 38,214-55 paise respectively, which comes to Rs. 11,160-97 paise and Rs. 6,830-48 paise and after giving credit to the amount paid on 11-8-1982. Further, interest was claimed at the same rate of 19.5% p.a. up to the date of filing of the suit namely, 22-8-1987. In the other case also the main defence taken by the defendant is the same contention was raised by the defendant in the written statement. It is necessary to point out that neither the demand of payment of interest is denied nor any definition is made as to payment of interest is only for the particular-date.

9. The trial Court while considering issue No. 3 in O.S. No. 10777/1987 held that the suit transaction being commercial nature and interest claimed by" the plaintiff is reasonable, the plaintiff is Justified in claiming the interest at 19.5%p.a. on the ground that for the business purposes the plaintiff has borrowed the money from the Bank, for which he is paying the same interest. So far as O.S. 10778/1987 Is concerned, the trial Court found that no document was produced by the plaintiff to claim Interest at the rate of 19.5% p.a., and applying Section 34 of C.P.C., granted interest at 14% p.a. from the date of suit

till the realisation. So far as the interest up to the date of filing of the suit, the trial Court found that prior to the part payment, he has claimed interest at 19.5%, which claims to be the bank rate of interest on which rate the plaintiff has borrowed the money from the Bank also is 19.5%. Holding the interest 19.5% as reasonable interest, such rate was granted prior to suit.

10. It is contended by Mr. Udaya Holla, counsel appearing for appellant that interest is payable only if there is any agreement to pay such Interest or money is retained by fraud or interest payable under statute and that on no such circumstances, the interest will be payable, as in the instant case admittedly none of the aforesaid ingredients existing, and consequently, grant of Interest prior to suit is bad in law. The fact that the plaintiff be entitled to interest because he has borrowed money from" the bank is not a ground for awarding the interest. There is no document produced to substantiate the claim of interest at the particular rate. The registration of the partnership was also questioned. The application of Section 34 CPC to the facts of the present case is attacked as not proper by the counsel.

11. Heard the respective counsel.

12. The point for determination in these appeals is :-

"Whether the plaintiff is entitled to pre-suit interest as indicated by the trial Court?"

12A. So far as the registration of partnership is concerned, it is not seriously disputed as the finding has been rendered by the Court below on the basis of the evidence available and no further evidence is produced before this Court to hold otherwise. Therefore, that question does not arise.

13. On the question of interest, the Division Bench of this Court in Sowcar T. Thimmappa Vs. S.L. Prasad, the following dictum has been laid down (at Page 27; of AIR) :-

"In the absence of stipulation in the contract stipulating payment of interest, interest on contractual payments (arrears of rent) cannot be awarded where no foundation is laid in the pleadings to establish the existence of a state of circumstances which attracts the equitable jurisdiction."

In S. Kotrabasappa Vs. The Indian Bank, another Division Bench of this Court has held that when a person utilised the amount, such person is bound to pay Interest or return the amount In view of Section 72 of the Contract Act. In that case, the Division Bench considered and laid down the following dictum (at Page 238) :-

"Grant of Interest cannot also be sustained on the basis of quasi-contract in view of the decision of the Privy Council in AIR 1938 67 (Privy Council) which reads thus :-

There is a considerable divergence of judicial opinion in India on the question 6f

whether Interest can be recovered as damages under S. 73, Contract Act, where it is not recoverable under the Interest Act. Now, S. 73, Contract Act, gives statutory recognition to the general rule that, in the event of a breach of a contract, the party who suffers by such a breach is entitled to recover from the party breaking the contract, compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs, reliance is placed upon Illus. (n) to that section. The illustration however, does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such intercept under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms, the enactment.

As observed in (1916) 43 Ind App 6 : AIR 1915 PC 48, S. 73 is merely declaratory of the common law as to damages and it has been held by the House of Lords in (1893) AC 429 that interest cannot be allowed at common law by way of damages for wrongful detention of debt. The Judgment of the Privy Council in (1929) AC 631: (AIR 1929 PC 185) dealt with a statute of New Brunswick, the relevant section of which was identical in terms with the Interest Act of India, and it was held in that case that the plaintiff was not entitled to interest at law, and as the case did not attract the equitable jurisdiction of the Court, no rule of equity in regard to interest could have any application. The law has however been amended in England by S. 3, Law Reforms (Miscellaneous Provisions) Act, 1934, empowering a Court of Record to award interest on the whole or any part of any debt or damages, at such rate as it thinks fit, for the whole or any part of the period between the date when the cause of action arises and the date of the judgment. But there has been no such amendment of the law in India."

Section 34, CPC applies for award of interest during the pendency of the proceedings. Interest prior to the institution of the proceedings cannot rest upon S. 34 of C.P.C. but, must depend upon some substantive law. After excluding the possibility of award of interest on grounds referred to above, we are required to determine whether the liability to pay interest arises either under the Trusts Act or Interest Act and incidentally the legal relationship between the parties.

Contention of Sri. Udaya Holla, learned counsel for the respondent, is that though the defendant may not fall within the meaning of "trustee" as defined under the Trusts Act, he will be a "constructive trustee" in the eye of law and hence, he is liable to pay interest as provided under S. 23 of the Trusts Act or S. 4 of the Interest Act of 1978.

Before determining the liability of defendant as a "constructive trustee" under

the Trusts Act, we would like to deal with his liability to pay interest under the Interest Act. Section 4 of the Interest Act, 1978, Which has come into force with effect from 14-8-1981, reads thus :

"4. Interest payable under certain enactments - (1) Notwithstanding anything contained in S. 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law.

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-sec. (1), the Court shall, in each of the following cases, allow interest from the date specified below to the date of institution of the proceedings at such rate as the Court may consider reasonable, unless the Court is satisfied that there are special reasons why interest should not be allowed, namely :-

(b) Where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;

(c) and (d).....

In view of the fiduciary relationship established from the passage extracted above, we hold that the appellant is liable to pay interest under CI. (b) of sub-sec. (2) of S. 4 of the Interest Act for the period from the date of cause of action up to the date of the institution of the proceedings."

In the above decision, however, the Division Bench did not go into the Trust Act as they have granted the interest under the Interest Act, 1978.

14. The Supreme Court in Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, has held (at Page 240) :-

"Interest is allowed by a Court of equity in the case of money obtained or retained by fraud. The agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during his agency : (1904) AC 817, Rel. on.

The next point canvassed in the Court below was in respect of the claim of the plaintiff regarding interest on the amount found due to the plaintiff from 5-4-1937 to, the date of the suit. It was contended that no interest could be allowed on damages because to do so would amount to awarding damages on damages which is opposed to precedent and principle. Clark J., however, awarded interest by placing reliance on, certain English decisions which enunciate the rule that an agent who receives or deals with the money of his principal improperly and in breach of his duty or who refused to pay it over on demand is liable to pay interest from the time when he so receives or deals with the same or from the time of demand. We think it is well settled that interest is allowed by a Court of Equity in the case of money obtained or retained by fraud. As stated in Art. 423 of Vol. I of Halsbury, the agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during his

agency. Their Lordships of the Privy Council in *Johnson v. Rex*, (1904) AC 817 (d) observed as follows :- "In order to guard against any possible misapprehension of their Lordships views they desire to say that in their opinion there can be no doubt whatever, that money obtained by fraud and retained by fraud can be recovered with interest whether the proceedings be taken in a Court of Equity, or a Court of law, or in a Court, which has Jurisdiction both equitable and legal."

15. There is no dispute in this case that the amount was payable to the plaintiff long prior to the suit and the finding is that the defendant is liable to pay interest. However, the money due is not challenged in this appeal and only the pre suit interest is challenged. Once it is found that the liability of the defendant to pay the money arises earlier, certainly he is liable to pay interest. The claim in question is based on agency (Commission and which money, the defendant kept under their control. Consequently as they had used and had the benefit of the money, the defendant is bound to pay interest.

16. In the light of the discussion made above, distinguishing the decision in 1977 (2) Kant LJ 346 (DB) and following the dictum in *S. Kotrabasappa Vs. The Indian Bank*, and *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, both the appeals are dismissed with costs.