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**(2002) 01 OHC CK 0035**

**In the Orissa High Court**

**Case No :** First Appeal No. 87 of 1977 with Memorandum of Cross-Objections

Mahanadi Multipurpose Industries and Others

APPELLANT

Vs

State of Orissa.

RESPONDENT

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**Date of Decision :** 09-01-2002

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 34, 96

**Citation :** (2002) 1 CivCC 628 : (2002) 93 CLT 231 : (2002) 2 RCR(Civil) 605

**Hon'ble Judges :** P.K. Balasubramanyan, C.J.;A.S. Naidu, J

**Bench :** Division Bench

**Advocate :** Ashok Mukherji, Addl. Government Advocate, for the Appellant; S.P. Misra, for the Respondent

**Final Decision :** Dismissed

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## Judgement

P. K. Balasubramanyan, C.J.—This appeal is filed by the defendants in a suit for recovery of money with interest thereon, filed by the plaintiff-State, on the basis that though paid for, the first defendant had not supplied the quantity of goods as agreed to; that a part of the amount was liable to be refunded; and that interest on the amount to be refunded was also to be paid by the first defendant " 6% per annum from the date of demand for refund of the amount as contained in the letter dated 28.10.1965. The defendants resisted the suit. They resisted the claim of the plaintiffs by contending that they had supplied goods worth much more than the amount claimed by the plaintiffs, and that the balance amount due from the defendants, if any, was something less than that claimed in the plaint. They also contended that they were not liable for the suit claim in view of the fact that it was the plaintiffs that were guilty of breach of contract and in fact the defendants had incurred a loss by the inaction of the plaintiffs in not lifting the articles which the defendants were to supply in terms of the contract. The trial court, on a consideration of the pleadings and the evidence adduced in the case, came to the conclusion that defendants had supplied articles which could be valued at Rs. 3,71,499.42 and the balance amount due to

the plaintiffs out of the admitted sum of Rs. 6,46,938/- advanced by the plaintiffs towards execution of the contract and the value of the goods to be supplied, was Rs. 2,75,138.58. The trial court thus found that a sum of Rs. 2,75,138.58 was refundable by the defendants. The trial court hence decreed the suit in part. Though it held that the plaintiffs were entitled to interest, it did not award interest " 6% on the sum determined from 28.12.1965 as claimed by the plaintiffs, but awarded interest only with effect from 1.11.1967 till the date of payment, since it held on the evidence that in terms of the contract, the defendants continued to supply materials, till the month of October, 1967.

2. Being aggrieved by this decree, the defendants have filed this appeal. During pendency of the suit, one of the partners had died, and during pendency of the appeal, the Managing Partner of first defendant - firm also died, and his legal representatives have been impleaded.

3. The plaintiff-State has filed a memorandum of cross-objections claiming that the trial court ought not to have granted a decree to the plaintiffs as prayed for in the plaint, and ought not to have reduced the amount as it has done.

4. Admittedly, the first defendant entered into a contract with the plaintiffs, for the supply of pipes and collars. The contract was to supply goods worth Rs. 7,18,820/-. The first defendant received 90% of the amount as advance, which amounted to Rs. 6,46,938/-. The first defendant supplied a quantity of pipes and collars in terms of the agreement. According to the plaintiffs, the first defendant failed to supply the entire quantity of goods as per the contract. According to the defendants, though they had not supplied the entire quantity as per the contract, there was default on the part of the plaintiffs as plaintiff No. 2 did not lift the materials which were already manufactured pursuant to the contract, and were lying in the factory premises and thus brought the business of the defendants to a stand-still. The defendants pleaded that in view of that, they suffered a loss by the blocking of capital and, therefore, are entitled to adjust a sum of Rs. 1,00,000/- out of the advance received.

5. It is in this context that the trial court went into the question of the quantum and the value of the articles supplied by the first defendant to the plaintiffs. Though the plaintiffs admitted the supplies covered Exts. E-1 to E-150, they disputed the supplies alleged to have been made by the first defendant covered by Exts. E-151 to E-237. According to the first defendant, the supplies covered by Exts. E-151 to E-237 were made and then delivery was acknowledged by the concerned officers of the department of the plaintiffs in the copies produced by the defendants and the supplies covered by them had also been accepted. The defendants called upon the plaintiffs to produce the originals of those documents. They were not produced. The defendants examined two of the officers of the concerned department about availability of the originals of Exts. E -151 to E-237. Though on the side of the plaintiffs, the alleged acknowledgments contained in Exts. E-151 to E-237 were denied, no attempt was made to examine any of those officers who allegedly made the acknowledgments contained in the copies

produced on behalf of the defendants. In this context and taking the circumstances as a whole, the trial court accepted the case of the defendants and held that the defendants have established that articles worth Rs. 3,71,499.42 had been supplied by the first defendant pursuant to contract between the parties.

6. In the memorandum of cross-objections the respondents have sought to question this finding. Learned counsel appearing for respondent No. 2-Corporation contended that no foundation was laid for adducing secondary evidence by the defendants and in the circumstances, the trial court was in error in accepting and acting upon Exts. E-151 to E-237 to uphold the plea of defendants in that regard. Learned counsel for the Corporation brought to our notice the relevant documents in this regard. On going through the relevant documents and the pleadings in the case, we are in agreement with the trial court that the defendants have succeeded in laying the foundation for adducing secondary evidence in support of their plea, and that the defendants have proved that the goods were supplied in terms of the acknowledgments contained in the copies of bills-Exts. E-151 to E-237. In other words in the circumstances of the case, we find that the trial court rightly accepted and acted upon Exts. E-151 to E-237 to find that the first defendant had supplied articles worth Rs. 3,71,499.42. Thus, it is seen that there is no merit in the memorandum of cross-objections filed on behalf of the respondents.

7. Thus, the first defendant had not supplied materials worth Rs. 2,75,438.58 out of the Value of articles received in advance. The first defendant had received Rs. 6,46,938/- from the plaintiffs towards the value of the articles to be supplied. Therefore, in the absence of any other sustainable claim intervening, the defendants are liable to refund a sum of Rs. 2,75,438.58 as found by the trial court. Though in the written statement, the defendants have raised a claim that they had suffered damages to the tune of Rs. 1 lakh, no counter claim was made in that behalf, and no court-fee was also paid. Even otherwise, no acceptable legal evidence was adduced on the side of the defendants to establish that they were entitled to retain any part of the amount received as advance towards the value of the goods which they had failed to supply. In the circumstances, we are of the view that the trial court was fully justified in holding that the defendants were liable to refund to the plaintiffs, the sum of Rs. 2,75,438.58. The decree for that sum granted by the trial court is hence clearly sustainable.

8. The learned counsel for the appellants contended that in any event the trial court was in error in awarding interest prior to the suit, and in decreeing interest on this amount from 1.9.1967 till the date of recovery. Learned counsel contended that in any event, there was no foundation laid to sustain the claim of interest prior to the suit since the contract between the parties did not provide for payment of interest. Counsel also contended that award of interest " 6% per annum was excessive.

9. Learned counsel for respondent No. 2-Corporation submitted that the

defendants had derived the benefit of the amount right from the date of its payment, and the plaintiffs were entitled to get a refund of the same together with interest thereon, and there was no illegality or defect in the decree passed by the trial court. The learned counsel, in fact, pointed out that in view of Ext. 16 and the demand for interest therein, interest ought to have been awarded from 28.12.1965 and the trial court committed an error in awarding interest only from 1.9.1967 as it has done.

10. The learned counsel for the defendants-appellants brought to our notice the decisions of the Supreme Court in Mahabir Prashad Rungta Vs. Durga Datt, and in Amar Chand Butail Vs. Union of India (UOI) and Others, to point out that interest prior to suit can be awarded only on the basis of the contract between parties or on any of the other grounds enumerated in those decisions. The learned counsel also submitted that interest subsequent to the suit at 6% per annum was excessive as indicated in the aforesaid decisions. Hence, the rate of interest subsequent to the suit was also liable to be scaled down.

Learned counsel for the plaintiffs-respondents on the other hand pointed out that during the relevant period interests had been high and the award of interest at 6% per annum was just and equitable and was clearly legal.

11. On examining the decisions relied on by learned counsel for defendants, we find that the trial court can award interest even in the absence of a contract, if the same is equitable. Obviously, even if the money received by the first defendant had been kept in a fixed deposit, that would have earned interest for it. If the money had been invested by defendant No. 1 in its business, the return would have been more. In such a situation, when the trial court has awarded interest at the rate of 6% per annum in its discretion, it cannot be said that the Court has acted illegally or has exercised its discretion in an arbitrary or unreasonable manner. Though there was no specific agreement to pay interest, in the circumstances, we find that award of interest from 1.11.1967 till the date of recovery can be sustained on the principle that the defendants are bound to disgorge the benefit they might have derived out of the amount advanced by the plaintiffs towards the value of the articles which they had failed to supply. In that view, we do not find any reason to interfere with the award of interest prior to suit. A specific demand for interest had also been made in Ext. 16 dated 28.12.1965. As regards future interest even going by Section 34 of the Code of Civil Procedure, it could not be held that the award at 6% per annum is illegal or unreasonable. Thus, we find that there is no reason to interfere with the decree passed by the trial court in this regard.

12. During the pendency of the appeal, the legal representatives of the Managing Partner, after getting themselves impleaded, made a request to this Court that they may be allowed to deposit Rs. 8,000/-per month from December, 1998 onwards towards the liability under the decree., and the amounts may be kept in deposit. This Court by Order No. 22 dated 24.11.1998 granted the legal representatives of the Managing Partner the liberty to make the deposits without

prejudice to the merits of the case and leaving the question of disbursement of the amount in deposit to be dealt with at the time of final disposal of the appeal. Subsequently, by order dated 8.3.2000, this Court directed that if any amount pursuant to the order dated 24.11.1998 had been deposited and the fixed deposit had matured, the deposit was to be renewed. According to learned counsel for appellants, a sum of Rs. 2,96,000/- in all has been deposited in this Court pursuant to this Court's order. Counsel for the Corporation submitted that he is not in a position to admit the quantum. Learned counsel for defendants-appellants submits that the respondent No. 2-Corporation can withdraw the amount deposited in this Court along with interest thereon before taking steps for execution of the decree.

13. In the circumstances obtaining, we direct that the amounts in deposit in this Court including interest will first be withdrawn by the plaintiffs, and execution will be taken out or continued only for the balance amount after giving credit for the amounts withdrawn from this Court.

14. Thus, the judgment and decree of the trial court are confirmed, and the appeal and the memorandum of cross-objections are dismissed with direction regarding execution as above.

The parties are directed to bear their respective costs in this Court.

A.S. Naidu, J.

15. I agree.

16. Appeal and cross-objections dismissed.