

(1987) 07 CAL CK 0039
In the Calcutta High Court
Case No : Decree No. 156 of 1978

Peeco Hydraulic Private Ltd.

APPELLANT

Vs

East Anglia Plastics (India) Ltd.

RESPONDENT

Date of Decision : 30-07-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23A, Order 8 Rule 6, 34
Contract Act, 1872 — Section 55, 73
Interest Act, 1978 — Section 61(2)
Sales of Goods Act, 1930 — Section 2, 2(3), 23(1), 4(3), 6(3)

Citation : (1987) 1 CALLT 551 : (1987) CALLT 551 : 92 CWN 453

Hon'ble Judges : Sankari Prasad Das Ghosh, J; L.M. Ghosh, J

Bench : Division Bench

Advocate : Rajgrihi Ram, for the Appellant; Nirmal Kumar Ghosal, Subhro Kamal Mukherjee and Binayak Ghosal, for the Respondent

Judgement

Sankari Prasad Das Ghosh, J.—The defendant is the appellant in this appeal arising out of a suit brought by the plaintiff-respondent for recovery of money advanced for purchase of one price of Peeco Branch Oil Hydraulic 4 Piller Type Multi-Daylight Hot-plate Press from the appellant.

2. On 12.6.71, the appellant made an offer to the plaintiff for sale of the Press on certain terms and conditions. The time for delivery was stated as 7 to 8 months from the date of receipt of Order. According to this offer, 30% of the value of the Press to the tune of Rs. 60,000 was to be paid as advance alongwith the Order and the balance was to be paid after satisfactory test-run at the Works of the appellant but before effecting delivery. The offer was accepted by the respondent on 9.7.71, when formal Order No. 101 dated 9.7.71 was placed for supply of the Press as per the description and specification given in that order. The specification was changed regarding the size of the Plate in that Order. The time of delivery was also mentioned to be six months from the date of the Order. A cheque for Rs. 18,000 was enclosed along with that Order towards 30% advance. The terms of payment, as per that Order, were the payment of 60% after

satisfactory test run at the Works of the appellant and 10% after one month's successful performance of the Press in the Works of the respondent. The appellant failed to deliver the machine within the stipulated time. On 14.10.72, the appellant wrote to the plaintiff explaining the delay in delivering the machine. The delay was stated to be due to the difficulties in obtaining Cast Iron Platens suitable for withstanding the steam pressure. By that letter the appellant requested the respondent to depute one of their representatives to inspect the progress of the Press, if desired, after 25.10.72 on prior intimation. The respondent sent a reply on 17.11.72 to the effect that the technical representative will be inspecting the Press on completion of the final assembling. The appellant was requested by that letter dated 17. 11. 72 to send a technical representative to the respondent's Works for demonstration after delivery of the Press to the respondent. There was no reply thereafter from the appellant. On 28. 9.73 the respondent wrote to the appellant that they did not require the Press any more as two years had since elapsed and the Government of West Bengal had cancelled their licence. It was also stated in that letter that the respondent had also failed to follow up properly. By that letter dated 28. 9. 73, the respondent requested the appellant to dispose of the parts assembled and to reimburse the amount of Rs. 18,000 paid to the appellant by them in advance. A reply followed from the appellant on 22.10.73 explaining the reason for their postponement of final assembling work of the Press. The reason, according to that letter, was an alleged promise by Mr. S.K. Gupta, the Project Adviser of the respondent, to communicate with the appellant by the end of October, 1973 as, according to that letter, Mr. S.K. Gupta had informed the appellant that the technology, based on which the specification of the Press ordered for was drawn, was not correct and the respondent wanted to import Japanese know-how. The respondent sent a letter thereafter on 13.11. 73 alleging that the appellant's letter dated 22.10.73 was nothing but an attempt by the appellant to deny the respondent's legitimate claim of Rs. 18,000 paid as advance. By that letter dated 13.11.73, the respondent requested the appellant to refund to them the sum of Rs. 18,000, paid as advance within one month, failing which interest would be charged at the rate of 10% per annum from that date (13.11.73) upto the date of payment.

3. As no refund of the sum of Rs. 18,000 was made by the appellant, the suit was brought on 3.5.74 for recovery of the sum of Rs. 18,000 along with interest at the rate of 10% per annum from 9.7.71 to March, 1974. The total claim, including interest for this period to the tune of Rs. 4800, was laid at Rs. 22,800.

4. The defence was a denial of the material allegations in the plaint. It was alleged that after the reason for delay in delivery of the machine was communicated by the appellant to the respondent by their letter dated. 14.10.72, the respondent did not show any interest in the progress of manufacturing and did not send any representative for inspection of the component parts. Moreover, Mr. S.K. Gupta had informed, the appellant that the respondent was not interested in taking delivery of the Press as it would not

serve their purpose and had instructed the appellant verbally not to assemble the component parts further, incurring further costs and expenses. As such, the appellant did not proceed further with manufacturing the machine and was not responsible for non-delivery of the machine to the respondent. The appellant prayed for a decree for Rs. 20,000, after setting off the amount of Rs. 18,000 advanced to it by the respondent and deducting the scrap value of sub-units and components manufactured by it, along with interest at the rate of 6% and costs.

5. The respondent examined their Secretary. The appellant examined one witnesses, who was one of their directors. After considering the evidences and the materials on record, the learned Subordinate Judge, 3rd Court, Howrah, who tried the suit, decreed the suit on contest with costs for Rs. 22,800. The learned Subordinate Judge disallowed the prayer of the respondent for further interest and dismissed the claim of the appellant for set-off. Being aggrieved, the present appeal has been filed by the defendant. A cross-objection has been filed by the respondent as the respondent's prayer for further interest from the date of judgment was refused by the court below.

6. Mr. Ram, the learned Advocate for the appellant, has contended that time was not of the essence of the contract for sale of the machine. According to him, the suit for recovery of money advanced with interest is not maintainable, as the suit was not for recovery of damages. Mr. Ram has next contended that the learned Subordinate Judge was not justified in rejecting the respondent's prayer for set-off and counter-claim to the extent of Rs. 20,000 along with interest, without framing any issue in the matter. The last contention of Mr. Ram is that the learned Subordinate Judge was not justified in passing a decree for interest upto the institution of the suit, as prayed for in the plaint.

7. Mr. Ghosal, the learned Advocate for the respondent, has challenged all these contentions of Mr. Ram. According to him, the learned Subordinate Judge erred in not allowing any interest from the date of institution of the suit till payment.

8. In commercial transactions time is ordinarily of the essence of the contract, (Bhudar Chandra Goswami v. C.R.S. Betts= 22 CLJ 566 ; Mahabir Prashad Rungta Vs. Durga Datt, and China Cotton Exporters Vs. Beharilal Ramcharan Cotton Mills Ltd.,). The very fact that by the letter dated 14.10.72, the appellant explained the delay in delivering the machine within the stipulated time and intimated that they expected to offer the Press for inspection by December, 1972, goes to show that time was of the essence of the contract; else, there was no necessity on the part of the appellant to explain the delay in delivering the machine within the period of six months from the date of the Order on 9.7.71 Mr. Ram has referred us to the cases of Badri Prasad v. State of M.P. (AIR 1970 S. C. 706) and Gaddarmal Hiralal and Another Vs. Chandrabhan Agarwal and Co., . It appears that these cases have no relevance so far as the present appeal is concerned. In the case of Badri Prasad (Supra), there was a letter dated 1.2.55 from a Divisional Forest Officer to the plaintiff of that suit for paying a further sum of Rs. 17,000 on giving up the plaintiff's claim to Rs. 17,000 already paid

by the plaintiff towards the contract in respect of big trees in one village. The plaintiff had sent a reply to that letter on 5.2.55, expressing his willingness to the payment of the amount of Rs. 17,000 on reserving expressly his right to claim refund of Rs. 17,000. It was held in that case that there was no contract between the Government and the plaintiff as the letter of the plaintiff dated 5.2.55 seemed to be an invitation to the plaintiff to make an offer, which was not accepted unconditionally by the plaintiff. It is not understood as to how this case of Badri Prasad (Supra) can help the appellant. The other case of Gaddarmal (Supra) is to the effect that there can be both express and implied acceptance of a proposal. This case has nothing to do with the present appeal.

9. The suit is actually a suit for recovery of damages u/s 73 of the Indian Contract Act, for breach of contract by the appellant to deliver the machine within the stipulated time of six months from the date of the respondent's Order on 9.7.71 and thereafter within the extended period of December, 1972, as stated by the appellant-company in their letter dated 14.10.72. Arguments have been advanced by Mr. Ram, by referring to some provisions in the Sale of Goods Act, 1930 (hereinafter referred to as the "Act" for the sake of convenience), and two case-laws, viz., cases of District Board, Hoshiarpur Vs. F. Hira Singh Jagat Singh and Others, and G.N. Behere v. N.B. Rice Mills (A.I.R. 1966 Ass 95) for the purpose of showing that the suit for recovery of money advanced cannot succeed, as it is not a suit for damages. According to Mr. Ram, the provisions of Section 19 of the Act will govern the suit by the respondent in the court below. u/s 19 of the Act, where there is a contract for sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Mr. Ram contends on the basis of this provision in Section 19 of the Act, that the property in the goods was transferred to the respondent after 9.7.71 when the offer of the appellant was accepted by the respondent, for purchase of the machine. The contention of Mr. Rani is that after the property in the goods is transferred to the respondent, the respondent cannot pray for refund of the purchase price, paid as advance by it, at the time of accepting the offer by then appellant. This contention cannot be accepted. The case of District Board, Hoshiarpur Vs. F. Hira Singh Jagat Singh and Others, is based on Section 20 of the Act, under which where there is an unconditional contract for sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. As such, it has been held in that case that sale can be completed without effecting immediate delivery or even without immediate payment. Though passing of title in goods is an essential ingredient of sale, physical delivery of goods is not essential ingredient. In the present appeal, we are unable to attract either Section 19 or Section 20 of the Act. The contract in this case was for supply of, "future goods" (defined in Section 2(6) of the Act) and these goods were not in a "deliverable state" (as defined in Section 2(3) of the Act). u/s 4(3) read with Section 6(3) of the Act, the contract was actually an

agreement to sell, as it related to future goods not in a deliverable state. u/s 23(1) of the Act, the machine was to be appropriated unconditionally to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, before the property in the goods can pass to the buyer. The goods were not unconditionally appropriated to the contract as the machine was not delivered at all to the respondent. In these circumstances, the property in the goods cannot pass to the respondent. In the case of *G.N. Behere v. N.B. Rice Mills* (A.I.R. 1966 Ass 95), there was a contract for sale of machinery of particular specification and there was payment in advance to the seller, who despatched the goods in the name of the buyer under Railway Receipt through Bank for collection. The buyer refused to take delivery of the goods or to take railway-receipt because of alleged damage in transit. The buyer filed a suit for refund of advance. It was held in that case that the suit was not maintainable as the buyer was guilty of breach and was not entitled to repudiate the contract. This decision was based on the fact that the articles were appropriated to the contract as soon as the goods were despatched. In the present case, the goods were not appropriated to the contract u/s 23 of the Act. As such, on the authority of the decision in the case of *G.N. Behere* (Supra), it cannot at all be stated that the suit for recovery of the sum of Rs. 18,000 along with interest is not maintainable.

10. A breach of contract always entitles an innocent party to maintain a suit for damage. The suit is u/s 73 of the Contract Act for breach of contract by the appellant as the appellant failed to deliver the goods within the stipulated period as per the agreement for sale within six months of the respondent's Order dated 9.7.71 and thereafter even within the extended time till December, 1972 as per the appellant's letter dated 14.10.72. Considered the materials on record, we find nothing to disagree with the finding of the learned Subordinate Judge that the respondent is entitled to recover the sum of Rs. 18,000 paid by them as advance for purchase of the Press. After 14.10.72, when the appellant wrote to the respondent that they expected to offer the Press for inspection by December, 1972, there was no communication by the appellant to The respondent before 22.10.73 (vide Ext. D), though the respondent sent a letter on 17.11.72 (Ext B) to the appellant that their technical representative would consent for inspection of the Press on completion of the final assembling and thereafter, the respondent had sent another letter dated 28.9.73 (Ext. C) intimating that they did not require the Press any more. The defence that on the representation by Mr. S.K. Gupta, Project Adviser of the respondent, final assembling of the Press was postponed, cannot be accepted as there was no mention of any representation by Mr. S.K. Gupta in the appellant's letter dated 14.10.72 or even thereafter and before 22.10.73 after repudiation of the contract by the respondent on 28.9.73. It is no doubt true that in their letter dated 28.9.73, the respondent stated that they had also failed to follow up properly, though the machine was to be delivered within six months from the date of Order. It was also stated in that letter that as the licence had been cancelled by the Government of West Bengal,

the respondent did not require the Press any more. Mr. Ram has contended that as the respondent failed to follow up properly and repudiated the contract because of cancellation of their licence by the Government of West Bengal, the respondent should not be allowed to recover any amount paid as advance for purchase of the Press. This contention cannot be accepted. It is in the evidence of D.W.I, that they were to execute the contract according to the specification of the contract itself. Though the Platen Size was changed and the time for delivery was also reduced to six months by the Order of the respondent dated 9.7.71, the appellant knew that they were to deliver the machine according to the specification of the respondent within a period of six months. Thereafter they themselves expected to offer the Press for inspection by December, 1972. There is no convincing evidence on record to show or suggest as to why the appellant failed to offer the Press for inspection by December, 1972. As already stated, there was no disclosure of the name of S.K. Gupta in any communication from the appellant to the respondent before 22.10.73. In these circumstances, even if, the respondent failed to follow up properly for getting delivery of the Press within six months of their Order on 9.7.71, the appellant cannot avoid their responsibility of delivering the machine at least by giving inspection of the same in December, 1972 as per their own letter dated 14.10.72. The licence was not cancelled upto December, 1972. It was cancelled subsequently as intimated in the respondent's letter dated 28.9.73. The cancellation of the licence of the respondent cannot thus absolve the appellant from their liability to deliver the machine within the stipulated time or even within the extended time as per their letter dated 14.10.72. The learned Subordinate Judge was thus justified in finding that the respondent was entitled to recover the sum of Rs. 18,000 paid by them as advance for purchase of the machine.

11. No argument regarding novation of the old contract has been advanced before us by Mr. Ram, though such an agreement was advanced in the Court below.

12. It is no doubt true that in the written statement the appellant made out a case for recovery of Rs. 20,000 on alleging that the cost incurred by them in manufacturing sub-units and components, after deducting the scrap value of the same was Rs. 38,000. The sum of Rs. 20,000 was claimed by deducting a sum of Rs. 18,000 paid by the respondent from the cost incurred for manufacturing the components to the tune of Rs. 38,000. According to D.W.I, the total loss was Rs. 44,000 and the scrap value of the components was Rs. 6,000. On deducting the scrap value from the sum of Rs. 44,000 and further deducting the amount of Rs. 18,000 paid by the respondent, the sum of Rs. 20,000 was arrived at by the appellant. The learned Subordinate Judge dismissed on contest this claim of the appellant for set-off, without giving any reason for dismissing the claim for set-off, though he had in mind the claim about the set-off while discussing the respective cases of the parties. As no reason was given by the learned Subordinate Judge for dismissing the claim for set-off and counter-claim to the tune of Rs. 20,000 and as no issue was framed regarding the prayer for set-off

by the appellant, Mr. Ram has contended that the judgment and decree passed by the learned Subordinate Judge should be set aside. Mr. Ram referred us, in this connection, to the cases of Jatindra Nath Das Vs. Jadaram and Another, , Aziz Ahmed Khan Vs. I.A. Patel, and Kaniz Fatima v. Naim Ashraf (AIR 1933 All 450). It is not necessary to discuss these cases as it is well-settled that, in the facts and circumstances of the suit, an issue as to whether the appellant was entitled to get a sum of Rs. 20,000 by way of set-off and counter-claim ought to have been framed in the suit under Order 14 Rule 1(5) of the Code of Civil Procedure. The omission to frame this issue is an irregularity, which does not, however, affect the disposal of the suit on merits. It is only in those cases when omission to frame an issue affects the disposal of a suit on merits that the suit is to be sent back on remand for a new trial to the lower Court after framing necessary issue. As already stated, the suit was for recovery of damages on the ground of breach of contract by the appellant for the appellant's failure to deliver the machine within the extended time. The agreement for sale was repudiated by the respondent by their letter dated 28.9.73. A supplier cannot apply balance of advance price towards damages, after termination of the contract by the purchaser (Colles Cranes of India Ltd. Vs. Speedeo Spares Corporation,). Moreover, when time is of the essence of the contract, as in the present case, failure on the part of the appellant to deliver the Press in time gives right to the buyer, the respondent, to repudiate the contract and the seller cannot claim damages against the buyer (British Paints (India) Ltd. Vs. Union of India (UOI), . In these circumstances, even though an issue regarding the defendant's prayer for recovery of Rs. 20,000 by way of set-off and counter-claim ought to have been framed in the suit, the omission to frame that issue, though an irregularity, does not affect the merits of the suit, particularly when the parties knew their respective cases and led evidence about the prayer for set-off and counter-claim. The suit was filed on 3.5.74. No useful purpose will be served by sending back the suit on record for framing of an issue regarding the appellant's prayer for set-off and counter-claim and deciding the issue after recording evidence again, if necessary, when in the facts and circumstances of this case and on the authority of the decisions reported in Colles Cranes of India Ltd. Vs. Speedeo Spares Corporation, and British Paints (India) Ltd. Vs. Union of India (UOI), , the seller cannot claim damages against the buyer by way of set-off and counter-claim after the seller's failure to deliver the goods in time in a case of this nature, where time was of the essence of the contract.

13. As for interest, it is to be stated that interest for a period before institution of a suit is claimed either under an agreement or usage of trade under a statutory provision or under the Interest Act, 1973 (previously the Interest Act, 1839). There was no agreement in this case for payment of interest. As such, Mr. Ram referred to the cases of Gopalakrishna Pillai Vs. K.M. Mani, and A.K. Srinivasa Naidu Vs. S. Jayarama Reddiar Firm, and contended that the learned Subordinate Judge erred in granting interest, as claimed by the plaintiff in the suit upto the institution of the suit. This contention cannot be accepted. In the case of

Gopalakrishna Pillai Vs. K.M. Mani, , interest was allowed by way of damages. In the absence of a contract to the contrary, Court may award interest at such rate as it thinks fit on the amount of price to a buyer u/s 61(2)(b) of the Act in a suit by the buyer for the refund of the price in a case of a breach of the contract on the part of the seller from the date on which the payment was made by the buyer. As interest by way of damages can be allowed to a buyer u/s 61(2)(b) of the Act, it cannot be stated that the learned Subordinate Judge erred in allowing interest on the sum of Rs. 18,000 to the respondent. The learned Subordinate Judge was, however, not justified in allowing the interest from 9.2.71 as in their letter dated 13.11.73, Ext. 1(B), the respondent claimed interest at the rate of 10% per annum from 13.11.73 in case of failure of the appellant to pay them back the sum of Rs. 18,000, advanced by them, within one month from 13.11.73. In view of this letter and particularly, on the basis of the provisions in the Interest Act, 1839. enjoining payment of interest in a case of this nature from the time when demand in writing is made for interest, the appellant is not liable to pay any interest upto 12.11.73. In the case of A.K.S. Naidu (supra), interest was allowed under the Interest Act, 1839. The plaintiff is entitled to recover interest on the sum of Rs. 18,000 from 13.11.73 till the institution of the suit at the rate of 10% per annum and thereafter to recover interest at this rate from the date of the suit to the date of decree and further interest at this rate, in a commercial transaction of this nature, from the date of the decree till the date of payment on the basis of Section 34 C.P.C. The Cross-objection of the respondent is, accordingly, to be allowed. At the rate of 10% per annum the interest from 13.11.73 to March, 1974, as claimed in the plaint, will be Rs. 675. The suit is, accordingly, to be decreed for Rs. 18,675 including interest and the respondent will get interest on the sum of Rs. 18,000 at the rate of 10% per annum from the date of institution of the suit till payment by the appellant.

14. The appeal is, accordingly, dismissed with the modification that instead of Rs. 4800 as interest upto March, 1974, the respondent will get interest to the tune of Rs. 675 on the Sum of Rs. 18,000 upto the date of institution of the suit. The suit in the Court below is, accordingly, decreed for a sum of Rs. 18,675 including interest upto the date of institution of the suit. The Cross-objection of the respondent is allowed. The plaintiff-respondent will be entitled to recover interest on the principal sum of Rs. 18,000 from the date of institution of the suit till payment. In the special circumstances of this appeal, parties to bear their own costs of the suit in the Court below and of this appeal as also of the cross-objection.

L.M. Ghosh, J.

15. I agree.