

(1962) 10 PAT CK 0002

In the Patna High Court

Case No : A.F.O.D. No's. 181 and 184 of 1958

Ram Pratap Kamalia Mills and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 01-10-1962

Acts Referred:

Constitution of India, 1950 — Article 299(1)
Contract Act, 1872 — Section 70
Evidence Act, 1872 — Section 145
Government of India Act, 1935 — Section 175(3)

Citation : AIR 1963 Patna 153

Hon'ble Judges : Tarkeshwar Nath, J;H. Mahapatra, J

Bench : Division Bench

Advocate : Chunilal in No. 181 and S. Sarwar Ali in No. 184, for the Appellant;
Rai Parasnath, for the Respondent

Final Decision : Partly Allowed

Judgement

Tarkeshwar Nath, J.—These two appeals arise out of the same suit. First Appeal No. 181 of 1958 was by defendants 1 to 3, but, after the death of defendant 2, Bhagirath Prasad Kamalia was substituted in his place. First Appeal No. 184 of 1953 is by defendants 1, 4, 5 and 6. The plaintiff, State of Bihar, instituted a suit for recovery of Rs. 13,830/14/- in the following circumstances. Defendants 2 and 3 were partners carrying on a partnership business under the name and style of Ram Pratap Kamalia Mills (defendant 1) in Warsaliganj. In the middle of 1949, defendant 1 was allotted Orissa paddy for milling into rice and that defendant agreed that the rate of extraction of rice would be 63.5 per cent of the paddy. A sum of Rs. 1/4/- per maund of the rice was fixed as the milling charges and defendant 1 agreed to deliver the rice on that basis. The plaintiff was to bear the transport charges of the paddy from the place of despatch to the gate of the Mill. Defendant 1 further agreed that rice would be delivered F. O. R. Patna Junction. According to Statement A of the plaint, defendant 1 received 29,700 maunds of paddy in 14898 bags between 10th June 1949 and 19th July, 1949 and, out of

that, 80 mau'nds of paddy were of fine variety. According to the agreement, defendant 1 was to supply 18808 maunds 28 seers of medium rice and 50 maunds 32 seers of fine rice to the plaintiff. Plaintiff gave the various dates, waggon numbers and places of despatch in Statement A.

According to Schedule B of the plaint, defendant 1 supplied 15965 maunds 25 seers 1 chatak of medium rice at Patna Junction and 982 maunds 20 seers of medium rice at Gaya, but did not supply 1860 maunds 20 seers 15 chataks of medium rice and 50 maunds 32 seers of fine rice in spite of various reminders. Schedule C of the plaint contained two headings. First one indicated the amount payable to the Mills and it came to Rs. 35,064/-, whereas the other heading was in respect of the amount payable by the Mills and, under that heading, the aggregate sum was Rs. 48,894/14/-. After adjustment of the claims, according to this Schedule, the plaintiff claimed a sum of Rs. 13,830/14/- in this suit. It appears from the written statement of defendants 2 and 3 that Ram Pratap Kamalia Mills (defendant 1) was being managed by a Board of Trustees under a trust deed and Sitaram Kamalia, Durga Prasad Kamalia and Chunnilal Kamalia also were the trustees. Accordingly, these three persons were added as defendants 4 to 6 on a petition dated 23-84956 filed by the plaintiff.

2. Defendants 2 and 3 admitted the agreement between defendant 1 and the plaintiff acting through its Secretary, Supply and Price Control Department, regarding the rate of extraction and delivery of rice in 1949, but took the plea that the agreement was vague and not enforceable. Their case was that there was no agreement or contract in accordance with the provisions of Section 175 of the Government of India Act and, as such, the plaintiff could not make any claim in respect of that agreement. They admitted in paragraph 7 of the written statement that there was an undertaking to supply rice at the rate of 63.5 per cent, (extraction rate) on the quantity of paddy received by them and to deliver the rice free of railway freight at Patna Junction. They challenged the accuracy of the figures given in Statement A of the plaint and stated that there was shortage of paddy in course of transit from Orissa to Warsaliganj". They were not bound to supply 18808 maunds 28 seers, of medium rice and 50 maunds 32 seers of fine rice. In fact, they received only 29,261 maunds of paddy, as indicated in Statement I of their written statement. They incurred heavy expenses in carrying on the consignments to the Mill premises and the milled rice from the Mill premises to the railway station at Warsaliganj. Thus they had to spend Rs. 7914/9/-, as indicated in Statement II.

Milled rice was ready for delivery, but on account of the laches of the plaintiff, it could not be despatched and it remained in godown for several months. On account of long storage, germination and refraction, there was shortage to the extent of 465 maunds, the value of which was Rs. 7440/- at the rate of Rs. 16/- per maund. This item was shown in Statement III. There was no agreement to supply fine rice and, in fact, no paddy was kept separate for that purpose. They had sent 1000/- maunds of rice to the District Magistrate of Gaya, according to

the direction of the plaintiff. Defendants alleged that they were once given deduction in respect of 77 maunds 20 seers on account of transit shortage of rice from Warsaliganj to Gaya and Patna Junction, but the plaintiff had failed to take that into account, while making a claim. The defendants were thus, entitled to a sum of Rs. 1240/- in respect of that shortage. They were entitled to receive milling charges also at the rate of Rs. 1/4/- per maund of rice in respect of 542 maunds 20 seers and that came to Rs. 678/2A Accordingly, the Mill (defendant 1) had a counter claim to the tune of Rs. 20,929/12/6 and that was indicated in the written statement of defendants 2 and 3. After deducting the plaintiff's claim out of this amount, the defendants were still entitled to a decree for Rs. 7098/14/6. Defendants 4, 5, and 6 filed separate written statements and their case was that the contract was between the plaintiff and defendants 2 and 3 only. Ram Pratap Kamaha, during his life time, purchased the said Mills (defendant 1) from defendants 2 and 3, the two partners, and after his death, a trust was created for the administration of the estate left by him. They denied their liability in respect of any sum claimed by the plaintiff.

3. Plaintiff also filed a written statement, in answer to the claim for set off made by defendants 2 and 3. Plaintiff averred that paddy was brought from Orissa by the defendants under their supervision and they were liable to supply rice in respect of the entire quantity of paddy. The figures given in Statement I of the written statement were not correct, reasonable expenses had been already allowed to the defendants and there was no justification for the claims made by them. Defendants were not entitled to make any claim in respect of any shortage and plaintiff's liability in respect of the other claims also was denied.

4. The Additional Subordinate Judge held that, although there was no written contract in accordance with the provisions of Section 175 of the Government of India Act, 1935, yet the plaintiff was entitled to make a claim, inasmuch as the important forms of the agreement were admitted and the difference between the parties on minor points could be ascertained on the evidence adduced in the case. He disallowed the claim of the plaintiff in respect of some items and reduced it by Rs. 8235/11/6. After deducting this amount from the total claim Rs. 13,830/14/-, he held that the plaintiff was entitled to the balance Rs. 5595/2/6 and he passed a decree in respect of that amount. Accordingly, he decreed the suit in part with proportionate costs. Defendants 2 and 3 had made a counter claim to the extent of Rs. 7098/14/5 and thus, they and defendant 1 valued their appeal (First Appeal No. 381 of 1958) at Rs. 12,694/1/- which included Rs. 7098/14/6 and the sum of Rs. 5595/2/6 which had been decreed. The other appellants, however, of First Appeal No. 184 of 1958 valued their appeal only at Rs. 5595/2/6, These appeals have been heard together and this judgment will govern both of them.

5. Certain points are common in both these appeals and it will be convenient to consider them at one place Mr. Chunilal for the appellants in First Appeal No. 181 of 1958 urged that the contract itself was vague, ambiguous and unenforceable.

There are certain letters which are relevant in this connection. On 25-4-1949, there was a letter (exhibit A/3) on behalf of defendant 1 addressed to the Secretary, Supply and Price Control Department, Government of Bihar, in connection with allotment of paddy for milling, extraction and transport, B. P. Kamalia wrote that letter on behalf of defendant 1 and he referred to an interview which he had with the Secretary in this connection. Defendant 1 agreed in that letter in categorical terms to supply the resultant rice F. O. R. any station in Patna, undertaking to bear the railway freight for the resultant rice. Best extraction 22 well, out of the Orissa paddy was assured. Request was made for the allotment of 1100 tons of Orissa paddy immediately. On 11-5-1949, a telegram (Exhibit B) was sent by an officer of the Supply Department to defendant 1, informing the latter that 1100 tons paddy were allotted and despatches would be arranged by the Bihar Marketing Staff, posted then at Keonjhar. A further direction was given that defendant 1 should deliver rice to the Rationing Officer, Patna, according to the details agreed upon.

Learned counsel made a comment that there was no mention of the extraction rate in this telegram and there was nothing about cost of cartage, weighment, loading etc, The next letter (Exhibit A-4) dated 25-5-1949 was sent on behalf of defendant 1 to the Secretary, Supply and Price Control Department. It indicates that defendant 1 had already sent its representative to Orissa contacting the Bihar Marketing Staff and the Secretary was requested to depute an Inspector for weighing the Orissa paddy at Warsaliganj. Defendant 1 specifically mentioned in this letter that it would deliver 63.5 per cent rice net to the plaintiff. On 20-6-1949, Under Secretary to the Government Supply and Price Control Department sent a letter (exhibit 1/a) to the Rationing Officer, Patna, informing the latter that the paddy in question had been allotted to defendant 1 for milling it into rice and delivery of the same at Patna. He further intimated that defendant 1 had agreed to deliver rice at the rate of 63.5 per cent, extraction in respect of paddy supplied from Orissa and the milling charge was at the rate of Rs. 1/4/- per maund. Plaintiff's case about the rate of extraction was admitted by defendants 2 and 3 in paragraphs 6 and 7 of their written statement and delivery of the resultant rice free of railway freight also was admitted by them. In view of these letters and the admissions, there can be no doubt about the terms of the agreement and there is no merit in the contention raised by learned counsel that the terms were either vague or ambiguous.

8. Next question raised is, as to whether this agreement was enforceable in law. Learned counsel submitted that the contract was not arrived at in accordance with the provisions of Section 175(3) of the Government of India Act, 1935, and, as such, it was not enforceable. Section 175(3) of the Government of India Act, 1935, runs as follows :

".....all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such

contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

It is absolutely essential for the validity of contracts and, assurances made on behalf of the Government that they must be executed by the proper authorities on behalf of; the Government. It was held in *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd.*, , that

"Under this section, a contract entered into by the Governor of a Province must satisfy three conditions. It must be expressed to be made by the Governor; it must be executed; and the execution should be by such persons and in such manner as the Governor might direct or authorise."

Another decision in the case of *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, . It was held that Section 175(3) plainly required that contracts on behalf of the Government of India should be executed in the form prescribed thereby; the section however did not set out the consequences of non-compliance. Their Lordships observed :

"Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good."

The reason for enacting that provision, according to their Lordships, was that the State should not be saddled with liability for unauthorised contracts and with that object, the Parliament provided that the contracts must show on their face that they are made on behalf of the State, i.e., by the Head of State and executed on his behalf and in the manner prescribed by the person authorised. Provisions relating to the form of the contract between the Government and the private individual were mandatory and not merely directory and their Lordships held that, if the contract was not in the prescribed form, it could not be enforced against the Dominion of India. Following these decisions of the Supreme Court and another decision in the case of *State of West Bengal v. B. K. Mondal and Sons* AIR 1962 SG 779 , it has been held by the Full Bench of this Court in *In Re: Baleshwar Lal, Mokhtar*, , that a contract with the Union Government or the State Government made without complying with the formalities of Section 175(3) of the Government of India Act, 1935 or Article 299(1) of the Constitution of India was a void contract and not merely unenforceable. But, if the goods have been delivered or services have been tendered to the Government in pursuance of such a void contract, then an obligation was imposed upon the State Government u/s 70 of the Contract Act to make compensation to the person delivering the goods or rendering the services, provided the conditions imposed u/s 70 of the

Contract Act were satisfied. In the present case, the contract was not made in the manner prescribed by law and it is directly hit by the provisions of Section 175(3) of the Government of India Act. This contract is thus, not enforceable and it cannot be given effect to. The Additional Subordinate Judge was entirely wrong in taking a contrary view and he failed to appreciate the terms of Section 175(3).

7. Mr. Chuni Lal for the appellants urged that the contract being void, plaintiff was not entitled to any relief and the suit should be dismissed on this ground. He, however, conceded that, if this could be a ground for dismissing the suit, then, in that event, the claim for set off as well, would not be maintainable. In order to get rid of this difficulty, learned Government Pleader submitted that, although the contract was not enforceable, yet the plaintiff was entitled to claim a reasonable compensation in respect of the paddy supplied to defendant 1. In support of his submission, he relied on the provisions of Sections 65 and 70 of the Indian Contract Act. There is yet another objection by Mr. Chuni Lal to the application of the provisions of Section 70 of the Indian Contract Act. According to him, the plaintiff had not claimed any relief on the basis of the provisions of Section 70 and facts necessary to attract the operation of those provisions were not disclosed. In those circumstances, he urged that it was not open to the Court to consider facts and circumstances not appearing from the pleadings and grant relief not asked for. He referred to the case of AIR 1930 57 (Privy Council) where it was laid down that no amount of evidence could be locked into upon a plea which was never put forward. He drew our attention to Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, , as well. It was observed in that case, that decision of a case could not be based on grounds outside the pleadings of the parties and the Court has to find out the truth or otherwise of a case pleaded before it. I would refer, in this connection, to another case of the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao and Others, . Their Lordships, in that case, referring to the case in AIR 1930 57 (Privy Council) observed that the true scope of the rule laid down to that case was that evidence let in on issue on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on, which they had no opportunity of adducing evidence. But that rule had no application to a case where parties went to trial with knowledge that a particular question was in issue, though no specific issue had been framed thereon, and adduced evidence relating thereto. It is true, that issues are framed on the case of the parties disclosed in the pleadings and evidence is directed in course of the trial to the proof of the case so set up and covered by the issues framed therein. Moreover, a person can only succeed on the basis of what he alleged and proved. It is a salutary rule, based on the principle that the other party should not be taken by surprise by reason of any change in the case, but there are exceptions to this general rule. In case, the new claim set up is not inconsistent with the allegations, made in the pleadings and can be made out on the facts alleged therein, there is no question of surprise or prejudice to the other side and, besides that, if the parties go to trial with the full knowledge

that a particular question, was in issue and adduce evidence, then there cannot be any legitimate grievance. The substance of the case should be kept in view and not merely the words used in the pleading (vide *Kidar Lall Seal and Another Vs. Hari Lall Seal*,). There is a decision of this Court in the case of *Dominion of India Vs. Preety Kumar Ghosh and Another*, on all fours, In that case as well, the contract was hit by the provisions of Section 175(3) of the Government of India Act, but the plaintiff was granted relief by applying the provisions of Section 70 of the Contract Act. Sinha J., (as he then was), on referring to a catena of decisions, observed thus :

"I am aware that the plaintiff in his plaint did not refer to Section 70 of the Act, but from the materials on record, if it could be gathered that the ingredients of SECTION 70, as narrated above are present, the Court shall not be justified in refusing relief to the plaintiff."

I would refer to one case more on this point, *Ram Nagina Singh Vs. Governor-General in Council*, . Sinha J. held that there was preponderance of authority in favour of the view that if the facts of a case could be fairly brought within the terms of Section 70, Contract Act, and the conditions expressly laid down therein were satisfied, the section should be given effect to and applied irrespective of the fact that there was in fact no contract between the parties. This decision also has been relied upon in the case, just referred to above *Dominion of India Vs. Preety Kumar Ghosh and Another*, . I am, therefore, of the view that although the plaintiff did not refer to Section 70 of the Indian Contract Act in the plaint, yet the facts disclosed, either in the plaint or in the written statement, are sufficient for giving relief to either party and there can be no bar to the application of the provisions of Section 70. The plaintiff disclosed the circumstances, in which, paddy was delivered to defendant 1 and the other terms of the agreement also were indicated in the plaint. Other details of the supply of paddy, delivery of rice and sums payable by one party to the other have been mentioned in the plaint. Defers dams 2 and 3, apart from defending the suit, made a counter claim and their written statement as well, is full and complete in all aspects. Plaintiff as well, filed a written statement, in answer to the claim for set off-Relevant issues with regard to the claim were in these terms :

(5) Can the plaintiff sue these defendants in the absence of an agreement in accordance with Section 175 of the Government of India Act, 1935?

(6) Is the plaintiff's account of claim correct?

(7) Is the plaintiff liable for the shortage due to long storage, germination and refractions of the consignment lying in the defendants' godown at Warsaliganj?

(8) Is the plaintiff liable to the defendants on account of the counter-claim as laid?

Parties have fed evidence on these issues and each party was fully aware of the claim made by the other, In this state of affairs, plaintiff is entitled to be

reimbursed in accordance with the provisions of Section 70 and there has been no prejudice to the defendants.

8. Section 70 reads thus.

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Under this section, the plaintiff has to prove (1) that he was acting lawfully when he was either making payments or delivering anything to the other party; (2) that he did not intend to do that gratuitously : and (3) that the defendant did enjoy the benefit. The delivery should not be gratuitous; in other words, there must be an element of self-interest also, while making delivery. The section contemplates a case in which there should be certain benefit to the other party. In this view, it has to be ascertained as to what happened in the present case.

9. Plaintiff supplied paddy on various dates in 1949 to defendant 1 for milling it into rice. This supply was neither fraudulent nor with any improper motive and, on the other hand, it was bona fide. It cannot, therefore, be held to be unlawful. Besides that, the plaintiff did not make a gift of it and expectation, on the other hand, was to get rice in return for the paddy supplied, lastly, the question of benefit arises in this case. Defendants 2 and 3 were carrying on the business of milling paddy into rice and they had a mill for this purpose. It was their avocation of life and they were to get milling charges. Bhagirath Prasad Kamalia (witness No. 1 for the defendant) was the Manager of the Mills (defendant 1) and his evidence is that, as there was no work, he requested the Government persistently to supply Orissa paddy to the Mill and he accepted to pay the railway freight for delivering the rice at Patna. In ordinary circumstances, it can be safely held that defendants 2 and 3 enjoyed the benefit and there is no material to come to a contrary conclusion. The conditions laid down in Section 70 have been fulfilled and defendants are liable to compensate the plaintiff.

(His Lordship then dealt with the merits of the claim and after discussion of evidence proceeded:)

10-13. Learned Government Pleader urged that the defendants were to bear the expenses of transport of rice from their mill to Warsaliganj railway station and he referred to the letter (exhibit A/3) dated 25-4-1949 in this connection. Defendant 1 had agreed, in that letter, to supply the resultant rice F. O. R. any station in Pama. Another line, in that letter, was that "Railway freight Ex. ours to Patna for the resultant rice will be borne by us." (the Mill). There was an endorsement on the back of that letter in these words;

"Transport charge we bear of rice delivery at Patna."

The learned Subordinate judge also relied on the contents of this letter and this endorsement and held that transport charges included railway freight, cartage,

loading, unloading charge and also weightment charge. In that view of the matter, he was of the opinion that the defendants were not entitled to claim anything for transport of rice. There are two objections to the use of this letter. The first one by Mr. Chuni Lal is, that the attention of D. W. 1, who had written that letter, was not drawn to this endorsement, while he was being examined in Court. Learned counsel submitted that, according to the evidence of that witness, cartage and other charges were to be paid by the Government, but, in case the endorsement made by that witness on the letter was to the contrary, it was essential to draw his attention to that endorsement and then contradict him by his previous writing. Learned counsel referred to the provisions of Section 145 of the Evidence Act in support of his submission and also to the decision in the case of Charandasi Debi v. Kanai Lal Moitra AIR 1955 Cal 205. It was held, in that case, that an alleged admission contained in a deposition made in a previous probate case by the defendant could not be used against that defendant, unless it was put to her and an opportunity was afforded to her to explain it. Section 145 of the Evidence Act provides, inter alia, that a witness can be contradicted, during his cross-examination, by his previous inconsistent statement, but, before doing so, it is essential to draw his attention to his previous writings which are said to be inconsistent. D. W. 1 was examined on the 30th and 31st October 1957 and the letter dated 25-4-1949 also was marked exhibit A/3 on 31-10-1957. The letter was no doubt filed on behalf of the defendants and it has been marked exhibit A/3, but the attention of D, W. 1 was, not drawn to the endorsement at the back, although he was in the witness-box on 31-10-1957 as well. I, therefore, find great force in the contention of the learned counsel, so far it is concerned to the use of the endorsement.

The other objection by Mr. Sarvvar All is, that the contract itself being void, the terms thereof, which were embodied in that letter, should not be looked into, while determining the amount of compensation u/s 70 of the Indian Contract Act. Learned counsel further urged that, if a decree was passed on the basis of the terms of the contract, which was void, it would be defeating the purpose of Section 175(3) of the Government of India Act. A similar contention has been repelled by the Supreme Court in State of West Bengal Vs. B.K. Mondal and Sons, , in these words :

"Thus considered it would, we think, not be reasonable to suggest that in recognising the claim for compensation u/s 70 we are either directly or indirectly nullifying the effect of Section 175(3) /if the Act or treating as valid a contract which is invalid. The fields covered by the two provisions are separate and distinct. Section 175(3) deals with contracts and provides how they should be made. Section 70 deals with cases where there is no valid contract and provides for compensation to be paid in a case where the three requisite conditions prescribed by it are satisfied. We are, therefore, satisfied that there is no conflict between the two provisions".

Even ignoring the endorsement on the back of this letter (exhibit A/3), it is clear

that defendant 1 had agreed to supply the rice F. O. R. Patna. This letter was sent before the despatch of paddy and thus, learned counsel submitted that the agreement to supply rice f. O. R. Patna should be treated as void, But I find that, apart from this letter, there are other materials as well, indicating that the defendants' promise was to supply rice F, O. R. at Patna. On 12-114949, defendant 1 sent a letter (exhibit A/8) to the Secretary, supply and Price Control Department, informing him that the resultant rice was ready for despatch. Defendant 1 wanted the special officer in charge Rationing to depute an Inspector for weighing the rice in the Mill premises before its despatch. Later on, there was an interview between the representative of the Mill and the Secretary, Supply and Price control Department, after which defendant 1 sent a letter (exhibit A/9) on 1642-1949 to the Secretary. The relevant words are these :

".....the undersigned most respectfully abide by your honour's order and accept to weigh the commodity at the F. O. R. station viz. Patna Jn."

These two letters were sent after the receipt of the entire quantity of paddy and there can be no doubt that defendant 1 throughout promised to deliver the rice F. O. R. Patna. Apart from these facts, the rate of extraction of rice was 63.5. per cent, of paddy and there was some consultation before fixing that rate (vide letter exhibit A/30 dated 17-4-1949). That rate was agreed upon by the defendants and there is hardly any scope for the contention, that they were entitled to claim transport charges from the plaintiff. I am thus, of the opinion that the trial Judge was right in rejecting the claim of the defendants in this respect.

14-15. (After discussion of the merits of other items claimed His Lordship proceeded).

Taking into consideration all the items, the position is, that the plaintiff's claim should be reduced by Rs. 1600/- on account of godown shortage, Rs. 304/12/3 in respect of the price of fine rice and Rs. 146/14/-, the milling charges. Total comes to Rs. 2,051/10/3 and, on deducting this amount from Rs. 5595/2/6, which was decreed by the trial Court, the balance comes to Rs. 3343/8/3 only.

16. On a consideration of the various claims of the plaintiff and the counter-claims of the defendants, I find that the plaintiff is entitled to a compensation of Rs. 3543/8/3 only and defendants 2 and 3 being partners of the Mills (defendant 1), they also are liable along with defendant 1 for this sum.

FIRST APPEAL NO. "184 OF 1953

17. Mr. Sarwar Ali for the appellants reiterated the grounds which were urged by Mr. Chuni Lal in the other appeal and it is not necessary to repeat them, as I have already considered them and given my findings on the points raised by Mr. Chuni Lal. It may be mentioned that defendant 1 is the common appellant in both the appeals and I have already held in the other appeal, that defendant 1 was liable to pay the sum of Rs. 3543/8/3. Mr. Sarwar Ali, however, raised an

additional ground in support of the appeal preferred by defendants 4 to 6. The contention was, that those defendants were not parties to the contract and, as such, they were not liable. Written statement of defendant 5 indicates, that Ram Pratap Kamalia had purchased the Mills (defendant 1) from defendants 2 and 3, the two partners of the Mills, and after the death of Ram Pratap Kamalia, a trust was created for the administration of the estate left by him. Defendants. 4 to 6 also were trustees according to the written statement of defendants 2 and 3 and, for that reason they were-added as defendants in the present action. They are managing the affairs of the Mills (defendant 1) as trustees, and are in possession of the assets of the Mills. Accordingly, they also are liable to compensate the plaintiff to the extent of Rs. 3543/8/3, the sum already determined but out of the assets of the Mills (defendant 1). Learned Counsel further urged that, in any event, defendants 4 to 6 could not be personally liable for the compensation and the Court below overlooked this aspect of the case. \\ find great force in this contention and it must be accepted, as defendants 4 to 6 were not Parties to the agreement.

18. In the result, both the appeals are allowed in part, the judgment and the decree of the trial Court are modified and the suit is decreed for Rs. 3543/8/3 with proportionate costs of both the Courts including only one set of hearing fee for both the appeals, against all the defendants, but the decree against defendants 4 to 6 would be limited only to the extent of the assets of the Mills (defendant 1) in their hands. Defendants will bear their own costs throughout.

Mahapatra, J.

19. I agree.