

(1976) 06 CAL CK 0032
In the Calcutta High Court
Case No : F.A. No. 87 of 1964

State of West Bengal and Another

APPELLANT

Vs

Ajit Kumar Mukherjee

RESPONDENT

Date of Decision : 22-06-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107, 34, 80
Constitution of India, 1950 — Article 299
Government of India Act, 1935 — Section 175(3)
Sales of Goods Act, 1930 — Section 61

Citation : AIR 1977 Cal 273 : 81 CWN 36

Hon'ble Judges : M.N. Roy, J; Anil Kumar Sen, J

Bench : Division Bench

Advocate : Chandidas Roychowdhury and S.N. Mukherjee, for the Appellant;
Shyama Charan Mitra and Anil Kumar Mukherjee, for the Respondent

Judgement

M.N. Roy, J.—This appeal is directed against the judgment and decree dated March 6. 1963 by the learned Subordinate Judge, 6th Court, Alipore, made in Money Suit No. 13 of 1958, The plaintiff respondent (hereinafter referred to as the plaintiff) at all material times and still is carrying on business under the name and style of Pearson Trading Company at 1/5, Raja Basanta Roy Road, Calcutta-26, as a contractor in food in the Police departments in West Bengal and several other mercantile concerns, pursuant to an invitation of a tender for the supply of dietary articles, including cow and Bhaisa ghee by the Superintendent of Police, 24 Parganas, he on November 5, 1948 submitted a tender for such articles of cow and Bhaisa ghee at the following rates :

(1) Buffalo ghee ... @ Rs. 235/- (2) Cows ghee ... @ Rs. 295/- (No. 1) Guarantee % per cent. (3) Cows ghee ... @ Rs.220/- per maund (No. 2) Such tender of the plaintiff was accepted by the said Superintendent of Police by his letter of November 18, 1948 for the month of November, 1948 and he was directed to supply 100 maunds of Bhaisa ghee as per his sample. It is also an admitted fact that pursuant to such acceptance and order, the plaintiff at first

delivered 26 maunds 6 seers and 14 chataks of Bhaisa ghee in 59 containers on November 19, 1948 and thereafter, on November 24, 1948 he delivered another consignment of 75 maunds 20 seers of Bhaisa ghee in 171 containers. It is also not disputed that the supplies in question were approved and accepted and thereafter, the plaintiff on Dec. 4, 1948 placed his bill for Rs. 23,891.14 as 3 pies, as price of 130 tins containing 101 maunds 26 seers 14 chataks of Bhaisa ghee. Since there were some errors in calculation, the said bill was ultimately returned to the plaintiff for correction, who thereafter on December 8, 1948 presented a corrected bill for Rupees 23,892-14 as 3 pies for the goods supplied. It appears that by Memorandum No. R/543 dated December 21, 1948, the plaintiff was informed by the Superintendent of Police concerned that the supplies so made by him were adulterated and he was asked to take back the tins which were lying in the store of the said defendant and to submit a fresh bill for the quantity of ghee actually consumed. Since there was delay in making the payments for such supply of ghee, the plaintiff on December 23, 1948 requested the Superintendent of Police concerned to send a cheque for the price of the goods so supplied. It also appears from the records that on receipt of the letter of December 21, 1948 from the Superintendent of Police concerned, the plaintiff by his letter of January 6, 1949 denied the charges of adulteration as was alleged. It would also appear that before the said letter of January 6, 1949, the plaintiff with his representatives had been to the Ration Store of the defendants on January 4, 1949 to take back the unconsumed tins lying at the said godown and at that time on proper examination of the tins it was found out to their utter surprise that they did not belong to them. Such detection was made when the plaintiff found that the secret marks "SB" which were given on the tins so supplied by him were conspicuously absent. By the said letter of January 6, 1949 the plaintiff also contended that the tins supplied by him have been replaced and that has placed "him in such an awkward position that he could not take back those tins as per the directions as mentioned above. In the said letter the plaintiff also alleged that some underhand means have worked with the mala fide intention to harass him. It was also stated by the plaintiff in the said letter that the samples sent for test by the said defendants were not taken in his presence nor did they bear Ms official seals and signature and it was quite possible that samples were taken through oversight from the stocks supplied by other contractors. The plaintiff also made it clear in his letter under reference that he would have certainly submitted to the charges as levelled against him, if the procedure which was adopted in the month of December 1948 for taking samples in the case of Messrs. National Dairy, since such procedure was quite in order. From a reference to the said letter it also appears that the plaintiff made it clear that the supply of ghee from several tins which he had supplied, had actually been made and distributed to several Police Stations like Barrackpore and G. R. P. Sealdah and since those supplies have been called back for the purpose of delivering them to him, also caused a suspicion in his mind. The plaintiff, however, made it clear that for the act and action the said defendants he has suffered much and irreparable damages to his goodwill and in any view of the

matter he requested for the payment of his bill at an early date. It has also been made clear that on failure of such payment, he would be compelled to charge the defendants interest @ 12 1/2%.

2. It also appears from the records that thereafter, proceedings were initiated against the plaintiff and another person named Sri S. Banerjee and they were placed on trial under Sections 420 and 227 of the I. P. C. Such proceedings of course ended in an acquittal of the (plaintiff and the said co-accused on April 22, 1950, by the learned trying Magistrate. Thereafter, the Superintendent of Police, 24 Parganas (defendant No. 2) filed a fresh complaint on the self-same allegations before the Additional District Magistrate and the plaintiff was summoned to face the trial. He in his turn moved this Court for quashing the said criminal proceedings and by the judgment of December 14, 1950, this Court was pleased to quash the said proceedings. Then at the instance of the Superintendent of Police, 24 Parganas, notices were issued on the plaintiff through the Court of the Magistrate, First Class, Alipore. directing him to take back the consumed containers of ghee and after considering the show cause by the plaintiff, the said learned Magistrate directed that the unconsumed ghee produced by the Superintendent of Police, 24 Parganas be made over to the plaintiff.

3. Even thereafter, the said defendants, instead of making due payment of the price of ghee as supplied, harassed the plaintiff in different criminal proceedings, which also failed. On the failure of the said defendants to make necessary payment for the supply of ghee as mentioned hereinbefore, the plaintiff on December 17, 1951 filed Money Suit No. 13 of 1958, for recovery of the price of goods sold and supplied and for damages. In the plaint it has been contended that the plaintiff was entitled to get Rupees 23,392-14 as. 3 pies as price of the ghee in question and as the said defendants have delayed the payment, so he was also entitled to damages by way of interest to the extent of Rs. 9,457-10 as. 4 pies. Thus his total claim in the said suit was Rupees 33,350-8 as. 7 pies. The said suit was preceded by a notice u/s 80 of the C. P. C. dated October 6, 1951.

4. The said defendants in their written statement contended the suit to be not maintainable since there was no proper service of notice u/s 80 of the C. P. C. They also denied the legality and validity of the same. The said defendants in their turn admitted that the plaintiff had supplied 100 maunds 26 sheers and 14 chatak of Bhaisa ghee as mentioned in the plaint but they contended that such supplies were neither examined nor approved or accepted by them. They have also alleged that some samples were sent to the Director of West Bengal Police Health Laboratory and it was detected that the ghee in question was highly adulterated and not according to the samples-sent along with the tender. The said defendants have further contended that the plaintiff was bound to supply ghee according to the approved samples and he was duly asked to take back the unconsumed portion of the ghee. They further stated that they were not liable to pay the amount so claimed by the plaintiff and in any event he was not entitled

to any interest as he did not claim any interest or damages in his notice u/s 80 of the C. P. C. It was further and also contended by the said defendants that there was no valid contract u/s 175(3) of the Government of India Act, 1935 and the plaintiff was not entitled to claim anything as per contract.

5. On the pleadings as aforesaid, the following issues were framed for determination :--

(1) Did the plaintiff supply ghee to the defendants as alleged in the plaint ?

(2) Was the ghee supplied adulterated ? Did the defendants refuse to accept the ghee for good and sufficient cause ?

(3) Are the defendants liable for any amount ? If so, for what amount ?

(4) Was the notice u/s 80, C. P. C., proper sufficient and legal ?

(5) To what relief, if any, is the plaintiff entitled ?

6. On consideration of the evidence as lead and available, the learned trial Court came to the conclusion that the plaintiff supplied the two consignments of Bhaisa ghee and there was no satisfactory evidence that the samples for the alleged tests were drawn properly from the supplies effected by him on November 19, 1948. It has also been held that the said defendants not only failed to establish that the ghee supplied by the plaintiff was adulterated but they also failed to establish that the unconsumed ghee was also adulterated and as such they had no right or authority to refuse to accept the ghee as supplied by the plaintiff. Apart from the above, it was also found by the learned trial Court that the notice u/s 80 of the C. P. C. was due, proper and sufficient, although it has been held, in view of the plaintiffs failure to mention in the said notice Ext. B (4), the rate at which he would get damages and more particularly his failure to specify the damages, that he would not be entitled to claim damages by way of interest for the period mentioned in the plaint and as such decreed the suit by holding that the plaintiff's claim for damages by way of interest cannot be granted and he would be entitled to get interest on the principal sum of Rs. 23,892-14-3 pies @ 3 per cent, from the date of the institution of the suit till the date of decree. The suit was of course dismissed against defendant No. 2 viz., the Superintendent of Police, 24 Parganas since no relief was claimed against him.

7. From such determination the defendants have preferred the present appeal and there has also been a cross-objection filed by the plaintiff on March 24, 1965, claiming interest at 6% per annum as interest on the principal sum for the period from November 24, 1948 to December 16, 1951 viz., for an amount of Rs. 4,728-13-2 p. and thereby giving up his claim for the balance of 6% and further claiming interest on the principal sum for the period from December 17, 1951 to March 6, 1963 i. e. from the date of institution of the suit upto the date of decree at the rate of 6% per annum.

8. Mr. Roychowdhury, appearing for the appellants contended before us that (i)

on the basis of the materials on record, it should have been held that the ghee supplied by the plaintiff was adulterated and as such there was enough justification for the defendant appellants to refuse to accept the consignment of ghee and correspondingly not to make any payment for any portion or at least for the unconsumed portion and as such (ii) the defendant appellants were not liable to make any payment either on account of the price of the goods sold and delivered or on account of interest as charged for and claimed.

(9-10. After discussion of the evidence the judgment proceeds as follows :--)

11. So. on the basis of the available evidence as mentioned hereinbefore, we do not find any justification in holding that the findings arrived at by the learned trial Judge were incorrect or are required to be interfered with or set aside. In view of the above, the first contention raised by Mr. Boychowdhury fails and as such we hold that the defendant appellants had no justification to refuse to make any payment or any portion of the same or at least for the unconsumed portion and as such it must be held that the defendant appellants are liable to pay for the price of the goods, ghee in the instant case, duly sold and supplied by the plaintiff. We are further of the view that the defendants have failed to establish that the ghee as supplied by the plaintiff was adulterated.

12. On the second point urged on behalf of the appellants, particulars whereof have been mentioned hereinbefore, Mr. Roychowdhury, in half seriousness repeated that in view of the provisions in Section 175(3) of the Government of India Act 1935, there was no valid contract in the instant case. However, in view of the admitted fact that the plaintiff was requested by the Defendant No. 2 to supply ghee, which was duly complied with and there has been no dispute that the supplies were meant for the use of the police personnel and there existed a lawful relationship between the parties to the contract, in terms of the decision of the Supreme Court in the case of State of West Bengal Vs. B.K. Mondal and Sons, and the more so when the defendants have failed to prove that the unconsumed ghee was adulterated, in agreement with the learned Court below, we also hold that the plaintiff cannot be held guilty of any laches as alleged if the defendants have not thought it fit to consume the stock of ghee lying with them and all the more so, when after acceptance of the ghee, they have used a portion of the same and furthermore, when there is evidence showing that after consumption of such ghee, any member of the Police force fell ill and when there is also no evidence to establish that the unconsumed portion of the ghee was adulterated. In view of the above, we also uphold the determination of the learned trial Court that the claim for compensation as made by the plaintiff and at the rate .as mentioned was justified. It may be mentioned that at no point of time any dispute was raised regarding the rate at which the supply was made.

13. In the notice u/s 80 of the C. P. C., (Ext. B (4)), admittedly the plaintiff has not claimed interest or damages and as such Mr Roychowdhury repeated the arguments as were made before the learned trial Court that as such, the plaintiff was not entitled to claim interest or damages prior to the institution of the suit i.

e. December 17, 1951. Such argument was sought to be made on the ground and the basis that the terms of Section 80 being express and explicit, apart from being mandatory, the plaintiff, because of his failure to plead and claim interest or damages therein, was not entitled to maintain his claim on that account Two judgments of the Supreme Court reported in *The State of Madras Vs. C.P. Agencies and Another*, and *Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI)*, , were relied on respectively by the defendant appellants and the plaintiff. Although in the notice Ext. B (4) neither any rate at which damages would be claimed nor the amount of damages had been mentioned, yet the plaintiff, in his plaint has claimed interest @ Rs. 12 1/2% from November 24, 1948 to December, 1951 i. e. for an amount of Rs. 9,457-10-4 p. In the notice in question Ext. B (4), the plaintiff has on the other hand just mentioned that he would claim damages for improperly and illegally delaying the payment of his claim of Rs. 23,892-14-3 p. and on consideration of the decisions as mentioned hereinbefore, the learned trial Court has come to the conclusion that the plaintiff would not be entitled to claim damages by way of interest for the period as mentioned in the plaint. The validity and sufficiency of the said notice Ext. B (4) has not been denied and disputed at any stage, including the proceedings in this appeal. For the determination of the point as indicated hereinbefore, the cross-objection of the plaintiff would be of relevant consideration.

14. As mentioned hereinbefore, the plaintiff has reduced his claim for interest and damages to 6% from 12 1/2% as originally claimed. Mr. Mitter appearing for the plaintiff has submitted that such reduction has been made because due to the delay in having the payment, his client has been placed in great financial hardship. The plaintiff has of course claimed further interest at that rate on the principal sum for the period from December 17, 1951 to March 6, 1963 i.e. from the date of the institution of the suit till the date of the decree.

15. After referring to the notice u/s 80 of the C. P. C, Ext. B (4), it was submitted by Mr. Mitter that the provisions regarding the pleading and damages in the said notice have been misconstrued by the learned Court below and in any event the findings that the plaintiff was not entitled to claim damages by way of interest for the period mentioned in the plaint and on the reasonings as mentioned in the impugned judgment and decree are unsustainable He further submitted that the learned Court below having found the said notice Ext. B (4) to be due, proper and sufficient, should not have made the judgment and decree in the manner he has done and furthermore in making the said determination, the learned trial Court failed to appreciate the import and effect of the case of *The State of Madras Vs. C.P. Agencies and Another*, V and that of *Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI)*, and in any event, having regard to the materials on record and the principles of law involved and more particularly because of the fact that the plaintiff was prevented from having the benefits of his money for a considerable time due to the neglect, laches and improper conduct of the defendants, interest at least @ 6% per annum on the principal sum should have been allowed in terms of the claim from November 24, 1948 to

December 13, 1951. Mr. Mitter further submitted that since the contract in the instant case was not severable and admittedly the defendants had duly accepted the supply of ghee, so the property passed to the buyer viz., the defendants and they having accepted and consumed a part or portion of such ghee, cannot now take the defence of adulteration and the more so when such charge has not been proved. In support of his contentions, Mr. Mitter first relied on Section 13(2) of the Sale of Goods Act, 1930 and then to S, 61 (2) of the same, and submitted further that since there was no contract to the contrary viz., interest @ 6%, the learned trial Court should have awarded interest at the said rate of 6% from November 1948 i. e. when the supply was effected to December 1951 i. e. when the suit was decreed, even though such pleading was not available in the notice in Ext. B (4). Mr. Mitter also relied on the case of Dhian Singh Sobha Singh v. Union of India, (supra) for the proposition that although the terms of Section 80 are to be strictly complied with, it does not mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense and submitted that such view has in fact and also been maintained in the case of *State of Madras v. C. P. Agencies* (supra). In fact, Mr. Mitter submitted that since the intention of the plaintiff could be well gathered from the notice Ext. B (4) viz., about his intention to claim interest and damages on the principal amount, so even in spite of paucity of pleadings for such claim of interest and damages, the learned trial Court should have also granted interest and damages at the rate and for the period as claimed.

16. On a consideration of the determinations as mentioned hereinbefore read with the pleadings of the parties and the evidence as lead, we are of the view that the plaintiff, in fact and in effect, intended to claim interest and damages on the principal amount and the defendants had also no difficulty in understanding the same and as such the plaintiff would be entitled to maintain his claim for interest and damage, particularly when such intention is manifest from the correspondence. The plaintiffs' failure to mention or plead specifically the said fact in the notice Ext. B (4) would not be fatal in the facts and circumstances of the case.

17. It has been held by a Bench decision of this Court in the case of *Kanchanganga Co. Ltd. Vs. The State of West Bengal*, , while dealing with a contract with the State or the Union under Article 299 of the Constitution of India, that when contract by correspondence has resulted in offer and acceptance and the parties have acted on it, the contract is enforceable. Furthermore, when a party has taken benefit under the agreement, it cannot be allowed to take up a new position. Such view also finds support from the determination in the case of *Union of India (UOI) Vs. A.L. Rallia Ram*, , where, dealing with Section 175(3) of the Government of India Act, 1935, it has been observed that :

"S. 175(3) does not in terms require that a formal document executed on behalf of the Dominion of India, and the other contracting party, alone is effective. In

the absence of any direction by the Governor General u/s 175(3) of the Government of India Act prescribing the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled. It is true that Section 175(3) uses the expression "executed" but that does not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor General of India and acceptance in writing which is expressed to be made in the name of the Governor General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of Section 175(3)."

The above view also gets support from another determination of the Supreme Court in the case of Union of India (UOI) and Others Vs. N.K. Private Limited and Another, . In that case while dealing with a contract under Article 299 of the Constitution of India, it has been observed, that :

"It is now settled by this Court that though the words "expressed" and "executed" in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised in this behalf by the President of India. A contract whether by a formal deed or otherwise by persons not authorised by the President cannot be binding and is absolutely void."

Thus from the above it is also clear that Mr. Mitter has ample justification in his contentions that the arguments on Section 175(3) of the Government of India Act, 1935, as were sought to be urged by Mr. Roy-chowdhury, although not very seriously, are of little or no substance, since the correspondence disclosed, proved the due execution of the contract and there is no evidence that D. W. 1 was not authorised to accept the tender or to enter into the contract.

18. Coming back now to the cross objection, it appears that the plaintiff claimed interest on the amount claimed by him as the unpaid price of the goods supplied to the defendant-appellant from 24th November 1948 till December 17, 1951 i. e. the date of institution of the suit at 12 1/2% per annum and also interest pendente lite. The learned Subordinate Judge disallowed the former claim merely on the ground that the plaintiff in his Section 80 notice had not specified the rate at which he would claim interest on the price of goods withheld nor did he specify the quantum of damages he would demand on that account. The learned Subordinate Judge allowed interest pendente lite at 3%. In this cross-objection the plaintiff is not reasserting his claim of interest for the period prior to the suit though he has reduced his claim to 6% per annum and he is also claiming the interest pendente lite as decreed by the learned Subordinate Judge to be enhanced to 6% from 3%. So far as the latter claim is concerned it appears to us that the learned Subordinate Judge has in his judicial exercise of discretion u/s 34 of the C. P. C. had held that awarding interest at 3% on the principal amount adjudged payable to the plaintiffs as reasonable and we find no reason either to differ from him in his assessment nor to hold that such assessment is not

reasonable or fair. Hence the second part of the plaintiff's claim in the cross-objection must be overruled. So far however the first part of the claim is concerned, we are of the view that the learned Subordinate Judge was clearly in the error in altogether rejecting plaintiff's claim of interest on the unpaid price of the goods supplied to the defendants from the date such price became payable to the date of the suit. Mr. Mitter has rightly pointed out that such interest being payable u/s 61 of the Sale of Goods Act. the plaintiff had statutory right to claim such interest and the Court should award interest when it is so payable under the statute. The ordinary rule that such interest for the period prior to suit is not payable in the absence of a specific stipulation therefore does not apply when the right is conferred by the statute. Learned Subordinate Judge also had not relied on that principle for disallowing the said claim. He seems to think that unless the total quantum of damage by way of interest or the specific rate of interest to be claimed is set out in the notice u/s 80 of the C. P. C. the plaintiff is not entitled to sustain a claim in this respect. There he was wrong as the" notice u/s 80 of the C. P. C. clearly asserted that the plaintiff claims damages for improperly and illegally delaying the payment of the price due on the goods supplied. On the decisions of the Supreme Court referred to hereinbefore it is now well settled that, although the terms of Section 80 of the C. P. C. are to be strictly complied with, that does not mean that the terms of the notice should be scrutinised in a pedantic manner. The notice must broadly make out the case which is proposed to be brought so that the Government may consider the position for itself. That object is served when the notice specifies the nature of the suit proposed to be filed, the facts on which the claim is founded and the precise reliefs asked for. The learned Subordinate Judge himself has upheld the notice u/s 80 of the Civil P. C. and still he had rejected the claim of the plaintiff in this respect on the ground that rate of interest to be claimed or the actual quantum of damages toy way of interest had not been specified in the notice. We do not think that was at ali necessary. It had precisely been stated in the notice that the plaintiff amongst others would claim the relief of damages on the unpaid price of the goods from the period the price was withheld. Hence this part of the cross-objection must succeed and the judgment and decree of the learned Judge dismissing the plaintiff's claim of interest prior to the suit must and is hereby set aside. Interest of justice would be best served if interest at 3% as has been allowed pen-dente lite and found by us to be reasonable be allowed for the period from 8th December 1948 (the date when the corrected bill was submitted by the plaintiff) till the date of the institution of the suit.

19. On the conclusions as above, the appeal fails and is dismissed. The cross-objections succeeds and is allowed in part. The decree as passed by the Court below is modified to this extent viz., that the interest which has been decreed at three per cent per annum would be from 8th December 1948 till the date of decree. The decretal amount shall be payable within three months. The plaintiff respondent (cross-objector) would be entitled to proportionate costs. Hearing fee being assessed at 3 g. ms.

Anil Kumar Sen, J.

20. I agree.