

HIGH COURT OF TRIPURA
AGARTALA

RFA No.09 of 2023

1. **Ardeshir B. Cursetjee & Sons. Ltd.,**
Mackinnon Mackenzie Building, 4 S.V. Marg, Ballord Estate, Mumbai 400001, represented by its Vice President.
2. **The Vice President,**
Ardeshir B. Cursetjee & Sons. Ltd. Mackinnon Mackenzie Building, 4 S.V. Marg, Ballord Estate, Mumbai 400001
.....Defendant- Appellant(s)

V E R S U S

Sri Niranjana Debnath,
S/O Sri Nilmani Debnath, resident of Santipur, P.O. & P.S. Pechartal, District Unakoti, Tripura
..... Plaintiff-Respondent(s)

For Appellant(s)	:	Mr. A. Acharjee, Advocate. Ms. M. Chakraborty, Advocate. Ms. S. Sarkar, Advocate.
For Respondent(s)	:	Mr. G.K. Nama, Advocate.

RFA No.12 of 2023

Sri Niranjana Debnath,
Son of Shri Nilmani Debnath, resident of Santipur, P.O. & P.S. Pechartal, District Unakoti, Tripura
..... Plaintiff-Appellant(s)

V E R S U S

1. **Ardeshir B. Cursetjee & Sons. Ltd.,**
Mackinnon Mackenzie Building, 4 S.V. Marg, Ballord Estate, Mumbai 400001, represented by its Vice President.
2. **The Vice President,**
Ardeshir B. Cursetjee & Sons. Ltd., Mackinnon Mackenzie Building, 4 S.V. Marg, Ballord Estate, Mumbai 400001
..... Defendant-Respondent(s)

For Appellant(s)	:	Mr. G.K. Nama, Advocate.				
For Respondent(s)	:	Mr. A. Acharjee, Advocate. Ms. S. Sarkar, Advocate.				
Date of hearing	:	<i>6th February, 2024.</i>				
Date of Judgment	:	<i>2nd April, 2024.</i>				
Whether fit for reporting	:	<table border="1"><tr><td>YES</td><td>NO</td></tr><tr><td>√</td><td></td></tr></table>	YES	NO	√	
YES	NO					
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**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE S.D. PURKAYASTHA**

JUDGMENT & ORDER

[S. Datta Purkayastha, J]

The judgment dated 12.01.2023 passed by the learned Civil Judge (Sr. Div.), Court No.2, West Tripura, Agartala in MS No.30 of 2015 and consequent decree thereof are under challenge in both the appeals. In RFA 12 of 2023, the challenge has been made for limited purpose.

[2] By the said judgment and decree, following reliefs were granted to the plaintiff (respondent of RFA No.09 of 2023 and appellant of RFA No.12 of 2023) of the original suit:

“26. In the result, the suit of the plaintiff is decreed in favour of plaintiff and against the defendants on contest with cost with following declaration:

The plaintiff is entitled to get from the defendants sum of Rs.17,75,000/- (Rupees Seventeen Lakhs and Seventy Five Thousand) Only along with 10% interest per annum on the said amount with effect from the date of the decree till realization of the said amount.

Senior Sheristadar of this Court is hereby asked to prepare the decree accordingly and place the same before me for obtaining signature within 15(fifteen) days from today.

This case is thus disposed off on contest.....”

[3] North Eastern Electric Power Corporation Ltd. (for short “NEEPCO”) entered into an erection, procreation and construction (EPC) contract with Bharat Heavy Electrical Ltd. (for short “BHEL”) for construction of one gas based combine cycle power project at Monarchak under Sepahijala District to be setup by said NEEPCO. BHEL in turn entered into another contract with defendant No.1, Ardeshir B. Cursetjee & Sons. Ltd. (appellant No.1 of RFA No.09 of 2023 and respondent No.1 of RFA No.12 of 2023) for

transportation of various over dimension cargo items for said construction. For that purpose, heavy machineries were required to be transported from Hyderabad to Kolkata by road and then from Kolkata to Badarpur (Assam) through sea and river and from Badarpur to Monarchak site via road. The State of Tripura did not grant any permission to transport such heavy machineries through some bridges, as those bridges were weak and would not support the movement of such heavy machineries thereupon. Therefore, as an alternative, said defendant No.1 was asked to construct bypass roads made of soil, pipes, bricks, chips etc. in different places of Tripura like Sanichara, Ramnagar, Pecherthal, Champaknagar, Sekerkote, Bishalgarh etc. In order to construct such bypasses, the defendant gave sub-contract in favour of the plaintiff for construction of such bypasses on abovesaid points.

[4] The dispute arose between the parties regarding construction of bypass at Bishalgarh. The terms and conditions of the contract regarding payment to be made to the plaintiff by defendants were that plaintiff would be paid 20% of the payment after 5 days of commencement of work on the bypass at Bishalgarh, the next 20% would be released on completion of 50% of the work, thereafter, further 20% payment would be released upon completion of 100% work and 20% more would be released on movement of 28 heavy/OSD consignments and the rest 20% would be released on completion of dismantling of such bypass road and after obtaining a certificate from the concerned authority regarding removal of such obstruction from the river channel.

[5] The plaintiff alleged that the amount of total contract work was Rs.86,35,000/- out of which the defendant paid Rs.68,60,000/- and the rest

amount of Rs.17,75,000/- was illegally kept undisbursed by them though, the plaintiff had completed all the works as per terms of the contract. He, thereafter, made repeated requests and finally issued a demand notice through his advocate, dated 17.07.2013 and getting no response from defendants, he finally filed the suit for recovery of said Rs.17,75,000/- along with 10% interest thereupon from 17.05.2013 (may be 17.07.2013) till realization.

[6] According to the defendants, on 03.04.2013, such heavy machineries were transported through the said Bishalgarh bypass and in response to the Email dated 05.04.2013 of the plaintiff, the defendants gave him permission to dismantle the said bypass vide their reply Email dated 06.04.2013. As alleged by the defendants, it was also asked by them that such dismantling had to be done in a time bound manner and original condition of the river bed was to be restored, but till 06.05.2013, plaintiff did not dismantle the said Bishalgarh bypass. On 06.05.2013 itself, there was heavy shower in that area and for not dismantling said bypass, the area was flooded with water causing heavy damage to the nearby houses and shops only for negligence and inaction of the plaintiff. The defendants on 07.05.2013, sent an Email to the plaintiff that due to failure of the plaintiff to undertake such dismantling work, that incident had occurred and therefore, BHEL asked the defendants to undertake the work of dismantling and cost of the same might be deducted from the final bill of the plaintiff. They also asked the defendants to arrange for necessary compensation to the affected person. By an Email dated 09.05.2013, the defendants asked the plaintiff to join a meeting with them in presence of BHEL, NEEPCO and the local administration on 13.05.2013 but the plaintiff

did not respond. Being compelled, the defendants engaged another contractor namely, Tapan Kumar Nag and got the said bypass dismantled and the river bed restored and cost of the same to the tune of Rs.17,75,000/- was adjusted from the final bill of the plaintiff relying on another clause of the contract. The defendants also filed one counterclaim bearing No. MS (CC)01 of 2015 for realization of Rs.28,58,371/- from plaintiff for the payment as was allegedly made by them to said Tapan Kumar Nag and also for realization of Rs.5,83,018/- from him towards compensation for damages as was allegedly disbursed by them to the affected people. The said counterclaim was ultimately dismissed for default.

[7] During trial, the plaintiff examined himself as witness along with other two witnesses namely, Biplab Bhowmik and Bijan Dey. Examination-in-chief on affidavit of one witness namely, Hemant N. Upadhyay was submitted before the Trial Court from the side of defendants but he ultimately did not face cross-examination. Several documents were proved by the plaintiff and on the contrary, no documentary evidence was adduced by the defendants.

[8] The Trial Court observed that as per evidence, the total cost of construction of bridge/bypass at Bishalgarh including dismantling thereof, was for Rs.25,50,000/- and as per the terms of the agreement, for last phase of payment of 20% of Rs.25,50,000/- was Rs.5,10,000/- which had to be released upon completion of dismantling work and on collection of a certificate from the concerned authority by the plaintiff, but Rs.17,75,000/- was hold back. The Trial Court further observed that as per document under Exbt.12, first part of dismantling work of Bishalgarh bypass was already completed by the plaintiff

and the second part of dismantling work was going on, and as per oral evidence of the plaintiff and his witnesses, said dismantling work was completed by him. But, the defendants, on the other hand, failed to controvert the same by adducing any evidence. Thus, the Trial Court ultimately decreed the suit.

[9] Mr. A. Acharjee, learned counsel for defendants argued that the work order was issued from Mumbai and the work site was at Bishalgarh and therefore, the suit ought to have been filed either at Mumbai or at Bishalgarh. He thus argued that the Trial Court had no jurisdiction to try the suit. Ld. Counsel also referred to Clause 9 of the terms and condition as attached with the work order(Exbt.1/B) as quoted below and argued that at all events the plaintiff was responsible for proper maintenance of the bypasses.

“9. You shall be responsible for Maintenance of the Bypasses FOR ONE SEASON upto the passage of the last Consignment/total of 28 Nos. Consignments shall be moving over these bypasses as per Packing List which shall be provided by us to you with the LOI/Work Order but can increase as per our requirements. In the event of any Damage to the Bypasses for any reason whatsoever, with the exception of reasons attributable to Nature or any Natural Calamity such as Floods, you shall be solely responsible to repair them at your Cost at the earliest but not later than 7 to 10 days.”

According to Mr. Acharjee, learned counsel, the plaintiff was, therefore, responsible for the cost and damages occurred due to inundation of flood water at Bishalgarh bypass. He also contended that despite requests to dismantle the bypass, the plaintiff did not dismantle it till 06.05.2013 and if he would have taken proper steps in time, such havoc could have been avoided and therefore, in no way, he is entitled to get the decree. In this regard, he also referred to another Email dated 09.05.2013 sent from the office of the defendants to the plaintiff, whereby the plaintiff was informed that due to his failure in diligent compliance of dismantling work had resulted in problems in

that area for which the plaintiff was solely responsible, and therefore, he was asked to attend the meeting with the local administration, BHEL and NEEPCO but he did not attend and he was throughout non-cooperating. Lastly, Mr. Acharjee, learned counsel argued that the plaintiff could not be allowed to take advantage of his own wrong, and therefore, the suit was liable to be dismissed.

[10] Mr. G.K. Nama, learned counsel for the plaintiff, Sri Niranjan Debnath, on the other hand, argued that his client would not have any grievance regarding the judgment of the Trial Court if the interest would be awarded to the plaintiff from the date of cause of action. Ld. Counsel prayed for awarding the interest on decreed amount from the date of cause of action till realization.

[11] So far the matter of territorial jurisdiction of the Trial Court, as raised, is concerned, the suit was tried by the Court of the learned Civil Judge, (Sr. Div.), Court No.2, West Tripura, Agartala and at the initial stage of trial, said Court had territorial jurisdiction over Bishalgarh area till it was bifurcated in the year 2018 after creation of a new judicial District for Sepahijala. Even after such bifurcation, both parties participated in the trial before the Court at Agartala without raising any objection. Therefore, the defendants had their acquiescence in this regard and they cannot be allowed now to raise such an issue at this appellate stage, more particularly, when there has been no resultant failure of justice by conducting trial of that suit by the Trial Court. Section 21 of Code of Civil Procedure creates a bar on raising such issue in the Appellate or Revisional Forum unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice.

[12] Regarding the next point of argument of Mr. Acharjee that due to flooding of the area by rain water, there was damage to the properties of neighbouring people at Bishalgarh and the plaintiff was, therefore, liable to bear the damages of the same. Clause 6 of "General/Special Conditions of the Contract cum Terms & Conditions" (Exbt.1/B) bears relevance which is extracted hereinbelow:

"6. Compensation payable to the Locals, if any, shall be to your account, with the exception to the Bishalgarh Bypass which is being dealt by us."

[13] As per above said clause, the obligation of payment of damages lies with the defendants. As per one dismantling status report dated 12.05.2013 (Exbt.12), as sent by the plaintiff to the defendants, the first part of such dismantling at Bishalgarh site was already completed and such dismantling work of second part was running at that time. It is also mentioned in that letter that first part of such work was only cutting of earth of 4-5 m. width at the center of the bypasses and depth up to top of the Hume pipes and second part consisted of the work of clearing of Hume pipes from river channel. The letter further indicates that it was agreed between the parties that first part of the work would be completed before arrival of rainy season and the second part would be started after the rainy season came. The witnesses of the plaintiff, i.e. PW-2 and PW-3 also stated that the first part of dismantling work at Bishalgarh site was completed within April, 2013 but in their cross-examination, even no denial as to abovesaid assertions was made from the side of defendants. On the other hand, examination-in-chief on affidavit of one witness namely, Sri Hemant N. Upadhyay was submitted before the Trial Court from the side of

defendants but he did not appear in the witness dock to face pertinent questions in cross-examination and no document was also proved as evidence to support their defence story including their claim that the dismantling work was ultimately done by engaging another contractor. Adverse inference under Section 114(g) of the Evidence Act, 1972 is, therefore, drawn against the defendants.

[14] Situated thus, no infirmity is found in the judgment of Trial Court by granting a money decree of Rs.17,75,000/- in favour of the plaintiff along with 10% interest per annum thereupon. However, admittedly, the dispute was regarding a contractual work of commercial nature where the plaintiff had invested his money and due to the blockade of the same, he suffered financially. Therefore, it would be just and proper if the Trial Court would grant interest from the date of cause of action and at the latest when the demand notice was sent by plaintiff on 17.07.2013 through his advocate. In view of the above, the impugned judgment and decree are liable to be modified only to the extent that the plaintiff will be entitled to interest @10% per annum on Rs.17,75,000/- from 17.07.2013 till realization.

As a result, the appeal bearing No.RFA 09 of 2023 is hereby dismissed being devoid of merit and RFA No.12 of 2023 is hereby allowed. It is held that plaintiff Sri Niranjan Debnath is entitled to get Rs.17,75,000/- from the defendants along with 10% simple interest per annum thereupon computing from the date 17.07.2013 till payment or realization.

Appeals are accordingly disposed of with cost in favour of plaintiff Sri Niranjan Debnath in both the appeals.

Registry is to prepare decree accordingly and to send down the LCR with a copy of this judgment and decree.

Pending application(s), if any, shall also stand disposed of.

(S.D. PURKAYASTHA), J

(APARESH KUMAR SINGH), CJ

Rudradeep

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