

(1973) 02 CAL CK 0028
Calcutta High Court
Case No: F.A. No. 576 of 1961

Kedar Nath Mall

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision: Feb. 19, 1973

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80
- Constitution of India, 1950 - Article 299
- Contract Act, 1872 - Section 65, 70
- Government of India Act, 1935 - Section 175(3)
- Limitation Act, 1908 - Article 85
- Limitation Act, 1963 - Article 1

Citation: (1974) 2 ILR (Cal) 509

Hon'ble Judges: Sen Gupta, J; Laik, J

Bench: Division Bench

Advocate: R.N. Mitra, Asoke Kumar Sen Gupta and Rathindra Kumar De, for the Appellant; B.S. Bagchi and Archana Sen Gupta for Respondent No. 1, H.C. Sen and Nani Gopal Das, for the Respondent

Final Decision: Dismissed

Judgement

Laik, J.

This is the Plaintiff's appeal directed against dismissal of his suit for a sum of Rs. 1,50,000 and odd as per accounts given in eight schedules to the plaint, that is, schedules A to H.

2. The Plaintiff's case in short was that the State of Bihar, the Respondent No. 1 in this appeal, introduced a scheme of monopoly purchase of rice and paddy in the district of Manbhum and in other districts in Bihar in the year 1947. The Plaintiff was a registered firm. It carried on business in foodgrains in Sadar sub-division of Purulia since 1943. The Plaintiff was appointed as agent by the State of Bihar for the

purchase of rice and paddy on behalf of the State Government on terms and conditions which were incorporated in agreements and writings which were duly executed by the Plaintiff and on behalf of the State of Bihar. It was the further case of the Plaintiff that it also worked as sub-agent of the Licensed Grain Dealers Syndicate, Purulia, (hereinafter referred to as L.G.D.S. or Syndicate for brevity) which was the agent of the Government of Bihar for the same purpose. The price of the commodities to be purchased and supplied by the Plaintiff to the Government was fixed by the Deputy Commissioner of Manbhum and the Plaintiff used to supply the foodgrains at the price so fixed.

3. Besides the value of rice and paddy the Plaintiff was to get

(a) transport charges and/or cart-hire for carrying the foodgrains from the place of purchase to the place from which the goods were despatched at the instructions of the Government;

(b) compensation for petrol coupons where the said coupons were not supplied by the Government;

(c) incidental charges including charges for weighment;

(d) cleaning charges;

(e) godown rent; and

(f) compensation for driage of the foodgrains.

4. It was also the case of the Plaintiff firm that under the terms of the agency and those of the sub-agency the Plaintiff had to purchase large stocks of foodgrains at different centres within the sub-division of Purulia. According to the Plaintiff, the said food grains became the property of the Government of Bihar because of the offer and acceptance of the terms between the parties. After the purchase of rice and paddy the Plaintiff used to store them in godowns previously approved by the authorities on behalf of the State Government. The Plaintiff also submitted reports for the same. After verification of the purchase reports advance payment was made by the State Government on interim bills made by the Plaintiff. As directed thereafter, the foodgrains so purchased were transported to different despatching stations from such godowns. After delivery of the foodgrains final bills were submitted for the price and other charges as mentioned above.

5. It was also the case of the Plaintiff that the business year of the Plaintiff runs from Chaitra Sudi 9 (Ram Navami) of each Sambat era and the accounts were maintained accordingly. The Plaintiff further stated that the agency between it and the State of Bihar continued till August 1955. A sum of Rs. 5,100 was furnished as security by the Plaintiff at the commencement of the agency which was refunded to the Plaintiff in October 1956.

6. The Plaintiff also stated that the account between the Plaintiff and the State of Bihar was open, current and mutual and a running one all the time. It was never finally and fully settled. The amounts mentioned in eight different schedules in the Plaintiff are due to the Plaintiff and he is entitled to recover the same. The details of the claims as mentioned in the schedules would be stated when we would deal with the said schedules one by one hereafter. The Plaintiff claims a total sum of Rs. 1,50,872-6-0. The suit was brought after service of notice under the provisions of Section 80 of the Code of Civil Procedure. The cause of action is alleged to have arisen on and from August 23, 1955, that is to say, the date of the first payment by the State of Bihar to the Plaintiff.

7. The Plaintiff also stated that the area within the district of Purulia was subsequently transferred to the State of West Bengal under the provisions of Bihar and West Bengal (Transfer of Territories) Act, 1956, with effect from November 1, 1956. Due to the fact that the Government of Bihar directed the Plaintiff to approach the State of West Bengal for its redress a notice u/s 80 of the CPC was also served on the State of West Bengal and, under the circumstances, the State of West Bengal is impleaded as the Defendant No. 2 in the suit.

8. The State of Bihar being the Defendant No. 1 in its written statement admitted that the Plaintiff was its agent and also a sub-agent of its Syndicate mentioned above. The State of Bihar, however, denied its liability to pay any of the claims of the Plaintiff. It had challenged them as false, fictitious and bogus. The plea of limitation was also taken in the written statement. Lastly, the State of Bihar maintained that whatever was legally payable by it to the Plaintiff had been fully paid up and nothing further remained to be paid.

9. The Defendant No. 2, the State of West Bengal, also filed its written statement. It maintains that it has no liability to pay anything to the Plaintiff particularly in view of the provisions of Section 33(1)(c) of the Bihar and West Bengal (Transfer of Territories) Act, 1956.

10. Nine issues were struck on the pleadings for determination. Five witnesses deposed on behalf of the Plaintiff and three on behalf of the Defendant No. 1 the State of Bihar. Voluminous documentary evidence was adduced on either side. That would be noticed at a proper place when each particular claim in respect of each schedule would be considered.

11. On a consideration of the evidence the learned Subordinate Judge, Purulia, found the claim of the Plaintiff to be untrue and incorrect. The Plaintiff's claim on account of each schedule was rejected by the learned Subordinate Judge. It also found that after acceptance of the final payment at the controlled rate the Plaintiff was estopped from claiming at a higher rate. The suit was held to be maintainable as framed. It was found that the Plaintiff had no cause of action in the suit. After the findings as above, according to the learned Judge, the question of limitation became

of academic importance. The learned Judge did not accept the argument advanced on behalf of the State of Bihar that the relationship between the Plaintiff and the said State was that of a buyer and seller. He came to the finding that the relationship between the parties was that of a principal and agent. But, after referring to the agreements and the other evidence on record, the learned Subordinate Judge *inter alia* came to the finding that the account maintained between the parties was not mutual, open or current. There were no reciprocal demands between the parties. The argument advanced on behalf of the Plaintiff that the contracts relating to transport charges, drriage etc. were all separate and independent contracts creating separate obligations between the parties independent of the agreements between them regarding purchase, and the supply of rice and paddy was not accepted by the learned Subordinate Judge. It was also found that the State of Bihar had and could have no occasion to make any counter claim on the Plaintiff. Ultimately, he came to the conclusion that Article 85 of the old Limitation Act had no application to the instant case and that, as such, the Plaintiff's claim must be held to be barred by limitation.

12. In deciding issue No. 4 the learned Subordinate Judge found in one sentence against the Defendant No. 1 that it was not open to the said Defendant to take recourse to the provisions of Section 175(3) of the Government of India Act, 1935, after reaping and receiving all the benefits arising out of the transactions between the parties.

13. In deciding issue No. 5 the learned Subordinate Judge found that the State of West Bengal, namely, the Defendant No. 2 cannot be saddled with any liability in view of the provisions of Section 33(1)(c) of the Bihar and West Bengal (Transfer of Territories) Act, 1956.

14. Issue No. 7 as to the legality and validity of the notice u/s 80 of the Code was decided in favour of the Plaintiff.

15. In view of the aforesaid findings, the learned Subordinate Judge dismissed the suit in its entirety with costs to both the Defendants.

16. Against the said judgment and decree of dismissal of the suit instant appeal has been preferred by the Plaintiff.

17. Elaborate arguments have been advanced by Mr. Mitra appearing on behalf of the Plaintiff-appellant. The main paper-book is heavy and contains several documentary evidences and particularly the accounts (Exs. F, 8 and 7 series). As many of the documents were not printed in the main paper-book, two supplementary paper-books were prepared. Even then, a few other relevant exhibits were not included in the said supplementary paper-books. We shall refer to the main paper-book as simply "paper-book" and we shall refer to the two supplementary paper-books as "S.P.B. No. I" and "S.P.B. No. II" as and when it would be necessary.

18. Mr. Bagchi, learned Advocate, appeared on behalf of the Respondent No. 1 the State of Bihar. He tried his best to support the judgment of the learned Subordinate Judge. Mr. H.C. Sen, learned Advocate, appeared on behalf of the Respondent No. 2, the State of West Bengal, and advanced his arguments which we would notice at a relevant place.

19. We shall first deal with the claims of the Plaintiff as given in the respective schedules to the plaint. We shall thereafter notice the other arguments as advanced by the learned Advocates before us.

130 paragraphs being discussions of the exhibits of the case are omitted.

20. Accordingly, we come to the final conclusion that the Plaintiff has not been able to prove any of its claims in respect of any of schedules A to H as made in the plaint.

21. Mr. Mitra made a comment that the State of Bihar did not produce certain documents and, if produced, would have gone against the State of Bihar. We must not forget the fact of the transfer of territories which took effect on November 1, 1956. The result was the transfer of records from the sub-division of Purulia to Patna, the headquarter of the State of Bihar. We can take notice of this fact also that the State of Bihar was somewhat handicapped, as noticed by the learned Subordinate Judge, after lapse of so many years, to produce all the relevant papers including the written undertakings of the Plaintiff.

22. In the facts and circumstances of this case, we are, however, inclined to disbelieve the story of the Plaintiff regarding these claims and believe the statements made in the written statement of the State of Bihar.

23. This might have been sufficient to dispose of the appeal on merits, but certain other important points were argued either by the learned Advocate for the Appellant Mr. Mitra, or by Mr. Bagchi appearing on behalf of the State of Bihar, and Mr. Sen appearing on behalf of the State of West Bengal, which we would now notice.

24. Mr. Mitra argues alternatively that even if the Plaintiff's case fails on the terms of the agreement as pleaded, his client is entitled to get a decree on the provisions of Section 70 read with Section 65 of the Contract Act. In other words, Mr. Mitra's case is that, as the Government enjoyed the benefit of an act of the Plaintiff which is non-gratuitous, the State is obliged to pay to the Plaintiff under the provisions of the said two sections or, in other words, the Government would not be allowed to enjoy the unjust enrichment.

25. The following three decisions of the Supreme Court were cited by Mr. Mitra in support of his argument. The first one is the case of [State of West Bengal Vs. B.K. Mondal and Sons](#), . The second case is of [V.R. Subramanyam Vs. B. Thayappa and Others](#), . The third case is of [Mulamchand Vs. State of Madhya Pradesh](#), . We find that in the case of [State of West Bengal Vs. B.K. Mondal and Sons](#), an alternative

case was made in the plaint which is not made in the instant case. Such a case was neither in the pleadings nor in the evidence nor argued before the trial Court there being no issue on the same. There is no evidence on the basis of which this Court can give a decree for compensation. The Plaintiff in the instant case proceeded either on the written terms of the agreement or the contract or on oral agreement. There was no third case which for the first time is sought to be raised here by Mr. Mitra on the provisions of the said two sections. The Supreme Court in the said decision pointed out that the claim was made in two ways: See the judgment in *State of West Bengal v. B.K. Mondal and Sons Supra* (781, Para. 1). It must not be forgotten that the trial Court, namely, G.K. Mitter J. sitting on the Original Side of this Court allowed compensation on the basis of Section 70 of the Contract Act which ultimately went up to the Supreme Court and Gajendragadkar J., as his Lordship then was, delivered the judgment making the observation that the Plaintiffs in certain cases were entitled to compensation u/s 70 read with Section 65 of the Contract Act. Nevertheless, his Lordship made it clear that the two fields were entirely different. If we closely read the other judgment of Sarkar J. sitting with Das Gupta J. of the same Bench, we find certain reservations in the said judgment, There is another ground on which this Supreme Court case can be distinguished from the facts in this case, namely, that Section 70 speaks of voluntary acceptance which is not proved in the instant case. It will further be noticed that the Division Bench judgment of this Court in the case of *Union of India v. Ramnagina Singh* (1951) 89 C.L.J. 342, a judgment of P.B. Chakrabartty J., as his Lordship then was, sitting with S.R. Das Gupta J., was approved in the said Supreme Court judgment in the case of *State of West Bengal v. M/S B.K. Mondal and Sons Supra*. In this connection we might also mention that a judgment of a Single Bench of P.B. Mukharji J., as his Lordship then was, in the case of [Anath Bandhu Deb Vs. Dominion of India](#), on the provisions of Section 70 of the Contract Act, relied on by Mr. Bagchi, was disapproved by the said Supreme Court decision.

26. It might also be noticed that in the Supreme Court decision in the case of *M/s. B.K. Mondal and Sons Supra* another earlier decision of the Supreme Court on a similar question in the case of [Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar](#), was not noticed. In the said decision of *M/s. Trojan and Co.*'s case it appears that it is laid down that an alternative case must have to be pleaded. *M/s. Trojan and Company*'s case was further explained by Gajendragadkar C.J. in the case of [Bhagwati Prasad Vs. Shri Chandramaul](#), .

27. In the Supreme Court case of *Mulamchand v. State of Madhya Pradesh Supra*, cited above, the claim for refund was made on the basis that there was no valid contract. But, in the instant case, the Plaintiff proceeded on the footing that the contracts were valid, and we have held so agreeing with the trial Court that Ex. D is a state of valid contract between the parties. Moreover, in the said Supreme Court case the Appellant abandoned the contracts of his own accord. Their Lordships observed that Section 70 of the Contract Act presupposes a different kind of

obligation. It is a third category of common law. An accounting by the Plaintiff is a condition for restitution. Therefore, it does not apply here. In the other Supreme Court decision relied on by Mr. Mitra, namely, the case of V.R. Subramanyam v. B. Thayappa Supra full evidence for compensation was given. It was a case between the private parties and not a case under the provisions Section 175(3) of the Government of India Act or Article 299 of the Constitution. We do not find any indication as to whether any alternative case was made in the said decision. But this decision also does not refer to the afore-mentioned M/S. Trojan and Co."s case Supra. This case also is, therefore, distinguishable.

28. In the cited case of [Seth Bikhraj Jaipuria Vs. Union of India \(UOI\)](#), we do not find any discussion of Section 70 of the Contract Act.

29. Mr. Mitra also relies on a Bench decision of the Patna High Court in the case of [Keshab Kishore Narain Saraswati Vs. State of Bihar and Another](#), . In our opinion, the said decision does not lay down any new principle except the principle stated in the said three Supreme Court decisions referred to in this case the Patna High Court. The observation in the judgment of the aforesaid case of Keshab Kishore is to the following effect:

If a very technical and strict view was to be taken of the complaints, it can be said that on the facts alleged in them, no claim u/s 70 of the Indian Contract Act could be maintained; but for the application of the principles of Section 70 of the Indian Contract Act, such a strict and technical view of the complaint could not be taken. If there is sufficient evidence to show to what extent the Respondents have been benefited, there can be no difficulty in allowing the appeal and decreeing the suits of the Plaintiff.

Their Lordships observed in the said paragraph (Para. 10) that all the materials requisite for determining the quantum of compensation are on the record. We may once more repeat that such evidence is not on the record before us in the instant case. It is also our view that the principle laid down in the portion quoted above by the said Patna High Court decision is slightly wide and wider than what the Supreme Court sought to lay down by all the aforesaid decisions.

30. Lastly, on this point Mr. Mitra relies on an unreported Bench decision of this Court in Zilla Parishad, 24-Parganas v. P.K. Bhattacharjee and Co. F.A. No. 202 of 1964 dated December 3, 1971. The facts in the said unreported case can easily be distinguished from the facts in the present case, namely, that Section 70 of the Contract Act as well as the alternative case were pleaded in the said unreported decision and that the evidence on the alternative case was complete, which are absent in the instant case.

31. For all these reasons, we are unable to accept the argument of Mr. Mitra that his client is entitled to get a decree on the basis of the provisions of Section 70 read with Section 65 of the Contract Act.

32. A point is argued that the suit is bad for non-joinder of parties and, particularly, for non-impleading the Licensed Grain Dealers Syndicate in the suit. It is also argued that the suit is bad for misjoinder of causes of action.

33. Certain facts need be stated in short to appreciate the argument on this point. It was pointed out that it was the Plaintiff's case that since 1943 the Plaintiff's firm carried on business in foodgrains at Purulia (P.W.I, p. 51 of the Paper Book, Pt. I). In the year 1946, the monopoly procurement scheme and also the levy scheme came into force (vide P.W. 1, p. 51 of the Paper Book, Pt. I, and Ex. A(3), p. 3, S.P.B. No. II). For paddy levy see ex. 8 (p. 54 of the Paper Book, Pt. II). For the year 1946-47, the Licensed Grain Dealers Syndicate was the only purchasing agent of the Government and there were about 190-192 sub-agents of the Syndicate (D.W. 1, p. 63, line 12 of the Paper Book, Pt. I). The Plaintiff's own witness (P.W. 1, p. 51, lines 22-30 of the Paper Book, Pt. I) stated that from the year 1947

the Government appointed our firm Licensed Grain Dealers Syndicate of Purulia as agent.... We were also Syndicate's agent.

In 1946, the Plaintiff firm M/s. Kedar Nath Mall was registered under the Indian Partnership Act (Ex. 10). On December 21, 1946, Sri K.N. Mall personally was a sub-agent under the Syndicate and also he was a member of the Syndicate (Ex. 8, pp. 12-72 and also other pages in Ex. 8 of the Paper Book, Pt. II). It might be noticed at p. 93 of the Paper Book, Pt. II (Ex. 8) that the bag account of the Plaintiff firm M/s. K.N. Mall appears. P.W. 2 at p. 58, lines 20-21 of the Paper Book, Pt. I, deposed that K.N. Mall (not the firm) was the purchasing agent of the Government and that was subsequent to the year 1947-48, but he does not remember since when. On November 24, 1949, K.N. Mall was the Secretary of the Syndicate (Ex. 10(z)5, p. 46, S.P.B. No. I) and also on March 16, 1953 [Ex. 3(n)]. P.W. 1 at p. 55, line 41 of the Paper Book, Pt. I, deposed that as Secretary of the Syndicate K.N. Mall sent a letter "to our firm directing us to do the cleaning work".

34. The Plaintiff's own witness P.W. 2 admits at p. 57, line 48 of the Paper Book, Pt. I, that M/s. K.N. Mall, namely the Plaintiff, was the sub-agent of the Syndicate. Exhibit F (p. 985 of the Paper Book, Pt. II), on the other hand, shows that the Plaintiff was the agent of the Government on September 11, 1947. P.W. 1 (p. 55, line 27 of the Paper Book, Pt. I) stated that there were despatches by the Plaintiff on behalf of the Syndicate. Exhibit 1(z)6 (p. 47, S.P.B. No. I) shows submission of purchase reports by the Plaintiff to the Syndicate.

35. On February 19, 1948, disputes between the agents (Syndicate) and the Plaintiff (as sub-agent) were referred to the D.C. for settlement (see Ex. 1(g), p. 8, S.P.B. No. I). On March 2, 1948, K.N. Mall, an individual member of the Syndicate, undertook to supply 32,000 mds. of rice. On April 11, 1948, in the personal ledger account of M/s. K.N. Mall, there appears a note of the Syndicate and the co-partners (Ex. F, p. 76 of the Paper Book). On May 31, 1948, monopoly came to an end and decontrol was

effected on June 1, 1948 (P.W. 1; p. 53, line 50 of the Paper Book). On March 2, 1949, it appears again that K.N. Mall was one of the purchasing agents of the Syndicate who were Government purchasing agents, (Ex. A(13), p. 28, S.P.B. No. II, and D.M. 1, p. 62, lines 23 and 24 of the Paper Book). The Government, however, admitted in its written statement (p. 31 of the Paper Book, Pt. I) that the Plaintiff was agent of the Government in 1949-50.

36. Before April 25, 1952, the Syndicate was defunct. But, according to the Plaintiff, its agency continued upto August 1955.

37. Security amount of Rs. 5,000 deposited on behalf of the Plaintiff was withdrawn on October 29, 1956 (Ex. 7, p. 209 and Ex. 7(a), p. 236 of the Paper Book, Pt. II). On November 1, 1956, the transfer of territories was effected and a part of the sub-division of Purulia was transferred to West Bengal.

38. This is the history which, according to us, was a part of the intelligent matrix within which the case fabric was sought to be shaped by the Plaintiff for his silly business.

39. The picture arising from the aforesaid statements is nothing but hazy and confusing. It calls for strident criticism. Nevertheless we cannot give effect to the contention of Mr. Bagchi that the suit should fail only because of the non-joinder of the Syndicate. There is no definite assertion made in the written statement made on behalf of the State Government on this issue. The only statement was made that the suit was not maintainable and Mr. Bagchi wanted to argue that that would include this issue of non-joinder of parties and misjoinder of causes of action. We are unable to accept the contention of Mr. Bagchi. No issue has been raised on this point. No argument was advanced before the trial Court. No evidence has been adduced and it would not be proper for us to dismiss the suit on this ground though we must say that suspicion as to the position of the Plaintiff vis-a-vis the State of Bihar lingered in our mind as we got enmeshed for sometime. We have also seen that whenever it suited to the Plaintiff, it attempted to become agents of the Government and simultaneously sub-agents of the Syndicate and vice versa which was a matter of simmering controversy. Mr. Mitra maintaining his characteristic vehemence ran into difficulties in arguing this point and he became a victim of his own proposition. Though his argument was concealed in polite language of which optimum use was made, it must be taken as an extension of his major failure to substantiate the point that the position of the Plaintiff was clear and definite all the time. In dealing with each schedule, we have noted the position Mr. Mitra took as regards his client's agency and sub-agency vis-a-vis the Government. Though we make it clear that it does not involve a charge of creating confusion in the mind of the Court. Serious doubt as to the Plaintiff's position persisted in us because of the casting of the long shadow. A few will disagree and a judicial hand wrote at an early period that the Bar is entrusted with anxious responsibilities with a high sense of honour of granite discretion and with strictest observance of fiduciary responsibilities. However, we

need not pursue this matter further except stating that we expected better assistance from Mr. Mitra as he had to abandon the logic of his own reasoning at the end. But we had the assistance of an extremely clear judgment of the trial Court. It has got closeness of approach on most matters. With these observations we close the discussion on this issue.

40. Mr. Mitra in answer to Mr. Bagchi's argument says that the suit is within time and it is not barred by the statute of limitation. According to him, Article 85 of the Limitation Act, 1908, (which is Article 1 of the Schedule of the Limitation Act of 1963) would apply. He relies on the plaint statement that the cause of action has arisen from August 23, 1955. He developed his argument by saying that the account of the Plaintiff with the Defendant No. 1, namely, the State of Bihar, was mutual, open and current and the account was not closed till October 1956 when the security amount was withdrawn. As the suit was instituted within two years of the said date, the suit is not barred by limitation. Mr. Mitra made use of certain decisions to shorten the edge of laws.

41. The argument of Mr. Mitra is fallacious and should be rejected on the following grounds:

(i) There is no running account between the Plaintiff and the Defendant No. 1. Ordinarily, the expression "running account" is not a self-wielding sword nor does it serve as a talismanic test. The expression again is not a broad vague generality whose contours might be invoked to abridge the fundamental principle of accounting embodied in it. It is the Plaintiff's own admission that agreements were entered into year to year or, in other words, there were separate agreements each year (vide P.W. 1, p. 51, line 30 and p. 55, lines 1-7 of the Paper Book, Pt. I). Agreement for a particular year was: stated even in the plaint (see Para. 2, p. 11, line 47 of the Paper Book, Pt. I). D.W. 1 also supported at p. 65, line 25 of the 1973 Paper Book, Pt. I, about the execution of separate agreements.

(ii) Mr. Mitra relies on Ex. 11 (p. 1305 of the Paper Book, Pt. II), namely, the monopoly scheme already referred to in para. 72. Clause (11) state of that scheme of p. 1306 of the Paper Book, pt. II itself states that "the personal ledger is a sort of running account with each agent with the District Supply Officer and should be closed monthly and the balance struck" (lines 13-15 of the said p. 1306). I italicize the word "sort". This demolishes the case of Mr. Mitra about the theory of a proper legal running account.

(iii) If we scrutinise Ex. D, the only agreement which has been relied on by Mr. Mitra (already referred to in paras. 76 and 77), we find that it was for a definite period of one year. The terms provided that money would be paid within three months of the determination of the agreement or on expiry of the same and, on failure of such payment, it would be competent for the party to take legal action or, in other words, the cause of action would then arise. Clause 9 of the said agreement provides about

the payment either in advance or on account or by instalments or by adjustment of earlier dues. Exhibit F is another document (already referred to in paras. 69 and 70) which shows that the amount was transferred to a "new account" as opposed to a running account. That goes against the submission of Mr. Mitra of the account being running.

(iv) Moreover, as Mr. Bagchi demonstrated before us that the final payments were made on the final bills submitted by the Plaintiff, and in many of the exhibits accounts were closed and that is noted. We may refer to Ex. A(7) (p. 12, S.P.B. No. II) where the account for the year 1049-50 was closed on January 13, 1951. That was supported by Ex. F at p. 91.

42. Mr. Mitra also submitted that there were reciprocal demands between the Plaintiff and the State of Bihar and he relied on certain entries in Ex. F. But if we closely scrutinise the said exhibit, we find that the entries at pp. 1189-92 of the said exhibit relate to the year 1950-51 (see p. 1177) and they do not relate to the period in suit. Again p. 997 of the said exhibit, though originally noted as carried over to the next month, but then it was penned through. If we go to p. 1003 of the said exhibit, we find that the claim in schedule F was finally paid on February 19, 1948. We do not find any entry as carried over or brought forward in the so-called account which Mr. Mitra termed as reciprocal, running and mutual.

43. Mr. Mitra relies on a Bench decision of this Court in the case of the Tea Financing Syndicate Limited v. Chandra Kamal Bezboruah (1930) 34 C.W.N. 1175. Rankin C.J. in deciding the said case has laid down and/or adopted, inter alia, the principles in applying the provisions of Article 85 of the Limitation Act that the conditions of the applicability of the said Article are, that there must be cross-claims arising out of a course of dealing which evidence is referable to an intention of set-off and that there must be transactions creating independent obligations on each side, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. There must be evidence of an open and unliquidated account between the parties and then only limitation is saved for the whole account inasmuch as such transaction means an implied admission of the prior existing debt, each article on such an account on one side being itself equivalent to a part-payment of the bill on the other and a promise to pay the balance. In the facts of this case, with which we are now dealing, the Plaintiff is either appointed agent or sub-agent by the Government and they undertook to supply rice to the Government. The rates under the terms of the agreement vary from year to year. In such circumstances, those principles, which Rankin, C.J. has laid down, are inapplicable. In the said reported decision it was a financing syndicate which was advancing money to tea estate. We do not find any obligation on the part of the Government to pay the money for the foodgrains that the Plaintiff was directed to supply.

44. The attention of their Lordships was not again drawn to a more valuable authority of this Court in the case of *Ram Pershad and Anr. v. Harbans Singh and Ors.* (1907) 6 C.L.J. 158. The said judgment has also been relied on by the Supreme Court in deciding such a question. Sir Ashutosh Mookerjee J. delivering the judgment on behalf of the Bench laid it down that an open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. We have already held that in the instant case the accounts were closed on the claims in each and every schedule of the plaint and it cannot be stated that it was unclosed. What is a running and mutual account has also been clearly laid down in the said decision. His Lordship has made it clear that mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having state of items on one side only though made up of debits and credits. This is the state of affairs which actually happened in the instant case with which we are dealing. Because there are credits and debits, Mr. Mitra wanted us to come to the conclusion that there is mutuality of obligations between the parties because at one point of time the Government is the creditor and at another point of time the Plaintiff is the creditor. Sir. Ashutosh Mookerjee J. has further laid down that an account under which one party has merely received and paid monies on account of the other is not a mutual account properly so called. Each party must receive and pay on account of the other. These conditions are not fulfilled in the instant case. His Lordship also thought of a shifting balance, sometimes in favour of one side, sometimes in favour of the other, and held that the same might be a test of mutuality but its absence was not conclusive proof against mutuality. There are one or two circumstances in the reported decision which also we do not find that they are so in the instant case. That a sum was shown to the credit of the Plaintiff in the ledger account would not make the account between the parties a mutual account under the law in which there have been reciprocal demands between the parties. The principle laid down in this decision has been unanimously followed by this Court in all cases upto this date and has not been disapproved by any higher Courts--Privy Council, Federal Court or the Supreme Court.

45. Mr. Mitra also relied on a decision of the Supreme Court in the case of [Kesharichand Jaisukhal Vs. The Shillong Banking Corporation](#), and drew our attention to paras. 9, 10 and 11 of the said decision. It should be noticed that it was found by the Supreme Court that there was no dispute that the account between the parties was at all times on open and current one. The only dispute was about the mutuality. To decide the said point of mutuality his Lordship Bachawat J. referred to the following facts:

The Respondent Bank gave loans on overdrafts, and the Appellant made deposits. The loans by the Respondent created obligations on the Appellant to repay them. The Respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for

collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the Appellant were not merely complete or partial discharges of its obligations to the Respondent. There were shifting balance; on many occasions the balance was in favour of the Appellant and on many other occasions the balance was in favour of the Respondent. There were reciprocal demands between the parties, and the account was mutual.

On these facts his Lordship held that the suit was not barred by limitation. We have pointed out that these conditions are not satisfied in the instant case. There is no independent obligation on the part of the Government though there are transactions between the Plaintiff and the Defendant No. 1

46. Therefore, accepting the reasonings given by the trial Court on this issue, namely issue No. 3, we hold that the suit is barred by limitation. Mr. Mitra also relied on another decision in the case of [Dau Dayal Vs. Pearey Lal and Others](#) . But this decision again has relied on the aforesaid decision in Ram Persad's case Supra. All the learned Advocates stated before us that they could not find out any reported decision where any State Government was involved in a mutual accounting with a private party. The submission that the State Government was also making a karbar with the private parties being on reciprocal demands is difficult to accept.

47. We come to the last point, namely, as to the liability of the State of West Bengal a low-priority issue. Argument was advanced by Mr. Mitra that the State of West Bengal is liable for the amounts claimed in the suit. Mr. Sen, however, appearing for the State of West Bengal took a measured trudge round the suburbs of his subject. He drew our attention to para. 25 of the plaint to the effect that, because the State of Bihar directed the Plaintiff to approach the State of West Bengal after the transfer of territories, the State of West Bengal is impleaded in the suit. There is no specific allegation made in the plaint against the State of West Bengal. There is no mention that the State of West Bengal is liable (see para. 29 of the plaint as also the prayer portion). Again, there is no specific mention for passing a decree against the State of West Bengal though it is stated "against the Defendants" and the State of West Bengal is the Defendant No. 2. In the nature of the pleadings, we are of opinion that the State of West Bengal has been impleaded as if in the nature of a pro forma party. We do not also find either any oral or documentary evidence fixing the liability of the State of West Bengal. The written statement on behalf of the State of West Bengal is also very short. It is submitted on behalf of the State of West Bengal that it is not in a position to controvert the statements made in the plaint after a portion of the territories has been transferred to this State.

48. If we now turn to the provisions of the Bihar and West Bengal (Transfer of Territories) Act, 1956 (XL of 1956), we find that the appointed day on which the said Act came into force was November 1, 1956. The provisions of the little-noted section, namely, Section 33, Sub-section (1) and particularly on Clause (c) of Sub-section (1)

are as follows:

33(1) Where, before the appointed day, the State of Bihar has made any contract in the exercise of its executive power for any purposes of the State, that contract shall be deemed to have been made in the exercise of the executive power--

(a) of Bihar, if the purposes of the contract are, as from the appointed day, exclusively purposes of that State;

(b) of West Bengal, if the purposes of the contract are, as from that day, exclusively purposes of the State; and

(c) of Bihar, in any other case, and all rights and liabilities which have accrued, or may accrue, under any such contract shall, to the extent to which they would have been rights or liabilities of Bihar, be rights or liabilities of Bihar or of West Bengal, as the case may be:

Provided that in any such case, as is referred to in Clause (c), the initial allocation of rights and liabilities made by this Sub-section shall be subject to such financial adjustment as may be agreed upon between the two States, or in default of such agreement, as the Central Government may by order direct.

49. It may be pointed out that the purpose of the contract, which is the subject-matter of the instant suit, can in no case be stated exclusively for the purpose of the State of West Bengal as thought of in Clause (b) of Sub-section (1) of Section 33. Mr. Sen drew our attention to Section 3 and, particularly, Clause (b) of Sub-section (1) of that section, and pointed out that the whole of the sub-division of Purulia has not been transferred to the State of West Bengal. Chas, Chandil and Patamda Police Stations of Barabhum, which were within the Purulia sub-division, were not transferred. He refers to several exhibits, namely, Ex. 11 which shows in para. 2 thereof the whole of the area of Manbhum sub-division and Ex. 3 series and several pages of Ex. F which show that the despatches of foodgrains were for Chandil, Jamalpur, Chas, Jamshedpur, Tatanagar and Begusarai which are admittedly still in the State of Bihar. The plaint schedules A, D and G themselves would show these places. Both purchases and despatches are from various places still in Bihar. On the interpretation of the said provisions we accept the submission of Mr. Sen that Clause (c) of Sub-section (1) of Section 33 applies, that is to say, if there be any liability, the same would be of the State of Bihar and not that of the State of West Bengal though we have held that there is no liability also of the State of Bihar in this case.

50. We may note that Mr. Sen has adopted the argument of Mr. Bagchi on all other points and strongly relied on the said decision in Ram Persad's case Supra. We may also note that the learned Judge also found no liability of the State of West Bengal though no detailed reasonings have been given by the learned Subordinate Judge.

51. We, accordingly, for the reasonings recorded aforesaid, find that the appeal has got no substance and the same must be dismissed with costs which we assess for hearing at 10 (ten) gold mohurs to each of the Respondents for each hearing day.

52. We listened to the arguments by naked ears for about 17 days with patience, expressed no less forcibly, but we have ultimately come to the conclusion with decent respect that both facts and law are with the Defendants-respondents. In awarding costs we have taken into consideration that the suit is a fictitious and frivolous one and the hearing was unnecessarily protracted. It is a pure gamble. The suit would not have been filed if there had been no transfer of territories. It is no better than bad. The Plaintiff, as we have shown in our detailed analysis before, eyed to target both the States placing itself in the position of an agent and sub-agent of the State of Bihar as if twin sisters to be found together. But he ultimately failed. One need not have to have too hot an imagination to anticipate the consequences. It is a sickening hypocrisy of the Plaintiff to a wide and deep extent to place P.W. 1, a partner of the firm, in the witness-box to tell all sorts of lies and to retreat after dishing out many distorted facts. He dreamt many things in his waking hours in the witness-box, but he is ultimately caught on the sorrowful wheel of costs.

Sen Gupta J.

I agree.