(1975) 02 J&K CK 0005

In the Jammu And Kashmir High Court

Kohli Brothers APPELLANT

Vs

State of.J.and K RESPONDENT

Date of Decision : 24-02-1975

Acts Referred:

Jammu and Kashmir Limitation Act, 1995 — Article 119, 14, 145, 68, 92
Limitation Act, 1908 — Article 97

Citation : AIR 1977 J&K 55 : AIR 1975 J&K 62 : (1975) JKLR 485 : (1975) KashLJ 417 : (1975) KashLJ 431

Hon'ble Judges : S.MURTAZA FAZL ALI, C.J;JASWANT SINGH, J and D.D.THAKUR, J

Bench : Full Bench

Advocate : R.N. Bhalgotra, for Petitioner: R. P. Bakshi, Advocates appearing for the Parties

Judgement

Jaswant Singh, J.

(1) The Conservator of forests, Jammu Circle, issued a notice in the year 1965 inviting tenders from persons and firms registered as Forest

Lessees in the Forest Dep. of J & K Government for the purpose of leasing out the right to convert and remove beyond the limits of the

demarcated Forests timber and firewood from trees marked for felling interalia in compartments Nos: 1 and 2 of Billawar Range and

Compartments Nos : 55, 56 57 and 58 of Basohli Range. In response to this notice the plaintiff, Messrs Kohli Brothers, which is a partnership

firm, submitted two tenders offering Rs. 16, 51,000/ in respect of Compartment Nos 1 and 2 of Billawar Range & Rs 22, 31, 000 00 in respect of

Compartments Nos : 55, 56, 57 and 58 of Basohli Range. Both these tenders were accepted by the Government. Whereas the plaintiff executed

the agreement in respect of lease of Compartments Nos : 55, 56, 57 and 58 of

Basohli Range, it did not, despite the intimation given to it by the

Conservator of Forests that the Govt. had accepted its offer in respect of Compartments Nos : 1 and 2 of Bilawar Range and it should pay the

balance of security of Rs. 8, 020/ and l/5th of the total sinking fund amounting to Rs. 3, 302/and sign the formal agreement in terms of the tender

notice, comply with the directions. On failure of the plaintiff to pay the balance of the security money etc. and to execute the agreement as provided

in the tender notice, the earnest money of Rs. 22. 000.00 deposited by it was confiscated and intimation thereof was given to it by the Conservator

of Forests on February 1, 1966. This action against the plaintiffs was taken in terms of Clauses 15 and 16 of the tender notice which read as under

:

15. The earnest money that must accompany each tender is given in the statement attached to clause 2 and must be in the form of revenue deposit

receipt from any treasury of Jammu and Kashmir State or a deposit receipt from any bank recognized by the Jammu and Kashmir Government

pledged to the Conservator of forests Jammu Circle, Jammu. The earnest money will be returned to unsuccessful tenderer but retained in the case

of successful tenderers and will count as part of the security money which will be 6% of the annual lease value but in no case less than 1%of the

total lease value rounded off to the nearest thousand. The C. C F. may however increase the security to any amount not exceeding 6% of the total

royalty.

The annual lease value works to 1/2 of the total royalty of one year, 1/3 for two years, 1/4 th for three years and 1/n + 1 for then year lease.

16. The successful tenderer will have to pay the balance of the security which shall have to be deposited in the treasury or bank mentioned in

clause 15 above and sign the agreement within fifteen days of the acceptance of his tender otherwise his earnest money will be forfeited and the

purchasers will be debarred from taking further leases and the lease will be sold afresh or allotted for working at the discretion of the department,''

(2) On April 1, 1972, the plaintiff brought the present suit for recovery of Rs. 25.000/ against the State alleging inter alia that the tender notice

issued by the Conservator of Forests was illegal as be was not the competent authority for inviting tenders from the intending forest lessees, that on realining this illegality it intimated to the government that it would not be in a position to work the lease, that it also informed the Government that

since it was not in a position to work out both the leases simultaneously, the working of lease of Compartments Nos: 1 and 2 of Billswar Range be

allowed to be defered, that the Govt. did not consider the prayer of the plaintiff? sympathetically and being fully conscious of the fact that the

tender notice was illegal and the acceptance of the bid in response thereto was not enforceable, it illegally ordered on Feb. 1, 1966 the

confiscation of the earnest money of Rs. 25,000 deposited by the plaintiff and deregistered the firm, that both the aforesaid orders of forfeiture of

the earnest money and deregistration of the firm were unauthorised and illegal, that both orders being illegal, it i. e. the plaintiff served a notice on

the Chief Secretary to Government of Jammu and Kashmir on January 28, 1972, calling upon the Govt, V to refund Rs. 25,000/, that as the Govt.

neither sent a reply to the notice nor returned the earnest money, hence the suit.

(3) The suit was resisted by the Govt. interalia on the ground that it was time barred.

(4) On Nov. 5, 1972 a number of issues ineluding the one as to whether the suit was time barred were framed.

(5) On the case coming up before Justice Thakur it was contended before him on behalf of the plaintiff that the suit was governed by Article 119 of

the Limitation Act No. IX of 1995 (1938 A. D.) hereinafter referred to as 'the Limitation Act'. On the other hand it was contended by Mr. R. K.

Bakshi appearing on behalf of the defendant that the suit was governed by Article 68 of the Limitation Act. Feeling that important question of law

relating to the application of various articles of the Limitation Act arose in the case. Thakur J. ordered that the pears be placed before the Hon'ble

Chief Justice for constituting a Division Bench for decision of the question. On the matter coming up before the D vision Bench which was

accordingly constituted by the Hon'ble Chief Justice, it was argued before it on behalf of the plaintiff that the suit was governed either by Article

145 or 119 of the Limitation Act. On the other band it was reiterated on behalf of defendant that the suit was governed by Article 68 of the

Limitation Act. A number of decisions expressing divergent views were cited before the Division Bench by the learned Counsel for the parties. In view of the fact that there was no decision either of the Supreme Court or of our own Court bearing on the point, the Division Bench considered it

necessary to refer the following question to a full Bench.

''Whether in the facts and circumstances of the present case, the plaintiff's suit is governed by Articles 145, 119 or 68 of the State Limitation Act.

(6) this is how the matter is before us.

(7) Learned counsel for the parties have reiterated the contentions urged by them before the Division Bench For a proper determination of the

question involved in this reference, it is necessary to refer to the following Articles of the Limitation Act:

Art. No.

Description of the suit

Period of Limitation

Time from which Period begins

68. For money paid upon an existing consideration which afterwards fails

3 years

The date of the failure.

92. For money payable by the defdt. to the pltff. for money received by the deftd. for the plaintiffs use.

6 years

When the money is received.

119. Suit for which no period of Limitation is provided elsewhere in this schedule

6 years

When the right to sue accrues.

145. Against a depository or a pawnee to recover movable property deposited or pawned.

30 years

Date of the deposit or pawn.

(8) It is now well settled the Art. 119 which corresponds to Art. 120 of the Indian Limitation Act (1908) is a residuary Article and applies only

when no other Article applies. Let us therefore, see as to which of the other three above mentioned Articles of the Limitation Act is applicable to the present case.

(9) So far as Art: 145 is concerned, it has in my opinion no application to the present case. The context in which the word 'depository' is used

indicates that the deposit should resemble a pawn or should be in the nature of a trust. It would be clear from the terms of the Tender Notice (

Exhibit DA) which is admitted by the plaintiff that the money of which recovery is sought, was intended to serve as a security for the lease

sanctioned in its favour. There is nothing in the Tender Notice to show that the deposit in question possessed an element of entrustment. It is

nowhere provided in the Tender Notice that the deposit would be kept as a separate fund or in other words that there would be a segregation of

the amount' which would have gone a long way to impress it with the character of a trust In M/s Rai Bahadur Seth Jessa Ram Fateh Chand Vs.

Om Narain Tankha and another AIR 1967 SC 1162 where Rs. 50, 000/ were deposited by the appellant as security for due performance of the

contract Wanchoo J. (as His Lordship then was) speaking for the Court said :

''The mere fact that money was deposited as a security is not sufficient to come to the conclusion that it must be treated as trust money. The court

will have to look to all the terms of the agreement if in writing and to the facts and circumstances of the case and to the conduct of the parties

before coming to the conclusion whether a security deposit was impressed with a trust. If a trust can clearly be spelled out from the terms of the

agreement that ends the matter. But if the trust cannot be spelled out clearly, the facts that there was no segregation provided for and the fact that

interest was to be paid would go a long way to show that the deposit was not impressed with the character of a trust particularly where the person

with whom the deposit was made could mix it with his own money and could use it for himself.

(10) Another factor which inclines to me hold that Art 145 cannot be invoked, in case of refund of earnest money is that whereas under Art. 145

time for suit begins to run from the date of the deposit or pawn in case of a deposit made for the performance of a contract the deposit does not

become returnable until the happening of a certain contingency. I am fortified in this view by a catena of authorities.

(11) In Dhanraj Mills Ltd. Vs. Laxmi Cotton Traders, Bombay AIR 1860 Bombay

404 Chrgle C. J. speaking for the Bench said :

The deposit contemplated by Art, 145 is a deposit which must as far as possible be approximated to a pawn as the expression ""depository'' in

Art. 145 must take colour from the expression that follows, viz; 'pawnee'. Thus the deposit to which Art. 145 applies is only that deposit where

there is an element of entrustment, which may be as security for a debt as in a pawn, or safe custody as in a deposit. In the case of a deposit made

for the performance of a contract, the deposit does not become returnable until the happening of a certain contingency. Hence is neither an

entrustment as security for a debt nor an entrustment purely for safe custody.

(12) A deposit for the performance of a contract is not merely a part payment, but is also an earnest to bind the bargain so entered into, and

creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. Hence, a suit for the return of a deposit made by the

plaintiffs for the due performance of a contract, which deposit by its very nature was to serve both the purpose of a part payment and an earnest,

does not fall under Art. 145

(13) Similar view have been expressed by the Patna and Rajasthan High Courts in Union of India Vs. Gangadbar Himraj and another, AIR 1962

Pat. 372, and in Badri Prasad Vs. The State of Rajasthan AIR 1968 Raj. 59 respectively. The following passage occurring in AIR 1968 Rajasthan

59 will amply repay a perusal :

A perusal of Art. 145 shows that there are three points to be borne in mind while considering its application : (i) the article does not appear in that

part of the schedule which deals with claims for the recovery money; (ii) the claim for refund of deposit mentioned in the article ranks with a claim

in respect of a pawn and (iii) the starting point of limitation is the date of the deposit. All these features of article 145 are important and have to be

considered while deciding the question of its applicability to the present case.

(14) The view expressed by Chagla C, J. in Dhan Raj Mills Ltd. Vs. Laxmi Cotton Traders Bombay (Supra) was reiterated in Shanker

Moreshwar Kulkarni Chinchwadbar Vs. State of Maharashtra AIR 1970 Bombay 8.

(15) The matter was also considered in two decisions of a Travancore High Court. In. Harayana Pillai Vs. Chithanbaram Phillai. 15 Trav L. R. 51

a Full Bench of the court while considering the scope of Art. 122 of the Travancore Limitation Regulation which corresponds to Art. 145 of our

Limitation Act, held that the Article will apply only to deposit, of moveable property which has to be returned in specie. In another case Chacko

Vs. Nathew (1918) 8 Trav L J 346 it was held that even assuming that the word moveable property employed in the Article included money no

person could be held to be a 'depository' unless the identical property left with the person was intended to be returned to the owner.

(16) Again in Bala Krishnudu Vs. Narayanaswami AIR 1914 Mad. Sir Charles Arnold White C. J. held that the word 'pawnee' which occurs in

conjunction with the word 'depositor' seems to be wholly inappropriate to the case of money.

(17) In Joseph Annemma Vs. Thressiamma and others AIR 1972 Ket. 170, Roti J. observed that the view expressed by Sir Charles Arnold

White C. J. in AIR 1914 Mad. 4 (Supra) is entitled to a considerable weight.

(18) The view expressed by Karsimham J. in Union of India Vs. Moh'd Sultan AIR 1966 Andhra Pradesh 218 that's suit for recovery of money

kept as security deposit for proper discharge of the plaintiff's functions as Govt. auctioneer is a suit against the depository and is governed by Art.

145' does not, if I may be permitted to say so with utmost deference, commend itself to me in view of the preponderance of judicial authority

referred to above.

(19) In view of the above discussions, I have no hesitation in ruling out the applicability of Art. 145 of the Limitation Act to the present case

(20) Article 68 of the Limitation Act, which corresponds to Art. 97 of the Indian Limitation Act. (1908) and to Art. 47 of the Indian Limitation Act

(1963), it may be observed applies only where the suit is for recovery of money paid upon an existing consideration which afterwards fails and the

time begins to run from the date of subsequent failure. As hold in Susila Devi Vs. Sridhar Rautray and others AIR 1970 Orisa 89 the applicability

of this Article would depend on answer to the question as to when the consideration failed. It was further held in that case that where the

transaction of the plaintiff is void ab initio and the plaintiffs never obtained possession of the suit property consideration fell immediately and Art. 97

of the Indian Limitation Act, 1908 (which corresponds to our Art. 68) is wholly inapplicable. Similar views were expressed in Gajodhar Baksh and

others Vs. Gauri Shankar and others AIR 1921 Oudh 47 and in Firm Makhanlal Girwarlal, Leshkar Vs. Harnarian and others AIR 1960 M. P.

56.

(21) As in the instant case the plaintiff did not pay the balance of the security money nor was a formal agreement in accordance with the

requirement of Section 122 of the Constitution drawn up nor was possession of Compartment Nos. 1 and 2 of Billawar Range delivered to the

plaintiff it is clear that there could be no question of failure of an existing consideration to attract the applicability of Art. 68 of the Limitation Act.

(22) Let us now turn to Art 92 of the Limitation Act (which corresponds to Art. 62 of the Indian Limitation Act 1908) and Art. 24 of Indian

Limitation Act, 1963) and see whether it can be appropriately applied to the present case. Although there has been a sharp divergence of opinion

regarding the circumstances in which this Article can apply, the controversy seems now to have been set an rest by their Lordships of the Supreme

Court. In A. Venkata Subbarao and Ors Vs. State of Andhra Pradesh, AIR 1965 SC 1773 Ayyangar J. while adverting to the expression ,for

money received by the defendant for the plaintiff's use occurring in the Article, passed the following questions :

''Does Art. 62 embody the essential elements of the action known in English Law and pleading as the 'action for money had and received to the

plaintiff's used ? (2) Does the fact that at the moment of receipt the defendant intended to receive the money for his own benefit and not for the use

of the plaintiff render the Article inapplicable ? Stated in other terms, is a literal compliance with the words that the money must have been received

by the defendant for the plaintiff's use necessary before the Article applies, or is it sufficient that the circumstances of the case are such that the

plaintiff being entitled in equity to the money, the law would impute to the defendant the intention to hold it for the plaintiff's use and compel a

refund of it to the plaintiff.

and then proceeded to quote with approval the following passage occurring in the judgment of Mookerjee J In Mohomed Wahib Vs. Mohomed

Ameer, (1905) ILR 32 Cal. 527 :.

''The Article, when it speaks of a suit for money received by the defendant for the plaintiff's use points to the wellknown English action in that form :

consequently the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under

circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff.

(23) It would also in this connection be advantageous to refer to the following passage occurring in headnote (b) of the said judgment of Ayyangar

J :â?¢

''In order to attract Art. 62, it is not necessary that at the moment of the receipt of money the defendant should have actually intended to receive it

for the use of the plaintiff and that it is sufficient if the receipt is in such circumstances that the law would impute to him an obligation to retain it for

the use of the plaintiff and refund to him when demanded. Art 62 most nearly approaches

the formula of money had and received by the defendant for the plaintiff's use if read as a description and apart from the technical qualifications

imported in English Law and procedure.',

(24) Relying on the decision of the Supreme Court in A. Venkata Subbarao Vs State of Andhra Pradesh (Supra) a Bench of the Patna High Court

in Gouri Shanker Parsad Vs. Ramkishan and others AIR 1974 Patna 319 at pages 323 & 324 said .

''Generally it used to be urged that when the contract is void then the money lying with the defendant cannot be said to be money received by the

defendant for the plaintiff's use. But in the aforesaid judgment of the Supreme Court it has been held that once the contract is held to be void, in

eye of law the defendant does held the money paid to him by the plaintiff and the plaintiff is entitled to file a suit within 3 years of the payment of the

money in question for refund of the same under the said Article. The said Article 62 came up for consideration before a Bench of this court in Smt.

Amika Bhawani Devi Vs. Chandrika Singh AIR 1974 Pat. 264. The learned Chief Justice of this court, on consideration of the different authorities

including the aforesaid Supreme Court judgment came to the conclusion that when the contract is void and money paid to the defendant is money

received by the defendant for the plaintiff's use and a suit, within 3 years from the date when the money was received, has to be filed. In a contract for sale of land if the vendor has neither title nor possession of the land in question, the contact is void and the vendor will be deemed to hold the

consideration money since the date of the receipt, for the plaintiff's use.

(25) Keeping in view the facts and circumstances and the frame of the plaint of the present case especially Para 7 thereof which avers that 'under

the circumstances there could not be and there was no existing contract or any agreement between the parries as envisaged under section 122 of

the Constitution of Jammu and Kashmir the money paid to the defendant by the plaintiff cannot but be deemed to have been received by the

defendant for the plaintiff's use and the suit in my opinion, is governed by Art 92 of the Limitation Act. This view also receives support from the

decision of the Lahore High Court in Buta Ram Vs. Gurdas and ors. reported in LVI (1918) I. C. 26; AIR 1918 Lah. 243 (1) where it was held

that if a contract of sale between two parties is void abinitio and is not merely voidable then a suit brought by the vtndee against the vendor for

refund of the purchase money is governed by Art. 62 of the Indian Limitation Act. 1908, (which correspond* to cur Art. (92) and not by Art. 97

of the Indian Limitation Act, (which corresponds to our Art 68)

(26) I am not inclined to agree with the view expressed in Ram Lal Puri Vs Gokalnagar P.Sugar Mills Company Ltd. AIR 1971 Delhi 91 where it

was held that Art. 120 of the Indian Limitation Act, 1908 (which corresponds to court Art. 119) applies to the case of return of earnest money

paid under the transaction which did not materialise as the attention of their Lordships does not in that case seem to have drawn to the decision of

the Supreme Court reported in AIR 1967 SC. 1773 (Supra)

(27) In view of the conclusion arrived at by me, there can be no question of the applicability of Art. 119 of the Limitation Act,

(28) I am therefore, of the opinion that the question referred to this Bench should be answered as follows :

In the facts and the circumstances of the case the plaintiff's suit is governed by Art. 92 of the Limitation Act and not by Article 145 or by Art. 119

or Art. 68 of the Limitation Act.

Sd/ Hon'ble Mr. Justice Jaswant Singh.

M/s Kohli Brothers Vs. State of J&K

Civil Original Sust. Per Thakur J.

(1) I have gone through the judgment prepared by my learned brother, Jaswant Singh J. fully endorse his view that Articles 63 and 145 of

Limitation Act have no application. For the reasons given by him and those to be stated in this judgment the aforesaid two articles cannot at all

apply. I. however, respectfully record my dissent to the view that Article 92 of the State Limitation Act applies. I would, for the reasons given

hereinafter, hold that no specific Article of the Limitation Act, as such, is applicable and that the case must fall under the residuary Article, being

Article 119 of the State Limitation Act.

(2) The facts have been stated by my learned brother in his judgment in quite a good detail and there is hardly any necessity of reiterating the same

here I would rest content only by making reference to those facts in a precise manner, wherever necessary deviating from the customary verbosity.

(3) One of the conditions precedent for the application of Article 92 of the State Limitation Act is that the money sued for must have been received

by the defendant for the plaintiff's use. The precise question, therefore, which invites an answer is, whether in the circumstances of this case the

amount sued for had been received by the defendant for the plaintiff's use. It is not disputed that the amount was deposited by the plaintiff pursuant

to the tender notice issued by the Conservator of Forests. This is also not disputed that the Conservator of Forest was not a person authorised by

the Governor under Section 122 of the Constitution of Jammu and Kashmir to enter into a contract on behalf of the State. A Perusal of clause 15

of the tender notice clearly suggests that the amount in question was received by the defendant as earnest money and that the same had to be

appropriated by the defendant towards the security money in the event of the plaintiff's tender being successful. The plaintiff was entitled to the

refund of the amount in case his tender was not accepted. According to clause 16 of the said notice the successful tenderer had to pay the balance

of the security and sign the agreement within 15 days of the acceptance of his tender otherwise his earnest money would stand forfeited. It is

admitted that no agreement envisaged by clause 16 of the tender notice was entered into between the parties. It is in this factual back ground that

we have to decide whether the receipt by the defendant of the amount in question was for the plaintiff's use.

(4) In order to approach the question it is necessary to examine the importance and the effect of the tender notice as a step towards the conclusion

of a valid contract. The Conservator of Forests not being the person authorised under Section 122 of the Constitution of Jammu and Kashmir and

there being no formal contract concluded between the parties admittedly no contract valid in law enforceable by either party against the other can

be said to have come into being for the simple reason that the requirements of section 122 of the Constitution of Jammu and Kashmir did not stand

satisfied. But that by itself does not resolve the difficulty. What even then remains to be examined is whether the tender notice and its terms can be

deemed to be nonexistent so as to disentitle the court to look into them. To me, it appears that the mere fact that the Conservator of Forests was

not duly authorised under Section 122 of the Constitution of Jammu and Kashmir to issue a tender notice or to receive earnest money from the

tenderers and the mere fact that such a tender notice could not, in any event, culminate in the conclusion of a valid contract enforceably in law do

not make the tender notice as non existent. The principle behind the rule contained in Section 122 of the Constitution of Jammu and Kashmir, as is

well settled, is that there should be a definite procedure according to which contract must be made by its agents in order to bind the Government

so as to obviate the possibility of public funds being deplated by clandestine contracts made by any and every public servant. What was sought to

be avoided by the incorporation of this rule in the Constitution was to save the Govt, from being saddled with liabilities for contracts not entered

into by a person duly authorised to do so. The salutary principle which flowed from the said Section was to render a contract not consistent with

the said Section as unenforcerble and imperative and nothing more With this principle in view all that can be said regarding a contract inconsistent

with the said constitution is that the constitutional prohibition is that the contract is unenforceable. The prohibition in my opinion does not have the

effect of causing the disappearance of the contract. The record relating to a contract which is unenforceable in law very much remaining visible to

the court to be considered for any purpose other than the one prohibited by the Constitution itself So is the case in regard to other contract forbidden by law specifically or rendered void by force of Section 21 to 30 of the Contract Act. In all such contracts what the court is prohibited

from doing is to enforce the same and nothing more. Both for purposes of common parlance and legal connotation the contracts remain contracts

though unenforceable in law. What I propose to emphasise in consequence is the fact that the tender notice in the instant case remained available to

the court for consideration of matters other than the enforceability of the contract sought to be founded on such a tender notice. That being so we

cannot close our eyes to the contents of clauses 15 and 16 of the said notice nor can we leave the same out of consideration while determining the

purpose for which the amount of earnest money was deposited by the plaintiff, as such a purpose is of a collateral character not at all falling with

the purview of the prohibition contained in Section 122 of the Constitution of Jammu and Kashmir. The question as to what was the purpose of

payment by the plaintiff and the receipt of the money by the defendant thought related to the contact can be taken into account for purposes of

applying the relevant articles of the Limitation Act to a suit seeking refund of the amount received by the defendant. Support for this view is amply

available from a judgment of the Supreme Court in Chattur Bhuj Vithaldas Tasani Vs. Moreshwar Parashram and others, reported as (1954) SCR

817. In that case one of the candidates for election to the Parliament of India had entered into a contract as a partner of a firm with the Central

Government for the supply of goods. The contract subsisted on the date of nomination and the date of election. Defence to a challenge to the

validity of the nomination paper of the candidate was that the contract in question did not satisfy the requirements of Article 299 of the Constitution

of India and therefore the subsistence of such a contract did not entail any disqualification of the candidate. Repelling the argument Their Lordships

of the Supreme Court observed that the contention was without force as this was the type of cases to which Section 230 (3) of the Indian Contract

Act would apply. Bose J. who spoke for the court observed as follows:

Now section 7 (of the Representation of the People Act does not require that the contracts at which it strikes should be enforceable against the

Government; all it requires is that the contracts should be for the supply of goods to the Governments. The contracts in question are just that and so are hit by the section.

(5) It in that case the contract not being in accordance with the provision of Article 299 of the Constitution of India had been treated as nonexistent

there could be no question of recognising the existence of such a contract even though not enforceable in law. Apart from that the Supreme Court

borrowed support from the provisions of Section 230 (3) of the Contract Act which provides that a contract entered into by an agent on behalf of

his principal can be enforced against the agent personally where the principal, though disclosed cannot be used. The aforesaid provision of the

contract Act also does to suggest that the unenforceability of a contract because of its invalidity due to the absence of the requisite requirement of

the Constitution does not make a contract nonexistent so as to deprive the court of its power to examine the documents relating to the contract for

a collateral purpose.

(6) Support can be borrowed from the principle confined in Sections 17 and 49 of the Registration Act also. No authority is needed for the

proposition that even when Section 49 prohibits receipt in evidence of any unregistered document required by Section 17 or by any provision of

the Transfer of Property Ace to be registered affecting any immovable property or any transaction affecting such property can be looked into for a

collateral purpose of determining the nature of possession referable to such a document. I have said all this to support the view that even when the

contract sought to be founded on the tender notice did not take a concluded shape or even if it would have taken such a shape, would not be

enforceable in law, by itself does not remove from the record the tender notice and that the same can be examined for purpose of determining the

nature of prospective relationship between the parties their intention and the purpose of receipt by the defendant of the amount in question.

(7) Once the principle that the tender notice remains available for consideration of a collateral purpose is acknowledged it has to be seen as to

whether the money in the instant case was received by the defendant for the plaintiff's use. As stated earlier the amount had to serve the purpose of

earnest money till the date of the decision by the Government whether the plaintiff's tender had to be accepted or rejected Needless to say that the

earnest money in the hand of the defendant cannot be said to have been received by the defendant for plaintiff's use. The use, if any, was that of the

defendant itself as if the plaintiff's tender would have been accepted as was done in this case, and if the plaintiff w mid have failed to excute the

agreement as envisaged by clause 16 of the tender notice to the State. This precisely money would stand forfeited to the State. This precisely is the

defence of the defendant in the suit. It is a different question to decide whether the defendant Could claim for feature of the amount because of the

failure of the plaintiff to execute the agreement but it is not possible to deny that the money in the hands of the defendant was not to ensure for the

use of the plaintiff but it was received by the defendant for its own use Going a step further we find that in the event of a valid contract tubing

concluded the amount was to be appropriated by the defendant towards the part payment of the security the value in percentage of which was

specified in clause 16 itself. Here again it could not be said that the money was to be retained by the defendant for the plaintiff's use. The amount of

security in a contract is in 'ended to ensure the performance of a contract by the party depositing the security. The right of the party with whom the

security is deposited to forfeit the same in case of violation of any terms of the contract by the party depositing the security amount is provided in

the contract itself, In nutshell therefore it is very difficult for me to bold that the receipt by the defendant of the amount in question in the instant case

was for the plaintiff's use so as to attract the application of Article 92 of the Limitation Act.

(8) There is one more angle of vision which necessitates exposition. One of the basic principles of the law of limitation is that the accrual of the right

to sue must either synchronise with the starting point of limitation or precede it. We cannot conceive of a case where the period of limitation has

started running against a plaintiff but he has no right to sue. Under Article 92 of the Limitation Act the starting point of limitation is the date of the

receipt of money by the defendant. Admittedly from the date of the receipt of the money till the date of the decision of the Government regarding

the acceptance or rejection of tender of the plaintiff the plaintiff could not have any right to sue for the refund of the money, How could therefore

we say that in this case even when the right to sue had not accrued to the plaintiff the period of limitation would have started running against him.

This is also settled that where the words in the third column of an Article relating to starting point of limitation referred to a time before the date of

accrual of cause of action for a suit it must be held that such words cannot apply to the suit or in other words that the article does not apply to such

a suit* If this were not true there could be cases where the period of limitation might expire before the date of accrual of the cause of action. This

also in my opinion is a circumstance to exclude the application of Article 92 of the Limitation Act.

(9) My learned brother in his judgment has relied on a judgment of the Calcutta High Court in Mohomed Wahib Vs, Mohomed Ameer j reported

as (1905) ILR 32 Calcutta 527. It was a case in which the defendant received money due to him on two deeds of mortgage. The plaintiff who was

entitled to a share out of this money instituted a suit for recovery of his share from the defendant more than three years after the receipt of the

money by him. The Calcutta High Court held that the money was received by the defendant for the plaintiff's use and that therefore the suit was

governed by Article 62 of the Indian Limitation Act corresponding to Article 92 of the State Limitation Act. In the circumstance of that case, it

appears to me. that no other article except Article 92. of the State Limitation Act could possibly apply, as the share out of the money received by

the defendant was payable to the plaintiff and the only intention of the defendant in that case to receive the plaintiff's share was, to receive it for

plaintiff's use. The intention to receive the money for the plaintiff's use, in such circumstances could very reasonably and justifiably be imputed to

the defendant as both in justice and equity the plaintiff was entitled to a share out of the money. The facts of this case being wholly different from

those of the Calcutta case the view that Article 92 should have applied to the facts of the case remains wholly unsupportable.

(10) My learned brother has relied upon a judgment of the Supreme Court in Venkata Subharao and ors. Vs State of Andhra Pradesh; A. I R.

1965 S. C. 1773. As a matter of fact the observations of the Calcutta High Court in Mohmod Wahib's case (Supra) were reported with approval.

In the case before the Supreme Court the money had been received by the State from the plaintiff as tax which the plaintiff was not bound in law to

pay but which he was compelled and forced to pay because of threats and apprehension of legal process. Their Lordships of the Supreme Court held that the money received by the State at the very moment of the receipt in justice and equity belonged to the plaintiff rendering its receipt by the

defendant for the use of the plaintiff and that the suit claiming refund of the money would be governed by Article 62 of the Indian Limitation Act.

This judgment of the Supreme Court is also in my opinion clearly distinguishable from the facts of the present case. If the receipt of the money by

the State in the Supreme Court case as tax was illegal, the intention to receive the money for the plaintiff's use could be reasonably imputed to the

State. But in the instant case, as stated earlier; on the own showing of the defendant the receipt of the money was not for the plaintiff's use.

Moreover, there will be no occasion to impute such an intention to the defendant when the intention at the time of the receipt of the money is

clearly discernible from various clauses of the tender notice which I have held earlier remains available to the court to be looked into to judge the

intention of the parties accompanying the receipt of the money by the defendant. At least till the time when the plaintiff refused to execute an

agreement in favour of the State on the ground that the Conservator of Forests was not competent to enter into a contract on behalf of the State

the intention of the plaintiff to pay and of the defendant to receive the money was unmistakeably clear viz that the amount shall be treated as earnest

money with a concomitant right of the defendant to forfeit it in case of the failure of the plaintiff to execute an agreement. The following

observations of Sarkar J. in the aforesaid judgment clarify the position beyond doubt.

In order to attract Article 62 it is not necessary that at the moment of the receipt of the money the defendant should have actually intended to

receive it for the use of the plaintiff and that it is sufficient if the receipt is in such circumstances that the law would impute to him an obligation to

retain it for use of the plaintiff and refund to him when demanded. Article 62 most necessarily approaches the formula of money had and received

by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and procedure.

However, if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently, Article

62 cannot apply, for it proceeds on the basis of that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt.

(11) It is manifest from the aforesaid observations that such an intention could be imputed to the defendant only if a contrary intention is not

discernible from the facts attendant upon a case. Moreover, the right to file a suit immediately is a necessary condition for the application of the

Article. As stated earlier the right to sue in this case, on the assumption that the tender notice was valid, could not accrue to the plaintiff till he had

been declared to be an unsuccessful tenderer. For these reasons therefore the aforesaid judgment of the Supreme Court does not in my opinion

constitute an authority for the proposition that Article 92 must be attracted in application to the case in hand.

(12) Another judgment relied upon by my learned brother is one in Gouri Shanker Barand Vs. Ramkishan and others reported as A. I. R. 1974

Patna 319, In this judgment of the Patna High Court also support was borrowed from the judgment of the Supreme Court (Supra). With utmost

regard to their Lordships of the Patna High Court lam unable to agree that the ratio in the Supreme Court case could support the view expressed in

the Patna judgment. Their Lordships of the Supreme Court did not consider in Venkata Subbarao's case the question as to whether in a case in

which the amount is paid on the assumption that the prospective contract would be valid and enforceable in law an intention could be imputed to

the receipient of the amount that the amount received would be held for the plaintiff's use Shorn of the support of the Supreme Court judgment the

reasoning adopted by their Lordships of the Patna High Court does not touch the question as to whether a contract or an important document in

relation to a contract can be considered for an ancillary or a collateral purpose to judge the intention of the parties in regard to the payment of the

receipt of the amount.

(13) On the other hand the view expressed by the Delhi High Court in Ram Lal Puri Vs. Gokalnagar Sugar Mills Company Ltd. reported as A. I.

R. 1967 Delhi 91 is more appealable and I respectfully follow it.

(14) There is another principle a reference to which is necessary to support the conclusion I have arrived at. While it is settled that an article of the

law of Limitation has to be given plain grammatical meaning howsoever great hardship may be to a plaintiff in a cause, it is equally settled that if an

article is capable of two interpretations, a construction favourable to the party whose valuable right has been taken away has to be preferred.

Assuming therefore that Article 92 of the Limitation Act by some stretch of reasoning is capable of another interpretation bringing the suit within its

purview it is comparatively and just to avoid its application as Article 119 of the Limitation Act is comparatively more benevolent to the plaintiff for

the reason that the limitation starts under that Article from the date of the accrual of the right to sue. In P. M. Films Ltd. and another Vs Overseas

Films Corporation Ltd. reported as A. I. R. 1958 Bombay 10 Chagla C. J. dealing with aforesaid judgment observed as follows :

The limitation Act must always be construed strictly against the party who sets up the plea of limitation. The Limitation Act deprives a party of a

valuable right, and unless the provision in the Limitation Act is clear and beyond doubt, a benevolent construction, a construction favourable to the

party whose valuable right is being taken away, must always be given.

(15) To the same effect are the observations of the Rajasthan High Court in Jethmal and another Vs. Ambsingh reported as A. I. R. 1955

Rajasthan 97, of the Madras High Court in Kandaswami Fillai, Vs. Kannapa Ctmty, reported as A. I. R. 1962 Madras 186 and of the Punjab

High Court in Sardari Ram Khetri and others Vs. Hind Iran Bank Ltd, reported as A. I. R. 1962 Punjab 526. So far the exclusion of Articles 68

and 146 of the Limitation Act is concerned I fully support the reasoning given by my learned brother Jaswant Sing I and state that it is neither a

case of entrustment under Article 145 nor a case of failure of consideration so as to bring the case within the purview of Article 63 of the Limitation

Act.

(16) For the aforesaid reasons therefore I am of the opinion that Article 119 of the State Limitation Act is the only Article within the purview of

which present suit should fall. I answer the reference accordingly.

Ali C. J.:

(1) I have gone though the lucid judgment prepared by my brothers, Jaswant Singh and Thakur J . After going through the same, I am afraid I

cannot subscribe to the view expressed by Jaswant Singh J. On the other hand I find myself in complete agreement with the reasoning given and

the view taken by Thakur J.

(2) The question of applicability of any Article of the Limitation Act would have to depend upon the facts of each case and cannot be divorced

from the terms of the recitals of a transaction of the parties and the surrounding circumstances. In the instant case the main centre of controvery

between Jaswant Singh J. and Thakur J. whether Art, 92 or Art. 119 of the Limitation Act applies to the facts of the present case. Thakur J. has

rightly pointed out that having regard to the terms and recitals of the contract, in the instant case the contract being in the shape of an agreement,

there is no evidence to show that money was ever intended to be used for the benefit of the plaintiff. Once this matter is determined, then the case

is at once taken out of the purview of Art. 92 of the State Limitation Act. My learned Brother Thakur J. has given cogent reasons for holding that

the facts and circumstances of the present case are not covered by any particular Article of the Limitation Act and therefore, the inference is

irresistible that the only Article that would apply is the residuary Article namely. Art 119 of the Limitation Act.

(3) The sheet anchor of the judgment of my learned brother, Jaswant Singh J is a decision of the Supreme Court in A. I. R. 1965 SC 1773 which

as rightly pointed out by Thakur J. is clearly distinguishable from the facts of the present case in as much as the money in that case had been

received by the State from the plaintiff as tax which the plaintiff was bound in law to refund, as the tax was illegal. In these circumstances the facts

of that case admit of no doubt at all that the money in question had not been received for the plaintiff's use, and therefore Art. 92 was not at all

applicable to that case. The same, however, cannot be said in the present case as pointed out by may learned brother, Thakur J.

(4) For these reasons I agree with nay brother Thakur J that the present suit is clearly covered by Art. 119 of the Limitation Act. The case shall

now go back to the learned Single Judge for disposing of the question of limitarson in the light of the view expressed by the Majority judgment.

