(1975) 02 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Civil Suit No. 1 of 1972

M/s. Kohli Brothers APPELLANT

Vs

State of Jammu and Kashmir RESPONDENT

Date of Decision : 24-02-1975

Acts Referred:
Limitation Act, 1908 — Article 62, 97

Citation : AIR 1975 J&K 62

Hon'ble Judges : Syed Murtaza Fazl Ali, C.J;Raja Jaswant Singh, J;Devi Dass Thakur, J

Bench : Full Bench

Advocate : R.N. Bhalgotra, for the Appellant; R.P. Bakshi, for the Respondent

Judgement

Jaswant Singh, J.—(Minority view). 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 Department of Jammu and Kashmir 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 inter alia 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. l and

2 of Billawar Ranpe and 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 Government had accepted its offer in respect of

Compartments Nos. 1 and 2 of Billawar 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. 25,000.00 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 plaintiff was taken in terms of Cls. 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 Jess 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. I for two 1 years, 1/4th for three years and 1/n+1 for the n 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 men 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 farther 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 he was not the competent authority for inviting tenders from the intending forest lessees; that on

realizing 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 Billawar Range be

allowed to be deferred; that the Government did not consider the prayer of the plaintiffs 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 February 1, 1966 the

confiscation of the earnest money of Rs. 25,000/- deposited by the plaintiff and de-registered the firm; that both the afore said orders of forfeiture

of the earnest money and de-registration 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 Government to refund Rs. 25,000/-. that as

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

3. The suit was resisted by the Government inter alia on the ground that it was time-barred.

4. On November 2. 1972 a number of issues including 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. P.

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 papers 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 Division Beach 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 hand 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

(contd. on col. 2)

Art. No:Description of the suit

68 For money paid upon an existing consideration which afterwards fails

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

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

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

8. It is now well settled that Article 119 which corresponds to Article 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 Article 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 R.B. Seth Jessaram Fatehchand Vs. Om Narain

Tankha and Another, 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 writ-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:

Period of Limitation, Time from which period begins.

3 years The date of the failure.

6 years When the money is received.

6 years When the right to sue accrues.

30 years Date of the deposit or pawn

ing 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 fact 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 me to hold that Article 145 cannot be invoked in case of refund of earnest money is that whereas under Article

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. v. Laxmi Cotton Traders, Bombay, AIR 1960 Bom 104 Chagla C. J. speaking for the Bench said:

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

Article 145 must take colour from the expression that follows, viz; 'pawnee"". Thus the deposit to which Article 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 to a certain contingency. Hence it is neither an

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

A deposit for the performance of a contract is not merely a part payment, but is also an earnest Co 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 Article 145.

12. Similar views have been expressed by the Patna and Rajasthan High Courts in Union of India (UOI) Vs. Gangadhar Mimraj and Another, ,

and in Badriprasad Vs. The State of Rajasthan and Another, respectively. The following passage occurring in Badriprasad Vs. The State of

Rajasthan and Another, will amply repay a perusal:-

A perusal of Article 145 shows that there are three points to be borne in mind while considering its applications: (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.

13. The view expressed by Chagla C.J. in Dhan Rai Mills Ltd. v. Laxmi Cotton Traders Bombay (Supra) was reiterated in Shankar Moreshwar

Kulkarni Chinchwadkar Vs. State of Maharashtra, .

14. The matter was also considered in two decisions of a Travancore High Court. In Narayana Pillai v. Chidambaram Phillai, 15 Trav, LR 51 a

Full Bench of the Court while considering the scope of Article 122 of the Travancore Limitation Regulation which corresponds to Article 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

Chacho v. Mathew (1918) 8 Trav L. J. 346 it was held that even assuming that the word movable 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.

15. Again in Bala Krishnudu v, Naravanaswami AIR 1914 Mad 4 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.

16. In Joseph Annamma and Another Vs. Kora Thressiamma and Others, , Poti 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.

17. The view expressed by Narasimham J in Union of India per Secretary to Govt. Department of Supply, New Delhi Vs. Firm Vazir Sultan and

Sons, that a suit for recovery of money kept as security deposit for proper discharge of the plaintiffs' 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,

18. In view of the above discussion,, I have no hesitation in ruling out the applicability of Article 145 of the Limitation Act to the present case.

19. Article 68 of the Limitation Act which corresponds to Article 97 of the Indian Limitation Act (1908) and to Article 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 held in Susila Dei and Others Vs. Sridhar Rautray and Others, , 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 Article 97 of the

Indian Limitation Act, 1908 (which corresponds to our Article 68) is wholly inapplicable, Similar views were expressed in Gajadhar Baksh v.

Gaurishankar AIR 1921 Oudh 47 and in Firm Makhanlal Girwarlal Vs. Harnarain and Others, .

20. 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 Compartments

Nos. I 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 Article 68 of the Limitation Act.

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

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 beep set at rest by their Lordships of the

Supreme Court. In A. Venkata Subba Rao Vs. State of Andhra Pradesh, Ayyangar J. while adverting to the expression 'for money received by

the defendant for the plaintiff's use' occurring in the Article posed the following questions:

Does Article 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 use? (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 plaintiffs 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 plaintiffs 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 v. Mohomed

Ameer, (1905) ILR 32 Cal 527:

The Article, when it speaks of a suit for money received by the defendant for the plaintiffs use points to the well-known 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.

22. 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:

In order to attract Article 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 plaintiffs use, if read as a description and apart from the technical qualifications imported in English Law and Procedure...

23. Relying on the decision of the Supreme Court in A. Venkata Subbarao v. State of Andhra Pradesh (supra) a Bench of the Patna High Court in

Gouri Shankar Prasad Vs. Ram Kishun Dass and Others, and 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 plaintiffs 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 hold 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.

Ambika Bhawani Devi Vs. Chandrika Singh, . 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 plaintiffs 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 contract is void and the vendor will be deemed to hold the

consideration money since the date of the receipt, for the plaintiffs use.

24. Keeping in view the tact's 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 parties as envisaged u/s 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 plaintiffs use and the suit in my opinion, is governed by Article 92 of the Limitation Act. This view also receives support from the

decision of the Lahore High Court in Buta Ram v. Gurdas reported in 46 Ind Cas 26 = (AIR 1918 Lah 249 (1)) where it was held that if a

contract of sale between two parties is void ab initio and is not merely voidable then a suit brought by the vendee against the vendor for refund of

the purchase money is governed by Article 62 of the Indian Limitation Act, 1908, (which corresponds to our Article 92) and not by Article 97 of

the Indian Limitation Act, 1908, (which corresponds to our Article 68).

25. I am not inclined to agree with the view expressed in Ram Lal Puri v. Gokalnagar Sugar Mills Co. Ltd. AIR 1967 Del 91 where it was held

that Article 120 of the Indian Limitation Act. 1908 (which corresponds to our Article 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 R.B. Seth Jessaram Fatehchand Vs. Om Narain Tankha and Another, ,

26. In view of the conclusions arrived at by me, there can be no question of the applicability of Article 119 of the Limitation Act.

27. 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 ease the plaintiffs suit is governed by Article 92 of the Limitation Act and not by Article 145 or by Article

119 or Article 68 of the Limitation Act.

D.D. Thakur, J. (Majority view)

I have gone through the Judgment prepared by my learned brother, Jaswant Singh J. I fully endorse his view that Articles 68 and 145 of the

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.

28-29. The facts have been stated by my learned brother in his judgment are 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.

30. 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 plaintiffs 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 plaintiffs 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 Forests was not a person

authorised by the Governor u/s 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 plaintiffs 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 background that

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

31. 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 u/s 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 non-existent so as to disentitle the court to look into them. To. me, it appears that the mere fact that the Conservator o Forests was not duly

authorised u/s 122 of the Constitution of Jammu and Kashmir o 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 enforceable 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 he made by its agents in order to bind the Government so as to obviate the possibility of

public funds being depleted by clandestine contracts made by any and every public servant. What was sought to be avoided by the incorporation

of this nile 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 unenforceable

and inoperative and nothing more. With this principle in view all that can be said regarding a contract inconsistent with the said constitutional

prohibition is that the contract is unenforceable. The prohibition in my opinion does not have the effect 0f causing the disappearance of the

contract. The record relating to a contract which is unenforceable in law very much remains 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 contracts forbidden by law specifically or rendered void by force of Sections 21 to 80 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 pot at all falling within 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 though related to the

contract 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 Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and

Others, . 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 Art. 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 T. who spoke for the Court observed as follows:

Now Section 7 (d) 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 Government. The contracts in question are just that and

so are hit by the section.

32. If in that case the contract not being in accordance with the provision of Article 299 of the Constitution of India had been treated as non-

existent 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 sued. The aforesaid provision of the Contract Act also goes 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 non-existent so as to deprive the Court of its power to examine the documents relating to

the contract for a collateral purpose.

33. Support can be borrowed from the principle contained 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 Sec. 17 or by any provision of the

Transfer of Property Act 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.

34. 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 plaintiffs tender had to be accepted or rejected. Needless to say that the

earnest money in the hands of the defendant cannot be said to have been received by the defendant for plaintiffs use, The use, if any, was that of

the defendant itself as if the plaintiffs tender would have been accepted as was done in this case, and if the plaintiff would have failed to execute the

agreement as envisaged by clause 16 of the tender notice the amount of earnest 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 forfeiture 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 enure for the use of the plaintiff but it was a case where the money was received by the defendant for its own use.

Going a step further we find that in the event of a valid contract having concluded the amount was to be appropriated by the defendant towards the

part payment of die 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 plaintiffs use. The amount of security in a contract is intended 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 hold 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.

35. 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 the 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.

36. My learned brother in his judgment has relied on a judgment of the Calcutta High Court in Mohomed Wahib v. Mohomed Ameer, reported as

(1905) ILR 32 Cal 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 circumstances 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 plaintiffs share was, to receive it for plaintiffs use. The

intention to receive the money for the plaintiffs 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 un-supportable.

37. My learned brother has relied upon a judgment of the Supreme Court in A. Venkata Subba Rao Vs. State of Andhra Pradesh, . As a matter

of fact the observations of the Calcutta High Court in Mohomed 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 a receipt by the defendant

for the use of the plaintiff and that the suit claiming refund of 'he 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 plaintiffs 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 plaintiffs 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 unmistakably 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 the use of the plaintiff and refund to him when demanded. Article 82 most necessarily approaches the formula of money had and

received by the defendant for the plaintiffs 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.

38. 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.

39. Another judgment relied upon by my learned brother is one in Gouri Shankar Prasad Vs. Ram Kishun Dass and Others, . 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 I am 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 recipient of the amount that

the amount received would be held for the plaintiffs 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.

40. On the other hand the view expressed by the Delhi High Court in Ram Lal Puri v. Gokalnagar Sugar Mills Company Ltd. reported as AIR

1967 Del 91 is more appealable and I respectfully follow it.

41. 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 more reasonable 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.N. Films Ltd. and

Another Vs. Overseas Films Corporation Ltd., Chagla C. J, dealing with the 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.

42. To the same effect are the observations of the Rajasthan High Court in Jethmal v. Ambsingh reported as AIR 1955 Raj 97 (FB), of the

Madras High Court in Kandaswami Pillai Vs. Kannappa Chetty alias Arunachala Chetty, and of the Punjab High Court in Sardarni Ram Khetri

and Others Vs. Hind Iran Bank Ltd., , So far the exclusion of Articles 68 and 145 of the Limitation Act is concerned I fully support the reasoning

given by my learned brother Jaswant Singh J 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 68 of the Limitation Act.

43. 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 the present suit should fall. I answer the reference accordingly,

S.M.F. Ali, C.J. (Majority view)

44. I have gone through the lucid judgments prepared by my brothers, Jaswant Singh and Thakur JJ. 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.

45. 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 and recitals of a transaction, the intention of the parties and the surrounding circumstances. In the instant case the main centre of

controversy between Jaswant Singh J. and Thakur J. is whether Article 92 or Article 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 Article 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, Article 119 of the Limitation Act.

46. The sheet anchor of the judgment of my learned brother, Jaswant Singh J. is a decision of the Supreme Court in A. Venkata Subba Rao Vs.

State of Andhra Pradesh, which, as rightly pointed out by Thakur J. is clearly distinguishable from the facts of the present case inasmuch 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 plaintiffs use, and therefore

Article 92 was not at all applicable to that case. The same, however, cannot be said in the present case as pointed out by my learned brother,

Thakur J.

47. For these reasons I agree with my brother Thakur J. that the present suit is clearly covered by Article 119 of the Limitation Act. The case shall

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