
(1963) 01 MAD CK 0004
In the Madras High Court
Case No : Second Appeal No. 1123 of 1960

The Vijaya Foundary	Vs	APPELLANT
Gordon Woodroffe and Co. Private Limited		RESPONDENT

Date of Decision : 18-01-1963

Acts Referred:

Limitation Act, 1908 — Article 51

Citation : (1964) ILR (Mad) 634

Hon'ble Judges : Jagadisan, J

Bench : Single Bench

Advocate : V.C. Veeraraghavan and N.C. Srinivasan, for the Appellant; John and Row and S. Nainar Sundaram, for the Respondent

Final Decision : Dismissed

Judgement

Jagadisan, J.—This second appeal is from the judgment of the District Court of Coimbatore in Appeal Suit No. 137 of 1959, affirming the

Judgment of the District Munsif's Court of Coimbatore in the suit, Original Suit No. 876 of 1957. The Appellant sued to recover from the only

Defendant in the suit the sum of Rs. 2,000 but failed in the Courts below. Shortly put his case was that he advanced a sum of Rs. 4,000 to the

Defendant as part payment of the price of certain diesel engines which he agreed to purchase, that a sum of Rs. 2,000 was adjusted towards the

price of five engines actually purchased and taken delivery of and that the balance of Rs. 2,000 was recoverable as the Defendant had failed to

deliver the engines. The defence was that the sum of Rs. 4,000 was deposited by the Plaintiff for the due and proper performance of the contract

between the parties, that the Plaintiff committed breach of contract, and that the balance of Rs. 2,000 which stood to the credit of the Plaintiff was

forfeited. In addition to this defence, the Defendant also pleaded that the suit claim was barred by limitation. The Courts below uphold the

Defendant's contentions and accordingly non-suited the Plaintiff. Regarding the nature, of the amount of Rs. 4,000 initially paid by the Plaintiff to

the Defendant the question is purely-one of interpretation of the terms of the contract. The plea of limitation is a question of law, the answer to

which would depend upon the applicability of the appropriate article under the Indian Limitation Act.

2. There is no difficulty in ascertaining the facts and events which culminated in the filing of the suit. The entire evidence consists of the

correspondence between the parties, and there is no oral evidence in the case. I shall now briefly refer to the terms of the contract and the letters

that passed between the parties subsequent to the date of the contract. The Plaintiff made an offer to the Defendant to purchase ten Bernard Diesel

engines at Rs. 2,050, less 72 inches quantitative discount for Madras, on 27th June 1961. Along with this written offer the Plaintiff enclosed a

cheque for Rs. 4,000 stating that the amount was towards twenty per cent advance for the order. He stipulated that this amount should carry

interest at 4 per cent per annum. He agreed to take delivery of the engines within a month from the date of intimation from the Defendant that the

engines were ready at Madras for delivery. Delivery was to be effected during August 1951. The Defendant accepted this offer by its letter, dated

3rd July 1951. The Defendant however made it clear that any increase in freight rates or in actual f.o.b costs of the engines should be borne by the

Plaintiff. In regard to the sum of Rs. 4,000 the Defendant stated thus in its acceptance letter:

We are pleased to note that you have paid an advance of Rs. 4,000 which we confirm would carry an interest of 4 per cent per annum.

3. These two letters, exhibits A-1 and A-2, contained the terms and conditions of the bargain between the parties. The Plaintiff expressly stated in

exhibit A-1 that the amount of Rs. 4,000 was towards 20 per cent advance, which means that he paid twenty per cent of the price of the engines as

part payment. The Defendant in its letter exhibit A-2, accepted this position and agreed to treat the sum of Rs. 4,000 as advance payment for the

price due to it on the sale of the engines. In pursuance of this contract the Plaintiff paid for and took delivery of three engines on 20th December

1951, 21st November 1952, and on another date, not disclosed by the evidence on record. But it seems that the Defendant showed a concession

to the Plaintiff even with regard to these three sales by allowing a reduction of Rs. 40 per engine. So far there was smooth sailing and both the

parties were keenly intent on fulfilling their respective obligations under the contract.

4. The price of diesel engines appears to have suffered a decline in the year 1953. The Plaintiff was naturally not anxious to take delivery of the

balance of seven engines at the price originally agreed to in a market where the price of engines was on a downward trend. On 6th March 1953,

the Plaintiff wrote to the Defendant stating that a constituent of his at Malabar, to whom he had supplied one engine purchased from the Defendant,

complained that the engine was not working satisfactorily and that he was not able to create a demand in the market for the type of engines agreed

to be purchased. The Plaintiff therefore requested the Defendant to refund the balance of advance amount lying with the Defendant. The Defendant

stated in reply, that it had not received any complaint regarding the performance of engines from other dealers, who purchased the engines, and

that the Plaintiff was bound to take delivery of the engines as per terms of the contract, and that it had the engines in stock ready to be supplied.

But the Defendant was willing to show some concession to the Plaintiff in the matter of price of Rs. 1,708-8-0 each instead of the original price of

Rs. 2,010 less seven and a half per cent discount. The Defendant was willing to sell at the reduced price quoted only if the Plaintiff were to take

delivery in one lot of the balance of seven engines outstanding against his previous order before the end of March 1953. The Plaintiff was not

agreeable to purchase the engines even at the reduced price at which they were offered. He, therefore, wrote to the Defendant on 19th March

1953, stating thus:

Under the circumstances we have to ask you, with the great reluctance, to cancel our order for the balance quantity of the engines as we do not

see any other alternative open to us.

As regards the advance paid by us, we do not want you to pay us back in the form of cash but are prepared to take goods from you to the value

thereof. We are purchasing from you, tin solder, punbago powder, white metal,

electrical goods, etc., and the amount may be adjusted towards these supplies.

5. The Plaintiff took up a definite stand that the balance of advance should be returned by the Defendant though not in cash atleast by supplying other goods. The Defendant was equally firm and refused to return the money and at the same time reiterated that it would allow the Plaintiff the privilege of purchasing the engines at a price less than the contract price. In its letter, dated 23rd March 1953 the Defendant informed the Plaintiff as follows:

Under these circumstances there can be no question of our refunding either in cash or in any other ground the advance which you have paid.

6. It must be noted that in this letter the Defendant stated for the first time that the initial amount received from the Plaintiff was only by way of guarantee of fulfilment of the contract. The Plaintiff would not however give up his endeavour to settle the dispute arising out of the contract

amicably. In his letter, dated 15th November 1954, to the Defendant, the Plaintiff wanted information from the Defendant whether it was not a fact

that it was selling the engines at the rate of Rs. 1,520 per engine less discount of five per cent to other dealers. The Plaintiff wanted to know why

the Defendant should insist upon the price of Rs. 1,708-8-0 per engine from him while the other dealers had the benefit of a lesser price. The

Defendant sent a reply to this letter on 18th November 1954, candidly admitting that the stock of engines held by it at that time was being sold only

at Rs. 1,520 with a discount of five per cent. But the Defendant stated that if it chose to sell engines at a low price and suffered loss it was its own

concern, and that it would not in any way affect the Plaintiff's obligation under the contract. Then the Defendant referred to the gesture made on its

behalf to supply engines at the concessional price of Rs. 1,708-8-0 and finally threatened the Plaintiff as follows:

Should you not have taken the remaining engines after all our own stock of these machines has been sold we will then commence to sell the

balance seven engines against your contract on your account and risk at the best price obtainable adjusting against the actual sum received the

deposit amount of Rs. 400 per engine which we hold from you.

7. After this letter there was a lull in the correspondence between the parties till

1954. On 30th November 1954, the Defendant wrote to the Plaintiff making a fresh gesture to help the Plaintiff from out of the quandary he had got in. In other words a fresh offer was made by the Defendant to the Plaintiff in these terms:

...in order to liquidate this old outstanding contract we are prepared to make the following concession:

Provided that you take delivery of all the seven remaining Bernard WD 13 Diesel Engines in one lot against cash payment before 31st December

1954, we will supply two engines at Rs. 1,520 each, less five per cent discount (i.e., Rs. 1,444 nett) F.O.R. Madras, sales tax extra, the other five

engines being invoiced at his. 1,708-8-0 each nett F.O.R. Madras, sales tax extra.

The deposit amount of Rs. 400 per engine which we hold from you would be deducted in our invoice.

8. Of course the Plaintiff did not pay any heed to this revised offer from the Defendant. Another year elapsed and on 24th March 1956, the

Plaintiff wrote to the Defendant expressing his willingness to take delivery of the seven engines at the rate of Rs. 1,520 per engine less five per cent.

The Plaintiff of course wanted to have the advance adjusted towards the price of the engines to be supplied. At first this request from the Plaintiff

was turned down by the Defendant as is apparent by its letter, dated 5th April 1956. It stated that the engines had been with it from 1951, that the

Plaintiff had failed to take delivery and expressed its non-liability to deliver the engines or to refund the advance collected from the Plaintiff.

Subsequently, however, on 21st April 1956, the Defendant was willing to deliver two engines stating that they were available with them as some

previous orders of other dealers were cancelled. The Defendant wrote thus:

We therefore offer your firm for reply here in writing by 27th April 1956, two Bernard Diesel Engines of the type known to you and the subject of

previous correspondence at the price of Rs. 1,635 each free on rail Madras, payment by cash prior to delivery. If you decide to accept this offer

we should allow you refund of Rs. 400 on each engine, which was previously deposited by you as security on your implementing the contract

entered into according to your letter, dated 27th June 1951. This officer is without prejudice in any way over the balance of deposit given by you

to implement the above mentioned contract which is forfeited as mentioned in

our letter dated in accordance with the normal conditions under which such deposits are given.

It appears that two engines were supplied by the Defendant and taken delivery of by the Plaintiff in May 1956. On 29th November 1956, the

Plaintiff, wanted the Defendant to deliver the balance of five engines within ten days from that day, failing which the Plaintiff wanted refund of the

amount of Rs. 2,000 still available with the Defendant as balance of the advance amount. This was met by a stubborn refusal on the part of the

Defendant as is clear from its letter, dated 7th December 1956. Thereafter the usual suit notices were exchanged. Eventually the suit was instituted.

9. It is unnecessary to refer to the pleadings in the case in any great detail. The Plaintiff charged the Defendant with the breach of contract and

claimed that he was entitled to recover the sum of Rs. 2,000 which according to him was the balance of advance amount paid towards the

purchase of engines. The Defendant contended that the amount was only deposit or earnest for the due performance of the contract, that the

Plaintiff committed breach in not taking delivery of the engines within the time stipulated under the contract of within a reasonable time thereafter,

and that the Plaintiff could not maintain the suit. As stated already there was also a plea of limitation.

10. The learned District Judge is of the opinion that the amount sued for cannot be claimed, as it was only a deposit which was forfeited, the

Plaintiff having failed to perform the contract. This view of the learned District Judge has been canvassed before me on behalf of the Appellant. The

terms of exhibits A-1 and A-2 indicate fairly clearly that the sum of Rs. 4,000 initially paid by the Plaintiff was only an advance or part payment of

the value or price of the ten engines to be supplied by the Defendant. The amount is described as advance and not as deposit. The phraseology

adopted by the contracting parties would of course be not conclusive on the determination of the true nature of the amount. The contract also does

not provide for forfeiture of the amount of Rs. 4,000 or any part thereof in case the Plaintiff were to commit default in the due performance of the

contract. The subsequent conduct of the parties, which would be certainly admissible as evidence to show how the parties to the transaction

understood the terms of the contract thought it may not be relevant to help the

proper construction of the contract, rather tends to show that the initial payment was not intended as something by way of earnest or deposit. In all the five sales of engines credit has been given by the Defendant at the rate of Rs. 400 per engine treating the amount as part payment. But this circumstances alone would not be sufficient to lead to the conclusion that the amount could not have been intended to be by way of deposit. The Defendant no doubt in the course of its correspondence took up the position that the amount was a deposit liable to be forfeited because of the default of the Plaintiff. But if the contract would not warrant the view that the amount was deposit, the mere assertion on the part of the Defendant that it was a deposit would not help the determination of its true character.

11. The difference between an earnest or deposit and an advance part payment of price is now well established in law. Earnest is something given by the buyer to the seller to mark the conclusiveness of the contract. This is quite apart from the price. It may also avail as a part payment if the contract goes through. But even so it would not lose its character as earnest, if in fact and in truth it was intended as mere evidence of the bargain.

An advance is a part to be adjusted at the time of the final payment. If the buyer defaults to carry out the contract, he loses the earnest but may

recover the part payment leaving untouched the seller's right to recover damages. Earnest need not be money but may be some gift or token given.

It denotes a thing of value usually a coin of the realm given by the seller to indicate that the bargain is concluded between them and as tangible

proof that he means business. Vide *Howe v. Smith* (1884) 27 Ch.D. 89.

12. The practice of giving earnest is not current in present day commercial contracts. But sometimes an advance is made and accepted by way of

deposit or guarantee for the due performance of the contract. The distinction between a deposit and a part payment is thus described by Benjamin

on sales at page 946:

A deposit is not recoverable by the buyer, for a deposit is a guarantee that the buyer shall perform his contract and is forfeited on his failure to do

so. As regards the recovery of part payments the question must depend upon the terms of the particular contract. If the contract distinguishes

between the deposit and instalments of price and the buyer is in default, the

deposit is forfeited and that is all. And in ordinary circumstances, unless the contract otherwise provides, the seller, on rescission following the buyer's default, becomes liable to repay the part of the price paid.

13. In Halsbury's Laws of England, third edition, volume XXXIV, page 118 the distinction between the two is thus pointed out:

Part of the price may be payable as a deposit. A part payment is to be distinguished from a deposit or earnest.

A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject thereto, forms part of the price.

Accordingly, if the buyer is unable or unwilling to accept and pay for the goods the seller may repudiate the contract and retain the deposit. If the

seller is unable or unwilling to deliver the goods, or to pass a good title thereto, or the contract is voidable by the buyer for any reason, the buyer

may repudiate the contract and recover the deposit. The buyer may also recover it where, without the default of either party, the contract is

rescinded by either party pursuant to an express power in the contract in that behalf.

14. In Cheshire and Fifoot on Contracts (fifth edition) at pages 496-497 the position is thus summed up:

Where, therefore, it has been agreed that a sum of money shall be paid by the one to the other immediately or at certain stated intervals, the

question whether in the event of rescission repayment will be compelled depends upon the proper construction of the contract. The object that the

parties had in view in providing for the payment must first be ascertained.

Where the intention was that the money should form a part payment of the full amount due, then, as we have seen, if the contract is rescinded for

the payer's default the payee is required at law to restore the money, subject to a cross-claim for damages. If, on the other hand, the intention was

that the money should be deposited as earnest or as a guarantee for the due performance of the payer's obligation, the rule at common law is that

if the contract is rescinded by reason of his default the deposit is forfeited to the payer and cannot be recovered.

In the latter case, however, and also where it has been expressly agreed that a part payment shall be forfeited in the event of the payer's default,

equity is prepared within limits to grant relief against the forfeiture.

15. It is contended before me by learned Counsel for the Appellant that the absence of an express provision in the contract that the initial payment

would be forfeited on default by the buyer is an indication that the amount was rather a part payment than deposit. This argument does not impress

me. I respectfully agree with the observation of Mellish, L.J., in *Ex parte Barrell*: In *re Parnell* 10 Ch. App. 512 that even when there is no clause in

the contract as to the forfeiture of the deposit if the purchaser repudiates the contract, he cannot have back the money if it was a deposit, as the

contract has gone off through his default. It is characteristic of a deposit to entail forfeiture if the depositor commits breach of his obligation. On the

contrary it is inherent in a part payment of price in advance that it should be returned to the buyer if the sale does not fructify. The buyer is not

disentitled to recover, even if he is the party in breach, because breach of contract on the part of the buyer would only entitle the seller to sue for

damages but not to forfeit the advance. A specific forfeiture clause might operate to defeat the buyer's right of recovery of even an advance

payment. But equity might step in to relieve the buyer from forfeiture. If the amount forfeited cannot stand the test of a genuine pre-estimate of

damages, it would be unconscionable for the seller to retain it. The question whether the amount is a deposit (earnest) or a part payment cannot be

determined by the presence or absence of a forfeiture clause. Whether the sum in question is a deposit to ensure due performance of the contract

or not is not dependent on the phraseology adopted by the parties or by the presence or otherwise of a forfeiture clause. The proportion the

amount bears to the total sale price, the need to take a deposit intended to act in *terrorem*, the nature of the contract and other circumstances

which cannot be exhaustively listed have to be taken into account in ascertaining the true nature of the amount. In essence the question is one of

proper interpretation of the terms of a contract.

16. I would like to refer to a decision of the Court of Appeal in England in *Stockloser v. Johnson* (1954) 1 All. E.R. 630 and particularly to the

observations of Denning, L.J., which, if I may say so with respect, has set out the legal position succinctly and with great clarity. The facts of that

case need not be set out and it would be sufficient to refer only to the principle

of law laid down by the Court of Appeal. At page 637 Denning

L.J., observes thus:

It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause, if money is handed over in part payment of the

purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for

performance, the buyer cannot recover the money, but once the seller rescind* the contract or treats it as at an end owing to the buyer's default,

then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see *Palmer v. Temple* 112 E.R.

1304, *Mayson v. Clouet* (1924) A.C. 980, *Dies v. British and International Mining and finance Corporation Ltd.* (1939) I.K.B. 724 and *Williams*

on *Vendor and Purchaser* fourth ed., Volume 2, page 1006. (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit

(which is equivalent to a forfeiture clause) then the buyer who is in default cannot recover the money at law at all. He may, however, have a

remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to

repay it on such terms as the court thinks fit.

17. Bearing in mind the principles of law as set forth above by judicial precedents and by authoritative text-books, it seems to me to be clear that in

the instant case the payment of Rs. 4,000 in the first instance by the Plaintiff to the Defendant was nothing but an advance or part payment of the

agreed price of the total quantity of engines to be supplied. The amount represented twenty per cent of the price of the engines as stipulated under

the contract. It is unlikely that the Plaintiff who apparently is also a dealer in engines would have agreed to the risk of losing that amount or any part

thereof in the event of his not being able to fulfil the terms of the contract. Admittedly the engines were to be imported by the Defendant and then

supplied. Having regard to the fluctuation of prices, the Defendant wanted a firm offer and therefore secured the advance of Rs. 4,000 and

accepted the offer. The Plaintiff on his part hoped for the best and expected to make profits and did not mind to give a fair portion of the price to

the Defendant, especially when the amount was to carry interest at the rate of four per cent. The idea of a deposit (earnest) or forfeiture in case the

Plaintiff were to commit default appears to have been the last thing in the minds of parties at the time when the contract was entered into. The

Defendant tried to improve his position by asserting that the amount was a deposit at a late stage of the correspondence between the parties. But

this, as stated already, cannot certainly help it to contend, that under the terms of the contract the amount was paid as deposit. I do not agree with

the learned District Judge that the amount was in the nature of deposit or earnest and that it was liable to be forfeited, though it is obvious and it is

new conceded before me that the Plaintiff committed default in not taking delivery of the engines in accordance with the terms of the contract.

18. The next question is whether the suit is barred by limitation. The suit was instituted on 19th July 1957. The Defendant contends that the suit is

governed by Article 51 of the Indian Limitation Act and reads:

Description of Period of Time from which period

suit. limitation" begins to run

For the balance Three years. When the goods ought

of money to be delivered.

advanced in

payment of good

to be delivered.

19. If this article applies obviously the suit is time barred. Under the terms of the contract goods were to be delivered even as early as August

1951, and it is not pretended that the goods were not available for delivery before three years prior to the institution of the suit. Nor does the

learned Counsel for the Appellant contend that the suit would be in time even if Article 51 applies. The point that has, therefore, to be considered

is whether this article can be properly invoked by the Defendant in support of its plea of limitation. Mr. V.C. Viraraghavan, learned Counsel for the

Appellant, contended that the word "balance" occurring in the first column of Article 51 is significant and that indicates that the article would

govern only a case where an advance is received, some goods are supplied but the price of which would not wipe off the whole of the advance. In

other words the contention is that balance really means the amount left with the seller after delivering the goods partly in pursuance of the contract.

According to the learned Counsel it cannot apply to a case where the seller failed to deliver any goods towards the advance received. In his

endeavour to make good this submission, learned Counsel referred me to the previous corresponding provisions under the prior Limitation Acts,

namely, Section 1, Clause 9 in Act XIV of 1859; Article 50 in chapter II, Act IX of 1871; and Article 51 of, Schedule II of Act XV of 1877. It

must be mentioned that the present Article 51 is merely a re-enactment of the provision in 1871 and 1877 Acts but the provision u/s 1, Clause 9 in

Act XIV of 1859 was slightly different. Learned Counsel referred me to the observations of Shepherd in his book on The Law of Limitation,

quoted by Rustomjee in his book on Limitation:

Article 51 is rather obscurely worded; the first column of the schedule, if more fully expanded, would run for the balance of money which money

has been advanced in payment of goods to be delivered.

20. Reference was also made to a decision of the Calcutta High Court in *Boddonath Sash and Anr. v. Lalunnissa Bibee and Ors.* (1867) 7

Weekly Reporter 164. That was a case where an advance had been given and goods were supplied but a balance was left with the seller even

after the supply of goods and the suit was laid by the buyer to recover the balance amount from the seller. The Calcutta High Court held that the

case was governed by Section 1, Clause 9 of the 1859 Act. But I do not think that the case really lays down any principle except that on the facts

of that particular case the proper article applicable was held to be Section 1 Clause 9.

21. In my opinion, the word balance need not necessarily be construed as some amount remaining in the hands of the seller who after receiving the

advance supplies some goods and fails to supply the full quantity of goods under the contract. The word balance as elucidated in *Earl Jowitt's*

Dictionary of English Law is:

The amount required to equalise the two sides of the account.

The Oxford Concise Dictionary gives the following meaning to the word Balance:

(Accounts) Difference between credit and debit Statement of these, etc.

22. If the advance made by the buyer to the seller remained intact because of the failure of the seller to supply any goods recovery of that amount

by the buyer would certainly be amount due to him as the balance on accounts between him and the seller. I am unable to confine the operation of

Article 51 only to a case where the advance amount had been reduced by part delivery and what remains payable by the seller is not the full

amount of advance but only a fraction thereof.

23. The decision of the Judicial Committee in *Hansraj Gupta v. Official Liquidators Dehra Dun-Mussoories Electric Tramway Co.* (1932) L.R. 30

I.A. 13, seems to me to be directly in point, on the question of the applicability of Article 51 of the Indian Limitation Act. It is interesting to note

that in that case also the question whether the amount sued for was a deposit or a part payment arose for decision. The facts were as follows. A

certain Lala Raghmal was a shareholder in a company. He entered into a contract in writing with the company by which he agreed to supply large

quantities of tramway construction material to them. The company paid as advance a sum of Rs. 27,000 to him. In a letter written by the managing

agent on behalf of the company to the shareholder the payment was described thus:

We have today paid 70a Rs. 27,000 by way of a advance and this amount will be deducted from your bill for the second shipment.

A receipt was given on behalf of the shareholder for this sum in the following terms:

...being the amount of advance for the order for rails placed with us by them in terms of their letter...dated February 23, 1922. This amount is to be

adjusted hereafter from our bills for supply of rails.

24. The company went into liquidation. The shareholder did not supply any materials as per the terms of the contract. In the winding up

proceedings the shareholder claimed damages against the company and obtained favourable orders. The liquidators of the company filed a claim

against the executors of the estate of the shareholder for recovery of this advance amount of Rs. 27,000. Two questions were raised before the

Judicial Committee: (i) Whether the advance was really in the nature of a deposit liable to be forfeited by reason of the breach committed by the

company and (ii) whether Article 51 of the Indian Limitation Act governed. Dealing with the question of the nature of the payment, Lord Russell of

Killowen observes thus at page 17:

...It was contended by the Appellants that these were not recoverable upon the ground that in each, case the sum was paid as a deposit or earnest to secure the due fulfilment of a contract, and that since the company in each case made default and failed to carry out the contract, the executors were entitled to retain the moneys. Their Lordships are unable to accept this contention, which depends upon a true view of the construction of the respective contracts. Suffice it to say that having heard the arguments adduced, and having considered the relevant documents, their Lordships are of opinion that the sum of Rs. 27,000 and Rs. 35,000 were not, nor was either of them, paid as a deposit or earnest money. They were payments in advance or anticipatory payments, and nothing else.

Holding that Article 51 governs the learned Law Lord observes thus at page 21:

In regard to the item Rs. 27,000 the company could have recovered this by a suit instituted before the expiry of the period of three years named in

Article 51 in the first schedule, a period which in their Lordships' view began to run on July 1, 1923, when the second shipment of goods fell to be

delivered under the relevant contract. This debt was accordingly not time-barred by suit at the date of the winding up order.

25. But the facts of the present case however seem to bring the case even within the interpretation sought to be placed by the learned Counsel for

the Appellant: It must be noted that the original advance was Rs. 4,000, and strictly speaking Rs. 2,000 which is the amount sued for is the balance

that remains due out of that Rs. 4,000. The contract under exhibits A-1 and A-2 was one and indivisible. It would not be open to the parties to split

up the contract and construe it as if there are ten contracts for the supply of ten diesel engines. This could not be a proper mode of construing the

contract. I have no hesitation in holding that the present case is governed by Article 51 and that the suit claim is barred by limitation.

It is contended on behalf of the Appellant that the proper article that would be applicable is article 115 of the Limitation Act. That reads:

Description of Period of Time from which

suit. limitation. period begin to

run.

For Three years. When the

compensation for" contract is
the breach of any broken, (or when
contract, express there. are
or implied, not in successive
writing, breaches) when
registered and the breach in
not herein respect of which
specially the suit is
provided for. instituted occurs,
or (where the
breach is
continuing) when
it ceases.

26. This is a general and residuary article for suits for compensation on
unregistered contracts, express or implied. This article will apply only when
there is no other specific article applicable to the case. I have already held that
the appropriate article which would govern the present case is

article 51. In this view of the matter it is really unnecessary to deal with the
question as to when the contract was broken. The Appellant's

repudiation of the contract by calling upon the Respondent to pay the balance of
advance amount need not necessarily be taken as the date of

breach, as it is now settled law that if one party to a contract repudiates it the
other party has an option either to accept the repudiation and sue for

damages for breach of contract, or to disregard or refuse, to accept it and keep
alive the contract with full force and effect. *White and Carter v.*

McGregor (1962) A.C. 413. In my opinion Article 115 cannot properly be invoked
by the Appellant to save the suit claim from the bar of
limitation.

27. Learned Counsel for the Respondent contends that Article 62 might govern.
But I must say that I do not agree with that contention, either.

Article 62 is as follows:

Description of Period of Time from

suit. limitation. which period

begins to run.

For money Three years. When the

payable by the money is

Defendant to received.

the Plaintiff for

money received

by the

Defendant for

the Plaintiffs

use.

28. The words of this article correspond to the formula of money had and received by the Defendant for the Plaintiffs use if read as a description

and apart from the technical qualification imported in English Law and procedure. It is only in cases where there is a complete cause of action for

money had and received at the time of the original receipt of money by the Defendant that this article will apply. Events subsequent to the receipt of

the money, placing one of the contracting parties as a debtor of the other; cannot alter the original agreement of the parties or change its character.

Article 62 prescribes the period of limitation in respect of contracts for money payable by the Defendant to the Plaintiff for money received by the

Defendant, for the Plaintiffs use.

29. If the contract sued upon is not that, the fact that the Defendant may be treated as one holding the money of the Plaintiff, on the termination or

breach of the contract, cannot bring in Article 62. I agree with the view of the learned District Judge that the suit is barred by limitation.

30. In the result, the second appeal fails and is dismissed but without costs. No leave.