

**(1984) 01 KAR CK 0023**

**In the Karnataka High Court**

**Case No :** Regular First Appeal No. 149 of 1983

Union of India (UOI)

APPELLANT

Vs

Karnataka Electricity Board

RESPONDENT

---

**Date of Decision :** 06-01-1984

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 80  
Limitation Act, 1963 — Section 113, 18, 24

**Citation :** (1987) ILR (Kar) 2552

**Hon'ble Judges :** Vithal Rao, J;Venkatachaliah, J

**Bench :** Division Bench

**Advocate :** H.G. Balakrishna, for the Appellant; N.K. Gupta, for the Respondent

**Final Decision :** Allowed

---

## **Judgement**

Venkatachaliah, J.—This appeal is by the Railway Administration of the Union of India, defendant in O.S. No. 94 of 1978, on the file of the Civil Judge, Haveri, and is directed against the judgment and decree dated 18-9-1982, decreeing the claim of the Karnataka State Electricity Board, the plaintiff in the suit, for refund of Rs. 21,456--10 alleged to have been wrongly recovered by the defendant by way of what are referred to as the "wharfage" and "demurrage" charges respecting the consignment of a Transformer and its accessories sent through the Railway by the New Government Electric Factory Ltd., Bangalore from By yappanahalli Railway Station at Bangalore to be delivered to the plaintiff at Haveri in Dharwar District.

The appeal was admitted on 4-4-1983. The matter has now come up for orders on the prayer for interlocutory application for stay. With the consent of learned Counsel on both sides the appeal is taken up for final hearing, heard and disposed of by this Judgment.

The parties are hereinafter referred to with reference to a their array in the original proceedings.

2. The relevant and material facts leading up to the institution of the suit are these :

On 30-10-1972 The New Government Electric Factory Limited (N.G.E.F.), Bangalore delivered to the Railways at By yappanahalli Railway Station, Bangalore, a "10 M.V.A. Transformer" with its accessories for transportation to and delivery at Haveri to the consignee -- the plaintiff. The consignment in due course reached Haveri on 20-3-1973 and remained undelivered till 16-5-1973 at the Railway-yard at Haveri. There is some dispute between the parties as to the cause for the delay in delivery, the plaintiff alleging that the postponement of delivery was due and owing to the nonavailability of a crane to lift the consignment. However, that aspect of the matter is not germane having regard to the limited scope of this appeal.

It would appear that on 16-5-1973 when the consignment was ultimately taken delivery of by the plaintiff, the Railway authorities insisted upon the payment of, and recovered from the plaintiff, the sum of Rs. 20,191 - 60 towards what was claimed as "Demurrage" charges and a further sum of Rs. 1,239--50 by way of "wharfage" charges. In all a sum of Rs. 21,456--10 was paid by the plaintiff, according to it, under protest, the plaintiff having disputed its liability to pay these charges. It is averred by the plaintiff that as the Transformer was urgently needed the Demurrage and Wharfage charges were deposited with the Station Master on the assurance from the Station Master, and on the expectation, that it would be refunded after due enquiry and consultation with the higher authorities in due-course. On 21-5-1973 there was a claim made by the plaintiff for the refund. There was some further correspondence between the plaintiff and the defendant culminating in the notice dated 13-7-1978 (Exhibit P. 10) u/s 80 C.P.C. The suit itself came to be filed on 28-11-1978, some five and half years after payment of the disputed charges.

3. Appellant-defendant contested the claim urging that it was no part of its obligation to unload the consignment and that the operations of loading and unloading were the entire responsibility and concern of the consignee and that the levy of Wharfage and Demurrage charges were, in the circumstances, justified. It was denied that any assurance for a refund had been held out to plaintiff. It was also urged that the suit was hopelessly barred by limitation.

4. The Trial Court framed the necessary and relevant issues stemming from the pleadings, Issue No. 5 being the one which bears on the point of limitation.

On behalf of the plaintiff, one Rajasekhar Gurusiddayya Kulkarni (P.W 1) the Assistant Executive Engineer (Electrical) of the Karnataka Electricity Board, tendered evidence. Exts. P.1 to P.22 were marked on the side of the plaintiff. On behalf of the defendant a certain M. V. Bhadri (D.W. 1) the former Station-Master at Haveri was examined. He denied that the amount was accepted as, deposit from the plaintiff with an assurance of a refund later.

On an appreciation of the evidence on, record the trial-Court recorded findings in

favour of the plaintiff on all material issues, including the one as to limitation and entered a decree in favour of the plaintiff. On the question of limitation it held that Article 113 applied to the case and that the right to sue arose only when there, was a refusal to pay in response to the Notice u/s 80 C.P.C.

5. The only point urged by Sri. H.G. Balakrishna, Learned Counsel for the appellant, is that of limitation.

He contended that Article 113 is not the proper provision to apply to a case of this kind and that the appropriate provision is Article 24 and not the residuary Article.

Sri Balakrishna urged that, at all events, even if Article 113 was held to apply the terminus a quo is when atleast a clear, un-equivocal threat to infringe plaintiff's right occurs and that the very circumstance that plaintiff was called upon to make the payment of Demurrage and Wharfage charges as a pre-condition for the delivery of the consignment was, in itself, a clear and unequivocal threat to infringe plaintiff's alleged right and that even under Article 113 the right to sue must be held to have Arisen on 16-5-1973 itself.

But the main thrust of Sri H.G. Balakrishna's argument is that the appropriate provision is Article 24 and not Article 113 of the Limitation Act, 1963.

6. Sri. N. K. Gupta, Learned Counsel for the respondent-plaintiff however sought to sustain the view taken by the Trial-Court. He urged that, at all events, the communication dated 5-3-1977 from the Railway H.Qs. Office of the Commercial Branch, Southern Railways, Madras, addressed to the Executive Engineer, Electrical, O & M. Division, K.E.B., Haveri, operated as an acknowledgment of liability and furnished a fresh starting point of limitation u/s 18 of the Limitation Act.

7. The points that, therefore, arise for determination in this appeal are these :

(a) Is the plaintiff's claim governed by the Residuary Article 113 or by Article 24 of the Limitation Act, 1963 ; and whether the suit brought on 28-11-1978 for refund of the disputed charges paid on 16-5-1973 could be said to be in time ?

(b) Does Exhibit P. 7 the defendant's letter dated 5-3-1977 amount to an acknowledgment of liability u/s 18 of the Limitation Act furnishing a fresh starting point of Limitation for the suit ?

8. Re : Point (a) :

Before we proceed to examine the correctness of the findings of the Court-below on the question of limitation we must advert to two other aspects.

Plaintiff appears to have relied upon Exhibit P-5 urging that under that document the defendant had admitted its liability But as rightly pointed out by the Trial-Court, this document, Exhibit P 5, referred to in Para 9 of the plaint did not pertain to the "suit transaction at all but related to some other transaction. The

correctness of this finding was not, in our opinion rightly, disputed before us by the Learned Counsel for the respondent-plaintiff.

The second aspect is this : The Trial-Court relying on the pronouncement of the Supreme Court in the case of Madras Port Trust Vs. Hymanshu International by its Proprietor V. Venkatadri (Dead) by L.R.s, has permitted itself Certain observations in regard to the morality of public authorities taking recourse to the plea of limitation. Laws of Limitation are laws of repose and peace and are founded on public-policy intended to eliminate the unsettling influence of perpetual threats of litigation. They are intended to quiet stale demands. The old view that the Rules of Limitation are infamous power created by positive law to decrease litigation and encourage dishonest defences is not regarded now as sound. All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost. In Jones v. Bellgrove Properties Ltd. (1949) 2 KB 700 it was observed :

".....If a claim is made for payment of a debt many years after it has been incurred, there may be difficulty in proving that the debt ever was in fact incurred or that it has not already been paid and so forth. That is why the law bars the right of action after a certain period has elapsed from the accrual of the cause of action....."

Again in R. B. Policies at Lloyd's v. Butler (1950) 1 KB 76 it was said :

"I agree with Mr. Atkinson that it is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the Courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands."

The Learned Judge, in that case, approved the statement of Best, CJ. in another case:

".....It, as I have heard it often called by great judges, an act of peace. "Long dormant claims have often more of cruelty than of justice in them."

It is not therefore, permissible to say that a plea of bar of limitation is either unjust or immoral despite the possibility that in some isolated cases the Rules of Limitation might cause some hardship. When a plea of limitation is taken it is the duty of the Court to adjudicate upon its merits. Indeed in the very Madras Port Trust case referred to by the Trial-Court, the Supreme Court has categorically stated that when a plea of limitation is taken it requires to be considered and pronounced upon on its merits.

Indeed the words of Sarkar, J. in Martin Burn Ltd. Vs. The Corporation of Calcutta, , though in a different context, are worth recalling :

".....A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting

from its operation. A statute must of course be given effect to whether a Court likes the result or not....."

9. We may now proceed to examine the merits of the contentions urged.

As to applicability of the residuary Article the reasoning of the Trial-Court proceeds thus:

"The Learned Counsel for the defendant, has not pointed out, under what Article of the Limitation Act, this suit is governed, and how it is barred by time. In the absence of it, the contention of the plaintiff gains weight and it has to be accepted.

In this case, the refund of illegal recovery is sought for, and not the compensation. There is no deposit as such, to cover Article 22 and 70. There is cash payment. So, only the residuary Article 113 applies to the instant case, according to which, the period of limitation is 3 years from that time, when the right to sue has accrued.

The point to note is that the Trial-Court expressly negatives, rightly, we may add, that there was any deposit of the sums by the plaintiff with the defendant. The Trial-Court holds that there was an illegal recovery.

As to when the right to sue can be said to have arisen in this case the Trial-Court observes:

".....Right to sue has accrued to the plaintiff, only when the defendant has not replied the notice, Ex. P. 10, nor complied the same, even after getting the particulars from the plaintiff, under various correspondences, as pointed out by the Learned Counsel for the plaintiff. Ext. P. 10 is the notice issued u/s 80 C.P.C. on 13-7-1978. It is served on the defendant on 28-7-1978. The plaintiff has waited for two months, for the compliance of the same. When the defendant has not done so, nor replied the same, the cause of action has arisen to the plaintiff to file this suit.....

....As urged by the plaintiff, it is only after the issue of notice, Ext.P. 10 and the failure on the part of the defendant to perform, or to refuse it, the cause of action has accrued, and the suit is filed within three years from that date. So, the suit is in time."

10. The residuary Article 113 is attracted where no other Article in the Schedule applies. Courts ought not to regard any case as falling within this Article unless clearly satisfied! that it does not come under any of the other specific Articles. The question is whether Article 24 is the specific Article attracted to this claim. Article 24 corresponds to Article 62 of the 1908 Act. The Article refers to the English Form of Action "money had and received", founded on an implied or imputed contract.

The levy of the "Demurrage" and "Wharfage" charges is regulated and governed by statutory provisions. Section 46c (d) and (h) of the Indian Railways Act, 1890,

defines "Demurrage" and "Wharfage". The former means a charge levied after the expiry of the free-time allowed for loading and unloading a wagon. The latter is a charge levied on goods for not removing them from the Railway premises after the expiry of the free-time allowed for such removal. Section 47 of the said "Act" envisages the making of Rules for purposes, inter-alia, of regulating the terms and conditions on which the Railway Administration will warehouse goods or retain goods at any Station on behalf of the consignee or the owner. Accordingly, Rules regulating "Demurrage" and "Wharfage" charges and their rates are framed. The disputed charges, in this case, are recovered by statutory authority. The question is whether a claim for refund of such charges on the ground that they have been wrongfully or illegally recovered is an action for "money had and received." Article 24 which refers to a suit "For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use" is based on the analogy of English Law of the action for "Money had and received."

11. In *Yerukola @ Penta Jogulu v. Yerukola @ Penta Tatayya* 1922 (45) Mad 648, referring to the origin of the action of "Money had and received", it is observed :

"..... These are technical terms of the Law of England used to cover a great variety of cases in which it can be said that the defendant has received money which really belongs to the plaintiff."

"Article 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."

12. Plaintiff's case in substance is that the disputed charges towards "demurrage" and "wharfage" were not legally leviable but were exacted wrongfully from the plaintiff and the plaintiff who needed the consignment urgently had had to pay. If a payment is made by a person under duress or some form of compulsion, other than a compulsion which can be said to be warranted by law, the payment is really involuntary and the money so paid is recoverable as money had and received- A payment is not considered voluntary when demanded and paid under colour of statutory authority or entitlement, where in fact and in law no such demand could have been made or where the demand is ultra-vires. The duress or compulsion in such a case would amount to a tort and the recovery is enabled under the principle of tort. The plaintiff in adopting this action is supposed to waive the tort and the law enables the recovery deeming the payment to be really for plaintiff's use. Such an obligation is, by a fiction of law, implied or imputed as under a contract.

In *Sinclair v. Brougham* 1914 AC 398 Lord Chancellor Haldane said :

".....The action for money had and received was, in principle, one which rested on a promise to pay either actual or imputed by law."

(underlining ours)

In John v. Dodwell and Company Ltd. 1918 AC 563. Privy Council referred to the principle thus :

"..... The action for money had and received is, according to the law of England, in its nature one of assumpsit, founded on implied or imputed contract, and depends on a waiver of any tort committed, and on the correlative affirmance of a contractual relation....."

In Municipal Council, Dindigul v. The Bombay Company Ltd., Madras 1929 (52) Mad 207, Coutts Trotter, C.J., said:

".....The industry of counsel put before us practically every decided case both English and Indian. I may clear the ground of two points at once. In the first place it cannot be contended, as was at one time suggested, that payment under protest can affect the position of the person who is being paid. Its value is to safeguard the position of the person who makes the payment and to ensure that it cannot be said that the payment he made was a voluntary one ; but it does not raise any obligation on the part of the person who accepts the payment to return it if it turns out ultimately that the money was not due. The question whether there is an obligation to return it has to be determined on grounds altogether independent of whether the payment was made with or without protest.

It is clear that actions such as the present are in the nature of English actions for money had and received...."

In Mohamad Wahib v. Mohamed Ameer ILR (1905) Cal 527, Mookerjee, J. referring to scope of the corresponding Article 62 in the 1908 Act, said :

".....Mr. Justice Blackstone in his Commentaries, when discussing this species of action says, it lies "when one has had and received money belonging to another without any valuable consideration given on the receiver's part ; for the law construes this to be money, had and received for the use of the owner only ; and implies that the person so receiving promised and undertook to account for it to the true proprietor....."

"....It seems to me to be clear, as pointed out by Markby, J. in Raghumoni Audhikary v.. Nilmoni Singh Deo ILR (1877) Cal. 393 that the Article, when it speaks of a suit for money received by the defendant for the plaintiff's 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".

12. In the Municipal Board of Ghazipur v. Deokinandan Prasad ILR 36 All 555, the distinction between Class of cases to which Article 62 of 1908 Act apply and to which the residuary Article 120 apply is brought out, In that case the plaintiff sued a Municipal Board for refund of octroi duty. He did not allege that the duty had, in the first instance, been taken from him illegally, but that he had after the payment thereof become entitled to a refund. It was held in these circumstances

that the suit was governed by Article 120 and not by Article 62 of the 1908 Act.

The distinction which attracted and determined the applicability of Article 62 (of the 1908 Act) and not the Residuary Article 120 was referred to thus :

"If the respondent had alleged that the Board was wrong in demanding and taking octroi in the first instance, the suit would have been governed by Article 62 Schedule I, to the Limitation Act. (See *Rajputana Malwa Railway Stores v. Ajmere Municipal Board* ILR (1910) All. 491). But the appellant does not seem to allege that the Board was wrong in taking octroi in the first instance."

(underlining supplied)

This, indeed, is a converse case where the wrongfulness of the demand was not known to plaintiff at the time of the demand and payment. In the present case before us, on the plaintiff's own showing, even at the time of the demand of the "Demurrage" and "Wharfage" charges it was known to the plaintiff to be wrongful. If that is so, authorities indicate that the appropriate provision in the law of limitation is the one in Article 24 and not Article 113.

Indeed, in *B.S. Venkatarama Ayyar v. Kuppuswami Ayyar* AIR 1955 Mad 643 where the landlord taking advantage of the tenant's situation had charged him excessive rent, contrary to the laws contained in the House Building (Lease and Rent Control) Act which was meant for the protection of the tenants, the landlord was held to have received the money for the tenant's use and the suit by the tenant, after the fixation of fair rent by the Controller, for recovery of the excess amount paid was held to be governed by Article 62 and not Article 120 corresponding to Articles 24 and 113 respectively of the 1963 Act.

We, therefore, accept the contention urged by Sri. H.G. Balakrishna, for the appellant.

13. That apart, even on the assumption that Article 113 applies, the time begins to run when the right to sue accrues. In AIR 1930 270 (Privy Council) the Judicial Committee held that though there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement, however a clear and unequivocal threat to infringe that right by the defendant is sufficient and the right to sue would arise. This view was reiterated in AIR 1931 9 (Privy Council)

It cannot be said that even on 16-5-1973, when the money was paid virtually under compulsion there was no threat to infringe the right of the plaintiff and accordingly the right to sue must be held to have arisen on that day. In any view of the matter, we hold that the suit filed on 28-11-1978 was barred by time.

14. We accordingly, hold and answer point (a) in favour of the appellant.

15. Re : Point (b):

Exhibit P.7 is a printed form in which the defendant, after referring to the communication dated 22-11-1976 from the plaintiff, asked the plaintiff to furnish

certain particulars. There are several columns in the printed pro-forma and attention to some items are drawn by tick-mark against some of the columns. Para II of Exhibit P. 7 says :

"II. Will you please return your letter furnishing the required particulars correctly in the columns shown above to enable this office to connect papers for taking necessary action."

This communication is sought to be relied upon as an acknowledgment of the liability u/s 18. Mere calling for some particulars is not an acknowledgment.

No acknowledgment can be inferred from or is implied in, a mere non-repudiation of liability. There must be a definite admission of liability and not a mere statement expressing a Jural relationship. All that the printed form expects the plaintiff to do is to furnish certain particulars which are printed column-wise so that the papers could be connected.

It is therefore, idle to contend that Exhibit P. 7 has any effect of furnishing a fresh starting point of limitation for the suit-claim.

16. We, therefore, hold and answer point (b) against the plaintiff.

17. In the result, for the foregoing reasons, we allow this appeal ; set-aside the Judgment and Decree under appeal and. dismiss plaintiff's suit as barred by time.

In the circumstances of the case, we leave the parties to bear and pay their own costs both here and below.