Bhajan Singh Hardit Singh And Co., Delhi vs Karson Agency (India) And Ors. on 31 March, 1967

Author: Chief Justice

Bench: Chief Justice

JUDGMENT

Tatachari, J.

(1) This letters patent appeal under Clause 10 of the Letters Patent of the High Court of Punjab originally came up for hearing before a Division Bench of the High Court (S.S. Dulat and S.K. Kapur, JJ). The learned Judges took the view that the case involved a question of limitation which should be decided by a larger Bench. The Appeal, has, therefore, been posted before us.

The appellant, M/s. Bhajan Singh Hardat Singh and Co., filed a suit No. 718 of 1954 in the Court of Shri Munnilal Jain, P.C. S., Sub-Judge, 1st Class, Delhi, for recovery of Rs.3392/9/6 from the respondents , herein Karson Agency (India) and another who were impleaded as defendants in the said suit.

(2) The case of the appellant-plaintiff was:

> (a) That on 14-2-51, the respondents defendants agreed at Delhi to purchase from the appellant "500 Yards of worsted (Woolen cloth) of Indian Woolen Mills, steel colour, June - July, Challan at Rs.23/4/ per yard and paid Rs.1,000/- as advance that on 25-7-1951, the respondents were sent a Bill (Ex. P-10) No. 5306, for 500 yards worsted as per the contract, and were required to take delivery of the goods after payment of Rs.10,625/- which was the balance amount due after deducting the advance of Rs.1,000/- from the total amount of Rs.11,625/-, the price of the cloth as per the contract, and that the respondents were asked to take delivery by the end of July, 1951, but that they did not take delivery of the goods.
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> (b) That on 6-3-1951, the respondents were sent a registered notice by which they were informed that they should take delivery within 4 days from the receipt of the notice against payment of the amount of Rs.10,625/- failing which the goods would be sold at the risk and responsibility of the respondents defendants and that in spite of the said notice, the respondents did not take delivery of the goods.
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> (c) that the appellant, therefore, sold the goods, on retail basis, on 8-11-1951, 9-11-1951, 10-11-1951, 15-11-9151, 16-11-1951 and 20-11-1951, at the market rates which prevailed on the said rates, that the amount realised from the sale was Rs. 7,349/1/9, that the appellant thus suffered a loss of Rs. 4,392/9/6 on the re-sale of

the goods, that after adjusting the advance amount of Rs.1,000/-, the balance due was Rs. 3,3,92/9/6 which the respondents did not pay in spite of repeated demands, and that, therefore, the suit was filed on 19-11-1954, for recovery of the said amount of Rs. 3,392/9/6, with future interest at 10 annas per cent per mensem from the date of decree till the realisation of the decretal amount.

(3) The respondents- defendants countered, inter alia, that the suit was barred by limitation. It is not necessary to refer to the other pleas raised by the respondents-defendants, as it is only the question of limitation that has been argued before us. Various issues covering the pleas put forward by the parties were framed by the trial Court. Issue No. 2 was framed as follows: "Whether the suit is within time?"

We are not concerned with the other issues, as the only question for decision on this appeal is the one relating to the plea that the suit was barred by limitation.

(4) the learned Subordinate Judge, by his judgment dated 1-11-55, held all the issues including the issue No. 2 regarding limitation in favour of the appellant-plaintiff, and decreed the suit as prayed for.

(5) On the question of limitation, the contention before the learned Subordinate Judge, on behalf of the appellant-plaintiff, was that the sale of the last item of goods was effected on 20-11-1951, that the present suit was filed on 19-11-1954, that it was not possible for the Appellant-plaintiff, to ascertain the damages until the goods were sold, that he could not, therefore, file the suit before 20-11-1951, that the cause of action arose only on the last sale when damages could be calculated and ascertained, and that, calculated from that date, the suit was well within time.

(6) On the other hand, the contention on behalf of the respondents - defendants was that the goods were to be delivered in July, 1951, that the offer of delivery was made on 25-7-1951, and was rejected on 31-7-1951, and that the period of limitation for the suit commenced to run from the end of July, 1951, and therefore, the suit was barred by time.

(7) The learned Subordinate Judge held that according to Section 46 of the Sale of Goods Act read with Section 54 of the same Act, an unpaid seller has a lien on the goods for the price while he is in possession of them, and has a right of re-sale also, that the unpaid seller on the rejection of the offer for delivery had two options, viz. -

(1) to keep the goods with himself and straightway sue for the price of the same, and (2) to resell the goods in order to mitigate losses and sue for the shortfall if any, that the statutory right to re-sell, which was given to the unpaid seller, sufficiently authorised him to resell the goods within a reasonable time and sue for the shortfall, that the respondents-defendants in the present case were served with a notice in August, 1951, and the resale was completed on 20-11-1951, that the limitation for a

> suit for the recovery of the shortfall commenced from the said date, and that the suit for the recovery of the shortfall was within time. In the result, as already stated, the learned subordinate Judge decreed the suit as prayed for.

It may be noted that no reference was made either by the parties or the learned Subordinate Judge to any particular article in the Limitation Act as being applicable to the case. They appear to have assumed that the period of limitation was 3 years, presumably under Article 115 of the Limitation Act, and the controversy was only as to the date on which the cause of action had arisen.

(8) Against that judgment and decree, the respondents - defendants preferred an appeal No. 43 of 1956 to the Court of Shri P.D. Sharma, Additional District Judge, Delhi. The learned District Judge, by his judgment dated 8/9-4-1957, affirmed the finding of the trial Court that the suit was not barred by limitation, though for different reasons, dismissed the appeal, and confirmed the decree passed by the trial Court. On the question of limitation, the learned District Judge held that an unpaid seller has two rights, viz., a right of re-sale under Section 54(2) of the Sale of Goods Act, and an independent right under Section 55 of the said Act to sue for the price of the goods, that it is open to him not to sell the goods, but to sue for the price leaving it to the purchaser to take delivery of the goods lying with the seller at his own convenience, that in the present case, the appellant herein (plaintiff) availed himself of the remedy provided under Section 54(2) of the Sale of Goods Act, resold the goods, and sued the respondents herein (defendants) for making good the loss sustained by him on account of the breach of the contract by the opposite party and that the last sale of the goods was effected on 20-11-1951 and the present suit was filed on 19-11-1954 within 3 years from the date of the resale of the last item of the goods.

(9) The learned District Judge also held that he was not convinced by the contention on behalf of the respondents - defendants that the cause of action arose on the date on which the respondents - defendants refused to accept the delivery and that the suit should have been filed within 3 years from that date. The learned District Judge further observed that the plaintiff availed himself of the second remedy, viz., the remedy provided in Section 54(2) of the Sale of Goods Act, for making good the loss suffered by him on account of the breach of the contract by the opposite party, that therefore the cause of action arose, not on the date of the defendants' (respondents herein) refusal to accept delivery but on the date on which the last item of the contracted goods was resold that since no specific article covering the limitation for such cases is to be found in the Indian Limitation Act, the residuary Article 120 of the Limitation Act will apply, that the period given in Article 120 is 6 years from the date on which the right to sue accrued on 20-11-1951, and that, therefore, the trial Court rightly held that the suit was not barred by limitation.

(10) Against that judgment and decree, the respondents - defendants preferred Regular Second Appeal No. 93-D of 1957, to the Circuit Bench of the High Court of Punjab. The Second Appeal was heard by Falshaw , C.J., who by his judgment dated 17-1-1962 allowed the Second Appeal, set aside the judgments and the decrees of the lower Courts, and dismissed the suit on the ground that it was barred by limitation. The only point that was argued in the Second Appeal was as regards the bar of limitation. It was contended on behalf of the defendants (respondents herein) that the suit was governed by Article 115 in the Schedule to the Limitation Act and not by the residuary Article 120.

On the other hand, it was argued on behalf of the plaintiff (appellant herein) that Article 120 applies to the case, and that even if Article 115 applies, the suit was still within time as it was filed within 3 years from the date on which the last item of the cloth was re-sold, and the said last resale was the starting point of the limitation even under Article 115 of the Limitation Act.

(11) The learned Chief Justice held that the lower Courts, while pointing out that the plaintiff could choose one of the two remedies which was open to him, did not explain exactly why the choice of the remedy by the plaintiff took the suit out of the scope of Article 115 and that the suit was one for compensation for the breach of contract, and was, therefore governed by Article 115 of the Limitation Act.

(12) The learned Chief Justice, agreeing with the decision of the High Court of Madras in Soundara Rajan and Co., v. K.P.A.T. Annamalai Nadar, , further held that under Article 115 of the Limitation act, the starting point of the limitation is the date on which the respondents - defendants refused or failed to take delivery of the goods tendered to them within the time specified in the contract, that the contention on behalf of the appellant- plaintiff that in view of the provision in Section 54(2) of the Sale of Goods Act the cause of action could really arise only when the last of the goods were resold, and the suit for loss on resale could be brought only after notice to take delivery has been issued to the buyer and the buyer failed to comply with it within a reasonable time, and that, therefore, the cause of action can be said to arise only after the resale of the goods is completed, is untenable, that in the present case the starting point was the date when the contract was broken, and that the date occurred when the respondents defendants failed or refused to take delivery of the goods; that the ascertainment of the amount to be claimed in a suit for damages for the breach of a contract is something separate and distinct from the occasion of such ascertainment, which is the real cause of action; that when the goods are resold after the buyer failed to comply with a notice to take delivery, the resulting resale may either obviate the necessity for filing a suit if the price realised is enough or exceeds the contract price, or it may determine the amount for which the relief is to be brought; and that this does not alter the fact that the cause of action is the breach of the contract as indicated by the words used in Article 115 of the Limitation Act. Accordingly as already stated, the learned Chief Justice allowed the Second Appeal, and dismissed the suit as barred by limitation.

(13) It is against that judgment and decree that the present Letters Patent Appeal has been preferred by the appellant-plaintiff. As already stated the only question for determination is as to whether the suit filed by the appellant-plaintiff was barred by limitation or not.

(14) The facts and the dates which are relevant for deciding the question of limitation are the following:-

> The suit contract was entered into on 14-2-1951; the quantity of cloth agreed to be sold was 500 yards. The said goods were to be delivered in June or July 1951. The appellant-plaintiff sent a bill (Ex. P-10_ for 500 yards on 25-7-1951 to the respondents defendants and required the respondents to take delivery by the end of July, but the respondents did not take the delivery of the goods.

Again, on 6-8=1951, the appellant-plaintiff sent a registered notice (Ex. P-7) to the respondents defendants informing them that they should take delivery within 4 days, failing which the goods would be sold at the risk and the responsibility of the respondents defendants. Even then the respondents did not take the delivery. Thereupon the appellant-plaintiff resold the goods at Delhi at the prevailing rates on retail basis between 8-11-1951 and 20-11-1951 for a total sum of Rs. 7349-1-9. The contract price was Rs.11,625, and the amount got by resale was short by Rs.4392-9-6. So, deducting the sum of Rs.1,000 which was paid by the respondents at the time of the contract the appellant-plaintiff filed the suit, out of which this appeal has arisen on 19-11-1954 for recovery of the balance of Rs. 3,392-9-6, being the loss incurred by the appellant by reason of the breach of the contract by the respondents defendants, with future interest thereon at 10 annas per cent per mensem from the date of the decree till the realisation of the decretal amount.

(15) Article 115 of the Indian Limitation Act Ix Of 1908, provides the period of limitation for a suit "for compensation for the breach of any contract, express or implied not in writing registered and not herein specifically provided for", as three years, from the date when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases. The present suit is, prima facie, a suit for compensation for the breach of the contract committed by the respondents defendants, although the appellant-plaintiff quantified the compensation as the amount by which the price for which the goods were resold fell short of the contract price, characterising the same as the loss incurred by the appellant-plaintiff. As such, Article 115 of the Limitation Act applies to the suit, and as provided in that Article, limitation began to run from the date on which the breach of the contract was committed by the respondents-defendants i.e. from the end of July, 1951. Consequently the suit which was filed on 19-11-1954, was clearly barred by limitation.

(16) As already stated, the trial Court took the view that, on a breach of the contract committed by the respondents. The appellant-plaintiff had an option either to sue immediately for the price or to resell the goods and sue for the shortfall, if any, that in the present case, the appellant adopted the second course, and filed the suit for recovery of the shortfall, that the limitation for such a suit commenced from 20-11-1951, the date of the resale of the last item of the goods, and that therefore the suit filed on 19-11-1954 was within time. Thus the trial Court treated the suit as one for recovery of the shortfall and not as one for compensation for breach of the contract, and assumed that the period of limitation is three years (presumably under Article 115) and that the said period of limitation commenced to run from the date of the resale.

The lower Appellate Court took the view that the cause of action arose not on the date of the refusal by the respondents- defendants to accept delivery, but on the date on which the last item of the contracted goods was resold, and that since no specific Article covering the limitation for such a case

is to be found in the Limitation Act, the residuary Article 120 which provides a period of 6 years will apply to the to the suit filled by the appellant-plaintiff.

On the other hand, the second Appellate Court took the view that the suit was one for compensation for the breach of a contract, that the period of limitation commenced to run from the date when the contract was broken, that the ascertainment of the amount to be claimed in a suit for compensation for damages for the breach of a contract is something separate and distinct from the occasion of such ascertainment, which is the real cause of action, and that therefore Article 115 of the Limitation Act, and not Article 120, applies to the case and that the suit was barred by limitation.

(17) Shri Anoop Singh, learned counsel for the appellant contended before us that the cause of action did not arise on the date of the breach of the contract committed by the respondents by their refusal to take delivery of the goods, that apart from the right to sue the price on the commission of the breach of the contract, the Appellant-plaintiff had a right to resell the goods and recover the shortfall, if any, under Section 54(2) of the Sale of Goods Act, that the act of refusal by the respondents to take delivery did not give rise to a cause of action until a specific injury by way of shortfall actually resulted, that the period of limitation for a suit for compensation for such an act should be computed from the time when the injury results, as provided in Section 24 of the Limitation Act, that such injury did not result in the present case till there sale was held, that the cause of action for the suit for compensation for the act of the respondents which resulted in the said injury by way of shortfall in the price arose only on the date of the resale of the last item of the goods, that such a suit does not fall under Article 115 of the Limitation Act, and there being no other specific Article, the suit is governed by Article 120 of the Limitation Act, and that even if Article 115 applies to the suit, the suit filed on 19-11-54 should be regarded as not barred by limitation, as the cause of action arose on and the period of limitation commenced to run from 20-11-1951, the date of the resale.

(18) We shall now consider the said contention advanced on behalf of appellant-plaintiff. The said contention rests mainly on the assumption that the appellant-plaintiff had a right to resell the goods by virtue of Section 54(2) of the Sale of Goods Act. We have, therefore to examine the provisions relating to the right of resale contained in the Sale of Goods Act, 1930, Chapter V of the Sale of Goods Act, which contains Sections 45 to 54, deals with the right of an unpaid seller against the goods after they have become the property of the buyer. Section 45 defines the term "unpaid seller" when the whole of the price has not been paid or tendered. Section 46(1) describes the rights of an unpaid seller against the goods after they have become the property of the buyer. It runs as follows:

> "46. (I) - Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer the unpaid seller of goods, as such, has by implication of law -
>
> (a) a lien on the goods for the price while he is in possession of them;
>
> (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them.

(c) a right of resale as limited by this Act."

(19) Section 46(2) on the other hand declares the rights of an unpaid seller where property in the goods has not passed to the buyer but remained in the seller. It runs as follows:- "(2) Where the property in goods has not passed to the buyer, the unpaid seller has in addition to his other remedies, a right of withstanding delivery similar to and co-extensive with his right of lien and stoppage in transit where the property has passed the buyer."

Thus it is Section 46(1)(c) that gives a right of resale to the unpaid seller in certain circumstances prescribed in the Act. We are concerned in the present case only with the said right of resale given to the unpaid seller but not with the right to a lien or the right to stoppage of goods in transit given to him under Section 46(1)(a) and (b).

(20) Section 54 of the Sale of Goods Act further provides regarding the seller's right to resell as follows:

> "54. (1) Subject to the provisions of the Section, a contract of sale is not rescinded by the mere exercise by us unpaid seller of his right of lien or stoppage in transit.
>
> (2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised has right of lien or stoppage in transit gives notice to the buyer of his intention to resell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, resell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract but the buyer shall not be entitled to any profit which may occur on the resale. If such a notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any on the resale;
>
> (3) Where an unpaid seller who has exercised his right of lien or stoppage in transit resells the goods the buyer acquires a good title therein as against the original buyer, notwithstanding that no notice of the resale has been given to the original buyer.
>
> (4) Where the seller expressly reserves a right of resale in case the buyer should make default, and, on the buyer making default resells the goods the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages."

(21) Shri Anoop Singh relied on Section 54(2) in support of his contention that the appellant-plaintiff had a right to resell the goods and recover the shortfall. He submitted firstly that the goods in the present case were of a perishable nature within the meaning of Section 54(2) and therefore, the appellant was entitled to the right of resale under Section 54(2). The phrase "perishable goods" has not been defined in the Act. Shri Anoop Singh relied on a passage in the "Commentary by Pollock and Mulla" on the Sale of Goods Act, 3rd Edition, page 212, which runs as follows:- "There is no definition of "perishable goods", though no doubt the phrase would include

the goods which are apt to deteriorate in a mercantile sense as well as those such as fruit or fresh fish, which cannot be kept for long, and it has also been judicially suggested that goods are perishable if their price is liable to fall rapidly." It is difficult to say what may be assumed perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days or few hours" Maclean v. Dunn (1828) 4 Bing 722 at pp. 728-729 = 29 R.R. 714. It is doubtful, however whether this meaning should be given to the word "perishable" but suggestion is worthy of notice in view of the fact that the term 'goods" in this Act includes such things as stocks and shares."

(22) The goods in the present case are worsted (Woolen cloth). We consider it difficult to accept the submission of the learned counsel that they can be regarded as perishable goods within the meaning of Section 54(2). Even if, the words "perishable goods" are taken to include goods which are apt to deteriorate in a mercantile sense, or in the sense of their price being liable to fall rapidly, there is no evidence in the present case, to show that the woolen cloth in question was such as was likely to deteriorate or that there was likelihood of a rapid fall in the price of the woolen cloth. We cannot, therefore, accept the submission that the goods in question are perishable goods within the meaning of Section 54(2).

(23) Shri Anoop Singh then submitted that the appellant should be taken to have exercised his right of lien within the meaning of S. 54(2) as he had continued to be in possession of the contracted goods and therefore he was entitled to resell the goods by virtue of the provision in Section 54(2). Even if we assume that the appellant had exercised his right of lien within the meaning of Section 54(2), the question remains as to whether he was entitled to resell the goods by virtue of the provision in Section 46(1)(c) and Section 54(2). As already stated the said Sections give a right to the unpaid seller to resell the goods, only when the property in the goods had passed to the buyer. Therefore unless the appellant establishes that the property in the goods had passed to the buyer he cannot succeed in his contention that he had a right to resell by virtue of the said provisions. This takes us to the question as to whether, in the present case, the property in the goods had passed to the buyer.

(24) We have already stated that the parties entered into an agreement on 14-2-1951 by which the appellant (plaintiff) was to supply 500 yards of worsted (woolen cloth) of India Woolen Mills, steel colour, June-July Challan at Rs. 23/4/ per yard to the respondent, (defendants). On 25-7-51, the appellant sent a bill No. 5306 for the goods with a covering letter Ex. P. 10, which reads as follows:

> REGISTERED A.D. 25th July, 51.
>
> B.L. Kora Esquire, Proprietor Karson Agencies (India), 5/7, W.E.A. Karolbagh, Delhi.
>
> Dear Sir, We are in receipt of your letter of 14-7-51. That on 14-2-51, at Delhi you contracted to purchase 500 yards of Worsted India Woolen Mills Steel Colour June-July challan at the rate of Rs. 23/4/ per yard.
>
> Previously you were offered the goods but you returned the bill and demanded bale numbers. Your request is rather unreasonable. As per contract you are offered to take

delivery of 500 yards of Worsted till the end of this month. The goods are ready for delivery in our godown.

If you fail to take delivery as asked above the goods will be sold or auctioned in the market holding you liable for losses and costs etc. Yours faithfully, for Bhajan Singh Hardit Singh and Co.

Partner"

Encls: - One Bill No. 53-6.

It may be noted that in Ex. P-10 the appellant stated that the goods (500 yards) were ready for delivery in their godown, and required the respondents-defendants to take delivery of the same.

It is the case of the appellant himself that the respondents defendants did not take delivery by the end of July. They appear to have sent a reply dated 30th July, 1951, which has been marked as Ex. D/5. After acknowledging the receipt of the letter dated 25-7-1951 and the enclosed bill, the respondents stated in Ex. D/5 as follows:-

" ..... That the bill accompanying your said letter dated 25-7-1951, is not only discrepant from the one previously sent by you but is as incomplete as the old one which had been already returned to you for supplying the omissions your persistent omission to quote the bill numbers which would have enabled my client to ascertain whether the goods which you wanted to offer were in conformity with the agreement or not and your definite refusal to supply the information as requested of you in this connection and calling his demand for the same as unreasonable, are tantamount to breach of agreement on your part.

It may be noted that the language of this reply shows that the contracted goods were yet unascertained by the date of this reply, Ex. D/5.

(25) In reply to Ex. D/5, the appellant sent a registered notice, Ex. P-7 on 6-8-1951, which runs as follows:-

"To B.L. Kora Esquire, Proprietor, Karson Agencies (India) 5/7 W.E.A. Karolbagh, Delhi.

Dear Sir, My Clients Messrs. Bhajan Singh Hardit Singh and Co., Katra Rathi, Nai Sarak, Delhi have instructed me to serve you with the following notice:-

(1) That on 14-2-1951 at Delhi you contracted to purchase from my clients 500 yards of Worsted of India Woolen Mills, Steel Colour, June-July Challan at the rate of 23/4/- per yard.

(2) On 25-7-1951, you were sent bill No. 5306 for 500 yards of Worsted as per contract and you were offered to take delivery of the goods on payment of 10625 after giving you adjustment of 1000 advance money.

(3) Instead of taking delivery of the stipulated goods on 1-8-1951, my clients have received your notice dated 30th July and are surprised to note its contents. Your notice is very much vague and irrelevant.

(4) My clients have offered you goods according to the terms of the contract, you can come on the spot, examine the bales, verify the goods according to the order and take delivery thereof against payment. Your demand for giving the numbers of bales is rather ridiculous and against the practice and custom prevalent in Delhi market. Anyway to submit to your request the numbers of bales offered to you is 4193 and 4200. You can take 500 Yards out of these bales.

(5) You are making excuses and delaying in taking delivery of the goods as the market has gone down considerably. This is unlike a good businessman.

(6) Now you are finally approached to take delivery of 500 yards of Worsted as per contract, within a period of four days from the receipt of this notice against payment, failing which my clients shall be constrained to auction or sell the goods in the market at your risk and you will be held liable for the entire loss and expenses for the recovery of which a suit will be brought against you holding you liable for all costs incurred.

Yours faithfully, Sd/- Anoop Singh (Advocate)".

(26) It may be noted that paragraphs 4 and 6 of Ex. P. 7 clearly show that the 500 yards which were agreed to be sold were not separated from the bales and appropriated to the contract. The goods were thus unascertained even by the date of Ex. P-7.

(27) Section 18 of the Sale of Goods Act provides that in the case of a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Section 23(1) of the Sale of Goods Act provides that - "Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes, to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." Thus, it is only when the goods in a deliverable state are unconditionally appropriated to the contract by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods passes to the buyer.

(28) Shri Anoop Singh referred to a number of decisions which dealt with the question as to what constitutes an unconditional appropriation of the goods to the contract. In the matter of David

Sassoon and Co. Ltd. Air 1926 Sind 246 (247) the goods were specially appropriated to the buyers by certain running numbers which were specified in the Invoices and in the Arrival notices. It was, therefore, held that the goods were appropriated by the sellers as the goods of the buyers in that case. In Firm Paharia Mal Ram Sahai v. Birdhi Chand Jain and Sons, , it was held that where there is a contract for the sale of unascertained goods and the goods are deliverable to the buyer ex-godown at place A, then if the buyer at B instructs the seller by letter to send the goods by lorry, the buyer must be held to have impliedly assented to the appropriation made by the seller when he removed the goods from his godown and took them to the lorry, and that at the time when the goods were removed from the godown there was irrevocable and unconditional appropriation of the goods to the contract.

In Commr. Of Income-Tax, Madras v. Mysore Chromite Ltd., , the contract was for the sale of chrome ores by a company which owned chromate mines in Mysore States to buyers outside India. The question that arose for determination in that case was as to whether the sales took place and the property in the goods passed at Madras or outside India. The argument in the case that as soon as the seller to the company placed the goods on board the steamer named by the buyer at the Madras port, the goods became ascertained and the property in the goods passed immediately to the buyer.

In dealing with the argument, the Supreme Court observed that the requirement of Section 23 of the Indian Sale of Goods Act is not only that there shall be appropriation of the goods to the contract, but also that such appropriation must be made unconditionally. It was pointed out that in that case "the price and delivery was Fob Madras but the contracts themselves clearly required the buyers to open a confirmed irrevocable Banker's credit for the requisite percentage of the Invoice value to be available against documents", and that "this clearly indicated that the buyers would not be entitled to the documents, that is the bill of lading and the provisional invoice, until payment of the requisite percentage was made upon the Bill of Exchange". It was, therefore, held that there was no unconditional appropriation of the goods by merely placing them on the slip, and that the property in the goods passed and the sales were concluded outside British India when the payment of the requisite percentage was made upon the Bill of Exchange by the buyer.

In M/s. Carona Sahu Co. (P) Ltd. V. State of Maharashtra, , it was held that the law is well established that in the case of a contract for sale of unascertained goods, the property does not pass to the purchaser unless there is unconditional appropriation of the goods in a deliverable state to the contract, and that in the case of such a contract, the delivery of the goods by the vendor to the common carrier is an appropriation sufficient to pass the property. It was, however, pointed out that there is a difference in the legal effect of delivering goods to a common carrier on the one hand and shipment on board a ship under Bill of Lading on the other hand.

(29) In re Wait, (1927), 1 Ch 606, by a C.I.F. contract of November 20, 1925, Walt bought 100 tons of Western white Wheat Ex-motor vessel Challenger, expected to load between December 16 and 31, 1925 from Oregon or Washington. Walt sold 500 tons of this parcel by the same description to sub-purchasers. The wheat was shipped in bulk at Oregon. Walt became a bankrupt before the ship arrived. It was held by the Court of Appeal that the 500 tons were not specific or ascertained goods, and that there never was any such appropriation or identification, on or any such obligation to

deliver, a particular 500 tons, as to effect an equitable assignment giving the sub-purchases a beneficial interest therein or a lien in respect thereof.

(30) Shri Anoop Singh, the learned counsel for the appellant, brought to our notice a decision of the High Court Punjab, Circuit Bench at Delhi, in M/s. Eastern Trader Ltd., v. Punjab National Bank Ltd. . In our opinion, the learned counsel for the appellant cannot derive any support for his contention from the said decision.

In that case, the appellant-company, as an importer of 5000 fresh-wheels for cycles from a company in New York opened a letter of credit on 1-9-1947 with the second respondent (a Bank in Bombay) through the first respondent (the Punjab National Bank, Chowri Bazar, Delhi). In the agreement, by which the letter of credit was opened the second respondent Bank was instructed to negotiate the drafts of the company at New York, "to the extent of 5000 to be drawn on M/s. Eastern Traders (India) Ltd., New Delhi (appellant), at sight for full invoice cost of shipments purporting to be 5000 free-wheels for cycles from U.S.A. ports to Indian ports in one or more shipments".

The stipulation with regard to the port of destination, being "Indian ports", assumed significance as a result of the partition of the country on 15-8-1947.

The bills under the letter of credit were received by the respondents, and the port of destination was indicated as Karachi in the said bills. The appellant company protested about the destination. The second respondent asked their agents at Karachi on 1-1-1948 to clear the consignment and book the consignment to Bombay. A sum of Rs.4105/- was expended for the clearing of the consignment at Karachi. Finally, the goods were received in Delhi between 26-1-1948 and 10-11-1948. According to the appellant in that case, the price of goods had depreciated between January and November 1948, and were therefore disposed of for a low sum.

(31) The appellant in that case filed a suit on 30-8-1950 for recovery of Rs.29,581/5/2. The break up of the amount was as follows:-

(I) Rs. 15,000/- on account of expected profits.

(II) Rs. 4,105/- paid to clearing Agents at Karachi.

(III) Rs. 190/- spent by the appellant-plaintiff.

(IV) Rs.231/- interest charged by the respondent.

(V) Rs. 10,055/5/2 as losses sustained.

(32) It appears that an amended plaint was filed on 23-8-1951 adding the second respondent as a party, as it was not impleaded in the original suit. Various contentions were raised one of them being the question of limitation. The trial Court held that Karachi was not the port of destination within the meaning of the

agreement and that there was a breach of the agreement for which the second respondent was liable. The trial Court also held that the item of Rs.4105/- was barred by limitation. But, the suit was however, dismissed by the trial Court because the second respondent was exonerated by reason of an indemnity clause in the agreement.

(33) On appeal to the High Court, the learned Judges of the High Court agreed with the finding of the trial Court that Karachi was not an Indian port within the meaning of the agreement. They, however, did not agree in the conclusion of the trial Court regarding the effect of the indemnity clause and held that the second respondent was liable for the damages, if any. The learned Judges held that the first respondent was not liable on the ground that there was no privity of contract between the appellant and the first respondent. Then, on the question of the actual damages, the learned Judges held that there was no satisfactory proof of the damages sustained by the appellant.

(34) The only other question that remained for decision was the question of limitation as regards the liability of the second respondent. In dealing with this question, the learned Judges, observed that the item of Rs.4105 paid to the clearing agents at Karachi was clearly barred by time as the cause of action actually arose in the end of 1947, when the goods were cleared". As regards the rest of the amount of damages, the contention on behalf of the second respondent was that the provision in the Limitation Act applicable to the case was Article 115 according to which the period of limitation of three years for compensation for breach of any contract is to be reckoned from the date when the contract is broken, and that as the breach took place in December, 1947, the suit should have been filed within three years from that date, whereas the suit (the amended plaint) should be regarded as filed against the second respondent on 23-8-1951, and was thus barred by time. Dealing with this contention, the learned Judges observed that the aforesaid argument did not take sufficient account of Section 24 of the Indian Limitation Act.

After extracting Section 24, the learned Judges proceeded to observe as follows:- "A breach in the abstract would not be sufficient, in our opinion, to provide a foothold for the plaintiff to file a suit for compensation against the second defendant. It was only when the goods had been disposed of in November, 1948, when the injury was actually sustained and time must run from that date. In this view of the matter, though the item of Rs.4105/- would be barred by time the amount of damages, if proved, could have been recovered from the second defendant against whom the suit must be deemed to have been filed on 23rd of August, 1951. We are, therefore, of the opinion that no decree for damages can be passed against either of the two defendants and in this view of the matter, this appeal must stand dismissed."

(35) It may be noted that there was no detailed discussion of the exact meaning and scope of Section 24 of the Limitation Act and none of the decisions bearing on the matter was considered. Further, the actual decision of the case was based on their finding that there was no proof of the damages

sustained by the appellant-plaintiff, and not on the question of limitation. Thus, the observations on the question of limitations were mere obiter diota. The decision should, therefore, be regarded as confined to the facts of that particular case, and not as laying down a general proposition of law regarding the scope and applicability of Section 24 of the Limitation Act.

(36) Apart from the various decisions mentioned above, Section 23 of the Act itself shows firstly, that there should be goods which are of the description given in the contract and which are in a deliverable state i.e. there should be an ascertainment or separation of the goods from the bulk by the seller, secondly, that there should be appropriation of the goods to the contract; thirdly, that the said appropriation by the seller should be with the consent of the buyer; and fourthly, that the appropriation should be unconditional.

(37) In the present case, none of these requirements is satisfied. Ex. P-7 read with Ex. P-10 clearly shows that there was no separation or ascertainment of specific 500 yards from the bales. Nor was there any appropriation of such specific 500 yards by the appellant to the contract. Admittedly, the buyer never gave any consent to any appropriation of such specific 500 yards. Moreover, the appropriation, if any, Ex. P-7 was not unconditional. In Ex. P-7, the appellant stated not only that the respondents could go to the appellant's place and take 500 yards out of the bales Nos. 4193 and 4200, but also that the delivery was to be taken against payment. The separation of the 500 yards from the bales of the taking delivery of the same was thus made conditional upon the payment of the balance of the price. So, the offer of delivery under Ex. P-7 cannot be regarded as an unconditional appropriation of the goods to the contract within the meaning of Section 23(1) and consequently, the property in the goods did not pass to the buyer.

(38) If the property in the goods did not pass to the buyer there can be no question of the seller having any right to resell by virtue of the provisions in Section 46(1) and 54(2) of the Sale of Goods Act.

(39) Once it is held that there is no question of the appellant having a right to resell the goods under Section 54(2) of the Act, there can also be no question of any cause of action for the recovery of the shortfall according to the appellant on the alleged resale of the goods by him. It was thus a simple case of a breach of the contract by the respondents- defendants by refusing to take delivery. That being so, on the said breach of the contract, the appellant-plaintiff acquired the cause of action to sue for compensation for the breach of the contract, and such a suit is governed by Article 115 of the Limitation Act.

(40) There is clearly no basis for the argument of Shri Anoop Singh placing reliance upon Section 24 of the Limitation Act. The said section contemplated the case of a suit for compensation for an act which does not give rise to a cause of action. But, in the view taken by that action or the conduct of the respondents-defendants in refusing to take delivery by the end of July, and thereby committing a breach of the contract, gave rise to a cause of action for the appellant-plaintiff to file a suit for compensation for the breach of the contract. Section 24 of the Limitation Act is, not available to the appellant.

(41) Mr. Whjg the learned counsel for the respondents referred to some decisions in which a similar was taken regarding the applicability of Art. 115 and Section 24 of the Limitation Act. In , it was held that a claim for loss sustained by a party after resale of the goods after adjusting the advance already paid by the other party ought to be instituted within three years of the date of the breach of the contract that Article 115 of the Limitation Act applies to the case, that it is no defence to urge that it was only the occasion of resale which enabled the defendant firm to ascertain exactly the decrees of damages or the precise amount which would represent the injury suffered by them, and that the occasion for ascertainment will have to be distinguished from the date upon which the case of action arose, and from which limitation began to run.

(42) In Rajagopal Naidu v. Aiyyaswami Chettiar, , the ratio of the decision therein was succinctly brought out in the head-note to the report. It runs as follows:- "It is not the law that in every case of a breach of contract, limitation would commence to run not on the date of the breach but only from the date when the party aggrieved was in a position to fix or quantify his damages. Different considerations would apply to a claim for indemnity. In a case of a simple breach of contract, where the breach is complete on the expiry of the period fixed for performance time commences to run under Article 115 of the Limitation Act from the date of the breach. The fact that the plaintiff cannot file his suit that very day and that some time has to elapse for him to determine the quantum of damages cannot mean the limitation does not commence to run from the date of the breach. The suit ought to be instituted within three years from the date of the breach. The occasion for ascertainment of the degree of damages or the amount which would represent injury suffered by the breach has to be distinguished from the date upon which the cause of action arises and from which limitation begins to run. There is no question of any continuing wrong in such a case within the meaning of Section 23 of the Limitation Act, or of any cause of action not according to the plaintiff on the date of the breach under Section 24".

(43) For the above reasons, we hold that the cause of action for the suit for compensation files by the appellant-plaintiff arose at the end of July, 1951 when a breach of the contract was committed by the respondents-defendants by refusing to take delivery of the contracted goods that Article 115 of the Limitation Act applies to the said suit, that the period of limitation of three years prescribed by Article 115 commenced to run from the said date of the breach of the contract, and that the suit filed by the appellant-plaintiff on 19-11-1954 was barred by limitation.

(44) In the result, the Letters Patent Appeal fails, and is dismissed with costs.

(45) Appeal dismissed.