

their respective shares if they become purchasers. The public will also have a right to bid at the auction.

ANGAMUTHU
MUDALIAR
v.
RAJNA
MUDALIAR.

KRISHNAN, J.

It was argued that the plaintiff should be compelled to adhere to the bid that he made once before to the Official Referee of Rs. 10,000 for this property; but we think that that cannot be insisted upon, because the bid was made when it was not clear as to what the rights of the parties were.

The decree will be modified as above stated and the case will go back to the Official Referee for disposal in the light of the above observations. The appellant will pay to the respondent half of the taxed costs.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Krishnan.*

P. RAMIAH & CO. (DEFENDANTS), APPELLANTS

1925.
January 19.

v.

T. R. SADASIVA MUDALIAR & BROTHERS (PLAINTIFFS),
RESPONDENTS.*

Contract—Sale of goods—Shortage in delivery—Suit by vendee for damages—Plea that defendant had fully paid his vendor who had become insolvent before plaintiff made his claim for shortage—Plea, whether sustainable—Bar of limitation—Limitation Act (IX of 1908), art. 62 or 96—Mistake—Knowledge of plaintiff as to shortage—Money had and received.

The defendants, who had purchased eight bales of grey shirtings from a person, sold them to the plaintiff in August 1918, representing that each bale contained sixty pieces. The latter sold the bales to others who found that each bale contained only fifty pieces; the plaintiff became aware of the shortage in April 1919, and, after sending a notice of demand to the defendants, sued them in February 1922 for

* Original Side Appeal No. 118 of 1923.

RAMIAR & Co. damages for short delivery. The defendants pleaded non-
 v. liability on the ground that they had paid full price to their
SADASIVA vendor who had become insolvent before the plaintiff made his
MUDALIAR. claim on him, and also pleaded that the suit was barred by
 limitation under article 62 of the Limitation Act :

Held, that the plea of the defendants on the merits was not sustainable in law :

that article 96 of the Limitation Act which was a specific article for suits for relief on the ground of mistake, applied to the facts of this case :

that article 62 which was a general article did not apply ;

and that the suit, instituted within three years from the date on which the mistake became known to the plaintiff, was not barred by limitation.

APPEAL from the Judgment of Sir WALTER SCHWABE, Chief Justice, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 174 of 1922.

The material facts appear from the Judgment.

V. Rathakrishnappa for appellant. —The suit is for damages for short delivery. There was delay in giving notice and making a claim on the defendants. This is a case of equitable restitution. The vendee must examine in a reasonable time and give notice to the vendor. There was here a delay of nearly eight months. The principle is not estoppel but of equitable restitution. The principle is not merely applicable to cases of agency but is applicable in all cases. The principle of the decision in *K.M.P.R. Firm v. The Official Assignee of Madras*(1) is applicable to this case.

Next as to limitation, article 62 applies to the case. From the date of short delivery, the cause of action arises : see *Ramanatha Iyer v. Ozhapoor Pathiriseri*(2).

K. S. Krishnaswami Ayyangar for respondent. —The proposition in *K.M.P.R. Firm v. The Official Assignee*

(1) (1922) 43 M.L.J., 142.

(2) (1913) 14 M.L.T., 524.

of *Madras*(1) is too broadly stated: see *Baylis v. Bishop of London*(2), and *Newall v. Tomlinson*(3). Article 96 is a specific article, which is applicable to cases of relief on the ground of mistake. See *Viraragava v. Krishnasami*(4) and *Mathuranath Kundu v. Debendranath Kundu*(5).

RAMIAH & Co.
v.
SADASIVA
MUDALIAR.

JUDGMENT.

COURTS TROTTER, C.J.—In this case the appellants bought some bales of grey shirtings from one Krishnaji Kesari Mull, a Bombay merchant. They sold them to the plaintiffs and then the goods went through a long chain of changing hands and, in the end, some 7 or 8 months after the bales had been sold, it turned out that some of them were short by 10 pieces; that is to say, whereas they purported to contain 60 pieces they in fact contained only 50.

COURTS
TROTTER,
C.J.

The learned CHIEF JUSTICE, my predecessor, who tried this case, found on the evidence before him that, although only 3 bales had been opened, the reasonable conclusion of fact was that the shortage extended to the other 5 bales which were exactly of the same size, appearance and description and with that finding, which the learned Judge was entitled to come to, we do not desire to interfere. There was evidence to support it and one knows that to rip up a bale for the purpose of counting the contents has a most damaging effect upon its value in the market.

There are only two points really argued and they are both points of law. It appears that the defendants were unable, when the mistake was found out, to have recourse to their sellers, because the sellers had gone bankrupt. They may not be able to get a dividend. That being so, reliance was placed on a judgment of this

(1) (1922) 43 M.L.J., 142.

(2) [1913] 1 Ch., 127.

(3) (1871) 6 C.P., 405.

(4) (1883) I.L.R., 6 Mad., 344.

(5) (1886) I.L.R., 12 Calc., 533.

RAMIAH & Co.
v.
SADASIYA
MUDALIAR.
—
COURTS
TROTTER, C.J.

Court to which I was a party, *K.M.P.R. Firm v. The Official Assignee of Madras*(1) in which the facts were the converse. There, there had been an over delivery of 1½ pieces, a delivery which was thought to be one of 7,000 pieces, but really turned out to be of 7,014 pieces. We there held that one of the persons in the chain was not accountable to his immediate seller because, he, in good faith, had passed all the 7,014 pieces to his immediate buyer, all parties being of the belief that they really were only 7,000. Rightly or wrongly we held there, and it may be we expressed the proposition in too general terms, that in such cases redress could be had by the plaintiff only if he was able to show that the goods which were not covered by the contract, namely, 14 extra pieces were in the possession of the defendant or that the defendant had had the benefit of them. But in *Standish v. Ross*(2) it was held that it was unnecessary to plead any such circumstance.

"It is quite true I had your money in my hands but unfortunately you paid them thinking you owed the money. I have gone and spent it on a luxury."

That was held in *Standish v. Ross*(2) not to be an answer to the claim. But it seems to us that that case has no application whatever to a case like the present where the converse is the fact, where the seller has failed to deliver to the buyer that which he contracted to deliver; and it is unaffected by the fact that the unfortunate buyer has been held liable to a third person and the still more lamentable fact that the unfortunate seller has got a remedy over only against an insolvent person—a risk to which every commercial man is liable.

Then a point is raised about limitation. It is said that this case falls within article 62 of the Limitation

(1) (1922) 43 M.L.J., 142.

(2) (1849) 3 Ex. Rep., 527.

Act, because it is a case of money had and received to the use of the plaintiff. No doubt, if one were drawing a pleading in an English Court in the approved Bullen and Leake style, after setting out the facts which, after all, is the real function of a pleading, one would end up by saying

RAMIAH & Co.
v.
SADASIVA
MUDALIAR.
—
COURTS
TROTTER, C.J.

“ the plaintiff’s claim is for money had and received to the use of the plaintiff.”

But it does not follow that that article is exhaustive, because a later article, article 96, provides for a special case of money had and received to the plaintiff’s use. It runs as follows :

“ For relief on the ground of mistake	3 years	When the mistake becomes known to the plaintiff ”
--	---------	---

It specifies that the time when limitation begins to run in such a case is when the mistake becomes known to the plaintiff. It seems to me that that special article must override the general provisions of article 62 and that it fixes a time when the plaintiff’s cause of action depends upon the fact that he was mistaken as different from the time when the mistake was ascertained ; or, I suppose, in certain cases it may be that you would have to qualify that by saying

“ the time when the plaintiff ought to have discovered his mistake if he used reasonable diligence.”

However, we are not concerned with that here ; because, having regard to the known habits and customs of the piece-goods market here, I do not think any judge would venture to say that 9 months was too long a time for the goods to be passing from hand to hand in their wholesale state as bales. It is a well-settled principle on which the English Courts have acted for centuries that, in all cases where something turns upon a mistake or concealment of fact by the fraud or

RAMIAH & Co.

v.

SADASIVA
MUDALIAR.

COURTS

TROTTER, C.J.

deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. We, therefore, think that the learned trial judge was right on all the points in this case and that the appeal must be dismissed with costs; but there will be this modification of the decree and Mr. K. S. Krishnaswami Ayyangar has very wisely accepted it because, after all, it is apparently rather a hard case. That is, the time from which interest is to be taken to run is not the initial short delivery but the time when the demand was made upon the defendants by the plaintiffs, i.e., the 24th April 1919. The decree will be modified to that extent; otherwise the appeal will stand dismissed with costs.

KRISHNAN, J.

KRISHNAN, J.—I agree with the learned CHIEF JUSTICE that this appeal fails. The first point taken on the facts of the case is that it has not been proved that all the 8 bales in each of which a shortage of 10 pieces is claimed by the plaintiff, contained only 50 pieces each and not 60. It is said that it is only as regards 3 bales the shortage has been properly proved as they were opened and the pieces actually counted; but as regards the other bales there is no doubt whatever that the late learned CHIEF JUSTICE is right in the view he took that they should be taken as shown to have contained only 50 pieces each. One of the bales opened for the purpose of finding out whether the 6 bales left in the hands of Motilal contained only 50 pieces each or 60, was taken at random as a sample bale from the lot and it was found to contain only 50 pieces. That evidence is quite sufficient to justify the finding as regards all the 8 bales. The fact of the shortage is thus established.

The next question is one of law based on the ruling of the learned CHIEF JUSTICE, then Mr. Justice COURTS

TROTTER, and Mr. Justice RAMESAM in *K.M.P.E. Firm v. The Official Assignee of Madras*(1). That case has now been explained by the CHIEF JUSTICE; it does not really apply to the facts of the present case and it is, therefore, unnecessary to consider how far that case overstated the law. I should, however, not be taken as agreeing to the statement of the law in that case; for I am inclined to think there is a little overstatement in it.

RAMAIAH & Co.
P.
SADASIVA
MUDALIAR.
—
K. BISHANAN, J.

Reference has been made to *Baylis v. Bishop of London*(2) and *Newall v. Tomlinson*(3). It is, however, unnecessary to pursue this matter further as the facts of this case are quite different from the facts of those cases. It is said that, because the seller from whom the defendant purchased the goods became insolvent, the defendant has lost his chance of getting his money from the seller and, therefore he should not be called upon to pay for shortage to his buyer. There is no authority cited to show that this doctrine is correct. It was the misfortune of the defendants that their seller has become insolvent. Whether he became an insolvent after the defendants got notice that a claim was going to be made against them by the plaintiffs or not is not very clear. For, if the insolvency happened only afterwards, it will be clearly defendant's own fault if they did not take steps in time to recover what they would have been entitled to claim from their seller. However that may be, we are not concerned with the question. It is clear that the defendants are bound to return the price which they received for the 10 pieces in each of the 8 bales in which there was a shortage.

The last question argued is one of limitation and it is one of some difficulty. It is contended that article

(1) (1922) 43 M.L.J., 142.

(2) [1913] 1 Ch., 127.

(3) (1871) 6 C.P., 405.

RAMIAH & Co.
v.
SADASIVA
MUDAITAR.
—
KRISHNAN, J.

62 applies to the case. I do not see how that article can be applied, for it refers to money had and received by the defendant for the plaintiff's use. It does not refer to a case like this where money had been paid under a mistake of fact and is now sought to be recovered on the ground that it was so paid. Both the parties believed that the bales contained 60 pieces each and the price was paid and received on that footing; it was subsequently found out that there was a mistake, there being only 50 pieces in each of the 8 bales. The excess price paid is clearly money paid by mistake and article 96 applies as the late learned CHIEF JUSTICE has held. I agree, therefore, that the bar by limitation does not arise on the facts of this case. The appeal will be dismissed with the modification of the decree proposed as regards interest.

The CHIEF JUSTICE again.—I should just like to add that, at the time I and my brother RAMESAM decided *K.M.P.R. Firm v. The Official Assignee of Madras*(1), *Baylis v. Bishop of London*(2) was not cited to us and I should like to consider that case further before expressing any final opinion as to the correctness of our decision in that case.

K.R.

(1) (1922) 48 N.L.J., 142.

(2) [1913] 1 Ch., 127.