

## CIVIL REVISION.

*Before Mr. Justice Baguley.*

1939

S. PERSHAD *vs.* THE FIRM OF UNICA.\*

Feb. 15.

*Food and drink sold by a hotel-keeper—Consumable articles in a restaurant—Shop as well as restaurant combined—Price of food and drink sold—Price for goods sold—Limitation period—Articles consumed on premises or sent out for immediate consumption—Articles or drinks in tins and cases—Limitation Act, Sch. I, arts. 8, 52.*

Consumable commodities sold in a restaurant come under art. 8, Sch. I of the Limitation Act. But where the proprietor of a store has also a restaurant on the premises the articles of food which he sells from the store do not lose their character of "goods" and with it the benefit of art. 52 of the Limitation Act merely because the man who sells them as a shop-keeper happens to be the proprietor of a restaurant. Food and drink the price of which would come under art. 8 must be meals or articles of food which are either consumed on the premises or are sent out or taken away by the customer which are intended for, or capable of, immediate consumption in the state in which they are sent out, that is to say without cooking. Articles in tins and cases of liquor which do not require to be consumed immediately would be goods.

*Quære: Whether articles of food sent out which require mere heating before consumption become goods.*

*K. C. Sanyal* for the applicant.

*Gregory* for the respondent.

BAGULEY, J.—This is an interesting case because it deals with a matter on which there seems to be no authority whatsoever. The firm of Unica sued the appellant for Rs. 57-0-6, price of goods. The plaintiff-respondent was supported by a mass of vouchers, all small ones. The defendant admitted the purchase of the goods, but pleaded that the sum due had been settled or adjusted against the bill which his firm, Messrs. Bhikaram & Sons, had against the plaintiff, and that, in any case, and without prejudice to this fact, he submitted that the suit was barred by limitation under Article 8, Schedule I, of the Limitation Act. The learned Judge took up the point of limitation as a

\* Civil Revision No. 399 of 1938 from the judgment of the Township Court of Maymyo in Civil Small Cause Suit No. 135 of 1938.

preliminary point. He set out the nature of the articles mentioned on the exhibit vouchers and stated that various items, cakes, fish, mutton chop, biscuits, cocoa, tea etc. were food and drink sold by a keeper of a hotel and the claim for them was time-barred under Article 8, Schedule I of the Limitation Act. Cigarettes, he held, did not fall within the category of food and drink and must be deemed to be goods under Article 52 of the same schedule and the period of limitation for them was three years. In fact he held that the claim of all goods sold was barred by limitation except cigarettes, and he put the case down for hearing on the question of adjustment. No preliminary decree on these lines was drawn up. The manager of the plaintiff firm was examined as a witness and gave details of the business carried on by Unica. The defendant did not go into the witness box with regard to the plea of adjustment. The learned Judge reconsidered his order with regard to limitation, and found that the claim on other articles besides cigarettes was not time-barred and he gave a decree for Rs. 49-8-6. Against this decree the present application for revision has been filed under section 25 of the Provincial Small Causes Courts Act.

The first ground raised is that, having once passed an order that the claim on everything except the price of cigarettes was barred by limitation, the Judge could not alter that decision. This ground, in my opinion, is not good. A Judge can always reconsider an order which he has passed *ad interim* until he comes to his final decision. The real item for consideration is the point of limitation. The two articles which have to be considered are Article 8 of the Limitation Act, which says that the period of limitation for a suit for the price of food or drink sold by the keeper of a hotel, tavern or lodging is one year from the time when the food or drink is delivered, and Article 52, which prescribes

1939  
 PERSHAD  
 v.  
 THE FIRM  
 OF UNICA.  
 BAGULEY, J.

1939  
 PERSHAD  
 V.  
 THE FIRM  
 OF UNICA.  
 BAGULEY, J.

three years as the period of limitation for a suit for the price of goods sold and delivered, where no fixed period of credit is agreed upon. The question is whether the various articles comprised in these vouchers are "goods" or "food or drink sold by the keeper of a hotel, tavern or lodging."

According to the evidence of the manager of Unica, which is not rebutted, his shop has four departments, *viz.*, stores and provisions, confectionery, cold store and restaurant. They have rooms upstairs where they lodge guests, and there is the restaurant downstairs. He says that teas are included in the department of restaurant and biscuits in the department of confectionery. By "teas" he means teas which are actually taken in the shop. The learned Judge has found that drinks, whether alcoholic or ordinary, are drinks supplied by keepers of restaurants or taverns; so he has held the items with regard to drinks as barred under Article 8. He then says

"As regards cakes, biscuits, jam, cheese, cocoa, cigarettes and fruits they are food usually supplied by the Confectionery Department and not exclusively by a hotel or tavern. I take it in that light and it would be most unfair if the claims for these goods are ignored on the simple reason that a hotel keeper opens a confectionery in addition to a restaurant or eating house."

The absence of any authority with regard to Article 8 is very striking. I have Rustomji's monumental work on the Law of Limitation which extends to 1888 pages, and the only comment which he is able to make with regard to Article 8 is "A tavern is a public house licensed to sell liquor in small quantities" with a reference to Webster's Dictionary and 142 Pun. L.R. 1908. It seems that the case must be considered on first principles as there seems to be no guidance on the point. In the first place I would hold that consumable

commodities sold in a restaurant would certainly come under Article 8, but I do not think that because the proprietor of a store has a restaurant department therefore all articles of food which he may have sold in a different department lose their character of "goods" and with it the benefit of the Article 52 of the Limitation Act merely because the man who sells them as a shop-keeper happens to be the proprietor of a restaurant. I had been inclined at first to the view that the governing factor would be the question whether the articles were consumed on the premises, in which case they would be food sold by the keeper of the restaurant, or whether they were carried away for consumption elsewhere, in which case they would be goods; but further consideration led me to believe that this would be fallacious. It is a well-known fact that in Rangoon certain restaurants do a big business in delivering lunches to people employed in different offices and common sense dictates that these lunches must be regarded as food sold by the proprietor of that restaurant, and therefore the price of those lunches would come under Article 8. The best definition which I can think of is to say that food and drink the price of which would come under Article 8 must be meals or articles of food which are either consumed on the premises or are sent out or taken away by the customer which are intended for, or capable of, immediate consumption in the state in which they are sent out, that is to say without cooking; though I am not quite sure if merely heating—and not really cooking—that is, the necessity for their being heated, would alter them from food and drink to goods, but this point is not required in this case. If from the restaurant is sent out, for instance, a case of beer, that would scarcely be drink in that sense of the word. It would be goods; and the same applies to articles in tins which do not require immediate consumption. In this light the

1939

PERSHAD  
v.  
THE FIRM  
OF UNICA.  
BAGULEY, J.

1939  
 PERSHAD  
 v.  
 THE FIRM  
 OF UNICA.  
 BAGULEY, J.

classification by the trial Judge will have to be reconsidered, *e.g.*, one voucher is for 5 teas and a plate of cakes (Ex. P.). He has charged the tea as food and drink, but the plate of cakes under "confectionery". In my opinion, the voucher certainly suggests they were all consumed within the restaurant and therefore that voucher has to come under Article 8. I classify below under the heads "Food and drink" and "Goods" all the vouchers seriatim :

[His Lordship classified fish chips mutton chop and whisky (consumed on the premises), tea, cocoa, and aerated waters with cakes or biscuits of the value of Rs. 10-10 under the head "Food and drink" and cakes over the value of one rupee, tins of cigarettes, jam cheese and other goods sent out of the value of Rs. 46-11-6 under the head "Goods."]

The claim on the price of all the articles which are classified as "Food and drink" is time-barred. The decree of the trial Court will be altered to one for Rs. 46-11-6. No order as to costs in this Court.