APPELLATE CIVIL

Before Falshaw and Kapur, JJ.

DIN DAYAL,—*Petitioner.*

versus

THE UNION OF INDIA, (2) STATE OF PUNJAB,—*Respondents.*

Civil Original No. 75 of 1953.

Damages—Measure of—Rule as to, stated.

1956. April 4th. *Limitation Act (IX of 1908)—Section 3—Bar of limitation not pleaded, and not arising on proved facts, whether can be allowed to be raised.*

On 29th August, 1947, D. N. purchased 1,50,000 maunds of fire-wood from different Mohammadan owners. On 4th October, 1947, District Magistrate, Karnal, passed a freezing order with regard to this fire-wood. On 17th November, 1947, D. N. wrote to the District Magistrate for release of the frozen fire-wood. In the meantime legislation relating to Evacuee Property had come into force on 14th September, 1947. On 12th January, 1948, D. N. put in his claim for recognition of the sale to the Custodian's Department and the sale was confirmed in appeal and orders were passed for handing over the fire-wood to D. N. In consequence of this order 79,000 maunds of fire-wood was returned. On 16th August, 1950, D. N. brought a suit for claiming the return of the balance

of 71,000 maunds of fire-wood or its price against the Union of India on the ground that the fire-wood had been consumed by its officers or at their instance.

Held, that ordinarily the value at the date of conversion is regarded as the measure of damages and this is the rule which is applied in England and has been followed in India.

Held also, that unless the question of limitation is specifically raised, it cannot be allowed to be raised because it depends on the facts which are proved and on the pleadings no question of limitation arises.

Union of India v. *Muralidhar Agarwalla* (1), *Stowe* v. *Benstead* (2), and *Lewis Pugh-Evans Pugh* v. *Ashutosh Sen and others* (3), relied on.

Original Suit No. 7 of 1953, Din Dayal *v.* Union of India, *was transfered to the file of this Court by the order, dated the 10th August, 1953, passed by the Hon'ble Mr. Justice Falshaw and the Hon'ble Mr. Justice Kapur, from the Court of the Senior Subordinate Judge, Karnal, for decision.*

Suit for recovery of Rs. 2,07,970-14-0.

A. N. GROVER and RAJ KUMAR AGGARWAL, for Petitioner.

S. M. SIKRI, Advocate-General, and N. L. SALOOJA, for Respondents.

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(1) A.I.R. 1952 Assam 141
(2) (1909) 2 K.B. 415
(3) A.I.R. 1929 P.C. 69

JUDGMENT

Kapur, J.

KAPUR, J.—This suit is brought by Din Dayal, Proprietor of Messrs. Lakhi Ram-Din Dayal of Delhi originally of West Punjab for the return of 71,000 maunds of firewood which values at Rs. 1,77,500 and interest Rs. 30,470-14-0 at 6 per cent per annum on the price of goods by way of damages or in the alternative a decree for Rs. 2,07,970-14-0 as price and interest thereon at 6 per cent per annum and costs of the suit etc.

Din Dayal is the proprietor of Messrs. Lakhi Ram-Din Dayal and was a firewood merchant in Pakistan and on partition he migrated to what is now India. He alleges that on the 29th August, 1947, he purchased from different Mohammedan owners large quantities of firewood for a sum of Rs. 2,11,250 which were paid the same day and this is evidenced by a document Exhibit P. 57|A at page 119 of the paper book. It purports to be a letter evidencing sale of different quantities of firewood lying at different places and belonging to three different parties. According to this letter payment was originally to be made on the 10th September, 1947, and if the stocks were frozen by or taken by Government the sellers were not to be responsible and compensation, if any, was to be paid to the buyers and if due to disturbed conditions the goods were found short the sellers were not to be responsible but the price was to be paid all the same. The price was paid the same day to Inam Ullah, Nisar Ahmad and another in cash which is evidenced by Exhibit P. 7. The plaintiff deposes that he paid cash from out of the money which he had brought from Pakistan and which was on his person and he paid the same to the vendors and took possession of the goods sold. It may be difficult to believe that such a large amount of money could be paid in the manner it is alleged but it is irrelevant to the case.

On the 4th October, 1947, the District Magistrate of Karnal passed what has been called by prties a freezing order which is Exhibit P. W. 7|1 at page 121 of the paper book. The operative part of the order is—

> "* * * the entire stock of the fuel wood in question is hereby frozen and it will be placed at the disposal of * * * *".

Copies were forwarded to all Tahsildars, all Station House Officers, all Station Masters in the district and Refugee Officer, Kurukshetra Camp, for information. On the 17th November, 1947, the plaintiff wrote a letter, Exhibit P. 69, to the District Magistrate, Karnal, asking for "release of frozen firewood stocks in Karnal District". In this he mentioned the quantity of firewood which was lying at different places and indicated that he had appointed *chaukidars* who were guarding the stocks and he also prayed that he may be allowed to send this firewood to the districts of Amritsar, Ludhiana and Jullundur where there was a great shortage of this commodity. On the 1st December, 1947, the plaintiff wrote another letter to the District Magistrate, Karnal, in regard to "release of firewood". He indicated to him that the firewood was in short supply in the East Punjab, that the Government had given him "priority assistance to move these stocks to the deficit towns in order to cope with the firewood situation" and that he had been ordered by the Government to keep the Government in touch with this and give periodical information. The following portion of the letter is important—

> "The Director Civil Supplies has also very kindly requested you to release our stock,—*vide* his letter No. 1126-FC-47|745, dated 25th November, 1947."

This letter, therefore, shows that the plaintiff had obtained a priority certificate for getting wagons to

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move the firewood and was requesting that the stocks be released.

On the 7th December, 1947, the plaintiff wrote another letter to "C. C. Kurukshetra" saying that stocks of firewood had been purchased from Mohammedan owners and that they should neither be removed nor taken possession of and that priority movement certificate had been issued by the Director, Civil Supplies.

On the 14th September, 1947, an Ordinance called the East Punjab Evacuee (Administration of Property) Ordinance IV of 1947 was promulgated, section 5 of which provided that subject to the provisions of the Ordinance the Custodian shall take possession of evacuee property and take all measures for preserving such property. Section 6 of this Ordinance laid down the modes of taking possession and in case of property which is exclusively movable the Custodian could immediately assume possession or control. This Ordinance was replaced by a Punjab Act (Act XIV of 1947) by section 4 of which all evacuee property vested in the Custodian for the purposes of the Act. By a subsequent Ordinance dated the 16th January, 1948 (Ordinance II of 1948) two sections were added—5-A and 5-B. Section 5-A prohibited certain transactions affecting evacuee property and under this section no transfer of any interest or right in any property made by an evacuee * * * * after the 15th day of August, 1947 was to be effective so as to confer any rights unless it was confirmed by him (the Custodian). Section 5-B provided for appeals and revisions. Section 6, as before, dealt with the Custodian's power to take possession of evacuee property.

On the 12th January, 1948, the plaintiff put in a claim under section 6 of the East Punjab Evacuee Properyt Act, starting that he had purchased the

stocks of firewood from certain Mohammedan dealers and prayed for release of the stocks. On the 20th January, 1948 this prayer was rejected by the Deputy Custodian, i.e., the Deputy Commissioner of the district and he passed the following order which is given in an appellate order at page 218 of the paper book :

> "I agree with the Civil Supply Officer. The claimant should establish his claim in a Court of law as the property involved is of a considerable value and proof with him is not conclusive."

Information about this was sent to the plaintiff by letter, dated the 21st January, 1948 which is at page 149 of the paper book. The relevant portion of this is—

> "* * * your claim has, therefore, been rejected."

Against this order the plaintiff filed an appeal to the District Judge under section 7(5) of the East Punjab Evacuees' (Administration of Property) Act, XIV of 1947, but his appeal was dismissed by an order, dated the 5th April, 1948. Although the learned District Judge gave reasons why he thought that the whole transaction was colourable he did not give a final judgment on any matter because of the introduction of section 5-A (1) of the Act which "makes the confirmation of the transaction by the Custodian *sine qua non* for rendering the transactions effective," and at the end of the judgment at page 223 the District Judge said—

> "Therefore, other considerations apart, the transaction, as it stands, cannot be upheld by this test. On what conditions and subject to what terms, its enforcement

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should be allowed, is not within the competency of this Court to decide but that of the Custodian appointed under the Act. I, therefore, dismiss the appeal but make no order as to costs."

Thus in my opinion he left the question as to whether this transaction should be confirmed or not to the proper authority, i.e., the Custodian.

The plaintiff, it appears, took an appeal to the Custodian against the order of the Deputy Custodian refusing to release the stocks of firewood and to confirm the transaction of sale and purchase. On the 31st March, 1948 the Custodian, Punjab, Mr. P. N. Thapar, asked for the comments of the Deputy Custodian Mr. Harbans Singh, who on the 29th April, 1948, made his recommendation saying that the sale should be recognised, that the sellers were the real owners of these stocks of firewood and that the stocks be disposed of jointly by the present plaintiff and the Assistant Custodian, Karnal. The Custodian accepted these recommendations on the 6th May, 1949 and ordered the confirmation of the sale (Exhibit P. 49 at page 149 of the paper book) and on the 12th May, 1948, Mr. Harbans Singh sent a letter to the plaintiff intimating to him that the Custodian had ordered that—

"(1) the sale under which the appellant claims did in fact take place; and

(2) the sale be confirmed and the property in question should be handed over to the appellant."

The plaintiff admits that out of the different stocks of firewood which were lying at different places, 79,000 maunds were returned to him (at Pehowa Road 24,000 maunds and at Pindarsi 55,000 maunds) and his claim is that 71,000 maunds have

not been returned to him and he relies upon three documents showing the non-return of this quantity of firewood. Exhibit P. 16 (at page 208 of the paper book) dated the 13th June, 1948, is for 20,000 maunds lying at Dhirpur, Exhibit P. 17 of the same date at page 208 is for 45,000 maunds lying at Kurukshetra and Exhibit P. 18 of the 14th June, 1948 at page 209 is for 6,000 maunds which was lying at Gharaunda Railway Station. These documents have been proved by the statement of P. W. 15 Ramji Dass (at page 55 of the paper book) who was Sub-Inspector, Evacuee Property, Karnal, at the relevant time.

A notice under section 80, Civil Procedure Code, was served on behalf of the plaintiff for payment of the price of 71,000 maunds of firewood. It appears that the Financial Commissioner made an enquiry from the Camp Commandant of the Relief Camp at Kurukshetra. Paragraphs 11 and 12 of this document (at page 197) indicate that 71,000 maunds of firewood had not been accounted for and there is an indication that it may have to be amended to 65,000 maunds.

The plaintiff on the 16th August, 1950 brought the present suit alleging that he had purchased firewood from some Mohammedans which he says was done in the manner I have indicated above, that out of the stock of firewood 1,50,000 maunds lying at different places 79,000 maunds had been returned but 71,000 maunds had not been returned. He claimed that he got a certificate from a Tahsildar certifying that the then market-price was Rs. 2-8-0 per maund, that in spite of his repeated requests the servants of defendants 1 and 2, i.e., the Union of India and the State of Punjab, continued to remove and use the stock of firewood belonging to the plaintiff and thus 71,000 maunds had been used up, and he claimed the return of this quantity of firewood plus interest

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at 6 per cent which comes to Rs. 30,470-14-0 or in the alternative for a decree for Rs. 2,07,970-14-0 as price and interest at 6 per cent per annum.

In their reply the Union of India denied all allegations of the plaintiff and pleaded that the Union was not liable as the Camp Commandant had no authority from the Union to use or misuse plaintiff's stocks. The written statement of the State also was denial of all the allegations made and they pleaded that they had not ordered the removal of the plaintiff's firewood and thus they were not liable for any loss to the plaintiff. They also pleaded that the plaintiff was not entitled to any interest and that the claim made was excessive. The plaintiff put in his replication and in regard to the Union of India he said that his claim was for the price of the stocks which had been converted "to their own use by the defendants."

The following issues were framed by the learned Judge :—

1. Is notice under section 80 C.P.C. served by the plaintiff on defendant No. 1 invalid for the reasons stated in paras Nos. 1 and 2 of the preliminary objections noted in the written statement of defendant No. 1 ?

2. Are defendants competent to question the factum and the legality of the sale of firewood in favour of the plaintiff or confirmatory order of the Custodian, Evacuee Property, dated 5th June, 1948. (Onus placed on the defendants with reference to sections 46 and 47 of the Administration of Evacuee Property Act, Act No. XXXI of 1950) ?

3. If issue No. 2 is proved, whether the plaintiff purchased 1,50,000 maunds of firewood at Pindarsi, Pehowa Road, Dhirpur,

Gharaunda and Kurukshetra Railway Station from M|s. Diwan Mohd. Ishaq Mohd. Sadiq, M|s. Hakim Inam Ullah Uman Ullah and Nisar Ahmad for Rs. 2,11,250 on 29th August, 1947, to whom the firewood in dispute belonged and whether the plaintiff obtained possession of the said firewood?

4. Was the plaintiff's stock of firewood lying at the aforesaid railway station included in the freezing order of the District Magistrate, Karnal?

5. How much stock of the firewood lying at the aforesaid railway station was delivered to the plaintiff after the confirmatory order of the Custodian and how much remained undelivered?

6. Was the said firewood or any part of it removed or consumed by any of the defendants during the continuance of the freezing order or thereafter and if so how much and of what value?

7. Was the refugee camp at Kurukshetra a liability of defendant No. 1 and for what period, a liability of defendant No. 2 and for what period, a liability of both the defendants and for what period?

8. Had the Camp Commandant an authority to use the plaintiff's stock and were they so used for the refugee camp and if so at what time and stage?

9. To what relief, if any, is the plaintiff entitled and against whom?

10. Whether the plaintiff was entitled to any interest in law, or equity and at what rate?

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The question of notice under section 80, Civil Procedure Code, was not pressed and we hold that a notice was given.

The real controversy between the parties is confined within narrow limits and that is as to the effect of the finality of the confirmation of sale, as to the quantity of firewood which was not returned to the plaintiff and the compensation to which the plaintiff was entitled and against whom. The arguments of the plaintiff were confined to these three points but the defendants raised certain other points also which I shall discuss later.

I have given the various stages at which the alleged sale in favour of the plaintiff came for determination before different Tribunals. The Custodian of the Punjab under section 5-A read with section 5-B confirmed the sale and the plaintiff submits that once the sale is confirmed by the Custodian the sale in his favour becomes effective and cannot now be challenged by the defendants. Under section 5-B (2) it is provided that the decision of the Custodian shall be final and conclusive and, therefore, under the Act of 1947 the Custodian's decision confirming the sale became final and if under the law authority was given to that Tribunal to finally decide as to the *bona fides* or otherwise of a sale of alleged evacuee property, then it is not for the civil Courts to go into the matter and decide the question. Under section 17 of East Punjab Act, XIV of 1947, any powers conferred by the Act and exercised by the appropriate authority under the provisions of that Act could not be called into question in any Court of law and the same is the law now under section 46(c) of the Administration of Evacuee Property Act of 1950 which corresponds to section 17 of the Act of 1947 in regard

to the powers of Courts. Under this Act it is provided—

> "Save as otherwise expressly provided in this Act, no civil or revenue Court shall have jurisdiction to question the legality of any action taken by the Custodian-General or the Custodian under this Act"

As this was an order of confirmation made by the Custodian, no civil Court has jurisdiction to decide the question whether the Custodian could or could not confirm the sale. The Custodian by his order dated the 6th May, 1949, Exhibit P.49, which I have referred to above, ordered confirmation of the sale and this was conveyed to the plaintiff by a letter, Exhibit P. 50 (at page 174 of the paper book), on the 12th May, 1949, and, in my opinion, this is final and this Court cannot go into the question whether the confirmation was proper or not. The result of this finding is that the plaintiff effectively became the owner of the property. Issues 2 and 3 must, therefore, be decided against the defendants and in favour of the plaintiff.

As to issues 4 to 6 the document Exhibit P. 76 which I have already referred to and which is a letter of the plaintiff to the defendant asking for release of the goods shows that the plaintiff had 1,50,000 maunds which he claims to have purchased. The same claim was put forward by him in Exhibit P. 75 (at page 141 of the paper book) which was a letter to the Camp Commandant, Kurukshetra. There are so many letters sent by the plaintiff to the various officers of the defendants and the affidavits, which have been filed by the plaintiff which are at pages 161 to 166 of the paper book, of the sellers showing that these various quantities of firewood were sold to the plaintiff. The plaintiff has gone into the witness-box and has stated on oath that he was the owner of 1,50,000

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maunds of firewood but of which 79,000 maunds had been returned to him and the rest had not been returned to him and the documents, Exhibits P. 16, P. 17 and P. 18, dated the 13th June, 1948 and 14th June, 1948 (at pages 208 and 209 of the paper book), I have already referred to them, show that 71,000 maunds of firewood belonging to the plaintiff had not been returned to him. I must hold, therefore, that the plaintiff was the owner of 1,50,000 maunds of firewood out of which only 79,000 maunds have been returned to him and 71,000 maunds have not been returned to the plaintiff. It was not disputed that the freezing order of the District Magistrate related to whole of the stock of firewood belonging to the plaintiff and there is no serious controversy between the parties in regard to the amount of firewood not returned by the defendants to the plaintiff. The counsel for the Union did raise the question of 6,000 maunds of firewood lying at Gharaunda but there is nothing to substantiate his objection and on the evidence which has been led we are satisfied that 71,000 maunds of firewood have not been returned to him.

The plaintiff alleges that 71,000 maunds have been consumed by the defendants or their servants and this is not denied by the defendants. Each of the defendants did raise the objection that the liability was of the other defendant but there is no substance in that as I shall just show.

Under the freezing order the firewood belonging to the plaintiff was frozen and was taken possession of and I have already held that out of that quantity 71,000 maunds have not been returned. There was some controversy as to whether the taking by the defendants was legal or otherwise. At the time when the property was frozen and was taken possession of, it was considered to be evacuee property and as a result of subsequent legislation, which had retrospective effect,

the sale to the plaintiff became ineffective for want of confirmation, and the confirmation was on the 6th May 1948. It may be that the confirmation may have retrospective effect and may take effect from the date of the sale to the plaintiff by the evacuees, but up to the time it was so decided the property in law was evacuee property and the defendants' officers could take possession of it as evacuee property. At the time when possession was taken, and according to the law then in force, the action of the defendants was not illegal. But because of a fiction of law the property became the property of the plaintiff as from the date of the sale although as a result of a subsequent act of the Custodian and, therefore, the defendants are liable to compensate the plaintiff for the 71,000 maunds of firewood which had been consumed by the defendants or their officers or at their instance.

It was the District Magistrate who made the Freezing Order and he was acting as such. A shortage of firewood would have seriously affected the law and order situation and it was a subject which also fell within the item "production, supply and distribution of goods" and in either case the action of the District Magistrate fell within the Provincial sphere. But at the time when the suit was brought the whole Department of Relief and Rehabilitation was a Union subject and, therefore, in my opinion, the responsibility to pay the compensation to the plaintiff is of both the Union as well as of the State Government. The actual taking over of the goods was by the State Government and the user was by the refugees and, therefore, within relief and rehabilitation and thus became the responsibility of the Central Government who are, in my opinion, equally liable at least at the time of the suit.

The learned Advocate-General raised a point, which was not taken by him in the pleadings or at

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any other stage of the proceedings, that the officers who took over the goods were exercising statutory powers and if during the course of their exercise of powers they acted negligently the State was not liable. As I have said, this point was never raised and this question does not arise. He relied upon *Shivabhajan Durgaprasad* v. *Secretary of State for India* (1), but, in my opinion, that case has no application to the facts of the present case because it is not the negligence of any officer that is alleged but it is the taking over of the goods of the plaintiff which have been consumed for refugees who were the responsibility of the Government. No one would say that it was negligence of the officers. On the other hand, it was a proper exercise of authority to provide for the comfort of these refugees. I would, therefore, overrule this contention.

The question then arises what is the amount of compensation to which the plaintiff is entitled. His claim was Rs. 2-8-0 per maund because according to him the Tahsildar had given a certificate that the price of *dhak* wood was Rs. 2-8-0 per maund which is shown by Exhibit p. 87 (at page 125 of the paper book) and which is proved by the plaintiff's statement at page 82, line 23, of the paper book, and according to his statement *kikar* fuel wood was selling at Rs. 3 per maund. But, in my opinion, this is not the measure of his compensation. He is entitled to the price which he paid for the goods purchased by him. As a matter of fact, counsel for the plaintiff conceded that that is the measure of his compensation. This measure of damages is supported by an English judgment, *Stowe* v. *Benstead* (2), where a Police Officer seized certain

(1) I.L.R. 28 Bom. 314
(2) (1909) 2 K.B. 415

partridges eggs in accordance with the provisions of an Act of 1862, and subsequently a summons against the person from whom they were seized was taken out. By this Act there was no power of seizure and the conviction under the summons was quashed on appeal and it was held that the Police Officer was liable for the value of the eggs at the time they were seized in an action founded on trover. In a recent case from Assam, *Union of India* v. *Muralidhar Agarwalla* (1) it was held that in case of conversion the plaintiff is not entitled to loss of income. In Kameswara Rao's Law of Damages and Compensation at page 816 the law is stated as follows :—

> "Ordinarily the value at the date of conversion is regarded as the measure of damages and this is the rule which is applied in England."

and reliance is placed on *Stowe* v. *Benstead* (2), the case which I have cited above, and the same rule has been followed in India. The plaintiff is, therefore, entitled to the price that he paid and that works out to Rs. 1-6-0 per maund.

The learned Advocate-General has also submitted that the suit should have been brought against the Custodian. This was never pleaded by either of the defendants and according to the pleadings the property was taken and used by the officers of the two defendants and, in my opinion, it is not open at this stage to the Advocate-General to raise this question as to whether the suit has been properly brought or not.

The only other question raised is a question of limitation. This again was never pleaded but counsel for the defendants contend that under section 3 of

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the Limitation Act it was the duty of the Court to proceed with the case only if it found that it was within limitation. That may be correct but in the circumstances of this case unless the question was specifically raised, it cannot be allowed to be raised now because everything will depend upon the facts which are proved in this case; and on the pleadings, in my opinion, no question of limitation arises. Even if the question can be allowed to be raised, the case is covered by Article 48 of the Indian Limitation Act (see *Lewis Pugh Evans Pugh* v. *Ashutosh Sen and others*) (1). The researches of counsel for the defendants have not succeeded in producing a case in support of their contention. On the other hand, the case cited by the plaintiff goes to support his submission. In my opinion, there is no substance in this plea of limitation and I would, therefore, overrule it.

In the result, I would decree the plaintiff's suit for a sum of Rs. 97,625 which is the price of 71,000 maunds of firewood at Rs. 1-6-0 per maund and this has been accepted to be correct by both the parties. The plaintiff will have his proportionate costs but in regard to printing only that amount will be allowed which was necessary for printing the documents which have been referred to.

Falshaw, J.

FALSHAW, J.—I agree.

CIVIL REFERENCE

Before Falshaw and Kapur, JJ.

NEMI CHAND,—*Petitioner.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Civil Reference No. 27 of 1952.

1956

April 9th

East Punjab Movable Property (Requisitioning) Act, XV of 1947—Whether intra vires *the Provincial Legislature—Government of India Act, 1935, Schedule VII, List II, items 27, 29 and List III, item 8.*

(1) A. I. R. 1929 P. C. 69