

Maria Cristina De Souza Sodder and Others

Vs

Amria Zurana Pereira Pinto and Others

Civil Appeal No. 1311 of 1969

(P. N. Bhagwati, V. D. Tulzapurkar JJ)

30.08.1978

JUDGMENT

TULZAPURKAR, J. -

1. This appeal, by certificate under Article 133(1)(a)(b) of the Constitution, raises an interesting but complex question of law, namely, what was the law of limitation applicable in the Union Territories of Goa, Daman and Diu to proceedings launched therein prior to and pending at the date of liberation ? The question arises in these circumstance.
2. One Melquiades Lusitano Joaquim Urbano Pereira died some time prior to 1941 leaving as his heir his widow Maria Cristina De Souza Sodder (appellant 1), two sons Elesbano pereira and Ciano pereira (appellants 2 and 3) and two daughters Maria Zurana Pereira and Linda Pereira (respondent 1 and 2). After the death of Melquiades his estates and property were partitioned on or about January 28, 1941; at that time respondent 1 was a minor. On March 15, 1960, the first respondent and her husband second respondent filed a suit against the appellants and third and fourth respondent (fourth respondent being the husband of the third respondent) in the Comarca Court at Margao alleging that in the partition effected on January 28, 1941 certain items of properties had not been properly valued by the appellants as a result whereof they had suffered a loss, that respondent 1 who was a minor than had come to know of such improper valuation (under valuation) only after her marriage and that, therefore, the said partition be amended and they be compensated for the loss suffered by them. Respondent 3 and 4 filed written statement supporting the allegations contained in the plaint and further filed a counter-claim praying that the said partition be rescinded on the ground that it was null and void due to simulation and collusion. The learned trial Judge by his judgment and order dated March 8, 1968 decreed the suit and the counter-claim. Feeling aggrieved by the said decree the appellants preferred an appeal being First Appeal 6 of 1968 to the Judicial Commissioner's Court at Goa on June 6, 1968.
3. Two preliminary contentions were raised on behalf of the respondents : (a) that the appeal had not been filed in proper Court and (b) that it was barred by law of limitation. These contentions were based on the provisions of the portuguese Civil Procedure Code (hereinafter called the Provisions of Portuguese Code). The respondent pointed out that according to the provisions of Portuguese Code (Article 687) the appeal was required to be filed in the Court which decided the suit and as such the appellants could not have lodged the appeal in the Court of Judicial Commissioner. It was further pointed out that under Article 686 of the Portuguese Code the period of limitation for filing an appeal was 8 days from the service of the judgment or order of the trial Court and that since the appeal was filed beyond that period it was evidently barred by time. On the other hand, the appellants relying upon certain events that had taken place between the institution of the suit and the

pronouncement of the judgment by the trial Court, contended that the appeal had been properly filed in the Judicial Commissioner's Court and that the same was within time. It may be stated that admittedly four events took place during the pendency of the suit viz. - (a) the territories of Goa, Daman and Diu were liberated and became a part of the Union of Indian with effect from December 20, 1961; (b) the Limitation Act, 1963 that was enacted by the parliament and which came into force on January 1, 1964, became applicable to the whole of India including the Union Territory of Goa, Daman and Diu, (c) the Parliament also enacted the Goa, Daman and Diu (Extension of the Code of Civil Procedure, 1908 and Arbitration Act, 1940) Act 1965 (Act XXX of 1965) whereunder the provisions of the Indian Code of Civil Procedure, 1908, were extended to the territories of Goa, Daman and Diu with effect from June 15, 1966, with the corresponding provisions of the Portuguese Code being repealed and (d) the Legislative Assembly of Goa, Daman and Diu enacted the Goa, Daman and Diu Civil Courts Act, 1965 (Act XVI of 1965) which came into force on June 15, 1966. Under Section 34(2) of the last mentioned Goa enactment (Act XVI of 1965) the instant suit which was pending before the Comarca Court at Margao stood transferred and was continued and decreed by the corresponding Senior Civil Judge and under Section 22 of the said Act since the property involved in the suit was of value exceeding Rs. 10,000 an appeal from the decision lay direct to the High Court which expression under Section 2(f) of the Act meant the Judicial Commissioner's Court. Relying upon the extension of Indian Civil procedure Code to Goa, Daman and Diu with protanto repeal of the portuguese Code and the aforesaid provisions of the Goa, Daman and Diu Civil Courts Act, 1965, the appellants contended that the appeal had been properly lodged in the Judicial Commissioner's Court especially as the Court of Comarca Court at Margao had ceased to exist, and as regard the bar of limitation it was contended that since Limitation Act was a procedural statute it applied to pending litigation and since the Limitation Act of 1963 had come into force in Goa, Daman and Diu on January 1, 1964 when the suit culminating in the appeal was pending it was the period of limitation provided by that Act which should govern the appeal in question and it was submitted that since the appeal had been filed within a period of 90 days from the date of the judgment and decree as provided by Article 116 of the Limitation Act, 1963, the appeal was well within time.

4. The learned Additional Judicial Commissioner, who heard the matter felt that the question whether the appeal should have been filed in the trial Court under the Portuguese Code of Judicial Commissioner's Court was, highly debatable, though he found considerable force in the appellants' contention that the question pertaining to the forum was a matter of procedural law and that after the Indian Code came into force in that Union Territory the forum of appeal will be the one provided by the Indian Code and not by the Portuguese Code. However, he refrained from expressing any final opinion on that question because in his view the appeal could be disposed of on the point of limitation raised by the respondents. As regards limitation he took the view that under Section 4 of the Central Act XXX of 1965 (which dealt with repeal and savings) though the Indian Code had replaced so much of law enacted in the Portuguese Code as corresponded to it (the Indian Code), the repeal did not affect any right acquired under the repealed part of the Portuguese Code and since the right of appeal arose no sooner the lis was commenced under the Portuguese Code it was not affected by the repeal; so also the legal proceedings or remedy in respect of that right could be continued or enforced as if the Indian Code had not passed. He further held that Section 32 of the Limitation Act, 1963 repealed only the Indian Limitation Act, 1908 and not other Act; moreover, under sub-section (2) of Section 29 of the Act the provisions relating to limitation contained in the Portuguese Code would be 'local Law' which had been saved and as such the period of limitation provided by that Code continued to apply and therefore the appeal which was admittedly filed much beyond 8 days from the date of judgment was clearly barred by time. He also took the view that

Article 116 of the Limitation Act, 1963 relates to appeals under the Indian Code while the instant appeal was one under the Portuguese Code. In other words, the Additional Judicial Commissioner held that the appeal so far as the period of limitation was concerned was governed by the Portuguese Code and not by Article 116 of the Indian Limitation Act, 1963. In this view of the matter he dismissed the appeal by his judgment and order dated December 27, 1968. The appellants have come up in appeal to this Court.

5. On the question as to where the appeal could be lodged we are clearly of the view that the forum was governed by the provisions of the Goa, Daman and Diu (Extension of Code of Civil Procedure, 1908 and Arbitration Act, 1940) Act, 1965 (Central Act XXX of 1965) read with the provisions of the Goa, Daman and Diu Civil Court Act, 1965 (Goa Act XVI of 1965) both of which came into force simultaneously on June 15, 1966 and the appeal was required to be filed in the Judicial Commissioner's Court. Under the Central Act XXX of 1965 with effect from June 15, 1966 the provisions of the Indian Civil Procedure Code were extended to the Union Territories of Goa, Daman and Diu and the corresponding provisions of the Portuguese Code were repealed while under the Goa Act XVI of 1965 the instant suit which was pending before the Comarca Court at Margao was contained and decreed by corresponding Court of the Senior Civil Judge, who ultimately decreed it on March 8, 1968. Under the Indian Civil Procedure Code read with Section 22 of the Goa Act since the property involved in the suit was of the value exceeding Rs. 10,000 the appeal clearly lay to the Judicial Commissioner's Court. The contention that since the right of appeal had been conferred by Portuguese Code, the forum where it could be lodged was also governed by the Portuguese Code cannot be accepted. It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right of any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. This position has been made clear by clauses (b) and (c) of the proviso to Section 4 of the Central Act XXX of 1965 which substantially correspond to clauses (c) and (e) of Section 6 of the General Clauses Act, 1897. This position has also been settled by the decisions of the Privy Council and this Code (vide *The Colonial Sugar Refining Company Ltd. v. Irving* (1905 AC 369) and *Garikapatti Veeraya v. N. Subbiah Choudhury* (1957 SCR 488) but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act. That the forum, appeal, and also the limitation for it, are matters pertaining to procedural law will be clear from the following passage appearing at page 462 of Salmond's Jurisprudence (12th Edn.) :

Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfill their functions.

It is true that under clause (c) of the proviso to Section 4 of Central Act XXX of 1965 (which corresponds to Section 6(e) of the General Clauses Act, 1897) it is provided that a remedy or legal proceeding in respect of a vested right like a right to an appeal may be instituted, continued or enforced as if this Act (meaning the repealing Act) had not been passed. But this provision merely saves the remedy or legal proceeding in respect of such vested right which it is open to the litigant to adopt notwithstanding the repeal but this provision has nothing to do with the forum where the remedy or legal proceeding has to be pursued. If the repealing Act provides new forum where the

remedy or the legal proceeding in respect of such vested right can be pursued after the repeal, the forum must be as provided in the repealing Act. We may point out that such a view of Section 6(e) of the General Clauses Act, 1897 has been taken by the Rajasthan High Court in the case of Purshotam Singh v. Narain Singh and State of Rajasthan (AIR 1955 Raj 203). It is thus clear the under the repealing enactment (Act XXX of 1965) read with Goa Enactment (Act XVI of 1965) the appeal lay to the Judicial Commissioner's Court and the same was accordingly filed in the proper Court.

6. However, the order preliminary objection upheld by the learned Additional Judicial Commissioner is more important and the question that really arises for our consideration is what what the law limitation applicable in the Union Territories of Goa, Daman and Diu to proceeding launched therein prior to and pending at the date of liberation ? In other words, whether the period of limitation for the appeal in question was the one prescribed by the Portuguese Code or by Article 116 of the Limitation Act, 1963 ? It was not disputed that if it was the former the appeal was out of time and if it was latter the appeal was well within time. It is really unnecessary for us to decide this question in view of the application for condonation of delay for filing the said appeal in the Judicial Commissioner's Court at Goa, that has been made by the appellants before us which we are inclined to grant. It cannot to gainsaid that the aforesaid question of limitation is a complex one and not free from doubt and if in such a situation the appellants, bona fide believing that the appeal could be filed within 90 days as provided by Article 116 of the Limitation Act, 1963 filed their appeal within that period, it would be clear case of sufficient cause which could be said to have prevented them from filing the appeal within the time prescribed be the Portuguese Code. Where two views are equally possible on this complex question and where a party being guided by one of such views adopts a course consistent with that view it would equally be a case of "just impediment" within the meaning of Article 145 of the Portuguese Code, which could be said to have prevented the party from filing the appeal within limitation prescribed by the Portuguese Code. In the application made for condonation of delay the appellants have categorically stated that they bona fide believed, presumably on legal advice, that Article 116 of the Limitation Act, 1963 was applicable and they had acted bona fide in filing the appeal in the Judicial Commissioner's Court within a period of 90 days as per that provision. In the circumstances, we grant the application for condonation of delay and direct that the appeal (being Civil First Appeal 6 of 1968) be taken on file and be disposed of by the Judicial Commissioner's Court on merits in accordance with law. The appeal before us is accordingly allowed but in the circumstances of the case there will be no order as to costs. We must that Civil First Appeal 6 of 1968 will be disposed of expeditiously.

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