

CASE NO.:
Appeal (civil) 4944 of 1989

PETITIONER:
SYNDICATE BANK

RESPONDENT:
PRABHA D. NAIK AND ANR. ETC.

DATE OF JUDGMENT: 26/03/2001

BENCH:
B.N. KIRPAL & U.C. BANERJEE & BRIJESH KUMAR

JUDGMENT:
JUDGMENT

2001 (2) SCR 714

The Judgment of the Court was delivered by

BANERJEE, J. The applicability of the provisions of Indian Limitation Act vis-a-vis the interpretation of Article 535 of the Portuguese Civil Code, said to be the governing law of Limitation in the State of Goa, Daman & Diu, is the focal point for consideration in this appeal. Needless to record that Section 29(2) of the Limitation Act, 1963 contains the provisions for savings of the Limitation Act which expressly provides that the provisions contained in Sections 4 to 24 (both inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by special or local law. In interpreting the said provision under Section 29(2) and the Portuguese Civil Code pertaining to the question of limitation as being a local law within the meaning of Section 29(2), this Court in the case of Justiniano Augusto De Piedade Barreto v. Antonio Vicente Da Fonseca and Others, AIR (1979) SC 984 came to a conclusion that the body of the provisions in the Portuguese Civil Code dealing with the subject of limitation of suits etc. and in force in the Union Territory of Goa, Daman and Diu only, is the local law within the meaning of Section 29(2) of the Limitation Act, 1963. This Court further held that these provisions of the Portuguese Civil Code have to be read in the Limitation Act, 1963, as if the schedule to the Limitation Act stands amended mutatis mutandis and question of any repugnancy does not and cannot arise. The earlier decision [Justiniano (Supra)], obviously was on an inspiration from the provisions of Section 3 of the Goa, Daman and Diu (Extension of the Code of Civil Procedure and the Arbitration), Act, 1965 by which both the Code of Civil Procedure, 1908 and the Arbitration Act, 1940 were extended to the Union Territory of Goa, Daman and Diu and it is on this perspective this Court in paragraph 10 of the Report observed : ".....Section 4 of the Act repeals so much of the law in force in the

Union territory of Goa, Daman and Diu as corresponds to the Code of Civil Procedure 1908 or the Arbitration Act, 1940. This Act also neither expressly nor by implication repeals the provisions relating to limitation contained in the Portuguese Civil Code".

Turning on to the factual matrix at this juncture however, be it noted that - Syndicate Bank is in Appeal against the order of Panaji Bench of the High Court of Judicature at Bombay in First Appeal No 73/1985 wherein the High Court came to a definite conclusion that in the event the cause of action, as has been in the matter under consideration, has arisen outside the Portuguese law, then part of the aforesaid law dealing with a period of limitation will not apply and the same would be governed by the Indian Limitation Act and since the cause of action under consideration arose outside the Portuguese Law, no exception can be taken to the judgment and decree of the Civil Judge, Senior Division, Panaji as regards the rejection of plaint being barred by limitation.

Incidentally, the only ground of challenge in the Appeal before the High Court also pertained to the issue of limitation. Both the learned Civil Judge and the High Court however, relied on a decision of the Bombay High Court in the case of MA. Cadar Constructions v. M/s. Tara Tiles, AIR (1984) Bom. 258 wherein the High Court after consideration of the decision of this Court in Justiniano's case (supra) summarised the situation in paragraph 25 of the report as below :

"25. We may now summarise our conclusions in this regard.

(i) Provisions in the Portuguese Civil code or other Codes in force in this Union Territory relating to the periods of limitation are local laws within the meaning of Section 29(2) of the Indian Limitation Act, 1963 as pointed out by the Supreme Court in Justiniano's case.

(ii) But they are also special laws dealing with the rights and liabilities under the Codes themselves of which they form a part.

(iii) If any cause of action arises under the Portuguese law in force in the Union Territory, then the period of limitation for the suit based upon that cause of action will be the period mentioned in the relevant Portuguese law. If, however the relevant provision in the Portuguese law has been repealed and the cause of action has arisen before the repeal of the law then, notwithstanding the repeal, a suit based upon that cause of action can be filed and even in that case the relevant provision relating to the period of limitation will be the provision in the Code itself.

(iv) If, however, the cause of action has arisen outside the Portuguese law, then that part of the law dealing with the period of limitation will not apply; on the other hand, a suit filed on the basis of the cause of action arising outside the Portuguese law will be governed by the provisions of the Indian Limitation Act, 1963".

During the course of hearing of these appeals, the reasonings as set forth in Cadar Construction's case (supra) have been relied upon and it was contended that in any event the Portuguese Civil Code being not a special legislation pertaining to the issue of limitation, the Code, cannot be termed to be a special law or local law within the meaning of Section 29(2) of the Limitation Act and a bench of two judges of this Court hearing the matter, upon assessment of the situation, found the submission to be attractive and as such, there was a felt-necessity for reconsideration of the Judgment in Justiniano's case (supra) by a larger Bench. It is in terms therewith that this Bench stands constituted for reconsideration of the issue of applicability of the provisions of Limitation Act in the State of Goa, Daman and Diu.

Before delving into issue it is expedient to note that though statutory recognition of law of limitation for the first time was engrafted in 1859 by and under the Act 14 of 1859, but there were existing various regulations passed from time to time for fixing the period of limitation in the country. Subsequently however, the Act of 1908 provided a sea change from the earlier legislation of 1859 and again the law pertaining to limitation finds place in the statute book by way of the Limitation Act, 1963.

Incidentally, it may be noted that though the old Hindu Law recognised both Prescription and Limitation but Muslim Jurisprudence recognised neither of them. The new law of limitation in terms of Limitation Act of 1963 however, does not make any racial or class distinction since both Hindu and Muslim Law are amenable to the law of limitation as is presently existing in the statute book (see in this context B,B. Mitra's Limitation Act: 20th Ed.).

On the further factual score, be it noted that Syndicate Bank instituted a special suit (suit No. 5 of 1985/A) for recovery of a sum of Rs. 32,353.30

with future interest at the rate of 18% per annum from 1.1.1989 until payment against the defendant No. 1 (presently Respondent No. 1) for money lent and advanced at the Plaintiff's Betim Branch, Goa, as the principal debtor, and against defendant No. 2 (presently Respondent No. 2) as co-obligant-guarantor for recovery of said loan. The loan was granted in July, 1978 for his business which the respondents agreed to pay by December, 1978, on execution of a Demand Promissory Note for the said sum, a Deed of Hypothecation together with a delivery letter both dated 22.7.78. The respondents herein being the Defendant in the suit failed to repay the loan as promised and several demands to the plaintiffs were of no effect whatsoever and hence the suit on 17th January, 1985. The records depict that the Office Superintendent raised an office objection on the ground of limitation and the plaintiff, however, contended that the suit is not barred by limitation by reason of the decision of this Court in Justiniano's case (supra) and as such, the suit was fixed for hearing on the preliminary issue of limitation only resulting in an order of dismissal of the suit on the ground of the same being barred by limitation. The appeals also had the same fate as noticed herein before and hence the appeals before this Court upon the grant of leave.

Admittedly, Portuguese Colonial possession in the country to wit: Goa, Daman and Diu islands became part of the territory of India from 20th December, 1961 and by the Constitution Twelfth (Amendment) Act, 1962, the territories of Goa, Daman and Diu were included as the Union Territory with effect from the said date (20th December, 1961). It is noteworthy that prior to its incorporation, there was existing Portuguese Civil Code containing details of multiple laws admittedly, including the laws pertaining to limitation. Probably in order to assess the situation comprehensively, a look at the provisions would have been better at this juncture, but by reason of the factum of admitted state of facts as regards its contents, being multiple laws and since Mr. Sharma's reliance on Article 535 only in support of his contention, the same is set out herein below for its true effect. Article 535 reads as below:

"Section III Negative Prescription

Article 535 - Whoever has assumed an obligation to do for, or to do something to another, stands relieved of the obligation, if its performance is not demanded for a period of 20 years, and the obligant stands in good faith, at the end of the prescription period, or when the performance is not demanded for a period of 30 years, regardless of good faith or bad faith, except where special prescriptions are provided in law." Relying thereon however, Mr. Sharma contended that the law of limitation as in force in the territory of Goa cannot but be treated as a local law under the Portuguese Civil Code since the same is for guidance of the common man there, for his knowledge in his day to day business and personal obligation creating rights and liabilities which can be discharged within the period of 30 years in terms of Article 535 of the Civil Code, more so, having regard to the language of Limitation Act, 1963 since local and special laws have been saved thereunder, the period of limitation as prescribed in the scheduled to the Act of 1963 would not be applicable. Strong reliance has been placed on the decision of this Court in Justiniano's case (supra) and the reasonings contained therein stands adopted by Mr. Sharma as part of his submission in support of the appeal.

Before proceeding further in the matter, be it noted that the Limitation Bill, 1963 was passed by the Parliament and subsequently received the assent of the President on 5th October, 1963 and it came into force on 1st January, 1964 as the Limitation Act 1963 (Act 36 of 1963). Sub-section 1 of Section

1 provides that the Act may be called Limitation Act, 1963 and sub-section

2 of Section 1 specifically provides that the Act shall be made applicable to the whole of India except the State of Jammu & Kashmir. The intent of

the Parliament has thus been categorised to denote that the same be made applicable to the territories which form the country and thereby thus obviously meant and included Goa, Daman and Diu - this submission of Mr. Mehta for the respondent seems to be rather attractive as the same goes to the root of the matter. But without further consideration of the same at this juncture, Section 5 of the Goa, Daman and Diu Administration, 1962 on which strong reliance was made in support of the Appeal is noticed hereinbelow for convenience sake and the same reads as below :

"5. Continuance of existing laws and their adaptation.- (1) All laws in force immediately before the appointed day in Goa, Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority.

(2) For the purpose of facilitating the application of any such law in relation to the administration of Goa, Daman and Diu as a union territory and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution, the Central Government may, within two years from the appointed day, by order, make such adaptations and modifications, whether by way of repeal or amendment, as may be necessary or expedient and thereupon, every such law shall have effect subject to the adaptations and modifications so made."

In this context, it has been contended that since there has been no specific legislation containing the repeal of the Civil code, the limitation as prescribed under the Portuguese Civil Code shall continue to be operative and hence the suit cannot be termed to be barred by the doctrine of limitation.

Admittedly Portuguese Civil Code is a complete Code in itself detailing therein various rights and liabilities of the citizens and obviously the limitation in the enforcement of such right cannot but be said to arise from the Civil Code and not de hors the same.

Admittedly, Portuguese Civil Code continued in the Union Territory of Goa, Daman and Diu by virtue of Section 5 of the Goa, Daman & Diu Administration Act, 1962 which provides that the existing laws shall be continued in force in the Union Territory until amended or repealed by a competent legislature. We may also note Regulation 12 of 1962 which provides for extension of certain laws mentioned in the schedule to the Regulation, to wit, Negotiable Instrument Act, 1881 and the same was brought into effect in the Union Territory of Goa, Daman and Diu with effect from 1st December, 1965. In Goa, Daman and Diu (Laws) No. 2 Regulation, 1963 (Regulation 11 of 1963), provisions akin to those contained in Regulation 12 are found under which the Indian Contract Act, Sale of Goods Act and Transfer of Property Act were brought into force in the Union Territory from 1st November, 1965 and 1st December, 1965 respectively. The situation thus emerge having regard to the two regulations noticed herein before (Regulation 11 and Regulation 12) that both Negotiable Instrument Act and Contract Act together with some other statute have been made applicable to the State by appropriate legislative authority. The Promissory Note signed by the Respondent No. 1 herein and the guarantor issuing a guarantee thereof cannot but be termed to be the subject within the meaning of the Negotiable Instrument Act. In any event, and obviously on the factual score, there was also existing a Deed of Hypothecation which cannot also but be termed to be a contract within the meaning of Indian Contract Act which stands applied in the State of Goa, Daman and Diu. It is, therefore, to be seen as to whether specific Legislations containing the subjects under which the cause of action arisen, would govern the field or the procedural law assuming it would have its due application in replacement of the governing statute. This however, involves a wider debate and this Bench has not been called upon to answer the same, as such we refrain ourselves from expressing any opinion in regard thereto but the fact remains that both Negotiable Instrument Act and Contract Act have been included in terms of the Regulations noticed above and as such, made applicable in the State of Goa,

Daman and Diu.

. Be it noted that Article 535 containing the provisions of limitation in

Chapter III regulating the contracts in the Portuguese Civil Code which how-ever, stands replaced by the Indian Contract Act. The prescribed period for limitation pertaining to the contracts being in the same Chapter under Contract Act cannot be said to be surviving as an independent provision rather than going along with the other provisions of the contract which by reason of adaptation of Contract Act stands replaced. It is thus cannot but be said to be an implied repeal. The necessity of having an express repeal was never felt by reason of the factum of adaptation of Indian Contract Act in so far as Chapter II is concerned. Either the Chapter survive in its entirety or it perishes in its all spheres - it is one chapter dealing with contract and prescribed the period of enforcement of the same: no dissection is possible.

The view expressed by the learned Single Judge in Ganoxama Bicy Nay Vaingonkar v. Joao Manuel Dias, 1983 (First Civil Appeal No. 27 of 1975); (Bom. at Panaji-Goa) stands accepted by Division Bench in Cadar Construction (supra). The High Court in the last noted decisions placed reliance on Articles 689 and 690 of the Portuguese Code which provides for special period of limitation in case of error and coercion respectively, and thus drawing analogy therefrom, came to a conclusion that the law as enunciated by the learned Single Judge in Ganoxama's case (supra) cannot but be termed to be the correct exposition of law. Similar is the reasoning as formulated by Mr. Mehta - since enforcement cannot survive the operation of law in the event the right is stated to be governed by another set of laws.

Article 505 of the Civil Code provides for acquisition of things and rights by possession and the same is ascribed to be positive prescription and discharge of obligations by reason of not demanding their fulfillment is known as negative prescription. The word 'Prescription' is in general is a mode of acquiring title to incorporeal hereditaments by continued user, possession and enjoyment during the time. Article 535 prescribes a negative element of prescription which is akin to adverse possession. A prescriptive right however, differs from adverse possession, since prescription relates to incorporeal rights while adverse possession applies to an interest in the title to property. 'Prescription' is usually applied to acquisition of incorporeal hereditaments and negative prescription obviously a negation of such an acquisition. 'Prescription' admittedly, is a part of substantive law but limitation relates to procedure, as such prescription differs from limitation. The former is one of the modes of acquiring certain right while the latter viz. the limitation, bars a remedy, in short, prescription is a right conferred, limitation is a bar to a remedy Chapter n of the Portuguese Civil Code provides detailed Articles pertaining to Prescription Corpus Juris Secundum (vol. 72) described the word 'prescription' as below :

"In law prescription is of two kinds; it is either an instrument for the acquisition of property or an instrument of an exemption only from the servitude of judicial process. In the first sense, as relating to the acquisition of property, prescription is treated in Adverse Possession. In the second sense, as relating to exemption from the servitude of judicial process, prescription is treated as Limitation of Actions".

On the wake of the above, question of expression of any contra opinion apart from what has been expressed in Cadar Construction (supra) pertaining to the interpretation of the Portuguese Civil Code, does not arise.

The other aspect of the matter ought also to be noticed to wit, the incorporation of Negotiable Instrument Act and Contract Act by a notification in the State of Goa, Daman and Diu. The cause of action of the suit viz. money lent and advanced in terms of the agreement stands squarely

governed by the Contract Act read with the Negotiable Instrument Act by reason of the admitted executed of a Promissory Note and as such cannot be said to be governed by the Code. In the event the right to initiate the proceedings goes out of the ambit of the Code, the latter cannot govern its enforceability. The Civil Code is a complete Code in itself; its applicability was not restrictive in any way whatsoever prior to the issuance of notification adapting into a State law, the two statutes named above. The Portuguese Civil Code cannot be termed to be a statute of limitation, as such it can not have its operation extended to prevent the enforcement of independently existing rights of action. The Civil Code, as noticed above can not but be ascribed to be a compilation of comprehensive law in the State which meets the need of the situation alongwith a specific period for extinguishment of the same - to clarify the situation it may be stated that the Portuguese Civil Code provides both for accrual of right and its enforceability and when the right stands divested, question of enforceability of the right arising from a different source and other than Code, would not arise. Either the Code applies in its entirety or it does not - there is no half way about it. On the wake of the aforesaid, the debate involving the distinction drawn between substantive and procedural matters need not be delved into nor even be discussed in the contextual facts, more so having regard to the criticism of Lord Eldon's dictum in *spear v. Hartly*, (1800) 3E sl. 81 170 ER 545 that a subsisting lien by reason of the existing debt owing to him does not stand discharged even though his remedy by action was barred by the statute of limitation - the distinction drawn between the drawal of the remedy and the subsistence of the right in the contextual facts for classification of statute of limitation in Private International Law is said to be merely procedural and has been described as both "artificial and cementic" (see in this context *Chesistiare and North, Private International Limited 11th Ed.; Mcleod; Conflict of laws. The High Court of Australia in the case of Mckain v. R.W. Miller & Co. (South Australia) Pty. Ltd., 174 CLR (1991-92 page 1) wherein C.J. stated :*

"Not all statutes of limitation, however, operate simply to deny a party a remedy while leaving a right in existence. Limitation provisions which can be seen as incidents of rights created, whether by the same or another related statute, have been typically construed as extinguishing those rights after the effluxion of the nominated period of time."

The obvious question thus appears as to whether the Limitation Act of this country would be made applicable to the State of Goa, being a part of this country or the Portuguese Civil Code in the facts of this case not governing the right, would have its application in the enforceability of such a right - we are left with no option but to record our opinion to the fact that by reason of the existence of right under Indian Law (to wit, Contract Act and Negotiable Instrument Act) the extinction of remedy under the Portuguese Law cannot but be deemed to be impliedly repealed. The doctrine of implied repeal has to take its place in the facts of the matter under consideration. Having regard to the factum of Article 535 being a mere procedural aspect and not being a substantive right, as such we are not contemplating the situation under Private International Law, but the distinction between substantive and procedural law has a meaningful existence herein. The doctrine of implied repeal, we are conscious of the fact, is not to be favoured but where a particular provision could not have been intended to subsist and if let subsisting, the resultant effect would be an absurdity. Courts cannot but declare it to be so on the ground of repeal by implication. Let us at this juncture try to appreciate the total effect, in the event we allow Article 535 to remain subsisting : The right to sue on a contract arising in any part of the country excepting the State of Goa stands extinguished after the expiry of the period of limitation as prescribed by under the Limitation Act. The Appellant Bank has its branches throughout the country, in a situation identical, appellant Bank will be entitled for the enforcement of its claim even the period of limitation is prescribed under the Limitation Act but if a similar suit appears in another part of the country, appellant Bank will have its liberty to

institute a claim for enforcement and the remedy continues for a much longer period of time (as in this case 30 years). Is it a conceivable situation that a debtor in this country without there being any implication of Private International Law can bona fide and validly extinguish a claim of the creditor within a specific period but a debtor situated in another part of the country having a uniformity of laws by reason of such local law said to be existing, cannot claim such extinguishment or bar of remedy until the expiry of a much longer period of time? - the situation is rather anomalous and cannot be conceived. Having regards to Section 1(2) of the Limitation Act which came into force much after the territories of Goa, Daman and Diu were incorporated as a Union territory by the Constitution, (Twelfth) Amendment Act however, should not detain us long.

Incidentally, the legislature is supposed to be aware of the need of the society and the existing state of law: there is no reason whatsoever to consider that the legislature was unaware of the existing situation as regards the Portuguese Civil laws with a different provision for limitation. Needless to record the special reference has been made to the State of Jammu & Kashmir but after incorporation of the State of Goa, Daman & Diu within the Indian Territory, if there was any intent of having the local law being made prevalent there pertaining to the question of limitation only, there would have been an express exclusion and in the absence of which no contra intention can be deduced, neither any contra inference can be drawn. In any event, as noticed above, Portuguese Civil Code, in our view, could not be read to be providing a distinct and separate period of limitation for a cause of action arising under the Indian Contract Act or under the Negotiable Instrument Act since the Civil Code ought to be read as one instrument and cause of action arisen therefrom ought only to be governed thereunder and not otherwise. The entire Civil Code ought to be treated as a local law or special law including the provisions pertaining to the question of limitation for enforcement of the right arising under that particular Civil Code and not de hors the same and in this respect the observations of the High Court in Cadar Construction (supra) that the Portuguese Civil Code could not provide for, a period of limitation for a cause of action which arose outside the provisions of that Code, stands approved. A contra approach to the issue will not only yield to an absurdity but render the law of the land wholly inappropriate. There would also be repugnancy in so far as application to the Limitation Act in various States of the Country is concerned; whereas in Goa, Daman and Diu, the period of limitation will be for a much larger period than the State of Maharashtra - the situation even conceptually cannot be sustained having due regard to the rule of law and jurisprudential aspect of the Limitation Act.

Needless to record that our concurrence to the observations of the High Court in regard to a special Law of Limitation is provided for enforcement of the rights arising under that Code itself, is by reason of the fact that Law of Limitation is a procedural law and the provisions existing on the date of the suit apply to it (reference may be made to the decision of this Court in C. Beepathuma and Others v. Velasari Shankaranarayana Kadambolithaya and Others, AIR (1965) SC 241.

Admittedly, Limitation Act is a statute enacting the provisions in general terms applicable to the entire country excepting the exception as mentioned in the statute itself. It is a latter statute of the year 1963 only that the Portuguese Civil Code assuming had its application in the State of Goa, Daman & Diu and an earlier statute thus stand altered, as the latter is expressed in affirmative language, more so by reason of specific application of Negotiable Instrument Act and Indian Contract Act : It thus cannot but be said to be repealing by implication - "affirmative statute introductive of a new law do imply a negative" (Harcourt v. Fox, (1693) 1 show. 506.

As regards the doctrine of implied repeal, another aspect of the matter ought to be noticed vis-a-vis the Civil Code. The issue of limitation being

a mixed issue of law and fact under the Limitation Act, the Court in spite of plea not being raised by the defence, can go into the same suo moto but there is a specific bar under Article 515 of the Civil Code which records that the Court cannot suo moto take cognizance of description unless it is specifically pleaded by the parties. It is a bar of jurisdiction of Court. The repugnancy and incongruity arise by reason of the fact that the Parliament by law viz. The High Court at Bombay (extension of jurisdiction to Goa, Daman and Diu) Act, 1981 extended the jurisdiction of the High Court of Judicature at Bombay to the Union Territory of Goa, Daman and Diu from the appointed day and the Court of Judicial Commissioner was abolished. Section 9 of the statute [(Act of 1981) (supra)] provides that there shall be, on and from appointed day, established a permanent Bench of the High Court of Bombay at Panaji and some Judges of the High Court at Bombay being not less than two in number or as may be nominated by Chief Justice of the High Court from time to time shall sit at Panaji, in order to exercise the jurisdiction and power for the time being vested in the High Court in respect of cases arising in this Union Territory. The authority and jurisdiction of the High Court of Bombay, to take cognizance of an action being barred by limitation, thus stands negated - conceptually even a difficult situation to conceive that same High Court will have two different spheres of jurisdiction while dealing with matters. At the cost of repetition we say that while implied repeal is not to be readily inferred but in the contextual facts, upon scrutiny, we cannot but hold that on the wake of the factum of the Limitation Act coming into existence from 1.1.1964, Article 535 of the Portuguese Civil Code cannot but be termed to be impliedly repealed and it is on this score that the decision of this Court in Justiniano's case (supra) stand overruled. There is one general law of limitation for the entire country being the Act of 1963, and the Portuguese Civil law cannot be termed to be a local law or a special law applicable to the State of Goa, Daman & Diu prescribing a different period of limitation within the meaning of Section 29(2) of the Limitation Act and in any event, question of saving of local law under the Limitation Act of 1963 does not and cannot arise. The submission that without there being a specific mention of repealing statute (since 1963 Act of Limitation does not record express repeal of any other law excepting the Limitation Act of 1908), question of Portuguese Civil Code being repealed does not arise, cannot hold good by reason of the doctrine of implied repeal as noticed above. In the premises aforesaid, these appeals fail and are dismissed without however, any order as to costs.