Supreme Court of India
Jose Da Costa And Anr. vs Bascora Sadasiva Sinai Narcornim ... on 1 August, 1975
Equivalent citations: AIR 1975 SC 1843, (1976) 2 SCC 917
Author: R Sarkaria
Bench: A Gupta, R Sarkaria, V K Iyer
JUDGMENT R.S. Sarkaria, J.

1. This appeal by special leave is directed against a Judgment, dated January 20, 1968, of the Additional Judicial Commissioner, Goa, Daman and Diu.

2. The defendants, Jose Da Costa and his wife, Isabela Braganca, are the appellants, and the plaintiffs, Bascora Sadasiva Sinai Narcornim and his wife, Dungabai Narcornim, the respondents. The suit property is known as "Deulacodil-Tucdo". It is a plot of land with a building on it and is situated in the town of Sanguem, District Goa.

3. The plaintiffs instituted a suit on February 27, 1961 in the Court of Judge of Quepem Comarca in accordance with the Portuguese Law then in force in these territories for ejectment of the defendants from the suit property. It was alleged that on the death of Sadasiva, father of the plaintiff, Bascora, in partition proceedings with minors (inventario), this plot was assigned to Bascora's mother. Sitabai towards her moiety in the estate. On Sitabai's death, the property devolved on the plaintiffs-Bascora and his six sisters. Before the partition of the property among the legal heirs of Sitabai, Bascora acquired the rights from some of his sisters and became the owner of the suit property with other heirs. Bascora's parents had inherited this property from their ancestOrs. The father of Bascora had permitted the ancestors of the defendants to build a house for their residence on a part of the property subject to the condition that they shall have to vacate the plot when called upon to do so. In the latter event, they shall be entitled to remove the super-structures of the building raised by them.

4. Notwithstanding the condition, Caetana Esperanca Fernandes, the mother of the appellant, Jose da Costa executed a deed on November 16, 1920 before the notary public of Comarca, which indicated that she and her family members were owners of the plot. On the basis of this deed, the defendants asserted ownership of that part of the plot on which stands the house built by their ancestOrs.

5. On the preceding allegations, the plaintiffs prayed for a declaration to the effect that the plain tiff, Bascora, and the other heirs of his mother, Sitabai, are the only owners of the plot in dispute and that the house in the occupation of the defendants on a part of that plot was constructed in the circumstances and subject to the terms aforesaid. They further prayed that the defendants be directed to vacate the plot after removing the materials of their house.

6. The defendants traversed the plaintiffs' allegations and pleaded that it was Visnu Bascora Sinai Narcornim, an ancestor of the plaintiffs, who had given the suit property on perpetual lease to Pascoal da Costa, an ancestor of the defendants, in the year 1875 at an annual rent of Rupees 2/4/-. It was stated further that no such rent has been paid for over forty years before the suit nor has any

rent ever been claimed by the family of the plaintiffs for such a long time. It was Pascoal da Costa, who possessed the plot as his own and originally built one house on it, but subsequently, his descendants constructed more houses so that at present there are three houses and one stable on the plot in dispute. On Pascoal da Costa's death, in inventario proceedings, this property on 16-11-1920, was "consolidated in full ownership in the patrimony of the descendants of the said Pascoal da Costa".

7. The defendants further averred that the suit property has been in their "public, peaceful and continuous" possession including that of their predecessors-in-interest, as owners for a period of more than 50 years and that they had acquired title by prescription.

8. The plaintiffs in their replication denied the grant of any perpetual lease as also the fact that Visnu Sinai Narcornim was their ancestor. It was stated that Visnu was only a brother of the father of the plaintiff. They further asserted that the document purporting to be a copy of the. perpetual lease executed by the said Visnu was fake and forged.

9. By its Judgment dated 30-4-1966, the trial court held that "the plot of land in question belonged to the household of the parents of the plaintiffs and their sisters" and "brothers-in-law". It further held that the defendants had failed to prove any perpetual lease in their favour, that since the defendants did not pay any rent, to the owners who were residing in the vicinity for the plot of land, it is to be "necessarily inferred that the house was built with the consent of the then owner of the plot". In its view the situation was "similar to that foreseen in Section 2308 of the Code: the landlord of the plot of land can take over the house on paying its value to the respective owner". The trial court accordingly passed a decree of ejectment directing the defendants to remove their superstructures or in the alternative, to receive from the plaintiffs Rs. 1084/- which was found to be the value of the material of the house in question.

10. Aggrieved, the defendants preferred an appeal. The learned Additional Judicial Commissioner after reviewing the evidence found "no scope for doubt on the point that "the plot was once the ownership of Sadasiva, the father of the male plaintiff, that on the death of Sadasiva, the plot was allotted to his widow Sitabai, and that on Sitabai's death the plot has been inherited by her children including the male plaintiff". He further found "no escape from the conclusion that the plaintiffs have failed to prove that the defendants are entitled only to remove the superstructures while vacating the plot". It was further held that the defendants had miserably failed to establish that they had taken the plot on perpetual lease from Visnu. The documentary evidence produced by the defendants to substantiate their plea was considered to be unreliable. It was added that Visnu was never the owner of the plot in dispute and had no right to lease it out. In the result, he dismissed the appeal and affirmed the decree of the trial Court. Hence this appeal.

11. Mr. Bhandare, learned Counsel for the appellants contends that notwithstanding the fact that a plea of acquisition of title by prescription was specifically raised in the pleadings, the grounds of appeal, and was also put in issue, (No. 3), the court below has failed to give a finding on the same. This being a pivotal point going to the root of the matter. proceeds the argument, the case should be remitted to the court below for redecision.

12. As against this, Mr. Tarkunde, learned Counsel for the respondents submits that the appellant is now precluded from agitating the plea of prescription, because he had not filed a review application (reclamacao) in the appropriate court to get that nullity i.e. omission to decide this plea, rectified within limitation in accordance with Articles 668, 669 and 717 of the Portuguese Civil Code. It is maintained that these are substantive provisions inasmuch as they regulate and affect a litigant's right of appeal. Since the suit was filed before the extension of the CPC, 1908 to Goa, Daman and Diu, the Portuguese Civil Code will continue to govern the rights of the parties in the matter of appeal.

13. It is not disputed that the plea of prescription was set up by the defendants in their pleadings. The defendants' case, as already noticed was that they and their predecessors- in-title were in continuous possession of the suit property for a period of more than 40 years, as owners, openly and peacefully. No rent was either paid by the defendants or their pre decessors, nor claimed by the plain tiffs or their ancestors for such a long time. It was then specifically alleged:

Thus with that long possession by the defendants and their ancestors there ought also to have operated the prescription which is expressly invoked, ex abundanti (vide the written statement and rejoinder of the defendants).

14. In their replication, the plaintiffs had traversed these allegations. In addition to two separate issues regarding non-payment and non-claim of rent for over 40 years, the trial court framed a distinct issue with regard to the plea of prescription. It was Issue 3. It reads:

Is it true that the property is in the possession of the defendants and their ancestors for over a half century publicly, peacefully and continuously.

15. The trial court did advert to this issue. Although there is no specific and elaborate discussion of all the points of fact or law having a bearing on the matter, it seems to have negatived this issue on the short ground that the plot of land having been given on perpetual lease to the ancestor of the defendants, the pos session exercised by him and his descendants, being in the name of another, can never lead to prescription", adding "It is true that the defendants state that the rent ceased to be paid for over 40 years, and since then their ancestors came to possess the plot of land in their own name. But that statement is opposed by the circumstance that the plaintiffs have their own house in the same plot of land for over 40 years. If the owner of the plot of land himself stays in it, for such a long time, how can the defendants say that they are possessing the same in their own name and as their own plot of land?"

16. In the memorandum of appeal filed in the court of the Judicial Commissioner, after reiterating the allegations inter alia as to continuous possession since 1875, and non-payment of rent for over 40 years, the appellant stated: "...and so the defendants invoke also the prescription in their favour". In ground No. 8, it was repeated that "the reasoning of the learned trial judge about the prescription is baseless, considering the circumstances in which the house was constructed by the plaintiff".

16A. Again in the application filed before the Judicial Commissioner for leave to appeal to this Court, it was stated- "that the learned Trial Court and Appeal Court have erred in law by misconstruing the provisions and principles of prescription of the Portuguese Civil Code, namely, that of Articles 510 and 529 of the Portuguese Code".

17. The learned Additional Judicial Commissioner appears to have overlooked the grounds of appeal filed in his Court wherein the defendant-appellant had clearly reiterated the plea of prescription. His observation in his order, dated 3-4-1968, whereby he refused leave to appeal, to the effect, that this plea cannot be availed of by the applicants because it was not "adopted in the grounds of Appeal filed by them in this Court as admitted by Shri Sonak" is not factually correct.

18. The second reason given by the learned Additional Judicial Commissioner (vide his order, dated 3-4-1968), for not dealing with the Issue relating to prescription was "No reclamacao having been filed in the instant case, the point of prescription is now beyond challenge". Precisely, the same stand has been taken by Mr. Tarkunde before us. To test this argument, it will be appropriate at this stage to notice the Portuguese law on the point.

19. According to Article 668 of the Portuguese Civil Code, the decision is 'null'..."when the Judge abstains from adjudicating which he ought to do or when he entertains an issue he ought not to do". The procedure to be adopted by the aggrieved party in such a situation" is indicated in Article 669, thus: "Where a decision contains any of the nullities mentioned in the preceding Article, any of the party can apply for being rectified the nullity or omission (silence) within the time limit fixed for the appeal. The opposite party will be heard on the said application and he can file his returns within 3 days, and thereafter the case shall be decided". Such a review application under the Portuguese law is called reclamacao. Article 686 provides that "the time limit for filing the appeals is of 8 days computed from the date of notification of the orders of Judgment". Thus the limitation prescribed for filing a reclamacao" was also 8 days from such notification. Article 715 makes it clear that the procedure prescribed with regard to the rectification of "nullities" in Articles 660 to 667, 669 etc. is applicable "to the second instance" (that is, to the Court of the Judicial Commissioner), also.

20. Bearing the above provisions in mind, the first question to be determined is whether it was imperative for the defendants to file a "reclamacao" under Article 669 in regard to Issue No. 3 in the Court of first instance? Answer to this question depends on whether the Judgment of the trial court suffered from a "nullity" as defined in Article 668. That is to say: Had the trial judge "abstained from adjudicating" the issue as to prescription within the contemplation of Article 669? We think not. As noticed already, he dealt with this issue and negatived it, though on a short and summary ground. His Judgment was not altogether silent on the plea of prescription and did not with regard to this issue suffer from any "nullity" or "omission" which would be required to be rectified in review (reclamacao) under Article 669. Thus considered, Article 669 was not applicable at the stage of "first instance".

21. This takes us to the Court of "the Second instance". At this stage, it will be appropriate to notice two other Articles of the Portuguese Civil Code. Article 722 provided:

The ground of appeal to the Supreme Court can be the infringement of substantive law either by error of interpretation or by error of application; but a plea founded on any of the nullities contemplated in the Articles 668 and 717 can be secondarily raised provided that the Court of the 1st instance or the High Court has given decision on the point of such nullity.

If the appellant desires to impugn the decision of the Court of 1st instance or of the High Court on the ground of the nullities laid down in the Articles 668 and 717 he shall file an appeal (agravo) against the decision given on the question of nullity. In this case if the decision of the Court of 1st instance or of the High Court is declared as null an appeal shall be to the Supreme Court on the ground of the infringement of the substantive law against the order whereby the said decision is peformed.

Article 677 laid down:

The judicial decisions can be impugned by way of appeals. The appeals are ordinary or extraordinary. The ordinary appeals are of "apolacao", "Revista", "agravo" quaxa and appeal to the Tribunal pleno. The extraordinary appeals are "obosicao deterceiro" and revision.

Para-unico-The decision is considered as forming res judicata wherever an appeal does not lie against it or as soon as the ordinary appeals are exhausted.

22. It will be seen that under the Portuguese law, a person aggrieved by a 'nullity' in a Judgment of the court of second instance, was not entitled to get it redressed by directly filing a further appeal against such a Judgment to the Portuguese Supreme Court. His remedy was to approach the same court under Article 669 for rectification of the 'nullity', and if he still felt aggrieved by the decision rendered in reclamacao, he could go in further appeal (agravo) under Article 722 against such a decision to the Portuguese Supreme Court at Lisbon.

23. The next question to be considered is, when and to what extent, did these provisions of Portuguese Civil Code cease to be applicable to this case?

24. The territories of Goa, Daman and Diu were made part of the territory of India with effect from 20-12-1961 by virtue of Article 1(c)(3) of the Constitution of India, and were being administered as a Union Territory by the President through an Administrator in accordance with Article 239 of the Constitution. Section 5 of the Goa, Daman and Diu (Administration) Act No. I of 1962 (which replaced Ordinance No. 2 of 1962) provided for continuance of all laws in force in these territories immediately before the appointed day (20-12-1961) until amended or repealed by a competent Legislature or other competent authority. Sub-section (2) gave power to the Central Government to adapt or modify by order such existing law within two years from the appointed day. Section 6 empowered the Central Government to extend by notification with restrictions or modifications "as it thinks fit", laws in force in a State to Goa, Daman and Diu. The Goa. Daman and Diu (Judicial Commissioners Court) Regulation 1962, was promulgated by the President under Article 240 of the Constitution. It came into force on 16-12-1963 and constituted for this "Union Territory a Court of Judicial Commissioner. It is the highest Court of Appeal replacing the former Court of Appeal

(Tribunal de Relacao) in that territory.

25. In exercise of its powers under Article 241(1) of the Constition the Parliament enacted Central Act 16 of 1964. The Act took effect from 16-12-1963. It declares the Judicial Commissioner's Court for Goa, Daman and Diu to be a High Court for the purposes of Articles 132, 133 and 134 of the Constitution (vide Section 3). Section 5 provides:

Subject to any rules made under Article 145 or by any other law as to the time within which appeals to the Supreme Court are to be entertained, appeal shall lie to that Court from a Judgment, decree or final order of the Judicial Commissioner's Court, under the provisions of Article 132 or Article 133 or from a Judgment, final order or sentence of such Court under the provisions of Article 134:

Provided that an appeal may be preferred within ninety days from the date of passing of this Act from a Judgment, decree, final order or sentence passed or made by the Judicial Commissioner's Court before that date.

Section 7 is also significant. It provided:

Any person aggrieved-

(a) by any Judgment, decree or order or sentence of Tribunal de Relacao passed or made before the 20th December, 1961, against which an appeal would lie to a superior court in Portugal in accordance with law but could not be preferred by reason of Goa, Daman and Diu becoming part of the territory of India, or against which an appeal having been preferred to a superior court in Portugal in accordance with law had not been disposed of before the said date; or

(b) by any Judgment, decree or order or sentence of the Tribunal de Relacao passed or made on or after the 20th December 1961.

may within ninety days from the date of passing of this Act (16-5-1964) prefer an appeal from such Judgment, decree, order or sentence to the Supreme Court as if such Judgment, decree, order or sentence had been passed or made by the Judicial Commissioner's Court.

26. The next enactment which may be noticed is the Goa, Daman and Diu (Extension of the CPC and the Arbitration Act) Act, 30 of 1965. It received the assent of the President on September 25, 1965. Section 3 of the Act extended the CPC V of 1908 and the Arbitration Act X of 1940 to Goa, Daman and Diu. Section 4 is important. So far as it is material for our purpose, it reads:

4 (1) So much of any law in force in Goa, Daman and Diu as corresponds to the CPC V of 1908...shall stand repealed as from the coming into force of this Act in Goa, Daman and Diu:

Provided that the repeal shall not affect -

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder. Or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or

(c) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability as aforesaid.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if this Act had not been passed:

Provided further that, subject to the preceding proviso notifications published, declarations and rules made, places appointed, agreements filed, awards made or filed, scales prescribed, forms framed, appointments made and powers conferred under any law so repealed shall, so far as they are consistent with the said Code or as the case may be, the said Act have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under the said Code or the said Act and by the authority empowered thereby in such behalf.

(2) In every law or notification passed or issued before the commencement of this Act in which reference is made to or to any Chapter or section or provision of any law hereby repealed, such reference shall, so far as may be practicable, be taken to be made to the said Code, or, as the case may be, to the said Act, or its corresponding Part, order, section or rule.

27. Sub-section (1) of Section 1 provides that the Act shall come into force on such date as the Central Government may by notification in the official Gazette appoint. Accordingly, by notification No. S.O. 1597 dated May 24, 1966 published in the Gazette of India, dated June 10, 1966, the Central Government has appointed the 15th June, 1966 as the date on and from which Act 30 of 1965, came into force in this Union territory.

28. Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be appropriate to bear in mind two well-established principles. The first is that "while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment" (see Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr.) . The second is that a right of appeal being a substantive right the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are two exceptions to the application of this rule, viz, (1) when by competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (2) when the court to which appeal lay at the commencement of the suit stands abolished (see Garikapatti Veeraya v. N. Subbiah Choudhry and Colonial Sugar Refining Co. Ltd. v. Irving, 1905 AC 369).

29. In the light of the above principles, these points arise for consideration: Are the provisions of the Portuguese Civil Code relating to Reclamacao merely matters of procedure? Or, do they create or

affect vested rights and remedies? That is to say, does a Reclamacao have all the attributes of a substantive right of appeal existing at the commencement of the suit? Did the superior Court of Appeal at Lisbon stand abolished as an appellate forum in relation to Goa. Daman and Diu from 20-12-1962? If so, what is its effect on the right of appeal given by Articles 677 and 722 of the Portuguese Civil Code and their application to the present case? Was the Portuguese Supreme Court at Lisbon succeeded by the Supreme Court of India for the purpose of the aforesaid Articles 677 and 722 of the Portuguese Code? If so, did this position hold good after 15-6-1966? Does the Central Act 30 of 1965 read with Notification No. S.O. 1597, issued thereunder, expressly or impliedly, make inapplicable the provisions of the Portuguese Civil Code in the matter of Reclamacao in respect of a decision or Judgment rendered by the Court of Judicial Commissioner after 15-6-1966? That is to say, have the rights, remedies or obligations arising out of the Portuguese Law relating to Reclamacao saved by any of the Clauses (a), (b) or (c) of the first Proviso to Section 4(1) of Act 30 of 1965?

30. It may be noted that while a right of appeal from court to court is a substantive right which under the then law, exists on and from the date of the institution of the suit, the same cannot be said with regard to Reclamacao. The provisions of the Portuguese Civil Code relating to Reclamacao lay down only special rules of procedure which have to be gone through before a litigant is entitled to raise in appeal a material point left undecided by the lower court. The object of requiring a party aggrieved by a 'nullity' is to save the time of the appellate Court by precluding a party to reagitate in appeal pleas that had been left undecided by the lower court. It also minimises the necessity of remands to the lower court for trial of particular issues and thus shortens litigation. The requirement or obligation to file a Reclamacao is not an obligation in esse or/and from the institution of the suit. Nor is the procedural right to file Reclamacao-if at all it can be called a 'right'-a vested right existing from the date of the suit. The filing of a Reclamacao is dependent upon the happening of an uncertain event. It arises only when a Judgment suffering from a 'nullity' is passed. Such a contingency may or may not arise. On the other hand in the case of a suit it can be predicated that it would normally result in a decree entitling the aggrieved party to have the suit reheard and redecided in a higher forum by filing an appeal provided of course such a right is available under the law prevailing at the institution of the suit.

31. In the present case, the Judgment of the Additional Judicial Commissioner in which the alleged "nullity" or "omission to adjudicate" on the point of prescription occurs was delivered on 20-1-1968, that is, long after the extension of Articles 132, 133 and 134 of the Constitution, Rules framed under Article 145 of the Constitution and Sections 109 and 116 of the CPC to Goa, Daman and Diu. The procedural provisions of the Portuguese Code relating to Reclamacao, and appeal from a decision on Reclamacao, from the High Court in Goa, Daman and Diu stood repealed and superseded by the extended Indian laws when the Judgment now under appeal was rendered.

32. This takes us to the next point. The appellate forum at Lisbon stood abolished, so far as this Union Territory is concerned with effect from 20-12-1962. Thereafter Section 7 of the Central Act 16 of 1964 (which came into force with effect from 16-12-1963) constituted this Court as the appellate forum in place of the superior court in Portugal in the case of Judgments, decrees or orders passed by the Tribunal de Relacao before or after 20-12-1961. This position as to the Supreme Court of

India being the successor court of the Portuguese Court at Lisbon continued till the Central Act 30 of 1965 came into force on 15-6-1966. Thereafter this Court ceased to be such a successor court except to the extent the repeal of the Portuguese Code was saved by any of the Clauses (a), (b) and (c) of the 1st proviso to Section 4(1) of that Act. Clause (a) of the Proviso has obviously no application. Nothing concerning the previous operation of the repealed law is involved in this case. Clauses (b) and (c) will not cover this case because a right, obligation or liability to file Reclamacao in respect of a Judgment of the Additional Judicial Commissioner could not, by any stretch of imagination be called a right, obligation or liability that had been "acquired" or "incurred" before 15-6-1966, that is, before the repeal of the Portuguese Civil Code.

33. On 15-6-1966, there was in relation to Reclamacao no "accrued" right or "incurred" obligation or liability within the contemplation of Clause (c) of the Proviso in respect of which any investigation. proceeding or remedy could be instituted, continued or enforced according to the repealed law. Thus considered, it is clear that the procedural provisions of the Portuguese Civil Code were no longer applicable to this case with effect from 15-6-1966. If that be the correct position, there is no legal hurdle in the way of the appellant to the reagitation in this Court of the issue as to prescription left undecided by the court below.

34. The problem can be viewed yet from another angle. The defendants have come in appeal to this Court by special leave under Article 136 of the Constitution and not by virtue of anything in the Portuguese law. The discretionary jurisdiction exercised by this Court under Article 136 read with Article 142 is of the widest amplitude. Article 136 vests in this Court plenary jurisdiction in the matter of entertaining and hearing appeals by granting special leave against any kind of Judgment or order made by a court or tribunal in any case or matter and the power cannot be taken away expressly or impliedly by any ordinary legislation short of Constitutional amendment. Article 142 gives very wide powers to this Court to make any order as may be necessary for doing complete justice in any matter before it.

35. As pointed out in Durga Shankar v. Raghuraj Singh the power vested in this Court under Article 136 is wider even than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England inasmuch as the powers under this Article cannot be curtailed or taken away by any Parliamentary legislation, the Constitution being the Supreme law of the land which overrides ordinary laws, and no presumption can arise from provisions in ordinary laws declaring an adjudication of a particular tribunal to be final and conclusive that there was an intention to exclude the exercise of the special power.

36. To sum up, since on and from 15-6-1966 the Portuguese law relating to Reclamacao stood repealed and no substantive right or obligation had been acquired or incurred under that repealed law within the meaning of the first proviso to Section 4(1) of Act 30 of 1965, the appellants cannot be debarred from canvassing in this appeal under Article 136 the plea of prescription notwithstanding the fact that they did not file any Reclamacao in the Court of the Judicial Commissioner. We therefore negative the preliminary objection raised by the respondents.

37. The plea of prescription goes to the root of the matter. It was raised by the defendants in their pleadings and the matter was put in issue. It was again taken up in the grounds of appeal filed in the Court of the Judicial Commissioner, but was left undecided. For the purpose of doing complete justice in the case, we think it necessary to have the advantage of the finding of the court below on this issue. Accordingly, we remit this case to the Court of the Judicial Commissioner, Goa, Daman and Diu with the direction that it should after rehearing the parties record a specific finding on the issue as to whether the defendants had acquired full title to the suit property by prescription under the law in force at the relevant time. The Judicial Commissioner shall submit his report with reasons therefore to this Court within four months from the date on which the records are received in his court. In the meantime the appeal shall remain pending in this Court.