Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 60 OF 2011

1. Shri Pedro Antonio D' Souza, alias Pedro Antonio Souza, Major of age, and his wife

2. Smt. Rita D'Souza, alias Rita Peter Souza, Resident of H. No. 479, Raia, Salcete, Goa. … Appellants

V e r s u s

M/s. Vijay Construction , An erstwhile partnership, now rendered into a proprietorship concern Represented by its sole proprietor Shri Devdatta Anand Mhapsenkar, Aged about 55 years, son of Anand Sadasiva Mhapsenkar, Businessman, residing at Flat No. S-4, Vijay Tara Apartments, Comba, Margao, Goa. …Respondents

Mr. C. A. Coutinho, Advocate *with Mr. I. Santimano, Advocate for the Appellant.*
Mr. Sudesh Usgaokar, Advocate *with Ms. Marie Rosette Pereira, Advocate for the Respondent.*

CORAM: MANISH PITALE, J
Reserved on: 2nd February, 2022
Pronounced on: 8th February, 2022

JUDGMENT

1. The only question that arises for consideration in this Appeal is, as to whether the suit filed by the Respondent was within limitation. According to the Respondent (original Plaintiff), the suit was filed within limitation by application of Article 1 of the Schedule to the Limitation Act, 1963, while the Appellants claim that the suit was barred by limitation by applying Article 19 thereof.

2. The Respondent filed suit against the Appellants on 31.10.2002, for a Decree directing the Appellants to pay a sum of ₹4,20,538.61 along with interest at the rate of 17.5% per annum from 01.11.2022 till actual payment. According to the Respondent, the said amount was due towards loan amounts advanced to the Appellants on various dates between 1981 to 1997. It was the case of the Respondent that it had taken a house situated in Salcete, Goa, from the Appellants on rent, initially for a monthly rent of ₹ 300/- and after one year, for rent at the rate of ₹350/- per month. It was the case of the Respondent that the amounts advanced towards the loan to the Appellants were agreed to be repaid with interest at the rate of 17.5% per annum. The amount of monthly rent, which the Respondent was obliged to pay was being adjusted towards repayment of the loan amount. It was stated in the plaint that the last amount towards loan advanced to the Appellants was on 23.07.1997. The monthly rent of ₹ 350/- payable to the Appellants was being adjusted by the Respondent towards the amount due from the appellants and, in that context, the Respondent claimed to have maintained an account from 1981 till the date of filing of the suit.

3. It was the case of the Respondent that on 07.09.2001, the Respondent caused a notice to be issued through Advocate to the Appellants, stating the amount due towards the repayment of loan as on 31.08.2001. It was stated in the notice that since the amount of monthly rent credited to the account of the Appellants was insufficient to repay the loan and since the interest was mounting thereon, in the month of July 2000 itself, the Respondent had asked the Appellants to take some concrete steps to repay the loan along with interest. Yet the Appellants had neither given proposal for liquidating the loan under the loan account nor were the dues liquidated. On this basis, the Appellants were called upon to repay the loan amount along with

interest within a period of one month, failing which, the Respondent would be constrained to initiate appropriate proceedings for recovery.

4. On 18.10.2001, the Appellants through their Advocate, sent reply to the aforesaid notice and denied that the Respondent had advanced loans to them. It was stated that no loan account existed and the claims of the Respondent were denied. Instead, it was stated that there were amounts due from the Respondent for occupation of the premises in question and if payment of the same was not made within 30 days, the Appellants would terminate the Agreement and initiate proceedings for evicting the Respondent.

5. It is in this backdrop, that on 31.01.2002, the Respondent filed the aforesaid suit for recovery of the amount specified herein above. In the plaint, the Respondent not only stated that specific amounts were advanced to the Appellants by way of loan and that there was an Agreement that the monthly rent would be adjusted towards the repayment of the loan amounts with interest, a detailed statement of the loan amounts was given in paragraph 7 of the plaint. The Respondent also filed statement of account as a document with the plaint, wherein it was specifically stated that monthly rent of ₹ 350/- was adjusted towards the amount due from the Appellants up to September, 2002. On this basis, the specific amount due from the Appellants was calculated and a Decree was sought in that regard. The Respondent also placed on record two Agreements dated 09.07.1985 and 30.01.1989, referring to loan amounts advanced by the Respondent to the Appellants and a number of vouchers were placed on record in support of the assertion that amounts were advanced on various dates between 1981 to 1997, to the Appellants by way of loan. The

Respondent also placed on record copy of the lease Agreement dated 04.06.1981, executed between the parties.

6. The Appellants also placed on record certain documents in support of their stand that there was no loan transaction between the parties although certain amounts were advanced by the Respondent. They claimed that all such payments were in respect of the licence fee pertaining to the said property occupied by the respondent. It was further claimed that the Respondent had defaulted in payment of the same and, therefore, the suit deserved to be dismissed. The parties led oral and documentary evidence in support of their contentions.

7. By Judgment and Order dated 08.12.2008, the Court of 1st Additional Civil Judge, Senior Division, Margao, (Trial Court), dismissed the Suit, holding that the material on record was not sufficient to support the case of the Respondent that loan amounts were advanced to the Appellants. Since the theory of loan was not accepted, it was also held that there was no question of the amount being due to the Respondent along with interest at the rate of 17.5% per annum. It was also held by the Trial Court that Article 1 of the Schedule to the Limitation Act, did not apply to the facts of the present case, because the account in question could not be stated to be a mutual, open and current account, wherein there were reciprocal demands between the parties. It was held that the account placed on record was unilaterally prepared by the Respondent. On this basis, it was found that the Suit was barred by limitation.

8. Aggrieved by the same, the Respondent filed Appeal before the District Court. By the Judgment and Order dated 28.10.2010, the

Adhoc District Judge-II, FTC-II, South Goa, (Appellate Court), allowed the Appeal and decreed the Suit in terms of the prayer made on behalf of the Respondent. The Appellate Court found that the Suit was filed within limitation, because Article 1 of Schedule to the Limitation Act applied to the facts of the present case. It was held that the Respondent had been able to prove that loan amounts were advanced to the Appellants, to be repaid with interest at the rate of 17.5% per annum. It was held that even though the account was maintained by the Respondent, the Appellants had conceded that they had not maintained any account and that they knew that the Respondent had indeed maintained such an account. On the basis of oral and documentary evidence on record, the Appellate Court found that the Respondent had proved its case on facts and, accordingly, the decree was granted in favour of the Respondent.

9. The present Appeal filed by the Appellants herein was admitted on 06.06.2011, on the following substantial question of law:

> *"(1) Whether the first appellate Court was legally justified in holding that the case set up by the plaintiff is governed by Article (1) of Schedule to the Limitation Act, 1963 as contended by the plaintiff and not Article 19 of the Limitation Act, 1963 and the plaintiff claims that the money given to the defendant was on account of loan to the defendants?"*

10. Mr. C. A. Coutinho, learned Counsel appearing for the Appellants, submitted that in the facts of the present case, Article 19 of

the Schedule to the Limitation Act squarely applied and that Article 1 thereof did not apply. It was submitted that the account in question, which the Appellate Court had relied upon, was merely a unilateral act on the part of the Respondent. There was no written agreement between the parties as regards mutual obligations and reciprocal demands. It was submitted that even the conduct of the parties could not lead to an inference that there were indeed mutual obligations and reciprocal demands. On this basis, it was submitted that Article 19 of the Schedule to the Limitation Act applied in the present case. The Respondent itself had admitted and stated in the plaint that the last date when loan amount was advanced to the Appellants was 23.07.1997 and yet the Suit was filed on 31.10.2002, which was clearly beyond the period of limitation of three years prescribed in Article 19 of the Schedule to the Limitation Act. It was submitted that under the aforesaid Article, the period of limitation was triggered when the loan was made. In the present case, even if it was to be taken that loan amounts were advanced on various dates between 1981 and 1997, admittedly, the last date on which the loan was advanced was on 23.07.1997. Since the Suit was filed beyond the period of three years from the aforesaid date, it was clearly barred by limitation. Alternatively, it was submitted that even if Article 1 was to be applied, the trigger point of a limitation would still be 23.07.1997 and not as claimed by the Respondent, on the basis of alleged unilateral account maintained by the Respondent.

11. The learned Counsel for the Appellants placed reliance on Judgment of the Supreme Court in the case ***Hindustan Forest Company Vs. Lal Chand & Others***[1]**,** judgment of the Himachal Pradesh High Court in the case of ***M/s. Roshan Lal Kuthiala &***

1 AIR 1959 SC 1349

Another Vs. Raja Rana Yogendra Chandra & Others[2] and Judgment of Gujarat High Court in the case of ***Shivam Construction Co., Ahmedabad & Others Vs. Vijaya Bank, Ahmedabad & Others***[3]**.** By relying upon the aforesaid Judgments, it was submitted that there was lack of material in the present case to conclude that the transactions between the parties had led to independent obligations on both sides, or to conclude that the case involved reciprocal demands in the context of a mutual, open and current account maintained between the parties.

12. On the other hand, Mr. Sudesh Usgaonkar, learned Counsel appearing for the Respondent, submitted that the Appellate Court, as the final Court of facts, had found in favour of the Respondent on the question of loans advanced to the Appellants on various dates between 1981 and 1997. The statement of account filed along with the plaint was believed on the basis of other documentary and oral evidence placed on record. It was submitted that the Appellants had conceded in cross examination that they knew about the account maintained by the Respondent and that they themselves never maintained any account. By relying upon the admitted position regarding existence of obligation of the Respondent to pay rent for the premises belonging to the Appellants and also an obligation on the Appellants to repay the loan amount advanced, it was claimed that the case on facts was clearly covered by Article 1 of the Schedule to the Limitation Act.

13. The learned Counsel placed reliance on Judgment of Hon'ble Supreme Court in the case of ***Kesharichand Jaisukhal Vs. Shillong Banking Corporation***[4]**,** Judgment of the Kerala High Court in the case

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2 AIR 1996 HP 14

3 AIR 1997 Guj 24

4 AIR 1965 SC 1711

of ***Komu Haji Hysrose Haji Vs. Moosakutty Bava***[5] and unreported Judgment of the Madras High Court in the case of ***ICICI Bank Ltd. Vs. Trishla Apparels Pvt. Ltd.***[6] and ***V.K. Abraham Vs. N.K. Abraham***[7]**.** By relying upon the said Judgments, the learned Counsel submitted that existence of two sets of independent transactions between the parties were necessary, demonstrating that the parties had reciprocal demands against each other and it was emphasized that this did not mean that either party had to actually raise demand against the other. On this basis, it was submitted that the case on facts was clearly covered under Article 1 of the Schedule to the Limitation Act and that, therefore, the Appeal deserved to be dismissed.

14. In order to decide the aforesaid substantial question of law framed by this Court and in the backdrop of the rival contentions raised between the parties, it would be appropriate to reproduce Articles 1 and 19 of the Schedule to the Limitation Act: -

Article 1 of the Schedule to the Limitation Act

Description of suit	Period of limitation	Time from which period begins to run
For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

5 AIR 1985 Ker 126

6 Judgment dt 24.02.2015 in S.A. No. 493/2007

7 1978 Mad 56

Article 19 of the Schedule to the Limitation Act

Description of suit	Period of limitation	Time from which period begins to run
19. For money payable for money lent.	Three years	When the loan is made.

15. The position of law as regards applicability of Article 1 of the Schedule to the Limitation Act, has been clarified and reiterated by the Supreme Court and various High Courts.

16. In the case of ***Hindustan Forest Company Vs. Lal Chand*** (supra), a Constitution Bench of the Supreme Court in the facts of the case held that Article 115 of the Jammu and Kashmir Limitation Act, identical to Article 1 of the Schedule to the Limitation Act with which this Court is concerned, did not apply. While discussing the nature of transaction between the two parties in the context of the aforesaid Article, the Supreme Court referred to Judgment of Calcutta High Court in the case of ***Tea-financingSyndicate Ltd. vs. Chandrakamal Bezbarua***[8]**.** The observations made in the said Judgment were quoted with approval to the effect that requirement of reciprocal demands involves transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. On the facts of the case before the Supreme Court, it was found that there was no reciprocity of dealings because there was no independent obligation and that it was a simple case of the seller undertaking to deliver goods and the buyer agreeing to pay for them.

8 (1930) ILR 58 Cal 649

17. In the case of ***Kesharichand Jaisukhal Vs. Shillong Banking Corporation*** (supra), the Supreme Court while applying the aforesaid Article of Limitation, found on facts that there were independent and reciprocal obligations between the parties, wherein there were shifting balances on some occasions in favour of one party and on other occasions in favour of the other. On this basis, it was found that the account was mutual, open and current with reciprocal demands. It was found that the aforesaid Article 1 applied and that the suit could not be said to be barred by limitation.

18. In the case of ***V.K. Abraham Vs. N.K. Abraham*** (supra), the Madras High Court relied upon the law laid down by the Supreme Court in the aforesaid Judgment in the case of ***Hindustan Forest Company Vs. Lal Chand*** (supra) and further referring to an earlier Judgment of the Madras High Court in the case of ***Ikesava Chettiar vs. Ramanathan Mudaliar***[9]**,** held that a mutual account between the parties requires that the essence of the transaction between them should be looked at in order to find out if independent obligations arise on both sides, resulting in possibility of reciprocal demands, even though the transactions may relate to the same commodity or to the same kind of business. The possibility of reciprocal demand in shifting balance was found to be one of the factors indicating that the account was mutual, open and current.

19. In the case of ***Komu Haji Hysrose Haji Vs. Moosakutty Bava*** (supra), the Kerala High Court, after quoting Article 1 of Schedule to the Limitation Act, held as follows:

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9 AIR 1959 Mad 470

"*The corresponding provision in the Indian Limitation Act, 1908 was Article 85. Article 1 applies only when the account is mutual, open and current. An account is nothing but a detailed statement of a series of receipts and disbursements. An account is said to be open when it is not settled. It is current when it is not closed. Then the further question is when can an account be considered as a mutual account. It is only when parties agree to bring together their items of debits and credits relating to their mutual dealings for a set off against each other, that a mutual account comes into existence. The mutual dealings must result in independent obligations in both directions. There should be two sets of independent transactions between the parties with the result that the creditor in one will be the debtor in the other. It is then that there will be room for reciprocal demands between the parties. This does not mean that either party must have actually made a demand against the other. Going by the nature of the transactions there need only be a possibility of cross claims. Mutuality will not be lost if the claims are of different nature. When one party claims wages for services rendered the other party can demand price of goods delivered. But both the sets of transactions must be entered in the same account. A shifting balance will no doubt be a test of mutuality but it is not a must. It is enough*

that the nature of the transactions was such that a shifting balance also was possible. In this case the account contains entries of two different transactions resulting in independent obligations. When the loans advanced and the price of goods given on credit were debited in the account, the salary of the respondent was credited. The facts that the respondent was an employee of the appellant and that the respondent used to purchase provisions on credit from the appellant's shop were concurrently found by the courts below. The challenge against the accounts was also rightly repelled. In the facts and circumstances of this case it cannot but be held that the account in question is a mutual, open and current account and hence it is Article 1 of the Limitation Act, 1963 that applies to the case. In that case no part of the plaint claim is barred by limitation and the suit will have to be decreed as prayed for."

On facts, the Kerala High Court found that Article 1 of the Schedule to the Limitation Act did not apply.

20. In the case of ***ICICI Bank Ltd. vs. Trishla Apparels Pvt. Ltd.,*** (supra), the Madras High Court again referred to the position of law as regards Article 1 of the Schedule to the Limitation Act. The High Court referred to the position of law reiterated in the case of ***V.K. Abraham Vs. N.K. Abraham*** (supra) and found that the requirements of a mutual, open and current account where the parties have

reciprocal demands were well recognized. The principles were applied to the facts of the said case and it was held that the Suit was filed within limitation.

21. Even in the Judgments of the Himachal Pradesh High Court in the case of ***M/s. Roshan Lal Kuthiala & Another Vs. Raja Rana Yogendra Chandra & Ors.*** (supra) Gujarat High Court in the case of ***Shivam Construction Co., Ahmedabad vs. Vijaya Bank, Ahmedabad*** (supra), relied upon by the learned Counsel appearing for the Appellants, the aforesaid principles have not been deviated from, while on the facts of the particular cases, a view is taken by the Court as regards applicability of Article 1 of the Schedule to the Limitation Act.

22. The aforesaid Judgments of the Supreme Court and various High Courts indicate that while applying Article 1 of Schedule to the Limitation Act, to hold that an account is mutual, open and current, where the parties have reciprocal demands, it is necessary to reach findings that there are independent obligations between the parties on the basis of independent transactions. Once it is established that such a situation on facts exists, it is not necessary that either party must have actually made demand against the other, as long as there is room for reciprocal demands between the parties. It is necessary that both sets of transactions should concern the same account and there is possibility of shifting of balance.

23. It needs to be examined whether the material available on record indicates existence of such a position on facts, thereby indicating that the Appellate Court was justified in applying Article 1 of the Schedule to the Limitation Act and holding that the Suit filed by the Respondent

was within limitation. In the present case, it has been established on facts that on the one hand, the Respondent was under obligation to pay monthly rent at agreed rate to the Appellants for occupying the premises in question. It is also established on facts that the Respondent had advanced loan amounts on various dates between 1981 and 1997 to the Appellants. There were documents placed on record, including two specific Agreements dated 09.07.1985 and 30.01.1989, showing agreement between the parties as regards the loan transaction. There was documentary evidence, including vouchers placed on record, proving that loan amounts were advanced to the Appellants in terms of the pleadings in the plaint. The Appellate Court also the considered hand written account of the Appellants at exhibit 21, showing that the Appellants themselves had taken into account their obligation to repay the loan and that this was in the context of the obligation on the part of the Respondent to pay rent, demonstrating the facet of reciprocity. It is for this reason that the Appellate Court, on facts, found the existence of two independent obligations between the parties on the basis of two sets of independent transactions, one being the obligation of the Respondent to pay rent to the Appellants and the other being the obligation on the part of the Appellants to repay the loan to the Respondent. These two independent transactions leading to two independent obligations which were concerning the same account, was found to be proved on facts by the Appellate Court.

24. This Court has also perused the oral and documentary evidence brought on record by the parties to assess as to whether the Appellate Court was justified in reaching the aforesaid findings. It is significant that the Appellants conceded that they never maintained account in respect of the aforesaid transactions. In cross-examination, the Appellants conceded that they knew that the partner of the Respondent

had maintained such an account. In this backdrop, the claim of the Appellants that since such an account was never given to them for verification, it cannot be relied upon, cannot be accepted in the facts and circumstances of the present case. The contention raised on behalf of the Appellants that the amounts towards rent were never agreed to be adjusted towards repayment of the loan, also cannot be accepted because, such an agreement in the present case can be inferred from the conduct of the parties. The reply sent by the Appellants to the notice issued by the Respondent and the stand taken in the written statement is belied by the evidence that has come on record. It is an admitted position, that till sending reply to the notice and filing written statement in the Suit, the Appellants never made any demand of rent from the Respondent and they did not take any steps for eviction or recovery of rent. This clearly demonstrates that the parties had agreed and proceeded with the two independent transactions leading to two independent obligations, which were to be settled on the basis of the same account. It is significant that when such a situation exists and there is possibility of cross claims between the parties, it is irrelevant as to whether either party has actually made a demand against the other.

25. In this backdrop, the contention raised on behalf of the Respondent is justified that a specific notice was issued to the Appellants that the amounts of rent credited to their account were found to be insufficient to repay the loan and interest which was mounting and, therefore, the Respondent had decided to take precipitate action by ceasing to adjust the monthly rent payable and raising a specific demand for return of the loan amount along with interest. It is in such facts that the Appellate Court was justified in applying Article 1 of the Schedule to the Limitation Act. The position

on facts established by the Respondent in the present case shows that the respondent issued notice to the appellants on 07.09.2001 and adjustment of monthly rent towards repayment of loan was stopped in August/September 2002 and the Suit was filed immediately on 31.10.2002. This was clearly within three years of the close of the year in which the last item was entered in the account. Hence, applying the position of law to the facts of the present case, it is found that no error was committed by the Appellate Court in holding that Article 1 of the Schedule to the Limitation Act applied and that the Suit for recovery filed by the Respondent was within the limitation period of three years.

26. In view of the above, the substantial question of law is answered in favour of the Respondent and against the Appellants.

27. Consequently, the Appeal is dismissed. Pending applications, if any, stand disposed of. There shall be no order as to costs.

MANISH PITALE, J