

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 1 OF 2015

1. Shri Damaciano Fernandes,
Major of age, r/o. H. No. 1103,
Zos, Vaddo, Socorro, Bardez
Goa and Proprietor of Goan
Realtors, with office at
Holy Family Apartment,
Shop No.1, Ground Floor,
Opp. SBI ATM Booth, Alto
Porvorim, Bardez, Goa.

2. Shri Joseph Fernandes, Major
of age, r/o H. No. Ni., near
Porvorim Church, Porvorim,
Bardez, Goa.

..... Appellants

V e r s u s

1. Mrs. Theresa Vaz
67 years of age, widow,
housewife, wife of late Victor Vaz,

2. Mr. Oscar Vaz, 43 years of age,
married son of late Victor Vaz and
his wife,

3. Mrs. Zita Vaz
40 years of age, married,
Housewife, all three r/o H. No. not
known, Escrivao Vaddo, Candalim,
Bardez, Goa.

4. Mrs Laura Vaz E D'sa,
36 years of age, married,
Housewife, daughter of late
Victor Vaz and her husband

5. Mr. Peter D'Sa,
48 years of age, married,
business, Both residents of Angod
Mapusa, Bardez, Goa.
The above named respondents are represented
herein by their duly constituted
Attorney Mr. Girdharilal N. Gangani,
Son of Mohanlal Gangani, Residing at

Galaxy Building, Atmaram Borkar Road,
Panaji, Goa.

6. Mr. Nitin Chhatwal,
Aged 44 years, married, r/o Plot No.2, New
India Co-op Society, E. W. Road No.2,
JPYD Scheme, Juhu, Mumbai 400 090 Through
his duly constituted Attorney Mr. Chinmay
Vishvas Path, Son of Vishvas Patil, r/o H.
No. A/199, Bardez Goa - 403 114.
7. Mr. Girdharilal Gangani, Major of age,
Son of Mr. Mohanlal Gangani, residing at Galaxy
building, Atmaram Borkar Road, Panaji Goa.
8. Mr. Andrew Rodrigues,
Major of age, r/o H. No. 963, Escrivao Vaddo,
Candolim, Goa. Respondents

Mr. N. N. Sardessai, Senior Advocate with Ms. Suzette Pereira, Advocate for the
Appellants.

Coram :- **F. M. REIS, J**
 K. L. WADANE, JJ.

Date : **28th April, 2015.**

ORAL JUDGMENT

Heard Shri N. N. Sardessai, learned Senior Advocate appearing for
the Appellants. None for the Respondents though served.

2. Admit.

3. The notice was served to the Respondents with an indication that the
above Appeal would be disposed of finally at the stage of admission. The
Respondent no. 6 who was earlier served, failed to remain present and the matter
was taken up on 23.02.2015. Thereafter, the Respondent nos. 6, 7 and 8 though

served, failed to remain present when the matter was taken up on 23.02.2015. The hearing was adjourned to serve the Respondent nos. 1 to 5 who were duly served and remained absent and the hearing was posted on 15.04.2015. An opportunity was given to the respondents to remain present as the case was posted for final disposal today. Though the Respondents were duly served, none appeared for the Respondents.

4. Shri N. N. Sardessai, learned Senior Counsel appearing for the Appellants pointed out that the suit filed by the Appellants was for specific performance, declaration and damages on account of the breach committed by the original owners of the property in the dispute namely the Respondent nos. 1 to 5 who had entered into an Agreement with the Respondent no. 6. Learned Senior Advocate further pointed out that there was an original Memorandum of Understanding entered into between the parties dated 23.02.2009 whereby the property in dispute was to be sold subject to the terms and conditions stipulated therein. Learned Senior Advocate further submits that there was also a Deed of Confirmation dated 19.06.2009 and that there was another Agreement executed between the Respondent nos. 1 to 5 with the Appellant herein dated 23.09.2009 whereby the clauses of the original Agreement were modified as stipulated therein. Learned Senior Advocate has thereafter pointed out that an application was filed by the Respondent no. 6 for rejection of plaint under Order 7 Rule 11 of the Civil Procedure Code on the ground that the suit filed by the Appellants was barred by limitation. Learned Senior Advocate further pointed out that though in the last Agreement dated 23.09.2009, there was a specific clause no. 2 which discloses

that the Agreement between the parties was kept alive until the property is conveyed to a third party with the intervention of the Appellant, the learned Judge has erroneously come to the conclusion that the cause of action for filing the suit was from the date of the original Agreement dated 23.02.2009. Learned Senior Advocate has thereafter taken us through the impugned Order to point out that though the learned Judge has recorded the terms of the said Agreement, nevertheless, has erroneously come to the conclusion that the suit is barred by limitation as the cause of action according to the learned Judge arose in February 2009 and as such was hopelessly barred by limitation. Learned Senior Advocate has further pointed out that the cause of action in the present suit arose when the Appellant learnt about the Agreement executed by the Respondent nos. 1 to 5 in the year 2014 and immediately thereafter, the suit was filed for the reliefs as specified herein above. Learned Senior Advocate further pointed out that in any event, the Agreement executed by the Respondent nos. 1 to 5 in favour of Respondent no. 6 in breach of the terms of the Agreement was executed on 03.09.2012 and the suit was filed on 10.01.2014 which is within the period specified. Learned Senior Advocate as such submits that the impugned Order deserves to be quashed and set aside.

5. The Respondents as already observed herein, failed to remain present though they were duly served.

6. Upon hearing the learned Senior Advocate appearing for the Appellants and on perusal of the records, the following point for determination

arises in the above Appeal :

- (1) Whether the learned Judge was justified to reject the plaint on the ground that the suit was barred by limitation ?

7. On going through the averments of the plaint and the records of the Agreement as referred to by the learned Judge in the impugned Order, there is a specific Clause no. 2 in the last Agreement dated 23.09.2009 which clearly provides that the terms specifying the period of one year was to perform the agreement dated 23.02.2009 was deleted and as such the clause was substituted in the manner referred to therein. Clause no. 2 of the said Agreement dated 23.09.2009 reads thus :

"Both the parties have clearly understood and agreed that the Agreement/MOU dt. 23rd February, 2009 and subsequent Deed of Confirmation and this Instrument shall remain in force till the time the property is sold through the intervention of the second parties to any prospective purchaser or by the SECOND PARTIES to any prospective purchaser for and on behalf of FIRST PARTIES. In view of such understanding, the words existing in the Agreement/MOU dated 23rd February, 2009, i.e "Shall remain in force for a period of 1 year from the date of its execution to such extension which may be agreed to by and between the parties hereto "shall stand deleted."

8. On plain reading of the said Clause, it clearly provides that the original

Agreement dated 23.02.2009 is kept alive until the property in dispute is conveyed in favour of a third party. In the present case, it is the case of the Appellants that in breach of the said terms of the Agreement, the Respondent nos. 1 to 5 had entered into an Agreement to convey the property in favour of the Respondent no. 6. by an Agreement dated 02.02.2012 which he came to know only in January 2014. In such circumstances, even assuming the date of the Agreement executed by the Respondent nos. 1 to 5 in breach of the original Agreement of the Appellants is taken into consideration, the suit filed by the Appellants cannot be said to be barred by limitation. The learned Judge has misconstrued the Agreement as well as the relevant provisions of law to come to the conclusion that the suit is hopelessly barred by limitation. The findings of the learned Judge that the cause of action arose as on the date of the Agreement is erroneous considering Clause 2 of the subsequent Agreement dated 23.03.2009. It is well settled that for the purpose of examining an application under Order 7 Rule 11 of the Civil Procedure Code, the averments in the plaint and the annexures thereto are only the material to be examined for the purpose of considering such aspect and not the material brought in defence.

9. In the present case, reading the plaint referred to by the learned Judge itself clearly discloses that the findings of the learned Judge that the suit is barred by limitation, cannot be accepted. Be that as it may, the issue of limitation is a mixed question of law and facts. The issue of limitation can be examined by the learned Judge after framing the issues if it so arises on the basis of the written statements filed by the Respondents. It is also made clear that the findings herein

are only prima facie findings to consider the application under Order 7 Rule 11 of the Civil Procedure Code and as such the learned Judge shall examine the issue of limitation on its own merits. The point for determination is answered accordingly.

10. Subject to the above, the impugned Judgment dated 6.11.2014 passed by the learned Judge in Special Civil Suit No.1/2014/C is quashed and set aside. The learned Judge shall proceed to dispose of the suit in accordance with law. The parties are directed to appear before the learned Judge on 06.07.2015. The learned Judge is directed to issue necessary notice to the parties and proceed in accordance with law.

11. Appeal stands disposed of with no orders as to costs.

K. L. WADANE, J.

F .M. REIS, J.

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