

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 20 OF 2021**

Vithal Harischandra Naik & anr.	... Appellants
<i>Versus</i>	
Laxmikant Mukund Naik & 9 Ors.	... Respondents

Mr. Prasheen Lotlikar, Advocate for the Appellants.

**CORAM: MANISH PITALE, J
DATED: 24th November, 2021**

P.C.

1. Heard learned Counsel appearing for the Appellant.

2. By this Appeal, the Appellants have challenged the judgment and order dated 31.03.2021, passed by the Court of Adhoc District Judge-I at Mapusa, whereby an appeal filed by the Respondent herein has been allowed and the order passed by the Court of Civil Judge Junior Division (Trial Court), rejecting the plaint, has been quashed and set aside. By the impugned judgment and order, the suit filed by the Respondent has been restored before the Trial Court to proceed in accordance with law.

3. The Respondent no.1 in the present case filed Regular Civil Suit No. 5 of 2017 before the Trial Court against the Appellants and Respondent nos.2 to 10 herein, *inter alia*, contending that he was entitled to a Decree of specific performance of an Agreement dated 20.08.2002 executed in his favour. It was claimed that as per the Agreement, particularly clause no. 17 thereof, the Respondent no.1 was put in possession of the suit property and that Sale Deed was to be

executed in terms of the clauses of the Agreement. In the plaint, the Respondent no.1 gave details as to the manner in which he pursued the matter, but Sale Deed could not be executed in pursuance of the said Agreement. It is claimed that cause of action for filing the suit arose when the Respondent no.1 found that some developments were taking place in the suit property just prior to the filing of the suit.

4. In this suit, the Appellants as the Defendants, filed an application under Order 7 Rule 11 of the Civil Procedure Code (CPC) for rejection of the plaint on the ground that the suit was barred by limitation. By placing reliance on Article 54 of the Limitation Act, the Appellants contended that a bare reading of the plaint along with the Agreement, particularly Clause 7 thereof, demonstrated that time was the essence of the contract and that the suit was clearly barred by limitation. The Trial Court in the first instance accepted the contentions raised on behalf of the Appellants and passed an order dated 29.06.2017, allowing the application under Order 7 Rule 11 of the CPC and accordingly rejected the plaint.

5. Aggrieved by the same, the Respondent no.1 filed the First Appeal before the First Appellate Court. By the impugned judgment and order, the Appellate Court has found that in terms of the pleadings in the plaint, as also the clauses of the said Agreement, it could not be said that time was the essence of the contract. It was noted that even as per the Agreement, the Respondent no.1 had been put in possession of the suit property and that the question of limitation could be raised, if at all, as a mixed question of law in facts and that Trial Court was not justified in rejecting the plaint.

6. Mr. Lotlikar, learned Counsel appearing for the Appellants in the present Second Appeal, submits that a substantial question of law does arise in the facts and circumstances of the present case for exercising jurisdiction under Section 100 of the CPC. He emphasized on the question of limitation in the context of the claim of the Appellants that the plaint deserved to be rejected as raising a substantial question of law, which this Court may consider.

7. This Court has appreciated the contentions raised on behalf of the Appellants in the context of the material on record. A perusal of the aforesaid Agreement shows that in terms of clause 7 thereof, the vendors were supposed to make out a clear and marketable title in the suit property in any event within a period of six months from the date of execution of the Agreement. According to the learned Counsel appearing for the Appellants, this was a clear indication that time was the essence of the contract in the present Agreement.

8. This Court has perused the entire Agreement and it is found that clause 17 thereof specifically states that the vendors had in fact handed over possession of the property to the Respondent no.1 herein.

9. A perusal of the plaint shows that the Respondent no.1 has stated in detail as to the manner in which he allegedly pursued the matter with the vendors for the execution of the Sale Deed. Upon an overall reading of the plaint and clauses of the Agreement, this Court is not in agreement with the contention raised on behalf of the Appellants that time was the essence of the contract. Once this conclusion is reached, the question of limitation clearly becomes a mixed question of facts and law. In such a situation, the Trial Court could not have rejected the

suit at the threshold under Article 54 of the Limitation Act by exercising powers under Order 7 Rule 11 of the CPC.

10. This Court is in agreement with the view expressed by the Appellate Court in the impugned judgment and order that the plaint could not have been rejected at the threshold and that the matter ought to go to trial. In paragraph 27 of the impugned judgment, it is clearly observed that the question of limitation is kept open to be decided by the Trial Court as a preliminary issue, if so required. The said observation takes care of the concern of the Appellants that the issue of limitation ought to be framed and decided by the Trial Court in the facts and circumstances of the present case. This Court endorses the view expressed by the Appellate Court in paragraph 27 of the impugned judgment and order.

11. In view of the above, it is found that no substantial question of law arises in the present appeal and accordingly the appeal is dismissed.

12. Pending applications stand disposed of.

MANISH PITALE, J

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