Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 555 OF 2022

1. M/s. Vasundhara Minerals, A partnership firm, registered under the Indian Partnership Act, 1932, Having registered office at House No. 836/5E, Shiv-Shail, Karai, Shiroda, Goa, Represented herein by its partners:

2. Shri Subhash Shirodkar, 70 years of age, Resident of House No, 836/5E, Shiv-Shail, Karai, Shiroda, Goa- 403103.

3. Shri Satyesh Shirodkar, 50 years of age, Resident of House No. 836/5E, Shiv-Shail, Karai, Shiroda, Goa – 403 103.

.....Petitioners
(Original Defendant Nos. 3, 3(a) and 3(b)

Versus

1. Dinar Tarcar Resources (India) Pvt. Ltd., Having its registered office at Minescape, M. G. Road, Panaji, Goa, represented herein by its duly Authorised Managing Director, Shri Dinar Tarcar, Major of age, having office at Minescape, M. G. Road, Panaji, Goa.

...Respondent No. 1
(Original Plaintiff)

2. Shri Devendra Tulshidas Sawant Talaulikar, Major of age,

...Respondent No.2
(Org. Defendant No.1)

3. Smt. Bhagyashri Devendra Sawant Talaulikar, Major of age, both being legal heris of late Kashinath Deu Sawant Talaulikar & late Girijabai Kashinath Sawant Talaulikar, Both residents of House No. 621/Z-1, Shripad Shrivallabhy Housing Society, Camarshet, Curtorim, Salcete, Goa-403709.

....Respondent No.3
(Org. Defendant No.2)

4. Minescape Infrastructure Pvt. Ltd., Through its Partner, having its registered office at Minescape, M. G. Road, Panaji, Goa.	...Respondent No.4 (Org Defendant No.4)
5. Shri Santosh Bhangui, Major of age, Residents of House No. 685, Digash, Panchwadi, Ponda, Goa – 403 706.	...Respondent No.5 (Org Defendant No.3(c))

Mr. A. D. Bhobe Advocate *with Ms. Shaizeen Shaikh, Advocate for the Petitioners.*

Mr. Venkatesh Dhond, Senior Advocate *with Mr. Nikhil Vaze and Mr. Aniket S. Kunde, Advocates for the Respondent No.1.*

CORAM: B. P. COLABAWALLA, J
Reserved On : 9th FEBRUARY 2023
Pronounced On : 21st FEBRUARY 2023

JUDGMENT

1. Rule. With the consent of parties, Rule made returnable forthwith and heard finally.

2. The above Writ Petition is filed under Article 227 of the Constitution of India assailing the Order dated 03.08.2022 passed by the District Judge-1, North Goa, Panaji (for short the **"Appellate Court"**) in Commercial Appeal No. 6 of 2022. By the said Order, the Appeal filed by the Petitioners was dismissed on merits.

Consequently, a prayer is sought to also set aside the Summary Judgment and Decree dated 25.02.2022, passed by the Senior Civil Judge, "A" Court, Panaji, (for short the **"Trial Court"**) under Order XIII-A of the Code of Civil Procedure, 1908 (for short the **"CPC"**). The Trial Court passed a Summary Judgement against Defendant No.3 [Petitioner No.1 herein], directing it to pay to the Plaintiff the sum of Rs.8,00,00,000/- (Rupees Eight Crores only) together with interest @ 9% per annum from the date the amount fell due till actual payment.

3. Petitioner No.1 herein is a partnership firm of which the Petitioner Nos. 2 and 3 are its partners. Petitioner No.1 was Defendant No.3 before the Trial Court in Commercial Suit No. 34/2020/A and Petitioner Nos.2 & 3 were Defendant Nos.3(a) & 3(b) respectively. Respondent No.1 herein was the Plaintiff before the Trial Court, who instituted Commercial Suit No. 34/2020/A, *inter alia* seeking a Money Decree in the sum of (i) Rs.23,91,27,956/- against Defendant No.1; and (ii) Rs.23,92,24,954/- against Defendant No.3 [Petitioner No.1 herein]. Before the Trial Court, Respondent No. 2 herein was Defendant No.1 and Respondent No.3 was Defendant No.2 respectively. Respondent No.4 herein was Defendant No.4 before the Trial Court and Respondent No.5 herein, being a partner of Defendant No.3, was Defendant No.3(c). For the sake of convenience, I shall refer to the parties as they were arrayed before the Trial Court.

4. The facts which give rise to the present controversy are this. One Late Mr. Kashinath Deu Sawant Talaulikar @ Caxinata Deu Sounto Talaulicar, was granted a Mining Concession bearing T.C. No. 48/58, known as 'Cormolachem Molio Aniotembo', situated in Cudnem Village, Bicholim, Goa (for short the **"said Mining Lease"**). He was married to Girijabai Kashinath Sawant Talaulikar. They shall be hereinafter referred to as the **'original lease owners'.** The original lease owners expired on 14.10.2006 and 06.12.2013 respectively and the said Mining Lease was inherited by Defendant Nos. 1 and 2.

5. Prior to their death, the original lease owners, by an Agreement for Sale/Purchase of iron ore dated 16.05.2006, agreed to sell to Defendant No.3 iron ore extracted from the said Mining Lease. By a separate Agreement called the "Agreement for Extracting and Raising Iron Ore", also dated 16.05.2006, the original lease owners appointed Defendant No.3 as a contractor to extract, excavate and raise the iron ore from the said Mining Lease. Thereafter, the original lease owners, alongwith Defendant No.3, entered into an Agreement dated 04.08.2006 with one Minescape Minerals Pvt. Ltd. (MMPL).

By virtue of this Agreement, the Agreement for Sale and Purchase of iron ore dated 16.05.2006 came to be modified, and the original lease owners now agreed and undertook to sell, allot and deliver, or cause to be sold, allotted and delivered, the entire ore extracted from the said Mining Lease to Defendant No.3 and MMPL, in the proportion of 50:50.

6. Thereafter, the original lease owners, Defendant No.3 and MMPL, executed an Addendum dated 05.09.2006 [to the said Agreement dated 04.08.2006] and it was mutually agreed that the original lease owners shall sell the entire body of iron ore in the said Mining Lease for a lump sum consideration of Rs.6,50,00,000/- to Defendant No.3, and which consideration was to be paid by Defendant No.3 within six years from the date of the addendum. This document records that Defendant No.4 was being appointed as the exclusive raising contractors. Shortly thereafter, by an Agreement dated 25.09.2006, the original lease owners agreed and undertook to transfer the said Mining Lease and all rights, privileges and interest appended therewith to the Defendant No.3 or its nominee subject to permission being obtained under Rule 37 of MCR, 1960 or any other provision of law, as may be applicable, for a consideration of Rs.6,50,00,000/-. The parties also agreed that in the event permission was declined, and also pending the grant of the permission, the relationship between the parties was to be governed by the Agreements dated 16.05.2006 and 04.08.2006, Addendum dated 05.09.2006, and the Agreement dated 25.09.2006. The parties further agreed that Defendant No.3 shall have unqualified rights to assign all the agreements in favour of any other party and upon such assignment/s, the original lease owners shall comply with the applications undertaken as required under said Agreement dated 25.09.2006.

7. Until this time, the Plaintiff was not involved in the aforesaid transactions. The Plaintiff entered the picture when they entered into an Agreement for Sale and Purchase of iron ore dated 11.09.2010 with Defendant No.3. Under this Agreement, the Plaintiff undertook to advance a sum of Rs. 13.50 Crores to Defendant No.3 to be adjusted against the iron ore to be supplied by Defendant No.3 to the Plaintiff at a mutually agreed rate as per the prevailing market conditions. Defendant No.3 also agreed to sell to the Plaintiff, and the Plaintiff agreed to purchase from Defendant No.3, iron ore worth Rs. 13.50 Crores from the said Mining Lease. Under this very Agreement, Defendant No.3, also agreed and undertook to pay the agreed consideration of Rs.6,50,00,000/- to the original lease owners [from and out of the said consideration of Rs.13,50,00,000/-]. Defendant No.3 further agreed and undertook that the Plaintiff or any person or body corporate nominated by the plaintiff shall be the exclusive party for assignment of rights of Defendant no.3 in terms of clause 17 of the Agreement dated 05.09.2006.

8. Pursuant to the said Agreement for Sale and Purchase dated 11.09.2010, the Plaintiff paid to Defendant No.3 an amount of Rs.13,50,00,000/-, by three cheques, all drawn on the HDFC Bank, Panaji Branch. The plaintiff paid a further advance of Rs.1 Crore to Defendant No.3 vide a cheque bearing No.299683 drawn on the HDFC Bank, Panaji Branch, pursuant to an oral request by Defendant No.3. As agreed between the parties, from the said advance of Rs.13,50,00,000/-, Defendant No.3 paid a sum of Rs.6,50,00,000/- to the original lease owners, vide cheque dated 17.01.2011, in favour of Smt. Girijabai Kashinath Sawant Talaulikar.

9. After the aforesaid Agreement was entered into and monies were advanced to Defendant No.3, the Hon'ble Supreme Court, by its Judgment dated 21.04.2014, in the case of **Goa Foundation vs. Union of India & Ors. [(2014) 6 SCC 590],** hereinafter referred to as **"*Goa Foundation – I*"**, *inter alia* passed certain directions in relation to the mining operations in the State of Goa. To put it in a nutshell, though certain directions were passed, mining operations were not halted under the *Goa Foundation – I*

Judgment. The Supreme Court inter alia directed that the Government of Goa may grant Mining Leases of iron ores and other ores in Goa in accordance with its policy decision and in accordance with the MMDR Act and the Rules made thereunder, in consonance with the constitutional provisions. Until the final report is submitted by the Expert Committee, the State Government was, in the interests of sustainable development, permitted to allow a maximum annual excavation of 20 million metric tons from the Mining Leases in the State of Goa, other than from dumps.

10. Accordingly, the State of Goa by an Order dated 12.01.2015, granted the second renewal of the said Mining Lease. Defendant Nos. 1, 2 and 3, therefore, approached the Plaintiff for a further sum of Rs.3,15,05,285/- to get the Lease Deed executed, which was accordingly paid by the Plaintiff.

11. After this, the Hon'ble Supreme Court by another Judgment dated 07.02.2018 in the case of **Goa Foundation vs. Sesa Sterlite Ltd. & Ors. [(2018) 4 SCC 218],** hereinafter referred to as **"*Goa Foundation – II*",** quashed the second renewal of all Mining Leases in Goa and directed stoppage all mining operations w.e.f. 16.03.2018, until fresh Mining Leases (not fresh renewals or other renewals) are granted, and fresh environmental clearances are given.

12. In the light of the aforesaid *Goa Foundation – II* Judgement, the Plaintiff realized that Defendant No.3 was not going to be in a position to supply the iron ore as contracted by them in the Agreement dated 11.09.2010. In these circumstances, the Plaintiff, by a legal notice dated 12.05.2018, called upon Defendant No.3 to return/refund their monies and pay a sum of Rs.23,92,24,954/- to the Plaintiff. Through the said notice, the Plaintiff also called upon Defendant Nos.1 and 2 to pay a sum of Rs.23,91,27,956/- to the Plaintiff. These figures are inclusive of interest.

13. Since the Defendants did not comply with the aforesaid requisitions, the Plaintiff filed a Suit seeking a money decree against the Defendants. The aforesaid Suit was lodged before the Trial Court on 18.06.2018 and was initially registered as Special Civil Suit No. 14 of 2018. Thereafter, the plaint was amended, and Defendant No. 4 was arrayed as a party Defendant in the said Suit. Subsequently, the same was registered as Commercial Suit No. 34/2020/A.

14. Once the aforesaid Suit was served on the Defendants, Defendant Nos. 3(a) and 3(b) [for and on behalf of Defendant No.3], filed their written statement dated 14.11.2018. Defendant No. 2 also filed its written statement on the same day adopting the written statement filed by the Defendant Nos. 3(a) and 3(b). Defendant No. 3 also filed a Counter Claim dated 12.01.2021 against the Plaintiff as well as Defendant No.4 seeking a decree in the sum of Rs.111,94,10,717/- [i.e. 111.94 crores approx] with interest at the rate of 24% per annum from 12.02.2021 till actual payment.

15. In the aforesaid Suit, initially the Plaintiff filed an Application under Order XII Rule 6 read with Section 151 of the CPC, seeking a Decree on Admission. This Application was finally withdrawn on 12.01.2021 and on the same day, the Plaintiffs filed an Application under Order XIII-A of the CPC seeking Summary Judgment against Defendant No.3. To this Application, Defendant No.3 filed its reply dated 12.08.2021. Thereafter, the said Application was heard by the Trial Court and by its Judgment and Decree dated 25.02.2022, directed Defendant No. 3 to pay to the Plaintiff an amount of Rs.8 Crores with interest at the rate of 9% per annum from the date the amount falls due till the actual payment is made.

16. Being aggrieved by this Summary Judgment and Decree, Defendant No.3 preferred an Appeal, being Commercial Appeal No. 6 of 2022 before the District Judge-I, North Goa, Panaji. This Appeal was filed by Defendant No.3 as well as Defendant No.3(a) and 3(b) [being partners of Defendant No.3]. The Appellate Court, after hearing the parties, partly allowed the Appeal. Being aggrieved by the Order passed by the Appellate Court, Defendant No.3, along with Defendant Nos. 3(a) and 3(b), have filed the present Writ Petition challenging the Orders passed by the Courts below.

17. In this factual backdrop, Mr. Bhobe, the learned Counsel appearing on behalf of Defendant No.3, 3(a) and 3(b) [the Petitioners herein], submitted that the Orders passed by the Courts below granting a Summary Judgement in favour of the Plaintiff under Order XIII-A of the CPC, clearly suffer from perversity and an error apparent on the face of record. Mr. Bhobe submitted that it was the specific case of Defendant No.3 before the Trial Court that the claim made by the Plaintiff was barred by the Law of Limitation. He submitted the issue of limitation is a mixed question of fact and law. If this be the case, the same would require evidence, and therefore, no Summary Judgment could have been passed by the Trial Court by resorting to the provisions of Order XIII-A of the CPC. Mr. Bhobe submitted that Order XIII-A contemplates that the Court may give a Summary Judgment against the Plaintiff or the Defendant on a claim, if it considers that (a) the Plaintiff has no real prospect of succeeding on the claim or that the Defendant has no real prospect of successfully defending the claim, as the case may be; and (b) there is no other compelling reason why the claim should not be disposed of before recording oral evidence. Mr. Bhobe submitted that once oral evidence is required, the Court cannot invoke powers under Order XIII-A and pass Summary Judgment. In these circumstances, the impugned orders are liable to be set aside on this count alone, was the submission of Mr. Bhobe.

18. Without prejudice to the aforesaid contention, Mr. Bhobe submitted that even otherwise, the claim of the Plaintiff was *ex-facie* time barred because the monies were given by the Plaintiff to Defendant No.3 as far back as in the year 2010-2011 and the Suit for recovery of those monies has been filed only on 18.06.2018. Mr. Bhobe, relying upon Article 19 of the Limitation Act, 1963, submitted that the claim of the Plaintiff was therefore clearly time barred. On this ground also, the impugned Orders passed by the Trial Court as well as Appellate Court ought to be quashed and set aside as they suffer from perversity and an error apparent on the face of the record, was the submission.

19. On the other hand, Mr. Dhond, the learned Senior Counsel appearing on behalf of the Plaintiff, submitted that there was no merit in the aforesaid contentions. Mr. Dhond submitted that in the facts of the present case, admittedly, there was no transaction of lending money by the Plaintiff to Defendant No.3. The transaction was for purchase of iron ore and for which monies were paid by the Plaintiff to Defendant No.3. When the *Goa Foundation – II* Judgement was passed by the Supreme Court on 07.02.2018 banning all mining operations in Goa, and which culminated in the cancellation of all Mining Leases including the Mining Lease renewed in favour of Defendant No.3 [under which the Plaintiff was to purchase the iron ore], it became clear that Defendant No.3 would not be able to perform its obligations under the Agreement for Purchase and Sale of iron ore dated 11.09.2010. It is at this time, that the Plaintiff, therefore, called upon Defendant No. 3 to refund the amounts paid by the Plaintiff for purchase of the iron ore. Mr. Dhond submitted that it is not in dispute that no iron ore has been supplied by Defendant No.3 to the Plaintiff and now the same becoming impossible, the Plaintiff has sued for refund of the amounts paid by them to Defendant No.3. To put it in a nutshell, Mr. Dhond submitted that the cause of action to ask for the refund of the amounts paid by the Plaintiff to Defendant No.3 arose by virtue of the Judgment passed by the Hon'ble Supreme Court in *Goa Foundation – II*, and hence, the claim made in the present Suit (lodged on 18.06.2018), is clearly within limitation.

20. Mr. Dhond submitted that this issue has been dealt with in great detail by the Courts below, and they have, after analyzing the factual situation before them, come to a conclusion that the claim made by the Plaintiff is not barred by the law of limitation. Mr. Dhond submitted that merely because limitation is a mixed question of fact and law does not necessarily mean that oral evidence would be required. That would depend upon the facts and circumstances of a particular case. In the present case, the Trial Court as well as the Appellate Court, after hearing the parties and analyzing the factual situation before them, came to the conclusion that to decide the issue of limitation, there was no requirement for leading oral evidence. Mr. Dhond submitted that there is absolutely nothing in the impugned Orders that could be termed as perverse or an error apparent on the face of the record which would require interference under Article 227 of the Constitution of India. He, therefore, submitted that there was absolutely no ground to interfere with the impugned Orders and the Writ Petition be dismissed with costs.

21. I have heard Mr. Bhobe as well as Mr. Dhond at great length. I have also carefully perused the Orders passed by the Trial Court as well as the Appellate Court. The Trial Court in its Judgment and Order dated 25.02.2022, framed as many as seven issues, which are as under :

Sr. No.	ISSUES	FINDINGS
1	***Whether the defendant nos. 1, 2 and 3 in their Written Statements have raised any issue which would require a trial or oral evidence to be lead?***	In the negative
2	Whether the entire claim of the plaintiff under this Application can be decided on documentary evidence, which is already produced on record?	In the affirmative
3	Whether the parties can lead any oral evidence contrary to the documentary evidence?	In the negative
4	***Whether the claim of the plaintiff is barred by the law of limitation?***	In the negative
5	Whether the plaintiff is not entitled to recover the amounts paid to these defendants pursuant to agreements between the parties, the said agreements having become infructuous on account of supervening circumstances brought about by the change or amendment to the Mines and Minerals Act, 1957 brought by the Mines and Mineral Amendment Act, 2015?	In the negative
6	Whether these defendants are entitled to recover from the plaintiffs Rs.111,94,10,717 as claimed by them in their counter claim?	In the negative
7	Whether the plaintiff is entitled for the summary judgment?	In the affirmative

(Emphasis supplied)

22. It thereafter proceeded to answer issue Nos. 1, 2, 3, 5, 6 and 7 from Paragraphs 34 onwards. As far as the issue of limitation was concerned [issue No.4], the reasoning of the Trial Court can be found from Paragraphs 110 to 122. The Trial Court noted the submissions of Defendant No.3, mainly that the amounts advanced and/or paid by the Plaintiff to Defendant No.3, were in the year 2010-2011 and, therefore, the limitation to file recovery proceedings ended in the year 2014. The other submission canvassed on behalf of the Defendant No.3 was that the cause of action cannot be based on the decision of the Hon'ble Supreme Court in the *Goa Foundation – II* Judgement, and, if at all, it would be the date when the Judgment was passed by the Supreme Court in *Goa Foundation – I*, which was in the year 2014. It was also argued that since the limitation issue involves the appreciation of law and facts, trial is imperative, and the provisions of Order XIII-A of the CPC cannot be availed of by the Plaintiff. The Trial Court, after examining the arguments canvassed by Defendant No.3 as well as the Plaintiff, *inter alia* came to the conclusion that the decision of the Supreme Court in *Goa Foundation – I* did not totally stop the mining operations. In other words, at that time, the Suit Agreement dated 11.09.2010 was not impossible to perform. The Trial Court noted that in fact after the *Goa Foundation – I* Judgement, the Goa Government renewed the said Mining Lease in favour of Defendant No.3 and which fact is admitted by all the parties. The Trial Court, therefore, came to the conclusion that the *Goa Foundation – I* Judgement did not give rise to a cause of action to the Plaintiff to seek refund of the monies advanced by them to Defendant No.3. This happened only when the Judgment of the Supreme Court was passed in *Goa Foundation – II*. The outcome of the *Goa Foundation – II* Judgement was that all mining operations in the State of Goa were completely stopped w.e.f. 16.03.2018. In other words, there was a total ban on mining operations, which made the performance of the Suit Agreement dated 11.09.2010 impossible. It is in this light, that the Trial Court concluded that the limitation to file the present Suit would commence from the date of the Judgment of the Supreme Court in the case of *Goa Foundation – II*, and consequently, held that the Suit was within the period of limitation.

23. The Appellate Court concurred with the findings given by the Trial Court. The Appellate Court also took the view that mining operations were not stopped by virtue of the Judgment of the Supreme Court in *Goa Foundation – I*. In fact, the Court noted that after the Judgment of the Supreme Court in *Goa Foundation – I*, the State of Goa, by an Order dated 12.01.2015, granted a second renewal of the said Mining Lease (the Mining Lease in question) and it was for this reason that Defendant No. 3 approached the Plaintiff for a further sum of Rs.3,15,05,285/- to get the Lease Deed executed, and which was accordingly paid by the Plaintiff. The Appellate Court therefore concluded that the date of the *Goa Foundation – I* Judgement [namely 21.04.2014] did not commence limitation for recovery of the amount due from Defendant No.3. This is for the simple reason that the performance of the contract entered into by the Plaintiff with Defendant No.3 dated 11.09.2010 was not impossible to perform by virtue of the *Goa Foundation – I* Judgement. The Appellate Court also came to the conclusion that this happened only when the *Goa Foundation – II* Judgement was passed by the Apex Court on 07.02.2018. It is from this date that the cause of action arose for the Plaintiff to seek refund of the amounts paid by it to Defendant No.3. In these circumstances, the Appellate Court also held that the claim made by the Plaintiff was within time.

24. After carefully going through the Orders passed by the Trial Court as well as the Appellate Court, I am in agreement with the submissions made by Mr. Dhond that the Orders passed by the Trial Court as well as the Appellate Court certainly do not suffer from any perversity and/or an error apparent on the face of the record which would require interference under Article 227 of the Constitution of India. I am unable to agree with the submission of Mr. Bhobe that merely because limitation is a mixed question of fact and law, oral evidence would be required. It is trite law that limitation is always a mixed question of fact and law. However, merely because that is the case, it does not follow that in every case oral evidence would be required. If the facts are admitted, and on the basis of those admitted facts, the issue of limitation can be determined, there is no question of leading any oral evidence. In the present case, though Mr. Bhobe submitted that the claim made by the Plaintiff is barred by the law of limitation as it would be hit by Article 19 of the Limitation Act, 1963, this is not even the case of Defendant No.3 before the Courts below. It was not the case of Defendant No.3 that monies were lent to Defendant No.3 and because of that, Article 19 of the Limitation Act, 1963 would come into play. In fact, Defendant No.3 in its written statement, has categorically admitted that amounts were paid by the Plaintiff for purchase of iron ore under the Agreement dated 11.09.2010. The relevant portion of the written statement is re-produced hereunder:

> "b. With reference to paragraphs No. 10 (a) and 10 (b) of the Plaint, the contents thereof are denied for being false. These Defendants state that the Agreement dated 11/09/2010 is an agreement for sale of ore between the Plaintiff and VM, by which Agreement, the ore Agreed by the Defendant No. 1 and 2 to be sold as per the Agreement dated 04/08/2006 and Addendum dated 05/09/2006, was to be raised /extracted and supplied by M/s Minescape Infrastructures Pvt. Ltd., (MIPL) a sister concern of the Plaintiff and the ore was not to be extracted and supplied by VM as alleged by the

Plaintiff. These Defendants further state that under the said agreements, VM was also to get 50% of the share of the ore raised/extracted by MIPL, and it was this 50% share of ore of VM, which was agreed to be supplied to the Plaintiff in exchange of the amounts paid. These Defendants state that it was entirely the responsibility of the Plaintiff and/or its sister concern MIPL to do all those things which were necessary for extraction of ore which included amongst other necessary things, buying of surface rights from the surface right holders of the lease area without which there could be no extraction possible."

(Emphasis supplied)

25. This apart, in the written statement, Defendant No.3 has taken a positive stand that after the Judgement of the Supreme Court in *Goa Foundation – II*, the Government of Goa as well as the Central Government, have publicly expressed their keenness to start the mining operations in Goa with the present lease holders and efforts are on to overcome the present situation. In these circumstances, Defendant No.3 has denied that they are not in a position to supply the iron ore and fulfill its obligation to the Plaintiff, subject to the Plaintiff doing all it has promised to facilitate the extraction of iron ore. Without prejudice to this argument, Defendant No.3 has stated [in the written statement] that presently, in view of the Judgement of the Supreme Court in the case of *Goa Foundation – II*, all the Agreements which are the subject matter of the Suit have become null and void under the doctrine of frustration. It is also stated that otherwise also the Agreements were void as their performance was not possible under the law. The relevant portion of this part of the written statement reads as under:

> "xiv. With reference to paragraph 18 of the Plaint, these Defendants admit that the Hon'ble Supreme Court by its Judgment dated 07.02.2018 has quashed the renewal of the mining leases and environmental clearances granted by the environment ministry and have further directed stoppage of mining operations from 15.03.2018. These Defendants state that however the Government of Goa as well as the Central Government have publicly expressed their keenness to start the mining in Goa with the present lease holders and the efforts are said to be on to overcome the present situation. In the circumstances, these Defendants deny that they are not in position to supply the iron ore and fulfill its obligation to the Plaintiff subject to the Plaintiff doing all it has promised to facilitate extraction of ore as mentioned in the foregoing paragraphs. These Defendants state that it is the primary responsibility of the Plaintiff to do all the necessary things either itself or through its sister concern MIPL to raise the ore and give half of the raised ore to VM and take the other half to itself. These Defendants state that unless and until the Plaintiff raises the ore, neither the Plaintiff gets ore nor VM. <u>Without prejudice to the above, these Defendants humbly submit that presently in view of the order of the Hon'ble Supreme Court, all the agreements which are subject of this suit have become null and void under the doctrine of frustration. Otherwise also the agreements as they stood were also void as their performance i.e., transfer of the lease was not possible under the law</u>."

(Emphasis supplied)

26. Looking at the written statement of Defendant No.3, it is their positive case that the Agreements are frustrated because of the *Goa Foundation – II* Judgement. This apart, even till date, they have not obtained any Mining Lease of the Mine in question to fulfill their obligation of supplying the iron ore under the Agreement dated 11.09.2010. In fact, the Mine in question has not even been put up for auction by the Government of Goa and it is only in the realm of conjecture as to when and how the said Mine would be auctioned, and whether Defendant No.3, if it participates therein, would be the successful party. What is pertinent is that nowhere in the written statement has Defendant No.3 taken up the contention that the monies paid by the Plaintiff to Defendant No. 3 was by way of a loan and, therefore, by virtue of Article 19 of the Limitation Act, 1963, could not be recovered, as the claim was time barred. To put it in other words, the argument canvassed by Mr. Bhobe before me is not supported by the pleadings filed before the Trial Court or the Appellate Court. This being the factual situation, I do not think Mr. Bhobe is right (i) in either contending that evidence would be required for deciding the issue of limitation, or (ii) that *ex-facie* the claim of the Plaintiff was barred by the law of limitation. As mentioned earlier, I find that the impugned Orders have correctly appreciated the law and the facts, and thereafter come to the conclusion that the claim of the Plaintiff is not barred by the law of limitation. Once this is the case, it can hardly be contended that the Orders of the Courts below suffer from any perversity or an error apparent on the face of the record which would require interference under Article 227 of the Constitution of India. Consequently, I do not think that the Orders passed by the Courts below require any interference on this count.

27. The next and the only other submission canvassed by Mr. Bhobe was that the Trial Court allowed the Summary Judgment holding that the Counter Claim of the Petitioners was a sham and that they are not entitled to the Counter Claim and, on that basis, tested the claim of the Plaintiff in the Application for Summary Judgment. In other words, the merits of the Counter Claim were tested, then rejected, and thereafter Summary Judgment was passed. This was done by the Trial Court on the basis of no evidence. The Appellate Court set aside this finding and opined that the Trial Court was incorrect in rejecting the Counter Claim of Defendant No.3. Once this was the finding, the Summary Judgment could not have been passed in favour of the Plaintiff, was the submission of Mr. Bhobe.

28. I find absolutely no merit in the aforesaid contention. One has to understand in what context the Appellate Court has passed the aforesaid directions. The Appellate Court noted that there is no dispute that there was no application filed under Order XIII-A of the CPC either by Defendant No.3 for a Summary Judgment of their Counter Claim nor by the Plaintiff seeking its dismissal. The Appellate Court held that the learned Trial Judge had, therefore, rightly observed that it was not necessary for it to dwell upon the maintainability of the claim made in the Counter Claim by Defendant No.3. However, the learned Trial Judge being influenced by the facts of the matter, and instead of only looking at the facts of the Counter Claim to find an answer to the question whether the filing of the Counter Claim was a compelling reason to proceed with the trial, erred in deciding the Counter Claim, vis a vis the Plaintiff. It is in this light that framing of issue No. 6 and the findings thereto were interfered with by the Appellate Court. In fact, on the application seeking Summary Judgment filed by the Plaintiff, the Appellate Court categorically held that the findings of the learned Trial Judge regarding the claim of the Plaintiff is on the basis of correct appreciation of the facts and the law and the same do not call for any interference. Merely because the Appellate Court has set aside the findings of the Trial Court on issue No. 6, does not in any way lead to the conclusion that the Plaintiff, by virtue of that fact, and that fact alone, would not be entitled to a Summary Judgment. The Appellate Court, in my view, correctly held that the effect of framing issue No. 6 would be to reject the Counter Claim filed by Defendant No.3 and this could not be done in the absence of any application being made by the Plaintiff under Order XIII-A of CPC seeking rejection of the Counter Claim. This being the position, I find that even this argument of Mr. Bhobe is misconceived.

29. Before parting, I must note that the Trial Court has passed a Summary Judgement directing Defendant No.3 to pay to the Plaintiff the sum of Rs.8,00,00,000/- together with interest @ 9% per annum from the date the amount fell due till the actual payment. However, in order to avoid any confusion in Execution, Mr. Dhond, on taking instructions, has stated that interest can be levied on the sum of Rs.8,00,00,000/- together with interest @ 9% per annum from 26th May 2018 [which is 14 days from the date of the legal notice issued to Defendant No.3 to repay/refund the amounts to the Plaintiff], till actual payment is made. In light of this concession, it is ordered that the Plaintiff shall be entitled to a Summary Judgement and Decree in the sum of Rs.8,00,00,000/- together with interest @ 9% per annum from 26th May 2018 till payment. The Trial Court Judgement and Decree dated 25.02.2022 is modified only to this extent.

30. In view of the foregoing discussion, I find that the Orders passed by the Trial Court as well as the Appellate Court on merits, do not suffer from any perversity and/or an error apparent on the face of the record. At the very least, the views taken by the Trial Court as well as the Appellate Court are a plausible view. Once this is the case, there is no scope of interfering with those Orders on merits under Article 227 of the Constitution of India.

31. In these circumstances, I find that there is no merit in the challenge to the Orders assailed in the above Writ Petition. However, in view of the concession made by Mr. Dhond, and recorded earlier, the Trial Court Judgement and Decree dated 25.02.2022 is modified to the extent that the Plaintiff shall be entitled to a Summary Judgement and Decree in the sum of Rs.8,00,00,000/- together with interest @ 9% per annum from 26th May 2018 till payment and/or realization. Rule is made absolute only to this extent and the Writ Petition is disposed of in terms thereof. However, there shall be no order as to costs.

32. This Order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

B. P. COLABAWALLA, J

ANDREZA PEREIRA

Digitally signed by ANDREZA PEREIRA
Date: 2023.02.21 11:38:21 +05'30'