

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL (ST) NO.18751 OF 2021
ALONG-WITH
INTERIM APPLICATION NO.3524 OF 2021
IN
FIRST APPEAL (ST) NO.18751 OF 2021**

Altaf Fakir Baig And Ors.

... Appellants/Applicants

Versus

Goel Ganga Deve.(IND) Pvt. Ltd.

Through Directors A) A.J. Goel B) A.J.

Goel C) J.S. Goel D) D.R. Thipse and

Ors.

... Respondents

....

Dr. Abhinav Chandrachud a/w Mr. Pavan Patil, Mr. Lalit Jhunjhunwala
and Mr. Nitin Jagtap, Advocates for Appellants/Applicants.

Mr. Girist Godbole a/w Mr. Saket Mane, Mr. Abhishek Salian i/b M/s.
Vidhi Partners, Advocates for Respondent No.1.

Mr. Sanjay Jain a/w Ms. Gauri Mestha i/b M/s. L.J. Law, Advocates for
Respondent No.2.

Mr. Asadali Mazgaonwala, Advocate for Respondent Nos. 4 and 5.

....

**CORAM : K. R. SHRIRAM &
RAJESH S PATIL, JJ.**

DATED : 10th JANUARY 2023

P.C.:

Aggrieved by a judgment and order dated 31st August

2021, passed by the Civil Judge Senior Division Pune in Special Civil Suit No.794 of 2021, Appellants have preferred this First Appeal. By the impugned judgment, the trial Court rejected Appellants' plaint under Order VII Rule 11(d) of the Code of Civil Procedure ("CPC", for brevity), as barred by law of limitation.

2 Appeal was listed for admission today. Since the issue was short, i.e., could trial Court summarily reject the plaint under Order VII Rule 11(d) on the ground of law of limitation, since limitation is a mixed question of law and fact, with the consent of the counsel we decided to take up the Appeal for final hearing at admission stage.

3 It is Appellants' case that they have averred in the plaint as to when the cause of action arose and Appellants should be given an opportunity in trial to prove and establish those averments, the issue of limitation being a mixed question of law and fact. It is also Appellants' case that rejection of plaint under Order VII Rule 11 of CPC is a drastic power conferred on the Court to determine the civil action at the threshold, and, therefore, when a plaintiff claims that he came to the

knowledge of certain fact or that the cause of action arose only at a particular point of time, the same has to be accepted at the stage of considering the application under Order VII Rule 11 of CPC.

4 Per contra, it is respondents' case that the trial Court has in detail analysed the averments in the plaint, and, has, after minute and meaningful reading of the averments made in the plaint, came to a conclusion that the cause of action as disclosed in the plaint arose in October 2012 itself, and, hence, the trial Court has correctly concluded that the suit filed was barred by law of limitation and the plaint had to be rejected under Order VII Rule 11 of CPC.

5 We list below a chronology of dates and events before we consider the rival submissions:

<u>No</u>	<u>Date</u>	<u>Particulars</u>
1.	21 Jan 2006 to 17 July 2006	Various development agreements were entered into between Defendant No.1 and Plaintiffs for development of the suit property (belonging to the Plaintiffs)
2	21 Jan 2006	Development Agreement between Defendant No.1 and Plaintiffs for the suit property at paragraph 2A of the plaint.
3	17 July 2006	Development agreement between Plaintiffs and Defendant No.1 for development of the suit property at paragraph 2B of the plaint.
4	23 Oct 2009	Defendant No.1 entered into two sale deeds with respect to the suit property without complying with its obligations under the development agreements.
5	7 Aug 2010	Supplementary Agreement entered into between Defendant No.1 and Plaintiffs for development of the suit property.

6	9 Sep 2011	<i>Defendant No.1 entered into a sale deed with respect to the suit property without complying with its obligations under the development agreements.</i>
7	29 Nov 2011	<i>Supplementary Agreement executed between Defendant No.1 and the Plaintiffs for development of the suit property.</i>
8	11 Oct 2012 - 13 Mar 2013	<i>Correspondence between the parties.</i>
9	3 May 2013	<i>Regular Civil Suit No. 920 of 2013 filed by Plaintiffs against Defendant No.1 before the Civil Judge, Junior Division, Pune seeking a copy of the layout plans from Defendant No.1.</i>
10	3 May 2013	<i>Special Civil Suit No. 627 of 2013 was filed by Plaintiffs against Defendant No.1 seeking payment of rent. The said suit is still pending.</i>
11	10 Apr 2015	<i>Plaintiffs withdrew their application filed under Section 156 (3) of the Code of Criminal Procedure, 1973 against Defendants.</i>
12	13 Apr 2015	<i>Defendant No.1 filed Special Civil Suit No. 545 of 2015 against Plaintiffs seeking compensation for alleged breaches of the agreements between the parties.</i>
13	21 July 2015	<i>Plaintiffs filed a complaint with the Urban Development Department of the government of Maharashtra alleging that Defendant No.1 illegally obtained FSI from land which had been acquired by the government.</i>
14	29 Oct 2015	<i>Defendant No.1 filed Special Civil Suit No. 1406 of 2015 against Plaintiffs before the Civil Judge, Senior Division, Pune, claiming compensation from Plaintiffs for alleged breaches of the agreements between the parties.</i>
15	20 Jan 2016	<i>Civil Miscellaneous Application No. 29 of 2016 filed by Plaintiffs for transfer of Regular Civil Suit No. 920 of 2013 was dismissed.</i>
16	10 Sep 2015	<i>Civil Miscellaneous Appeal No. 411 of 2013 filed by Defendant No.1 against the decree and judgment dated 5 February 2016 came to be dismissed by appellate court.</i>
17	5 Feb 2016	<i>Regular Civil Suit No. 920 of 2013 was decreed by the trial court, directing Defendant No.1 to deliver a copy of approved layout, approved building plan, working plan etc to Plaintiffs.</i>
18	2017	<i>Plaintiffs filed Regular Civil Suit No. 1191 of 2017 before Civil Judge, Junior Division, Pune, against a notice issued by Pune Municipal Corporation (Defendant No.3) dated 27 April 2017.</i>
19	2017	<i>Defendant No.1 filed Regular Civil Suit No. 647 of 2017 in Pune against Plaintiffs seeking injunctive relief against Plaintiffs. Interim relief has been passed in the said suit, directing Plaintiffs not to cause obstruction to the construction work of Defendant No.1, but</i>

		<i>also directing Defendant No.1 not to disturb the peaceful possession of Plaintiffs until the final disposal of the suit.</i>
20	23 Oct 2019	<i>Defendant No.1 sold an area admeasuring O H 47.754 R in favour of Defendant No.2.</i>
21	3 Dec 2020	<i>Defendant No.1's goons (allegedly) attacked Plaintiffs and their family members.</i>
22	3 Feb 2021 and 27 Mar 2021	<i>Defendant No.1 attempted to dispossess Plaintiffs from the suit property. Contempt petitions have consequently been filed by Plaintiffs.</i>
23	3 May 2021	<i>Defendant No.1's goons (allegedly) attacked Plaintiffs and their family members with a view to dispossess them.</i>
24	10 June 2021	<i>Special Civil Suit No. 794 of 2021 filed by Plaintiffs against Defendants before the Civil Judge, Senior Division, Pune.</i>
25	June 2021	<i>Application filed by Plaintiffs under Order 39 of the Code of Civil Procedure, 1908 ("CPC"), seeking interim relief against Defendants.</i>
26	16 June 2021	<i>Application filed by Defendant No.1 (Ex. 16) under Order 7 Rule 11 of the CPC.</i>
27	24 June 2021	<i>Reply filed by Plaintiffs to the application filed by Defendant No.2 (at Ex. 23) under Order 7 Rule 11 of the CPC.</i>
28	24 June 2021	<i>Application filed by Defendant No.2 (at Ex. 23) under Order 7 Rule 11 of the CPC.</i>
29	6 July 2021	<i>Reply filed by Plaintiffs to the application filed by Defendant No.2 under Order 7 Rule 11 of the CPC.</i>
30	26 July 2021	<i>Application filed by Defendant No.4 (at Ex. 40) under Order 7 Rule 11 of the CPC.</i>
31	31 Aug 2021	<i>Impugned Order of the Civil Judge, Senior Division, Pune, in Special Civil Suit No. 794 of 2021 at Ex. 16, 23 and 40, dismissing the suit on the ground that it is barred by the law of limitation.</i>
32	1 Oct 2021	<i>First Appeal (St.) No. 18751 of 2021 filed along with IA No. 3524 of 2021.</i>

6 Dr.Chandrachud for Appellants submitted:

- (a) That a developer's obligation is a continuing obligation, and, therefore, the cause of action was a continuing cause of action;
- (b) It is a construction contract and in a construction contract, time is not an essence, and, therefore, performance should be within

a reasonable time. What is a reasonable time is a question of fact, and, therefore, trial Court should have permitted Appellants to lead evidence to prove when the cause of action in fact arose;

- (c) Order VII Rule 11 of CPC is a drastic power conferred on the Court, the conditions precedent to the exercise of power are stringent especially when rejection of plaint is also on the ground of limitation. Therefore, when a plaintiff claims that the cause of action arose only at particular point of time, the same has to be accepted at the stage of considering the application under Order VII Rule 11 of CPC.

7 Dr.Chandrachud further submitted that whether the suit is barred by limitation or not is a triable issue, and, hence, the suit cannot be thrown out at the threshold. He relied upon the Judgment of the Apex Court in ***Salim D. Agboatwala Vs. Shamalji Oddhavji Thakkar and Ors.***¹ He also relied upon Article 59 of the Limitation Act to submit that the period of limitation is three years when a suit to cancel or set aside a judgment or decree or for dissolution of a contract is filed and the time would begin when the facts entitling the plaintiff

1 2021 SCC 735

to have the instrument or the contract rescinded first become known to him. Dr.Chandrachud submitted that as averred in the plaint in paragraphs 55, 57 and 65, the cause of action arose only on or about 23rd October 2019 and again on 3rd May 2021, and, hence, it is within limitation.

8 Dr.Chandrachud also relied upon *M/s.Lata Construction and Ors. Vs. Dr.Ramchandra Ramniklal Shah and Another*² to submit that in an action between a flat purchaser and the developer, it is a continuing cause of action . He also relied upon a judgment of learned Single Judge of this Court in *Zodiac Developers Pvt. Ltd., Mumbai Vs. Krishna Developers, Mumbai and Ors.*³, to buttress this point. Dr.Chandrachud also relied upon *McDermott Internation INC Vs.Burn Standard Co. Ltd. and Ors.*⁴, to submit that in construction contracts generally time is not of the essence of the contract unless special features exist therefor. He also relied upon Sections 46 and 55 of the Indian Contract Act.

9 The judgment relied upon by Dr.Chandrachud in *M/s.Lata*

2 2000(1) SCC 586

3 2017 (1) Mh.L.J. 166

4 (2006) 11 SCC 181

Constructions and Ors. (Supra) is not applicable to the facts of this case. The agreement under which Appellant has filed his suit, Appellant is not a pure flat purchaser, as was the case in ***M/s.Lata Construction (Supra)***. There is not even an averment that provisions of Maharashtra Ownership Flats Act (“MOFA”, for brevity), is applicable. As regards ***Zodiac Developers Pvt. Ltd., Mumbai Vs. Krishna Developers, Mumbai and Ors. (Supra)*** again the same is not applicable because the Court had not decided in that matter as to whether in a construction contract, cause of action is a continuing one. As regards ***McDermott International INC Vs.Burn Standard Co. Ltd. and Ors. (Supra)***, again the agreement between the parties herein is not a pure construction contract, but, it is a development agreement. Hence, the said Judgment also would not be applicable in this cases.

10 Mr.Godbole, strongly opposed and even though Dr.Chandrachud had taken us through the entire plaint, took us through the entire plaint and wanted the Court to read as he wanted it to be read. Mr.Godbole explained to the Court that Appellants have in detail referred to every agreement entered into between the parties. There are innumerable litigations pending/going on between the parties and all these litigations indicate that the cause of action arose much

earlier way-back in 2015 itself, if not earlier, and, hence, for Appellants to say that for the first time they got to know only in 2021 that Respondents are not intending to perform its obligation, is an incorrect statement. Mr.Godbole submitted that while reading a plaint, the Court has to find whether the plaint discloses real cause of action or illusory action of action created by clever drafting. The Court must be vigilant against camouflage or suppression and if suit is found to be vexatious and an abuse of process of Court, it should exercise its drastic power under Order VII Rule 11 of CPC to reject the plaint.

Mr.Godbole relied upon the following judgments:

- (i) *Dahiben Vs. Arvindhbai Kalyanji Bhanushali (Gajra) Dead*⁵;
- (ii) *Khatrri Hotels Private Limited & Anr. Vs. Union of India and Anr.*⁶;
- (iii) *Raghwendra Sharan Singh Vs. Ram Prasanna Singh (Dead)*⁷;
- (iv) *L.C. Hanumanthappa (Since deceased) Represented by his Legal Representatives Vs. H.B. Shivakumar*⁸.

11 Having heard the counsels and also having considered the impugned judgment, we must observe that the trial Court has correctly accepted the position that issue of limitation is a mixed question of law and fact and requires adducing evidence, if the question of limitation

5 (2020) 7 SCC 366

6 (2011) 9 SCC 126

7 (2020) 16 SCC 601

8 (2016) 1 SCC 332

relates to the merits of the case. Trial Court has also accepted the settled position of law that while deciding an application under Order VII Rule 11 of CPC only the averments made in the plaint has to be looked into.

12 As held by the Apex Court in ***Dahiben Vs. Arvinbhai Kalyanji Bhanushali (Gajra) Dead (Supra)***, while deciding the nature of inquiries to be made by the Court while exercising power under Order VII Rule 11 of CPC, the Court has to read the averments in plaint as a whole without addition or subtraction of any words. It is not a form but substance which has to be seen. So read, if cause of action is *prima facie* disclosed, Court is not required to further enquire about the truthfulness of allegations on fact. In fact, law also states that plea taken by the defence in written statement is also not relevant at the stage while Court is considering an application under Order VII Rule 11 of CPC. If the Court finds the suit to be manifestly vexatious, not disclosing any right to sue, it would be justified in exercising power under Order VII Rule 11 of CPC.

13 It is also clear from the Judgment of Apex Court in ***Salim D. Agboatwala and Ors. Vs. Shamalji Oddhavji Thakkar and Ors.***

(*Supra*), that the rejection of plaint under Order VII rule 11 of CPC is a drastic power conferred upon the Court to terminate the civil action at the threshold. Limitation is a mixed question of fact and law. Therefore, if there are averments in the plaint, that the facts giving right to cause of action only arose at a particular point of time, the Court has to accept the evidence at the stage of considering the application under Order VII Rule 11 of CPC. It is settled law that it becomes a triable issue and when the Court is satisfied that plaint discloses real cause of action and not merely illusory cause of action drafted by clever drafting, the Court should be hesitant, and, infact, should refuse to terminate the civil action at the threshold.

14 We have read the plaint as stated earlier with the assistance of counsel and what impresses us are the averments in paragraphs 56, 57 to 65. It is also averred in the plaint that Appellants were attacked by unknown person allegedly at the behest of Respondent No.1 on 3rd May 2020 and First Information Report (“FIR”, for short) has been also lodged. It is also alleged in the plaint that on 23rd October 2019, Defendant No.1 has sold an area out of the suit property to Defendant No.2 by falsely using Power of Attorney Plaintiffs had given under the development agreement. It is also

averred in the plaint that though there were disputes going on between Plaintiffs and Claimants, action and counter actions have been lodged before various forum, Plaintiffs realised that Defendant No.1 was no longer intending to provide construction component to Plaintiffs only on 3rd May 2021, when 200 persons allegedly at the behest of Defendant No.1 attacked Plaintiffs and their family members. The relationship between Appellants and Respondent No.1, has been very bitter and there are cross suits and cross complaint filed against each other. There are many litigations between the parties pending. On first blush when one reads the plaint one could feel that Appellant should have realised much earlier Respondent No.1 had no intention to perform its obligation under the agreement. Having said that, if one reads the Plaint holistically, the averments in the plaint does not persuade us to believe that an illusory cause of action has been created by clever drafting requiring the Court to exercise its drastic power under Order VII Rule 11 of CPC to reject the claim. The scope of order VII Rule 11 of CPC being limited, we would not like to go into the aspect as to whether there is a continuing cause of action or whether it is a construction contract or whether time was essence of contract etc. Having come to a conclusion that the cause of action alleged in the

plaint cannot be considered as an illusory cause of action created by clever drafting, we will allow this issue to be decided by the trial Court.

15 In the circumstances, we hereby quash and set aside the impugned order and judgment dated 31st August 2021, and, allow the First Appeal.

16 Special Civil Suit No.794 of 2021 is restored to the file of Civil Judge Senior Division, Pune.

17 The Civil Judge Senior Division, Pune, shall proceed to dispose the suit in accordance with law.

18 Interim Application also disposed.

19 Defendants to file written statement within six weeks from today.

20 Matter be listed before the trial Court on 3rd March 2023 for directions.

(RAJESH S. PATIL, J.)

(K. R. SHRIRAM, J.)