CNR No. GASG010011932022

Presented on : 14.10.2022

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Decided on :03.03.2023

Duration:	Days	Months	Years
	20	**03**	**--**

IN THE COURT OF THE DISTRICT JUDGE, SOUTH GOA, AT MARGAO

(Before Pooja Kavlekar, Adhoc District Judge-1, FTC-1, South Goa, Margao)

Regular Civil Appeal No. 69/2022

Mrs. Evolda Maria Colaco

Wife of Agnelo Colaco
married, housewife, aged 70 years
Resident of Flat no. C-2,
Shamiana Co-op. Housing Society
Comba, Margao, Goa. .... Appellant.

Vs.

1. Mrs. Maria Fernandes alias Maria Alfonso
daughter of Evaristo Fernandes
Wife of Josinho Afonso
Aged 57 years, married, housewife,
And her husband

2. Josinho Afonso
Son of Luis C. Afonso
Aged 62 years, married, business
Both resident of Flat no. G-2,
Kurtarkar Nagar,
Fatorda, Margao, Goa.

3. Mahamaya Builders
Sole proprietorship concern of
Mr. Sadashiv Dharmakant Nagvekar
Son of Dharmakant Nagvenkar
Aged 45 years, business
Resident of H.no. 905, Opposite SBI Colony
Borda, Margao, Goa. ... Respondents.

Appellant represented by Ld. Advocate Shri A. Viegas.

Respondent nos. 1 and 2 represented by Ld. Advocate N. Khan.

Respondent no. 3 represented by Ld. Advocate Shri H.T. Bhangui.

J U D G M E N T

(Delivered on this the 3rd day of the month of March of the year 2023).

1. This is an appeal against judgment of the trial Court whereby the trial Court had rejected the plaint under Order VII Rule 11 of CPC contending that the suit is barred by law and that the plaint does not disclose a cause of action.

2. The case of the plaintiff is that the defendant nos. 1 and 2 had purchased a part of the property described at para 2 of the plaint to the extent of 3654 sq mts from its erstwhile owners vide Sale Deed dated 19.6.1997. After the purchase, the property was divided into several plots and of such plot namely plot no. 1 carved out from the said property having an area of 300.90 sq mts. The said plot is referred to as suit plot and is stated to be bounded as under:

On the north by the remaining part of the chalta nos. 6 and 7 of PT sheet no. 33; on the south by the 6 mts wide road; on the east by the remaining part of the chalta nos. 6 and 7 of PT sheet no. 33; on the west by the remaining part of the chalta nos. 6 and 7of PT sheet no. 33.

3. The plaintiff states that by an Agreement of sale dated 13.12.2001 duly registered before the Sub-Registrar of Salcete at Margao bearing no. 39 at pages 364 to 273 at Book no. I Volume no. 1280 dated 4.1.2002 the plaintiff purchased the suit plot from the defendant nos. 1 and 2. The plaintiff states that the plaintiff had paid the entire consideration of RS. 2,10,000/- to the defendant no. 1 at the time of execution of Agreement of Sale dated 13.12.2001 and pursuant to the execution of the Agreement of Sale, the plaintiff has been in peaceful uninterrupted occupation and possession of the suit plot since January 2002 till date..The plaintiff states that as per the terms of the Agreement of Sale the defendant nos. 1 and 2 agreed to execute the Sale Deed on or before 30.4.2002. The defendant nos. 1 and 2 did not communicate to the plaintiff

the date of the execution of Sale deed though it was agreed that the Sale deed would be executed on or before 30.4.2002. That the defendant nos. 1 and 2 obtained sub-Division approval from the South Goa Planning Development Authority in 2002. The plaintiff made several oral request to the defendant nos. 1 and 2 to execute the Sale Deed however the defendant nos. 1 and 2 delayed the execution of the same on some pretext or the other.

4. The plaintiff states that the plaintiff also obtained construction licence bearing no. A/141/10-11 dated 29.11.2010 from Margao Municipal council for construction of compound wall around the suit plot and have thus constructed wall after having obtained licence from the statutory authorities. That in March, 2010 the plaintiff started receiving calls from third persons inquiring as to whether the plaintiff was willing to sell the suit plot. The plaintiff then got to know from reliable sources that the defendant nos. 1 and 2 are in the process of alienating the

plot no. 1 to some third person thereby depriving the plaintiff of her right to the suit plot.

5. The plaintiff out of abundant caution through her lawyer issued a public notice in the newspaper " O Herald O' and the ' The Navhind Times' both dated 27.3.2010 cautioning the General Public that the plaintiffs have executed an Agreement of Sale and has paid the entire consideration for the suit plot and the defendant nos. 1 and 2 are surreptitiously planning to alienate the suit plot to some third party in order to deprive the plaintiff of the proprietary rights to the suit plot. The plaintiff then checked online the survey form of the said property and learnt that there is some Mutation entry in chalta no. 6 of PT sheet no. 33 in the name of Mahamaya Builders by virtue of Deed of sale dated 28.10.2016. The plaintiffs daughter immediately applied for a certified copy of the Deed of Sale dated 28.10.2016 vide application dated 20.6.2022. The plaintiffs daughter was furnished a

certified copy of the Deed of Sale dated 28.10.2016. that on 15.8.2022 the plaintiff was informed by some of her neighbours that some workers have entered the suit plot and are clearing the vegetation that has grown in the suit plot as well as that some wood has been kept in suit plot.

6. The plaintiff's daughter then rushed to see as to what was happening at the suit plot. The plaintiff was shocked to see that some workers were clearing the suit plot as informed to her by the neighbours. The plaintiff's daughter then made inquiries with the workers as to who had sent them to the suit plot. The plaintiff's daughter was informed by the workers that they are the workers of the defendant no. 3. The plaintiff's daughter informed the workers that they are carrying out the work in her mother's property which is plot no. 1 to which the worker replied that they are asked to work in the suit plot by the defendant no. 3 and after clearing the vegetation they would do the layout by digging inside the suit plot. The plaintiff was

shocked to learn all this since her mother had never sold the suit plot to any third person. That the defendant no. 3 has no right to the suit plot as the defendant no. 3 has purchased plot no. 2 as per the sale deed dated 28.10.2016 and not suit plot which is owned and lawfully possessed by the plaintiff. The plaintiff states that the defendant no. 3 through his agents/workers has cleared the vegetation inside the suit plot and has also started digging inside the suit plot in order to commence construction inside the suit plot. The plaintiff having paid the entire consideration to the defendant nos. 1 and 2 and having been in lawful possession of the suit plot from the year 2001 are entitled to declaration that they are the owners in possession of the suit plot and that the defendant no. 3 has no right whatsoever to the suit plot as the Deed of sale pertains to plot no. 2. The plaintiff states that they have been pursuing the defendant nos. 1 and 2 for execution of the sale deed however, the said defendants have been delaying the same on some pretext or the other. The plaintiff has paid the entire consideration amount to the defendants. The defendant no. 1 informed the plaintiff that they would execute the sale deed and that the plaintiffs ought not to worry about the same. The relations between the plaintiff and the defendant nos. 1 and 2 was amicable and thus the plaintiff being assured by the defendant nos. 1 and 2 had full faith that the defendants would execute the sale deed in due time as assured by them. The plaintiff has always been willing and ready to execute the sale deed as the plaintiff has paid the entire consideration to the defendant nos. 1 and 2. It is the defendant nos. 1 and 2 who have failed to execute the Sale Deed.

7. The defendants appeared in the matter upon issuance of summons. The defendant no. 3 filed an application under section Order 7 Rule 11(d) of the CPC . The plaintiff contested the said application by filing her reply however the defendant no. 1 and 2 supported the case of the defendant no. 3. The defendant filed their written

statement. The Trial Court allowed the application under order 7, Rule 11 of CPC and rejected the plaint.

8. The Judgment of the learned trial Court has been challenged in the present appeal on the grounds that the Ld. trial court has failed to apply the well settled principles while deciding an application under Order VII Rule 11 of CPC and that ld trial court has absolutely not applied her mind to the averments in the plaint and has passed its order in a casual manner. It is stated that the learned trial Court failed to appreciate that the sale deed of the defendant no. 3 pertains to plot no. 2 and not to the plot no. 1 which is in lawful possession of the plaintiff and that the ld trial court failed to appreciate that the appellant is protected under section 53A of the Transfer of Property Act and hence the plaint could be ejected at the threshold.

9. Heard ld. Adv. A. Viegas for the appellants and ld. Ld. Advocate N. Khan argued for respondent Nos.1 and

2. Advocate Shri H. Bhangui for the respondent no. 3. I have heard arguments for and against.

10. The point that arises for my determination, my findings and reasons thereof are as under:

POINTS	FINDING
1.Whether the plaint discloses the cause of action?	Affirmative.
2. Whether the suit is barred by law of limitation ?	Negative.
3. Whether the judgment of the trial Court is erroneous and is liable To be quashed and set aside?	Affirmative.

R E A S O N S

11. Parties shall be referred to as the plaintiffs and defendants as they were referred to before the Trial Court.

12. **Point nos. 1 and 2:** Both points are taken together for joint discussion as they pertain to common facts and law. The plaint has been rejected under order 7 Rule 11(a) and (d) which read as under:

11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

> ***(a) where it does not disclose a cause of action;***
>
> ***(d) where the suit appears from the statement in the plaint to be barred by any law;***

13. In the case of **Hardesh Ores Pvt. Ltd. V. M/s. Hede and Co. Appeal (civil) 2517 of 2007** it was held bar that is contemplated under order 7 rule 11 of CPC can also be the bar of law of limitation.

14. The plaint has been rejected on two distinct grounds that the plaint fails to disclose the cause of action and secondly that the suit is barred by law of limitation. I shall first address the issue relating to the cause of action. The ld trial judge in her order at para 64 has stated that the cause of action appears to be an

illusion created by way of clever drafting and on this count, the plaint is liable to be rejected under Order VII Rule 11(a). In the same para, the ld trial Court has given the reasons as to why she has come to the conclusion that the cause of action is illusive. She has stated that the agreement of sale if read as a whole, spells out that the intention of parties is very clear on the aspect of execution of sale deed. Therefore, the suit is barred by limitation. Since the trial Court has held that the suit is barred by limitation she has come to the conclusion that the plaint does not disclose a cause of action. The cause of action therefore is sought to be connected to the bar of law, in this case the law of limitation. Therefore as rightly pointed out by the ld Counsel for the plaintiff, the issue of bar of limitation will have to be considered first by the Court and if the Court come to the conclusion that the plaint is barred by limitation, the correctness of finding given in terms of Order VII Rule 11(a) of CPC will have to be examined.

15. The ld trial Court concluded that the plaint is barred by limitation , by considering that the plaintiff and defendant nos. 1 and 2 had executed an Agreement of Sale dated 13.12.2001. The agreement of sale provided that the parties had agreed that the final sale deed shall be executed on or before 30.4.2002. The cause of action pleaded in the plaint is February 2022. Since the instrument clearly provides the date on which, the sale deed had to be executed, limitation would run form 30.4.2002 and would be 3 years from that date. As three years have long expired, the suit would be barred by limitation. The reasoning to this effect is contained in para 47 of the impugned order.

16. As regards the plea of possession, the ld trial Court emphasized that since the Agreement provides that the possession would be handed over to the plaintiff upon execution of the Sale deed, the possession would not be

with the plaintiff and therefore there is no continuous cause of action in terms of Article 54 of the Limitation Act.

17. As regards the contention of the plaintiff that the period of limitation should be reckoned from the date when the plaintiff had notice that the performance is refused. The ld. Trial court has reasoned out at para 51, 52 and 53 as under:

> "*51. When the sale deed was not executed on the agreed date, the plaintiff was required to show what efforts she took in order to seek execution of the sale deed. The plaintiff has averred in the Plaint at para 18, that from the Plaintiff visited Defendants No. 1 and 2 calling upon them to execute the sale deed in her favor, however, they started giving excuses. Therefore, the Plaintiff was very well aware that there is inaction on the part of Defendants No. 1 and 2 in*

performing the contract. Yet, she remained silent till the year 2022 when the alleged cause of action occurred on 15.08.2022.

52. These facts necessarily gather that the plaintiff was dormant and has not exercised her right within the period of limitation. The legal proposition of Vigilantibus non dormientibus jura subveniunt squarely comes into play in present situation. The law assists only those who are vigilant, and not those who sleep over their rights.

53. Therefore, I am in agreement with the contention of Ld. Adv. Bhangui that the Limitation period for seeking the present relief of specific performance would arise on 30.04.2002, which was the date agreed between the parties. The said date had given rise for the cause of action for seeking the present relief. However, the plaintiff did not exercise her right of seeking specific performance within 3 years."

18. This finding of the ld trial Court is challenged on the ground that first that there is a fraud pleaded by the parties and secondly the ld trial Court failed to note that the appellant is protected under Section 53A of the Transfer of Property Act and thirdly that the ld trial Court failed to apply well settled principles of Order VII Rule 11 of CPC. It is argued that one of the principles for applying order VII Rule 11 CPC is that if the question of Limitation also involves same disputed facts then the plaint cannot be rejected. In the instant case, it is contended that the law that is pleaded to create a bar is the law of limitation. The plaintiff has demonstrated as to how limitation in the instant case is a mixed question of law and fact. The ld trial Court has not properly appreciated the arguments advanced in this regard. Therefore, it is contended that the finding of the ld trial Court is erroneous.

19. Per contra the ld. Counsel for the defendant no. 3 has argued that the Limitation Act provides that when a date is fixed for performance of a promise, the limitation period is 3 years from that date and if no such date is fixed the limitation begins to run when the plaintiff has notice of that performance is refused. In this case, the Agreement dated 13.12.2001 categorically contains a date on which it was to be performed, which is on or before, 30.4.2002. The limitation therefore began to run from the year 2002 and expired in the year 2005. It is therefore, argued that the ld trial Court has rightly held that the suit is barred by limitation.

20. To counter these arguments, the ld counsel for the plaintiff has essentially relied upon the principle that although an instrument fixes a date on which, a promise is to be performed, if the parties by their conduct extend the date of performance, the limitation cannot run from the date so fixed.

21. To buttress his claim, he has relied upon binding precedent in the case of **Sharad Sitaramji Shende vs. Nilesh Subhashandji Katariya and ors. 2022 (5) ALL MR 277**

27. A Perusal of 'Sauda Chitthi' dated 3.2.3011 shows that the area of the subject property is specified the rate at which it is to be purchased is specified, the specific amount exchanged between the parties is stated and it was specifically recorded that 'sauda' was executed on the said date and that a 'Visarpatra' i.e. agreement would be executed on 17.2.2011. There is no dispute about the fact that on 17.2.2011, instead of executing the agreement, the said document for extension of time was executed, in the light of the admitted position that certain objectors had objected to the transaction between the parties.

28. Even in the subsequent document for extension of *time dated 17.2.2011, reference was made to the aforesaid 'Sauda Chitthi' dated 3.2.2011 reiterating the details of the area of land, rate at which it was agreed to be sold and specific amount that exchanged hands, stating that 'sauda' had been entered into. Thereafter the said document for extension of time recorded the nature of objections raised, the manner in which the Revision Applicants intended to deal with the objections and that after settling the said dispute they were to execute the 'Visarpatra' with respondent no. 1 i.e. original plaintiff.*

29. In the light of the aforesaid two documents, when the pleadings in the plaint are perused, it is seen that according to the respondent no. 1 i.e. original plaintiff, the contract was executed between the parties on 3.2.2011 titled as 'Sauda Chitthi' further referring ot the obligation of the parties to execute the agreement and ultimately the sale deed. After referring to subsequent events that took place in the form of the *necessity to execute the documents for extension of time, the respondent no. 1 also referred to Special Civil Suit no. 26/2011, filed by the revision applicants as a consequence of the objections raised by certain parties to the said contract, the manner in which the suit proceeded and the fact that the appeal arising from the suit bearing RCA no. 14/2014, was pending before the competent Court.*

30. After stating such facts, the respondent no. 1 claimed that he had suffered projected financial loss due to the revision applicants and after stating as to the manner in which the cause of action arose, relief was sought in the form of seeking specific performance of 'sauda Chitthi' read with the document for extension of time and in the alternative specific amount was claimed from the revision applicants.

31. This court is of the opinion that applying the above mentioned principles pertaining to the question as to whether the documents signify a concluded contract *or not, at this stage, the respondent no. 1 has clearly made out a prima facie case for the matter to go to trial with an opportunity to the parties to lead evidence in respect of their respective stands. As noted above, the position of law as clarified by the Supreme Court specifies that the language of the document has to be construed in the light of surrounding circumstances. The reference to the manner in which the revision and the fact of pendency of the appeal arising therefrom, shows the circumstances in which the extension of time was necessitated in the context of the 'sauda Chitthi' and it could not be said at this stage that the parties had contract or that at this stage itself it can be concluded contract between the parties. This applies equally to the objection raised by original defendant nos. 5 and 9, as regards absence of their signatures on the documents, for the reason that certain facts are pleaded in the plaint about why absence of their signatures would not absolve them of* *their liability and that decree of specific performance ought to be passed against them also. This aspect would also require an opportunity for the parties to lead evidence.*

22. Therefore in the facts and circumstances of the case it was observed at para 34 that the question of limitation is a mixed question of law and fact and therefore, the Court could not apply Article 54 of the Limitation Act without giving an opportunity to the parties to lead evidence.

23. Further in the case of **Shaukathussain Mohammed Patel vs. Khatunben Mohmmedbhai Polara (2019) 10 SCC 226** it was held that *It is well settled that for the purposes of the provisions of Order VII Rule 11 of the Code, the entirety of the averments in the plaint have to be taken into account. Going by the version of the appellant as detailed in the plaint, there*

was an element of deception and fraud which was practiced upon him as a result of which the concerned document got entered into. It is also a matter of record that the consideration in respect of the transfer of the property in question was stated to have been paid in cash.

Again going by the averments made in the plaint, the information in respect of the transaction came to the knowledge only in the year 2013-2014. According to the assertions in the plaint, the plaintiff-appellant was always in possession of the property. In the entirety of the circumstances, as pleaded in the plaint, the issues raised in the matter were certainly required to be considered on merits.

24. The court particularly noted that since the issue of fraud is a mixed question of law and fact, the plaint could not be rejected under Order VII Rule 11 on the ground of limitation.

25. The next proposition that is put forth by the plaintiffs is that in the instant case, the transaction in question is a sale of immovable property. It is contended that the law is well settled that in transaction pertaining to immovable property, time can never be considered as a essence of contract and to support this proposition reliance is placed in the case of **Chand Rani vs. Smt Kamal Rani – AIR 1993 SC 1742** wherein it was held that *from an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:*

1. from the express terms of the contract;

2. from the nature of the property; and

3. from the surrounding circumstances, for example: the object of making the contract.

26. In this case, the Court considered judgment in the case of **Gomathinayagam Pillai vs. Pallaniswami Nadar 1967 AIR 868** wherein it was held that *'It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the*

contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.

Further the court also considered judgment in the case of **Govind Prasad Chaturvedi v. Hari Dutt Shastri AIR 1977 SC 1005** wherein it was held that it is a settled law that the fixation of period within which the contract was to be performed does not make the stipulation as to time being the essence of the contract.

27. Further reliance is placed in the judgment in the case of **Ram Kishan Dass and ors vs. Bhavi**

Chand Sharma AIR 1988 Delhi 20 wherein it was held that *in the draft of the agreement, the period for completion was settled for three months and that was reduced to one month. The submission is that the parties had restricted the period for the performance of the contract to sell by changing it from three months to one month and that gave out the intention of the parties that the time is the essence of the contract. We are unable to accept this contention. In cases of a contract for the sale of immovable property, time is not of the essence of the contract unless expressly stipulated at the time of the contract or there are circumstances disclosed sufficiently to displace ordinary presumption that in a contract for sale of immovable property time is not of the essence of the contract.*

28. Therefore it is sought to be contended that mere stipulation of a date in the contract for its performance does not cause limitation to begin. The court has to

consider the conduct of the parties. In the instant case, the plaintiff has pleaded that even if the stipulated time period expired, the plaintiff would often go to the house of defendant no. 1 and 2 and would request them to execute the sale deed. Since they had already performed their part of contract they were right in their stand only to make a request. It was open for the defendant no. 1 and 2 to inform them that they are not willing to perform their contract only then they could have filed a suit for specific performance. If the defendants by their conduct continued giving assurance that they will execute the sale deed, there was no reason for the plaintiff to have filed a suit for specific performance. This is conduct that expected of a prudent person the question whether the averment of the plaintiff that the defendant till some few last months before filing of the suit continued them giving assurance that they would perform contract, is a question of fact and will have to be ascertained at the time of the trial. Thus it is argued that the finding of the ld trial court that the plaint is barred by law of limitation is incorrect.

29. Per contra, the ld counsel for the defendant no. 3 has argued that there are precedents to the contrary where importance of time being the essence of the contract has been properly explained. It is further argued that even if the court holds that time was not essence of the contract and that parties by their conduct decided to give the stipulation of date of performance a complete go by, there are pleadings in the plaint to suggest that despite of having due notice of refusal of the performance the plaintiff did not bother to enforce its right of specific performance. Having said this, attention of the court is drawn to the para 51 and 52 of the impugned judgment.

30. It is argued that the ld trial Court has categorically observed that when the plaintiff realized that the defendant nos. 1 and 2 were only giving excuses they

should have filed the suit. Therefore the limitation would start running from that day. As they have failed to do so, the suit is barred by limitation.

31. Going a step further and apart from the contention raised before the trial Court, the ld. Counsel for defendant no. 3 has argued that the plaintiff has averred at para 16 and 17 of a plaint that defendant no. 3 had approached her on several occasions in the year 2010 to sell the suit plot to him which she declined and out of abundant caution, she issued a public notice cautioning the general public that the plaintiff had executed an Agreement of sale and had paid the entire consideration in respect of the suit plot and that defendant no. 1 and 2 are surreptitiously trying to alienate the suit plot to some party inorder to deprive her of her proprietary rights. The very fact that the plaintiff has stated in the said legal notice that the defendants are trying to alienate the suit property means that the plaintiffs were convinced that

the defendant no. 1 and 2 will not honour the Agreement and therefore, the limitation began to run from 27.10.2010 when the legal notice was published and ended in the year 2013. This being the case, it is argued that from the plaintiffs' statement the suit becomes hopelessly barred by limitation.

32. It is further argued that time is not the essence of the contract relating to immovable property does not have a universal application. The reliance is placed on the judgment in the case of **Dahiben vs. Arvindbhai Kalyanji Bhanusali Civil Appeal 9519 of 2019**. *In this case, the plaintiff filed the suit to declare sale deed dated 2.7.2009 and subsequent sale deed dated 1.3.2013 as null and void on the ground that they were illiterate and they have not given free consent to the said sale deed. The respondent filed application for rejection of the plaint under Order VII Rule 11 of CPC. The Trial Court held that the period of limitation for filing the suit*

was 3 years from the date of execution of the Sale Deed dated 02.07.2009. The suit was filed on 15.12.2014. The cause of action as per the averments in the plaint had arisen when the Defendant No.1/Respondent No.1 had issued 'false' or 'bogus' cheques to the Plaintiffs in 2009. The suit for cancellation of the Sale Deed dated 02.07.2009 could have been filed by 2012, as per Articles 58 and 59 of the Limitation Act, 1963. The suit was however filed on 15.12.2014, which was barred by limitation. The suit property was subsequently sold by Respondent No.1 to Respondent Nos. 2 and 3 by a registered Sale Deed dated 01.04.2013. Before purchasing the suit property, the Respondent Nos. 2 and 3 had issued a public notice on 14.08.2012. The Plaintiffs did not raise any objection to the same. The Trial Court, on the basis of the settled position in law, held that the suit of the Plaintiffs was barred by limitation, and allowed the application under Order VII Rule 11(d) CPC.

33. Accordingly the plaint was rejected in terms of Order VII Rule 11 of CPC. The Hon'ble High Court upheld the judgment of the trial court and held that the suit is barred by limitation. This order was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court after considering various precedents held that the "In view of the law laid down by this Court, even if the averments of the Plaintiffs are taken to be true, that the entire sale consideration had not in fact been paid, it could not be a ground for cancellation of the Sale Deed. The Plaintiffs may have other remedies in law for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered Sale Deed. We find that the suit filed by the Plaintiffs is vexatious, meritless, and does not disclose a right to sue.

34. The plaint is liable to be rejected under Order VII Rule 11 (a). The plea taken in the plaint that they learnt of the alleged fraud in 2014, on receipt of the *index of the Sale Deed, is wholly misconceived, since the receipt of the index would not constitute the cause of action for filing the suit. On a reading of the plaint, it is clear that the cause of action arose on the non-payment of the bulk of the sale consideration, which event occurred in the year 2009. The plea taken by the Plaintiffs is to create an illusory cause of action, so as to overcome the period of limitation. The plea raised is rejected as being meritless and devoid of any truth.*

35. In Dahiben supra it is pertinent to note that the plaintiff had not performed his part of the contract. Secondly, the Hon'ble Supreme Court observed that the cause of action in the suit actually should have arisen on the day when the plaintiff realized that the bulk of consideration was not paid. In the instant case, although the suit is based on fraud, the fraud is alleged to have been noticed on the day when the property as actually sold and not on the day when the property was intended

to be sold. Therefore the cause of Dahiben is distinguishable.

36. Further reliance is placed on the judgment in the case of **Khatri Hotels Private Ltd and anr vs. Union of India and anr. Civil Appeal No. 7773 of 2011.** In this case the Hon'ble Supreme Court noted that the Limitation Act prescribe time limit for all suits.

It is held as under:

While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word `first' has been used between the words `sue' and `accrued'. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is *beyond the period of limitation counted from the day when the right to sue first accrued.*

37. It is further held that *the issue deserves to be considered from another angle. Although, paragraph 19 of Suit No. 303/2000 was cleverly drafted to convey an impression that the right to sue accrued to the appellants in November/December, 1998 when they learnt about the wrong recording of entries in Khasra Girdawris/Revenue Records, but if the averments contained in that paragraph are read in conjunction with the pleadings of the earlier suits, falsity of the appellants' claim that the cause of action accrued to them in November/December, 1998 is established beyond any doubt. In the first suit filed by him, appellant No.2-Lal Chand had pleaded that the cause of action accrued on 10.8.1990 when the officials of the respondents came to the suit premises and threatened to demolish the same. In the second suit filed by Surat*

Singh (brother of appellant No.2-Lal Chand), it was claimed that the cause of action accrued on 29.2.1992 when the officials of the respondents demolished the boundary wall of the property on the ground that the same was Gaon Sabha land. The appellants have not explained starking contradictions in the averments contained in three suits on the issue of cause of action and in the absence of cogent explanation, it must be held that the statement contained in paragraph 19 of Suit No.313 of 2000 was per se false and, as a matter of fact, the cause of action had first accrued to the appellants on 10.8.1990 when their so called right over the suit land was unequivocally threatened by the respondents. Therefore, the suit filed by the appellants on 14.2.2000 was clearly beyond the period of limitation of 3 years prescribed under Article 58 of the 1963 Act and was barred by time.

38. It is therefore argued that the principle that

time is the essence of contract does not apply to contract relating to immovable property cannot be extended in this case and therefore, the judgment cited by the respondent cannot be looked into.

39. Before going into the merits of the contention raised, I shall first discuss the law relating to rejection of plaint on the ground of nondisclosure of cause of action and bar of law. It was held in the landmark judgment in the case of **Rajendra Bajoria and ors vs. Hemant Kumar Jalan and ors Civil Appeal no. 5819-5822 of 2021** it was held that *the court has to find out as to whether in the background of the facts, the relief, as claimed in the plaint, can be granted to the plaintiff. It has been held that if the court finds that none of the reliefs sought in the plaint can be granted to the plaintiff under the law, the question then arises is as to whether such a suit is to be allowed to continue and go for trial. This Court answered the said question by holding that*

such a suit should be thrown out at the threshold.

40. Here the court considered the judgment of **Azhar Hussain v. Rajiv Gandhi 1986 Supp SCC 315** wherein it is held that *the whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint, if it does not disclose any cause of action.*

41. Further in the case of **N. V. Shriniwasa Murthuy and ors vs. Mariyamma Appeal (civil) 4500 of 2004** it was held that *the High Court does not seem to be right in rejecting the plaint on the ground that it does not disclose any 'cause of action'. In our*

view, the trial court was right in coming to the conclusion that accepting all averments in the plaint, the suit seems to be barred by limitation. On critical examination of the plaint as discussed by us above, the suit seems to be clearly barred on the facts stated in the plaint itself. The suit as framed is prima facie barred by the law of limitation, provisions of Specific Relief Act as also under Order 2 Rule 2 of the Code of Civil Procedure.

42. In the landmark case of **T. Arvindam vs.T.V.Satyapal [1977 (4) SCC 467] it was held hat**

"The trial court must remember that if on a meaningful no formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise its power under Order VII, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing by examining

the party searchingly under Order X, CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men (Ch.XI) and must be triggered against them."

43. In **Raghwendra Sharan Singh vs. Ram Prasanna Singh Civil Appeal no. 2960 of 2019** wherein it was held that *Applying the law laid down by this Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 of the CPC to the facts of the case in hand and the averments in the plaint, we are of the opinion that both the Courts below have materially erred in not rejecting the plaint in exercise of powers under Order 7 Rule 11 of the CPC. It is required to be noted that it is not in dispute that the gift deed was executed by the original plaintiff himself along with his*

brother. The deed of gift was a registered gift deed. The execution of the gift deed is not disputed by the plaintiff. It is the case of the plaintiff that the gift deed was a showy deed of gift and therefore the same is not binding on him. However, it is required to be noted that for approximately 22 years, neither the plaintiff nor his brother (who died on 15.12.2002) claimed at any point of time that the gift deed was showy deed of gift. One of the executants of the gift deed – brother of the plaintiff during his lifetime never claimed that the gift deed was a showy deed of gift. It was the appellant herein original defendant who filed the suit in the year 2001 for partition and the said suit was filed against his brothers to which the plaintiff was joined as defendant No. 10. It appears that the summon of the suit filed by the defendant being T.S. (Partition) Suit No. 203 of 2001 was served upon the defendant No.10 plaintiff herein in the year 2001 itself. Despite the same, he instituted the present suit in the year 2003. Even from the averments *in the plaint, it appears that during these 22 years i.e. the period from 1981 till 2001/2003, the suit property was mortgaged by the appellant herein original defendant and the mortgage deed was executed by the defendant. Therefore, considering the averments in the plaint and the bundle of facts stated in the plaint, we are of the opinion that by clever drafting the plaintiff has tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation. Therefore, considering the decisions of this Court in the case of T. Arivandandam (supra) and others, as stated above, and as the suit is clearly barred by law of limitation, the plaint is required to be rejected in exercise of powers under Order 7 Rule 11 of the CPC.*

7.1 At this stage, it is required to be noted that, as such, the plaintiff has never prayed for any declaration to set aside the gift deed. We are of the opinion that such a prayer is not asked cleverly. If such a prayer would have *been asked, in that case, the suit can be said to be clearly barred by limitation considering Article 59 of the Limitation Act and, therefore, only a declaration is sought to get out of the provisions of the Limitation Act, more particularly, Article 59 of the Limitation Act. The aforesaid aspect has also not been considered by the High Court as well as the learned trial Court.*

8. Now, so far as the application on behalf of the original plaintiff and even the observations made by the learned trial Court as well as the High Court that the question with respect to the limitation is a mixed question of law and facts, which can be decided only after the parties lead the evidence is concerned, as observed and held by this Court in the cases of Sham Lal alias Kuldip (supra); N.V. Srinivas Murthy (supra) as well as in the case of Ram Prakash Gupta (supra), considering the averments in the plaint if it is found that the suit is clearly barred by law of limitation, the same *can be rejected in exercise of powers under Order 7 Rule 11(d) of the CPC.*

9. In view of the above and for the reasons stated above, we are of the opinion that both the High Court as well as the learned trial Court have erred in not exercising the powers under Order 7 Rule 11 of the CPC and in not rejecting the plaint in exercise of powers under Order 7 Rule 11 of the CPC. For the reasons stated above, the impugned judgment and order passed by the High Court as well as the trial Court cannot be sustained and the same deserve to be quashed and set aside. Consequently, the impugned judgment and order passed by the High Court dated 12.03.2013 as well as the order passed by the Munsif, Danapur rejecting the Order 7 Rule 11 application filed by the original defendant are hereby set aside. Consequently, the application submitted by the appellant herein original defendant to reject the plaint under Order 7 Rule 11 of the CPC is hereby allowed and *the plaint, being Title Suit No. 19 of 2003 is hereby rejected. The present appeal is allowed accordingly in terms of the above. No costs.*

44. In **M/s. Hotel Leela Venture Pvt Ltd. Vs. Smt. Veena Govind Sadekar and ors. 1998 (2) Goa L.T. 286**, it was held that *when statute provides specific limitation period, aggrieved party has to approach Court within period prescribed and such period cannot be extended any order of the Court. Hence, on face of pleadings in the plaint, the suit is barred by limitation and plaint to be rejected.*

Whether limitation would begin to run for the date stipulated is the agreement to perform the contract.

45. In the light of the arguments I shall revert back to the facts of the instant case. In the case of T. Arivandandam (supra) the Court has explained the meaning of the term cause of action which basically

implies a bundle of facts that gives the plaintiff right to sue. In a suit for specific performance of contract the right to sue accrues when performance is refused or upon the date on which contract is agreed to be performed, expires. In the instant case, there was a written agreement executed between the parties. Therefore, strictly speaking agreement should have been executed on that date specified in the agreement. As the defendants failed to perform his part on that day the plaintiff should have filed the present suit seeking specific performance of contract. The plaintiff has not done so and she has given reasons for not filing a suit immediately within 3 years of the date when the cause of action accrued. Here it is pertinent to note that the plaintiff has already paid the entire consideration to the defendant and parties have not stipulated as to what would be the remedy available to the plaintiff in case the defendants do not execute the sale deed in time.

At para 8,9,11 and 12 of the plaint there are specific averments which read as under:

Para 8 " The plaintiff states that as per the terms of the agreement of sale the defendant nos.1 and 2 agreed to execute the sale deed on or before 30th April, 2002.

Para 9 :*The plaintiff states that the defendant no.1 and 2 did not communicate to the plaintiff the date of the execution of sale deed though it was agreed that the sale deed would be executed on or before 30th April, 2002.*

Para 11 *The plaintiff made several oral requests to the defendants nos.1 and 2 to execute the sale deed, however the defendant nos.1 and 2 delayed the execution of the same on some pretext or the other.*

Para 12 *The plaintiff states that upon taking possession of the suit plot the plaintiff applied for technical clearance from the SGPDA for construction of a compound wall all around the suit plot. The SGPDA* *granted technical clearance bearing letter No.SGPDA/P/5105/1194/10-11 dated 30.09.2010."*

46. Again at para 18, 19 and 31 of the plaint there are averments which reads as under:

Para 18: The plaintiff states that from 2002 to 2013 the plaintiff and her neighbor Vinay Vishwas Wadekar have been to the residence of the defendant nos.1 and 2 calling upon them to execute the deed of sale in favour of the plaintiff, however, the defendant nos.1 and 2 started giving one or the other excuse.

Para 19 The plaintiff states that in February, 2022 the plaintiff took the help of the said Vinay Vishwas Wadekar and both of them went to the house of the defendants nos.1 and 2 and the plaintiff requested the said defendants to execute the sale deed however, the defendant nos.1 and 2 started saying that they need more time to fulfill certain necessary requirements and *hence the sale deed would be executed in favour of the plaintiff only after the requirements are fulfilled by them.*

Para 31 The plaintiff states that they have been pursuing the defendants nos.1 and 2 for execution of the sale deed however, the said defendants have been delaying the same on some pretext or the other. The plaintiff has paid the entire consideration amount to the defendants. The defendant no.1 informed the plaintiff that they would execute the sale deed and that the plaintiff ought not to worry about the same. The relations between the plaintiff and the defendant nos.1 and 2 was amicable, and thus the plaintiff being assured by the defendant nos.1 and 2 had full faith that the defendants would execute the sale deed in due time as assured by them".

47. The plaintiff has therefore clearly pleaded that she approached the defendants to execute the deed of sale however the defendant nos.1 and 2 delayed the

execution of the same on some pretext or the other and further that the defendant nos.1 and 2 started saying that they need some more time to fulfill necessary requirements. Therefore, all throughout the plaint it is the case of the plaintiff that it is the defendants who extended the time of performance by making an oral request. In this scenario therefore the principles laid down in the cases of Chand Rani(supra), Govind Prasad (supra) and Ram Kishan Das and others (supra) would be applicable.

48. Learned Counsel for the respondents is correct in arguing that the principle that time is not essence of contract of immovable property does not have universal application and same has to be seen in the light of facts and circumstances of every case. However, I have noted that the Court is considering an application under Order 7 Rule 11 of CPC and in view of the judgment in the case of **Shaukathussain (supra**) the Court will have to

accept the averments in the plaint in its entirety as true and proceed to examine whether the despite of accepting all the averments as true, the case of the plaintiff would fail.

49. In the instant case since the issue whether the defendants assured the plaintiff that he would execute the sale deed on several occasions is a question of facts and materially so because the plaintiff had already performed his part of contract and has paid entire compensation and the defendants were required to perform their part of contract and execute the sale deed. Therefore, strict principle of performance of the contract on the date stipulated in the agreement cannot be borrowed to the present case and thus the finding of the learned Trial Court to the effect that since the agreement stipulated execution of the sale deed on or before 30.04.2022 limitation to file the suit expires after 3 years since that date cannot be sustained.

Whether limitation begins from the date of publication of public Notice.

50. Ld. Counsel for the respondent no.3 has argued that even assuming that period of limitation stands extended by conduct of the parties. The plaintiffs own pleadings suggest that she had knowledge of refusal on the part of the defendant nos.1 and 2 to execute the contract in the year 2010. It is pleaded in the plaint that she issued a public notice and in the public notice she had in clear terms stated that "*defendant nos.1 and 2 are serruptiously planning to alienate the suit plot to a third party in order to deprive the plaintiff of a proprietary right*" .

Therefore in view of this averment the limitation would begin from 27.3.2010 when the plaintiff had knowledge of refusal and at the most, the suit could have been filed in the year 2013. This suit which is filed in the year 2022 is hopelessly barred by limitation.

51. Per contra, the plaintiff has reiterated that she has already performed her part of the contract as stated in the agreement of sale. In furtherance of her right she also applied for a construction licence and constructed a compound wall surrounding the suit plot. Thus she performed two acts one of notifying the defendant no.1 and 2 of legal consequences in case they are serruptiously trying to sell the suit plot to any person and second of consolidating her possession by constructing a compound wall. After this was done she has pleaded at para 18 that she has been time and again going with her neighbour whose affidavit she has filed with the plaint and requesting the defendants No. 1 and 2 to execute the sale deed but the defendants kept on assuring that they will execute the sale deed. Para 31 of the plaint is very crucial where there is a categorical averment that the plaintiff has requested the defendant nos.1 and 2 to execute the

sale deed and the defendant no.1 an 2 assured that they will do so and since the relationship was good they did not file a suit. There is no reason to disbelieve this statement at the stage of considering an application under order 7 rule 11 of CPC.

52. If the chronology of pleadings is seen the plaintiff who had already paid the entire consideration issued a legal notice apprehending sale of the property agreed to be sold to her, to some third party. After being notified, in the year 2010, the defendant No. 1 and 2 assured the plaintiff that they will execute the sale deed. Once this assurance came there was no reason for the plaintiff to file a suit. As the purpose of legal notice was served and defendant nos.1 and 2 obliged to the plaintiffs and refrained from selling the property to any third person and ensured the plaintiffs that they will execute a sale deed in their favour. Therefore, the subsequent conduct of the defendants no.1 and 2 that has been pleaded in

paras 18, 19 and 31 makes limitation a mixed question of law and fact.

53. When an application under order 7, Rule 11 of CPC is to be decided by the Court, the Court cannot draw any inference about the truth and falsity of the statement made in the plaint except if the Court comes to a clear conclusion that a cause of action is sought to be created by clever drafting. It is rightly argued by Ld. Counsel for the plaintiff that for the purpose of Order 7 Rule 11 of CPC the Court will have to accept that the defendant nos.1 and 2 assured the plaintiff all throughout that they will execute the sale deed and since the relationship was good nothing prompted the plaintiff to file the suit. These averments has to be seen in the light of fact that although the agreement of sale states that the possession has not been handed over to the plaintiff, the plaintiff obtained construction licence on the suit plot and also constructed a compound wall. There are photographs

produced alongwith the plaint showing the compound wall as the plaintiffs have also produced the approved plan. If the relationship was not good the defendant No.1 and 2 would have objected to the same. Acquiescence on the part of the defendant nos.1 and 2 to allow the plaintiff to construct a compound wall lends credence to the statement of the plaintiff that she was put in possession of the suit plot. Thus overall conduct of the defendants of having not objected to the plaintiff constructing the compound wall, makes a triable case in favour of the plaintiffs in proving the contention that the defendant nos.1 and 2 never by their conduct showed any hostility or refusal to execute the deed.

54. Inaction on the part of the defendants to object to the construction of the compound wall or take any action upon the legal notice issued on the newspaper lends some credence to the claim of the plaintiff that since the relationship was good there was never any

reason for the plaintiff to believe that the defendant nos.1 and 2 will not execute the contract. This has to be seen in the light of the fact that the cause to issue notice is not any act on the part of the defendant nos.1 and 2. In fact the cause to issue legal notice is act of the defendant no.3 approaching the plaintiff to sell the suit plot to him. Hence, legal notice in my considered view cannot be treated as sufficient notice to the plaintiff of defendants' refusal to honour the contract without there being sufficient opportunity given to the plaintiff to prove his case.

55. That apart, Ld. Trial Court rejected the entire plaint as being barred by limitation. At the outset it is noted that the relief of specific performance no longer is discretionary after the amendment to the Specific Relief Act. Even assuming that the suit of the plaintiff fails on the ground of prayer of specific performance being barred by limitation. Prayer of injunction stands on the

independent footing. The plaintiff has averred in the plaint that she was put in possession of the suit plot and has also performed acts of possession which has not been opposed by the defendants since last more than 10 years. Therefore protection available under section 51 A of the Transfer of Property Act must be extended to her and hence the plaintiff who is in possession of the suit plot, in part performance of the contract, can assert her possession against all the persons including true owner.

56. Ld. Counsel for the defendants has argued that now since the ownership vests in the defendant no.3 and the plaintiff claims to be have lost her possession to the defendant no.3 there is no question of any relief of injunction being available to her. This aspect will have to be examined at the time when issue of injunction is appropriately decided. The only observation that this Court finds it necessary to be made is that, after execution of the sale deed the defendant no.3 steps into

shoes of defendant no.1 and 2. The defendant nos.1 and 2 can transfer to the defendant no.3 only that which they had at the time of transfer. The plaintiff has averred in the plaint that the defendant nos.1 and 2 had lost possession of the suit plot at the time of transfer. Until and unless the possession was restored by following due process of law by the defendant nos.1 and 2, protection under section 51 A of the Transfer of Property Act will be available to the plaintiff. The plaintiff can file a suit for injunction claiming that the defendant no.3 is a trespasser on the strength of the claim of part performance.

57. It is well settled that limitation only extinguishes remedy and not a right. This is more particularly when the plaintiff herein has already performed his part of contract long back and there is nothing left on the part of the plaintiff to be done except for waiting for the defendants to execute the sale deed.

58. It is also pertinent to note herein that issue of possession is not crystal clear. The agreement of sale refers to plot no.1 whereas the plot that is sold to defendant no.3 is a different plot which is plot no.2. Since the Court cannot go into the documents of the defendants at this stage to ascertain or to decide the question of identification, the Court will have to accept averments of paras 22 and 23 of the plaint as true. At para 23 and 24 of the plaint the plaintiff has stated that the defendant nos.1 and 2 have sold the plot no.2 to the defendant no.3 and not plot no.1. However in the garb of that sale deed, the defendant no.3 is interfering with plot no.1.

59. Learned Counsel for the defendants has requested the Court to superimpose the plan of agreement of sale with the plan on the sale deed and has urged the Court to draw an inference based on comparison that plot is the same. Since the plans are as per the scale the duty of

superimposition can be best left with the experts. If the Court compares the boundaries of both the plots as stated in the agreement of sale and in the sale deed, the boundaries differ from one another. Thus it will be proper in an application under Order 7, Rule 11 of CPC to superimpose the plan and draw an inference. This point requires a larger investigation and for this reason issue of part performance under section 51 A becomes relevant in examining maintainability of suit simplicitor on the strength of prayer of injunction.

60. An observation is made by the Trial Court that the plaintiff has not challenged the sale deed executed by the defendants. Since, the plaintiff is not a party to the sale deed there is no obligation in law for the plaintiff to challenge the same. Hence, I hold that question of limitation in the present case is mixed question of law and facts because there are averments in the plaint indicating that although the sale deed had to be executed

by 30.4.2022 the defendant no.1 and 2 kept assuring the plaintiff that he will execute the sale deed even lately till February, 2022. I further hold that question whether legal notice dated 27.3.2010 would amount to notice of refusal is again a question of fact on account of the plaintiff asserting his possession by construction of compound wall and inaction on the part of the defendants. Also on account of the averments in the plaint that even lately the defendant no.1 and 2 assured the plaintiffs that they will execute a sale deed. As question of limitation for the purpose of specific performance is a mixed question of law and facts and plaint could not have been rejected on the ground of limitation.

61. Notwithstanding this as the prayer of injunction is maintainable on its own strength, the entire plaint could not have been rejected. The order of the Trial Court is therefore erroneous and is liable to be quashed

and set aside. Hence, point No.1 is decided in the affirmative and point No.2 is decided in the negative.

62. **Point No.3**: The learned Trial Court has taken an erroneous view that limitation began from the date stipulated in the contract for execution of the agreement for the reasons stated above. Hence, the finding of the Trial Court that the plaint is barred by law and that it fails to disclose a cause of action cannot be sustained. Point No.3 is decided in the affirmative.

63. Hence, I pass the following:

O R D E R

The appeal is allowed.

The Judgment and Order of the Trial Court is quashed and set aside.

The plaint is restored to file. Parties shall appear before the Trial Court on 16.3.2023 at 2.30 p.m. and the matter shall proceed from the stage that which the matter was before the order for rejection of the plaint could have been passed.

Decree to be drawn accordingly.

Pronounced in the Open Court.

Proceedings closed.

Margao.

Dated: 03.03.2023.

POOJA C. KAVLEKAR

Digitally signed by POOJA C. KAVLEKAR
Date: 2023.03.03 19:07:55 +05'30'

(**Pooja Kavlekar**)
Adhoc District Judge-1,
FTC-1, South Goa, Margao,

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