

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.285 OF 2015
IN
NOTICE OF MOTION NO.91 OF 2015
IN
SUIT NO.2280 OF 2007
WITH
NOTICE OF MOTION (L) NO.781 OF 2015**

Hemant D. Shah and Others Appellants
(Original Defendant Nos.1 to 5)
V/s

Chittaranjan D. Shah & Others Respondents.
(Respondents Nos. 1 to 7 Org.
Plaintiffs and Nos. 8 to 15 Orig.
Defendant Nos. 6 to 13)

Mr. Riyaz Chagla alongwith Mr. Vaibhav Krishna, Mr. Hamid Kidiani, Mr. Tahir Prande i/b Juris Consillis for the Appellant.

Ms. Aarmin Wandrewala alongwith Mr. Govind Mohanty i/b Ms. Ashwini Takalkar for Respondent Nos. 1, 3, 4 and 6.

**CORAM: V. M. KANADE, ACTING CHIEF JUSTICE &
REVATI MOHITE DERE, J.**

DATE: 20th January, 2016

P.C.:-

1. Appellants have filed this appeal challenging the judgment and order passed by the learned Single Judge dated 23/02/2015 in Notice of Motion No.91 of 2015. By the

said order, the learned Single Judge was pleased to dismiss the Notice of Motion and imposed costs of Rs 1 lakh on the Defendants for taking out the said Notice of Motion.

2. Appellants took out the Notice of Motion for rejection of the Plaint under Order 7, Rule 11(d) of the Code of Civil Procedure on three grounds viz **(i)** the suit was ex facie barred by limitation; **(ii)** the reliefs sought in the suit had been rejected by the Arbitrator and were the subject matter of challenge by the Plaintiffs in the Arbitration Petition and therefore the suit was barred under section 5 of the said Act; and **(iii)** the suit was barred on the principle of *res judicata* or the principles analogous to *res judicata*.

3. We have heard the learned Counsel appearing on behalf of the Appellants and the learned counsel appearing on behalf of the Respondents.

4. The learned Counsel for the Appellants has taken us through the impugned judgment and order passed by the learned Single Judge.

5. It is a settled position in law that when the application is filed under Order 7, Rule 11(d) of the Code of Civil Procedure, the contention of the Defendant is to be examined after taking into consideration the averments in

the plaint and at that stage defence or Written Statement is not to be taken into consideration. The learned Single Judge has taken into consideration the averments made in the plaint and has observed that the prayers in the plaint cannot be seen in isolation to each other and has further observed that if the entire plaint is carefully perused together, there was no question of the suit being barred by section 5, particularly in view of the fact that the Plaintiffs were seeking the orders against independent legal entities like Defendant Nos. 8, 9 and 10 and, therefore, filing of the suit was the only remedy which was available to the Plaintiffs. Secondly, the learned Single Judge has held that the principle of *res judicata* is a question involving mixed question of law and fact and, therefore, evidence would have to be led for establishing the said fact and, lastly, on the point of limitation, the learned Single Judge has observed that the Plaintiffs had made a specific averment that they were entitled to further damages on account of losses or damages upto 31/10/2007 and therefore the suit was well within time.

6. The learned Counsel appearing on behalf of the Appellants has relied on the judgments in *Hardesh Ores (P) Ltd. vs. Hede and Company*¹ and in *Hole vs. Chard Union*² in support of his submissions. In our view, ratio of the said judgments is not applicable to the facts of the present case.

1 (2007) 5 SCC 614

2 [1894] 1 Chancery Division 293

7. We do not find any infirmity in the judgment and order passed by the learned Single Judge. We are therefore not inclined to interfere with the said order. Appeal is dismissed. However, imposition of costs of Rs 1 lakh is set aside. Interim order, if any, stands vacated. Hearing of both the suits is expedited.

8. Since appeal itself is dismissed, Notice of Motion (L) No.781 of 2015 does not survive and it is accordingly disposed of.

9. Place the matter for directions on 28th January, 2016 in order to see whether the parties agree to the suggestion made by this Court to again refer the matter for Mediation.

(REVATI MOHITE DERE, J.)

(ACTING CHIEF JUSTICE)