IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1776 of 2015
IN
SUIT NO. 512 OF 2013

Lily Realty Private Limited, a Company incorporated under the Companies Act, 1956, having its registered office at 3rd floor, Bengal Chemicals Building, 502, Prabhadevi, Mumbai-400 025	)..Applicant/ Defendant No.11

In the matter between:

1.	Kalpesh Kantilal Dedhia, adult, Indian Inhabitant, son of Kantilal P. Dedhia, 103, Blue Pearl, Vidhya Mandir Road, Dahisar (East) Mumbai-400 068	)
2.	Kantilal P. Dedhia, adult, Indian Inhabitant, 103, Blue Pearl, Vidhya Mandir Road, Dahisar (East) Mumbai-400 068	)
3.	Falguni Rakesh Shah, adult, Indian Inhabitant, resident of A-604, Parichay Apartments, Vidhya Mandir Road, Dahisar (East), Mumbai-400 068	)..Plaintiffs

versus

1.	Altius Developers Private Limited, a Company incorporated under the Companies Act, 1956 and having its Registered office at B/3, Prathnastar Building, Andheri, Sahar An dheri (East), Mumbai-400 069	)
2.	Shailesh Dilip Shah, Indian Inhabitant, resident of A/303 Royal Vasundhara, C.S. Road, Near Avdhoor Nagar, Dahisar (East), Mumbai-400 068	)

3. Bhavana Shailesh Shah)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

4. Stuti Realty Pvt. Ltd.)
a Company incorporated under the Companies Act,)
1956, having its registered moffice at 3rd floor,)
Bengal Chemical Building, 502, Veer Savarkar)
Marg, Prabhadevi, Mumbai-400 025)

5. M/s. Altius Pashmina Realty,)
a registered Partnership firm, having)
its registered moffice at A-603, Winsway)
Complex, Old Police Line, Opp. Andheri)
Railway Station, Andheri (E))
Mumbai-400 069)

6. M/s. Skylark Habitat,)
a registered Partnership firm, having)
its office at Skylark Chambers)
No. 37/21, Yellappa Chetty Layout,)
Ulsoor Road, Bangalore 560 042)

7. Mrs. Nishant, d/o Mr. Abbas Khan, adult,)
Indian Inhabitant, resident of No. 2336, HAL,)
3rd Stage, Bangalore-560 017)

8. Mr. H.B. Abdul Azeem, s/o late)
Mr. H.R. Abdul Basith, adult, Indian)
Inhabitant, presently at No. 10,)
Serpentine Street, Richmond Town,)
Bangalore-560 025)

9. Mr. L. Umesh, s/o Mr.C. Lakshmaiah,)
adult, Indian Inhabitant, resident of)
No. 85, 4th Main, G.M. Palya,)
Thippasandra Post, Bangalore-560 075)

10. Ishani Realty Pvt. Ltd.)
a Company incorporated and registered under the)
Companies Act, 1956, having its registered office)

at 3rd floor, Bengal Chemicals Building,)
502, Prabhadevi, Mumbai-400 025)

11. Lily Realty Private Limited,)
a Company incorporated and registered under the)
Companies Act, 1956, having its registered office)
at 3rd floor, Bengal Chemicals Building,)
502, Prabhadevi, Mumbai-400 025)

12. Asit Koticha, resident of 19th floor)
Rameshwar Apartments, Palkewadi,)
K.D. Marg, Prabhadevi, Mumbai-400 028)..Defendants

ALONGWITH
NOTICE OF MOTION NO. 1774 OF 2015
IN
SUIT NO. 512 OF 2013

Stuti Realty Pvt. Ltd.)
a Company incorporated under the Companies Act,)
1956, having its registered moffice at 3rd floor,)
Bengal Chemical Building, 502, Veer Savarkar)
Marg, Prabhadevi, Mumbai-400 025)..Applicant/
Defendant No.4

In the matter between:

1. Kalpesh Kantilal Dedhia,)
adult, Indian Inhabitant, son of Kantilal P. Dedhia,)
103, Blue Pearl, Vidhya Mandir Road, Dahisar (East))
Mumbai-400 068)

2. Kantilal P. Dedhia, adult, Indian Inhabitant,)
103, Blue Pearl, Vidhya Mandir Road, Dahisar (East))
Mumbai-400 068)

3. Falguni Rakesh Shah,)
adult, Indian Inhabitant, resident of)
A-604, Parichay Apartments, Vidhya Mandir Road,)
Dahisar (East), Mumbai-400 068)..Plaintiffs

versus

1. Altius Developers Private Limited,)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at B/3, Prathnastar Building,)
Andheri, Sahar An dheri (East), Mumbai-400 069)

2. Shailesh Dilip Shah,)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

3. Bhavana Shailesh Shah)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

4. Stuti Realty Pvt. Ltd.)
a Company incorporated under the Companies Act,)
1956, having its registered moffice at 3rd floor,)
Bengal Chemical Building, 502, Veer Savarkar)
Marg, Prabhadevi, Mumbai-400 025)

5. M/s. Altius Pashmina Realty,)
a registered Partnership firm, having)
its registered moffice at A-603, Winsway)
Complex, Old Police Line, Opp. Andheri)
Railway Station, Andheri (E))
Mumbai-400 069)

6. M/s. Skylark Habitat,)
a registered Partnership firm, having)
its office at Skylark Chambers)
No. 37/21, Yellappa Chetty Layout,)
Ulsoor Road, Bangalore 560 042)

7. Mrs. Nishant, d/o Mr. Abbas Khan, adult,)
Indian Inhabitant, resident of No. 2336, HAL,)
3rd Stage, Bangalore-560 017)

8. Mr. H.B. Abdul Azeem, s/o late)

Mr. H.R. Abdul Basith, adult, Indian)
Inhabitant, presently at No. 10,)
Serpentine Street, Richmond Town,)
Bangalore-560 025)

9. Mr. L. Umesh, s/o Mr.C. Lakshmaiah,)
adult, Indian Inhabitant, resident of)
No. 85, 4th Main, G.M. Palya,)
Thippasandra Post, Bangalore-560 075)

10. Ishani Realty Pvt. Ltd.)
a Company incorporated and registered under the)
Companies Act, 1956, having its registered office)
at 3rd floor, Bengal Chemicals Building,)
502, Prabhadevi, Mumbai-400 025)

11. Lily Realty Private Limited,)
a Company incorporated and registered under the)
Companies Act, 1956, having its registered office)
at 3rd floor, Bengal Chemicals Building,)
502, Prabhadevi, Mumbai-400 025)

12. Asit Koticha, resident of 19th floor)
Rameshwar Apartments, Palkewadi,)
K.D. Marg, Prabhadevi, Mumbai-400 028)..Defendants

ALONGWITH
NOTICE OF MOTION NO. 1775 OF 2015
IN
SUIT NO. 499 OF 2015

Shashwati Realty Pvt. Ltd.)
a company incorporated under the Companies Act,)
1956, having its registered office at 3rd floor, Bengal)
Chemical Building, 502, Veer Savarkar Marg,)
Prabhadevi, Mumbai-400 025)..Applicant/
Defendant No.4

In the matter between

1. Kalpesh Kantilal Dedhia,)
adult, Indian Inhabitant, son of Kantilal P. Dedhia,)
103, Blue Pearl, Vidhya Mandir Road, Dahisar (East))
Mumbai-400 068)

2. Kantilal P. Dedhia, adult, Indian Inhabitant,)
103, Blue Pearl, Vidhya Mandir Road, Dahisar (East))
Mumbai-400 068)

3. Falguni Rakesh Shah,)
adult, Indian Inhabitant, resident of)
A-604, Parichay Apartments, Vidhya Mandir Road,)
Dahisar (East), Mumbai-400 068)..Plaintiffs

versus

1. Altius Developers Private Limited,)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at B/3, Prathnastar Building,)
Andheri, Sahar An dheri (East), Mumbai-400 069)

2. Shailesh Dilip Shah,)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

3. Bhavana Shailesh Shah)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

4. Shashwati Realty Pvt. Ltd.)
a company incorporated under the Companies Act,)
1956, having its registered office at 3rd floor, Bengal)
Chemical Building, 502, Veer Savarkar Marg,)
Prabhadevi, Mumbai-400 025)

5. M/s. Pashmina Altius Developers)
a registered Partnership firm, having its registered)
office at A-603, Winsway Complex, Old Police Line,)
Andheri Railway Station, Andheri (E),)

	Mumbai-400 069	)
6.	K.M. Anantkumar, adult, Indian Inhabitant having address at 47/A Nanjundeshwan Layour J.P. Nagar, 6th Phase, Bangalore-560 078	)))
7.	Manohar S. Reddy, adult, Indian Inhabitant, having address at Medikere Village, Daddar Gunjan Post Chintamani Taluka, Chikabauapura, Dist. Bangalore, Karnataka	))))
8.	Ishani Realty Pvt. Ltd. a Company incorporated and registered under the Companies Act, 1956, having its registered office at 3rd floor, Bengal Chemicals Building, 502, Prabhadevi, Mumbai-400 025	)))))..Defendants

ALONGWITH
NOTICE OF MOTION NO. 1777 OF 2015
IN
SUIT NO. 522 OF 2013

Aahana Realty Pvt. Ltd. a company incorporated under the Companies Act, 1956, having its registered office at 3rd floor, Bengal Chemical Building, 502, Veer Savarkar Marg, Prabhadevi, Mumbai-400 025	)))))..Applicant Defendant No.4

In the matter between:

1.	Kalpesh Kantilal Dedhia, adult, Indian Inhabitant, son of Kantilal P. Dedhia, 103, Blue Pearl, Vidhya Mandir Road, Dahisar (East) Mumbai-400 068	))))
2.	Kantilal P. Dedhia, adult, Indian Inhabitant, 103, Blue Pearl, Vidhya Mandir Road, Dahisar (East) Mumbai-400 068	)))
3.	Falguni Rakesh Shah, adult, Indian Inhabitant, resident of	))

A-604, Parichay Apartments, Vidhya Mandir Road,)
Dahisar (East), Mumbai-400 068)..Plaintiffs

versus

1. Altius Developers Private Limited,)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at B/3, Prathnastar Building,)
Andheri, Sahar An dheri (East), Mumbai-400 069)

2. Shailesh Dilip Shah,)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

3. Bhavana Shailesh Shah)
Indian Inhabitant, resident of A/303)
Royal Vasundhara, C.S. Road, Near Avdhoor Nagar,)
Dahisar (East), Mumbai-400 068)

4. Aahana Realty Pvt. Ltd.)
a company incorporated under the Companies Act,)
1956, having its registered office at 3rd floor, Bengal)
Chemical Building, 502, Veer Savarkar Marg,)
Prabhadevi, Mumbai-400 025)

5. M/s. Pashmina Altius Developers)
a registered Partnership firm, having its registered)
office at A-603, Winsway Complex, Old Police Line,)
Andheri Railway Station, Andheri (E),)
Mumbai-400 069)

6. K.M. Anantkumar, adult, Indian Inhabitant)
having address at 47/A Nanjundeshwan Layour)
J.P. Nagar, 6th Phase, Bangalore-560 078)

7. Manohar S. Reddy, adult, Indian Inhabitant,)
having address at Medikere Village, Daddar Gunjan)
Post Chintamani Taluka,)
Chikabauapura, Dist. Bangalore, Karnataka)

8. Ishani Realty Pvt. Ltd.)
a Company incorporated and registered under the)
Companies Act, 1956, having its registered office)
at 3rd floor, Bengal Chemicals Building,)
502, Prabhadevi, Mumbai-400 025)..Defendants

Mr. Kapur alongwith Ms. P. Jain instructed by Law Globle for the Plaintiffs.

Mr. Sharan Jagtiani i/by Mr. Madhusadan Gawde, for the Applicant/Defendant No. 11 in Notice of Motion No.1776 of 2015 in Suit No. 512 of 2013.

Mr. Mayur Khandeparkar alongwith Ms. K. Chandarana i/by Mehernosh Humranwala & Co, for the Applicant/Defendant No.4 in Notices of Motion Nos.1774 of 2015 in Suit No.512 of 2013, 1775 of 2015 in Suit 499 of 2015, 1777 of 2015 in Suit 522 of 2013.

CORAM: S.J. KATHAWALLA, J.
DATED: 18TH FEBRUARY, 2016.

JUDGMENT:

1. By these Notices of Motion, the Applicants seek dismissal of the respective Suits under the provisions of Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (hereinafter "the CPC"). For convenience, the parties and the pleadings are referred to as they are in Suit No. 512 of 2013.

2. Before dealing with the Notices of Motion on merits, it would be relevant to mention at the outset that in this matter, after the arguments concluded on 1st December, 2015, this Court had indicated that it would be allowing the Notices of Motion, i.e. rejecting the Plaint as the same is barred by limitation. Before the Order could be finalised and uploaded, the Counsel for the successful Applicants/Original Defendants, Mr. Jagtiani and Mr. Khandeparkar, mentioned the matter in Court to point out that they have come across a Judgment of this Court in the case of *Export Credit Guarantee Corporation of India Ltd. v. Mr. T. Mathew & Ors.* [1](" *the ECGC Judgment*") that may be read against them on the point of maintainability of an application under Order 7 Rule 11(d) of the CPC to reject the Plaint on the ground of limitation. They informed the Court that the said Judgment appears to take the view that a ground of limitation cannot be raised as a bar of law to the maintainability of a suit under Order 7 Rule 11(d). This point of maintainability was in fact not even argued by the Plaintiffs at the hearing of the Notices of Motion on 1st December, 2015. Mr. Jagtiani and Mr. Khandeparkar, did, whilst pointing out the said Judgment, also submit that they would like to deal with the said Judgment and make submissions on why it ought not to apply to the case at hand.

3. In view of this development, on 12th February, 2016 I recalled my Order (as orally indicated) of allowing the Notices of Motions and then listed the matter on 17th February, 2016, for hearing arguments only on the effect of the said Judgment in the case of *Export Credit Guarantee Corporation of India Ltd. (supra),* on the limited point of maintainability of the Notices of Motion to reject the Plaint. It was made clear then that no further arguments on the merits of the Notices of Motion would be permitted, that part having already been heard by me at length. These events have also been recorded in my Order dated

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12th February, 2016.

4. Accordingly, on 17th February, 2016, I heard the parties on the maintainability of the Notices of Motion under Order 7 Rule 11(d), the main issue being whether a bar of limitation as apparent from the Plaint, is ground in law that can be raised under Order 7 Rule 11(d) of the CPC.

5. After hearing the parties on this aspect of the matter, I am satisfied that the Judgment delivered in ECGC (supra), would not apply, as it is *per incuriam* as it has not considered two binding judgments of the Division Bench of the Bombay High Court, as discussed hereinbelow. I therefore maintain my earlier decision of allowing the Notices of Motion under Order 7 Rule 11(d) of the CPC for rejection of the Plaint.

6. I have in the judgment considered the submissions in the order in which they were argued. The first part deals with my decision on the merits of the Notices of Motion and the rejection of the Plaint. I have thereafter dealt with the Judgment delivered in *ECGC (*supra), and the reasons for concluding that an application for rejection of the Plaint under Order 7 Rule 11(d), on the ground that the Plaint is ex-facie barred by limitation is maintainable under that provision.

7. The Suit has been filed by the three Plaintiffs, who claim to be Minority Shareholders, holding 15% of the Equity Share Capital, of the Defendant No. 1 Company. Defendant Nos. 2 and 3 are the Majority Shareholders of Defendant No. 1, holding the balance shares, comprising 85% of the Equity Share Capital. Defendant No. 1 Company, and Defendant No. 4 were Partners in the Partnership Firm of Defendant No. 5. Defendant No. 5 had entered into a Joint Development Agreement ("JDA") with the erstwhile owners of certain land located outside Bengaluru, being Defendant Nos. 6 to 9. After Defendant No. 1 was said to have retired from the Partnership, which is the contentious event, as seen from the Plaint, Defendant No. 10 was inducted into the Partnership as the Incoming Partner. After that took place, the JDA with the owners was cancelled and instead the owners of the subject land entered into Agreements for Sale and thereafter Sale Deeds, conveying the subject land to Defendant No. 11, the Applicant in Notice of Motion No.1776 of 2015. Defendant No. 12 is joined as the person who is said to be in control, inter alia, of Defendant No. 11.

8. The Suit has been filed by the Plaintiffs as a derivative action, purporting to be for and on behalf of and to protect the interest of Defendant No. 1 Company, in which they are Minority Shareholders. The main challenge in the Suit, as is seen from prayer (a), is to a Deed of Retirement dated 10th July 2009 (Exhibit "D" to the Plaint), pursuant to which Defendant No.1 Company retired as a Partner from the Partnership Firm of Defendant No. 5. It is the case in the Plaint, in paragraph 17 and in prayer (a), that after Defendant No. 1 Company retired as a Partner, various other documents were executed, by which development rights in favour of the Partnership Firm were cancelled and the land was instead sold to Defendant No. 11. Those documents and agreements are also challenged, and are described as "subsequent documents" in prayer (a) of the Plaint.

9. It is also clear from the Plaint that the challenge to those 'subsequent documents' would survive only if the Suit to challenge the Deed of Retirement is maintainable in law. If, however, the said Suit is liable to be dismissed as being barred by limitation, then the Plaintiffs in this derivative action would not be able to challenge the other subsequent documents or agreements.

10. Briefly stated, it is the case of the Applicants that, ex- facie, based on the averments in the Plaint, the challenge to the Deed of Retirement dated 10th July 2009 is barred by the law of limitation. It is contended by Mr. Jagtiani and Mr. Khandeparkar that the Plaintiffs claim that the Deed of Retirement came to be executed pursuant to a resolution of Defendant No. 1 Company, which they dispute as being fraudulent as the meeting itself never took place. According to the Applicants, that is a matter entirely between the Shareholders of the Defendant No. 1 Company. For the purposes of the Applications, it is clear from the Plaint that the Plaintiffs had knowledge of the Deed of Retirement in July – August 2009, itself. Therefore, the period of limitation to challenge it would begin then. The Suit has been filed on 16th January 2013, which is more than three years after the commencement of the period of limitation.

11. It is then submitted that the only pleading in the Plaint as regards the bar of limitation is in paragraph 24. The first is a plea of exclusion of time under Section 14 of the Limitation Act, 1963 ("the Act") and the second, is on account of certain negotiations between the parties. According to the Applicants, ex- facie and based on the pleadings in the Plaint and as a matter of law, neither of these two pleas can extend the period of limitation, and therefore the Suit is time-barred, having been filed more than three years after the accrual of the cause of action to file this Suit. It is submitted that Section 14 of the Act can have no application to exclude time, as the proceeding to which it has been applied, i.e., a CLB proceeding filed by the Plaintiffs, does not even, according to the averments in the Plaint, meet the requirements of Section 14 of the Act.

12. Counsel for the Plaintiffs contends that the filing of the present Suit was after the Order and Judgment of the CLB, which made certain findings in favour of the Plaintiffs as regards the Deed of Retirement having been obtained by fraud. It was therefore suggested that there was no delay in the filing of the present Suit. It was also argued that according to the Plaint there were negotiations between the Plaintiffs and the Defendant No. 2 as regards the Deed of Retirement, and in this regard reference is made to a letter dated 18th January 2010, received from Defendant No. 2. Again, the suggestion was that this defers the start of the limitation period for the purpose of challenging the Deed of Retirement.

13. Before considering the specific pleadings in paragraph 24 as regards the bar of limitation, it is necessary to set out the paragraphs in the Plaint that relate to the Deed of Retirement, and the Plaintiffs knowledge of the same. The relevant pleadings are as follows:

> "*6.... Accordingly on instructions of defendant no. 2, the plaintiffs on 20.07.2009 and 01.08.2009 handed over all the records pertaining to the said project and subject matter of the said JDA was handed over. The Plaintiffs state that the said Defendant No. 2 i.e. Shailesh D. Shah who was the Shareholder and Director of the Defendant No. 1 company, in collusion with Defendant No. 4 entered into a purported Deed of Retirement dated 10th July 2009 purporting the Plaintiffs to retire from the partnership firm of Defendant No. 5.*
>
> *7. The plaintiff states and submits that as the aforesaid information of the alleged retirement the authority of which derived through some alleged resolution came as a shock to him,*

the plaintiffs immediately caused search to be made at the office of the registrar of firms. The said search revealed that the defendant no. 2 pursuant to some alleged resolution of 09.07.2009 has executed an alleged retirement deed dated 10.07.2009, copy of which along with Form B and E are annexed herewith and marked as "Exhibit D" to the said plaint.

It is submitted that immediately thereafter objections were filed before the Registrar of Firms objecting to the registration of the amended partnership deed and as a result of the said objections, so filed, no action on the proposed amendment has been taken by the office of the Registrar and the issue is pending. Copy of the letter dated 07.08.09, filed with the Registrar of Firms containing such objections is annexed herewith and marked as Exhibit E to the present plaint. Needless to say that similar objections were also send to the Board of directors of the defendant no. 4.

8. The plaintiffs state and submit that the inspection of the record from the office of the registrar revealed that under the purported deed of retirement dated 10.07.2009, the defendant no. 10 has sought to be inducted as a new partner in defendant no. 5. Not only this it also got revealed that the defendant no. 1 company is alleged to have given up all its right, title, interest in the suit property subject matter of the JDA. Apart from that it also got revealed that no amounts have been paid to defendant no. 1 by defendant no. 5 and/or defendant no. 4 for relinquishment /surrender of the rights in the said immovable property.

9. The plaintiffs state and submit that they realised that fraud has been played on them, immediately also vide their letter dated 21.08.2009, 09.09.2009 as well as email messages dated 21.08.2009 and 09.09.2009, collectively annexed and marked as Exhibit F, to *the said plaintiff objected and challenged the said purported retirement deed.*

10. The plaintiffs state and submit that as the actions of the defendants were un utter disregard to the law, they were compelled to file a Company Petition, being CP No. 33 of 2010, before the Company Law Board (CLB), Mumbai Bench, Mumbai, praying for various relief, inter alia, praying that the purported deed dated 09/10.07.2009, be also declared null and void & inoperative in law consequent to alleged resolution dated 09/07/2009.

17. That the facts and circumstances stated herein above, it is most respectfully submitted that:-

(i) The purported resolution dated 09.07.2009 being invalid and/or nonexistent is null and void.

(ii) The purported retirement deed dated 09/10.07.2009, is null and void for want of consideration apart from also being bad in law for non service of mandatory notice of 3 months as per the partnership deed dated 10.01.2008.

That in light of the said facts, the plaintiffs stated and submit that the defendant no. 1 company continues to be a partner in the defendant no. 5 firm entitling it to the profit ratio of 50%.

(iii) The Purported cancellation deed dated 27.01.2010 is also void for want of consideration apart from the strength of the facts submitted herein above.

(iv) The purported Agreement to sell dated 27.01.2010 and the subsequent sale deeds so executed are null and void ab-initio in

light of the facts submitted herein above.

(v) That the blatant instance of fraud, as is explicitly evident in the present case, as perpetrated by the defendants upon the defendant no. 1 company in collusion with each other is within itself good enough to vitiate and unravel everything claimed by the defendants.

18. The plaintiffs state and submit that the Company Law Board, Mumbai Branch, Mumbai, in its final order dated 29.08.2012, was pleased to allow the Company Petition No. 33. of 2010, filed by the plaintiffs holding inter alia that there was no valid resolution dated 09.07.2009, in the absence of which there could not be a retirement deed retiring defendant no. 1 company and depriving it of its valuable rights. The CLB further held that the retirement deed bring (sic) without consideration has no legal validity and sanctity. The CLB further held that in the absence of a valid retirement deed there could not have been a valid cancellation deed and thus held that the basis of all these documents to be unfounded. The Plaintiffs crave leave to refer to and rely upon the CLB Co Petition No 33 including Orders passed therein and the proceedings arising there from including orders passed therein when produced."

14. It is in the context of the above averments and challenge, that the Plaint, at paragraph 24, raises two pleas to save limitation. Again, it would be relevant to set out paragraph 24 in its entirety, which reads as follows:-

"*24. No part of the Plaintiffs' cause of action is barred by Limitation. The Plaintiffs had filed Company Petition No 33 of 2010* *before the Hon'ble CLB, Mumbai and in the said proceedings the Defendant No. 4 had filed their Affidavit in Reply dated 5th June 2010 disclosing the purported cancellation/Termination of Joint Development Agreement and the purported invalid and illegal Sale of the suit property in favour of Defendant No. 11. Thus the period of limitation lastly commenced on 5th June 2010. As regards the challenge to the Deed of Retirement, the Plaintiffs had challenged the same in the aforesaid Company Petition No. 33 of 2010, which came to be disposed off vide Order dated 29/8/2012. The said proceedings of the Company Petition being bonafide proceedings adopted by the Plaintiffs the period from 21/04/2010 till 29/8/2012 are liable to be excluded under Section 5 of the Limitation Act. The Plaintiffs states that the Defendant No. 4 & 11 has preferred Appeal under Section 10 F of the Companies Act challenging Order dated 29/8/2012 and the said Appeal's are pending. In any event the Plaintiffs states that receipt of the letter dated 18/1/2010 from Defendant No. 2 to the Plaintiffs, as there were negotiations between the parties including Defendants for setting aside the said alleged Deed of Retirement as is revealed from the fact that the Deed of Retirement was no acted upon by virtue of the continuance of the Bank Account of Defendant No. 5 s 236 of 2014 (902) Evidence 1 15.07 firm in joint signature of representative of defendant no. 1 company and representative no. 4 company and the email communication dated 12/08/20009 (sic) exchanged between the parties, the challenge to the Deed of Retirement is also not barred, by the Limitation Act. The Plaintiffs shall crave leave to refer to and rely upon the proceeding, communication and emails, when produced."*

15. It is apparent from a reading of the Plaint, that the main challenge in the Suit is to the Deed of Retirement dated 9th July 2009. Further, it is also clear from the paragraphs of the Plaint extracted above that the Plaintiffs were aware of the Deed of Retirement by July – August 2009 itself. That would be the starting point for computing the period of limitation for seeking a declaration that the said Deed of Retirement is illegal, null and void and not binding upon the Defendant No. 1 Company. The Suit has been filed on 16th January 2013, i.e., more than three years from the commencement of the period of limitation.

16. In my opinion it is very clear that on these facts alone, based on a bare reading of the Plaint, the Suit would be barred by limitation, unless the bar of limitation is saved by any of the provisions of the Act. The Plaintiffs, being obviously conscious of this position, have sought to invoke an exclusion of time in paragraph 24 of the Plaint. This is really the only issue to be considered by the Court.

17. First, the Plaint seeks to exclude under Section 14 (mistakenly referred to as Section 5 in the Plaint) of the Act, the period spent prosecuting Company Petition No. 33 of 2010 before the Company Law Board. The period for which exclusion is claimed is 21st April 2010 (date of institution of the Company Petition) to 29th August 2012 (date of the CLB Order and Judgment). The second plea that has been made, very cursorily and without any explanation as to how it might save limitation, is about some negotiations between the Plaintiffs and the Defendant No. 2 for setting aside the Deed of Retirement, and to a letter of 18th January 2010.

18. Before considering whether the time spent prosecuting Company Petition No. 33 of 2010 can be excluded for the purposes of calculating the period of limitation, or whether the CLB Petition is at all a proceeding within the meaning of Section 14 of the Act, it would be relevant to set out the provisions of Section 14 of the Act. Section 14 of the Act reads as follows:

> *"14.* ***Exclusion of time of proceeding bona fide in court without jurisdiction.***– *(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain.*
>
> *(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other*

cause of a like nature, is unable to entertain it.

(3)…

Explanation.- For the purposes of this section-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction"

19. It is clear from a plain reading of Section 14 of the Act, that to claim any exclusion of time by invoking Section 14, the other civil proceeding must relate to the same matter in issue; against the same defendant; it must be prosecuted in good faith; and the other court (or forum, such as the Company Law Board) must be unable to entertain it due to a defect of jurisdiction or a like defect. The question for the present purposes is: whether Company Petition No. 33 of 2010 instituted in the Company Law Board, Mumbai, qualifies as another proceeding under Section 14 of the Act.

20. Whilst Company Petition No. 33 of 2010 may satisfy the other requirements of Section 14 of the Act, being a civil proceeding against the same or substantially the same defendants and instituted in the Company Law Board, which would for the purposes of Section 14 be a 'court', it must also meet the last requirement of a proceeding not being entertained by the CLB due to a defect of jurisdiction or like defect.

21. There is absolutely no pleading in the Plaint, either in paragraph 24 or elsewhere, to suggest that Company Petition No. 33 of 2010 was not entertained by the CLB due to a defect of jurisdiction or like defect. On the contrary, paragraph 18 of the Plaint states that the said Company Petition was allowed by holding, inter alia, that there was no valid Resolution dated 09.07.2009, in the absence of which there could not be a Retirement Deed retiring Defendant No. 1 Company, and depriving it of its valuable rights. Therefore, by reason of the pleading in paragraph 18 of the Plaint itself, the invocation of Section 14 of the Act to exclude time, is flawed.

22. This is also clear from the Order And Judgment of the CLB, in Company Petition No. 33 of 2010, dated 29th August 2012. The CLB concludes (at paragraph 113), that the CLB Petition is maintainable and that the Petitioners (Plaintiffs herein) have succeeded in making out a case of oppression and mismanagement. In doing so, the CLB rejected the submission made by the Respondents therein, including the present Applicants, that the CLB Petition was not maintainable under Sections 397 and 398 of the Companies Act, 1956 (hereinafter "the Companies Act") and that a derivative action cannot be filed in the garb of a Petition for oppression and mismanagement. After reaching this conclusion, the CLB (at paragraph 121) proceeded to grant some limited relief to the Petitioner, which again is a clear indication that the Petition was considered and allowed, to this extent, on merits. In other words, even in the CLB Order And Judgment itself, to which reference is made in paragraph 18 of the Plaint, there is nothing to suggest that the proceeding was not entertained by the CLB by reason of lack of jurisdiction or such other like defect.

23. On 14th December 2012, this Court admitted certain appeals filed under Section 10F of the Companies Act, by the Respondents to the Company Petition (including the Applicants herein), challenging the Order and Judgment of the CLB dated 29th August 2012. These 10F Appeals are pending hearing and are being contested by the Plaintiffs, being Respondents therein, which fact has been admitted in paragraph No. 24 of the Plaint.

24. More significantly, on 31st January 2013, the Plaintiffs (as Respondents to the aforementioned 10F Appeals) served upon the Appellants/Applicants a 'Cross Objection' raised by them to the Order and Judgment of the CLB dated 29th August 2012. By this Cross Objections the Plaintiffs are seeking from this Court the grant of certain other prayers or reliefs, which were not granted to them by the CLB. More particularly, the reliefs that they seek in the Cross Objections, are in effect the restoration of Defendant No. 1 Company to the status of a Partner of Defendant No. 5 and the setting aside of the Deed of

Retirement. This is apparent from the grounds taken in the Cross Objections and the prayers itself. By an Order dated 12th October 2015, this Court, without admitting the Cross Objections, has directed that the same be heard along with the pending 10F Appeals.

25. I have made reference to these subsequent proceedings (of Appeal and Cross Objections) as the Plaint itself, in paragraph 18, craves leave to refer to and rely upon proceedings arising from the CLB proceedings.

26. In addition to the averments in paragraph 18 of the Plaint and the CLB Order and Judgment, the Plaintiffs stand in the Cross Objections also makes it abundantly clear that it clearly understands the CLB proceeding to be one that has resulted in an order on merits. Far from it being the Plaintiffs case of the CLB proceeding being one that could not be entertained for want of jurisdiction or like defect, the Plaintiffs contend in the Cross Objections that the CLB should have gone a step further and granted to it more reliefs than it actually did. The Plaintiffs are deemed to be prosecuting the proceeding as contemplated by explanation (b) of section 14 of the Act.

27. Therefore, I am of the view that based on a reading of the Plaint, the CLB Order and Judgment and the subsequent proceedings arising there from such as the Cross Objections, there can be no exclusion of time spent prosecuting Company Petition No. 33 of 2010 in the Company Law Board, in computing the period of limitation. Section 14 of the Act can have no application in these facts and based on the pleading in the Plaint as it stands.

28. In this regard, the reliance placed by Counsel for the Applicants on the Judgment of the Hon'ble Supreme Court in the case of *M.P. Steel Corporation v. Commissioner of Central Excise*[2], is well founded. In this recent judgment, the Hon'ble Supreme Court had occasion to review the legal position of Section 14 of the Act. In explaining the conditions for the applicability of Section 14 of the Act, the Court said as follows[3]:

> "*49. The language of Section 14, construed in the light of the object for which the provision has been made, lends itself to such an interpretation. The object of Section 14 is that if its conditions are otherwise met, the plaintiff/applicant should be put in the same position* ***as he was when he started <u>an abortive proceeding</u>****. What is necessary is the absence of negligence or inaction. So long as the plaintiff or applicant is* ***bona fide pursuing a legal remedy <u>which turns out to be abortive</u>****, the time beginning from the date of the cause of action of an appellate proceeding is to be excluded if such appellate proceeding is from an order in an original proceeding*

2 (2015) 7 SCC 58

3 *Supra*, at paragraph 49, page 94

instituted without jurisdiction ***or which <u>has not resulted in</u>*** ***<u>an order on merits</u> of the case****....*"(Emphasis Supplied)

29. It is clear from the text above that the exclusion of time must relate to a proceeding that turns out to be abortive or discontinued and not one which has resulted in an order on the merits of the case. Applied to the present case, Company Petition No. 33 of 2010 is not an abortive proceeding, in fact as mentioned herein, an Appeal and Cross Objection are presently pending, and is a proceeding which according to the Plaintiffs has resulted in an order on merits.

30. Apart from reliance on Section 14 of the Act to save the bar of limitation, paragraph 24 makes a vague and unclear reference to some negotiations and a letter dated 18th January 2010. There is no explanation in the Plaint as to how this would save the bar of limitation. It is well settled that negotiations would not extend the period of limitation and nor would it stop time from running, once the period of limitation has commenced. It is clear from the averments in the Plaint that the Plaintiffs had knowledge of the alleged fraud and the Deed of Retirement dated 9th July 2009 in the month of July-August 2009 itself. The three-year period of limitation for seeking a declaration in terms of prayer clause (a), would, under Article 58 of the Schedule to the Act, expire in July-August 2012. The reference to some negotiation with Defendant No. 2, without even mentioning any negotiations with the other parties to the Deed of Retirement (i.e., Defendant No. 4 and Defendant No 10), does not save the bar of limitation.

31. For all these reasons I would hold that the challenge to the Deed of Retirement is, from a reading of the Plaint, barred by the law of limitation.

32. Once it is established that the Suit, as regards this challenge, is barred by the law of limitation and therefore liable to be dismissed, the challenge to the other 'subsequent documents' set out in paragraph 17 of the Plaint, does not survive. The challenge to all the other deeds and documents is premised on the Deed of Retirement being set aside and the Defendant No. 1 Company being restored to the position of Partner of Defendant No. 5 Firm. Without the Deed of Retirement being set aside, neither Defendant No. 1 nor its Minority Shareholders in a derivative action, would have any locus to challenge the other deeds and documents and would not be able to maintain any cause of action to challenge such deeds and documents executed by a partnership firm, of which Defendant No. 1 is not a partner and therefore not concerned with the same.

33. As regards the Judgment in the case of *Export Credit Guarantee Corporation* (supra), the Court in that case relied upon an earlier decision of a Single Judge of this Court in the case of *Western Coalfields Ltd. v. Shri Chandraprakash K. Khare*[4]. The Court in Western Coalfields referred to

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4 2010(3) Bom. C.R. 344

various decisions of the Hon'ble Supreme Court, including Judgments of the Apex Court in *Hardesh Ores (P) Ltd. v. Hede and Company* [5] and *Balsaria Construction (Petitioner) Ltd. v. Hanuman Seva Trust and Ors.*[6]. The Judgment in *Balsaria Construction (* supra), is a Judgement delivered by a two-judge Bench of the Hon'ble Supreme Court but in that matter, before the final order and judgment, the matter was referred to a larger bench of three judges because of an apparent conflict between two prior decisions in the cases of *N.V. Srinavasa Murthy v. Mariyamma*[7] and *Popat and Kotecha Property v. State Bank of India Staff Assn.* [8].

34. The question that was referred to a larger Bench, as stated in paragraph 5 of the Judgment in Balsaria Construction (supra), was, " *Whether the words 'barred by law under Order 7 Rule 11(d) would also include the ground that it is barred by the law of limitation.*"

35. This question never came to be answered by the Three Judge Bench constituted in the case of *Balsaria Construction,* because, as noted in paragraph 6 of the Final Judgment in Balsaria Construction, the Three Judge Bench observed as follows:

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5 (2007) 5 SCC 614

6 (2006) 5 SCC 658

7 (2005) 5 SCC 548

8 (2005) 7 SCC 510

> "*... It is not the case of either side that as an absolute proposition an application under Order 7 and Rule 11(d) can never be based on the law of limitation. Both sides state that the impugned judgment is based on the facts of this particular case and the question whether or not an application under Order 7 Rule 11(d) could be based on law of limitation was not raised and has not been dealt with. Both sides further state that the decision in this case will depend upon the facts of each case.*"

36. In *Balsaria Construction (* supra), the Two Judge Bench, at paragraph 8, went on to hold that the present suit could not be dismissed as barred by limitation. The Judgment then went on to state that, "*... We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure.*"

37. In my view, the Hon'ble Supreme Court in *Balsaria Construction (*supra), clearly does not state that an application under Order 7 Rule 11(d) can never lie for seeking dismissal of a suit on the ground of limitation. The final decision rested on the facts of that particular case without laying down any absolute proposition of law in this regard.

38. A later decision of the Hon'ble Supreme Court in *Hardesh Ores (P) Ltd. (*supra), clearly holds that "law" within the meaning of Order 7 Rule 11(d) of the CPC, as a ground for dismissing a suit, would include the 'law of limitation'. At paragraph 25, the Judgment observes:

> "*The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well…*"

39. Based on the above statement of law, the Hon'ble Supreme Court in paragraph 41, upheld the decision of the trial court and the High Court dismissing the suit as being barred by limitation.

40. In *Western Coalfields (* supra), a Single Judge of this Court relying upon *Balsaria Construction* (supra), took the view that a plaint cannot be rejected on the ground of limitation. The Learned Judge gave his own reasons in paragraph 8 of the Judgment, in addition to what he considered to be the reasons in support of this proposition in the case of *Balsaria Construction (* supra). In brief, the reasoning of the Learned Single Judge was that the law of limitation does not prevent a party from instituting a suit and therefore the law of limitation is not a bar or prohibition to taking cognizance of the suit. This, according to the Learned Judge, is the reason for limitation not being a ground available under Order 7 Rule 11(d) of the CPC.

41. It is relevant to note that whilst the Learned Single Judge did notice the later Judgment of the Supreme Court in *Hardesh Ores (*supra), there is no discussion by the Learned Single Judge as to why the clear statement of law laid down in that case would not bind the Court.

42. This Court in *Export Credit Guarantee Corporation (*supra), in paragraph 57, sets out the Judgment of the Learned Single Judge in *Western Coalfields (*supra). Then, in paragraph 58 of the Judgment (in *Export Credit Guarantee Corporation*), the Learned Single Judge sets out his own further reasons for following the view taken in *Western Coalfileds (* supra). Paragraph 58 of the Judgment in *Export Credit Guarantee Corporation*, states as follows:

> "*A perusal of section 3 of Limitation Act clearly indicates that every suit filed after prescribed period has to be dismissed subject however to provisions contained in section 4 to 24 of the Limitation Act, 1963, even if limitation has not been set up as a defence. In so far as remedy under order 7 rule 11 of the CPC, 1908, is concerned, if the conditions set out therein are satisfied, suit cannot be dismissed but only plaint can be rejected. Under order 7 rule 13 of the CPC, even if plaint is rejected, fresh suit can be filed whereas if suit is dismissed on the ground of limitation, no fresh suit can be filed in respect of such time barred claim. In my view both the provisions thus operate in different field. Plaint therefore cannot be rejected under order 7 rule 11 of CPC in the ground of limitation. If according to the defendant no.3, suit is barred by limitation, such issue can be raised by defendant no. 3 in the affidavit in reply or in the written*

statement and such issue if raised can be tried by this court as a preliminary issue."

43. It must be noted that the decision of the Learned Single Judge in *Export Credit Guarantee Corporation (*supra)*,* was carried in appeal and was not interfered with, but the Hon'ble Appeal Court did not consider this aspect of the matter at all. The decision of the Appeal Court says nothing on this view of the law at all.

44. As mentioned above, the Judgment in *Export Credit Guarantee Corporation (*supra), does not notice, and therefore does not consider two binding decisions of the Division Benches of this Court, that in terms hold that an application for dismissal of a suit under Order 7 Rule 11(d) of the CPC is maintainable on the ground that the suit, as seen from the averments in the plaint, is barred by the law of limitation. In this view of the matter, I am not required to consider whether I agree with the views expressed on this point in *Export Credit Guarantee Corporation* so as to decide whether the decision on that point warrants reference to a larger bench. This is because, two Division Benches of this Hon'ble Court have, before the date of the Judgment of the Learned Single Judge in Export Credit Guarantee Corporation (supra), taken a different view.

45. The first of the Division Bench decisions is in the case of *Kanayalal*

Madhavji Thakkar v. Shree Padmanabh Builders (Coram: Dr. D.Y. Chandrachud and Anoop V. Mohta, JJ.)[9]. The Division Bench in paragraphs 10 and 12 of the judgment, held as follows:

> *"10. In this context, it would be necessary to advert to some of the well settled principles underlying the interpretation of Order 7 Rule 11 of the Code. In Sopan Sukhdeo Sable vs. Assistant Charity Commissioner, 2004(5) Mh. L. J. (SC) 129 = AIR 2004 SC 1801 the Supreme Court held that the real object of Order 7 Rule 11 is to keep out of Courts irresponsible law suits. For the purpose of deciding an application under clauses (a) and (s) of Order 7 Rule 11, the averments in the Plaint are germane. The plea taken by the Defendant in the Written Statement would be wholly irrelevant at that stage. In exercise of its jurisdiction under Order 7 Rule 11 what is required is a meaningful and not a formal reading of the Plaint and clever drafting which creates an illusion of a cause of action ought not to detract from the jurisdiction of the Court on an application for rejection. In Popat and Kotecha Property vs. State Bank of India Staff Association, (2005)7 SCC 510 the earlier judgments on the subject were revisited and the Supreme court held that under Order 7 Rule 11 an independent remedy is made available to the Defendant to challenge the maintainability of the suit irrespective of his right to contest it on merits. The use of the word "shall" casts a duty on the Court to perform its obligations in rejecting the plaint when it is hit by any of the infirmities provided in the four clauses of Rule 11. For that purpose, the statement of claim without addition or subtraction*

9 2011 (1) Mh. L. J. 939

must show that it is barred by any law to attract the application of Order 7 Rule 11. A bench of two learned Judges of the Supreme Court in Balasaria Constructions (P) Ltd. vs. Hanuman Seva Trust, (2006) 5 SCC 662 referred the question as to whether the rejection of Plaint on the bar of limitation is within the scope of Rule 11(d) to the larger Bench. When the case came up before a Bench of three learned Judges, counsel for both the parties stated that it was not the case of either side that as an absolute proposition under Order 7 Rule 11(d) that an application can never be based on the law of limitation. Both the sides stated before the Court that the impugned judgement was based on the facts of that particular case. In view of the statement the question which was referred to a larger Bench was rendered academic and the case was sent back to the Bench for disposal on merits. Thereafter in Balasaria Construction (P) Ltd. vs. Hanuman Seva Trust, (2006) 5 SCC 658 the Bench of two learned Judges of the Supreme Court held that "the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence" holding that the question of limitation was a mixed question of law and fact, the Supreme Court held that ex facie in that case on a reading of the plaint it could not be held that the suit was barred by time. In Hardesh Ores (P) Ltd. vs. Hede and Company, 2007(5) Mh. L. J. (SC) 577 = (2007)5 SCC 614 a Bench of two learned Judges of the Supreme Court accepted a plea that the Plaint was liable to be rejected on the ground that the claim was barred by limitation. This was in the context of a suit for specific performance where under Article 54 of the Limitation Act, the suit should have been filed within three years from the date on which the Plaintiff had *notice that the renewal of the agreement was refused by the Defendant.*

12. In view of the law laid down by the Supreme Court on an application under Order 7 Rule 11(d) the issue as to whether the claim of the Plaintiff to the counter-claim is barred by limitation must be decided on the face of the counter-claim as to stands. There is no question at this stage of leading or letting in any evidence. This is one of those cases where on the fact of the counter-claim it is evident that the Plaintiff to the counter-claim had notice of the termination of the agreement on 7th February, 2000 and of the refusal of the Defendant to the counter-claim to perform the agreement both by the notice of termination and from the reliefs claimed in the suit against him, which was instituted on 27 March, 2000. Hence, the counter-claim which was lodged on 9 August, 2004 was well beyond the period of limitation and was barred by limitation."

46. Significantly, the Judgment considers the aforesaid decisions of the Hon'ble Supreme Court in the cases of *Balsaria Construction Ltd. (*supra), and *Hardesh Ores (*supra). This Judgment that was not noticed by the Learned Single Judge in *Export Credit Guarantee Corporation (supra),* leaves no manner of doubt that a ground of limitation based on the averments in the plaint, is very much a ground that can be raised for rejection of the plaint under Order 7 Rule 11(d) of the CPC.

47. The next binding judgment of the Division Bench of this Court is in the case of *Merit Magnum Constructions v. Nand Kumar Anant Vaity & Ors.*[10] (Coram: Dr. D.Y. Chandrachud and M.S. Sonak, JJ.). In paragraph 20 of the Judgment, after considering the observations of the Hon'ble Supreme Court in *Balsaria Constructions (*supra), the Court observed:

> "*From the aforesaid observations of the Supreme Court, it is clear that there is no absolute proposition that a plaint can never be rejected under Order 7, Rule 11 on the basis of the bar of limitation. This will depend upon the facts and circumstances of each case. Where the issue of limitation is a mixed question of law and fact or where a conclusion is not discernible from the statements in the plaint that the suit is barred by limitation, the plaint cannot be rejected by resort to Order 7, Rule 11(d) of CPC.*"

48. This judgment too clearly takes the view, as a matter of law, that in a given case a suit can be dismissed on the ground of limitation where the same is discernible from the plaint.

49. I am respectfully bound by both the above decisions of the Division Benches of this Court. Since neither of these decisions have been noticed in the Judgment in *Export Credit Guarantee Corporation (*supra), I am respectfully of the view that the Judgment of Export Credit Guarantee Corporation, only in so

10 2014(2)Bom C.R.182

far as this issue is concerned, and with respect to the view expressed in paragraph 58 of the Judgment, is *per incuriam*.

50. I am also of the opinion that the judgment in *Western Coalfields (supra)*, stands impliedly overruled by both of the above decisions of the Division Benches of this Court.

51. In other words, a plaint can be rejected under Order 7 Rule 11(d) of the CPC if from the averments in the plaint it is clearly barred by the law of limitation. For the reasons given in the first part of this Judgment, I have held that the Suit in the present case is ex facie barred by the law of limitation as is apparent from the averments in the plaint itself. When the rejection of the Plaint under Order 7 Rule 11(d) is on the ground of limitation, the same would tantamount to dismissal of the Suit itself. The Hon'ble Supreme Court in Suresh Kumar Dagla V/s. Sarwan and anr.[11] has, whilst confirming an order of the Trial Court under Order 7 Rule 11 (d) on the ground of limitation, 'dismissed' the Suit as barred by limitation.

52. In this view of the matter, Notice of Motion No. 1776 of 2015 is made absolute in terms of prayer (a). For the same reasons, companion Notices of Motion Nos. 1774 of 2015, 1775 of 2015 and 1777 of 2015, in Suit Nos. 512 of 2013, 499 of 2013 and 522 of 2013, respectively which arise in the same

11 (2014) 14 SCC 354, at paragraph 17

circumstances are also allowed in terms of prayer clauses (a). In the above view, the other prayers in the Notices of Motion do not arise for consideration. The suits accordingly stand dismissed. There shall be no order as to costs.

(S.J. KATHAWALLA, J.)