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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.472 OF 2014 IN
NOTICE OF MOTION NO.31 OF 2013 IN
SUIT NO.2894 OF 2011.

Bhagwanji Kanji Mistry
and another ...Appellants
vs.
New Purshottam Nagar Co-op
Housing Society Limited and others ...Respondents

Mr.Ravi Kadam, Sr.Advocate a/w Dr. Birendra Saraf
a/w Ms.Pooja Kshirsagar i/b I.C. Legal for the
appellants
Mr. V.A.Thorat, Sr.Advocate a/w Mr. Pravin
Samdani, Sr. Advocate a/w Mr. Niranjan Waghela i/b
M/s Pandya & Co for the respondent no.1
Mr.Gaurav Joshi, Sr.Advocate i/b Mr.Aditya Chitale
for the respondent no.5

CORAM : A.S.OKA, & P.D.NAIK, JJ.
DATE : APRIL 4 & 5, 2016

ORAL JUDGMENT: (PER A.S.OKA, J.)

1 The submissions of the learned counsel for the parties were heard on the earlier date. Today, the Appeal is fixed for dictation of the Judgment.

2 By this Appeal, the challenge is to the Judgment and Order dated 6th March 2014 passed by the learned Single Judge. The present appeal is preferred by the original defendant Nos.1 and 2. A Notice of Motion was taken out by the defendant No.2 under Rule 11 of Order VII of the Code of Civil Procedure, 1908 (for short 'the said Code'). The

prayer made in the Notice of Motion was for rejection of the plaint. With a view to appreciate the submissions made by the learned senior counsel representing the contesting parties, it will be necessary to make a reference to the substantive prayers in the plaint. The prayers containing substantive reliefs are prayers (a) to (k) which read thus:

“(a) That this Hon'ble Court do declare that the Consent Terms dated 18.8.2006 being Exhibit `N' hereto null and void ab initio, of no legal effect and conferring no rights in favour of the Defendant Nos.1 to 3;

(b) That this Hon'ble Court do declare that the Consent Terms dated 18.8.2006, being Exhibit `N' hereto terminated, of no legal effect and confer no rights in favour of Defendant Nos.1 to 3;

(c) That the Defendants be ordered and directed by this Hon'ble Court to deliver up for cancellation the Consent Terms dated 18.8.2006, being Exhibit `N' hereto;

(d) That this Hon'ble Court do declare that the Order dated 24.8.2006 passed by the Hon'ble Consumer Disputes Redressal Forum, South Mumbai District, Mumbai, being Exhibit `O' hereto, a nullity and void, of no legal effect and confer no rights in favour of Defendant Nos.1 to 3;

(e) That this Hon'ble Court do declare that the Plaintiff is entitled for conveyance of

the property, described at Exhibit 'B' hereto, from Defendant Nos.1 to 3;

(f) That this Hon'ble Court do direct Defendant Nos.1 to 3 to convey the property, described at Exhibit 'B' hereto to the plaintiffs;

(g) That this Hon'ble Court do declare that Defendant Nos.1 to 3 are not entitled to develop the property described at Exhibit 'B' hereto;

(h) That this Hon'ble Court do declare that the Sanctioned plan, Intimation of Disapproval (I.O.D.), Commencement Certificate and pursuant thereto further sanctions, permissions and approvals corresponding to I.O.D. u/no. CE/1781/WS ... dated 2nd June 2004 cancelled;

(i) That this Hon'ble Court do declare that Defendant Nos.1 to 3 have no right to utilize the FSI, additional FSI available by way of TDR or by any other means, in respect of the land component area corresponding to the construction of the Plaintiff's building of Ground floor plus 7 upper floors, i.e a built up area of about 2163 sq meters or make changes in the common areas and facilities, including the compound, parking areas, the children's play ground area and Recretional Ground;

(j) That this Hon'ble Court do direct Defendant No.4 not to grant, sanction, permit or approve any proposal to develop or change

the layout of the property, described at Exhibit `B' hereto, in any way whatsoever, without the written permission of the plaintiff;

(k) That this Hon'ble Court by a permanent order and injunction do restrain Defendant Nos.1 to 3 their managers, contractors, agents, workers and persons from in any manner constructing on the property, described at Exhibit `B' hereto."

3 As the prayer made before the learned Single Judge was a very limited prayer for rejection of the plaint, it is not necessary to go into the various factual details of the case in as much as for considering the prayer for rejection of the plaint, the defence of the defendants is not to be considered and only the averments made in the plaint and the documents forming part of the plaint are to be looked into.

4 The learned senior counsel appearing for the appellants has raised various contentions. He submits that the rejection of plaint was sought by invoking clause (d) of Rule 11 of Order VII of the said Code. His first submission is based on the provisions of the Consumer Protection Act, 1986 (for short `the said Act of 1986'). He pointed out the scheme of the provisions of the said Act of 1986. He invited our attention to the remedies provided under the said Act of 1986 and the scope of jurisdiction of the various Authorities under the

said Act of 1986. He would urge that a remedy is provided under the said Act of 1986 for challenging the orders of the District Forum before the State Commission which is headed by a retired Judge of the High Court. He pointed out that further remedy of a revision is provided before the National Commission which is headed by a person who is or has been a Judge of the Supreme Court. He pointed out section 24 of the said Act of 1986 by pointing out that the orders of the District Forum or the orders which may be made by the State Commission or the National Commission are final, if no appeal is preferred against such orders. His submission is that in view of the said provision of section 24 which confers finality on the orders of the District Forum and in view of the availability of remedies under the said Act of 1986, there is an implied bar to the suit filed by the plaintiffs. He submitted that the challenge in the suit is to the consent terms admittedly filed between the contesting parties before the District Forum and the order passed thereunder. He submitted that Rule 3-A of Order XXIII of the said Code also creates a bar to the present suit. He pointed out the material averments made in the plaint as regards the cause of action. He submitted that the case made out in the plaint is that when on 26th July 2010, the defendant No.2 filed an affidavit in reply to the execution application filed by the plaintiffs that the plaintiffs realised that a fraud was played upon them by the defendants. He pointed out that the contention of the plaintiffs seems to be that the fact that there

was a restraint order passed by this Court in Suit No.1906 of 2006 on 13th July 2006 was never brought to the notice of the plaintiffs. He pointed out that according to the case of the plaintiffs, they became aware of the so called fraud on 26th July 2010. He invited our attention to the letter dated 2nd April 2007 which is addressed to the Chairman/Secretary of the plaintiffs by Shri Ashwin Mehta in which there is a specific reference to the injunction granted by this Court in Suit No.9906 of 2006. He pointed out that the said letter dated 2nd April 2007 is annexed to the reply filed by the opposite party before the said Consumer Disputes Redressal Forum and that a copy of the said affidavit in reply is annexed to the plaint. He submitted that the said letter will clearly show that as of April 2007, the plaintiffs had full knowledge of the ad-interim injunction granted by this Court in the aforesaid suit. He, would, therefore submit that going by the contents of the documents which are annexed to the plaint, the suit for declaration filed in October 2010 on the face of it was barred by limitation. He relied upon the decision of the Division Bench of this Court dated 5th March 2012 in the case of Sachin C. Shah and another Vs. Hemant D. Shah and others¹. He submitted that for the purpose of deciding an application for the rejection of Plaint under Rule 11 of Order VII of the said Code, annexures to the plaint are also required to be considered. On this aspect , he also relied upon another decision of the

1 Appeal (L) No.747 of 2011 decided on 5-3-2012

Apex Court in the case of Liverpool & London S.P. & I Association Limited Vs. M.V.SEA Success I and another² and especially paragraph 142 which holds that even the documents annexed to the plaint and the documents filed along with the plaint are required to be considered for the purpose of disposal of an application under Rule 11 of Order VII of the said Code. In support of the plea of the bar of limitation, he also invited our attention to the averments made by the plaintiffs in interim application filed before the Apex Court vide No.29880 of 2015.

5 He submitted that even assuming that there are allegations fraud, the Authorities under the said Act of 1986 have all the incidental and ancillary powers under which they can go into the aspect of alleged fraud. Moreover, he pointed out that in view of the consent terms, the complaint filed by the plaintiffs was disposed of but there is no order passed in terms of the consent terms. He relied upon the decision of the Apex Court in the case of Chief Executive Officer and Vice Chairman, Gujarat Maritime Board vs. Haji Daud Haji Harun Abu and others³. He also invited our attention to the decision of the Apex Court in the case of the United India Insurance Co. Ltd. vs. Rajendra Singh and others⁴. He urged that no Court or the Tribunal is powerless to recall its own order If it is vitiated

2 (2004) 9 SCC 514

3 (1996) 11 SCC 23

4 (2000) 3 SCC 581

by fraud or misrepresentation. He relied upon another decision of the Apex Court in the case of Income Tax Officer, Cannanore vs. M.K.Mohammed Kunhi⁵ and in particular what is held by the Apex Court in paragraphs 6 and 9. He submitted that the Authorities under the said Act of 1986 can always exercise powers to recall its orders. He also relied upon the decision of the Division Bench of this Court in the case of Arenja Industries Limited and another Vs. Jagdish C. Shah and others⁶. He relied upon the observations made in paragraph 12 of the said decision. He also relied upon well known decision of the Apex Court in the case of Dhulabhai vs. State of Madhya Pradesh and another⁷. He also relied upon the decision of the Apex Court in the case of Nivedita Sharma vs. Cellular Operators Association of India and others⁸ and submitted that in view of the law laid down by the Apex Court, the plaintiffs will have to exhaust the remedies under the provisions of the said Act of 1986 and implied bar of the jurisdiction of the Civil Court is attracted. He submitted that if the plaint and the annexures to the plaint are read as a whole, this is a clear case where the power of rejection of the Plaint ought to have been exercised as the suit was time barred and even otherwise, the jurisdiction of the Civil Court was barred.

6 The learned senior counsel representing the

5 AIR 1969 SC 430

6 2011 (6) Bombay Cases Reporter 216

7 AIR 1969 SC 78

8 (2011) 14 SCC 337

original plaintiffs invited our attention to the prayers made in the plaint. He pointed out that only first four prayers are as regards consent terms filed before the District Forum. He pointed out that clauses (e) to (k) are essentially for enforcing rights of the plaintiffs or its members under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 'the MOFA Act'). He invited our attention to the decision of the learned Single Judge of this Court in the case of Export Credit Guarantee Corporation of India Limited vs. Mr.T. Mathew and others⁹. He submitted that the power under Rule 11 of Order VII cannot be exercised for rejecting the plaint on the ground that the same is barred by limitation. He relied upon the finding recorded by the learned Single Judge and urged that the learned Single Judge has rightly followed the earlier decision of this Court in the case of Western Coalfields Limited vs. Shri Chandraprakash K. Khare¹⁰. He submitted that the learned Single Judge has referred to the provisions of Rule 13 of Order VII of the said Code which provide that even if the plaint is rejected, a fresh suit can be filed. He submitted that if it is accepted that the plaint can be rejected in exercise of power under Rule 11 of Order VII of the said Code on the ground of bar of limitation, by virtue of Rule 13 of Order VII, a fresh suit will have to be entertained. He also invited our attention to the

9 2014 (4) All M.R. 135

10 2010 (2) All M.R. 713

well known decision of the Apex Court in the case of Mardia Chemicals Limited vs. Union of India and others¹¹. He submitted that in view of the fact that the dispute before the District Forum was not disposed of in terms of the consent terms, the Civil Court can always go into the question whether the consent terms are null and void.

7 The learned senior counsel for the defendants submitted that the learned Single Judge in the case of Export Credit Guarantee Corporation of India Limited has not correctly read Rule 13 of Order VII. His submission is that Rule 13 of Order VII does not mean that a fresh suit can be maintained after rejection of the plaint on all grounds. He submitted that in some of the cases covered by Rule 11 of Order VII, the plaint can be rejected for want of technical compliance such as non payment of Court fees or the failure to file the plaint in duplicate. His submission is that the view taken by the learned Single Judge does not lay down the correct proposition of law.

8 We have given careful consideration to the submissions. We have already quoted the prayers made in the plaint. As far as prayer clauses (a) to (d) are concerned, the same are in relation to the consent terms filed before the District Forum and the order passed on 24th August 2006 on the dispute in which consent terms were filed. The prayers (e) to (l) appear to be independent prayers. Prayer

11 AIR 2004 SC 2371

clause (e) is for a declaration that the appellant is entitled to conveyance from the defendants in view of the provisions of the MOFA Act. The prayer (f) is for a decree directing the execution of conveyance. Prayer (g) appears to a prayer consequential to the prayer clauses (e) and (f). By way of consequential relief, the plaintiffs have challenged the IOD granted to the defendants on 2nd June 2004 and have prayed for a declaration that the defendants have no right to utilise the FSI available by way of TDR in respect of the land component area corresponding to the construction of the Plaintiff's building of Ground floor plus 7 upper floors, i.e a built up area of about 2163 sq meters or make changes in the common areas and facilities, including the compound, parking areas, the children's play ground area and Recretional Ground. Prayer (j) is for injunction against the defendant No.4 from granting, sanctioning, permitting or approving any proposal to the develop or change the lay out of the property. Prayer (k) is for a consequential perpetual injunction restraining the defendants from in any manner carrying on construction on the suit property. Thus, only first four prayers contain a challenge to the consent terms before the District Forum and the order passed by the Forum on the ground that the same are vitiated by fraud and are nullity. The other prayers are founded on the alleged rights claimed under MOFA.

Senior Counsel appearing for the defendants is that principles analogous to Rule 3A of Order XXIII of the said Code will apply and therefore, there is an implied bar which is attracted to the suit.

10 As far as the contention raised by the learned senior counsel for the appellants on the basis of the principles analogous Rule 3A of Order 23 of the said Code is concerned, it will be necessary to make a reference to the decision of the Apex Court in the case of A.A.Gopalakrishnan vs. Cochin Devaswom Board and others¹². The Apex Court in paragraph 11 while dealing with the issue of Rule 3A of Order XXIII of the said Code held thus:

"11...Order 23 Rule 3 CPC deals with compromise of suits. Rule 3-A provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. We are of the considered view that the bar contained in Rule 3-A will not come in the way of the High Court examining the validity of a compromise decree, when allegations of fraud/collusion are made against the statutory authority which entered into such compromise. While it is true that decrees of civil Courts which have attained finality should not be interfered with lightly challenge to such compromise decrees by an aggrieved devotee, who was not a party to the suit, cannot be

12 (2007) 7 SCC 482

rejected, where fraud/collusion on the part of officers of a statutory board is made out. Further, when the High Court by order dated 9.9.1998 had directed the Board to take possession of Sy. No.1042/2 immediately from Respondents 3 and 4 in CDB No.3 of 1996, in a complaint by another devotee, it was improper for the Board to enter into a settlement with Respondents 2 and 3, giving up the right, title and interest in Sy.No.1042/2, without the permission of the court which passed such order. Viewed from any angle, the compromise decree cannot be sustained and is liable to be set aside."

(emphasis added)

11 In the case of *Horil vs Keshav*¹³, the Apex Court considered the issue of applicability of Rule 3-A of Order XIII in relation to a decree passed by the Authorities under the U.P Zamindari and Land Reforms Act, 1950. The challenge was to the compromise decree in a suit filed under the said Act on the ground of fraud. In paragraphs 10 to 14, the Apex Court held thus:

"10. In *Banwari Lal v. Chando Devi* [(1993) 1 SCC 581] this Court examined the provisions of Order 23 Rule 3-A in some detail and in the light of the amendments introduced in the Code and in para 7 of the judgment came to hold as follows: (SCC p. 585)

"7. By adding the proviso along with an Explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The

Explanation made it clear that an agreement or a compromise which is void or voidable under the Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the Explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on the basis of a compromise saying:

‘3-A. Bar to suit.—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.’”

11. It was further held in *Banwari Lal* [(1993) 1 SCC 581] in paras 13 and 14 as follows: (SCC pp. 588-89)

“13. When the amending Act introduced a proviso along with an Explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, ‘the court shall decide the question’, the court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the Explanation to the proviso says that an agreement or compromise ‘which is void or voidable under the Contract Act ...’ shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the Explanation, a court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code.

14. ... The court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the Explanation to the proviso to Rule 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the court could have recorded such agreement or compromise on 27-2-1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of Rule 3, there was no option left except to recall that order.”

12. In the light of the decision in *Banwari Lal* [(1993) 1 SCC 581] it would **prima facie** appear that the High Court was right in holding that the appellant's suit was hit by the provisions of Order 23 Rule 3-A and was not maintainable. But the significant distinguishing feature in this case is that the compromise decree which is alleged to be fraudulent and which is sought to be declared as nullity was passed not by a civil court but by a Revenue Court in a suit under Section 176 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter “the Act”).

13. Section 331 of the Act bars the jurisdiction of the civil court and provides that a suit under the Act can be entertained by no court other than that the courts specified in Schedule II to the Act. A reference to

Schedule II would show that the court of original jurisdiction for a suit under Section 176 of the Act for division of a holding of a bhumidhar is the Assistant Collector, First Class and the courts of first appeal and second appeal are the Commissioner and the Board of Revenue respectively. Section 341 of the Act, of course, provides that unless otherwise expressly provided by or under the Act, the provisions of the Court Fees Act, 1870; the Code of Civil Procedure, 1908 and the Limitation Act, 1963, including Section 5 thereof would apply to the proceedings under the Act.

14. Though the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the Act but that would not make the authorities specified under Schedule II to the Act as "court" under the Code and those authorities shall continue to be "courts" of limited and restricted jurisdiction.

15. We are of the view that the Revenue Courts are neither equipped nor competent to effectively adjudicate on allegations of fraud that have overtones of criminality and the courts really skilled and experienced to try such issues are the courts constituted under the Code of Civil Procedure."

(emphasis added)

12 Therefore, we are unable to accept the contention raised by the learned senior counsel for the defendants that the provisions analogous to Rule 3-A of Order XIII of the said Code will apply. The Authorities under the said Act of 1986 cannot decide the issue of fraud.

13 As far as the bar of limitation is concerned, before we deal with submissions canvassed by the learned counsel for the plaintiffs on the issue whether plaint can be rejected under Rule 11 of Order VII of the said Code, we must note that even according to the case of the defendants, if the averments made in the plaint from paragraph 37 onwards are correct, the suit will be within

limitation. Only ground on which the bar of limitation is pleaded is by virtue of the letter dated 2nd April 2007 addressed by Shri Ashwin Mehta to the office bearers of the Plaintiffs- Co-operative Housing Society. We must note that the said letter is annexed to the affidavit in reply filed by the defendants in execution application filed for executing the order passed in the complaint. In that sense, the said letter dated 2nd April 2007 is not the document of the plaintiffs or the document relied upon the plaintiffs. It is the contention raised by the defendants in the said affidavit in reply filed before the Authority under the said Act of 1986 that the letter dated 2nd April 2007 allegedly addressed to the Secretary and Chairman of the said Society shows that the plaintiffs had knowledge about the interim order passed in the year 2007 in Suit No.1906 of 2006. It is not the case made out by the plaintiffs in the plaint that the letter dated 2nd April 2007 was received either by the Chairman or the Secretary of the plaintiffs. There are no averments made in the plaint as regards the receipt of the letter dated 2nd April 2007. As stated earlier, the said letter is annexed to the reply filed by the defendants to the execution application. For the purposes of considering the prayer for rejection of the plaint, the Court will have to proceed on the footing that the averments made in the plaint are correct. Though the said reply is annexed to the plaint, it is a document of the defendants. Today, there is no material on record to show that the letter dated 2nd

April 2007 was served upon the plaintiffs. No document showing the service of the letter is annexed to the said affidavit-in-reply of the defendants which is annexed to the plaint. Hence, for deciding the prayer for rejection of the plaint, the said letter will have to be kept out of consideration. Going by the averments made in the plaint and in particular the averments regarding the date of knowledge of the alleged fraud, there cannot be any dispute that the plaint cannot be rejected on the basis of the bar of limitation .

14 If the argument that the letter dated 2nd April 2007 which is annexed to the affidavit-in-reply of the Appellants is to be relied upon for considering the prayer for rejection of plaint, by that logic, even the contents of the affidavit-in-reply will have to be relied upon as a copy thereof has been annexed to the plaint. The correctness and the service of letter dated 2nd April 2007 is yet to be proved.

15 Thus, the said letter cannot be relied upon for throwing out the suit at this stage only on the ground of bar of limitation. Going by the averments made in the plaint starting from paragraph 36, the suit for declaration filed by the Plaintiffs was well within limitation.

16 Now we turn to the submissions made by the learned Senior Counsel appearing for the Plaintiffs on the basis of the decision of learned Single Judge in the case of **Export Credit Guarantee Corporation**

of India Limited Vs. Mr.T.Mathew and others. What is relied upon is mainly the discussion in paragraphs 57 and 58. Paragraph 58 reads thus :

"58. 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 sections 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 on 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."

(emphasis added)

17 At this stage reference will have to be made to the decision of the Apex Court in the case of **Vaish Aggarwal Panchayat Vs. Inder Kumar and others**¹⁴. The case before the Apex Court arose out of a suit for specific performance. In the suit, a prayer was made for rejection of the plaint under Rule 11 Order VII of the Code on various grounds including bar of limitation. Paragraphs 12 to 15 of the said decision are material, which read thus :

“12. In this regard the pronouncement in *Kamala v. K.T. Eshwara SA6* would be seemly. In the said case while dealing with the principle engrafted under Order VII Rule 11(d) C.P.C., the Court has held thus:-

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.”

13. After so stating, while proceeding to deal with the concept of res judicata, the Court opined:-

“23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of

the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

14. In this regard a reference to a three-Judge Bench decision in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust*⁷ and others would be fruitful. Be it noted the said case was referred to a larger Bench vide *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust*⁸. The order of reference reads as follows:-

“4. This case was argued at length on 30-8-2005. Counsel appearing for the appellant had relied upon a judgment of this Court in *N.V. Srinivasa Murthy v. Mariyamma*⁹ for the proposition that a plaint could be rejected if the suit is ex facie barred by limitation. As against this, counsel for the respondents relied upon a later judgment of this Court in *Popat and Kotecha Property v. State Bank of India Staff Assn.*¹⁰ in respect of the proposition that Order 7 Rule 11(d) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by limitation. The point as to whether the words “barred by law” occurring in Order 7 Rule 11(d) CPC would include the suit being “barred by limitation” was not specifically dealt with in either of these two judgments, cited above. But this point has been specifically dealt with by the different High Courts in *Mohan Lal Sukhadia University v. Priya Soloman*¹¹, *Khaja Quthubullah v. Govt. of A.P.*¹², *Vedapalli Suryanarayana v. Poosarla Venkata Sanker Suryanarayana*¹³, *Arjan Singh v. Union of India*¹⁴ wherein it has been held that the plaint under Order 7 Rule 11(d) cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7 Rule 11 CPC. A contrary view has been taken in *Jugolinija Rajia Jugoslavija v. Fab Leathers Ltd.*¹⁵, *National Insurance Co. Ltd. v. Navrom Constantza*¹⁶, *J. Patel & Co. v. National Federation of Industrial Coop. Ltd.*¹⁷ and *State Bank of India Staff Assn. v. Popat & Kotecha Property*. The last judgment was the subject-matter of challenge in *Popat and Kotecha Property v. State Bank of India Staff Assn.* This Court set aside the judgment and held in para 25 as under:

“25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo case*¹⁸ the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not so in the present case.”

5. Noticing the conflict between the various High Courts and the apparent conflict of opinion expressed by this Court in *N.V. Srinivasa Murthy v. Mariyamma* and *Popat and Kotecha Property v. State Bank of India Staff Assn.* the Bench referred the following question of law for consideration to a larger Bench:

“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.”

15. The three-Judge Bench opined that there was no conflict of opinion and thereafter the matter came back to the Division Bench for adjudication. The Division Bench reproduced what has been stated by the three-Judge Bench. It is as under:-

“Before the three-Judge Bench, counsel for both the parties stated as follows:

“...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 this case."**

(emphasis added)

18 In paragraph 15, the Apex Court observed that the three Judge Bench came to the conclusion that there was no conflict of opinion on the question whether the plaint could be rejected under Rule 11, Order VII on the ground of limitation. Therefore, the Apex Court has not laid down as an absolute proposition of law that clause(d) of Rule 11 of Order VII will not attract if bar of limitation is pressed into service.

19 Learned Single Judge in the case of *Export Credit Guarantee Corporation of India Limited (supra)* observed that in view of Section 3 of Limitation Act, 1963, a suit filed after prescribed period has to be dismissed. He has observed that under Rule 11 of Order VII, the plaint can be rejected and the suit cannot be dismissed. This observation is made in the context of Rule 13 of Order VII of the said Code. Clause-(d) of Rule 11 of Order VII applies to various categories of bars created by the statute. In a given case, if bar created by a statute is not invoked by taking recourse to Rule 11 of Order VII, if at the time of final hearing, the Court is satisfied that the bar is attracted, the suit can always be dismissed. But, if Rule 11 of Order VII is invoked, the plaint can

be rejected. The rejection of plaint is also a decree within the meaning of the said Code. We may also make a reference to Rule 13 of Order VII of Code, which reads thus :

"13. Where rejection of plaint does not preclude presentation of fresh plaint.— The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

20 We find that Rule 13 of Order VII is an enabling provision. Clauses-b, c, e and f of Rule 11 of Order VII provide for rejection of plaint for non compliance with the procedural requirements. An unsuccessful plaintiff whose plaint has been rejected on the said grounds, can invoke Rule 13 of Order VII. Rule 13 of Order VII being an enabling provision, cannot be construed to mean that when a plaint is rejected by the Court by holding that the bar of a statute is attracted, a fresh plaint on the same cause of action can be instituted in the Civil Court. Hence, we are of the view that in a given case, if by taking the averments in the plaint as correct, the suit appears to be clearly barred by limitation, the plaint can be rejected under clause (d) of Rule 11 of Order VII.

21 Though, in the facts of the case we are satisfied that considering the averments made in the plaint, the same cannot be rejected on the ground of bar of limitation, the argument of learned Senior Advocate appearing for the Plaintiffs based on the view taken by learned Single Judge cannot be accepted.

22 We have already held that no statutory bar is attracted as far as prayer clauses (a) to (d) are concerned. As far as prayers (e) to (l) are concerned, the same are essentially for enforcing the rights of the Plaintiffs under MOFA.

23 Therefore, for the reasons which we have recorded earlier, we concur with the view taken by the learned Single Judge in the impugned order. Accordingly, we find no merit in the appeal and the same is dismissed. We, however, make it clear that the observations made by learned Single Judge as well as by this Bench are only for the purposes of examining the prayer for rejection of plaint and the said observations cannot be considered to mean that any final adjudication is made on the issue of bar of limitation. No order as to costs.

24 At this stage, learned counsel for the Appellants seeks continuation of the ad-interim relief granted by this Court on 27th April 2014. The said prayer is opposed by learned Senior Advocate appearing for the original Plaintiffs.

This order of ad-interim relief has remained in operation from 27th July 2014. Therefore, we direct that for a period of six weeks from today, the stay of further proceedings of the suit will continue to operate till then.

(P.D.NAIK,J.)

(A.S.OKA,J.)