

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

APOT 225 of 2024
With
CS 98 of 2023
+
IA No. GA 1 of 2024

Lord Grih Nirman Private Limited
Versus
Merlin Projects Limited

For the Appellant : *Mr. S. N. Mookherjee, Sr. Adv.,*
Mr. Jishnu Saha, Sr. Adv.,
Mr. Joy Saha, Sr. Adv.,
Mr. Reetobroto Mitra, Adv.,
Mr. Aditya Kanodia, Adv.,
Mr. Ishaan Saha, Adv.,
Mr. Yash Singhi, Adv.

For the Respondent : *Mr. P. Chidambaram Sr. Adv.,*
Mr. Surojit Nath Mitra, Sr. Adv.,
Ms. Rajashree Kajaria, Adv.,
Mr. Sankarsan Sarkar, Adv.,
Mr. Uttam Sharma, Adv.,
Mr. Dharav Shah, Adv.,
Mr. P. Goyal, Adv.,
Mr. Shayak Mitra, Adv.,
Mr. Samriddha Sen, Adv.

Hearing is concluded on : *1st October, 2024.*

Judgment On : **8th November, 2024.**

Tapabrata Chakraborty, J.

1. The appellant/defendant has challenged an order dated 16.05.2024 passed by the learned Single Judge dismissing an application being IA No. G.A. 02 of 2023 under Order VII Rule 11 of the Code of Civil Procedure (hereinafter referred to as the Code) filed in connection with the suit for specific performance being CS 98 of 2023.
2. For adjudication of the *lis*, the following dates would be necessary.
 - a) 11.11.2022 – Basant Properties Limited executed a deed of conveyance pertaining to land and buildings detailed in Schedule 'A' of the deed (hereinafter referred to as the said property) in favour of the Lord Grih Nirman Private Limited, the appellant/defendant;
 - b) 11.11.2022– Merlin Projects Limited, the respondent/plaintiff and the appellant executed a term sheet for entering into a Joint Development Agreement (hereinafter referred to as the JDA) and the respondent paid an amount of Rs. 2 crores to the appellant as a refundable deposit;
 - c) 21.04.2023 – The appellant's advocate forwarded the final draft of the JDA to the respondent;
 - d) 20.05.2023 – By an e-mail, the respondent requested the appellant to arrange for execution of the JDA as early as possible;
 - e) 22.05.2023 – The respondent paid a further amount of Rs.3 crores to the appellant as a refundable deposit with a request to intimate the date when the JDA would be executed;

f) 22.05.2023 – The appellant by an e-mail to the respondent described the document to be a ‘*void document*’ and refunded Rs. 5 crores to the respondent by RTGS;

g) 01.06.2023 – The respondent preferred the suit being CS No. 98 of 2023 *inter alia* praying for a decree for specific performance of the agreement as per the term sheet dated 11.11.2022 and to execute and register the JDA;

h) 18.06.2023 – The appellant filed an application under Order VII Rule 11 of the Code being IA No. G.A. 02 of 2023 *inter alia* praying for rejection of the plaint;

i) 16.05.2024 – Order passed by the learned Single Judge dismissing the application being IA No. G.A. 02 of 2023;

j) 18.06.2024 – Appeal filed by the respondent challenging the order dated 16.05.2024;

3. Discussing and deliberating upon the arguments as advanced by the learned advocates appearing for the respective parties, the learned Single Judge delved into two facets of the *lis*; one – as to whether any development/joint venture agreement was executed by the parties and the other - as to whether the dispute involved in the suit is a commercial dispute as defined under Section 2(1)(c) of the Commercial Courts Act 2015 (hereinafter referred to as the 2015 Act).

4. Drawing our attention to the averments made in the plaint, Mr. Mookherjee, learned Senior Advocate appearing for the appellant has urged that the term sheet is a construction contract and is hit by the rigours of the

provisions of Sections 2(1)(c)(vi), 2(1)(c)(vii) and 2(a)(xi) of the 2015 Act. The learned Single Judge erroneously observed that the dispute involved in the suit is not a commercial dispute. No reason, however, stands disclosed in the order as to why the dispute amongst the parties is not a commercial one. An agreement which is for construction of a building, whether for residential or commercial use, is a construction contract under the 2015 Act. Elaborating such argument, he submits that such a jurisdictional issue has to be decided at the threshold, on the basis of the averments made in the plaint and the Court is empowered to summarily dismiss the suit without proceeding to record evidence and conducting a trial. Reliance has been placed upon the judgments delivered in the cases of *Liverpool and London S.P. & I Association Limited vs. M.V. Sea Success I and Another*, reported in (2004) 9 SCC 512, *Natraj Studios Private Limited vs. Navrang Studios & Anr.*, reported in (1981) 1 SCC 523, *Abdulla Bin Ali vs. Galappa & Ors.*, reported in (1985) 2 SCC 54 and *Asma Lateef & anr. v. Shabbir Ahmed & Ors.*, reported in (2024) 4 SCC 696.

5. According to Mr. Mookherjee, the Courts are empowered to initiate *suo moto* proceedings for rejecting a plaint under Order VII Rule 11(d) of the Code. At every stage of the suit, Judges have to be vigilant to see as to whether cause of action to further proceed with the suit survives or not. If answer comes in negative, it should not await a formal application under Order VII Rule 11 and can even *suo moto* exercise its inherent power under Section 151 of the Code. In Order VII Rule 11(a), the legislature has used the word ‘disclose’ and not the word ‘survive’ or ‘appear’ or ‘disappear’. Court is

not required to wait till completion of pleadings for ascertaining whether cause of action set up in the plaint survives or not. In support of such contention, reliance has been placed upon the judgments delivered in the cases of *Patasibai and Others vs. Ratanlal*, reported in (1990) 2 SCC 42 and *Patil Automation Private Limited vs. Rakheja Engineers (P) Ltd.*, reported in (2022) 10 SCC 1.

6. He argues that having not preferred any cross-objection against the specific finding of the learned Single Judge that '*it is nobody's case that there was an agreement*', the respondent concedes that there is no agreement and as such the suit for specific performance cannot survive and no decree can be passed to execute an incomplete document.

7. Drawing our attention to various clauses of the term sheet, Mr. Mookherjee argues that the dispute amongst the parties is a commercial one as there is a specific provision towards sharing of profit and as it is a joint venture agreement bereft of any clause conferring right or interest in the said property upon the developer. In support of such contention, reliance has been placed upon the judgments delivered in the cases of *Blue Nile Developers Private Limited vs. Mohan Chandra Sekhar & ors.*, reported in (2021) SCC OnLine AP 3964, *Raj Kumar Gupta vs. Jagan Nath Bajaj and Ors*, reported in 2022 SCC OnLine Del 2995, *P. Siva Mohan Reddey vs. K.R.K. Reddy*, reported in Manu/TL/0482/2023 and *T.K. Lathika vs. Seth Karsandas Jamndas*, reported in (1999) 6 SCC 632.

8. He contends that the High Court at Calcutta Commercial Court Practice Directions, 2021 provides that since no party has applied for

transfer of the suit to the Commercial Division at High Court at Calcutta, the said suit ought to be rejected more so when the said Practice Directions have statutory force in accordance with the provisions of Section 18 read with Section 21 of the 2015 Act.

9. *Per contra*, Mr. Chidambaram, learned Senior Advocate appearing for the respondent argues that the foundational basis of the suit is the signed term sheet and the draft JDA. The appellant had disputed the term sheet and the draft of the JDA. Such dispute can only be decided on the basis of evidence at trial. In view thereof, the learned Single Judge rightly observed that the provisions of Sections 2(1)(c)(vi), 2(1)(c)(vii) and 2(a)(xi) of the 2015 Act cannot be applied unless existence of the agreement is proved. The learned Single Judge has not gone into the question as regards the nature and character of the agreement amongst the parties since the very existence of the agreement is in dispute. Such issue as regards the nature and characteristic of the agreement can only be decided after the existence of the said agreement is determined on the basis of evidence at trial. Any question of fact that is disputed cannot be decided at the time of considering an application under Order VII Rule 11 of the Code. A factual dispute as regards existence of an agreement can be decided only after leading evidence, oral as well as documentary. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Popat & Kotecha Property vs. State Bank of India Staff Association*, reported in (2005) 7 SCC 510 and an unreported judgment delivered in the case of *Maharshi Commercial Limited vs. Rajiv R. Balani*.

10. He further argues that after the evidence is taken on the question of proof of the term sheet and/or the JDA, it would be still open to the learned Single Judge to consider whether the plaint deserves to be rejected as '*barred by law*' under Order VII Rule 11 of the Code.

11. Mr. Chidambaram contends that the challenge in the application for rejection of plaint is restricted to Order VII Rule 11(d) inasmuch as in the said application, there is no averment as regards lack of cause of action contemplated under Order VII Rule 11(a) of the Code and that as such, the judgment delivered in the case of *Pattasibai & Ors. vs. Ratanlal* reported in (1990) 2 SCC 42, upon which reliance has been placed by the appellant, has no manner of application. In the plaint, the respondent has clearly set out the cause of action in paragraphs 28 and 31.

12. We have perused the copy of the plaint, the application under Order VII Rule 11 of the Code and the order impugned in the present appeal. We have taken note of the submissions made by the parties.

13. The proposition of law that can be culled out from the judgments pertaining to application of the provisions of Order VII Rule 11 is that the power conferred upon the Court to terminate civil action is drastic and accordingly, conditions prescribed under Order VII Rule 11 of the Code have to be strictly adhered to. With reference to Order VII Rule 11 of the Code it can be held that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The pleas taken in the written statement and in other pleadings would be irrelevant. Plaint is to be read in its entirety. It is not permissible to cull out a sentence or a

passage and to read it out of the context in isolation. Pleadings have to be construed as it stands without any addition or subtraction of words or change of its apparent grammatical sense and the Court must give a meaningful reading to the plaint. At this stage, the Court has to presume that every allegation made in the plaint is true. Plaint can be rejected if the averments made therein *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law. If the learned Court invokes its power under Order VII Rule 11, then it can reject the plaint only if any of the conditions incorporated in clause (a) to (f) of Rule 11 is fulfilled considering the averments made in the plaint.

14. A perusal of the order impugned reveals that the learned Single Judge had *inter alia* opined that first the existence of the agreement has to be proved and such factual dispute can be decided only after leading evidence at trial. Once such existence is established, the issue as to whether the dispute involved is a commercial dispute, can be gone into. The said issues as regards existence of an agreement and the nature of such agreement are admittedly distinct and different and are not inextricably bound.

15. The argument that the suit has been wrongly filed on the Ordinary Original Civil Jurisdiction as the dispute is a commercial dispute was rightly discounted by the learned Single Judge since the existence of the agreement is required to be first proved on trial. The former issue needs to be finally decided and then only, the determination of its nature can be explored. In such circumstances, we are of the opinion that at this stage it is

unnecessary to delve deeper into the pleas as to whether the agreement is a pure construction contract or as to whether the dispute involved in the suit is a commercial dispute as defined under Section 2(1)(c) of the 2015 Act more so when, the dismissal of the application for rejection of plaint would not prevent the appellant from renewing the application at an appropriate stage of the trial.

16. In view of the discussion made hereinabove, we are not inclined to interfere with the order impugned in the present appeal. However, the observation of the learned Single Judge in the concluding part of the order that the '*dispute involved in the suit are not "commercial dispute" for the reasons stated above*', is contrary to the observations made in the earlier part of the order. Accordingly, the said observation is set aside.

17. The appeal and its connected application are, accordingly, dismissed with the modification as indicated in the foregoing paragraph. Parties to bear their own costs.

18. Urgent photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Tapabrata Chakraborty, J.)

Partha Sarathi Chatterjee, J.

1. I have meticulously reviewed the comprehensive, well-reasoned and well-crafted judgment authored by the Hon'ble Justice Chakraborty. I express my respectful concurrence with the reasons assigned by His Lordship for the conclusions reached in such judgment. However, my concurrence, notwithstanding, and with respect again, I wish to add a few observations of my own, mainly by way of emphasis.

2. In this appeal, which challenges the order dated May 16, 2024, in G.A. 02 of 2023, we are tasked with examining whether the learned Court below erred in declining to reject the plaint presented to institute the suit, C.S. No. 98 of 2023, for a decree of specific performance of an agreement claimed to have been concluded under a 'Term Sheet.' The rejection of the plaint was sought on the ground that the underlying dispute qualifies as a "commercial dispute" under the Commercial Courts Act, 2015.

3. The sum and substance of the averments in the plaint is that, to commercially exploit the suit property, the plaintiff, Merlin Projects Limited (hereinafter "Merlin"), intended to purchase it from its previous owner, Basant Properties Limited. However, during negotiations, one Om Jalan intervened and expressed his interest in financing the project. Ultimately, it was agreed that Mr. Jalan would acquire the property through a company owned and controlled by him, namely, Lord Grih Nirman Private Limited (hereinafter "the defendant"), and that Merlin would develop it under certain mutually agreed terms and conditions. Accordingly, on November 11, 2022, Basant Properties Ltd. executed a Deed of Conveyance in favour of the

defendant. On the same day, Merlin and the defendant signed a 'Term Sheet' (Annexure-M to the plaint), with stipulations that they would enter into a Joint Development Agreement (JDA) and that Merlin would make a non-refundable, non-interest-bearing security deposit of Rs. 7 crores in three phases. Merlin deposited Rs. 2 and 3 crores in two phases and sent a draft of the Joint Development Agreement. However, on May 22, 2023, the defendant refunded the amount and asserted via email that, although negotiations were ongoing, no final agreement was reached, and the 'Term Sheet' and JDA were not definitive documents. Given the situation, Merlin was compelled to institute the suit.

4. Upon receiving the summons, the defendant appeared and filed an application under Order VII Rule 11 of the Code, seeking rejection of the plaint. In addition to the assertions made in the email, the defendant claimed that even if the allegations in the plaint were assumed to be correct, the dispute qualifies as a "commercial dispute" under the Commercial Courts Act, 2015, yet the suit was not filed in the Commercial Division of this Hon'ble Court. Therefore, the Hon'ble Court, in its Ordinary Original Civil Jurisdiction, lacks the jurisdiction to hear the suit, rendering the plaint liable to rejection as barred by law.

5. Merlin opposed the application by filing written objections, denying all the averments made therein. It specifically contended that none of the conditions under Order VII Rule 11 of the Code had been fulfilled, necessitating the rejection of the plaint as sought by the defendant/appellant.

6. Upon a contested hearing, the learned Court below refused to reject the plaint, observing that the existence of the 'Term Sheet' and the agreement itself was disputed. The Court held that this issue could only be resolved at trial through evidence. Although the Court noted in the penultimate portion of its order that the dispute was not a 'commercial dispute,' it ultimately concluded that until the agreement's existence is established, all disputes between the parties do not possess the character of a 'commercial dispute'.

7. At the outset, Mr. Chidambaram, learned Senior Advocate, opposing the appeal, raised a preliminary issue regarding maintainability of the appeal.

8. Mr. Mookherjee, learned Senior Advocate appearing in support of the appeal, argued that in view of the proposition laid down in the decision, reported at (2004) 9 SCC 512 (Liverpool & London Steamship Protection and Indemnity Association Ltd. v. M.V. Success I & Anr.), this appeal is maintainable.

9. Mr. Mookherjee further argued that when deciding an application for the rejection of a plaint, a Court should consider only the averments in the plaint. In this case, however, the learned Court below considered the defendant's case and concluded that the issue of rejecting the plaint would be determined after taking evidence. He contended that a jurisdictional issue was raised in the application, which should have been addressed at the threshold. He cited the decisions reported at (2024) 4 SCC 696 (Asma Lateef & Anr. v. Shabbir Ahmad & Ors.) and (1985) 2 SCC 54 (Abdulla Bin

Ali v. Galappa), for the proposition that the allegations made in the plaint determine the forum, and jurisdiction does not depend on the defence taken by the defendant in the written statement.

10. Inviting our attention to certain paragraphs of the plaint, he asserted that the disputes leading to the suit arise from construction and infrastructure contracts, as well as a joint venture agreement, thus qualifying as commercial disputes under Section 2(1)(c)(v) and Section 2(1)(c)(xi) of the Commercial Courts Act, 2015. He elaborated on this issue contending that the terms of the 'Term Sheet' indicate that the project was intended to be jointly branded under the names of Merlin and the landowner and according to the 'Term Sheet', the land would be provided by the landowner, while Merlin would bear all costs and expenses associated with the construction and development of the land.

11. Referring to clause 8 of the 'Term Sheet,' he argued that this clause of the 'Term Sheet' included a provision for sharing the proceeds from sales arising from the 'Saleable Areas,' as defined in clause 6. Consequently, no interest in the property was created. He contended that it is not anyone's case that an agreement existed and therefore, there can be no cause of action to enforce the performance of any agreement. He relied upon the decision (1990) 2 SCC 42 (Patasibai & Ors. v. Ratanlal) for the proposition that that if a plaint discloses no cause of action, allowing the suit to continue is akin to licensing frivolous and vexatious litigation, which should not be permitted.

12. He contended that the provisions of Section 12A of the Act of 2015 are mandatory in nature; therefore, the suit, which was instituted without exhausting the remedy available under Section 12A, is flawed. To lend support to such contention, he placed reliance upon the decisions, reported at (2022) 10 SCC 1 (Patil Automation Private Limited & Ors. v. Rakheja Engineers Private Limited), and AIR 2021 Cal 190 (Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd. & Anr.).

13. He further argued that, according to the provisions of the High Court at Calcutta Commercial Court Practice Directions, 2021 since no application under Order VII Rule 10 of the Code had been presented to transfer the suit to the Commercial Division of this Hon'ble Court, the plaint was liable to be rejected.

14. To invigorate his argument, he also relied upon the decisions, reported at 2021 SCC OnLine AP 3964 (Blue Nite Developers Private Limite, Rep. by its Director v. Movva Chandra Sekhar & Ors.) , 2023 SCC OnLine TS 1337 (P. Siva Mohan Reddy v. Dr. K.R.K. Reddy), 2021 SCC OnLine Cal 452 (Swastik Project Pvt. Ltd. v. City Enclave Pvt. Ltd. & Ors.) and 2021 SCC OnLine Del 2995 (Raj Kumar Gupta & Anr. v. Jagan Nath Bajaj & Ors.).

15. In rebuttal, Mr. Chidambaram, learned Senior Advocate, while arguing on merit, submitted that the ratio established in Shah Babulal Khimji's case, reported at (1981) 4 SCC 8, contradicts the principles laid down in the decision reported at (2004) 9 SCC 512 (Liverpool & London Steamship Protection and Indemnity Association Ltd. v. M.V. Success I &

Anr). Therefore, he left it to the discretion of the Court to determine whether the appeal is maintainable.

16. He contended that although the learned Court below rejected the application for rejection of the plaint, it effectively indicated that a decision regarding rejection of the plaint would be made after evidence was taken. He argued that the learned Court below shall have the authority to reject the plaint if the condition under Order VII Rule 11(d) of the Code is fulfilled after the evidence is adduced.

17. He argued that the appellant claims the dispute leading to the institution of the suit is a commercial dispute within the meaning of Sections 2(1)(c)(vi) and 2(1)(c)(xi) of the Act of 2015 and has abandoned its claim that the dispute falls under Section 2(1)(c)(vii). He contended that it is a more or less settled proposition that Section 2(1)(c)(vi) pertains to pure construction contracts. In support of this contention, he relied on the decisions reported in (2019) 2 SCC 241 (Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors.) and 2022 SCC OnLine SC 898 (Rameshwar & Ors. v. State of Haryana & Ors.).

18. Drawing our attention to Clauses 4.1, 10.1, 10.1(a), and 10.1(b) of the draft joint development agreement, he asserted that the use of the words 'Revenue Share and other rights' in Clause 4.1, along with the provisions for the division and allocation of unsold and/or residual areas in Clauses 10.1, 10.1(a), and 10.1(b), clearly indicates that an interest in the property was created in favour of Merlin. According to him, in view of this, the dispute cannot be claimed to fall within the ambit of Section 2(1)(c)(vi).

19. He further argued that Section 2(1)(c)(xi) of the Act of 2015, which deals with joint venture agreements, requires the sharing of capital, profit, risk, or loss. He contended that, in the present case, it was agreed that the entire cost of construction and/or development would be borne by Merlin, with no provision for sharing risk or losses. Therefore, it cannot be argued that the dispute falls within the ambit of Section 2(1)(c)(xi) of the Act of 2015. In support of such contention, he placed reliance upon the decisions, reported at (2016) 8 SCC 429 (Bunga Daniel Babu v. Sri Vasudeva Constructions & Ors.), (1995) 1 SCC 478 (New Horizons Limited & Anr. v. Union of India & Ors.) and (2008) 10 SCC 345 (Faqir Chand Gulati v. Uppal Agencies Private Limited & Anr.).

20. He submitted that the provocation to file the suit must be taken into account. According to him, it was the defendant's e-mail dated May 22, 2023, in which Rs. 5 crores were refunded to Merlin, and it was asserted that both the 'Term Sheet' and the joint development agreement were void documents, and the deposit of Rs. 3 crores was a unilateral act by Merlin. He further drew the Court's attention to the fact that Rs. 2 crores were refunded almost six months later.

21. He contended that the plaint is based on a disputed document, and thus the learned Court below rightly observed that evidence is required to determine the existence of any agreement between the parties. Only after this a decision can be made on whether the dispute qualifies as a 'commercial dispute' under Sections 2(1)(c)(vi) and 2(1)(c)(xi) of the Act of 2015. Referring to the prayer portion of the plaint, he argued that the

plaintiff sought a decree to compel the defendant to perform its obligations under the 'Term Sheet' and execute the joint development agreement, which indicates that the suit falls within the Ordinary Original Jurisdiction of this Hon'ble Court.

22. To lend support to his contention, he placed reliance upon the decisions, reported at (2005) 7 SCC 510 (Popat and Kotecha Property v. State Bank of India Staff Association), (2016) 8 SCC 429, (2020) 7 SCC 366 (Dahiben v. Arvinbhai Kalyanji Bhanusali (Gajra) dead Thr. Lrs. & Ors.) and one unreported decision of a Hon'ble Division Bench of this Court passed in APOT 242/2022 (Maharshi Commerce Limited v. Rajiv R. Balani & Ors.).

23. Therefore, before delving into the contentious issues, the primary question for consideration is whether the appeal is maintainable.

24. Admittedly, the judgment in Liverpool & London Steamship Protection and Indemnity Association Ltd. v. M.V. Success I & Anr. was delivered by a Hon'ble Division Bench of the Supreme Court, while the judgment in Shah Babulal Khimji was handed down by a Hon'ble three-Judge Bench. Notably, the judgment in Liverpool's case considered both the Shah Babulal Khimji decision and another three-Judge Bench ruling in Subal Paul v. Malini Paul ((2003) 10 SCC 361). Therefore, it is no longer *res integra* that an order by a Hon'ble Single Bench refusing to reject the plaint is a 'judgment' (preliminary judgment) within Clause 15 of the Letters Patent, and thus, appealable before the Hon'ble Division Bench of this Chartered High Court.

25. The next question to resolve is whether the plaint was liable to be rejected under Order VII Rule 11(d) of the Code as barred by law, on the ground that the dispute giving rise to the suit qualifies as a 'commercial dispute' within the meaning of the Commercial Courts Act, 2015.

26. As noticed earlier, the learned Single Bench observed that the question raised in the application for rejection of plaint can only be determined upon appreciation of evidence since the existence of agreement (herein the 'Term Sheet') is in dispute.

27. Mr. Mookherjee argued that a jurisdictional issue, raised in the application for rejection of the plaint, should be addressed at the outset. However, it is well settled proposition of law that absence of jurisdiction of the Court can be raised at different stages and under different provisions of the Code. This issue can be raised under Or. VII R.11 (d) and also under Or. XIV R. 2 of the Code. [see, the judgment delivered in case of Kamal vs. K.T.Eshwara SA, reported in (2008) 12 SCC 661]. Needless to state that jurisdictional question, being purely legal, can be decided under Or. XIV R. 2 of the Code.

28. Though before the learned Single Bench, it was not argued on behalf of the defendant, but while arguing in support of appeal, Mr. Mookherjee contended that plaint should have been rejected under Or. VII R.11(a) of the Code also. Needless to observe that it is one thing to say that the plaint on its face discloses no cause of action but it is another thing to say that though the plaint discloses cause of action but the same is barred by law. However, since such point that plaint discloses no cause of action

has not been raised before the learned Single Bench, we are inclined to limit our inquiry to the question of whether the plaint is liable to be rejected on the grounds of being barred by law, as argued by the appellant.

29. The provision of Or. VII Rule 11(d) of the Code specifies that a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Therefore, while deciding the application presented under Or. VII R.11(d), only the averments made in the plaint are to be looked into but if the issue involves mixed questions of fact and law, and the determination of such questions requires examination of both the averments made in the plaint and the evidence, then such questions cannot be determined at the threshold. It is also axiomatic that, in deciding the application for rejection of plaint at the threshold, the court is not expected to delve into the disputed questions of law and fact. [see, the judgment of Kamal vs. K.T.Eshwara SA,(supra)].

30. Indisputably, jurisdiction must be considered with reference to place, value, and subject matter. Thus, it can be classified as pecuniary, territorial, and subject matter jurisdiction. Here, the focus is on subject matter jurisdiction. The questions of whether the lower court lacks jurisdiction to hear the suit and whether the plaint should be rejected due to non-compliance with the provisions of Section 12A of the 2015 Act or Paragraph 9(1) of the Calcutta High Court Commercial Courts Practice Declarations, 2021, depend on whether the dispute qualifies as a "commercial dispute" under the 2015 Act. Thus, the court must first determine if the dispute is indeed a commercial dispute.

31. Admittedly, in the present case, the parties are not *ad idem* regarding the existence of an agreement. The learned court, upon considering the plaint and the documents annexed thereto, observed that negotiation was going on between the parties, and whether this negotiation culminated in an agreement is in dispute. Thus, this question must be resolved first, and only then the nature of the dispute can be ascertained and it can be ascertained whether the dispute falls within the ambit of Sections 2(1)(c)(vi) and 2(1)(c)(xi) of the Act of 2015 and at this stage, the Court will not enter into disputed question of fact.

32. It is needless to observe that the power conferred upon the Court under Order VII, Rule 11 of the Code can be exercised at any stage of the suit—before registering the plaint, after issuing summons to the defendant, or at any time before the conclusion of the trial. The use of the word ‘shall’ in the provision of Order VII, Rule 11 implies that it imposes upon the Court a duty to reject the plaint when it falls under any of the infirmities provided in the four clauses of Rule 11, even without intervention from the defendant [see the judgment delivered in case of *Popat & Kotecha Property* (*supra*)]. Therefore, the learned Court below may exercise such power even after taking evidence if the situation so demands.

33. I have carefully reviewed the judgments cited by the appellant. Although there is no scintilla of doubt about the binding effect of those judgments but in the given facts and circumstances, they will not aid the defendant/appellant.

34. Therefore, for the reasons stated above, I am also of the view that the learned court below rightly observed that resolving the question raised in the application for rejection of the plaint requires an examination of evidence. Thus, at that stage, the application for rejection of the plaint could not be entertained. Hence, I concur with the views expressed by the Hon'ble Justice Chakraborty.

(Partha Sarathi Chatterjee, J.)