IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.528/2019

Maharashtra State Electricity Distribution
Co. Ltd., Incorporated vide No.U 40109
MH 2005 PLC 153645 dated 31.05.2005
by the Registrar of Company through its
Superintending Engineer, O & M Circle,
Bhandara, Tahsil & District Bhandara.
(Ori. Plaintiff).

....**APPELLANT.**
(On R.A.)

VERSUS

M/s. Uniferro International Ltd.
(Universal Ferro & Allied Chemicals
Ltd. (Chemicals & Ferro Alloys Private Ltd.)
Consumer No.430019002076 R/o Maneknagar,
Tumsar, Tah. Tumsar, Dist. Bhandara,
having its Head Office at Liberty Cinema
Building, Sir Vithaldas Thackersey Marg,
New Marine Line, Mumbai 400 020.
(Ori. Defendant)

....**RESPONDENT.**
(On R.A.)

Mr. S.P. Dharmadhikari, Senior Advocate with Mr. A.M. Qazi, Advocate for the appellant.
Mr. Rahul Narichania, Senior Advocate with Mr. Aashdin Chivalwala, Mr. Rohan Vasa and Mr. H.N. Verma, Advocates for respondent.

CORAM : VINAY JOSHI AND MRS.VRUSHALI V. JOSHI JJ..

JUDGMENT RESERVED ON : 15.04.2024
JUDGMENT PRONOUNCED ON : 03.05.2024

JUDGMENT : (PER COURT)

Heard.

2. This is plaintiff's appeal challenging the order dated 13.04.2018 (Exh.17) rejecting the plaint in terms of Order VII Rule 11(a) and (d) of the Code of Civil Procedure ('CPC'). The plaint was rejected on the ground that it does not disclose fresh cause of action and is barred by Order II Rule 2 of the CPC. The suit is also not tenable in view of the Order XXIII Rule 1 of the CPC as the earlier suit was withdrawn without obtaining leave of Court. Moreover, the suit is barred by the rule of estoppel and law of limitation.

3. The facts of the case in brief are that the plaintiff Maharashtra State Electricity Distribution Company Ltd., ('MSEDCL') is a corporate body engaged in distribution of electricity to its various type of consumers. The defendant is a Private Limited Company constituted under the provisions of the Companies Act.

The defendant has obtained electric connection for industrial purpose at Maneknagar, Madgi, Tahsil Tumsar, District Bhandara. The electric supply was provided to the defendant vide service connection No. 430019002076 under High-Tension Category having 29340 KW connected load. It is plaintiff's case that since beginning, the defendant was irregular in payment of energy charges. The defendant has raised dispute on various counts including getting benefits like NTPC tariff charges etc.

4. The plaintiff has maintained regular account of the defendants service connection in consumer personal ledger. The defendant was in arrears of energy charges to the tune of Rs.182,12,78,910/-. The plaintiff has issued demand notice dated 15.09.2004, but it was not complied, hence cause of action accrued. Therefore, the plaintiff has filed a Special Civil Suit No. 73/2004 for recovery of aforesaid energy charges.

5. In the meantime, the Government of Maharashtra has declared a "Special Amnesty Scheme" ("SAS") for Industrial Units which had been closed for one year or more and which were beyond possibility of rehabilitation. In order to facilitate such closed units

for an easy exit, the Government of Maharashtra has issued a Commercial Circular No. 211 dated 01.10.2023.

6. During pendency of suit, the defendant has submitted required application on 22.07.2013 seeking benefit under the SAS as per Commercial Circular No. 211, dated 01.10.2013. After due scrutiny of the said application, the defendant being found eligible, the plaintiff accepted the defendant's application and submitted a "One Time Settlement" ("OTS") proposal to the defednat vide communication dated 18.11.2013. The defendant accepted OTS proposal and conveyed its acceptance vide communication dated 25.11.2013. The plaintiff computed the amount of OTS and vide communication dated 30.11.2013 directed defendant to pay Rs. 46,20,24,380/- towards OTS to be paid on or before 31.03.2014. The defendant has accordingly paid OTS sum of Rs. 46,20,24,380/- towards full and final settlement. The said letter was acknowledged by the plaintiff on 04.01.2014. Moreover, the plaintiff has also issued no dues certificate dated 25.03.2014. Thus, according to the defendant, the matter was finally settled and nothing remained to be paid.

7. On the wake of above background, the plaintiff has filed a second suit bearing Special Civil Suit No. 14/2017 for recovery of sum of Rs. 124,48,25,874/-. towards energy charges. It is not in dispute that for recovery of energy charges, the plaintiff had filed earlier Special Civil Suit No. 73/2014. The cause of action for the first suit accrued when the defendant did not comply the demand notice dated 15.09.2004. The said suit was came to be withdrawn, since under SAS, the defendant has deposited one time settlement ('OTS') amount. However, in second suit, the plaintiff came with a case that the settlement was in terms of the Commercial Circular No. 211 dated 02.10.2013. According to the plaintiff, the purpose of SAS was to rehabilitate and to restart the Industrial Units. In terms of the Commercial Circular [condition (6)] the new Management taking the benefit of SAS, has to start reproduction/new production within three years from the date of approval of the SAS. Moreover, in view of the Commercial Circular, if the production has not been started at the same place within three years, the benefit given under the SAS has to be recovered with interest @ 12% per annum.

8. It is plaintiff's case in second suit that, thought the defendant has availed the benefit of SAS in terms of Commercial

Circular No.211, however the defendant did not take steps for re-production/new production. The plaintiff vide communication dated 11.08.2016, 29.09.2016, 26.10.2016 directed the defendant to restart the production, but the defendant did not. Therefore, according to the plaintiff, the defendant is liable to pay the entire sum with interest and thus, the second suit was filed for recovery of aforesaid sum to Rs. 124,48,25,874/-.

9. The defendant has resisted the suit by filing written statement. The defendant has also filed an application (Exh.17) in terms of Order VII Rule 11 of CPC for rejection of plaint. The said application is captioned as an application under order VII Rule 11 read with Order II Rule 2 read with Section 151 of the CPC. The defendant stated about filing of first suit for recovery of sum of Rs. 182,12,78,910/- towards energy charges. It is stated that as per Government of Maharashtra Commercial Circular No.211 dated 01.10.2013, the defendant applied and held eligible for OTS under the SAS. The defendant contended that they have accepted the plaintiff's offer of OTS towards full and final settlement of entire outstanding dues. The defendant has accordingly paid OTS amount of Rs. 46,20,24,380/- towards full and final settlement. The plaintiff

has acknowledged the said payment on 04.01.2014. Moreover, the plaintiff has also issued no dues certificate dated 25.03.2014. Thus, according to the defendant, the matter was finally settled and nothing remained to be paid on their part.

10. The defendant contended that the amount claimed in second suit was already claimed in earlier suit which was disposed by way of settlement. Therefore, the second suit is not maintainable due to want of fresh cause of action. The defendant contended that condition (6) of the Commercial Circular No.211 would not apply since there was no change of management. The management which applied for SAS, the management which accepted OTS proposal and deposited OTS amount is the same and thus, Condition (6) of the Commercial Circular No.211 would not apply. In other words, the condition (6) would apply only to a new management who has taken the old management of an Industrial Unit. The defendant was a sick company against whom the proceeding was pending in BIFR, therefore, it could not change the management at all. According to the defendant this being the position, no fresh cause of action arose for filing of second suit. Moreover, the suit is barred by the provisions of Order II Rule 2 of CPC and the law of limitation. The

suit is also not maintainable due to principle of estoppel, hence plaint is prayed to be rejected.

11. The plaintiff resisted the application vide reply Exh.,25. On material aspect, it is contended that the defendant has accepted the terms and conditions of settlement vide letter dated 30.12.2013, accordingly, on compliance no dues certificate was issued. As per condition (6) of the Commercial Circular No.211 dated 01.10.2013, the new management which has taken the benefit of SAS has to start reproduction/new production at the same place within three years, failing which the benefit is to be recovered with interest @ 12% per annum. The defendant secured advantage under SAS, however neglected to start reproduction. The plaintiff has issued several letters directing to restart the production, but defendant did not. It is contended that no dues certificate was issued subject to complying condition (6) of Commercial Circular. Since the defendant did not comply the condition on which SAS was granted, the fresh cause of action arose and thus, the suit is maintainable.

12. Having regard to rival submissions, the learned Trial Judge was pleased to hold that the suit is bad for want of cause of action,

barred by law, and consequently plaint was rejected in terms of Order VII Rule 11(a) and (d) of the CPC.

13. Undisputedly, the plaintiff MSEDCL has supplied industrial electric connection to the defendant for commercial purpose. The defendant was allegedly irregular in payment of energy charges for which the plaintiff had filed Special Civil Suit No.73/2004. During the pendency of suit the Government of Maharashtra has declared SAS for Industrial Units which were closed and could not be restarted. The defendant applied for the benefit of the SAS under the Commercial Circular No.211 which was accepted. The OTS amount was fixed which was deposited by the defendant. In pursuance of settlement, the pending suit was came to be withdrawn. It is not in dispute that the withdrawal was without seeking leave of the Court. On above background, the question arose about the maintainability of second suit for recovery of energy charges.

14. The defendant while objecting the maintainability of the suit on the ground of absence of independent cause of action, relied on the decision in case of **Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others, (2004) 3 SCC 137.** In

the said decision, the Supreme Court reiterated that the power under Order VII Rule 11 of the CPC can be exercised at any stage of the suit, based upon a holistic and meaningful reading of the plaint. For this purpose, the pleas taken by defendant in the written statement would, however, not be looked into. Upon considering of the earlier pronouncements, the Court held as follows:-

> *"10. In Saleem Bhai v. State of Maharashtra,(2003 (1) SCC 557) it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are the germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.*
>
> *11. In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal, (1998) (2) SCC 70 it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.*

12. The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam v. T.V. Satyapal and Anr. (1977) (4) SCC 467).

13. ……

14. ……

15. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be

> *borne in mind that no pedantic approach should be adopted to defeat justice on hair- splitting technicalities.*
>
> *16. .....*
>
> *17. Keeping in view the aforesaid principles the reliefs sought for in the suit as quoted supra have to be considered. The real object of Order 7 Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, the Order 10 of the Code is a tool in the hands of the Courts by resorting to which and by a searching examination of the party, in case the Court is prima facie of the view that the suit is an abuse of the process of the court, in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7 Rule 11 of the Code can be exercised."*

15. The defendant has heavily relied on the provisions of Order II Rule 2 of the CPC while claiming rejection of the plaint. To substantiate said contention, the defendant relied on the decision of the Supreme Court in case of **Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited, (2013) 1 SCC 625** which reiterates the principle that the suit shall include the whole claim and its omission bars the subsequent suit. The Court has explained the object behind the rule that to discourage vexatious and multiple suits based on same cause of action.

16. The first objection pertains to bar of suit for want of fresh cause of action coupled with the bar created under Order II Rule 2 of CPC. For ready reference, the said provision reads as under:-

> *"**Order II. Frame of suit**.*
>
> *1. **Frame of suit**. - Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.*
>
> *2. **Suit to include the whole claim**. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) **Relinquishment of part of claim**- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) **Omission to sue for one of several reliefs**- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted".*

It is defendants contention that second suit was equally for recovery of energy charges based on the same cause of action. Since the first suit was withdrawn, the second suit based on the same cause of action is not maintainable in view of the provisions of Order II Rule 2 of the CPC. The said provision indicates that if a plaintiff is entitled to several relief against the defendant in respect of the same cause of action, he cannot split up claim so as to omit one part of the claim and sue for such omission by second suit. If the cause of action is the same, the plaintiff has to place all his claim before the Court in one suit. In second suit, raising issue which could have been raised in the first suit which was relatable to the same cause of action is not permissible.

17. To constitute bar to the fresh suit under Order II Rule 2(3) of the CPC, three elements are required to be proved. First, it must be established that the second suit was in respect of the same cause of action as that of which the previous suit was based; secondly, in respect of that cause of action, the plaintiff is entitled to more than one relief; and lastly, that being so, the plaintiff, without leave obtain from the Court, omits to sue for the relief for which the second suit has been filed.

18. It is defendant's contention that second suit is based on the same cause of action. In this regard, it is essential to note the cause of action of the first suit. Needless to say that "cause of action" means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment which consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed for the suit.

19. The copy of first plaint is produced on the record. In first suit it is pleaded that the defendant was in arrears of energy charges for which the demand notice was issued and on non-compliance, the suit was filed for recovery of energy charges. The cause of action for the first suit being relevant having bearing on the second suit, we have reproduced the relevant para 4 to 7 of the first suit as below:-

> *"4. That the plaintiff's maintains regular account of the said service connection of the defendant company in Consumer Personal Ledger under computerized H.T. billing system at Circle office Bhandara as per the conditions of supply applicable to the defendant company. The bills for the above charges used to be sent to the defendant company by the Board. As per the regular accounts maintained by the Board in it's ordinary course of business regarding the said service connection of the*

defendant company an amount of Rs. 182,12,78,910/- is due to be recovered from the defendant the company by the Board as arrears of the electrical energy charges till the filing of the suit. The particulars of account have been set forth in the Statement of Account filed herewith which is prepared on the basis of the original C.G.L. record, which is kept in the office of Board and maintained in the ordinary course of the business of the plaintiff in it's computer section. The C.P.L. extract is filed as "schedule-A" and the Statement of Account is filed as "schedule-B", which is part and parcel of the plaint.

5. The defendant company had filed various litigation for getting various benefits like NTPC tariff etc. That the defendant company had filed writ petition No. 1467 of 2003 before the High Court of Judicature, Bombay on 7/4/2003. On 25/4/2003 the Hon'ble High Court has directed that the defendant company should pay installment of Rs. 1 crore per month towards arrears in addition to regular bill. However the defendant company has failed to pay the arrears as per the directives given by the Hon'ble High Court.

6. That, the Board has issued a registered notice with A/D on 09/09/2004 through Board's counsel and demanded the recovery of the dues from the defendant company. The defendant company has sent a fax massage vide letter No. UFA/KR/2106 dt. 15th September 2004 through Dy. General Manager Mr. K. Rangarajan and requested to wait for the reply through the counsel of the *defendant company with references to the civil suit notice dt. 9-9-2004 claiming electricity charges for M.S.E.B. mentioned above. The plaintiff demanded the payment of suit money within 7 days from the date of receipt of the notice and not the reply through the counsel. The defendant company failed to comply the civil suit notice within the period mentioned therein. The plaintiff is therefore filing this civil suit against the defendant company before this Hon'ble Court for the recovery of the outstanding arrears.*

7. That, the cause of action accrued to file this suit on 25-4-2003 when the Hon'ble High Court has directed the defendant company to pay Rs. 1 crore per month towards arrears in addition to regular bill and the defendant company failed to pay the amount of arrears after 1-7-2003. The cause of action also accrued on 23-9.2004 when the defendant company did not comply the notice and sent by Fax, a request letter No. UFA/KR/2106 dt. 15th September 2004. Hence this suit is within limitation."

The second suit though pertains to the recovery of energy charges, the cause of action as pleaded by plaintiff in second suit is distinct. The plaintiff came with a case that the earlier suit was withdrawn on account of settlement under SAS in terms of Commercial Circular No.211 dated 01.10.2013. The plaintiff pleaded that as per SAS, the defendant was under obligation to restart production within three years, failing which the benefit derived by the defendant under the SAS stands withdrawn. Since the defendant failed to restart the production within stipulated period, the benefit derived by him stands withdrawn making plaintiff entitled to recover entire amount with interest. The pleadings of the second suit pertaining to the cause of action are material which are reproduced below:-

> *"7. That the very purpose of the "Special Amnesty Scheme" is to rehabilitation and for to restart the Industry/ Unit under Maharashtra Industrial Policy 2013. the specific directions and terms are directed by the Government of Maharashtra vide Resolution dated 1st August 2013 and accordingly as per the Government resolution a present plaintiff i.e. Maharashtra State Electricity Distribution Company Limited had issued a Commercial Circular No.211 dated 01.10.2013 and it is mentioned in the Circular No.211 that "The New Management who has taken benefit of Special Amnesty Scheme" will have to start reproduction/New Production at same place within 3 years from the date of approval of special Amnesty Scheme otherwise benefit given under special Amnesty Scheme will be recovered with interest @ 12% per annum and information is to be submitted to the Directorate of Industries (DOI) or appointed Authority – Undertaking from the new management is to be obtained to this effect.*

8. That the defendant had taken the benefit of "Special Amnesty Scheme 2013" but had not took a step for reproduction/New production and hence a plaintiff had issued a letters dated 11.08.2016, 29.09.2016, 26.10.2016 for to start the Industry for reproduction/New production but in vain and hence a legal notice through Advocate V.M. Dalal Bhandara is issued on 28.03.2017 with a specific contention that "a benefit of Special Amnesty Scheme" is withdraw.

9. That the cause of action accrued to file this suit on 11.08.2016, 29.09.2016, 26.10.2016 when the letters are issued by a plaintiff to the defendant and on 28.03.2017 when a Legal Notice is issued."

20. According to the plaintiff as the defendant failed to restart production as per the terms of SAS, the plaintiff has issued letter dated 11.08.2016, 29.09.2016, 26.10.2016, and legal notice dated 28.03.2017. Since the defendant failed to act in accordance with the Commercial Circular, the cause of action accrued. Reading of the entire plaint discloses that though the plaintiff is claiming energy charges, the cause of action is wholly based on defendant's alleged failure to comply the condition of SAS despite service of notice.

21. The learned counsel appearing for plaintiff relied on the decision of the Supreme Court in case of **Rathnavathi and anr. Vs.**

Kavita Ganashamdas, (2015) 5 SCC 223 to contend that in order to invoke Order II Rule 2, the cause of action in latter suit must be the same as that in previous suit. Similarly, the plaintiff relied on the decision in case of **Pramod Kumar and another Vs. Zalak Singh and ors, (2019) 6 SCC 621** to contend that cause of action in both suits must be in substance and identical to attract the bar.

22. In earlier suit, the position was quiet distinct wherein the plaintiff was merely seeking recovery of energy dues. However, the cause of action for second suit arose on the non-compliance of the condition within three years from the acceptance of OTS. Thus, it cannot be said that both suit are based on the same cause of action. Moreover, it is not a case that the plaintiff was entitled to claim certain reliefs in first suit, which he omitted and for the same relief has filed the second suit. The defendant's alleged failure to comply the condition of SAS has occasioned new cause of action for plaintiff to institute the second suit. Therefore, the cause of action for second suit being distinct and the relief which plaintiff is seeking was not available on earlier occasion, it cannot be said that, either the cause of action is same or there is no new cause of action or the provisions of Order II Rule 2 would apply.

23. Recently, the Supreme Court in case of **Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) dead through Legal Representatives and ors., (2020) 7 SCC 366** has exhaustively dealt with the issue regarding rejection of plaint. Following observations of the Court are relevant for the purpose of present suit:-

> *"23.2. The remedy under Order 7 Rule 11 is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.*
>
> xxx xxx xxx
>
> *23.6. Under Order 7 Rule 11, a duty is cast on the Court to determine <u>whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, read in conjunction with the documents</u> relied upon, or whether the suit is barred by any law.*
>
> xxx xxx xxx
>
> *23.8. Having regard to Order 7 Rule 14 CPC, the documents filed alongwith the plaint, are required to be taken into consideration for deciding the application under Order VII Rule 11(a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.*

23.9. In exercise of power under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.

23.10. <u>At this stage, the pleas taken by the defendant</u> in the written statement and application for rejection of the plaint on the *merits, <u>would be irrelevant</u>, and cannot be adverted to, or taken into consideration.*

23.11. The test for exercising the power under Order 7 Rule 11 is that if the <u>averments made in the plaint are taken in entirety, in conjunction with the documents relied</u> upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V.Sea Success, (2007) 5 SCC 614 which reads as :-

> *"139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if <u>the averments made in the plaint are taken to be correct in their entirety, a decree would be passed.</u>"*

23.12. In Hardesh Ores (P.) Ltd. v. Hede & Co, (2007), 5 SCC 614, the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. <u>It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands</u>, without addition or subtraction of *words. If the allegations in the plaint prima facie show a cause of action, the court, the cannot embark upon an enquiry whether the allegations are true in fact. D. Ramachandran V. R.V. Janakiraman, (1999) 3 SCC 267.*

23.13. If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 CPC.

23.14. The power under Order 7 Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain.

23.15. The provision of Order 7 Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clause (a) to (e) are made out. If the Court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the Court has no option, but to reject the plaint.

(Emphasis supplied)

24. The test for exercising the powers under Order VII Rule 11 are that the averment made in plaint are to be read as a whole. It is

the substance, and not merely the form which has to be looked into. While ascertaining the cause of action, the Court has to see every fact which would be necessary for the plaintiff to prove in support of the judgment which he is seeking for. However, the plea taken in defence cannot be looked at this stage. Though the provisions of Order VII Rule 11 of the CPC is mandatory, however it being the drastic step, the provision is required to be strictly construed. For this purpose, the plaintiff has relied on the decision in case of **P. V. Guru Raj Reddy represented by GPA Laxmi Narayan Reddy & anr. Vs. P. Neeradha Reddy and ors., (2015) 8 SCC 331**.

25. The learned counsel appearing for plaintiff relied on the decision in case of **Shaukathussain Mohammed Patel Vs. Khatunben Mohmmedbhai Polara, (2019) 10 SCC 226** to contend that the averment in plaint have to be taken into account in their entirety and not the defence raised by the other side. Likewise, the plaintiff relied on the decision in case of **Mayar (H.K.) Ltd. & Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express & Ors., AIR 2006 SC 1828** to impress that the plaint cannot be rejected on the basis of allegations made by the defendant in written statement. Keeping in mind above principles of law meaningful reading of the plaint necessitates to

find out the cause of action made out by the plaintiff in the plaint. We have extracted above para 7 to 9 of the plaint which indicate that the entire cause of action is based on the condition of SAS which was availed by the defendant by paying the OTS amount.

26. The plaintiff's second suit is entirely based on the pleadings that though the defendant has availed the benefit of SAS in accordance with Commercial Circular No.211, dated 01.10.2013, it has not abided by the mandatory conditions and thus, new cause of action arose after lapse of three years on failure to comply the essential conditions of the Commercial Circular. On the other hand, the defendant has strongly resisted said contention by stating that the so-called condition (6) of the Commercial Circular No.211 would not apply to the defendant since there was no change in the management. According to the defendant, under SAS, the matter was fully and finally settled as well as no dues certificate was also issued and thus, the Commercial Circular would not apply for want of change of management. Rather the defendant's learned counsel mostly argued to convince as to how condition (6) of the Commercial Circular does not apply to the defendant.

27. There is no dispute that the Government of Maharashtra under the "Maharashtra Industrial Policy 2013" has declared "Special Amnesty Scheme" vide Government Resolutions dated 02.05.2013 and 01.08.2013 for Industrial Units closed for one year or more which are beyond possibility of rehabilitation. The Government of Maharashtra has introduced SAS with the intention to balance the industrial development for financial growth with motive to encourage to new entrepreneurs to establish their units to create new employment and opportunities. In order to implement the SAS, Commercial Circular No.211 dated 01.10.2013 has been introduced. According to the plaintiff, the defendant has availed the SAS under Commercial Circular No.211 and thus, defendant was under obligation to abide by all the conditions contained therein. Particularly, emphasis is laid on the condition (6) of the Commercial Circular No.211 which reads as below:-

> *"6 The new management who has taken benefit of Special Amnesty Scheme will have to start re-production/new production at same place within 3 years from date of approval of Special Amnesty Scheme. Otherwise benefit given under Special Amnesty Scheme will be recovered with interest @ 12% per annum and information is to be submitted to the Directorate of*

> *Industries (DOI) or appointed Authority. Undertaking from the new management is to be obtained to this effect."*

Rather the entire suit is based on the non compliance of condition (6) of the Commercial Circular No.211. The plaintiff has pleaded in second suit (para 7) that the very purpose of SAS is rehabilitation and to restart the industry/Unit under the Maharashtra Industrial Policy 2013. As per the Commercial Circular No.211, the new management who has taken benefit of SAS has to start reproduction. The defendant has taken the benefit of SAS, but did not take steps for reproduction. Despite several communications the defendant failed to restart the unit hence, the benefit of SAS stands withdrawn.

28. The learned senior counsel appearing for the defendant strenuously argued that though defendant has availed the benefit of SAS vide Commercial Circular No. 211, however it does not fall under category (C) of the Circular which pertains to change of management. Condition (6) of restarting unit would apply only if defaulter falls in category (C) of the Circular. According to the defendant, they would fall under category (A) or (B) which applies to the Industrial Unit which are closed for the period more than one year or which are beyond the scope of rehabilitation. It is submitted

that there is no change in management at all and thus, the condition (6) of restarting the production within three years would not apply to the defendant at all.

29. The relevant portion of Commercial Circular No.211 specifying the categories of the eligibility reads as below:-

"COMMERCIAL CIRCULAR NO.211

"………

………

……….

The GoM vide the Special Amnesty Scheme has provided option for easy exist to the closed industrial units beyond scope of rehabilitation which will fulfil the following conditions.

(A) Those Industrial units which are closed for the period more than one year or those which are declared nadar/insolvent by the Court.

(B) Those industrial units which are beyond scope of rehabilitation as per the guidelines given by Reserve Bank of India.

(C) Those industrial units which can run successful by change of management.

(D) If the liable industrial units which satisfied for above conditions and pays entire principal amount of the arrears on one stroke, then interest & DPC will be waived off.

(E) The special Amnesty Scheme will be in forced upto 31/03/2014.

In view of Special Amnesty Scheme (Vishesh Abhay Vojana) under Maharashtra Industrial Policy 2013 for closed industrial units which are beyond the scope of rehabilitation, the Board of Directors has accorded approval as under:

1. In view of objective of Special Amnesty Scheme to establish a balanced Industrial & financial growth and to encourage the new industries to create more employment opportunities, in the state the Board accorded approval to Special Amnesty Scheme.
The Amnesty Scheme will be applicable to:-

(a) Permanently disconnected LT/HT Industrial Consumers which are closed for the period more than one year or those which are declared nadar/insolvent by the Court.

(b) Industrial units which are beyond scope of rehabilitation as per the guidelines given by the Reserve Bank of India.

(c) Industrial units which can run successfully by change of management.

…………
………..”

30. The Trial Court in para 29 of its order by referring condition (6) of the Commercial Circular No.211, has observed that in order to apply the condition, undertaking from the new

management has to be obtained. It is observed that the plaint is silent about such undertaking furnished by the defendant, nor anything is on record to show that there exist a new management of the defendant. The said reasoning would not sustain since the Trial Court went into considering the defence which is not permissible at this stage. The plaint may be lacking of certain particulars, which would be at the detriment of the plaintiff at the time of adjudication. Whether condition (6) of the Commercial Circular No.211 would apply to the defendant is a matter of merits of suit. Whether there was change in management or mere case of amalgamation is of a question of fact to be decided in trial upon evidence. All these defences cannot be considered while dealing with the application under Order VII Rule 11 of the CPC.

31. We may reiterate the cardinal principle that the plaint as it stands has to be read and without considering the defence, the application needs adjudication. Moreover, the matter is to be viewed by considering that the averments made in plaint are true and correct. Therefore, at this stage, we are not inclined to accept the defence contention that condition (6) would not apply to him. Certainly, it is a matter of evidence and merit. The plaintiff may

ultimately fail, but at this stage, we are not inclined to venture into the exercise of adjudicating whether condition (6) of the Commercial Circular No.211 would apply in case or not.

32. The defendant has assailed the suit on the ground of rule of estoppel. It is contended that the plaintiff himself has withdrawn the first suit on which no dues certificate was issued and thus, principle of estoppel would apply. The defendant has acted upon the OTS proposal by paying the settlement amount. It is submitted that the defendant had also withdrawn the writ petition challenging the legality of electric bills. The defendant relied on the decision in case of **M/s. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and others, (1979) 2 SCC 409** to contend that when a party by his words or conduct made to the other a clear and unequivocal promise and other acted upon, then the prior cannot go back from the promise.

33. Essentially, principle of estoppel is a rule of evidence which is a matter of trial. Estoppel prohibits a party from proving anything which contradicts his previous declarations or act, to be prejudice of party, who, relying upon them, altered his position. It is distinct than the *res judicata* which oust the jurisdiction of Court whilst the

estoppel shuts the party to plead contrary. No doubt, on payment of OTS under SAS, no dues certificate was issued and suit was withdrawn. However, it is plaintiff's specific case that the said settlement and withdrawal of suit was subject to industrial policy in terms of Commercial Circular No. 211 which was within knowledge of defendant. Therefore, at the threshold without adjudication of merits, it cannot be said that the rule of estoppel bars the suit which is to be determined on facts and evidence of the case.

34. The defendant also assailed the maintainability of the suit on the ground of bar created under Order XXIII Rule 4 of the CPC. It is submitted that since the first suit was withdrawn without obtaining leave of the Court, the plaintiff is precluded from instituting a fresh suit in respect of the same subject matter. In this regard, defendant has relied on the decision of the Supreme Court in case of **Sarguja Transport Service Vs. State Transport Appellate Tribunal M.P. Gwalior, & ors, (1987) 1 SCC 5**. The relevant provision reads as under:-

> ***"Order XXIII. Withdrawal of suit or abandonment of part of claim***
>
> *1.* ***Withdrawal of suit or abandonment of part of claim*** *- (1) At any time after the institution of a suit, the plaintiff*

may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2)……

(3) ……

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

35. The rider imposed under Sub-clause (4) from instituting a fresh suit is about the same subject matter or such part of claim which was abandoned. Therefore, it necessitates to understand the term "Subject matter" which has relevance in deciding the maintainability of second suit in absence of the leave of the Court.

36. The term "subject matter" employed in Order XXIII Rule 1 has been explained by the Supreme Court in case of **Vallabh Das Vs.**

Dr. Madan Lal & ors, 1970(1) SCC 761 para 5 of the decision reads as below:-

> *"5. Rule 1, 0rder XXIII, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The terms imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous. Suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. ………….. As observed in Rukhma Bai v. Mahadeo Narayan ILR 42 Bom 155, the expression "subject matter" in Order XXIII, Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject matter" means the bundle of facts which have to*

be proved in order to entitle the plaintiff to the relief claimed by him."

(Emphasis supplied)

37. It reveals from the correspondence that the defendant has applied under the SAS in terms of Commercial Circular No. 211. The letter issued by the Superintendent Engineer, MSEDCL dated 18.11.2013 indicates that the defendant's proposal for OTS was placed before the Competent Authority. In view of the policy for SAS under the Maharashtra Industrial Policy 2013 in terms of Commercial Circular No. 211, the defendant was held eligible to avail the package scheme till 31.03.2014. The defendant through Chairman has acknowledged the said letter by accepting the OTS scheme. The demand of OTS amount of Rs. 46,20,24,380/- was informed to the defendant vide communication dated 30.11.2013 with energy bill which was complied. Moreover, no dues certificate was issued which was followed by the withdrawal of a suit.

38. In order to invoke the provisions of Order XXIII Rule 4 of the CPC, the plaintiff must withdraw or omit part of his claim obviously which was available at the time of institution of the first suit. The withdrawal of suit was under SAS is not in dispute. As per

plaintiff's case, condition (6) of the Commercial Circular No.211 puts a rider of restarting Industrial Unit within three years and on failure, the benefit would be withdrawn. Thus, at the time of withdrawal of first suit, there was no such cause to seek leave of the Court. Though the withdrawal pursis does not bear reference, however the settlement was under a Government Police as per Commercial Circular No. 211, hence the provisions of Order XXIII Rule 4 of the CPC would not apply under peculiar facts.

39. As regards to the point of limitation is concerned, as per plaintiff's case, after three years from the date of approval of SAS, the cause of action arose. It is plaintiff's case that the suit is filed within three years thereafter. Moreover, the issue of limitation is mixed question of law and facts. It is a matter of evidence to be decided at the time of final adjudication.

40. To summarize the position, for the first suit (Special Civil Suit No. 73/2014), the cause of action was default in payment of energy bill, whilst the cause of action for second suit was quite distinct arose after three years from the availment of benefit of SAS by the defendant. The cause of action for second suit is breach of condition of SAS which is distinct. The question whether there is

change of management or conditioin No. (6) of the Commercial Circular No.211 would apply is a matter of merit which cannot be pre-judged. Moreover, the earlier withdrawal was under a Special Government scheme which authorizes the plaintiff on proof of default to withdraw the benefit of SAS and thus, Order XXIII Rule of the CPC would not apply.

41. We may reiterate that from the meaningful reading of the plaint tenability of the suit is to be decided without looking to the merits of claim. The plaintiff may fail on merits but the same is not germane at this stage.

42. In view of above, the impugned order of rejection of plaint is unsustainable in the eyes of law. In the result, by allowing this appeal, we hereby quash and set aside the order of rejection of plaint dated 13.04.2018 passed in Special Civil Suit No. 14/2017 by Civil Judge, Senior Division, Bhandara at Exh.17 and consequently reject the said application.

43. Appeal stands disposed of in above terms.

(MRS.VRUSHALI V. JOSHI, J.) **(VINAY JOSHI, J.)**

Gohane