IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

COMMERCIAL APPELLATE DIVISION

APPELLATE SIDE

Before:

The Hon'ble Justice Arijit Banerjee
And
The Hon'ble Justice Om Narayan Rai

FAT 3 of 2024

With

I.A. No. CAN 2 of 2025

Everstrong Sales Pvt. Ltd.

Vs.
Binod Kumar Mahipal & Ors.

For the Appellant	: Mr. Abhrajit Mitra, Sr. Adv Mr. Shoham Sanyal, Adv. Mr. K.N. Jana, Adv.
For the Respondent No. 41	: Mr. Mainak Bose, Sr. Adv. Mr. Rishabh Karnani, Adv. Mr. Sourath Dutt, Adv. Mr. Sanjay Kr. Baid, Adv.
Hearing Concluded on	: 06.05.2025
Judgment on	: 30.06.2025

Om Narayan Rai, J.:-

1. The instant appeal assails an order dated August 11, 2023 passed by the learned Judge, Commercial Court at Rajarhat in Title Suit No. 20 of 2021 (C.C) whereby an application for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereafter "the Code") filed by the defendant no. 41 (respondent no. 41 herein) has been allowed.

2. Since we are examining an order whereby an application for rejection of plaint has been allowed, the case run in the plaint only needs to be noticed together with the documents appended thereto. Briefly summed up the plaint case is as follows:

    a. The defendant nos. 1 to 32 being in need of funds for the purpose of their business jointly approached the plaintiff for financial assistance to the tune of Rs.7,00,00,000/- (Rupees Seven Crore). The said defendants offered to secure repayment of the loan requested for by them by mortgaging their respective undivided shares in land measuring 394.77 decimals in Baranagar (hereafter "the suit property").

    b. It was specifically agreed between the plaintiff and the defendant nos. 1 to 32 that the said loan sought for by the said defendants would be utilized only for business purposes and that no part thereof would be transferred to any of their heirs or legal representatives. It was further represented to the plaintiff that the defendant nos. 2 to 36 had in two divisions (one consisting of the defendant nos. 2 to 25 and the other comprising the defendant nos. 26 to 32) executed two several powers of attorney in favour of the defendant no.1 to look after and administer their shares in the said suit property as also to negotiate terms regarding mortgage of their share in the suit property.

    c. It was on such understanding plaintiff had lent and advanced a sum of Rs.7,00,00,000/- (Rupees Seven Crore) to the defendant nos. 1 to 32 in tranches, which was to be repaid with interest within a period of 24 months.

d. As agreed, repayment of the said loan was secured by mortgage of immovable property executed by the defendant nos. 1 to 32 to the extent of the said defendants' undivided/unpartitioned 78.05% share in the suit property. The defendant nos. 33 to 41 are the other co-owners and co-sharers in respect of the suit property together with the defendant nos. 1 to 32.

e. The said loan that was advanced by the plaintiff to the defendant nos. 1 to 32 was a commercial loan for business purposes and the property that was mortgaged to secure repayment of the said loan was also used exclusively in trade and commerce. The borrowers being the defendant nos. 1 to 32 failed to repay the borrowed sum wherefore the appellant/plaintiff instituted the aforesaid suit for recovery of a sum of Rs.13,20,46,829/- with interest against the defendant nos. 1 to 32.

3. Based on the above-noted case run in the plaint, the plaintiff has claimed the following reliefs in the suit:

"a. A preliminary decree in Form 5A of Appendix 'D' of the Code of Civil Procedure declaring the amount due to the plaintiff on the mortgage to be Rs.13,20,46,829/- as on 31st August 2021 and directing the defendant nos. 1 to 32 to make payment of the aforesaid sum together with pendent lite interest and interest on judgment at the contractual rate of 13.5 percent per annum;

b. In default of the defendant nos. 1 to 32 making such payment, decree for sale of the undivided 78.05% share of the defendants in the property more fully described in the Fisrt Schedule hereof and handing over of such sale proceeds to the plaintiff in pro tanto satisfaction of its claim *c. In case the proceeds of the sale are found to be insufficient to satisfy the amount due under the decree to be passed, leave be given to the plaintiff to apply for personal decree against the defendant nos. 1 to 32 for the balance….."*

4. The defendants contested the suit by filing their written statements in two sets. The first set being the written statement filed jointly by the defendant nos. 1 to 32 and the second set being the written statement filed by the defendant nos. 33 to 41.
5. The defendant no. 41 also took out an application under Order VII Rule 11 of the Code contending that as the dispute raised in the suit was/is not "commercial dispute" in terms of Section 2(1)(c) of the Commercial Courts Act, 2015 (hereafter "the said Act"), therefore the subject suit was not a commercial suit, that the same would not maintainable before the Commercial Court at Rajarhat and that the said Court had no jurisdiction to try and entertain the said suit.
6. The plaintiff contested the said application filed by the defendant no. 41 by filing its affidavit-in-opposition.
7. After considering the material on record and upon a contested hearing, the learned Commercial Court allowed the defendant no.41's application under Order VII Rule 11 of the Code and rejected the plaint by observing as follows:

> *"Critically analyzing the factual matrix it transpires that the suit property is an undivided one and the plaintiff has extended loan facilities to some co-owners in respect of the suit property and when the defendant no. 1 to 32 failed and neglected the repayment, the plaintiff has been compelled to file the present suit. The principal question before this Court as under what capacity the plaintiff extended the loan whether in the capacity of money lender or non-banking financial institution. On both counts the license as well as the*

certificate from the RBI has not been disclosed in the plaint nor annexed with the list of documents and further did not file memorandum of association whereby it could also be ascertained the nature of business and lastly failed to present the suit qualification of a "Commercial dispute" in the averments within the purview of the Commercial Courts Act, it is necessary to break down the classes of persons and transactions contemplated in the clause (ii) to (xxii) which do not apply in the instant suit. The absence of MOU of the plaintiff company together with money-lending license and RBI certificate makes me hold the suit has not arisen out of commercial dispute and has no locus to institute before the Commercial Court.

Therefore, in view of the aforesaid discussion, I am of the view plaint does not contains sufficient pleading to the effect that the statements in the plaint are not supported by relevant and important material documents which ultimately demolishes the suit of the plaintiff following omission of material facts/documents which leads to an incomplete cause of action which is bad in law, accordingly the defendant no. 41 succeeds."

8. Feeling aggrieved by the said order dated August 11, 2023 the plaintiff has come up in appeal before us. It may be mentioned that the plaintiff-appellant has also filed an application under Order 47 Rule 11 of the Code seeking to bring on record *inter alia* its Memorandum of Association and a document evincing that subsequent to the rejection of plaint, the plaintiff-appellant had put in the requisite fees with penalty to obtain a money lending license under the Bengal Money Lenders Act, 1940.

9. Mr. Abhrajit Mitra, learned Senior Advocate appearing on behalf of the appellant/plaintiff invited the attention of this Court to the provisions of Section 2(1)(c)(vii) of the said Act to submit that a dispute arising out of any agreement relating to immovable property which was used in trade and commerce would be treated as a commercial dispute in terms of the aforesaid provisions. He thereafter took us through paragraph 19 of the

plaint to show that the sum lent and advanced by the plaintiff to the defendant nos. 1 to 32 was a commercial loan for business purpose and repayment of such loan was secured by mortgage of the suit property and that the suit property was used exclusively in trade and commerce. It was submitted that since the said loan is secured by mortgage of immovable property (created by way of registered Deed of Mortgage) and the said immovable property is used exclusively in trade and commerce, therefore the present suit which is based on a dispute arising from an agreement relating to immovable property used in trade and commerce the same has rightly been filed as a commercial suit.

10. Paragraph 3 of the plaint was also placed by Mr. Mitra to contend that as the plaintiff and the defendant nos. 1 to 32 had agreed that the loans to be advanced by the plaintiff would be utilized only for business purposes the loan transaction clearly fell within the scope of 2(1)(c)(i) of the said Act.

11. It was further submitted that for the purpose of deciding an application under Order VII Rule 11 of the Code, the Court is required to see the averments made in the plaint and that the statements made in the plaint are to be treated as true and correct. Paragraph 13 of a Single Bench judgment of this Court rendered in the case of ***Lord Grih Nirman Private Limited vs. Merlin Projects Limited***[1] was relied upon in support of the aforesaid proposition.

12. The Court was then taken through the deed of mortgage dated September 7, 2016 which forms an annexure to the plaint and it was submitted that the said deed clearly recorded that the plaintiff had lent and advanced a

[1] *2024 SCC OnLine Cal 9922*

sum of Rs.7,00,00,000/- (Rupees Seven Crore) to the defendant nos.1 to 32 for commercial purpose and that the property mentioned in the said deed had been mortgaged for securing repayment of the said sum by the borrowing defendants to the lender-plaintiff. Paragraphs 4, 14 and 37 of a judgment of the Hon'ble Supreme Court in the case of ***Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and Another***[2] were relied on for the proposition that in a mortgage suit the determining factor as to whether or not the Commercial Courts Act, 2015 would apply, is the usage of the property on the date of the agreement.

13. It was submitted on behalf of the appellant that on a cumulative reading of the case run in the plaint and the documents annexed thereto, it will be absolutely clear that the plaintiff had lent and advanced the said sum of Rs.7,00,00,000/- (Rupees Seven crore) for commercial purpose and that there was an agreement in the form of a deed of mortgage which satisfied the requirement of Section 2(1)(c)(vii) of the said Act of 2015 and that being so the suit instituted by the appellant was clearly a commercial suit and was maintainable before the Commercial Court.

14. It was further submitted that the observation of the learned Commercial Court that the plaintiff's suit could not be maintained as a commercial suit since the plaintiff did not have money lending license and the requisite certificate from the Reserve Bank of India (hereafter "RBI") is not correct inasmuch as money lending license is not a requirement prescribed under any of the provisions of Section 2(1)(c) of the said Act. It was then submitted by the appellant that the appellant had already deposited the maximum fine

[2] *(2020) 15 SCC 585*

of Rs.1,000/- required to be paid/deposited in terms of the provisions of Section 32 of the Bengal Money Lenders Act, 1940 and had thus cured the defect, if any, in the institution of the suit. In support of such proposition the plaintiff relied on another Single Bench judgment of this Court in the case of ***Ashvin & Co. vs. Bajaj Tea House***[3].

15. It was then submitted on behalf of the plaintiff that even it is assumed that the plaintiff's suit is not maintainable as a commercial suit before the Commercial Court the correct approach would have been to transfer the suit from the Commercial Division to the non-Commercial Division and that the plaint should not have been rejected under Order VII Rule 11 of the Code. In support of the aforesaid proposition the appellant relied on the following judgments:

   i). ***Ladymoon Towers Private Limited vs. Mahendra Investment Advisors Private Limited***[4] (paragraphs 1 and 2),

   ii). ***Jai Balaji Industries Limited vs. Calderys India Refractories Ltd.*** (Order dated 13th May, 2022 passed in C.S. No.19 of 2019),

   iii). ***Sherawali Developers LLP vs. M/s. Majesty Homes & Ors.***[5] (Paragraph 12),

   iv). ***Satyavama Commotrade Private Limited & Ors. vs. Global Motocorp LLP & Anr.*** (Order dated 11th November, 2019 passed in FMA No. 1522 of 2019)

   v). ***Suraj Prakash vs. Neeraj Kumar & Ors.***[6] (Paragraphs 7, 8 and 11).

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[3] *2010 SCC OnLine Cal 44*
[4] *2021 SCC OnLine Cal 4240*
[5] *MANU/DE/3640/2024*
[6] *2023 SCC OnLine Del 4563*

16. It was further submitted that a Chartered High Court has no power to return a plaint under Order VII Rule 11 of the Code and as such this Court had in the case of ***Macneill and Magor Ltd. & Anr. vs. Mouhsen Ali & Anr.***[7] (Paragraphs 19 to 21) transferred the case from this Court to a Court having jurisdiction by exercising its power under Section 24(1)(a) of the Code. It was further submitted that such power of transfer can be exercised either under Section 151 of the Code in exercise of inherent power of the Court or under Section 24 thereof.

17. Mr. Mainak Bose, learned Senior Advocate appearing for the respondent no.41 (defendant no.41) supported the impugned order and submitted that neither of the two sub clauses of Section 2(1)(c) of the said Act that have been relied on by the plaintiff come to the aid of the plaintiff. It was further submitted that the loan that had been sought to be recovered by the plaintiff by way of the suit did not satisfy the requirements of a loan or advance in ordinary transaction of merchants/bankers, financer and trader inasmuch as the plaintiff is neither a bank nor a financial institution nor a merchant nor a trader. It was also submitted that the plaintiff had made no averment in the plaint in such regard. Placing reliance on the judgment of this Court in the case of ***Venkatesh Vincom Private Limited vs. Spice of Joy, Multicuisine Restaurant cum Bar and Others***[8] (Paragraphs 7, 9 and 11), it was submitted that for a transaction to be called a commercial transaction in terms of Section 2(1)(c)(i) of the said Act, the same should have arisen in the ordinary course of business of the litigant.

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[7] *AIR 1985 Cal 460*
[8] *2022 SCC OnLine Cal 3010*

18. The Memorandum of Association of the company that has been annexed by the Plaintiff to its application under Order 41 Rule 27 of the Code was relied on to show that the same did not permit the business of lending and advancing money by the plaintiff. It was submitted that the loan transaction done by the plaintiff in the suit cannot be said to be one in the ordinary course of business of the plaintiff. Placing reliance on a judgment of this Court in the case of ***Ladymoon Towers Private Limited***[4] (supra) (paragraphs 5, 15, 19 and 20), it was submitted that unless the plaintiff could show that the loan transaction which forms the subject matter of the suit was a transaction in the ordinary course of business of the plaintiff, the plaintiff's suit could not be termed as a commercial suit. It was further submitted that the suit property was a vacant land and not one which was being used in the trade and commerce and that being so the plaintiff could not have invoked the jurisdiction of the Commercial Court.

19. The defendant no. 41 has also relied on paragraphs 36 and 37 of the judgment in the case of ***Ambalal Sarabhai Enterprises Limited***[2] (supra) to assert that a suit relating to an immovable property being used exclusively in trade and commerce can be instituted only if the suit property is used exclusively in trade and commerce on the date of the filing of the suit.

20. It was submitted that the learned Commercial Court rightly rejected the plaint and did not return the same as contended by the plaintiff because the Commercial Court lacked subject matter jurisdiction to entertain the suit. A

Full Bench judgment of the Allahabad High Court in the case of ***Ananti vs. Chhannu and Others***[9] was pressed into service to assert that in a case of lack of subject matter jurisdiction a Court ought to reject a plaint and not return it. It was submitted that the plaintiff had drafted the plaint in a manner so as to bring the suit within the jurisdiction of the Commercial Court but once it was evident that the Commercial Court lacked subject matter jurisdiction the only option left for the Commercial Court was to reject the plaint. Paragraph 6 of a judgment of the Bombay High Court in the case of ***Lt. Col. Anil Bhat and Others vs. CITI Bank, Mumbai***[10] was relied on for the said proposition.

21. It was then submitted that as no specific averment has been made in the plaint as to how is the suit property exclusively used in trade and commerce and no supporting document has been annexed thereto showing that the property is in fact being used for trade and commerce, the learned Commercial Court has rightly rejected the plaint.

22. It was finally submitted that since the plaintiff has run a case of having lent and advanced a sum of money to the defendant it was incumbent on the part of the plaintiff to show that the plaintiff had a license permitting money lending or a certificate of registration from RBI at least as on the date of institution of the suit. Reliance in such regard was placed on the judgment in the case of ***Nedumpilli Finance Company Limited vs State of Kerala***[11]***.*** It was also submitted that the defect of conducting a business of money lending under the Bengal Money Lenders Act, 1940 without having a

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[9] *AIR 1930 All 193*
[10] *AIR 2009 Bom 99*
[11] (2022)7 SCC 394

money lending license could not have been cured by depositing license fee and penalty after rejection of the plaint and by bringing the same on record by way of an application under Order 41 Rule 27 of the Code.

23. We have heard the submissions made by the respective parties and have considered the material on record.

24. At the outset the definition of "commercial dispute" as provided in Section 2(1)(c) of the said Act needs to be noticed:

> *(c) "commercial dispute" means a dispute arising out of--*
> *(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;*
> *(ii) export or import of merchandise or services:*
> *(iii) issues relating to admiralty and maritime law;*
> *(iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;*
> *(v) carriage of goods;*
> *(vi) construction and infrastructure contracts, including tenders;*
> *(vii) agreements relating to immovable property used exclusively in trade or commerce;*
> *(viii) franchising agreements;*
> *(ix) distribution and licensing agreements;*
> *(x) management and consultancy agreements;*
> *(xi) joint venture agreements;*
> *(xii) shareholders agreements;*
> *(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;*
> *(xiv) mercantile agency and mercantile usage;*
> *(xv) partnership agreements;*
> *(xvi) technology development agreements;*
> *(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;*
> *(xviii) agreements for sale of goods or provision of services;*
> *(xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;*
> *(xx) insurance and re-insurance;*
> *(xxi) contracts of agency relating to any of the above; and*
> *(xxii) such other commercial disputes as may be notified by the Central Government*

Explanation.-- A commercial dispute shall not cease to be a commercial dispute merely because--

(a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

25. A reading of the provisions of Section 2(1)(c) of the said Act reveals that for a dispute to be called a "commercial dispute" under the said Act, the same must fall within one of the several sub-clauses of clause (c) of Section 2(1) of the said Act. The expression "means" used in Section 2(1)(c) of the said Act to define "commercial dispute" clearly indicates that the definition is exhaustive and therefore a dispute not falling within the scope of any the several sub-clauses of clause (c) of Section 2(1) of the said Act would not qualify to be called a "commercial dispute"

26. Of all the disputes that have been enumerated under Section 2(1)(c) of the said Act, the ones mentioned in sub-clauses (i) and (vii) of Section 2(1)(c) (which have been underlined) are relevant for the case at hand.

27. It is, therefore, required to be seen as to whether the case run in the plaint is such that the same can withstand a challenge thrown to it under Order VII Rule 11 of the Code on the strength of any of the aforesaid clauses of Section 2(1)(c) of the said Act.

28. It is now well settled that when the Court assesses the worth of a plaint which is faced with the peril of rejection under Order VII Rule 11 of the Code, the only question that needs to be answered is *"if the averments made in the plaint are taken in entirety, in conjunction with the documents relied* *upon, would the same result in a decree being passed".* ***(See: Dahiben vs. Arvindbhai Kalyanji Bhanusali[12] paragraph 23.11)***

29. It is equally settled that while examining a plaint at the stage of Order VII Rule 11 of the Code the plaint should be read meaningfully (not formally) and in its entirety i.e. as a whole.***(See Ram Prakash Gupta vs. Rajiv Kumar Gupta & Ors.[13])***

30. We have gone through the plaint and the reliefs claimed therein. Simply put the suit is one for recovery of money upon enforcement of mortgage. It would qualify for a commercial suit if the dispute qua the parties satisfies the definition of "commercial dispute" in terms of Section 2(1)(c) of the Act.

31. The following paragraphs of the plaint have been relied on by the plaintiff in order to justify the institution of the suit as one arising from a commercial cause:

> *"3. It was specifically agreed by and between the plaintiff and the defendant nos. 1 to 32 that the loans to be advanced by the plaintiff to the defendant nos. 1 to 32 would be utilized only for business purposes and that the said defendants would not use/part/transfer the loan amount to any of their legal heirs or any representatives.*
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> *19. The loan advanced by the plaintiff to the defendant nos. 1 to 32 was a commercial loan for business purposes secured by mortgage of the property described in the First Schedule hereto. The said property is also is used exclusively in trade and commerce and is situated at Surya Sen Road (formerly Hasti Road) within Circle Nos. 3 and 7 of the Baranagar Municipality in the District of North 24 Parganas within the territorial jurisdiction of this Learned Court."*

32. In the case at hand the plaint has been attacked on the ground that the Court whereat it has been filed lacks jurisdiction to entertain a commercial

[12] *(2020) 7 SCC 366*
[13] *(2007) 10 SCC 59*

suit. From a meaningful reading of the plaint in conjunction with the documents annexed therewith it cannot be said with absolute certainty that the plaint is not based on a commercial dispute between the parties. The aforementioned paragraphs of the plaint, relied on by the plaintiff read cumulatively with the other paragraphs thereof indicate the existence of a commercial dispute, at least at this stage, when only the averments made in the plaint and the documents annexed thereto are to be considered without reference to the defense case.

33. The assertion of Mr. Bose that since there is no averment in the plaint to the effect that the plaintiff carries on business of money lending, therefore a dispute arising from the loan transaction between the plaintiff and the defendant nos. 1 to 32 would not qualify to be termed as a "commercial dispute" in terms of Section 2(1)(c) of the said Act would not, in the considered view of this Court, lead to rejection of the plaint in the facts and circumstances of the instant case. Indeed if the suit was simply one for recovery of money lent and advanced, then absence of an averment of the nature as contended by Mr. Bose could have had a serious bearing on the plaint upon a challenge being mounted to it under Order VII Rule 11 of the Code but such is not the situation here.

34. As already indicated hereinabove, the instant suit is one for recovery of money by sale of the mortgaged property in enforcement of the mortgage. Paragraph 19 of the plaint contains a clear averment to the effect that the property that has been mortgaged *"is also is used exclusively in trade and commerce."*

35. We have perused the Deed of Mortgage annexed to the plaint which reveals that the immovable property that has been mortgaged to secure repayment of the said loan is possessed by the defendant nos. 1 to 32 and that they have *"unfettered right and entitlement to develop and make appropriate constructions on the said property"*. While it is true that there is no recital in the deed that can throw any light on the present mode of user of the said property the averment contained in the plaint that the same is used exclusively for trade and commerce at the moment helps the plaint in fending off the attack. Such averment cannot be simply ignored unless something starkingly contradictory is shown from the plaint or the documents annexed thereto.

36. We are alive to the fact that Mr. Bose has asserted that the land is a vacant land but then such assertion is an assertion of a defendant in defense to the plaint case which cannot be taken note of for deciding the fate of a plaint under Order VII Rule 11 of the Code. In any case even a vacant land can be used for a commercial purpose. Development of land itself can be a commercial venture. Whether in the case at hand it is so or not cannot be ascertained at this stage. When at the moment, it cannot be said with certainty that the said property is not being used for commercial purpose the plaint cannot be rejected more so when the plaint specifically avers that the property "*is used exclusively in trade and commerce*". We need not overemphasize that at this stage we have to accept the averments made in the plaint to be true and correct. Needless to say however, that the plaintiff would remain obliged to prove that which it has averred in the plaint in order to get the ultimate relief claimed by it from the Commercial Court.

37. While on this, certain observations of the Hon'ble Supreme Court in the case of ***Kamala & Ors. vs. K.T. Eshwara Sa & Ors.***[14] need to be recounted:

> ***"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. <u>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.</u>*
>
> ***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.*
>
> ***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.*
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> ***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.*** *<u>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.</u>"*

(Emphasis supplied by underlining)

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[14] *(2008) 12 SCC 661*

38. Going by the dictum of the Hon'ble Supreme Court in the aforementioned case, the defendant no.41 (i.e. the applicant in the application for rejection of plaint) may get one more chance to take a bite at the same cherry (which it has now missed) once the cherry grows a little older and reaches the stage of Order 14 Rule 2 of the Code, when the pleadings would be complete and Court would have the authority to enter into the disputed factual arena as well.

39. The judgments cited by the parties may now be dealt with. The judgment of the Hon'ble Supreme Court in the case of ***Ambalal Sarabhai Enterprises Limited*[2]** (supra) has been relied on by both the parties. The respondent no.41 has relied on the same to contend that for a dispute arising out of an agreement relating to an immovable property to be called a commercial dispute the property must actually be used for commercial purpose as on the date of institution of the suit and the deed of mortgage does not show that such property is being used for commercial purpose. At the risk of prolixity we reiterate that at the stage of Order VII Rule 11 of the Code, all that the Court is required to see is as to whether such a case has been made out in the plaint which, if the averments made in the plaint are taken to be true and correct, would be entitled to succeed. In the case at hand there is a specific pleading that the mortgaged property is used for trade and commerce. The said judgment in the facts of the present case therefore, does not help the defendant no.41. In the said case the Hon'ble Supreme Court found that the pleadings in the plaint were deficient, which is not the

case here in view of the specific pleading in the plaint as already mentioned hereinabove. In this regard paragraphs 8, 14 and 39 thereof may be noticed:

> ***"8.*** *Though such rival contentions are put forth by the learned Senior Advocate on either side, these aspects cannot be dealt with in abstract. Instead the nature of the dispute and the jurisdiction to try the same is to be reflected in the suit itself since in a civil suit the pleadings, namely, averments in the plaint would at the outset be relevant to confer jurisdiction. Hence before adverting to the other aspects it would be necessary to carefully examine the plaint. The plaintiff has in detail referred to the nature of the transaction between the appellant and the respondents herein. In Para 5 thereof the detail of the land bearing R.S. No. 122 corresponding to City Survey Nos. 1101 and 1100/1 having land area of 9207 sq m at Mouje Subhanpura Reg. District, Vadodara is referred. Further the schedule of the property is indicated in Para 6 and reference is made to the Memorandum of Understanding where again the reference is made to the land. It is averred therein that it would be the total responsibility of Respondent 1 herein (Defendant 2 in the suit) to change the land use as well as to pay the amount that may be required for the permission. The amount to be paid as premium is referred and the right of the plaintiff to secure the mortgage deed in view of the terms of the MoU is stated. In the entire plaint there is no reference to the nature of the land or the type of use to which it was being put as on the date of the agreement to sell/sale deed/memorandum of understanding or as on the date of the suit.*
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> xxxxx xxxxxxx xxxxxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx
>
> **14.** *In that view it is also necessary to carefully examine and entertain only disputes which actually answers the definition "commercial disputes" as provided under the Act. In the instant case, as already taken note neither the agreement between the parties refers to the nature of the immovable property being exclusively used for trade or commerce as on the date of the agreement nor is there any pleading to that effect in the plaint. Further the very relief sought in the suit is for execution of the mortgage deed which is in the nature of specific performance of the terms of Memorandum of Understanding without reference to nature of the use of the immovable property in trade or commerce as on the date of the suit. Therefore, if all these aspects are kept in view, we are of the opinion that in the present facts the High Court was justified in its*

conclusion arrived through the order dated 1-3-2019 [K.S. Infraspace LLP v. Ambalal Sarabhai Enterprises Ltd., 2019 SCC OnLine Guj 1926] impugned herein. The Commercial Court shall therefore return the plaint indicating a date for its presentation before the Court having jurisdiction.

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39. *It appears that the trial court has proceeded under the footing that the parties to the suit more particularly, the appellant-plaintiff seems to be carrying on business as estate agent and to manage land, building, etc. and the very object as enumerated in Memorandum and Articles of Association of the appellant-plaintiff company established that the property in question is being used exclusively in trade or commerce rather in the business of the plaintiff. As rightly pointed out by the High Court, there is nothing on record to show that at the time when agreement to sell came to be executed in 2012, the property was being exclusively used in trade and commerce so as to bring dispute within the ambit of sub-clause (vii) of Section 2(1)(c) of the Act. Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the Commercial Court."*

(Emphasis supplied by underlining)

40. The case of ***Ladymoon Towers Private Limited***[4] (supra) has also been relied on by both the parties. While the appellant has relied on the same to buttress its contention that if this Court finds that a suit which ought to have been filed as commercial suit has been filed as an ordinary civil suit or vice versa, the proper path to follow would be to transfer the same to the appropriate Court having jurisdiction, the respondent no.41 has relied on the same to contend that for a dispute to be called a commercial dispute in terms of section 2(1)(c)(1) of the Act, there must be an averment in the plaint as regards an agreement involving a mercantile document.

41. It is the respondent no.41's assertion that as in the case on hand there is no pleading as regards any money lending business and there is no agreement pertaining to mercantile documents, the suit cannot be termed to

be a commercial suit. We have noticed that there is a deed of mortgage annexed to the plaint that records the factum of loan having been advanced by the plaintiff/appellant to the defendant/respondent nos. 1 to 32 for business purpose. The suit is one for recovery of money upon sale of the mortgaged property in enforcement of mortgage and there is a specific averment in the plaint that the mortgaged property is used for commercial purposes. In such a fact situation, reference to or even existence of any mercantile document is immaterial. It would have mattered if the dispute was one which was only relatable to the plaintiff's business of money lending or solely based on an agreement to lend and advance a sum of money because in such a situation the only provision available to the plaintiff would have been section 2(1)(c)(i) of the said Act. In the instant case the pleadings of the plaintiff are two pronged - one pertaining to the grant of commercial loan and the other relating to mortgage of property used for commercial purpose. The bald pleading that the loan is commercial in nature does not impress us, therefore, if the dispute had pertained only to such loan, without any mortgage, then in the facts of the present case, the plaint could probably not have crossed the hurdle of Order VII Rule 11 but since the averments made in the plaint indicate that the dispute pertains to the mortgaged property used for commercial purpose therefore the plaint case presently satisfies the conditions of Section 2(1)(c)(vii) of the Act. Therefore at the present stage we are not minded to reject the plaint. The aforesaid judgment therefore does not help the defendants at all.

42. Insofar as the judgment in the case of ***Lord Grih Nirman Private Limited***[1] (supra) relied on by the appellant is concerned, it deals with a situation

where the suit which was instituted as an ordinary civil suit was allowed to proceed so, since the plaintiff's assertion that there was no agreement between the parties of the nature contemplated by Section 2(1)(c)(i) of the said Act was required to be established on evidence. The defendant therein had filed an application for rejection of plaint asserting that as there was an agreement between the parties that satisfied the test of Section 2(1)(c)(i) of the said Act and therefore the suit could only be tried by a commercial Court. Such application was repelled by the learned Single Judge. The Division Bench upheld the order with a modification, observing as follows:

> ***"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."*

43. Although the case at hand involves an inverse factual scenario as compared to that involved in the case of ***Lord Grih Nirman Private Limited***[1] (supra) yet the ratio of the said judgment squarely applies to the case at hand i.e. in case of a disputed question of fact the suit must proceed till the Court assumes authority to get into the pleadings of both the parties as well the evidence adduced by them.

44. Insofar as the judgment in the case of ***Ashvin & Co.***[3] (supra) is concerned, the same is an authority on the point that a claim on account of money lent and advanced by a money lender would not be barred by the provisions of the Bengal Money-Lenders Act, 1940 but no decree could be passed unless the money lender cures the defect of not having obtained a license under the said Act of 1940. The said judgment may further the case of the appellant inasmuch as the appellant contends that the appellant has cured the defect by putting in the requisite fees and fine for getting a money lending license. However at this stage the same is not required to be gone into inasmuch as the plaint can be sustained on a different ground altogether as already discussed hereinabove.

45. The judgment in the case of ***Nedumpilli Finance Company Limited***[11] (supra) cited by the defendant no.41 is again of no help to the said defendant. The said judgment was rendered to answer the following question (as would be evident form paragraph 1 of the report):

> ***"****The question as to whether Non-Banking Financial Companies (for short "NBFCs") regulated by Reserve Bank of India, in terms of the provisions of Chapter III-B of the Reserve Bank of India Act, 1934 (hereinafter referred to as "the RBI Act") could also be regulated by the State enactments such as Kerala Money Lenders Act, 1958 (hereinafter referred to as "the Kerala Act") and Gujarat Money Lenders Act, 2011 (hereinafter referred to as "the Gujarat Act"), has arisen for our consideration in these appeals, with the Kerala and Gujarat High Courts taking opposite views.*

46. In the case at hand it is nobody's case that the Plaintiff is a Non-Banking Financial Company. The question with which we are concerned in the present case is whether the dispute that has arisen between the parties is such that the same can be termed as a commercial dispute justifying institution of a commercial suit in terms of the Commercial Courts Act,

2015. We have held that the suit is one for recovery of money upon sale of the mortgaged property in enforcement of the mortgage which property, as stated in the plaint, is used for commercial purposes. In such view of the matter, the plaint cannot be and ought not to be rejected on the ground of non-availability of certificate from RBI.

47. We have noticed that the learned Commercial Court has treated the non-availability of RBI's certificate and absence of money lending license as the principal grounds for rejecting the plaint. The learned Court has myopically analyzed the plaint which will appear from the following observations in the order impugned:

> *The principal question before this Court as under what capacity the plaintiff extended the loan whether in the capacity of money lender or non-banking financial institution. On both counts the license as well as the certificate from the RBI has not been disclosed in the plaint nor annexed with the list of documents and further did not file memorandum of association whereby it could also be ascertained the nature of business and lastly failed to present the suit qualification of a "Commercial dispute" in the averments within the purview of the Commercial Courts Act, it is necessary to break down the classes of persons and transactions contemplated in the clause (ii) to (xxii) which do not apply in the instant suit. The absence of MOU of the plaintiff company together with money-lending license and RBI certificate makes me hold the suit has not arisen out of commercial dispute and has no locus to institute before the Commercial Court.*

48. Two points of analysis by the learned Court emerge from the above – a) Under what capacity has the plaintiff extended financial assistance and b) the nature of plaintiff's business. The aforesaid points, irrespective of whether the same are considered together or singularly, would be relevant to find an answer to only one question - whether the dispute in question has

arisen from a transaction that satisfies the conditions mentioned in section 2(1)(c)(i) of the said Act and not to answer the question as to whether the dispute is covered by the provisions of 2(1)(c)(vii) of the said Act. The learned Commercial Court has referred to "*clause (ii) to (xxii)*" of the said Act but such reference appears to be a fleeting one inasmuch as it has missed to note that the averments in the plaint and the nature of relief claimed presently satisfy the test of section 2(1)(c)(vii) of the said Act.

49. The judgment in the case of ***Venkatesh Vincom Private Limited***[8] (supra) relied by the respondent no. 41 is of no avail to the said respondent inasmuch as the same was rendered in a fact situation that was covered by the provisions of Section 2(1)(c)(i) of the said Act. In the said case a transaction arising in the ordinary course of business of a litigant has been held to be a commercial transaction even without any agreement. The case before us falls under Section 2(1)(c)(vii) of the said Act since the averments in the plaint, the reliefs prayed for and the document annexed therewith, make it apparent that the suit is one for recovery of money upon sale of the mortgaged property (stated in the plaint to be used for commercial purpose).

50. The Delhi High Court judgments in the cases of ***Sherawali Developers LLP***[5] (supra) and ***Suraj Prakash***[6] (supra) and the unreported judgments of this Court in the cases of ***Jai Balaji Industries Limited vs. Calderys India Refractories Ltd.*** (supra) and ***Satyavama Commotrade Private Limited & Ors. vs. Global Motocorp LLP & Anr.*** (supra) have been cited to demonstrate that suits which satisfied the tests of a commercial suit have been transferred to the commercial division by the Courts. We note that the case of ***Satyavama Commotrade Private Limited*** (supra) was one where

the parties had agreed that the suit was a commercial suit and as such the Court had no option to delve deep into the matter and decide any issue as regards the nature of the suit. The same is of no avail to either of the parties here in any case.

51. ***Macneill and Magor Ltd. & Anr.***[7] (supra) is an authority on the point that since this Court has no authority to return a plaint under Order VII Rule 10 of the Code in view of the provisions of Order XLIX Rule 3 of the Code, a suit, if found to be not maintainable before this Court, could be transferred to the appropriate Court having jurisdiction in exercise of powers under section 24 of the Code. The aforesaid judgments need not be discussed here in any detail view of the fact that we have held that the plaint should not be rejected.

52. The judgments in the case of ***Ananti*** (supra) and ***Lt. Col. Anil Bhat and Others*** (supra) which have been cited by the respondent no.41 are authorities for the proposition that a plaint would have to be rejected if the Court lacks subject matter jurisdiction, would not help the said defendant inasmuch as we have found that, at the present moment, the averments made in the plaint, the reliefs claimed therein and the documents annexed thereto read cumulatively bring the plaintiff's case within the scope of section 2(1)(c)(vii) of the said Act. It therefore cannot be said at this stage that the learned Commercial Court lacks subject matter jurisdiction.

53. In view of the above discussion and the reasons provided hereinabove we are of the considered view that the plaint should not have been rejected by the learned Commercial Court. We therefore allow the appeal being FAT 3 of 2024 by setting aside the order dated August 11, 2023 passed by the

learned Judge, Commercial Court at Rajarhat in Title Suit No. 20 of 2021 (C.C). The application for rejection of plaint under Order VII Rule 11 of the Code filed by the defendant no.41 stands rejected, the plaint is resurrected and the suit being Title Suit No. 20 of 2021 (C.C) is restored to the file of learned Judge, Commercial Court at Rajarhat. No costs.

54. Since we have allowed the appeal, the application under Order 41 Rule 27 of the Code for producing additional evidence stands disposed of accordingly.

55. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Arijit Banerjee, J.) **(Om Narayan Rai, J.)**