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**(2018) 08 CAL CK 0059**

**In the Calcutta High Court**

**Case No :** Government Appeal No. 3248, 3249, 3250, 3251, 3252, 146 of 2016

ITC Limited

APPELLANT

Vs

JP Morgan Mutual Fund India Private Limited & Ors.

RESPONDENT

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**Date of Decision :** 24-08-2018

**Acts Referred:**

Companies Act, 2013 — Section 166

Code of Civil Procedure, 1908 — Order 1 Rule 3, Order I Rule 10(2), Order 7 Rule 11

**Citation :** (2018) 08 CAL CK 0059

**Hon'ble Judges :** MOUSHUMI BHATTACHARYA, J

**Bench :** Single Bench

**Advocate :** S.N. Mookerjee, S.N. Mookerjee, Dipendra Nath Chander, Jishnu Saha, Souvik Mazumdar, Rishav Banerjee, Ishan Saha,

**Final Decision :** Dismissed

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**Judgement**

Moushumi Bhattacharya, J.

The instant application has been made on behalf of defendant Nos. 6,7,8,9 and 10 for rejection of the plaint and for striking out the names of the said

defendants from the array of parties in the suit. The defendant no.1 is the Asset Management Company and the defendant No.2 is the Asset Management

Company of J.P. Morgan India Treasury Fund and J.P. Morgan India Liquid Fund. The treasury fund and liquid fund are debt funds of J.P. Morgan

Mutual Fund. The defendant no. 3 is the Managing Director and Chief Executive Officer of the Asset Management Company; the defendant nos. 4

and 5 are the head of fixed income and the Associate Fund Manager (debts) respectively of the Asset Management Company and are also fund

managers of both the Treasury Fund and the Liquid Fund.

Defendant nos.1 and 2 issued the Scheme Information Document on which the

plaintiff relied and invested a substantial amount of money in the Treasury Fund and the Liquid Fund. The defendant no.6 is the Associate Director and Chairman of the Board of Directors of the Trustee Company (defendant no. 1). The defendant nos. 6 to 10 are the Directors of the Trustee Company (defendant no.1) and are responsible for ensuring that the transactions entered into by the Asset Management Company (defendant no.2) are in accordance with the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (SEBI MF Regulations) and are also responsible for reviewing the activities carried on by the Asset Management Company. These defendants seek to have their names removed from the array of parties in the suit. The description of the defendant, as stated above, has been taken from the plaint.

The plaintiff has alleged negligence and breach of fiduciary duties owed by the defendants to the plaintiff on the basis of which the plaintiff has claimed Rs.39,09,23,135.61/- on account of loss suffered by the plaintiff in relation to the investment made by the plaintiff in the liquid fund of the defendant no. 2.

The facts as stated in the plaint which culminated in filing of the present suit are these; Scheme Information Document of the Treasury Fund dated 30th April 2014 and liquid Fund of J.P. Morgan was circulated by the Trustee Company and Asset Management Company (defendant nos. 1 and 2) to potential investors on the website of the defendant nos. 1 and 2, by which the said defendants invited the public to subscribe to units of the Treasury Fund. The Scheme Information Document outlined the investment objective of the Liquid Fund which was to provide reasonable returns and a high level of liquidity to investors.

The invitation to the public to subscribe to units of the Treasury Fund and Liquid Fund constituted an offer document within the meaning of the SEBI (Mutual Fund) Regulations. The plaintiff invested a substantial sum of money in the Funds on various dates in 2014 when the Net Asset Value (NAV) of the Funds reflected an attractive value per unit. The plaintiff invested further sums of money in the Funds based on the Net Asset Value of the Funds taken per unit. According to the plaintiff, the defendants were aware at the relevant point of time that the plaintiff intended to hold the investment for at least three years as the same would also enable the plaintiff to

enjoy certain benefits under the Income Tax Act, 1961. The Scheme

Information Document of both the treasury as well as the Liquid Fund was amended from time to time but the principle terms remained unchanged.

On 15th June 2015, the Asset Management Company (defendant no.2) purchased secured bonds worth Rs.2 crore issued by Amtek Auto Limited

from Axis Bank at which time the bonds were rated as 'AAA' by Credit Analysis and Research Limited (care) and BWRAA by brickwork

ratings. From May 2015, the bonds started showing signs of poor performance which according to the plaintiff, would be evident from a downgrading

of the ratings of the bonds by Care and Brickwork as well as the reports in the print media. Based on the dwindling projections, the plaintiff filed its

redemption instruction with the defendant no.2 for redeeming the units held by it in the Treasury Fund. Several communications were exchanged

between the plaintiff and the defendant no.2 thereafter in relation to the amounts receivable by the plaintiff on account of the redemption instruction

given by the plaintiff.

The plaintiff claims that the defendant no.2 failed to make payment of the total amount demanded by the plaintiff and instead made part payments on a

piecemeal basis on various dates in August and September 2015. The plaintiff alleges breach of contract between the plaintiff and the defendant nos.

1 and 2 and breach of obligation on the part of all the said defendants in failing to protect the investment interest of the plaintiff as represented in the

Scheme Information Documents of the Funds. The plaintiff alleges dereliction of duty on the part of the defendants in failing to advise the plaintiff on

the timing of the exit in the plaintiff's investment in the bonds despite the downgrading of the said bonds. The plaintiff has further alleged breach

of fiduciary duty on the part of the defendants in failing to take care of the plaintiff's investments after the plaintiff had relied on the

defendants' representation that the defendant possessed skill and experience to protect the plaintiff's investments and that the plaintiff had

relied on such representation.

Mr. Jishnu Saha, senior counsel appearing for the defendant nos. 6 to 10 (who intend to have their names struck off from the array of parties) has

primarily placed reliance on the specific paragraphs of the plaint to show that no case for seeking relief against these defendants have been made out

in the plaint. It is submitted that the plaint does not disclose the circumstances in which the defendant nos. 6 to 10 came to owe a fiduciary duty to the plaintiff or the manner in which such duty has been breached. According to him, general allegations have been levelled against the defendant nos.6 to 10 only on the basis of their being directors of the Trustee Company (defendant no.1) and without any specific allegations against the said directors for either having made representations or holding themselves out to the plaintiff in terms of possessing particular skills or expertise in managing Mutual Funds.

He submits that the only allegation made against these defendants is that they were aware of and acquiesced to the acts and conduct of the defendant nos. 1 to 5 and hence are not necessary parties to the suit as no right to relief can exist against the defendant nos.6 to 10. Counsel places reliance on specific paragraphs in the plaint to show the absence of specific pleadings against the defendant nos.6 to 10 which would warrant treating the said defendants as necessary or proper parties. Counsel relies upon Order I Rule 3 of the Code of Civil Procedure, 1908 and submits that a right to relief must exist against a defendant and such right to relief must be judged on the basis of the acts alleged to exist against the concerned defendants. In essence, it is submitted that for determining whether the plaintiff has any right to relief against the defendant nos.6 to 10, it must be shown whether the allegations in the plaint gives the plaintiff a right to claim against them. According to Mr. Saha, in the absence of the particulars in relation to the alleged acts and transactions, there can be no duty of care or breach of fiduciary duty on the part of the defendant nos.6 to 10 and the plaintiff therefore cannot be entitled to any relief against the said defendants. It is submitted that under Order I Rule 10(2) a Court may order the name of a party to be struck out if it appears that some of the defendants in a suit have not been properly joined.

Counsel submits that in order to establish a cause of action for breach of fiduciary duty against the defendant nos.6 to 10, the plaintiff must plead with sufficient particulars the acts which were in conflict with the interest of the plaintiff. According to him, there is no such pleading in the plaint and hence the plaint fails to disclose a cause of action for breach of fiduciary duty allegedly owed by the defendant nos.6 to 10 to the plaintiff.

Mr. S.N. Mookherjee, Senior Counsel appearing for the plaintiff submits that partial rejection of a plaint cannot be permitted and relies on a recent decision of the Honâ??ble Supreme Court where the decision of a single bench of the Delhi High Court was set aside on the ground that partial rejection of the plaint was not permissible. Mr. Mookherjee submits that there is no averment in the applications that the defendant nos. 6 to 10 are not necessary of proper parties. He submits that under Order I Rule 10 of the CPC, a defendant can only be struck out if he has been improperly joined and that no case has been made out in the applications in this regard. According to him, in an application under Order VII Rule 11 of the CPC, once the plaint discloses even a shred of a cause of action against the defendants, no further probe is necessary and even a semblance of a cause of action against the concerned defendants is sufficient for the plaint to remain on the file. Counsel submits that if it is found at the time of trial of the suit that a plaintiff has no right to sue some of the defendants, a decree would be passed only against those defendants against whom the plaintiff has been able to establish a right to sue. It is submitted that in an application under Order VII Rule 11, the court is not required to make an elaborate enquiry into complicated questions of facts and law. Further, a defective cause of action, as opposed to non-disclosure of a cause of action, can be decided at trial. Counsel submits that the plaint has all the necessary elements of the tort of negligence namely (a) a duty of care owed by the applicants/defendants (b) breach of such duty by the said defendants and (c) the consequences of such breach. He submits that the duty of care would be apparent from the fact that the defendant no. 1 solicited funds from the general public including the plaintiff through the Scheme Information Documents (SID) and that the defendants were aware that the general public (including the plaintiffs) would rely on the statements contained in the SID before deciding to invest in the mutual fund of the defendants. He further contends that when investments are made by the general public on the basis of such SID, there is an element of entrustment of the plaintiffâ??s property with the defendants which entails a duty of care. This duty of care further arises from the fact that the defendant 1 (The Trustee Company) is to act through its Board of Directors, who is bound by the representation made in the SID to protect the investment funds of the investors and exercise duty of care, skill and judgment in managing such funds. It is the plaintiffâ??s case that as

Directors of the defendant no. 1, the applicants/defendants failed to exercise the duty of care and as a consequence, the plaintiff suffered loss and damage.

Mr. Mookherjee has relied on the following Cases: In Navilan Merchants Pvt. Ltd. Vs. Sejal Glass Ltd. & Ors. reported in (2016) SCC Online Del

6580 the order of a single judge of the Delhi Court allowing the plaint to be rejected against two of the defendants in the suit was set aside by the

Honâ??ble Supreme Court reported in (2018) 11 SCC 780 which was held that partial rejection of a plaint is not permissible Mayar (H.K.) Ltd. and

others vs. Owners & Parties, Vessel M.V. Fortune Express and others reported in (2006) 3 SCC 100 and Liverpool & London S.P. & I Association

Ltd. vs. M.V. Sea Success I and another reported in (2004) 9 SCC 512, held that in deciding an application for rejection of a plaint, the statements

made in the plaint have to be taken as true and correct. In the case of H.L. Bolton (Engineering) Co. Ltd. vs. T.J. Graham & Sons. Ltd. reported in

(1956) 3 All E.R. 624, the mental element of a company was equated with the mental element of its directors and managers. In the case of

Jageshwari Devi and others vs. Shatrughan Ram reported in (2007) 15 SCC 52 it was held that a vague or incomplete cause of action cannot be a

ground for rejection of a plaint and Balwant Singh vs. The State Bank of India and others reported in AIR 1976 P& H 316 held that even if the plaint

does not disclose a cause of action against some of the defendants, the plaint cannot be rejected as a whole.

Â have considered the submissions of Counsel appearing for the parties. The issue for consideration is whether the plaint should be rejected under

Order VII Rule 11 of the CPC for failing to disclose a cause of action against the defendant nos.6, 7, 8, 9 and 10 and whether the names of the said

defendants should be struck out from the array of parties to the suit under Order I Rule 10(2) of the CPC by reason of the said defendants not being

necessary parties to the suit.

Let us first examine whether the plaint is liable to be rejected in its entirety in terms of prayer (a) of the applications. This enquiry would involve an

assessment of the cause of action disclosed in the plaint against the defendant no.6 to 10, which will be tested as the final issue. The decision of the

Honâ??ble Supreme Court relied on by Counsel for the plaintiff reported in Sejal

Glass Limited vs. Navilan Merchants Private Limited has to be

accepted in terms of laying down the proposition in terms of partial rejection of a plaint not being permissible in law. In the said judgment, the Supreme

Court has held that the expression "plaint" necessarily means the plaint as a whole and for Order VII Rule 11 to come into play, the court must

come to a finding that the plaint as a whole does not disclose a cause of action. Hence, there is no scope for the plaint to be bifurcated in an action

under Order VII Rule 11. Although, prayer (a) of the applications relates to the rejection of the entire plaint, the case urged by the

defendants/applicants is that the plaint should be only rejected against the defendant nos. 6 to 10 and not against the others. In any event, the prayer

for striking out the name of the applicants/defendants has been framed as alternative to the prayer for rejection of the plaint. It is not necessary

therefore to dwell at length on whether the applications should be allowed in terms of prayer

(a). This court is in any event bound by the decision of the Hon'ble Supreme Court in Sejal Glass where it has been held that partial rejection of a

plaint is not permissible. The next issue is whether the names of defendant nos. 6 to 10 be struck out in terms of prayer (b) of the applications.

In this context, Order I Rule 10(2) of the CPC is set out below:-

10.(2) Court may strike out or add parties:- The Court may at any stage of the proceedings, either upon or without the application of either party,

and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be

struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court

may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be

added.

From the above it is evident that a party can be struck out only if a court comes to a finding that a party has been improperly joined or is not a

necessary party for the court to come to an effective and complete adjudication of all the questions involved in the suit. If this be the case, What are

the questions involved in the instant suit? And does the plaint, as framed, requires the presence of the said defendants as necessary parties for

deciding all the questions involved in the suit?

From a meaningful reading of the plaint, the questions involved appear to be whether the first defendant, being the Trustee Company, acts through its

Board of Directors and is under a duty of care to protect the investments of the investors (including the plaintiff) and exercise due care and skill in

managing such investments. The other question must be whether the defendant nos.6 to 10 as directors of the Trustee (defendant no.1) failed to

exercise such care as a consequence of which the plaintiff has suffered loss and damage.

The Scheme Information Document (SID) referred to in the plaint and forming an annexure to the plaintiff's affidavit-in-opposition, makes it clear

that the defendant nos. 6 to 10 were aware that potential investors would be persuaded to invest with defendant nos.1 and 2 based on the skill and

expertise of the defendant nos. 6 to 10 as projected and put out to the public in the SID. The statement of additional information to the Scheme

Information Document dated 30th June 2015 contains an introductory paragraph on the Trustee (defendant no.1) which is in the nature of a

declaration and gives a virtual stamp of certainty on the potential returns of the offer in calling upon potential investors to invest in the defendant nos.1

and 2. The paragraph needs to be set out for a proper understanding as to what the declaration contains:

“The Trustee: JP Morgan Mutual Fund India Private Limited, through its Board of Directors, shall discharge its obligations as trustee of the Mutual

Fund. The Trustee ensures that the transactions entered into by the AMC are in accordance with the SEBI (Mutual Fund) Regulations, 1996 (the

Regulations), and will also review the activities carried on by the AMC.”

“The statement of additional information goes on to provide “Details of Trustee Directors, namely, Dr. Dharmendra Bhandari (defendant no.7),

Mr. Simon Walls (defendant no.6), Mr. Gopalakrishnan Narayanan (defendant no.8), Mr. Surendra Singh (defendant no.9), Mr. Srinivasan Sridhar

(defendant no.10). The particulars include the academic qualifications and the work credentials of the said directors including the positions held by

them in various national and overseas companies involving (in all cases), a general expertise in market intelligence for growth and profitability. The

projection given is of the trustee having at its helm a group of directors who are

eminently suited to monitor and make a sound judgment in relation to investments made in the Trustee Company. The statement was framed in a manner so as to induce investors to put their money in the care of these highly qualified persons for maximum returns. It is arguable whether the statement of additional information without featuring the names of these directors would have been as attractive a proposal to potential investors for reposing their trust in terms of investments with the defendant no.1. It is evident that the defendant nos.1 and 2 took an informed decision to bandy the names of the said defendants for inviting investments from the public including from the plaintiff. It follows therefore that the representation made by the defendant nos.1 and 2, in the Scheme Information Document is three fold; that its Board of Directors (including defendant nos.6 to 10) would discharge their obligations in ensuring the best returns for the investors; that the transactions entered into by the Asset Management Company (defendant no.2) are in compliance with the SEBI (Mutual Fund) Regulations, 1996; and that the applicants/defendants would review the activities carried on by the Asset Management Company.

It is not necessary to look beyond the Scheme Document to ascertain whether the defendant nos. 1 and 2 brought the Trustee Directors (applicants/defendants herein) within the fold of the general duty of care in respect of the investments made in the Asset Management company (the defendant no.2). The SEBI regulations, reference to which has been made in the plaint, also casts a duty on the applicants/defendants to ensure that the plaintiff's funds were safely invested. According to the plaintiff, the sharp downgrade of Amtek Auto by several credit rating agencies was a clear pointer that the plaintiff's investments were required to be redeemed or at least reviewed on the basis of the downward projection given to the particular Bonds. Without going into the small print of the chain of events leading to the plaintiff approaching this court, it cannot be doubted that the defendants/applicants were fastened with a duty of care to look after the funds of the plaintiff, as had been represented in the scheme documents.

The scope of enquiry in the present applications is not to adjudicate on the truth or falsity of the statements made in the plaint including whether the defendants were accountable for the alleged loss and injury suffered by the plaintiff, but whether from the statements made in the plaint read together

with the Scheme Information Document, the defendant nos. 6 to 10 can be said to be parties in whose absence all the questions raised in the plaint can be effectively adjudicated.

The grievance embedded in the plaint is of a duty cast on the defendants to exercise due care and skill in managing the money given in trust by the plaintiff to the defendants and breach of that duty committed by the defendants leading to loss suffered by the plaintiff. If the starting point of the trust

reposed by the plaintiff is the Scheme information Document, can it be said that the defendants/applicants can exit the suit altogether before the

adjudication commences for answering the questions raised in the suit?

The applicants/defendants have argued that the pleadings in the plaint are not sufficient to prove negligence or breach of duty of care on the part of

the defendants and hence no case has been made out in the plaint in support of the relief claimed. It may be useful to step back and take a broader

view of what a plaint in a suit for negligence should contain. Forms 29 and 30 of Appendix A to The Code of Civil Procedure, 1908, give an outline of

the pleadings which are required to be made in a plaint for injuries caused by negligence. Although, facts may obviously differ in each individual case

as to the trigger for the aggrieved plaintiff to file a suit, the broad requirements of such pleadings show that a plaintiff must plead:-

- a) An identified defendant who committed (or omitted to do) the negligent act.
- b) The specific act of negligence and
- c) The fallout of such negligent act or the damage caused to the plaintiff by reason of such negligent act.

Forms 22 and 23 of Atkin's Encyclopaedia of Court Forms in Civil Proceedings 2nd Edition Volume 29 on statements of claims for damages

caused by negligence are substantially on the same lines as the CPC Forms except that particulars of negligence have been delineated to include the

following important pointers (again, case-specific);

- a) that the plaintiff had warned the defendant of the probability of the particular event,
- b) the defendant had failed to heed the warning given by the plaintiff and had failed to take sufficient steps to prevent the event from happening,
- c) the event took place due to the negligence of the defendant,

d) the plaintiff suffered loss and damage as a result of the event.

If the requirements of a plaint for negligence are these, then it must be held that the plaint in the instant suit contains the necessary elements of the tort

of negligence namely, a duty of care owed by the applicants/defendants; breach of such duty by the applicants/defendants; and the consequences of

such breach suffered by the plaintiff.

In the backdrop of the prescribed rules of pleading in an action for negligence, the plaint in the instant suit must be tested in order to determine

whether a cause of action has been disclosed against the defendant nos.6 to 10. The statements concerning the defendant nos.6 to 10 have been

arranged in the following sequence in the plaint:

â?¢ Defendant nos.6 to 10 owed a duty of care to the plaintiff; paragraphs 3, 4, 10, 12 and 42.

â?¢ There was a breach of the duty of care on the part of defendant nos.6 to 10: paragraphs 27, 42, 43, 44, 45, 46, 49 and 51.

â?¢ The plaintiff suffered the consequences of the said breach of the duty of care on the part of the defendant nos.6 to 10: paragraphs 46, 49 and 51.

Therefore, from the statements made in the plaint, the cause of action pleaded against the defendants/applicants â?¢ as required to be pleaded in a suit

for negligence â?¢ is sufficient. In a case where the concerned defendants are seeking a rejection of the plaint and deletion of their names from the

array of parties, the enquiry of a court is not to ascertain whether the cause of action pleaded against the defendants is vague or uncertain or merely a

pretext to club the defendants with some others in an attempt to create an illusion of a cause of action against all. This is usually the case where the

plaintiff does not have the necessary information or evidence to implead only those defendants who are actually necessary for effective and complete

adjudication of all the questions involved in the suit.

On a careful reading of the statements made in the plaint, together with the Scheme Information Document and the SEBI Regulations relating to

Mutual Funds, in particular, the central question is whether the defendant nos.6 to 10 can be said to be improperly joined and wholly irrelevant for the

court to decide whether a collective duty existed on the part of the defendants; whether they collectively failed in performing that duty and whether

the plaintiff suffered as a result of such collective failure on the part of the

defendants arrayed as parties to the suit. Besides the statements contained in Paragraph of the plaint stated above, Paragraph 42 trains the spotlight on; â?? The Defendant Nos. 6 to 10 are and were at all material time aware of and acquiesced to the same therein and accordingly by their acts and conducts held out and/or made the representations referred to above.â??

Having stated thus, it is difficult to agree with Mr. Saha that the Defendant nos. 6 to 10 are irrelevant to the question whether the defendants were collectively â??dutyâ??-bound to the plaintiff and whether they fell short of being dutiful. (Pun-intended, but with care).

It is well-settled that in an action under Order VII Rule 11 of the CPC, only the statements made in the plaint have to be taken as true and correct and the court cannot extend its enquiry beyond what has been pleaded in the plaint. The limitations of looking at a plaint for an enquiry of this nature is that even in case of a niggling doubt whether a defendant has been confronted with a cause of action against him or not, a court does not have the option to give the benefit of that doubt to the defendant and let him go without subjecting him to a trial in order to determine whether there is any basis to that doubt. The argument of counsel appearing for the defendants/applicants that the cause of action pleaded must be such as to entitle the plaintiff to a relief against that defendant, is an enquiry which can come only after the realisation that a niggling doubt exists. In the view of this court, once it is recognised that a probability exists for enquiring into the question whether a defendant is necessary or not in the scheme of the plaint as pleaded, the issue must be decided at trial and not in an application for rejection of the plaint or for deletion of parties. Since the contentions raised by the defendant nos.6 to 10 entail a determination of facts which may extend beyond the plaint and is essentially argumentative in nature, the issues involved must necessarily be proved at trial.

There is another logical aspect of the matter. In a complaint involving the tort of negligence, where the defendant is a corporate entity, the extent of liability would essentially depend upon the degree of mental element as decided in *Rajkot Municipal Corporation Vs. Manjulben Jayantilal Nakum & Others* reported in (1997) 9 SCC 552. This mental element can only be assessed by a reference to the mental element of the directors and managers of such corporate entity, as had been recognised in *H.L. Bolton (Engineering) Co.*

Ltd. reported in (1956) 3 All ER 624, the illuminating passage of which is set out below:-

“A company may in many ways be likened to a human body. They have also hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such.”

It would be uncharitable to visualize Defendant nos. 6 to 10, being the directors of the Trustee Company, as mere “hands” who do the work and this is certainly not the way they have been projected in the SID. It is far easier to say that the said defendants represent the mind of the company (defendant no. 1) and hence cannot be said to be improper or unnecessary to the case made out in the plaint. The defendants have represented in the SID that the defendant no. 1 through its Board of Directors, which includes the defendant no. 6 to 10, shall discharge their obligations and ensure that the transactions entered into by the defendant no. 2 are in accordance with the SEBI (Mutual Funds) Regulations, 1996 and shall further review the activities carried out by the defendant no. 2. The Regulations, which have been referred to in the plaint, casts a duty on the defendants to ensure that the plaintiff’s funds are safely invested.

The wording of Regulations 18 (12) and 60 in particular are significant in that the trustees have been made accountable for the funds and property of the respective schemes and hold the same in trust for the benefit of the unit holders in accordance with the SEBI (MF) Regulations. Regulation 60 is even more explicit in casting a duty of care on the trustees. Regulation 60 states that the trustee shall be bound to make such disclosures to the unit holders as are essential to keep them informed about any information, which may have an adverse bearing on their investments. In making a specific representation in the (SID) that the trustees/defendant no. 1 would ensure that the transactions entered into by the Asset Management Company/defendant no. 2 are in accordance with the SEBI Regulations, the defendants took upon themselves the obligation to exercise due skill and

judgment in the funds invested by the investors including the plaintiff. In the face of the Scheme Information Documents, there cannot be any

argument that the defendant no. 6 to 10 (Directors of the defendant no. 1 were not fastened that a duty of care in respect of the funds invested by the plaintiff.

In the light of the above discussion, it cannot be said that no shred of cause of action has been disclosed in the plaint against the

defendants/applicants. The other point taken by Counsel on behalf of the plaintiff is that the defendant no. 3, namely, Nandkumar R. Surti cannot speak

for the individual applicants/defendants (nos. 6 to 10) and cannot vouchsafe the facts pleaded by the said defendants. In the applications filed for

rejection of the plaint, Mr. Surti has made specific statements with regard to the defendant nos. 6 to 10 not having made any representations to the

plaintiff for the alleged breach on the part of the other defendants. The applications proceed on the basis that the plaintiff has failed to assert how any

negligent act can be attributed to the defendants/applicants and has failed to make any specific allegations against the said defendants. The two

authorities cited in relation to this issue, namely are (2005) 2 SCC 217 and (2014) 11 SCC 790 for the proposition that a Power of Attorney holder

cannot depose with regard to any acts done by the Principal.

Mr. Surti, being the Managing Director of the Asset Management Company cannot be in a position to depose in relation to the individual acts of

omission or commission on the part of the defendants/applicants and seek a rejection of the plaint on that basis. Paragraph 10 of the application being

G.A. 3252 of 2016 makes a specific averment as to the defendant no. 10 not having entered into any contract with the plaintiff and hence cannot be

held liable for any alleged breach of contract. This statement has been affirmed as being true to the knowledge and information of Mr. Surti. In the

view of this court, although the principle laid down in the decision cited cannot be faulted, this argument is only ancillary to the main issue, namely

whether the names of the applicants can be deleted. In any event, for deciding the primary issue in the applications only the plaint has to be looked into

for deciding whether the presence of the concerned defendants are necessary to the adjudication. That a person must depose only to the extent of his

personal knowledge is fundamental to depositions and there cannot be a

different view on this.

Mr. Saha has relied on *Laxmi Niwas Mittal Vs. Lindsay International Private Limited* reported in (2018) SCC Online Cal 52, a decision of a Division

Bench of this Court, where it was held that even though a plaint may not be rejected in part, it is permissible for a party (defendant) to be struck out

under Order I Rule 10 of the CPC and the effect of such would be the same as rejection of the plaint against the said defendant. However, a later

paragraph in that decision crystallizes the issue that where even a shred of cause of action exists against a party, the question of deleting that party

will not arise. Further, the decision relied upon by Mr. Saha proceeds on the basis that the defendant must have been improperly joined. From the

pleadings in the plaint and the materials referred to therein, it cannot be said that the defendants/applicants have been improperly joined as required to

be found under Order I Rule 10(2) of the CPC. Mr. Saha has also relied on *Rajkot Municipal Corporation Vs. Manjulben Jayantilal Nakum & Others*

reported in (1997) 9 SCC 552, for the proposition that in an action for negligence, liability can only arise where a duty of care is fastened by law on the

concerned party which is akin to an obligation recognised by law with reference to conduct which can lead to unreasonable damage to others.

However, the said decision recognises the various manifestations of negligent conduct including a careless state of mind and careless conduct giving

rise to a tortious liability and damage caused due to negligence.

The next decision relied upon by Counsel Om Prakash Srivastava Vs. Union of India and Another reported in (2006) 6 SCC 207 defines "cause of

action". In the aforesaid decision cause of action has been defined as circumstances forming the infraction of the right or the immediate occasion for

the reaction; in other words, the necessary conditions for maintaining a suit. *State of Haryana Vs. State of Punjab & Another* reported in (2004) 12

SCC 673, has been relied on as a follow up to Om Prakash Srivastava. According to Mr. Saha, in order to determine whether the plaintiff has any

right to relief against the defendant nos.6 to 10, it must first be first determined whether the allegation of acts as made in the plaint, gives the plaintiff a

right to claim a relief against a said defendants. In both the decisions, however, it has been reiterated that a question of rejection of a plaint must only

be decided on the allegations contained in the plaint. The Punjab National Bank

Limited Vs. Firm â??Ishwarbhai Lalbhai Patel and Co.â? reported in AIR (1971) BOM 348 has been relied on for the proposition that a case of negligence must be pleaded in a manner so that the opponent is in a position to squarely make a case for defence. ANIIDCO Limited Vs. M/s. DYC Self Help Group reported in (2013) 2 Cal LJ 576 has been relied on in support of the power of a court to strike out a party under Order I Rule 10(2) of the Code.

In the said decision defendant no.2, was deleted from the array of parties on the ground of being a stranger to the agreement forming the subject

matter of the dispute and on the basis that the defendant no.2 had been added as a party in the capacity of the Secretary to the defendant no.1. The

aforesaid decision reiterates the primary issue that for a court to delete the name of a party, it must come to a finding that the said party had been

improperly joined. The two decisions relied on by Mr. Saha in relation to fiduciary obligations are Coulthard Vs. Disco Mix Club Limited reported in

(2000) 1 WLR 707 and C.M. Philip Vs. The Registrar of Co-operative Societies and Ors. reported in (2017) 2 KLT 1087. In the said decision, a

fiduciary has been defined as â??someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give

rise to a relationship of trust and confidence.â??

In other words, the breadth of fiduciary duty has been narrowed down to a relationship of trust and confidence together with an obligation of loyalty.

The principle enunciated in Coulthard was followed in C.M. Philip where it was held that the core idea of fiduciary duty is the assumption of

responsibility for the property or affairs of others. The court drew a parallel from common law and equity and recognised that duty of care of those in

positions arises when such persons are entrusted with the property of another including Bailees, Trustees, Directors and Agents.

Coulthard and C.M. Philip in fact help the case of the plaintiff in that a definite statement has been made by the trustee in the Scheme Information

Document which can be interpreted as a representation made on behalf of the applicants/defendants (the Directors of the Trustee Company) that they

shall discharge their obligations as trustees of the Mutual Fund and ensure that the transactions entered into by the Asset Management Company

(defendant no.2) are in accordance with the relevant regulations of SEBI. This in

fact fits squarely into the definition of fiduciary duty outlined in the decision of the Kerala High Court. Para 8-04 from Clerk & Lindsell on Torts (21st Edition) has been placed by Mr. Saha for the four requirements of the tort of negligence which have enumerated as:-

â?¢ The existence in law of a duty of care.

â?¢ Breach of the duty of care by the defendant.

â?¢ A causal connection between the defendants careless conduct and the damage.

â?¢ The particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

In the view of this Court, the cause of action which emerges from the statements made in the plaint satisfies all the four requirements to maintain an action for negligence against all the defendants including the applicants herein.

Mr. Saha draws on Section 166 of The Companies Act, 2013 to urge that fiduciary duty can only arise in case of a director with reference to the

company where the director holds office. He accordingly submits that the allegations contained in the plaint in respect to breach of fiduciary duty and

obligations owed by the defendants to the plaintiff is entirely misplaced. In the view of this court however, to restrict the noble (and high-sounding)

undertone of a relationship of trust and confidence to the stranglehold of Section 166 of The Companies Act, would be doing immense injustice to the

vision contemplated in the duty itself. Any undertaking of a responsibility, whether of person, property or the safe-keeping of another, would imply an

entrustment of a duty to take care and to ensure that a sense of security is inseparable to the entrustment. Hence, a failure to ensure that due care is

taken to protect that which another has handed over in trust, would constitute breach of the obligation.

To sum up, the plaint contains the necessary elements of the tort of negligence; namely a duty of care owed by the applicants/defendants, a breach of

the duty by the applicants/defendants and the consequences of such breach (allegedly suffered by the plaintiff in this case). The plaint therefore

discloses a cause of action for negligence and breach of the duty of care against the defendants. Whether the defendant nos. 6 to 10 are brought

within the net of liability for breach of duty of care was the next enquiry. Besides specific paragraphs (paragraph 42 in particular) which single out the

applicants/defendants, the Scheme Information Documents referred to in the plaint, crystallizes the duties and obligations of the defendant nos. 6 to 10,

who have been named and projected as the skilled repositories of the monies put in trust by investors, including the plaintiff.

Such representation by the defendant no. 1 to the general public must also therefore bind its Board of Directors constituted by the defendant nos. 6 to

10. Having featured as the most attractive proposition in the SID, the applicants/defendants cannot claim to be unnecessary for the complete

adjudication of the issues involved in the suit or claim to be improperly joined and seek deletion of their names on that basis. Incidentally the

applicants/defendants are the only persons who have been named in the SID. The fundamental issue however is whether the defendants can be

excused from trial by reason of the plaint not establishing any cause of action against them. The answer is that even a shred of a cause action

disclosed (however weak it might be) would be sufficient for the plaint to survive as against the said defendants. Further any question involving an

argumentative fact-finding exercise, with regard to the defendants being brought within the fold of the cause of action can only be put to rest through

the rigours of a trial.

In view of the above findings, the five applications being GA No. 3248 of 2016, GA No. 3249 of 2016, GA No. 3250 of 2016, GA No. 3251 of 2016 &

GA No. 3252 of 2016 are rejected. There shall be no order as to costs. Since the applicants/defendant nos. 6 to 10, have filed written statements, the

suit will be expedited and listed for hearing within four weeks from date. Urgent Photostat certified copy of this Judgment, if applied for, be supplied to

the parties upon compliance of all requisite formalities.