

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 262 OF 2021

WITH

INTERIM APPLICATION NO. 2460 OF 2021

M/s. T. Walkar Pharmaceuticals
Pvt. Ltd.

.....*Appellant*

:Versus :

M/s. Iatros Pharmaceuticals Pvt. Ltd.

....*Respondent*

Mr. A.V. Bhuskute, *for the Appellant.*

Mr. Mandar Limaye *with Ms. Gauri Velankar and Ms. Sajiri Shah i.b. Mr. Sarang Aradhye for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

JUDG. RESD. ON : 21 AUGUST 2026.

JUDG. PRON. ON : 01 SEPTEMBER 2026.

JUDGMENT:

1) This Appeal is filed by the Appellant/Defendant challenging the judgment and decree dated 28 May 2021 passed by the District Court, Pune in Appeal No. 149 of 2016. The first Appellate Court has dismissed the Appeal preferred by the Defendant but has partly allowed the cross objections filed by the Plaintiff. The Appellate Court has modified the decree of the Trial Court. The Trial Court had allowed the claim of the

Plaintiff for damages of Rs.25 lakhs and had rejected the other claims including the claim for amount of Rs.7,59,074.07/-. The first Appellate Court has reduced the amount of damages to Rs.21,60,000/- and has awarded the claim towards outstanding amount of Rs.7,59,074/-. The first Appellate Court has confirmed the decree *qua* rejection of other claims of the Plaintiff. Only the Defendant is aggrieved by the decree of the Appellate Court and has filed the present Second Appeal.

2) Appellant/Defendant is in the business of manufacture of pharmaceuticals. The Plaintiff/Respondent is engaged in the business *inter-alia* of marketing pharmaceuticals products. The Marketing Agreement was executed between Plaintiff and the Defendant on 13 August 1999 under which Plaintiff agreed to market the pharmaceutical products manufactured by the Defendant. The Defendant terminated the Marketing Agreement vide notice dated 12 December 2000 alleging breach of covenants thereof.

3) Plaintiff filed Special Civil Suit No. 84 of 2001 challenging notice of termination dated 12 December 2000 and seeking a declaration that Plaintiff is entitled to continue with marketing of Defendant's products as per the Agreement dated 13 August 1999. In the alternative, Plaintiff sought compensation of Rs.25,00,000/- from the Defendant for unlawful termination of the Marketing Agreement. Plaintiff also sought amount of Rs.7,59,074.07/- towards the amount payable as per the accounts of the Plaintiff. Plaintiff also sought prayer for recovery of amount of Rs.12,86,694.40/- towards compensation due and payable as

per the claim in para-25-A to 25-D. The Defendant appeared in the suit and filed Written Statement. The application filed by the Plaintiff for temporary injunction was rejected by the Trial Court by order dated 9 March 2001. The Appeal from Order No. 331 of 2001 filed by the Plaintiff challenging rejection of temporary injunction was disposed of by this Court by order dated 5 September 2001. Plaintiff sought amendments in the Plaint for introduction of paragraphs 25A to 25D and 30A in the Plaint by filing Amendment Application, which was allowed on 29 June 2002. Defendant filed additional Written Statement in 2002. Based on the pleadings, issues were framed and parties led evidence in support of their respective claims and defenses. By judgment dated 6 March 2003, the Trial Court partly decreed the suit by granting alternate prayer of damages in the sum of Rs.25 lakhs on account of termination of the agreement dated 13 August 1999 before expiry of its term. The Trial Court however rejected the claims for outstanding amount of Rs.7,59,074.07/- and further compensation of Rs.12,86,694.40/-.

4) Defendant filed Appeal No.149 of 2016 before the District Court challenging the decree passed by the Trial Court. In the Appeal filed by the Defendant, Plaintiff filed cross-objections. By judgment and order dated 28 May 2021, the Appellate Court has dismissed the Appeal filed by the Defendant but has partly allowed the cross-objections filed by the Plaintiff. Accordingly, the Appellate Court has modified the decree of the Trial Court. It has declared termination of the Marketing Agreement to be unreasonable and void. The Appellate Court has directed Defendant to pay to the Plaintiff outstanding amount of Rs.7,59,074/- along with

interest @ 6% p.a. from the date of institution of the suit till realization. Defendant has been further directed to pay compensation/loss of profit of Rs.21,60,000/- to the Plaintiff along with interest @ 6% p.a. from the date of institution of the Suit till realization.

5) Defendant is aggrieved by the decree of the Appellate Court and has accordingly filed the present appeal. The Plaintiff is not aggrieved by the decree of the Appellate Court though the same reduces the amount of damages from Rs.25 lakhs to Rs.21,60,000/-.

6) The Second Appeal has been admitted by formulating following substantial questions of law:

(i) Whether the contractual covenant stipulating an additional discount on achieving a particular figure of sales can be treated as a 'target' for the purpose of termination of the contract for failure to achieve the same?

(ii) Whether it was permissible for the Plaintiff to lead evidence in support of claim for sufferance of loss of profit of Rs.25,00,000/- without elucidating in the Plaint the manner in which the loss was actually suffered?

(iii) Whether the Appellate Court is justified in applying a different norm for awarding the claim for loss of profits than one appearing in the evidence led by the Plaintiff?

(iv) Whether in respect of claim for recovery of amount of Rs.7,59,074/- it was necessary for the Plaintiff to plead as to how the said amount was due and payable by the Defendant and whether the Appellate Court could have considered evidence qua the said claim in absence of pleadings?

7) I have heard Mr. Bhuskute, the learned counsel appearing for the Appellant, who submits that the Trial and Appellate Courts have erred in holding that termination of the Marketing Agreement is unlawful. He submits that there were specific contractual stipulations for mandatorily achieving the target of sales figure. He submits that under Clauses-8, 9 and 10 of the Marketing Agreement, the Plaintiff was supposed to achieve the target amount of Rs.3 crores, which it has admittedly failed to achieve. He submits that the contract is lawfully terminated by the Defendant for failure to achieve the target contractually agreed between the parties.

8) Mr. Bhuskute further submits that the figures quoted by the Plaintiff in the affidavit of evidence of the alleged profits cannot be attributed solely by the Defendant. That it has come in evidence that Plaintiff was doing business with other companies as well. That therefore profit of Rs.29.22 lakhs for FY-1999-2000 or profit of Rs.22.91 lakhs for FY-2000-01 is not attributable to the activities of the Plaintiff with the Defendant. That the said amount of profit is a consolidated profit earned through businesses made by the Plaintiff to other entities as well. That the lower Appellate Court has held that those profit figures are relating to overall business of the Plaintiff, not limited to the Defendant alone.

9) Mr. Bhuskute further submits that the Trial Court had erroneously awarded the claim for damages of Rs.25,00,000/- in absence of any pleadings and without discussing the evidence on record. That there is absolutely no discussion by the Trial Court as to why damages of

Rs.25 lakhs were awarded by it in favour of the Plaintiff. That mere finding that there was sufficient material before it on record was not sufficient and it was necessary for the Trial Court to examine the pleadings in the plaint and evidence on the aspect of damages. He submits that the Appellate Court has rejected the evidence led by the Plaintiff in support of the claim for damages of Rs. 25 lakhs. However, despite rejecting the said evidence, it has erroneously applied an imaginary formula for awarding damages of Rs. 21,60,000/-. There are neither pleadings nor evidence to suggest that such sales figure was achieved or was achievable, or that profit of 15% could be earned on the same. That in the entire plaint, there are no pleadings as to how compensation of Rs. 25 lakhs is claimed. That the pleadings in paragraph 29 of the plaint do not contain any basis as to why Rs.25 lakhs was claimed as damages. That the Appellate Court thus erred in awarding claim for loss of profits in the sum of Rs.21,60,000/-. So far as award of claim towards outstanding dues of Rs.7,59,074/- is concerned, Mr. Bhuskute submits that the Trial Court had rejected the same on account of absence of pleadings and evidence. However, the first Appellate Court has erroneously granted the said claim. That in paragraph 30 of the plaint, there are absolutely no pleadings to indicate that as to how sum of Rs.7,59,074/- was due or payable by the Defendant. It is a well-settled position of law that evidence cannot be permitted to be led in the absence of foundational pleadings. He accordingly prays for setting aside the orders passed by the Trial and the first Appellate Courts and for dismissal of the suit with costs.

10) Mr. Limaye, the learned counsel appearing for the Respondent opposes the Appeal submitting that termination of the Marketing Agreement is rightly held to be unlawful by the Trial and the first Appellate Court. That there are concurrent findings of fact on the said issue. That the interpretation of the contract made by both the Courts does not suffer from the vice of perversity. That no target was fixed for the Plaintiff to achieve and that therefore termination of the contract for failure to achieve the alleged target was clearly unlawful.

11) Mr. Limaye further submits that the Trial Court had correctly awarded the claim for loss of profit in the sum of Rs.25 lakhs and that the Appellate Court has erroneously reduced the same to Rs.21,60,000/-. He however submits that the Plaintiff has accepted the sum awarded by the Courts though it is less than its entitlement. He takes me through the evidence of the Plaintiff to demonstrate as to how evidence was led in respect of the profits earned by the Plaintiff during FY-1999-2000 and 2000-2001. He submits that Plaintiff would have earned profits of at least Rs. 25 lakhs per year. However, the claim was still restricted to only Rs.25 lakhs though Plaintiff was entitled to claim higher figure towards loss of profit. That the audited Balance Sheet was produced and proved before the Trial Court. That there is substantial evidence on record to support Plaintiff's claim for loss of profits.

12) So far as award of claim of outstanding amount of Rs. 7,59,074/- is concerned, he submits that the Trial Court had grossly erred in rejecting the same ignoring the evidence on record. He takes me

through paragraph 29 of the affidavit of evidence of Plaintiff's witness to demonstrate that the sum of Rs.1 lakhs was provided as advance and financial help to the Defendant. That Plaintiff had supplied packaging material to the Defendant of value of Rs. 6,59,074.07/- and this is how claim for outstanding amount of Rs. 7,59,074.07/- was raised. That the claim was well supported by evidence and there is absolutely no cross-examination by the Defendant on the evidence produced by the Plaintiff. That therefore first Appellate Court has rightly awarded the claim towards dues and that there is no element of perversity for this Court to interfere in the findings recorded by the lower Appellate Court. On above broad submissions, Mr. Limaye prays for dismissal of the Appeal.

13) Rival contentions of the parties now fall for my consideration.

14) I take up the first question of law about termination of Marketing Agreement for failure to achieve the alleged target by the Plaintiff. Mr. Bhuskute has invited attention of the Court to Clauses-9 and 10 of the Marketing Agreement, which reads thus:

9) For the current year (September 99/August 2000 12 months) total sale exceeding Rs.2.50 Crores will entitle 'IATROS' to additional discount on the incremental amount at 5%.

10) For the subsequent year (September to August), the target amount is set at Rs.3.00 Crores for entitlement of an additional discount at 5% as above on incremental sale.

Targets for subsequent years thereafter will be mutually agreed-upon along with Discount Structure as applicable.

15) Careful perusal of the above targets would indicate that for the period September 1999 to August 2000, Defendant had agreed to extend additional discount of 5% on the incremental amount, if the total sales exceeded Rs.2.50 crores. For the subsequent year, the target amount was set at Rs.3 crores for entitlement of additional discount @ 5%. For the years thereafter, the targets for the purpose of discount structure was to be mutually decided. That what was agreed between the parties was that if Plaintiff was to exceed sales figures of Rs.2.50 crores in the first year, an additional 5% discount was to be granted by the Defendant in respect of sales exceeding Rs.2.50 crores, Clause 9 of the agreement does not use the word 'target'. Though the word 'target' appears in Clause 10, the same is not to be confused with a particular benchmark to be achieved for continuation of contract. Clause 10 has to be read in conjunction with Clause 9. Clause 9 applies for the period from September 1999 to August 2000 and Clause 10 applies for the period September 2000 to August 2001. Except this, there is no difference between the two clauses and both the clauses provided that on achieving a particular sales figure, the additional sales would carry discount @ 5%. For the period September 1999 to August 2000, the threshold for grant of 5% discount was agreed at Rs.2,50,00,000/- whereas for September 2000 to August 2001, the same was determined as Rs.3 crores. The word 'target' appearing in second part of Clause 10 again applies only for providing additional discount of 5%. Thus, there was no specific agreement between the parties that upon failure to meet a particular target of sales figure, Defendant was entitled to terminate the contract.

16) Both the Courts have taken note of letter dated 30 July 1999 (Exh.58) which was addressed by the Defendant to the Plaintiff and which had following contents :

"Enclosed please find our selling prices to you for your purchases upto 2 crores.
These prices will be reduced by 5% for your purchasers above 2 crores.
The prices will be revised by mutual agreement when you will cross 3 crores.

17) Thus, apart from specific covenants in the Agreement, the letter dated 30 July 1999 also indicates that there was no target agreed nor was any specific contractual obligation for the Plaintiff for doing marketing business of Rs.2.5 crores. The letter indicates that in the first year, the selling prices for purchases made by the Plaintiff upto the limit of Rs.2 crores were 'X'. If sales figures exceeded Rs.2 crores, the Defendant agreed to give discount of 5%. Parties also agreed that as and when Plaintiff exceeded the sales figures of Rs.3 crores, the prices of the products would be further reduced. Thus, the parties agreed for incentivization of sales made by the Plaintiff. Higher the sales, the purchase price for the Plaintiff would be reduced. Therefore, it cannot be held that the parties agreed for any particular target of sales figures for performance of the contract. Thus, failure to reach any particular sales figures by the Plaintiff did not empower the Defendant to terminate the contract.

18) Clause-17 and 18 of the Marketing Agreement stipulated thus:

17) The Marketing Agreement will remain in force for a period of three years from the date i .e. 16th August, 1999 and then may be renewed thereafter.

18) After three years the Agreement can be terminated by either side by giving three months notice.

19) Thus, the contract could be terminated by giving 3 months' notice only after completion of tenure of 3 years. However, termination notice was issued before completion of period of 3 years and more particularly the same did not specify the period of 3 months.

20) The Trial and the Appellate Courts have rightly construed the contractual covenants and the interpretation made by them does not suffer from any irrationality for this Court to interfere in the same. The first question of law is accordingly answered by holding that no particular sales figure could be treated as a 'target' for the purpose of enabling Defendant to terminate the contract for failure to achieve the same.

21) Coming to the second question of law, the Plaintiff's claim for loss of profit amounting to Rs. 25 lakhs was essentially based on the alleged denial of opportunity to perform the contract for its full term. Plaintiff made following pleadings in paragraph 29 of the plaint in support of the claim for loss of profits:

(29) The Plaintiff intends to continue with the said Marketing Agreement of the Defendant's products and wants to genuinely business in the market and therefore, has sought proper relief as mentioned below, however, if the Hon'ble Court do not grant said relief, then in the alternative, the Plaintiff's Prayer for compensation & may kindly be considered favourably. For the purpose of compensation, Plaintiff determinate their loss to Rs.25,00,000/-and is entitled to getthe said loss

compensated from the Defendant and therefore, prays for compensation in the alternative.

22) Plaintiff's main case was thus for setting aside termination and for grant of opportunity to perform the contract during its full term. Alternatively, the Plaintiff raised the claim for loss of profit in the event the relief of performance of the contract was not to be granted.

23) The averments in paragraph 29 of the plaint are bereft of any particulars as to how the figure of Rs. 25 lakh was arrived at by the Plaintiff. Plaintiff however led evidence in support of its claim for loss of profits. It would be apposite to reproduce paragraph 30 of the affidavit of evidence of Plaintiff's witness:

30) I say that, in the F.Y. 1999-2000, when Plaintiff was selling Defendant's goods, Plaintiff Company entered profit of Rs. 29,22,411.42, so also, in the F.Y. 2000-2001 Plaintiff earned profit of Rs. 22,91,241.28, however, since Defendant has terminated the said agreement and illegally prevented Plaintiff from selling Defendant's product Plaintiff sustained loss of Rs.4,41,854.07/- in F.Y. 2001-2002. This clearly shows that, if as per the agreement, Plaintiff would have continued the said business of selling Defendant's product, Plaintiff would have earned profit of at least Rs. 25,00,000/- per year, but the said illegal act of the Defendant has prevented the Plaintiff from earning said profit and thus has caused loss, which is much more than Rs. 25,00,000/-. I say that since the said loss has been caused only due to illegal act, of termination of the agreement before its maturity by the Defendant, hence Defendant is bound to compensate Plaintiff Company for the said loss. For the purpose of this suit the Plaintiff Company has restricted their claim to the extent of Rs. 25,00,000/-. As aforesaid, Plaintiff Company would have earned more than Rs.25,00,000/-, if the agreement would have been continued for the agreed period of 3 years. Defendant must compensate the Plaintiff Company at least to the extent of Rs. 25,00,000/-. Therefore, Plaintiff Company is entitled for decree to the extent of Rs. 25,00,000/- as a compensation against the Defendant. I have produced true copies of Audited Balance Sheets of Plaintiff Company bearing signature of Mr. VIJAY SHETH, Chartered Accountant of Plaintiff Company for the year ended 31/3/1999, 31/3/2000 31/3/2001

and unaudited copy of balance-sheet for the year ended 31/3/2002. I identify signature of VIJAY SHETH, the contents therein are true and correct.

24) Thus, the Plaintiff led evidence that it was earning profit of Rs.29,22,411.12/- during Financial Year 1999-2000 and Rs.22,91,241.28/- in Financial Year 2000-2001. Plaintiff attributed reduction in the profit in the year 2000-2001 on account of illegal termination of the Marketing Agreement. It is contended by Mr. Bhuskute that these figures of profits were not relatable to the business with the Defendant and that the profit was earned through activities with other entities also. This contention is accepted by the Appellate Court.

25) There was thus evidence before the Trial Court in support of the claim of loss of profit of Rs.25 lakhs. It is sought to be contended by Mr. Bhuskute that the evidence led by the Plaintiff in support of loss of profit of Rs.25 lakhs ought to have been discarded on account of absence of requisite pleadings. In my view, when it comes to a claim for loss of profits, it is not necessary for the Plaintiff to plead in the plaint all the particulars as to how the claimed amount has been computed. A claim for loss of profits ordinarily represents the loss of an opportunity to carry on business and earn profits. In paragraph 29 of the plaint, Plaintiff has made some averments for raising the claim for loss of profit of Rs.25 lakhs. Additionally, there are several other averments throughout the body of the plaint as to how Plaintiff had absolute right to market the products of the Defendant at least for a period of 3 years as agreed in the Marketing Agreement (para-25). In my view, those pleadings are sufficient for the purpose of laying foundation for leading of evidence. It

therefore cannot be contended that the plaint is totally bereft of any pleadings for supporting the claim for loss of profit. The entire evidence need not be pleaded and therefore the evidence cannot be discarded on the ground of absence of pleadings. The second question of law is accordingly answered by holding that it was permissible for the Plaintiff to lead evidence before the Court for claim of sufferance of loss of profit without enunciating in the plaint, the manner in which the loss was actually suffered. In any case, the evidence on loss of profits is actually discarded by the Appellate Court and therefore the discussion on this question is actually rendered academic.

26) Coming to the third question of law, it is contended by the Defendant/Appellant that the Appellate Court has erred in applying totally different norm for awarding claim of loss of profit in the claim of Rs.21,60,000/-. As observed above, the Trial Court had awarded the entire claim of the Plaintiff for loss of profit for Rs. 25 lakhs and the Appellate Court has reduced the same to Rs.21,60,000/-.

27) Perusal of the findings recorded by the Appellate Court would indicate that the Appellate Court has refused to accept that the figures of profit stated in paragraph 30 of the Affidavit of Evidence of P.W.1 which represent the profits earned through exclusive business with the Defendant. The Appellate Court has held that Plaintiff was doing business with other entities as well. The Appellate Court has recorded in paragraph 42 of the judgment as under:

42] It is the evidence of Vinod Shah (P.W.1) that in the financial year 1999-2000 the plaintiff company earned profit of Rs.29,22,411/- and in financial year 2000-2001 plaintiff earned profit of Rs.22,91,241/-. It is not the case of the plaintiff that at the relevant time plaintiff was doing business only with defendant company. Rather, it can be seen from the cross-examination of the witness that at the relevant time the plaintiff was doing business with other entities also. Therefore, there is no satisfactory evidence to show exactly how much profit was earned by plaintiff by doing business with defendant for those 16 months.

28) Thus, the Appellate Court has not accepted the basis of past profit figures for the purpose of awarding claim for loss of profits. In my view, the Appellate Court is right in doing so. Since the figures of profits claimed in paragraph 30 of the affidavit of evidence are not attributable exclusively to the business made with the Defendant, the said figures cannot form the basis for determining how much profits Plaintiff could have made during the balance period of 1 year and 8 months when it was not permitted to perform the contract. Instead, the Appellate Court has applied the formula of 15% profit on the sales figures by holding in paragraph 43 of the judgment as under:

43] In Mohd. Salamatullah and in M/s. A.T. Brij Paul Singh, the Hon'ble Apex Court has awarded damages of 15% of the contract price. In the present case the agreement between parties does not show that any specific target was fixed. However, the agreement prescribes 5% incentives for sale of 2.5 crore. In the letter of defendant dt.12.12.1999 below Exh.106 the defendant has stated that the sale from period from 13.08.1999 to 30.11.1999 was of average of Rs. 9 lacs per month. Naturally, the sale might have increased thereafter. But in absence of any documentary evidence in that regard the sale @ 9 lacs p.m. needs to be considered. As per said letter it can be said that the annual business must have been of Rs. 1,08,000,00/-. The 15% of this amount comes to Rs.16,20,000/- as loss of profit for one year. Plaintiff in this case is entitled for compensation/loss of profit for 1 year 8 months i.e. remaining period of contract which comes to Rs. 21,60,000/-. Thus, I find that the plaintiff is entitled for compensation/loss of profit to the tune of Rs.21,60,000/-. I therefore, answer point No. 6 accordingly.

29) The Appellate Court has thus taken into consideration Defendant's own letter dated 12 December 1999 (Ex.106) in which Defendant itself admitted that Plaintiff was doing average sales figures of Rs.9 lakhs per month during August 1999 and November 1999. The Appellate Court rightly relied on the evidence in the form of Defendant's own letter in which it had admitted sales of Rs.9 lakhs per month by the Plaintiff. After taking the sales figure of Rs.9 lakhs per month, the Appellate Court arrived at total sales figure achievable for the period of 1 year and 8 months at Rs.1 crore 8 lakhs. Though it was Plaintiff's case that it was easily possible to increase the sales figure, the Appellate Court has not considered any notional or hypothecated increase in the sales figures and has capped the achievable sales at Rs.9 lakhs only during the balance period of 1 year 8 months. The Appellate Court has thus applied the most conservative estimate of sales figures based on Defendant's own letter. The Appellate Court has thereafter applied 15% profit margin and achievable sales figure of Rs.1 crore 8 lakhs and this is how, it was awarded claim for loss of profits in the sum of Rs.21.60 lakhs. I am in complete agreement with the exercise carried out by the Appellate Court. Question No. 3 is answered accordingly by holding that the Appellate Court was justified in holding that a different norm was adopted for awarding the claim for loss of profits from the one that appeared in the evidence led by the Plaintiff.

30) So far as Question No.4 is concerned, the same involves award of claim in the sum of Rs.7,59,074/- by the Appellate Court which

was rejected by the Trial Court. This claim was raised by the Plaintiff in paragraph 30 by raising following averments:

(30) The Plaintiff respectfully submits that as per their account, Defendant has to pay an amount of Rs. 7,59,074.07 Ps. to the Plaintiff. The Defendant should pay the said amount due to the Plaintiff but as they have failed to make payment of the same, the Plaintiff is entitled to recover the said amount from the Defendant in this suit.

31) Thus, beyond pleading that '*as per their account, Defendant has to pay an amount of Rs.7,59,074.07 ps. to the Plaintiff*', there are absolutely no pleadings in the plaint as to on what account, the said figure was claimed by the Plaintiff. In absence of any pleading, Plaintiff led evidence by stating in paragraph 29 of the Affidavit as under:

(29) I have produced true extract of account of the Defendant Company maintained by Plaintiff Company. All the entries in the said extract of account have been made as and when the transaction have taken place between the parties. All the figures written therein are true and correct. The said extract bears my thumb impression and the seal of Plaintiff Company. The said extract of account As a extract from the computerised accounts maintained in the office of the Plaintiff Company. The entries therein have been made in due course of our business and as and when such transactions took place. The said extract is for the period from 1/4/2000 to 5/12/2000. In the said extract entry dt 25/11/2000 shows that, the Plaintiff Company had paid an amount of Rs.1,00,000/- by a Cheque bearing No.81088 drawn on BANK OF INDIA, as an advance money as financial help to the Defendant. So also, entry dt. 4/6/2000 shows that, Plaintiff Company supplied packing material i.e. ampoules and trays, for production of goods by Defendant Company worth Rs.6,59,074.07. Thus, the said account extract shows that, Defendant owe an amount of Rs.7,59,074.07 to Plaintiff Company of advance of Rs.1,00,000/-. Till today in spite of our repeated demand Defendant has failed to make payment of said amount and therefore, Plaintiff Company is entitled to get decree for Rs.7,59,074.07 against the Defendant. I have also produced copy of debit note raised by Plaintiff Company for Rs.6,59,074.07Ps. dated 30/5/2000 bearing signature of our accounts officer Mr. ANIL CHOUDHARY. I identify his signature. The contents therein are true and correct. It is the true carbon copy of the

original debit note raised by Plaintiff Company on the Defendant Company. Both the copies oh prepared in one uniform process on typing machine available in Plaintiff's office. I have also produced an extract showing details of raw and packing material supplied by Plaintiff Company to the Defendant Company worth Rs.6,59,074.07. It bears my thumb impression and seal of Plaintiff Company. The contents therein are true and correct.

32) Thus, in the affidavit of evidence, Plaintiff claimed that Rs.1 lakh was provided as financial assistance to the Defendant and Rs.6,59,074.07/- was due towards packaging material supplied to the Plaintiff by the Defendant. However, there are absolutely no pleadings about giving of any advance or about supply of any packaging material in the entire plaint. In my view, Plaintiff cannot be allowed to lead evidence in the plaint about providing financial assistance or supply of packaging material. It would have been another thing if Plaintiff was to atleast mention that the claim of Rs.7,59,704.07/- was towards advance of supply of packaging material. Even if full details of the claim of Rs.7,59,074.07/- were not to be pleaded, at least some basis for the claim ought to have been provided. There has to be factual assertion that Rs.1 lakh was advanced to the Defendant towards alleged financial assistance. It was also necessary to plead that the packaging material was supplied to the Defendant for which Defendant did not pay to the Plaintiff. However, the plaint is totally bereft of any pleadings with regard to the financial assistance of supply of packaging material.

33) Here, the distinction needs to be understood between the claim for loss of profit and claim for amount towards financial assistance and supply of packaging material. In respect of the claim for loss of

profits, there are specific pleadings in the body of the plaint wherein the Plaintiff has clearly pleaded that it had an absolute right to market the products of the Defendant-Company for a full period of three years and that, on account of the wrongful termination, the Plaintiff lost the opportunity to do so. The claim was further elucidated by leading evidence. In any event, a claim for loss of profits can always be ascertained by the Court by applying an appropriate formula or percentage. However, for the claim of Rs.7,59,074/- the plaint is totally silent as to on what account, the said figure was claimed. The case of providing financial help of Rs.1 lakh to the Defendant and supply of packaging material worth Rs.6,59,074/- was introduced directly in the affidavit of evidence. This cannot be permitted. It is well settled position of law that the parties cannot be permitted to lead evidence in absence of foundational pleadings and such evidence, if led, is required to be discarded. (SEE: **Ram Sarup Gupta (Dead) By Lrs vs Bishun Narain Inter College & Ors**¹)

34) The Trial Court had rightly rejected the said claim of Rs.7,59,074.07/- by holding in paragraph 31 of its judgment as under:

31) The plaintiff has also claimed relief for due payable amount Rs. 7,59,074.07 page 21 of the plaint in the suit from defendant which is prayer clause No (g) in the plaint. However from the reading of the plaint cause of action clause does not disclosed in detailed about such claims or any such cause of action arose for such due amount 7,59,074.07 is due against defendant in the plaint and for one of cause of action and details particular, regarding due and payable amount claimed by the plaintiff in view of order 7 rule 11 of C.P.C. is not maintainable in law against defendant in the instant suit. Moreover, there is no notice given by the plaintiff before filing the suit to show that such due and

1 AIR 1987 SUPREME COURT 1242

payable amount was due against the defendant, nor made any cause of action details particulars in the plaint in the cause of action in the suit. Therefore, under such circumstances in my opinion, plaintiff has not proved and entitle for prayer clause (g) prayed against the defendant in the suit.

35) The Appellate Court has grossly erred in awarding the said claim of Rs.7,59,074/- by taking into consideration the evidence of P.W.1 ignoring the position that the same was without any pleadings. The award of claim of Rs.7,59,074/- by the Appellate Court is based entirely on evidence of P.W.1 which is clear from the following :

31] According to plaintiff, an amount of Rs.7,59,074/- is due from defendant as per the balance in statement of account. In this regard Vinod Shah (P.W.1) has testified that "he has produced true extract of account of the defendant company maintained by plaintiff. All the entries in the extract of accounts have been made as and when the transaction had taken place between the parties. All the figures written therein are true and correct. The extract bears his thumb of impression and seal of plaintiff company. Said extract of account is an extract from computerized accounts maintained in the office of plaintiff company. The entries therein have been made in due course of business and as and when such transaction took place. The entry dt. 04.06.2000 shows that the plaintiff company supplied packing material, i.e. ampules and trays for production of goods to defendant worth Rs.6,59,704=07ps. Similarly, entry dt.25.11.2000 show that plaintiff had paid an amount of Rs. 1 lac to defendant by cheque as an advance money as financial help. Thus, the account extract shows that defendant owe an amount of Rs. 7,59,074=07ps to plaintiff company". This evidence of plaintiffs witness has not been rebutted in his cross-examination. Rather, the ledger statement has been exhibited as "C-5" in the cross-examination of PW-1. Thus, the oral evidence of plaintiffs witness supported by statement of ledger account Exh.C-5 shows that Rs.7, 59074 = 7 ps is due to plaintiff from the defendant.

32] In para 30 of the written statement defendant has put-forth a story that in fact ledger balance amount of Rs. 2,32,125/-and costs of ampules and trays 99, 910 = 70ps total amount of Rs. 3, 32,035 = 71ps is due to plaintiff from defendant. On the other hand an amount of Rs. 19 ,448/- as 65% of modvat reversal and Rs 3, 37, 644 = 23ps as excise exemption from April 2000 to 4.12.2000, total amount of Rs 3, 52, 604 = 23ps is due to defendant from plaintiff. Therefore, upon calculation plaintiff

company owes Rs 20,568 = 52ps to defendant company. There is no supporting documentary evidence to suffice this contention in the written statement. It is pertinent to note that the defendant is claiming 50% of excise benefit but there is nothing in the agreement dt. 13.08.1999 that defendant is entitled for 50% of excise benefit. Rather the document below Exh.61 dt.25.08.1999 signed by both the parties reflect that the excise modavt benefit will pass on in full to the plaintiff company.

33] Thus, the un rebutted evidence of Vinod Shah (P.W.1) and computerised ledger account Exh.C-5 do show that an amount of Rs. 7,95,074/- is due to plaintiff from defendant. The learned trial Court was of the opinion that plaintiff is not entitled for this amount as it has not sent pre-suit notice claiming such amount. Legally speaking, such notice is not mandatory to succeed in the claim. In the present case, infact, it is the defendant who has terminated the contract by notice dt. 12.12.2000 which entitled plaintiff company to sue on that cause of action. It being so, the observation of the learned trial Court regarding absence of per-suit notice is incorrect and plaintiff is entitled for that amount. I therefore, answer point No. 4 in the affirmative.

36) The Trial Court had specifically recorded a finding that there was no disclosure of details of the claim in the plaint. The Appellate Court has not dealt with the aforesaid findings of the Trial Court and has only considered the Trial Court's finding regarding failure to give notice of the claim amounting to Rs. 7,59,074/- to the Defendant. However, the main finding recorded by the Trial Court was that there is no foundational pleading in the plaint disclosing cause of action for recovery of amount of Rs.7,59,074/-. I am in agreement with the Trial Court and unable to uphold the award of claim of Rs.7,59,074/- on account of absence of foundational pleading in the plaint. Question No. 4 is accordingly answered by holding that it was necessary for the Plaintiff to plead as to how the amount of Rs.7,59,074/- was due or payable by the Defendant and it was not open for the Appellate Court to consider the evidence *qua* the said claim in absence of pleadings.

37) The conspectus of the above discussion is that the Appellate Court has rightly awarded the claim of loss of profit in the sum of Rs.21,60,000/- in favour of the Plaintiff. However, award of claim of outstanding amount of Rs.7,59,074/- by the Appellate Court is not in order and deserves to be set aside.

38) The Second Appeal succeeds in part, and I accordingly proceed to pass the following order:

- (i) The operative direction No. (iii)(c) in the judgment and decree of the Appellate Court dated 28 May 2021 is set aside.
- (ii) Rest of the decree of the Appellate Court is confirmed.

39) The Appeal is **partly allowed** to the above extent with proportionate costs. Nothing would survive in the Interim Application and the same is disposed of.

[SANDEEP V. MARNE, J.]

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signed by
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SAWANT
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