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

First Appeal No. 282 of 2000

Kumar's Liquors and Beers Pvt. Ltd., A company incorporated under the Provisions of the Companies Act, 1956, Having its registered office at 401, Swapnalok, S.D. Road, Secunderabad - 500 033.	.. **Appellant** [Orig. plaintiff in Spl.C.S. 183/97 (Old No.427/94) [Orig. Deft. in Spl.C.S.375/95]

versus

BDA Limited, a company incorporated of the Companies Act, 1956, having its registered office at 12, Evergreen Industrial Estate, Shakti Mills Lane, Haines Road, Bombay - 400 001.	.. **Respondent** [Orig. Deft. in Spl.C.S.183/97] [Orig. Plaintiff in Spl.C.S.375/95]

....

Mr. P.V. Mandlik, Senior Advocate, with
Mr. A.S. Gandhi, Advocate, for the appellant.
Mr. P.K. Joshi, Advocate, for the respondent.

....

With

First Appeal No. 283 of 2000

Kumar's Liquors and Beers Pvt. Ltd., A company incorporated under the Provisions of the Companies Act, 1956,	.. **Appellant** [Orig. Deft. in Spl.C.S.375/95

Having its registered office at 401, Swapnalok, S.D. Road, Secunderabad - 500 033. [Orig. plaintiff in Spl.C.S.183/97]

<u>versus</u>

BDA Limited, a company incorporated of the Companies Act, 1956, having its registered office at 12, Evergreen Industrial Estate, Shakti Mills Lane, Haines Road, Bombay - 400 001. .. **<u>Respondent</u>** [Orig. plaintiff in Spl.C.S.375/95] [Orig. deft. in Spl.C.S.183/97] (OldC.S.No.420/97)

....

Mr. P.V. Mandlik, Senior Advocate, with
Mr. A.S. Gandhi, Advocate, for the appellant.
Mr. P.K. Joshi, Advocate, for the respondent.

....

<u>With</u>

<u>First Appeal No. 421 of 2000</u>

BDA Limited, a Company registered under the provisions of the Companies Act, 1956, having its Registered Office at 12, Evergreen Industrial Estate, Shakti Mills Lane, Off. Hanes Road, Mumbai - 400 011. .. **<u>Appellant</u>** (Original plaintiff)

versus

Kumar's Liquors & Beers Private Limited, a Company engaged under the provisions of the Companies Act, 1956, having its Registered

Office at 401, Swapnalok,
S.D. Road, Secunderabad - 500 003,
carrying an office at Eureka House, .. **Respondent**
Jalna Road, Aurangabad - 431 005. (Original defendant)

....

Mr. P.K. Joshi, Advocate, for the appellant.
Mr. P.V. Mandlik, Senior Advocate, with
Mr. A.S. Gandhi, Advocate, for the respondent.

....

CORAM : B.P. DHARMADHIKARI &
A.M. BADAR, JJ.

Date of reserving the
judgment : 11th December, 2014

Date of pronouncing the
judgment : 16th February, 2015

JUDGMENT *(Per B.P. Dharmadhikari, J.)* **:**

1. All these Appeals under Section 96 of the Code of Civil Procedure, 1908, arise out of a common judgment dated 11-10-1999, delivered by 4th Joint Civil Judge (Senior Division), Aurangabad, in Special Civil Suit No. 375/1995, and Special Civil Suit No. 183/1997.

2. Special Civil Suit No. 183/1997 was filed by the appellant in

First Appeal No. 282/2000 and First Appeal No. 283/2000, namely, Kumar's Liquors & Beers Private Limited **[hereinafter referred to as "Kumar Liquors"]**, claiming refund of security deposit of Rs. 1,00,00,000/- (Rs. One Crore) from the defendant in that suit, namely, BDA Limited **[hereinafter referred to as "BDA Limited"]**. That Suit was initially filed at Secunderabad City Civil Court vide Original Suit No. 427/1994 & came to be transferred to Aurangabad for its trial along with Special Civil Suit No. 375/1995. Special Civil Suit No. 375/1995 was filed by BDA Limited against Kumar Liquors, for recovery of sum of Rs. 2,93,73,919.46, towards the liquor & wine supplied to later with interest at 18%. Trial court has by impugned judgment dated 11-10-1999, partly decreed Special Civil Suit No. 375/1993 and Kumar Liquors has to pay sum of Rs. 1,03,29,717.40, with interest at 12 % on it calculated from the date of suit i.e. 29-4-1995 till payment. Special Civil Suit No. 183/1997 filed by Kumar Liquors is dismissed because of adjustment or appropriation of security deposit of Rs. 1,00,00,000/- towards money claim of BDA Limited.

3. In First Appeal No. 283/2000, as also First Appeal No. 282/2000, appeal memo and prayers are identical. However, Kumar Liquors has submitted that one of its appeal challenges decree and

judgment dismissing its Special Civil Suit No. 183/1997, while the other challenges judgment and decree passed in Special Civil Suit No. 375/1995 against it. BDA Limited has filed First Appeal No. 425/2000 for the remaining monetary claim which has been rejected by the trial court including the exercise of adjustment of security deposit undertaken by it.

4. We have heard Senior Adv. Mr. P.V. Mandlik with Adv. Mr. A.S. Gandhi for the Kumar Liquors and Adv. Mr. P.K. Joshi for BDA Limited, in these matters.

5. Sr. Adv Mr. Mandlik has contended that the claim in Suit filed by M/s. BDA Limited was for the liquor supplied to M/s. Kumar Liquors, between 26-2-1993 to 27-4-1993 for Bombay Region and between 6-3-1993 to 26-4-1993, for Aurangabad Region. Its total claim in suit was of Rs. 2,93,73,919.40. The BDA Limited, therefore, does not claim that any goods were supplied to M/s. Kumar Liquors, after above mentioned dates in April 1993 & there was no grievance about payment for earlier period. The legal notice was issued by BDA Limited vide Exhibit 1153 on 28-3-1995, claiming amount of Rs. 2,93,73,919.46, and in it, they did not state that said claim towards price of goods supplied was worked out after

adjusting security deposit amount of Rs. 1,00,00,000/- otherwise to be repaid by it to Kumar Liquors. According to him, in this situation, the claim in plaint, of Rs. 3,93,73,919.46 could not have been accepted and acted upon by the trial court. Learned Counsel has further contended that the suit in Secunderabad court was filed by his clients Kumar Liquors even before issuance of that legal notice. That suit was registered as Original Suit No. 427/1994. When such a suit was already instituted against BDA and a decree of refund of security deposit was sought, it was incumbent upon BDA Limited to plead adjustment of security deposit towards the amount of sale price in that notice itself. Not only that there is no such plea in suit notice, but such adjustment is also not pointed out in its plaint by BDA Limited. The plaint has been instituted in 1995.

6. He has further submitted that relationship between BDA Limited and Kumar Liquors was regulated by letter dated 28-11-1990 and the later communication dated 15-12-1990 was not at all relevant. He contents that a Company by name, Cruikshank was subordinate Company of BDA Limited and as per arrangement between parties, Cruikshank collected large amount from indentors of Kumar Liquors but did not credit those amounts to BDA Limited. This was on account of dispute between

Madhu Chhabriya and Kishor Chhabriya over the management and ownership of BDA Limited. He submitted that Kumar Liquors had debited amount of Rs. 1,45,00,000/- to the account of BDA Limited as it was outstanding from indentors and Cruikshank Similarly, Cruikshank was liable to pay Rs. 1,12,60,780.50 to Kumar Liquors and one Company, by name, Vinedale Distilleries was also liable to pay amount of Rs. 80,01,455/- to Kumar Liquors. Thus, total amount of Rs. 3,37,02,235.50 was debited to the account of BDA Limited by Kumar Liquors. He contends that the trial court has erroneously overlooked the arrangement evolved as per letter dated 28-11-1990. BDA Limited was liable to pay sum of Rs. 2,22,534.34/- to Kumar Liquors, inclusive of deposit amount of Rs. 1,00,00,000/- and interest.

7. He has further argued that the trial court correctly accepted entitlement of Kumar Liquors to receive back deposit amount of Rs. 1,00,00,000/-, but erred in adjusting the same towards alleged demand of BDA Limited. BDA Limited did not find any statement of accounts showing the payment made by Kumar Liquors and the outstanding figure. The documents produced on record by Kumar Liquors reveal payment of entire amount to BDA Limited and the trial court accepted only part of it while

observing that BDA Limited suppressed payment of Rs. 1,88,59,832/- received by it from Kumar Liquors. He submits, that burden was upon BDA Limited to prove the balance amount by producing accounts and its failure to do so results in adverse inference. Relationship between BDA Limited and Kumar Liquors is not regulated by Section 213 of Contract Act and no adverse inference could have been drawn against Kumar Liquors for not producing the records.

8. He submits, that when Kumar Liquors placed on record the documents showing fraud being played by BDA Limited, BDA Limited did not examine any of its responsible Directors or concerned Officers, but sent one Mr. Kanse, a Clerk maintaining inward and outward register and one Mr. Gule who was maintaining the registers and ledgers. These witnesses did not produce any document. The registers and ledgers were not produced by BDA Limited by alleging that some were seized by Income Tax authorities. However, at the end of trial, affidavit of one Chartered Accountant, by name, Mr. Sudhir Madhukar Indapurkar was filed to support the suit claim of BDA Limited. This affidavit dated 17-8-1998 worked out claim of M/s. BDA Limited at Rs. 3,12,61,271/- and after adjusting security deposit of Rs. 1,00,00,000/-, Indapurkar has shown

Kumar Liquors liable to pay amount of Rs. 2,12,61,271/- only, to M/s. BDA Limited. This affidavit was filed with list of documents as a document and M/s. BDA Limited never offered to examine Mr. Indapurkar as its witness. The alleged audited balance sheet submitted by him was, therefore, never exhibited and Kumar Liquors did not get opportunity to cross examine Mr. Indapurkar. Learned Sr. Adv. Mr. Mandlik, however, submits that variance between figure of claim mentioned in plaint and in affidavit of Mr. Indapurkar again shows a doubtful state of affairs.

9. A certified copy of profit & loss account and balance sheet issued by Registrar of Companies (ROC) was produced by BDA Limited, but that certified copy was not supported by any oral evidence. The said certified copy was issued by office of Registrar of Companies on the strength of report of Chartered Accountant Mr. Indapurkar. As Mr. Indapurkar's report itself has not been proved in accordance with law, that balance sheet is wholly irrelevant. Though trial court has put Exhibit 1230 upon that balance sheet, it is only for the purposes of identification and truth of its contents is not proved, as required by law.

10. Lastly, he submitted that all documents on record show that

person who presented the plaint on behalf of M/s. BDA Limited, verified it and also entered the witness box, was not legally competent to do so. He was never on the pay roll of M/s. BDA Limited, but was drawing salary from Cruikshank BDA Limited did not pass any resolution to institute such suit or to demand any amount from Kumar Liquors. He has invited attention to cross examination of said person Mr. Sudhirkumar Sinha, to show that he claimed to be aware of all facts & of accounts between parties. After his cross examination, a power of attorney was executed in his favour on 17-8-1998. Learned Counsel also states that during his cross examination, Mr. Sinha expressly refused to produce account books of BDA.

11. He points out that, in this situation, when the Excise Inspector posted at the godown of Kumar Liquors has not been examined, trial court could not have relied upon evidence of Excise Inspector posted at the godown of BDA Limited and on that strength, recorded a finding that goods disclosed in various invoices or indents produced by M/s. BDA Limited were received by Kumar Liquors. Said inference is unsustainable and bad. As the accounts were not produced and trial court noted that invoices did not reflect correct position, and it also found that payment in excess of Rs. 1,88,59,832/- was suppressed by M/s. BDA Limited, the suit

filed by BDA Limited ought to have been dismissed. He contends that effort made by trial court to reconcile accounts by perusing various vouchers / invoices and to infer that certain payments were made by Kumar Liquors towards increased excise duty, is totally unsustainable and illegal. The learned Sr. Advocate concludes by submitting that once the money claim, as made, was shown to be incorrect and trial court found the same doubtful; for not producing and proving the original account books, suit needed to be dismissed with costs.

12. Adv. Mr. Joshi on behalf of BDA Limited has submitted that amount claimed in suit notice Exhibit 1153 was after adjusting security deposit. The claim in suit also was made accordingly. Kumar Liquors came up with mutually inconsistent stories in written statement filed in Special Civil Suit No. 375/1995. Firstly, it totally denied the liability. Later on, it amended written statement and alleged some payment made to Cruikshank and pointed out the debit for said amount to BDA Limited. Any such entries of debit are not proved by Kumar Liquors by producing any accounts and hence, this defence itself shows that in absence of proof of such payment to M/s. BDA Limited, claim in the suit needed to be decreed.

13. The efforts made by Kumar Liquors to somehow stall or delay adjudication of Special Civil Suit No. 375/1995 are also pressed into service. He submits, that application under Section 10 of the Code of Civil Procedure, moved by it, was rejected right up to Hon'ble Apex Court. Its effort to join M/s. Shaw Wallace and M/s. Cruikshank by moving application under Order I Rule 10 of C.P.C., also failed. Thereafter, it made efforts to implead these Companies in its own suit and again challenge to maintainability of suit as instituted by M/s. BDA Limited was also raised independently and trial court has passed a separate reasoned order rejecting that challenge. All these orders passed separately are not challenged by Kumar Liquors before this court and have attained finality.

14. He submits, that as account books were not available, BDA Limited produced all transport permits / invoices by which goods were forwarded to Kumar Liquors and proved the same, one by one, by putting it to Mr. Sudhirkumar Sinha and also Excise Inspector at the godown of the factory. He submits, that the excise duty payable is always much more than the cost price of the liquor / wine. Hence, Kumar Liquors was under obligation to deposit the amount of excise duty payable on stock demanded by it in advance. Thus, against each indent, excise duty was paid by Kumar

Liquors as per trade practice, before hand; and then goods were dispatched. Trial court, therefore, correctly held that goods were received by Kumar Liquors. Burden was upon Kumar Liquors to demonstrate payment for stocks received.

15. He further submits that on some occasions, excise duty was hiked retrospectively and hence Kumar Liquors became liable to pay the said excess amount i.e. amount at revised rate of duty. That amount was paid by Kumar Liquors from time to time. Kumar Liquors attempted to take advantage of those payments and introduced those payments to show that it has cleared the purchase price. According to him, such an effort is inconsistent with defence in written statement and reveal a roving attitude. When such vouchers or payments were introduced on record & attempted to be used in evidence of Anilkumar Agrawal by Kumar Liquors, BDA was constrained to rebut it. Hence, with the leave of court, BDA Limited examined its employees Mr. Kanse and Mr. Gule. Original letters accompanying the cheques for these enhanced duty-payments were shown during his cross examination to Mr. Anilkumar Agrawal and with oblique motive, he refused to identify the same. These witnesses examined by M/s. BDA Limited later on proved those letters. Trial court, therefore, correctly

correlated said payments with the letters of Kumar Liquors and found that the same were made towards the revised excise duty.

16. In view of inconsistent defences and as M/s. BDA Limited proved the delivery of liquor / wine, burden was upon Kumar Liquors to show repayment. for that, they could have produced the account books, audited or otherwise. Though said best possible evidence was available with them, the same were not produced and inconsistent and evasive defences were pressed into service. Trial court, therefore, ought to have accepted the amount of claim disclosed in affidavit of Chartered Accountant Mr. Indapurkar and decreed the suit for that amount. Adjustment of Rs. 1,00,00,000/- was already made by M/s. BDA Limited and trial court, therefore, should have dismissed the suit filed by Kumar Liquors entirely. Its finding, that said suit was rendered infructuous because of adjustment of security deposit amount of Rs. 1,00,00,000/- is bad in law. He relies upon provisions of Section 79 of Companies Act, Section 34 of Evidence Act, and Section 213 of Contract Act to buttress his submissions. He further submits, that though Chartered Accountant Mr. Indapurkar was made available for cross examination, Kumar Liquors deliberately avoided to cross examine him and hence, adverse inference

needed to be drawn on that account against it. He has placed strong reliance upon cross examination of Mr. Anilkumar Agrawal to show that he admits supply of goods. He further expresses surprise that if amount of Rs. 72 Lack or any sum in excess of Rs. 1,00,00,000/- was legally recoverable by Kumar Liquors, why it filed suit at Secunderabad only for Rs. 1,00,00,000/- or then, did not file suit to recover such balance amount.

17. Before proceeding further, we find that the trial court framed common issues in both these suits, after they were clubbed together. Those issues and findings recorded by trial court upon it are reproduced by us for convenience :

> 1. Does the plaintiff prove that the defendant was appointed as a distributor in pursuance of letter dated 28-11-1990 ? .... *In the affirmative.*
>
> 2. Does the defendant prove that the plaintiff has appointed it as a distributor by virtue of letter dated 15-12-1990 ? .... *In the Negative.*
>
> 3. Is the suit bad for non-joinder of necessary parties i.e. M/s. Shaw Wallace & Co. Ltd. and M/s.

Cruikshank & Co. Ltd. ? .... *In the Negative.*

4. Whether M/s. Shaw Wallace & Co. Ltd. and M/s. Cruikshank and Co. Ltd. are liable for the recovery of amount alleged to be due against the defendant ? ..... *In the Negative.*

5. Does the plaintiff prove that it has supplied the goods to the defendant as per list of invoices annexed with the plaint ? .... *In the affirmative.*

6. Does the plaintiff prove that it has supplied the goods amounting to Rs. 3,93,73,919.40 Ps. to the defendant ? .... *Partly in the affirmative, to the tune of Rs. 3,91,89,549.4 Ps.*

7. Is the plaintiff entitled for decree of an amount claimed under the suit with interest, as prayed ? ..... *Partly in the affirmative to the tune of Rs. 1,03,29,717.46 Ps. along with interest at 12 % p.a. from the date of suit till realization with proportionate costs.*

8. Is the defendant entitled to money decree of Rs. 1,00,0000/- against the plaintiff as claimed in Special Civil Suit No. 183/97 ? .... *In the negative, in view of*

adjustment in Special Civil Suit No. 375/1995.

8b. If yes, whether the plaintiff is entitled to adjustment of said amount, as claimed in Special Civil Suit No. 375/95 ? ..... *Amount of deposit of Rs. 1.00 Crore is adjusted in payment of dues in Special Civil Suit No. 375/1995.*

9. What decree and order ? .... *Special Civil Suit No. 375/1995 is partly decreed to the tune of rs. 1,03,29,717.46 Ps. with proportionate costs, as per final order and Special Civil Suit 183/1997 is dismissed in view of adjustment of deposit amount in Special Civil Suit No. 375/1995. the plaintiff in Special Civil Suit No. 183/1997, to get 2/3rd court fees refund in the said suit, if permissible under the Andhra Pradesh Court Fees Act.*

18. It needs to be pointed out that Kumar Liquors filed Special Suit No. 427/1994 at Secunderabad on 28-11-1994, while BDA Limited filed its Special Civil Suit No. 375/1995 on 29-4-1995. Before filing that suit, BDA Limited issued a notice at Exhibit 1153 on 28-3-1995 and claimed amount of Rs. 2,93,74,748/- as costs of goods supplied to Kumar

Liquors. On 22-1-1997, BDA Ltd. filed its written statement in suit filed by Kumar Liquors & in it also amount of costs recoverable is stated to be Rs. 2,93,73,919.46/-. It did not plead set-off Rs. 1 Crore even then.

19. During arguments, we have found that none of the parties to the suits have filed their balance sheets or accounts before trial court. Hence, when the evaluation of rival contentions of the respective Counsel was undertaken, the question cropped up at threshold whether in absence of such balance sheet filed either by BDA Limited or Kumar Liquors, a disputed question about the liability could have been gone into by the trial court. We would like to note here the labour taken by trial court as apparent from its application of mind in paragraph 58 onwards of its judgment, till paragraph 64. However, when the pleadings by parties are not consistent and necessary accounts are not produced, we have to consider the possibility or desirability of undertaking such an exercise by trial court. BDA has relied upon the certificate issued by the Chartered Accountant & certified copy of the balance sheet issued by Registrar Of Companies (ROC) during arguments, but did not bother to explain the inconsistencies arising therefrom or different amounts logically surfacing therefrom as principal sums which militate with the suit claim.

20. Following questions fall for our consideration in these three appeals :---

(i) Whether BDA has proved nonpayment of Rs. 3,93,73,919.46/– towards price of wine & liquor supplied by it during the periods given in plaint to Kumar Liquors?

(ii) Whether the indents or transport permits produced by BDA inspire confidence & are sufficient to sustain suit-claim?

(iii) Whether Kumar Liquors has established its entitlement to receive back security deposit of Rs. 1 Crore?

21. Before adverting to oral evidence, basic documents available on record need scrutiny. As the suit filed by Kumar Liquors is first in point of time, it will be appropriate to briefly consider the pleadings of Kumar Liquors in that Civil Suit i.e. Civil Suit No. 427/1994. Said suit presented at Secunderabad was for recovery of security deposit of Rs. 1,00,00,000/-. BDA Limited is sole defendant in that suit. It is pleaded in paragraph 3 therein that BDA Limited appointed Kumar Liquors as sole distributor as

per letter dated 15-12-1990 for sale of IMFL and Beer products and other brands in State of Maharashtra. Then, they have pointed out the labour undertaken by Kumar Liquors for successful discharge of the duties as distributor and giving of a refundable deposit of Rs. 1,00,00,000/- to BDA. In paragraph 4, they have submitted that contract of agency was not terminated or canceled and BDA Limited unauthorizedly, suddenly stopped supplying the products to Kumar Liquors. They have also pointed out that upon enquiries, they learnt about the dispute about ownership between two Chabbariya Brothers. They have also stated that despite efforts made by Kumar Liquors, the supply of liquor or wine was not restored. They have also submitted that in absence of supply, its investment in office establishment was lying idle & going waste. They have pointed out damage caused to them under different heads and stated that gross loss of more than Rs. 20,00,00,000/- was sustained by way expenditure on advertisement, sales promotion, salaries, rents, etc. They have also submitted that they have suffered damages of Rs. 1,50,00,000/- as they could not earn the expected reasonable profit. Kumar Liquors reserved right to file proceedings against BDA Limited for recovery of these amounts.

22. Next document chronologically available is Exhibit 1153 i.e. legal notice dated 28th March 1995, forwarded by the Solicitors of BDA Limited to Kumar Liquors. It is for recovery of outstanding amount towards price of goods supplied in pursuance of distribution agreement to Kumar Liquors. It mentions grant of super distributorship to Kumar Liquors by letter dated 28-11-1990. It is mentioned, that towards supplies effected, Kumar Liquors made payments from time to time. It is claimed therein that during period January to April 1993, said payments were not made. It is expressly mentioned in said legal notice that, "*the aggregate amount of price or goods sold and delivered during that period amounts to Rs. 2,93,73,919.46/- which amount you have failed and neglected to pay to our clients despite repeated reminders*". The notice, therefore, demands said amount and threatens legal action in default with 18 % per annum interest. It does not speak of appropriation of amount of Rs. 1 Crore deposited with BDA by Kumar Liquors as security. Apart from this, if amount of Rs. 3,93,73,919.46/– was recoverable towards value of wine or liquor supplied to Kumar Liquors, the notice must have mentioned that amount only & not any lesser amount.

23. Document then available is the plaint in Special Civil Suit No.

374/1995 for recovery of Rs. 2,93,73,919.46. In paragraph 4 of the plaint, it is mentioned that for the period from January 1993 to April 1993, for supplies towards Bombay Region, Kumar Liquors has failed and neglected to pay any amount. The non-payment alleged is for supplies between March 1993 to April 1993 in Aurangabad Region. Raising of invoices in respect of these supplies for said period is also pointed out. The particulars of the invoices are given in Exhibit "B", while Exhibits "C" and "C-1" are the copies of transport passes issued by Excise Department. In paragraph 5, legal notice dated 28th March 1995 is also pointed out. They have also pleaded that Kumar Liquors filed an affidavit dated 18-11-1994 wrongfully stating that terms and conditions of letter dated 28-11-1990 were not completely agreed to by it. BDA Limited also denied agreement dated 15-12-1990. In paragraph 11, it is mentioned that part of plaintiff's (i.e. BDA Limited) claim is barred by law of limitation. In paragraph 12, BDA Limited has stated that plaint has been signed and verified on its behalf by Mr. S.K. Sinha, who is aware of the facts and also able to depose about the same. This plaint has been amended later on. Despite this, the story of appropriation of Rs. 1 Crore is absent.

24. On 29th July 1997, Kumar Liquors filed written statement in

Special Civil Suit No. 375/1995. They denied that they were appointed as distributor in pursuance of letter dated 28-11-1990 and asserted that they are appointed as sole distributor vide letter dated 15-12-1990. In paragraph 4, they denied non-payment towards the goods supplied either for Bombay Region or Aurangabad Region. They also denied particulars of invoices given in Exhibits "B" and "C" with its plaint by BDA Limited. They denied Advocate's notice dated 28th March 1995 and submitted that no such notice was received or served upon them. They also denied all other allegations and denied liability of Rs. 2,93,73,919.46. They also denied authority of Mr. S.K. Sinha as competent person.

25. In this written statement, Kumar Liquors reiterated the story pleaded by it in its plaint seeking recovery of Rs. 1,00,00,000/-. In addition, they submitted that M/s. Shaw Wallace and Company was owing M/s. BDA Breweries Limited, M/s. Cruikshank & Co. Ltd., and was managing M/s. Vinedale Distilleries Ltd., Hyderabad, with some other Companies when Kumar Liquors came to be appointed as distributor. It has pleaded that a memorandum of understanding was signed, setting out terms and conditions of agreement reached between Kumar Liquors and Cruikshank happened to be subsidiaries of M/s. Saw Wallace. These

agreements with Kumar Liquor were executed and signed by S. Roy, representing BDA Limited and Cruikshank Mr. A.K. Agrawal represented Kumar Liquors in both these agreements. BDA Limited and Cruikshank continued to be subsidiaries of Shaw Wallace till 1993 and Senior Executive Mr. S. Roy was looking after them. In late 1993, management of BDA Limited changed hands & from Shaw Wallace, it came to Mr. Kishor Chhabariya and his officers. Business was carried out by Kumar Liquors by treating BDA Limited and Cruikshank as one entity and those units also agreed to do the business accordingly with Kumar Liquors. M/s. Cruikshank had agreed to render marketing services to Kumar Liquors, to promote the brands procured from BDA Limited, and Kumar Liquors had agreed to sell the products / brands as per recommendations of M/s. Cruikshank on the terms and conditions agreed and in such quantities as may be advised by M/s. Cruikshank and Company, from time to time.

26. Kumar Liquors has pleaded in written statement, in paragraph 12(g), that M/s. Cruikshank shall be responsible for recovery of payment of price of IMFL / Beer from the indentors. According to Kumar Liquors, BDA Limited were the manufacturers, while Cruikshank was marketing company and both acted as one unit. As per advice of Cruikshank, Kumar

Liquors supplied the goods to indentors / whole-sellers in Maharashtra i.e. at Aurangabad and Mumbai, while entire payments therefor were being collected by Cruikshank and Cruikshank was paying it back to BDA Limited. Fraudulently, Cruikshank collected large amounts from indentors without knowledge of Kumar Liquors and did not credit the same to its account. Everything was going on smoothly till early 1992 before dispute between two Chhabariya Brothers arose. After dispute between two brothers, dispute also arose between Cruikshank and BDA Limited. Cruikshank directly collected certain payments from indentors, took credit therefor in its own account and did not pay it to BDA Limited. It is pointed out that a sum of Rs. 1,45,00,00,000/- was outstanding from indentors and M/s. Cruikshank being unit of BDA Limited, was responsible for said amount. Kumar Liquors, therefore, debited said amount to the account of M/s. BDA Limited in its book. Additionally, an amount of Rs. 1,12,60,780.50 on account of M/s. Cruikshank was debited to the account of M/s. BDA Limited, which was due and payable to Vinedale Company. It is further submitted, that this was done on understanding between M/s. BDA Limited and M/s. Cruikshank and as per continuous practice between parties. It is further stated that apart from these amounts, a sum of Rs. 3,74,01,485.50/- was paid to M/s. BDA Limited during the period 1993.

27. Kumar Liquors has further stated that as per its books and account and statement maintained, a sum of Rs. 72,22,534.34/- is due to it from BDA Limited, including deposit of Rs. 1,00,00,000/- excluding interest. It also pointed out that Original Suit No. 921/1994 was pending in Delhi High Court, between M/s. Vinedale distilleries Limited and one M/s. Sanman Distributors Limited & others. One Mr. Uthpal Kumar Ganguly and Mr. Ajit Kumar Sanyal filed affidavit therein, that Kumar Liquors was directed by BDA Limited to pay the amount to various Companies and those payments were routed through Vinedale distilleries Limited. Kumar Liquors submitted that BDA Limited which later on became subsidiary of M/s. Sanman Distributors Limited (Defendant in Delhi Suit), made false and fictitious claims to help Sanman Distributors to defeat the orders of Delhi High Court. Kumars Liquors reiterated that it had to recover amount of Rs. 72,25,534.34/- from BDA Limited apart from sum of Rs. 20,00,00,000/- towards gross loss incurred by it. Kumar Liquors thereafter has made reference in detail to said Delhi Suit and developments therein. In sub-paragraph "j", they have mentioned at least nine Companies urging that various transactions between these Companies needed investigation and piecemeal examination could not have been

undertaken. However, for the present purposes, we do not find it necessary to go into further details.

28. On 22-1-1997, BDA Limited filed its written statement in Civil Suit No. 427/1994 at Secunderabad. They pleaded that the suit was false & without any basis. They denied letter dated 15-12-1990. They stated that Kumar Liquors has not made any deposit as set out in letter dated 15-12-1990. They pointed out filing of Special Civil Suit No. 375/1995. They stated that on the date of filing of that suit, BDA Limited was entitled to claim sum of Rs. 2,93,73,919.46/- from Kumar Liquors. They denied alleged loss of Rs. 20,00,00,000/- and also denied their liability to refund alleged amount of Rs. 1,00,00,000/- or any other amount. They stated that as per Clause 4 of letter dated 28-11-1990, Kumar Liquors gave advance of Rs. 1,00,00,000/-. Special Civil Suit No. 375/1995 filed by BDA Limited was amended on 7-8-1997 because of amendment to written statement by Kumar Liquors. The amendment points out transfer of Secunderabad Suit filed by Kumar Liquors, to Aurangabad, by Hon'ble Apex Court. They have pointed out that entire amendment to WS was irrelevant. They have stated that Cruikshank and Company was having independent status and was not having any understanding or contract with

BDA Limited. They have denied any connection with alleged agreement between Kumar Liquors and M/s. Cruikshank They have also pointed out that dispute pending before Delhi High Court was entirely different and had no bearing on Special Civil Suit No. 375/1995.

29. Thus, these pleadings show that last supply of IMFL or Beer by BDA Limited to Kumar Liquors was in April 1993. There were no supplies after said date. The first claim is suit at Secunderabad by M/s. Kumar Liquors where only refund of security deposit of Rs. 1,00,00,000/- was claimed. The claim by BDA Limited in legal notice dated 28-3-1995 or then in Special Civil Suit No. 375/1995 was for recovery of price of liquor supplied i.e. Rs. 2,93,73,919.46/-. Even in written statement filed at Secunderabad Court, while opposing the suit of Kumar Liquors, BDA Limited did not plead that advance of Rs. 1,00,00,000/- with it, was already adjusted and thereafter, for the balance amount, legal notice was issued or suit was filed. Thus, there is no plea in writing anywhere about adjustment of said amount.

30. When suit at Secunderabad was for a specific purpose and was being opposed, BDA Limited accepted receipt of amount of Rs.

1,00,00,000/-, but did not point out its adjustment. It is in the background of this situation, that this Court is called upon to appreciate the oral evidence. Though there is challenge to maintainability of suit as presented by M/s. BDA Limited, we find that said issue was looked into by trial court and it has passed separate order overruling the objections to its maintainability or to competency of Mr. Sudhirkumar Sinha, to either present the plaint or to depose.

31. Perusal of evidence of Mr. Sudhirkumar Sinha at Exhibit 60 shows that as per agreement between parties, Kumar Liquors was to pay price of goods within 30 days of dispatch. But excise duty was to be paid in advance on the basis of indents. The goods were dispatched by BDA Limited under excise transport passes and the goods were supplied accordingly till 26-4-1993. Kumar Liquors stopped payment from second week of February 1993. He deposed that last consignment was forwarded by BDA Limited on 26-4-1993 and during middle of February 1993, to 26-4-1993, BDA Limited supplied goods worth Rs. 4,00,00,000/-. This part of deposition in paragraph 2, therefore, shows that excise duty payable on this stock supplied up to 26-4-1993 was received by BDA Limited. He relied upon photostat copies of documents about these transactions. Carbon

copies of all those documents were in custody of BDA Limited and originals with Kumar Liquors. Third carbon copy was with State Excise Officer at the factory. According to this witness, as per those photostat copies placed on record, and account maintained by BDA Limited, amount of Rs. 3,93,74,000/- was due to it from Kumar Liquors. The suit notice was accordingly sent and Kumar Liquors did not forward any reply to it. Therefore, suit came to be filed. In his deposition, suit notice is identified as Article 2 and it has not been exhibited. His further evidence shows a statement that amount of Rs. 1,00,00,000/- due to Kumar Liquors towards refund of advance was adjusted and hence in suit, claim was of Rs. 2,93,74,000/-. It needs to be reiterated that this plea of adjustment of Rs. 1,00,00,000/-, out of the amount mentioned supra, does not figure either in suit notice or in plaint. It is apparent that total value of goods supplied by BDA to Kumar Liquors needed specific mention first & then only, reduction therein due to appropriation of Rs. 1 Crore could have been asserted.

32. This witness has then spoken about the invoices or transport passes, one by one, of which according to him, total should come to 3,93,74,000/-. This examination became necessary as those transport

permits / passes were not accepted by Kumar Liquors. However, Mr. Sinha has not spoken about any audit conducted on the basis of these documents. In paragraph 242 of his deposition, Mr. Sinha has asserted that Kumar Liquors received those goods under excise supervision at its godown at Aurangabad and at Bombay. He has denied that Cruikshank Company paid directly Rs. 1,12,60,780/- to BDA Limited on behalf of Kumar Liquors. He accepted that BDA Limited received Rs. 3,74,11,485/- during year 1992-93, but according to him, said payments were towards earlier supplies. He submitted that claim of Rs. 72,00,000/- by Kumar Liquors, after alleged adjustment, was false. He reiterated adjustment of advance to Rs. 1,00,00,000/- and, therefore, justified filing of suit for recovery of Rs. 2,93,00,000/- only. He has further stated at the end of said para, that claim and accounts maintained by BDA Limited and documents relied were genuine one. He deposed that suit claim was only of principal amount without any interest.

33. Cross examination of this witness shows that on the date of filing of suit, he was on roll of Cruikshank Company. He could not speak about agreement dated 15-12-1990. He stated that letter of appointment as distributor was given to Satishkumar Agrawal of Kumar Liquors on 28-

11-1990. He further stated that as per Exhibit 1144, Cruikshank Company and himself as Factory Manager were in a position to control factory of BDA Limited at Aurangabad under court orders. He denied knowledge of publication of a notice revoking his power of attorney in "Daily Lokmat" dated 18-5-1993. He accepted that from 18-5-1989 to 30-11-1996, he was Factory Manager of BDA Limited, but was receiving pay from Cruikshank His evidence shows that from 1-4-1991 till March 1992, he worked on pay roll of BDA Limited and thereafter, from April 1992 till August 1993, he managed the factory on pay roll of Cruikshank In paragraph 250, he stated that between December 1990, till 27-4-1993, there were thousands of transactions between parties, amounting to several crores. He accepted that he was in custody of all accounts and ledger books for the period covered under suit and also stated that he could produce it for the period from 10-12-1990 till 26-4-1993. He stated that BDA Limited supplied goods to Kumar Liquors worth Rs. 2,93,74,748/- and that amount was due against the price of goods. He also accepted amount mentioned in notice (Exhibit 1153) as Rs. 2,93,73,919.46/-.

34. His cross examination in paragraph 252 shows that one Shobhan Roy was Director of BDA Limited during the distributorship of

Kumar Liquors. He was shown a letter dated 8-4-1993 issued by Cruikshank to BDA Limited. He agreed that said letter shows payment by defendant of excise duty for various indents raised by Cruikshank on BDA. This letter has been exhibited as Exhibit 1154. He accepted that said amount of excise duty was not credited to the account of defendant and it was not claimed in the suit. He also accepted that BDA Limited received amount of Rs. 40,70,429/- from Kumar Liquors on 16-4-1993 vide letters Exhibit 1155 and 1156. He very specifically deposed at the end of paragraph, that “the claim under suit is not relating to excise duty at all”. In paragraph 253, his attention was invited to certain inconsistencies between the transport passes produced by BDA Limited and its original produced by Kumar Liquors. Those documents are Exhibit 376 and Exhibit 1157, Exhibit 371, Exhibit 1158, Exhibit 366 and Exhibit 1159. He has denied that transport passes produced by him contained any manipulation by adding certain amounts. He also agreed that in invoices, at Exhibits 321, 316, 311, 306, 301, 296, 291, 286, 281, 276, 271, 266, 267, 261, 256, 251, 246, 241, 236, 231, 226, 221, 216, 211, 206, 201, 196, 191, 186, 181, 176, 171, 166, 161, 156, 151, 146 and 141, the price of goods is lesser and plaintiff claimed more amount for the reasons disclosed by him in paragraph 253 of his deposition. He accepted that all these documents (invoices) were not signed by Kumar Liquors. He denied that BDA Limited did not claim all these amounts in legal notice.

35. Paragraph 253 also shows that he could not offer any explanation for more amount in Exhibit 361. Only reason given by him and recorded on Exhibit 371 is, subsequent revision of excise duty by State Government. In paragraph 254 also, he has accepted difference in price of goods and actually claimed price in about 63 Exhibits (invoices) taken note of by trial court in that paragraph. In paragraph 255, he has stated that amount outstanding against Kumar Liquors and supplies made to it were not included in the statements attached with plaint. He further stated that he mentioned those supplies in the account book. He could not specify quantity supplied by BDA Limited to Kumar Liquors in the month of January 1993. He submitted that goods worth Rs. 2,00,00,000/- to 3,00,00,000/- were supplied in the month of January 1993. He accepted that he did not file any extract of account book on record. He also answered that he can produce account books for perusal. Counsel for Kumar Liquors then requested the witness to produce account books from December 1990 till April 1993. Witness deposed that he had not brought account books with him on that day and it would not be possible for him to

produce it on the same date. Witness Mr. Sinha told the trial court, that it would take one or two days to bring the same. Court then directed Counsel for Kumar Liquors to complete cross examination, keeping the point of account open.

36. Trial court has then recorded, that Counsel for plaintiff declined to produce account books and explained that suit was based on documentary evidence. Trial court has recorded that effect of non-production of account books would be considered at the time of final hearing. Witness Shri Sinha then deposed that he was not ready to produce account books. He denied that only to prevent true picture from coming on record, he was declining to produce the accounts. He accepted that ledger contains accounts of payment made by Kumar Liquors as also others to BDA Limited and BDA Limited supplied goods to Kumar Liquors and others. He stated that Income Tax Department had seized account books of BDA Limited in August 1995. Copy of seizure Panchanama was given by Income Tax Department. He could not state exact amount recoverable from Kumar Liquors in the month of February 1993, but roughly disclosed it to be Rs. 3,50,00,000/- to Rs. 4,00,00,000/-. He accepted that Kumar Liquors stopped payment from February 1993.

37. Shri Sinha further stated that financial year of BDA Limited was from 1st April to 31st March. He also accepted that no documents were filed showing the outstanding amount in February 1993. He further stated that amount of Rs. 3,74,18,185/- was received towards supplies prior to 15th February 1993 from Kumar Liquors. He was not aware whether Cruikshank Company was responsible for collecting the amount from indentors as it was in a position to manage and control BDA Limited. He was not aware whether Cruikshank collected the amount from indentors for the goods supplied by BDA Limited to Kumar Liquors. He accepted that deposit of Rs. 1,00,00,000/- was to be refunded after the business was discontinued. He also accepted that in suit notice at Exhibit 1153, there was no mention of adjustment of suit amount of Rs. 1,00,00,000/-.

38. On behalf of Kumar Liquors, Anilkumar s/o O.P. Agrawal entered the witness box. His evidence shows that he produced copy of the statement showing payments made by Kumar Liquors to BDA Limited in April 1993, towards the price of goods. Said statement was marked as Article 4 by trial court. Paragraph 6 of his evidence shows details of those

payments. Here, it is required to be noted that Kumar Liquors did not plead these payments totaling to Rs. 3,74,01,475.50/- in written statement and did not produce accounts to substantiate the same. Shri Agrawal has in paragraph 8, spoken about the variance between invoices / transport passes produced by BDA Limited. In paragraph 7, he has stated that Exhibit 1154 revealed payment to BDA Limited by Kumar Liquors through Cruikshank and Company towards differential excise duties. He has also pointed out letters Exhibits 1155 and 1156, urging that those letters proved the payments made by Kumar Liquors to BDA Limited.

39. During cross examination, Anilkumar Agrawal accepted various indents issued by Kumar Liquors in favour of BDA Limited. He was shown letters at Exhibits 694, 699, 703, 707 and 711. He deposed that those letters did not belong to Kumar Liquors. In paragraph 12, he was shown various other letters with Exhibit numbers as mentioned therein, 210 in number. Mr. Agrawal accepted supply of goods under said letters, but stated that those letters were duplicate transport passes and needed verification from the originals to ascertain whether his Company received the goods as per those transport passes. In paragraph 14, he accepted that goods were purchased on 45 days credit initially, but later on BDA Limited

started taking advance. He submitted that Kumar Liquors had paid more amount than the price of goods. He further stated that Kumar Liquors filed a suit for recovery of excess amount paid to BDA Limited and it was claiming amount of Rs. 1,72,00,000/- in it, but immediately corrected himself that suit was for recovery of Rs. 1,00,00,000/- only. He accepted payment of Rs. 3,74,01,485.50/- & that some amount was paid towards costs of goods under dispute. This witness appears to have accepted suggestion as given by BDA and the relevant answer reads, "It is true to say that defendant has paid Rs. 3,74,00,000/- and some odd amount has been paid towards costs of goods under dispute". He denied that amount of Rs. 25,00,000/- was paid by cheque on 3-4-1993 towards earlier supplies. This deposition appears in paragraph 14 of the evidence.

40. Trial court in same paragraph records filing of an application at Exhibit 1174 seeking permission to produce documents moved by plaintiff BDA Limited. Thereafter, matter was adjourned. In further cross examination in paragraph 17, trial court has recorded certain part in question and answer form. First question is, whether Kumar Liquors submitted accounts in respect of transactions with BDA Limited and Mr. Agrawal has answered it in negative. Second question was about auditing

the accounts through Chartered Accountant and Mr. Agrawal has refused to answer it. Third question was whether Kumar Liquors had any reason for not filing accounts, and Mr. Agrawal replied that he had already answered it. He accepted that Kumar Liquors did not file up to-date balance sheet or auditor's report of Kumar Liquors. He was asked whether Kumar Liquors represented against discontinuation of supply by BDA Limited and he answered that orally he discussed said issue with the officers of BDA Limited. When asked about action taken, Mr. Agrawal stated that Kumar Liquors filed suit at Secunderabad. He accepted that Kumar Liquors did not file any suit for recovery of Rs. 72,00,000/-. This cross examination of Mr. Agrawal was over on 6-8-1998.

41. After Kumar Liquors evidence was over, trial court has vide its order passed on Exhibit 1183, allowed plaintiff to lead evidence. Evidence of one Dinar Kanse has been recorded on 8-3-1999. This person was working as Clerk with BDA Limited since 1988, in inward outward section. He deposed about 19 letters he received filed along with list Exhibit 1175. He deposed that those 19 letters were brought to him by representative of Kumar Liquors i.e. either by Mr. Prabhakar or by Mr. Naidu, or one office boy whose name he could not remember. Letters were brought by hand

delivery. After receipt of letters, he impressed BDA Company's seal and date of receipt on it. He further submitted that these 19 letters were on letter head of Kumar Liquors & that these letters were entered by him in a separate register maintained for excise accounts of Kumar Liquors. Mr. Naidu was Manager of Kumar Liquors and this witness claimed to know his signature as he regularly used to receive letters written by him. He identified signature of Mr. Naidu on letters dated 3-4-1993, 21-4-1993 and 23-4-1993, which were exhibited as Exhibits 1216, 1217 and 1218. He could not identify signature on other letters. He accepted that one of the letters i.e. letter dated 8-4-1994, out of said 19 letters, was not on letter head of Kumar Liquors and was not issued by Kumar Liquors. He denied that those letters as also inward register produced by BDA were fabricated documents. He also accepted that 19 letters were typed on three different types of letter heads.

42. After this witness, one more witness, namely, Avinash Gule was examined by BDA Limited. He was working as Accounts Executive and looking after the work of receipt and payment. He presented the cheques and drafts in the Bank. He took entry of the same in Bank book maintained by BDA Limited. He was shown general bank book of Company and he

stated that it was maintained by him. He then pointed out 16 entries in the month of April 1993 relating to Kumar Liquors in that register. He stated that the relevant Demand Draft numbers were also noted in the Bank book. He produced extract of this Bank book showing these entries at Exhibit 1220. In paragraph 2, he accepted that BDA Limited was maintaining ledger of account holders including Kumar Liquors.

43. His cross examination shows that he was not maintaining salary particulars of the employees and head office was doing that job. He accepted that Bank book produced by him was not signed by any officer of the Company or by himself. He denied that Bank book was a got up document. He accepted that on very first page of Bank book, which was not having page number, "A.Y. 1994-95" was written. He denied that it was ledger for accounting year 1994-95. He accepted that papers from said Bank book could be removed and replaced. He accepted that Bank book was not signed by any representative of Kumar Liquors. He accepted that there were no references to letters filed by BDA Limited with list Exhibit 1175 in Bank book. He accepted that he himself and Mr. Sudhirkumar Sinha were on pay roll of Cruikshank and Company. He denied that at that time, BDA Limited was controlling Cruikshank Company. He accepted that

both these Companies were subsidiaries of Shaw Wallace. He accepted that BDA Limited had published a declaration in newspaper Lokmat, that this witness (Mr. Gule), Mr. Sinha (PW 1) and eight other persons were no longer working with BDA Limited. However, he was not remembering date of publication. He accepted that during 27th April 1993 to November 1993, BDA Limited was closed due to differences amongst Directors. He denied that Bank book and letters were fabricated documents.

44. It is after this cross examination, that the BDA Limited closed its evidence. Along with the documents placed on record, it had filed affidavit of Mr. Sudhir Madhukar Indapurkar, dated 17-8-1998. Thus, Mr. Sudhir Madhukar Indapurkar was never sought to be produced and examined as a witness. BDA Limited examined two persons as its witnesses after closure of evidence of Kumar Liquors. Why it could not examine chartered accountant Mr. Indapurkar as its witness, has not been explained. On 11-10-1999, trial court passed an order on question of exhibiting certain documents. BDA Limited had filed application Exhibit 1127 for exhibiting certified copy of balance sheet and certified copy of excise challans. Trial court, by placing reliance on Section 3 of Commercial Document Evidence Act, and judgment of this Court in case

of *Omprakash Berlia and another Vs. Unit Trust of India and others*, reported at *1983 Mh.L.J. 339*, accepted certified copy of balance sheet as Exhibit 1230. It also exhibited certain other documents, but no Exhibit number has been given to affidavit of Mr. Sudhir Indapurkar. In this affidavit, Mr. Sudhir Indapurkar has in paragraph 5 stated that amount of Rs. 3,12,61,271/- was due and payable by Kumar Liquors to BDA Limited. He has further stated that after adjusting dealership deposit of Rs. 1,00,00,000/-, acknowledged by M/s. BDA Limited, amount of Rs. 2,12,61,271/- was still recoverable from Kumar Liquors by BDA Limited. He has certified that from books of account, the extract of transactions with Kumar Liquors was prepared and same was verified and signed by him. Therefore, he issued the certificate accordingly in favour of BDA Limited. Thus, this affidavit of Chartered Accountant of BDA Limited brings on record, situation emerging after alleged examination of the books of accounts by him and a different figure as price of goods supplied.

45. The trial court has in paragraph 50 of its judgment stated that it has carefully gone through the list at exhibit B i.e. the list of invoices, indents, transport passes and other documents produced by BDA. This list is produced by witness S.K. Sinha on behalf of BDA. It has noted material

contradictions in invoice amounts and found that amount of Rs.81,057.47/- was claimed less by BDA. No explanation was offered for making such less claim and Kumar liquors also did not seek any justification therefor. However as the amount claimed was found less than the invoice amount, trial court did not find any difficulty in accepting the lesser amount as correct figure. In paragraph 51 it has looked into invoices where amount claimed was more. Addition of Rs.500 was made by BDA in ink in the typed document. It noted five such invoices where amounts were added in handwriting. This addition was explained by witness Shri Sinha who pointed out that on 16 March 1993 excise duty was increased and therefore these amounts were added subsequently. 3 vouchers in original were produced by Kumar liquors to show that there the additions in ink did not appear. In spite of this, trial court accepted oral explanation given by Shri Sinha that these amounts were added on account of increase in excise duty. It has drawn support from the fact that Kumar liquor paid differential excise duty in respect of added amount in disputed documents. It also gathered this fact from communications sent by Kumar liquors to BDA. It has looked into about 17 indents to note that differential excise duty of Rs. 10,86,007.50/ paid by Kumar liquors thereunder tallied with the figures in letters and concluded that additional amount included in indents at Exhibit

371 and 376 was already paid by Kumar liquors. It held that said amount in respect of Exhibit 366 of Rs.65,812/- Ex. 1078 of Rs.59,530/- and Exhibit 1082 of Rs.58,927/- that is total amount of Rs. 1, 83,869.50/ was not paid to BDA by Kumar liquors.

46. The trial court has in paragraph 52 of its judgment also held that BDA is entitled to reimbursement of differential amount of excise duty provided it has paid in the same. It found that in absence of proof of such payment, BDA limited cannot claim that amount back from Kumar liquors and as such when no proof of payment was produced, that amount would be required to be deducted from the suit claim. It has accordingly deducted amount of Rs.1,83,869.50/. It has found that BDA, after deducting said amount was entitled to claim Rs.3,91,89,549.46/ as amount due from Kumar liquors.

47. Perusal of judgment in paragraph 53 shows consideration of argument of Kumar liquors that suit filed by plaintiff was not to claim any amount towards differential excise duty. Trial court remarks that after careful inspection of documents filed by BDA, it became clear that BDA claimed the differential excise duty of Rs.30,48,463.45/ besides the price of

goods of Rs.1,82,98,146.53 towards sales to Kumar liquors for Bombay region. Similarly for Aurangabad region, claim towards differential excise duty was of Rs.33,59,974.31/ while towards price of goods, claim was of Rs.1,46,67,337.00/–. Here it is necessary to reproduce finding recorded by trial court at the end of paragraph 53 which reads --

> " *this difference in excise duty is included in the price of goods itself. Therefore PW 1 S.K. Sinha's evidence that the suit is not for claim of excise duty, is contrary to the plaint pleadings or he might have meant that it is not for merely excise duty payable in advance*."

Thus, the trial court makes out a case contrary to express plea of BDA in its plaint re-affirmed in his deposition by S.K. Sinha.

48. Judgment in paragraph 54 also shows a finding that in many cases amount forwarded by Kumar liquors to BDA in advance to pay excise duty was short and hence, balance amount was paid by BDA. The trial court therefore finds BDA entitled to recover such short payment. In paragraph 55, trial court also takes note of 6 indents of which excise duty has been paid by Kumar liquors. Total excise duty paid is of

Rs.50,68,883.00/– through these 6 documents. These documents are exhibit 1154 dated 8-4-1993, Ex. 1234 dated 2nd April 1993, Ex. 1235 dated 3 April 1993, Ex. 1236 dated 12 April 1993, Ex. 1238 of 15th April 1993 and lastly, Exhibit 1239 of date 17th of April 1993. Because of this, trial court rejected defense of Kumar liquors that it was not liable to pay excise duty as claimed in various indents. It is therefore held that delivery of goods worth Rs.3,91,89,549.46/– to Kumar liquors was proved by BDA. This shows that on the basis of data on record, it also attempted reconciliation or settlement of accounts.

49. In paragraph 56 and 57, trial court proceeds to consider the failure of Kumar liquors to substantiate its stand that it had to recover amount of Rs.1,45,00000/– from Cruikshank or payment of Rs.80,01,455/– by it to VDL Co. towards dues of BDA. In paragraph 58 it looks into letter Ex. 1154 of date 8 April 1993 to note that Kumar liquors had paid amount of Rs. 25,00,816.50/ out of which BDA had already given credit of Rs.3,79,311/– towards excise duty of indent number B– 22 vide Exhibit 126, 128 and 129. Little later it finds Kumar liquors entitled to credit of balance amount of Rs.21,21,505.50/– out of & as per this letter Exhibit 1154.

50. The trial court records that it has verified the accounts of excise duty claims by BDA from Kumar liquors against indent numbers disclosed in the letter. Trial court in paragraph 59 takes note of claim of differential excise duty of Rs. Rs.10,86,007.50/. It has then proceeds to verify differential excise duty claimed against invoice Nos. 546, 547, 548, 549 and 583 of Rs.3,26,747.00/-. It finds that said amount is paid by Kumar liquors to BDA. It also looks into 11 indents where differential excise duty was claimed by BDA and records a finding that amount of Rs.7,08,750 .00/- vide letter Ex. 1154 has been paid by Kumar liquors. It also accepts letter dated 16th of April 1993 at Ex. 1155 & Ex. 1158, dated 15 April 1993 at Ex. 1178 and dated 5 April 1993 at Ex. 1180 to hold that amount of Rs.85,70,949.00/– disclosed the payments to BDA. Adding amount of Rs.21,21,505.50/– as per this letter Exhibit 1154, it finds that BDA had already received amount of Rs.1,06,92,454 .50/- from Kumar liquors and also an additional amount of Rs.20 lacks as per letter Ex. 1216 dated 3 April 1993.

51. In paragraph 60 of its judgment trial court considers application Ex. 1183 filed by BDA admitting various payments made by Kumar liquors

and as the admissions were against the interest of person making it, it accepted those payments. It has looked into 9 letters all of April 1993 to conclude that amount of Rs.1,88,59,832/– was already received by BDA. In paragraph 61, trial court takes note of the fact that Kumar liquors did not lead any evidence about the subsequent payments of Rs.8167377.50 which BDA itself admitted in its application Ex. 1183. Trial court records that it verified the payments of differential excise duty amount of Rs. 462288/– by Kumar liquors to BDA vide Ex. 1234 and it proceeds to mention indent numbers 903, 908, 917, 866, 913, 924, 907, 918, 931 and finds that total amount as claimed in these indents was same i.e. Rs. 462288/–. In paragraph 62 it again compares differential excise duty amount of Rs.890393/ of indent numbers 882 to 892 and 925 to 928 to conclude that amount claimed therein tallies with actual amount claimed by BDA. Excise duty amount of Rs.81,227.50 in Exhibit 1236 is found to tally substantially with excise duty claims vide indent numbers shown in the list of letter Ex. 1236. Total figure of differential excise duty is not found to tally with amount of Rs. 423854/– under letter dated 15 April 1993 at Ex. 1238 & is found not credited by BDA to the account of Kumar liquors. Differential excise amount of Rs. 353565/ shown in letter dated 17 April 1993 at Ex. 1239 is found tallying with excise duty claimed by indent numbers 894 to

899 at Ex. 1082, 1014, 970, 960 & 854. Trial Court mentions this exercise in this para 62 as (Rs. 59827.50 X 6). We may point to appear that actual product of this multiplication works out to Rs. 3,58,965.00/–.

52. Further discussion by the trial court in para. 63 and 64 of its judgment shows a comment that BDA was guilty of not producing the account books and original documents in its possession in an attempt to claim double credit of advance excise duty amount paid by it. It holds that Kumar liquor wanted its letters on differential excise duty not to be exhibited so as to use admission of Shri S.K. Sinha [witness of BDA] about receipt of amount of Rs.3.74 Crores in the month of April 1993 from it to get the entire suit filed by BDA dismissed and therefore avoided to produce office copies of those letters. The trial court held that Kumar liquors had made payment of Rs.1,88,59,832/– towards the price of goods claimed by BDA as per an Annexure-B to the plaint and after deducting that amount, BDA was entitled to Rs. 2,03,29,717.46/–. It then proceeded to deduct amount of Rs. One Crore i.e. 1,00,00,000/- payable to Kumar liquors towards refund of its security deposit and found BDA entitled to recover amount of Rs. 1,03,29,717.40/-. It has awarded interest at 12% PA on this amount from 29 April 1995 that is the date of filing of suit.

53. Rival contentions in all the three Appeals can be conveniently appreciated further in the light of above consideration by Trial Court & material on record. Kumar liquors, though pleaded & pointed out about damages suffered by it, did not make any prayer for recovery thereof or then for recovery of its other dues as set out in its plaint or written statement. Suit as filed by BDA is not for accounts or then, on the strength of running accounts maintained by it. Claim by Kumar liquors of debitting various amounts in the account of BDA is also not based upon any documents or accounts. None of the parties relied upon accounts maintained either to vindicate its claim or to defend the action. Evidence laid by BDA shows its assertion that its suit was based upon documents presented by it. However, there is no express statement anywhere by it that all its dues prior to 31 December 1992 have been cleared by Kumar liquors. As it has chosen to claim the costs towards goods supplied by it after February or March 1993 and till 26th or 27th April 1993, one has to presume that it has no claim to make for earlier period. Though in plaint and orally BDA seeks price of goods, trial court has worked out and accepted its entitlement to claim differential excise duty. The same can also be said about treatment extended to Kumar liquors by trial court. Totally

ignoring the plea that it had debited certain amounts due from Cruikshank to the account of BDA, a finding that amount of Rs.1,88,59,832/– has been paid and that payment was suppressed by BDA, is reached. This finding is on the strength of documents like letters written by Kumar liquors to BDA and produced later on. Suit filed by Kumar liquors for refund of Rs. 1 Crore was based upon these repayments made. The trial court in paragraph 56 has found that amount of Rs.1,45,00000/– was not proved to be due and payable to itself from Cruikshank by Kumar liquors and repayment by debiting amount of Rs. 1,12,60,780.50/- to the account of BDA is also found not established. The version of Kumar liquors of discharging its liability to BDA not having been accepted, defense of Kumar liquors that it had to recover amount of Rs.72 lacks more excluding security deposit of Rs. 1 Crore also could not have been believed. Kumar liquors could have produced its running accounts or examined its accountant/auditor, but failed to do so. The variance between pleadings and proof of/by both sides becomes material as both the parties are companies constituted under The Companies Act, 1956 and therefore statutorily obliged to maintain accounts and have the same audited regularly. Once this variance was noticed, trial court ought to have been slow in undertaking exercise of personally verifying documents and to build accounts for such unwilling & noncooperating parties of its own. It should have seen that parties before it were not bonafide litigants & did not approach it with clean hands.

54. Section 215 of the Companies Act deals with authentication of balance sheet and profit and loss account. As per said provision every balance sheet and every profit and loss account of a company is to be signed on behalf of board of directors by its manager or secretary and not less than 2 directors of the Company, one of whom must be managing director, where there is one. Said balance sheet and profit and loss account needs to be approved by the board of directors before its signing on behalf of board as mentioned supra. Section 220 contemplates filing of 3 copies of balance sheet and profit and loss account signed by the managing director, manager or secretary of company with the Register of companies after the same are laid before general meeting of the Company. Section 224 is about audit and every company at its annual general meeting has to appoint an auditor to hold office from the conclusion of that meeting until the conclusion of next annual general meeting. Section 227 deals with powers and duties of such auditors. Such auditor has a right to access at all times to the books and accounts and vouchers of the Company and is also entitled to obtain from officers of company, such information and

explanation as he thinks necessary for performance of his duties as auditor. This section also in its subsection [1 – A] lays down the mandatory obligations cast upon such auditor. Under subsection (2) he has to make a report to the members of the company on the accounts examined by him and also on every balance sheet and profit and loss account. He has to submit a report on every other document declared by Companies Act to be part of or annexed to the balance sheet or profit and loss account. Thus these provisions which are binding on BDA limited or Kumar liquors clearly show the statutory obligation to have accounts audited through a recognized and duly approved auditor, need of its authentication and its filing with ROC. Such accounts of both the companies which have undergone scrutiny as contemplated in provisions above, were not made available to the trial court. Kumar liquors filed its suit on 16th of November 1994 while BDA limited filed its suit on 31st of July 1995. Both the suits have been decided on 11 October 1999. None of the parties produced any profit and loss account or balance sheet duly authenticated in terms of section 215 and filed with Register of Companies thereafter, in terms of section 220. They did not point out appointment of any auditor in terms of section 227 of the Companies Act. Kumar liquors has refused to produce any accounts while Shri S.K. Sinha though initially agreed to produce the same, upon legal advice did not file it. Documents on the basis of which finding of part payment is reached are produced by Kumar liquors during evidence and then, documents in rebuttal were produced by BDA.

55. It is at this last stage that BDA limited has produced certificate given by its chartered accountant Shri Indapure. Said certificate is produced as a document along with affidavit of said chartered accountant. His affidavit is also produced as a document and no leave of trial court was sought by BDA to examine said chartered accountant as its witness. As such, there is no question of Kumar liquors even attempting to cross examine him. The trial court has passed separate order below Exhibit 1 in special civil suit number 375/1995 on 11th October 1999. BDA limited then filed application Exhibit 1127 for exhibiting certified copy of balance sheet and certified copies of excise challans. The trial court has given exhibit number 1230 to the certified copy of balance sheet issued by office of registrar of companies in view of provisions of section 77 of the Evidence Act. Said certified copy is director's report to the members dated 21st of June 1996. The documents accompanying it nowhere show any reference to any dues recoverable from Kumar liquors. In balance sheet amount of Rs.1,06.31,1000/- is shown against Sunday debtors. Audit of company

appears to have been conducted by Mrs. Lovelock and Lewes, chartered accountant. However, instead of filing their affidavit, BDA has filed affidavit of Sudhir Madhukar Indapurkar. Its advocate P.K. Joshi urged before us that Kumar liquors did not cross-examine this person Indarpurkar. Advocate Joshi wanted to rely upon said affidavit in support of claim of BDA in present appeal. Neither affidavit nor certificate issued by Indapurkar is exhibited by trial court. Because of insistence of Adv. Joshi we have perused this affidavit. It is sworn on 17th of August 1998 and said chartered accountant mentions that he has seen and verified the account books, ledgers etc. maintained by BDA Limited in respect of its transactions with Kumar liquors between 1990 to 1993. He states that after verification and careful scrutiny, he found amount of Rs.3,12,61,271/– due and payable by Kumar liquors to BDA. After adjusting the dealership deposit of Rs. 1 Crore acknowledged by Mrs. BDA Limited, this liability according to him, gets reduced to Rs. 2,12,61,271/–. He has further stated that from the books of accounts, the extract of transactions with Kumar liquors has been prepared and it is verified/signed by him. Therefore he issued a certificate in favor of BDA Limited. Certificate dated 6 August 1998 issued by Indapurkar is not exhibited and proved. However he states that he has verified ledger book extracts between the period December 1990 to April

1993 and found them in agreement with the books of accounts maintained by BDA. He also certified that he verified the following balances. After the certificate, there is a document running into 16 pages [printouts] with heading ledger extract of Mrs. Kumar liquors. The period of these extracts is from 15th of December 1990 to 28th of December 1992. Thus, it is not upto 30th April,1993. Each page is signed by said Indapurkar. At least at 2 places there is a note by BDA that its original books of accounts are seized by income tax Department and extract is prepared from photostat copies of ledgers available with it, that though amounts indicated are correct, there might be slight variation in some cases in other details as date etc. wherever photostat copies are not legible. Few pages thereafter in original R & P of trial court, printout running into 3 pages is seen. It starts from 28.12.1992 & is upto 27th April,1993. These pages are not palced in sequence.

56. Ledger debit as per these prinouts filed by BDA & certified by chartered accountant Shri Indapurkar also call for attention. An amount of Rs. 3,54,64,835.60/- is debited to the account of Kumar Liquors for Aurangabad region as on 31.12.1992 in it. Rs. 2,09,94,943.00/- is shown on debit side towards sales for Bombay region as on 31.12.1992. Thus, as

on 31.12.1992, total amount of Rs. 5,64,59,779.60/- was recoverable from Kumar Liquors by BDA. As on 31.01.1993, amount of sale consideration due for Aurangabad region is Rs. 3,47,66,929.00 & for Bombay sales, it is Rs. 2,59,33309.00/-. Considering the amounts separately credited during 1.1.1993 till 31.01.1993 in the account of Kumar Liquors, the liability as on 31.12.1992 was not cleared till 31.01.1993. Ledger position as on 28.2.1993 for Aurangabad region is Rs. 3,99,25,730.10/- & for Bombay area, outstanding towards sales is Rs. 2,91,83,171.00/-. Net balance as on 31.03.1993 for Aurangabad area is Rs. 2,07,05,671.10/- & for Bombay, Rs. 98,47.544.88/-. Last entry in this ledger prinout is for date 27th April,1993. Balance towards sales as on 27.04.1993 for Aurangabad area is Rs. 2,39,45,812.58/- & for Bombay, Rs. 73,15,496.08/-. The ledger therefore does not show or support separate accounting for period covered in suit or for supplies mentioned in it. It does not show a particular date by which or on which, Kumar Liquors had brought down its liability to “NIL” so as to enable BDA Ltd. to urge that the non-payment by Kumar Liquors is for supplies effected after said date/dates for respective area. We find it necessary to revert back to plaint filed by BDA where in Exhibit “B” it claims Rs. 1,80,27,311.31/- towards sales in Aurangabad area & Rs. 2,13,46,608.15/- towards Bombay area. BDA has, in said exhibit, claimed

Rs. 71,83,994.44/- as interest on amount due to it for sales in Bombay area. Thus, this ledger extract prepared by its own chartered accountant & produced or sought to be used by BDA can definitely be used against BDA itself. Sums figuring as due on the strength of this ledger extract countermand the suit-claim & calculations. Here, we can only conclude with certainity that legal notice dated 28-3-1995 could not have been for Rs. 3,93,73,919.40/- & hence, oral statement that amount of Rs. 2,93,73,919.40/- demanded in notice was after adjusting Rs. 1 Crore has to be discarded as afterthought.

57. When certified copy at Exhibit 1230 is of report dated 21st June 1996, it is obvious that company auditor at Bombay Mrs. Lovelock and Lewes must have had the advantage of perusing original ledger book and cashbook/accounts. They must be the legal auditors appointed as per mandate of S.227 of the Companies Act. Why their audit report and details pointing out amount recoverable from Kumar liquors could not be pressed into service and a certificate dated 6th August 1998 from a total stranger like Shri Indapurkar was required to be filed with his affidavit? It amply demonstrates that BDA could not rely upon the accounts and audits report of recognized auditor and hence, prepared the certificate dated 6th August

1998 to suit its purpose. This also explains why it did not dare to tender Indapurkar as a witness. It also explains refusal of BDA to produce its accounts before trial court.

58. Legal provisions noted supra contained in Companies Act also apply to Kumar liquors. Its refusal to produce the accounts and the ledger book cannot be viewed by applying different yardstick. The trial court has already drawn an adverse inference against it for this omission. It ought to have drawn similar inference also against BDA. Trial court has vide its order passed on 11.10.1999 due to Exhibit 1174 exhibited 19 letters produced on record through one Dinkar Kanse by BDA with list Exhibit 1175. It has also drawn adverse inference against Kumar Liquors for its omission to produce office copies of those letters or such letters. But, in controversy of present nature that is not sufficient to compute the liability of Kumar Liquors.

59. Exhibit B with plaint in special civil suit 375/1995 filed by BDA begins from date 15th February 1993 and contains supplies alleged to be made to Kumar liquors, Bombay up to 27 April 1993. Against each entry, due date of payment, delay in paying it, as also amount of interest

calculated at 18% for such delay, find mention. Amount of Rs.2,13,46,608.15/– is claimed as price or cost of material supplied while amount of Rs.71,83,994.44/-is claimed as interest on it for supplies made in Bombay region. For Aurangabad region, the supplies for which payment is not made are alleged to commence from 6 March 1993 and last such supply is on 26th April 1993. Again similar details of principal amount and interest calculation are given. Principal amount claimed is Rs.1,80,27,311.31/- while interest amount claimed is Rs.57,82,370.15/–. In exhibit E, while giving details of suit-claim, interest amount has not been included at all. Both principal amounts have been added together pointing out total claim to be Rs.3,93,73,919.46/– and the amount of Rs. 1 Crore is deducted from it to claim decree for recovery of Rs.2,93,73,919.46/–. There is no apparent reason to give up huge interest amount as calculated in exhibit B. Total interest amount given up is in excess of Rs.1,29,00,000/–. Maximum court fee was already paid and interest amount in excess of security deposit to be refunded has been waived by BDA.

60. Trial court has looked into a chart which is a compillation containing all details about the amounts due and payable by Kumar liquors

to BDA prepared & submitted by BDA for convenience. Its copy is also given to us by the learned Counsel for BDA & we perused it with the assistence of respective Counsel. The Marks and calculations on this chart which consist of 19 pages with the remarks like "added" or "erasures" ,show that trial court has applied its mind with reference to this document. Indents looked into therein start from 23rd April 1993 and are up to 30th January 1993. This period is inconsistent with duration of supplies given in exhibit B with plaint noted supra. In plaint, period up to 27th April 1993 is included while the supplies begin from 15th February 1993. Amount shown due from Kumar liquors in this compillation is Rs.3,99,38,898.73/– only. This includes amount of Rs. 65,98,010.05/– towards differential excise duty. However, the finding of fact of erasures in the originals or of additions in handwriting done therein recorded by the trial court is not perverse.

61. The difference in principal amount claimed in plaint and worked out by chartered accountant Indapurkar is noteworthy. Authentic document showing payment or nonpayment is not produced by any of the parties. Amount of cost & period of supplies in ledger extract does not tally with pleadings in plaint filed by BDA. In this situation, when BDA has claimed lesser amount than amount claimed in some indent/voucher, trial

court could not have accepted it by adopting logic that as it was lesser than the amount shown as due in indents, it must be correct. This incongruity as also its finding that BDA suppressed some payments and its indents/vouchers contained handwritten additions, should have put it on guard. When the indents or vouchers were not creditworthy, evasive certificate issued by Indapurkar, inconsistencies inter- se in various documents should have either led in discarding the passes and vouchers as also secondary evidence in the shape of certificate/charts showing supplies or then, the trial court ought to have called upon parties to produce the original running accounts to find out how continuous supplies have been accounted for and paid. Material produced before it by BDA itself demonstrated that proof of mere supplies by it to Kumar liquors was not sufficient to infer nonpayment or to crystalize/compute the liability. Suit claim was of Rs. Rs.3,93,73,919.46/– while as per certificate issued by Shri Indapurkar, amount of Rs.3,12,61,271/– was due and payable by Kumar liquors to BDA. Thus there was difference of Rs. 81,12,648.46 between the claim of BDA and claim certified by its chartered accountant Indapurkar. BDA, though relied upon certificate and affidavit of said chartered accountant, it never amended its claim to bring it in consonance with the said certificate of chartered accountant. BDA cannot dispute the amount certified by its chartered accountant Shri Indapurkar and this material was sufficient to discard the vouchers or indents pressed into service by BDA as all of them were not accepted even by its own chartered accountant. The trial court in this situation, ought not to have ventured into province of auditing or writing accounts & dismissed the suit as those indents were not sufficient to fasten any liability upon Kumar liquors. The role played by S.K. Sinha who represented BDA before court cannot be lost sight of because at relevant time he was in charge of factory of BDA and supplies therefrom, but was on the pay role of Cruikshank. The trial court has held that Kumar liquors had made payment of Rs.1,88,59,832/– towards the price of goods to BDA which payment was suppressed by BDA and after deducting that amount, BDA was held entitled to Rs. 2,03,29,717.46/–. It then proceeded to deduct amount of Rs. One Crore ie 1,00,00,000/- payable to Kumar liquors towards refund of its security deposit and found BDA entitled to recover amount of Rs. and 1,03,29,717.40/-. It however ignored the fact that cliam first in point of time ie notice claim towards recovery of price was of Rs.2,93,73,919.46/– only and at that juncture, there was no whisper of any adjustment of security deposit amount of Rs. 1 Crore by BDA. In plaint also there was no story of adjusting said amount of Rs. 1 Crore though Kumar liquors had already filed a civil suit claiming it back. Legal notice claiming the balance amount towards goods supplied was long after the supplies were discontinued and hence, ought to have pointed out appropriation of security deposit of Rs. 1 Crore. Had trial court deducted this security amount and suppressed payment by accepting suit claim to be of Rs. 2,93,73,919.46/– only, its decree, if possible, could not have been for more than Rs. 03,29,717.40/-. We need not go into all these niceties, as according to us definite amounts could have been crystallized only with the help of production of and perusal of all relevant papers or then, proper running accounts by the parties. Party wishing to succeed in such suits was duty-bound to produce the same. BDA should have demonstrated last payment & its legal appropriation. We are satisfied that BDA Ltd. manipulated indents or vouchers. It may have been with a view to swell the alleged due amount from Rs. 2,93,73,919.46/– to Rs. 3,93,73,919.46/– to allow adjustment or appropriation of security deposit of Rs. 1 Crore which it was duty-bound to refund to Kumar Liquors. Letter dated 8-4-1993 at exhibit 1154 issued by Cruikshank to BDA Limited admittedly shows payment by Kumar Liquors of excise duty for various indents raised by Cruikshank on BDA. This letter also indicates inherent risks in any third party or court trying to write accounts when the complete material & best evidence in their possession was deliberately withheld by both the parties.

They have not assisted the trial court at all and succeeded in misdirecting it. Precious court time and public money has thus been allowed to go waste and judicial process has been abused.

62. We will also like to place on record effort of Adv. Joshi to push certified copy of balance sheet Ex.1230 to substantiate the claim against Kumar Liquors. This certified copy as a matter of fact does not better the prospects for BDA at all. However, trial court has exhibited this document merely because it is certified copy & truth of its contents is not established. In present matter & facts,when inconsistencies galore, everything turns on accounts & parties withhold the same, the following principle laid down by the Hon. Apex Court clinch the issue. In ***LIC v. Ram Pal Singh Bisen, (2010) 4 SCC 491,*** at page 496 , Hon, Court states that : --

> "*31. Under the law of evidence also, it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the*

> *court. Contents of the document cannot be proved by merely filing in a court.*"

Section 77 of the Evidence Act is only about the proof of the contents of original by producing its certified copy & it does not obliterate procedure for proving the truth of such contents. Here the material on record warranted an evidence of proof of contents of the balance sheet at Ex. 1230. Thus, here the certified copy issued by ROC is of no consequence as BDA Ltd. has not proved truth of its contents & itself brought on record material to its doubt correctness. Reported judgment of this Court in case of ***Omprakash Berlia and another Vs. Unit Trust of India and others***, (supra) is not of any assistance

63. Kumar Liquors could have examined M/s. Cruikshank as its witness to prove its point of view on the agreement between it & BDA or any peculiar practice followed in the field. It did not tender any evidence to point out responsibility of M/s Cruikshank to recover the amount from indentors or then its entitlement to take credit for such recoveries by debiting to BDA. It expressly pleads debit of huge amounts to account of BDA in an effort to show that nothing is due from it to BDA & hence, to

demonstrate that BDA has to refund its security deposit of Rs. 1 Crore to it. BDA only accepted receipt of such deposit amount but did not admit entitlement of Kumar Liquors to its refund. On the contrary, it pleaded non-payment of price of liquor & wine supplied & asserted its right to appropriate said amount of Rs. 1 Crore towards it. Discussion above shows that neither BDA proved alleged nonpayment nor Kumar Liquors established alleged debits & therefore, wiping out of its liability to pay anything to BDA. With the result, Kumar Liquors did not prove its entitlement to seek refund of Rs. 1 Crore. In present matter, declaration of failure of BDA Ltd. to legally prove that it has not been paid price of stocks supplied during specified period by it to Kumar Liquors does not tantamount to holding that Kumar Liquors has paid the price of that stock and does not ipso facto result in bringing on record, Kumar Liquor's right to receive back the security deposit. Both the parties therefore, did not establish their entitlement to relief as claimed by them against each other. In any case, when the trial court found BDA justified in appropriating the deposit amount of Rs. 1 Crore, it could not have declared Kumar Liquors entitled to receive it back & hence, its Spl. C.S. 183 of 1997 needed to be dismissed. Thus direction by the trial court to refund 2/3rd court fee to Kumar Liquors is unsustainable. Its conclusion that Spl. C.S. 183 of 1997 is decided on admission is liable to be set aside.

64. As a result of this discussion, we find the judgment & decree of trial court impugned herein unsustainable. Accordingly, the common judgment & decree dated 11-10-1999 delivered by 4th Joint Civil Judge (Senior Division), Aurangabad, in Special Civil Suit No. 375/1995 and Special Civil Suit No. 183/1997 is set aside. Set-of or exercise of appropriation of security deposit of Rs. 1 Crore undertaken therein as also the money decree passed against Kumar Liquors in Spl.C.S. No. 375 of 1995 is also quashed. Special Civil Suit No. 183/1997 filed by Kumar Liquors & Special Civil Suit No. 375/1995 filed by BDA Ltd. are dismissed in toto.

65. Appeal filed by BDA Ltd. & two Appeals filed by Kumar Liquors against each other before this Court are disposed of accordingly with no orders as to costs.

(A.M. BADAR)
JUDGE

(B.P. DHARMADHIKARI)
JUDGE

puranik /