

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

BEFORE :

THE HON'BLE JUSTICE SOUMEN SEN

And

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

APO 128 of 2021

IA. No. GA 1 of 2021

with

CS. No. 50 of 2019

TATA CHEMICALS LIMITED

VS.

M/S. KSHITISH BARDHAN CHUNILAL NATH & Ors.

APO. No. 129 of 2021

IA. No. GA 1 of 2021

with

CS. No. 51 of 2019

TATA CHEMICALS LIMITED

VS.

ASHOK KUMAR SAHA & ANR.

For the appellants	: Mr. Ratnanko Banerjee, Sr. Adv. Mr. Shaunak Mitra, Adv. Mr. Joydeb Ghorai, Adv., Mr. Suman Chatterjee, Adv., Mr. Diptesh Ghorai, Adv.
For the respondents 1 to 4 in APO/128 of 2021	: Mr. Subhamoy Bhattacharya, Adv., Mr. Shankar Mukherjee, Adv., Mr. Sarangam Chakraborty, Adv.
For the respondents 1 in APO 129 of 2021	: Mr. Jishnu Chowdhury, Adv., Mr. Syed Narul Arefin, Adv., Ms. Saswati Chatterjee, Adv., Mr. Saurodeep Chakraborty, Adv. Mr. Rahul Singh, Adv.

For the Respondent no.5 : Mr. Arindam Paul, Adv.,
 in APO 128 of 2021 & Mr. Ovik Sengupta, Adv.,
 respondent no.2 Ms. Parna Mukherjee, Adv.,
 in APO 129 of 2021 Mr. Saswata Chatterjee, Adv.

Hearing Concluded on : 25th August, 2022
 Judgment Date : 28th September, 2022

Soumen Sen, J.: By consent of the parties, both the appeals and the applications are taken up together for consideration in view of the similarity of issues involved in both the appeals and applications and are disposed of by this common judgment.

TATA Chemicals Limited is the appellant in both the appeals.

In APO 128 of 2021, respondent No. 1 is a partnership firm of which respondents Nos. 2 to 4 are partners and respondent No.5 was the Deputy Manager (Accounts) of the Appellant.

In APO 129 of 2021, respondent No.1 Ashok Kumar Saha is the sole proprietor of Ashok Sales Agency and Respondent No. 2 was the Deputy Manager (Accounts) of the Appellant.

Deputy Manager (Accounts) of the appellants is the common respondent in both the appeals.

For the sake of convenience, TATA Chemicals Limited shall be referred to as "TATA," Kshitish Bardhan Chunilal Nath as "KBCN", Ashok Kumar Saha as ASA and Sudip Kumar Singh shall be referred to as "SKS".

The appellant is aggrieved by the order dated 16th March, 2021 by which the interim order of injunction initially passed on July 17, 2019 restraining the respondents from transferring, alienating and/or creating any third party interest in respect of the properties mentioned in annexure "M" in GA No. 725 of 2019 and Annexure "R" in GA No. 733 of 2019 respectively was vacated.

The interim order was vacated at the final hearing of the injunction application by a subsequent bench on the ground that the claim of the plaintiff in both the matters is for an uncertain sum and is essentially a claim on account of damages for the alleged wrongdoing of the defendants in its dealings and transactions with the plaintiff and for such an unascertained and un-liquidated amount for damages no order of injunction could be granted.

TATA has assailed this order dated 16th March, 2021 and has prayed for the restoration of the order dated 17th July, 2019.

Before we consider the respective submissions made on behalf of the parties, it is necessary to briefly state the facts.

We first briefly summarize the facts in APO 128 of 2021.

TATA is, *inter alia*, engaged in manufacturing and marketing of chemicals and fertilizers. TATA has a wide network of dealers throughout the country to facilitate the sale of its products. KBCN and ASA were distributors/dealers of TATA and had a long standing business relationship. TATA, from time to time as a part of their sales promotion, had introduced

and extended incentives and/or benefits to its dealers by way of discounts and/or rebates by issuing price circulars in respect of bulk fertilizers. In both the suits the appellant claims that by reason of wrongful, collusive and illegal acts of the dealers in connivance with SKS the plaintiff has suffered huge losses and damages to the extent of illegal credit obtained by the dealers in their dealings with the plaintiff/appellant on account of sale and purchase of fertilizers supplied during the financial year 2014-15 to 2017-18. The appellant has quantified such loss and damage in both the suit representing the illegal credit obtained by both the dealers during the aforesaid period.

The appellant has stated that in order to promote sales it used to give rebates/discounts marked as “credit” to KBCN. The amount of the rebate was predetermined in price circulars issued by the appellant from time to time. Price circulars are notified and supplied to the sales manager as and when they are issued by the appellant who then informed the sale executives of the relevant regions of such price circulars. The appellant has never given any extra discount or rebates in any other mode or manner other than those clearly specified in the price circulars. SKS, the respondent no.5, was the Deputy Manager (Accounts) of the appellant who used to calculate and extend the benefit of rebate/discount to KBCN. The credit notes were issued based on price circulars. All the transactions were managed through the Systems Applications Product enterprise resource planning software (in short ‘SAP’). SKS on behalf of the appellant was supposed to issue credit notes based on price circulars in the SAP. It is stated that as part of his job SKS used to calculate and extend the benefit of such rebates and discounts which were

determined as per price circulars issued monthly, primarily to the distributors, in respect of each of the products, depending on the business requirements and management decisions. SKS used to upload the amount of discounts and rebates in the form of credit notes in favour of the dealers including distributors in the SAP system of the appellant using the unique login ID issued to him by the appellant. Price circulars issued during the financial year 2014-15, 2015-16, 2016-17 and 2017-18 (till June 2017) have been disclosed in the petition.

In or about October 2016, the Regional Accounts team of the appellant discovered that SKS had issued credit notes to these dealers in excess of their entitlements, which were later reversed in December 2016, and the appellant without doubting the integrity of SKS accepted such excess rebates as a genuine error on his part. However, while validating the accounts in July 2017, various other irregularities were discovered in the appellant's accounts with regard to the credit notes provided. During enquiry it transpired that SKS had passed and issued considerable credit notes to the distributors in excess of their entitlement in lieu of kickbacks that surfaced during further investigation. As a result, the distributors had benefited in excess of what they were entitled to in terms of rebates and discounts by way of a diminution in their outstanding dues payable to the petitioner.

When approached, SKS acknowledged to miscalculating in recording entries from October 2016 to June 2017 and claimed that these errors were due to his carelessness and negligent conduct. This admission of wrong recording is documented in an email he addressed to the appellant's

Controller-Agri business on July 25, 2017. Following that, the appellant undertook an internal assessment to check the extra credits passed by SKS over the previous three years, which revealed more information of SKS's misdeeds and fraud.

In view of discovery of such misdeeds on September 5, 2017, SKS was suspended. On and from July 2017 onwards, the appellant continued to conduct business with the distributors on an advance against delivery basis.

On October 19, 2017, TATA recruited KPMG, a well-known audit KBCN, to undertake an examination into the complete transactions connected to the issuance of excess credit issued by SKS to all the dealers of the appellant.

On November 14, 2017, a meeting was held between the representatives of the appellant and KBCN. KBCN claimed to have admitted in the meeting that if there were any extra credit handed on to them, they would repay them. The minutes of this meeting, as well as the month-by-month reconciliation of accounting statements for the fiscal years 2015-16 and 2016-17, were forwarded to the distributor. In acknowledgement of their liability KBCN had made an ad hoc payment of Rs. 1 crore to the appellant. Subsequently on February 9, 2018, one of the partners of KBCN, namely Krisnendu Bardhan the respondent no. 3 (hereinafter referred to as 'Krisnendu') met the appellant and admitted to receiving extra credit notes amounting to Rs. 26 crores for the financial years 2015-2016 and 2016-2017. He further mentioned in his acceptance letter that the employee colluded with him and got cash payments of around Rs. 3 crores in exchange for the extra

credit. An additional payment of Rs. 50 lakhs was paid by KBCN to the plaintiff on that day to demonstrate bona fide and intention to repay the amount received by way of excess credit.

The appellant contends that there is no dispute between the parties in respect of the quantities of goods (valued at Rs.218.18 crores) supplied by the appellant from the year 2014 to June 2017. The same has been confirmed by both the parties as would appear from Fertilizer Monitoring System (in short 'FMS') portal maintained by the Department of Fertilizers under the Ministry of Chemicals & Fertilizers, Government of India. For the fertilizer sold and supplied KBCN was entitled to a credit of Rs.8.55 crores as per the price circulars issued by the appellant. The price circulars are disclosed in the petition. However, credit provided by employee to KBCN for such supplies from the year 2014 is Rs.40.32 crores which is in excess of the credit to which KBCN was entitled to by Rs.31.77 crores.

The appellant claims that the respondents have all along been aware of the excess rebate and have admitted to receiving such rebates and have wilfully withheld such amounts which would be evident, *inter alia*, from the following facts and course of conduct between the parties after the detection of such irregularities:

- a) The respondents have paid a sum of Rs.1.5 crores to the Appellant as refund for a part of the excess rebate provided by SKS which would be evident from: the writing dated February 9, 2018 of Krishnendu one of the partners of KBCN on behalf of KBCN, stating to have paid Rs.1 crore and undertaking to pay Rs.5 crores in 5 consecutive years and in

furtherance thereof paid Rs.25 lacs each on January 11, 2018 and February 9, 2018 respectively.

b) Krishnendu moreover had acknowledged the outstanding dues to TATA owing to excess credit being fraudulently received by KBCN as would be evident from the minutes of meeting between the said Krishnendu and officials of the TATA held on November 14, 2017 followed by payment of Rs.1.50 crores as stated above.

Krishnendu later by an email dated February 14, 2018 wrongfully attempted to retract from his statement as an afterthought in order to cause wrongful loss to the Appellant. The said purported retraction statements, however, do not raise any dispute pertaining to reconciliation of accounts, as would be evident from the:

- a) Minutes of the meeting held on November 14, 2017 where Krishnendu had claimed that he did not have the required infrastructure to check all transactions.
- b) The dues owing from KCBN across various districts, issued by the Appellant, for the purpose of balance confirmation as on March 15, 2018 have not been disputed.
- c) KBCN did not dispute such balance confirmation letters, even in its subsequent letters dated April 4, 2018
- d) The quantity of fertilizers purchased by KBCN had also been acknowledged by KBCN in FMS portal.

It is submitted that SKS has also admitted to have passed on excess credit notes in the sum of Rs.22.5 crores in favour of two dealers and has stated to have been paid around 25% as kickback in his writing of February 8, 2018. The said SKS in acknowledgement of his wrongdoing had even offered his property at Ideal Regency to the appellant in order to enable the

appellant to realise a part of the claim or to adjust the value thereof towards his liability.

Thus it is contended that there is no dispute with respect to quantity of fertilizers purchased.

The appellant states that the respondents were aware that they are wrongfully withholding the appellant's funds and further with mala fide intention, by an e-mail dated 22nd March, 2018 one of the partners of KBCN sought for reconciliation of the accounts to ascertain the amount of excess rebate. After such reconciliation amounts the appellants issued letters dated 27th March, 2018 to the respondents stating amounts they were supposed to pay to the appellant. However, by letters dated 4th April, 2018, KBCN admitted to retract from their earlier statements and had wrongfully denied that there was any fixed amount of rebate that was to be given as per price circular and that any amount was being withheld by KBCN. The said respondents again on 29th April, 2018 sent another letter demand for reconciliation of accounts to ascertain the excessive rebate.

The appellant has disclosed e-mails exchanged between the Krishnendu one of the partners of KBCN and the employee of the appellant which would show that KBCN was always informed that rebate in excess of that fixed by the price circulars were being extended to KBCN and its partners.

The appellant claims that respondents have all along being aware of the excess rebate and have admitted to receiving such rebates and have wilfully

withheld such amounts as would be evident from the writings and admissions mentioned above.

The appellant has disclosed the balance confirmation statement and the subsequent communications for the relevant years to show that the respondents had acknowledged its liability.

In APO 129 of 2021 ASA is the dealer.

It is stated that following similar modus operandi excess credit was granted to him by SKS. It is stated that between 2014 and June 2017, goods worth Rs.39.37 crores were supplied by TATA to ASA. ASA had duly acknowledged supply of the fertilizers. In terms of price circulars, ASA was entitled to a credit of Rs.1.52 crores. Despite the same, SKS of TATA had extended credit facilities for such supplies from the year 2014 till 2017, aggregating to Rs.4.55 crores which were in excess of the credit entitlement by Rs.3.02 crores. In a meeting held between the appellant and the representative of the distributor ASA on February 19, 2018 at the office of the appellant, ASA acknowledged receiving excess credit. In furtherance of such admission ASA voluntarily and unreservedly had made a part payment of Rs.9,05,161 to TATA and recorded such fact in its letter dated February 19, 2018. Out of Rs. 69,27,600 ASA's representative had also agreed to pay the remaining amount of Rs. 60,22,439/- in monthly instalments of Rs. 5,00,000/- each. The appellant alleged that ASA and SKS were fully aware of such excess rebates and had admitted to receiving such rebates and had wilfully withheld balance amounts.

The appellant notified ASA in a letter dated March 27, 2018 that excess credit obtained by the said distributor for the financial years 2014-15 to 2017-18 (until June 2017) was in the amount of Rs. 2,49,87,636/-, based on further investigation. Along with the letter dated March 27, 2018, the appellant had also provided a reconciled ledger statement, which had been prepared after ASA had made assurance for future payments.

The dealings and transactions between the appellant and ASA from July 2017 till the appellant stopped supplying fertilizer to ASA had resulted in ASA making total adjustments and payments of Rs. 3,66,06,076/- to the appellant, and the appellant delivering items worth a total of Rs. 3,22,28,115/- to the ASA. Following adjustments, including repayments made by ASA a total sum of Rs. 43,77,961/- had remained to the credit of ASA in relation to such dealings. The appellant did not remit the money to ASA, but instead used it to be a debt owed to ASA.

SKS in his statement dated February 8, 2018, alleged to have admitted that excessive rebates were given to ASA. However, he was ready and willing to refund the excess rebates to TATA. The said employee claimed to have even offered his property in lieu of a refund to TATA Chemicals for such excess rebates to both KBCN and ASA. However, subsequently by way of a clear afterthought, the said employee, in his purported letter dated June 25, 2018, retracted his admission and called upon TATA to withdraw the notice of termination dated April 30, 2018, issued in view of his alleged misconduct. TATA, however, has denied the existence of any letter dated January 9, 2018, or January 12, 2018.

TATA claimed that ASA did not raise any dispute pertaining to the reconciliation of accounts, which would be evident from the letter dated March 27, 2018, issued by the appellant to ASA. ASA did not contend that he could not verify the accounts in his subsequent letter dated March 29, 2018. The said statement was accepted. The quantity of fertilizers purchased by ASA had also been acknowledged by the agency in the FMS portal, evidencing that there was no dispute with the quantity of fertilizers purchased.

TATA appointed a well-known Audit Firm, namely, KPMG, on October 19, 2017, to look into the issue of excessive rebates. KPMG submitted a report wherefrom the modus operandi of respondents revealed that the said respondents were in collusion and conspiracy with each other and had availed of excess rebates. The reports disclosed, among other things, a large amount of cash that the employee of appellants had received by perpetrating a fraud upon the appellant. The report revealed several bank accounts in the name of the said employee, transactions involving a large amount of cash deposited into such bank accounts by the said employee, and investments made by the said employee during this period above his declared income.

The report dated March 20, 2018 of KPMG, would reveal the following:

- a) SKS had made aggregate Cash Deposits in excess of Rs. 1.27 crores in different bank accounts. SKS had several banks accounts, and the sums in excess of Rs. 1.27 crores had been deposited on review of bank statements of only around 10 bank accounts.
- b) SKS had incurred expenditure of approximately Rs. 50 lakhs from his VISA Regalia credit card.

c) SKS had made aggregate cash deposits in excess of Rs.64 lakhs during the period of demonetization, that is, between November, 2016 and January, 2017.

d) Income tax returns of the employee for the assessment years 2015-2016 and 2016-2017 reflect gross total income of only Rs. 6,95,160/- and Rs. 7,69,284/- respectively.

e) SKS had made aggregate payments in excess of Rs. 45 lakhs towards premium for insurance policies.

f) SKS had invested aggregate sum of excess of Rs. 32 lakhs towards mutual funds and fixed deposits.

g) Equity transactions of around Rs. 3.42 crores had been carried out in the account of Pradip Kumar Singh (the father of the employee) in the financial year 2016-2017.

h) SKS had purchased jewellery worth around Rs. 47 lakhs using his credit card and bank accounts.

i) Public provident funds deposits in excess of Rs. 4 lakhs had been made by the employee during the material time.

In order to identify the gross discrepancies in the accounts and the fraud that had been the perpetrated by the respondents in both the appeals the appellant had appointed BDO India LLP ("BDO") on October 10, 2018 to conduct a forensic audit of the appellant for the purpose of computation of excess rebates that had been given. The report of BDO dated February 4, 2019, inter alia, shows-

- i) Several emails were sent by SKS to Krishnendu with attached MS Excel workbooks showing calculations of the excess rebates given.

- ii) Confidential and trade related information was shared by SKS to KCNB.
- iii) The total rebate that was given for business of Rs.218.18 crores with KBCN was Rs.40.32 Crores. KCBN was entitled to rebate of an amount of Rs.8.55 crores. The difference in the rebates that KBCN was entitled to and the rebates that were actually given at the instance of employee came to Rs.31,77,22,561/-.
- iv) While computing rebates given by the appellant to other dealers, what was seen was for a business of Rs.284.47 crores, the rebate given was only Rs.11.74 crores whereas a dealer who had a business transaction of Rs.59.67 crores with TATA received a rebate of only Rs.2.30 crores.

The appellant has disclosed BDO report in order to demonstrate the devious mechanism adopted by SKS and the connivance between the respondents to make wrongful gain.

The report of BDO revealed various illegal and unauthorized transactions between the respondents. The excess credit passed on in favour of the dealer was also reflected and formed part of the BDO report. For convenience relevant extract of the report of BDO in relation to KBCN and ASA is mentioned below:

C.S. No. 50 of 2019

Financial Year	Territory -24 paraganas (south) (Dealership code FK0645001)	Territory - Hooghly (dealership code FK0995001)	Territory - 24 paraganas (North) (Dealership code FK2095001)	Total amount of excess credit notes issued

	(Amount of excess credit notes issued)	(Amount of excess credit notes issued)	(Amount of excess credit notes issued)	
2014-15	3,81,92,407/-	1,65,06,392/-	2,53,12,167/-	8,00,10,966/-
2015-16	5,70,64,071/-	3,55,35,672/-	3,09,57,407/-	12,35,57,150/-
2016-17	2,80,25,896/-	3,80,11,171/-	2,55,68,222/-	9,16,05,289/-
2017-18 (till June)	57,11,203/-	48,05,366/-	1,20,32,586/-	2,25,49,155/-
Total	12,89,93,578/-	9,48,58,601/-	9,38,70,382/-	31,77,22,561/-

C.S. No. 51 of 2019

Financial Year	Territory- Nadia (Dealership Code No.: FA0595001)
2014-15	32,76,618/-
2015-16	1,63,66,140/-
2016-17	1,00,29,847/-
2017-18 (till June)	5,74,137/-
Total	3,02,46,742/-

TATA was unaware of the enormity of such fraud until the BDO filed the report on February 4, 2019, and before that, it only had an initial knowledge of unauthorized acts of extension of excess credit in June 2017; KPMG was appointed to investigate the same.

After providing credit for the sums paid by the distributors, the distributor no. 1 KBCN became liable for Rs. 28,25,48,558 and the distributor no. 2 ASA for Rs. 2,58,68,781 till March 5, 2019.

The purported retraction of the employee in his letter dated June 25, 2018, according to the appellant, contains ex-facie false statements since the employee had amassed substantial assets out of the ill-gotten funds received in lieu of such excessive rebates and had admitted to having received kickbacks from the dealers representing 25% of the value of the excess credit rebates. The appellant was unaware of any purported letter dated January 5, 2018, or January 12, 2018. Additionally, the appellants state that the said employee had never visited the office of TATA on February 11, 2018.

The appellant filed two suits for recovery of money both on March 5, 2019.

In the said proceeding, the appellant has filed an application for injunction and attachment of certain immovable properties of the respondents.

The documents that explicitly showed the alleged fraud committed by the distributors and the employee were put forward by Mr. Ratnanko Banerjee the Learned Senior Counsel appearing on behalf of the appellant in both the actions. Mr. Banerjee has relied upon the emails exchanged between the employee and the distributors from 2014 to 2017 as evidence, claiming that each had an excel sheet detailing the amount of rebate the

distributors were due to receive, the amount actually paid to the distributors and the difference between the two. These emails were discovered from the employee's computer through forensic examination by experts. Following that, Mr. Banerjee outlined the contents of the KPMG and BDO reports, the first identifying the modus operandi and the second estimating the precise excess rebate/credit earned by the distributors as a result of the distributors' collaboration and fraud with the employee. It is submitted that the plaintiff distributed price circulars to all its distributors on a regular basis, and that they were all aware of such circulars and thereafter payments were made on such price circulars.

Any claim that the distributors were unaware of the pricing circulars was not true. Our attention is drawn to the documents pertaining to the defendants' confessions as well as their readiness to return specified amounts. The distributors made payments on an ad hoc basis, which amounted to a further acknowledgment by them of their admission of liability and refund of amounts received in excess of their entitlement. Mr. Banerjee submits the retraction of the respondents is a clear afterthought and contained false assertions with regard to lack of knowledge of pricing circulars.

It is further submitted that ASA was evasive and had no explanation for the minutes and excess credit statement that he received via email on November 17, 2017. Reliance has been placed on balance confirmations forwarded by the appellant, which were never disputed by the distributors.

The Learned Senior Counsel also submitted that the employee had used his unlawful gains to make huge investments, acquire properties, and make dealings and transactions that exceeded his declared income. The declared income of the employee as submitted by the appellant would be Rs. 6,95,160 and Rs. 7,69,284 for the assessment year 2015-16 and assessment year 2016-17 respectively. As per the last compensation revision, SKS was to receive an annual compensation of Rs.11,09,472.

However, the assets acquired and investments made during this period increased exponentially and disproportionate to the known source of income. Mr. Banerjee submits that in the affidavit SKS has failed to justify such enormous acquisition during aforesaid period under scanner and the source of the fund can only be attributed to such unholy transactions.

Mr. Banerjee submits that on the basis of the report of KBCN and the documents retrieved by the TATA, it was found that SKS has made substantial gains at the expenses of the TATA and, in fact, 18 bank accounts were opened in the name of SKS. Mr. Banerjee has referred to paragraph 50 and the various sub paragraphs of G.A. 733 of 2019 to show the enormity of the wealth both movable and immovable acquired by the SKS out of the funds illegally procured from KBCN and ASA. It is submitted that the deposits, payments and expenses by the SKS pertain to the financial year 2014-18 (till June, 2017) however, did not constitute all deposits, payments and expenses made by the said respondents.

Mr. Banerjee refers to paragraph 58 of G.A.No. 725 of 2019 at page 69 volume (I) to demonstrate the extent of assets acquired during the relevant point of time. The summary of the extent of acquisitions are stated below:

- (i) cash deposits in excess of Rs.1.20 crores
- (ii) cash deposits of around Rs.64 lacs made during the period of demonetisation
- (iii) credit card expenses of around 50 lacs
- (iv) payment of insurance premium of insurance policies of around Rs.45 lacs
- (v) purchase of jewellery and other luxurious items of around 47 lacs
- (vi) immovable properties in the form of a flat 11D, Block E, Ideal Regency, 46 Diamond Harbour Road and a flat at the 4th floor of premises no. 293/3A Diamond Harbour Road, Behala.

Mr. Banerjee submits that the source of the fund are the amounts received by SKS as kick backs from the aforesaid two dealers. Significantly the two reports clearly establish the link of funds to the acquisition of such enormous wealth and all had happened during the period under investigation. Mr. Banerjee submits that preliminary investigation as well as a forensic audit report have clearly established the modus operandi and by way of illustration Mr. Banerjee has referred to the email exchanged between SKS and Krishnendu in respect of APO 128 of 2021 and email exchanged between the SKS and ASA in respect of APO 129 of 2021 that were retrieved from the computers of SKS. Mr. Banerjee submits that the contemporaneous evidence available on record would unmistakably show that all of them engineered mechanism with a clear intention to defraud the TATA.

Mr. Banerjee has extensively taken us to the report filed by the KPMG and BDO India LLP to demonstrate the mechanism through which excess rebate was extended to KBCN and ASA by SKS with the motive to defraud the appellant. Our attention is also drawn to specific email dated 18th October, 2014 from SKS to ASA showing excess rebate extended to the respective dealers namely, KBCN and ASA. Attachment of email observed during forensic audit relating to disclosure of competitive dealer information to KBCN and ASA were placed before us to show the complicity between the parties.

The Learned Senior Counsel has contended that the claims in the suit are entirely and precisely quantified as evidenced by the facts and documents stated and disclosed in the pleadings, and the respondents have not been able to detract from their position. It is the appellant's case that the claim is for an ascertained and liquidated sum as would, inter alia, appear from the relevant pleadings in the plaint and petition. The Learned Judge has erred in failing to appreciate the appellant's claims as unliquidated damages. The Learned Counsel thus submits that the appellant's case was fit for directing the respondents to secure the appellant's claims. Thus, the appellant prays for restoring of the order dated July 17, 2019 and setting aside the consequent order.

For the legal proposition that orders of injunction should protect the claim in a money decree, the appellant has relied upon decision of the Hon'ble Supreme Court in ***Rahul S. Shah v. Jinendra Kumar Gandhi***

reported in **(2021) 6 SCC 418** and of a Division Bench of this Court in ***Harleen Jairath v. Prabha Surana*** reported in **2019(4) CHN 412**.

Both the dealers and the employee of TATA contested the proceeding before the learned Single Judge by filing affidavits.

Per Contra, Mr. Jishnu Chowdhury the Learned Counsel for ASA submits that no money was payable to the plaintiff. The incentives and discounts available were appropriate and extended by the plaintiff. In fact, ASA was entitled to receive a sum of Rs. 2 crores on proper reconciliation of accounts and has filed a counter-claim along with his written statement. The circulars on which reliance has been placed were never communicated to ASA. The circulars have been created and brought on record to deny the legitimate dues of ASA and to create an illusion of a cause of action. The alleged audit reports are tailor-made and inadmissible in evidence. No opportunity was given to ASA to place proper facts before the auditor.

Mr. Chowdhury submitted that the claim is an ascertained sum of money is completely belied by the documents relied upon by KPMG and BDO. Our attention is drawn to summary of findings of BDO to show that the discount is to be calculated on the invoiced amount on account of freight discount and cash discount. Over and above a dealer may get an ad hoc freight discount and additional price revision discount. The ultimate amount is determined after adjustment of all these variables which are to be prepared and executed by the accounts department. All these transactions were closely scrutinised by different departments of TATA and

it is preposterous to suggest that SKS has extended any benefits to the dealers de horse the circulars. The accounts are regularly audited and it is unbelievable that the auditors ratified all such transactions without reference to the price circulars and the trade practice. The dealers have a chance at the trial to place evidence to show that whatever has been received was part of their entitlement. They have not received any amount illegally or in excess to their entitlement. The reports are now thrown at the face of dealers which had no evidentiary value. Acceptance of such report on its face value even at this stage would cause serious prejudice to the respondents as it would be a denial of right to have a fair trial on the issue raised by the respondents. The reports cannot be taken as sacrosanct as it is based on information and data furnished by TATA without any opportunity being given to any of the dealers to question the basis of such investigation. Reliance are placed on documents that were never shown to the respondents nor the auditors sought for any view from the dealers on data furnished by TATA.

The learned counsel has submitted that the alleged admission of ASA stands nullified in view of the fact that ASA, after the alleged date of admission dated February 19, 2018, had made payment of a sum which is far in excess of the admitted sums. Moreover, the appellant's claim is unascertained and is in the nature of a claim in damages. For the proposition that no order of attachment before judgment or injunction can be passed in a claim for damages, the learned Counsel has relied on ***Raa Projects Ltd., v. Seaways Shipping Ltd.***, reported in **2010 (4) C.H.N. Cal**

34 Para 17; *Jai Balaji Industries Ltd. v. Hyquip Systems (P) Ltd.* reported in **2010 (4) CHN 87** Para 8; *Board of Trustees for the Port of Kolkata v. Haldia Bulk Terminals Private Limited* reported in **2013 (3) CHN 200** Para 34).

The learned Counsel has strenuously argued that reports of KPMG and BDO India L.L.P., appointed as auditors, cannot be relied upon until the same is proved in accordance with law. These are merely the opinion of experts and unless such opinion of experts are proved no reliance could be placed on such reports in view of clear pronouncements of law in this regard, which *inter alia*, would appear from the following decisions:

State of Himachal Pradesh v. Jai Lal & Ors., reported in **(1999) 7 SCC 280** Para 19; *Ramesh Chandra Agarwal v. Regency Hospital Limited & Ors.*, reported in **(2009) 9 SCC 709** Para 16, 21 and 22; *Keshav Dutt v. State of Haryana* reported in **(2010) 9 SCC 286** Para 19.

Mr. Chowdhury has argued that it is trite law that in a money suit the Court in exercise of power conferred under **Order 39 Rule 1(b) of the Code** can restrain the respondents from disposing of the property which is not the subject matter of the suit if it appears that the respondent intended or threatened to dispose of his property with a view to defraud his creditors subject to the necessary averments with supporting materials in the plaint and the application for injunction in terms of Order 39 Rule 1(b) of the Code that the defendant threatened or intended to dispose of its property with a view to defraud its creditors. In the instant case the statements

made in the plaint as also in the interlocutory application are extremely vague. The claims of the alleged creditors whose debts the respondents allegedly are unable to pay have not been disclosed and that it was also not disclosed the manner and mode how the defendant intended to defraud its creditors. Further, the Counsel contends that it was also not disclosed that the respondent nos. 1 to 4 are in financial stringency or the proceeds of dissipating properties to defraud any creditor. It is trite law that on the basis of such vague allegation no order or direction for security or injunction or an order of attachment can be passed against the respondents.

Mr. Jishnu Chowdhury has painstakingly pointed out that in case of a money suit, the Court permits attachment before judgment as prescribed under **Order 38 Rule 5 of the Code** provided it fulfils and that certain tests as laid down by the judicial pronouncements namely the judgments of the Hon'ble Supreme Court in the matter of ***Raman Tech and Process Engineering Company vs. Solanki Traders*** reported in **(2008) 2 SCC 302** which has affirmed the judgment of this Hon'ble Court in the matter of ***Prem Raj Mundra vs. Md. Manek Gazi*** reported in **AIR 1951 Cal 156** , which ought to have been satisfied. It is argued that in the instant case no such averments had been made by the appellant in its pleadings which can satisfy the tests of **Order 38 Rule 5 of the Code**. Specific powers have already been conferred under the Code under **Order 39 Rule 1(b) read with Section 94** thereof under which an injunction is possible to be granted in case of a money suit provided the tests of the said provisions are

satisfied along with inherent powers of **Section 151** of the Code. These powers are not just any powers over the substantive right which any litigant possesses, rather these are specific powers to be conferred on the Courts for passing such order which would affect such right of a party and such powers cannot come within the scope of inherent powers of the Court in the matters and procedure.

The Learned Counsel rests his submission that as the claim of the appellant is in the nature of damages and the same is required to be ascertained and that for a claim of an un-liquidated amount in damages, no order in the nature of attachment before judgment could be ordinarily passed. Reliance is also placed on judgment of this Hon'ble Court, in the case of **Jai Balaji Industries Limited** (*supra*)

The Learned Counsel for the parties have argued that from the averments made in the plaint and the interlocutory application filed by the appellant, including the documents disclosed therein by the appellant, it is evident that the appellant had suppressed material documents and facts before this Hon'ble Court as stated hereinabove and such suppressed facts were a result of deliberate and wilful suppression because some of such documents have been issued by and the facts relating thereto are in the knowledge and notice of the appellant prior to the filing of the suit.

The Learned Counsel contends that fraud as alleged to have been pleaded and/or sought to be pleaded by the appellant in the plaint and the interlocutory application on the face of it shows that they involve serious

disputed questions of fact and as such the same are triable in nature and if not admitted, needs to be adjudicated upon a detailed trial. Passing of an order of injunction is an equitable relief that depends upon the Court's discretion.

Mr. Chowdhury has submitted that having regard to the nature of dispute the issues from the statements raised cannot be adjudicated upon without a proper trial and that in such circumstances it is settled law that the Court shall be refrained from passing any discretionary and equitable relief. In this regard, reliance has been placed by the respondents on the judgment of the Hon'ble Supreme Court in the matter of ***Air India Ltd. & Ors., v Vishal Kapoor & Ors.***, reported in **2005(13) SCC 42** (paragraph 34).

The learned counsel for KBCN Mr. Subhomoy Bhattacharya has adopted the submission made on behalf of the ASA. KBCN in its objection has stated that KBCN had been the top channel partner of the appellant for more than 7 years with the largest volume of sales and being the highest performing business associate for years in a row and having a long-standing mutually rewarding business relationship with TATA. TATA had sold and supplied fertilizers to KBCN which in turn had sold the same in different territories of the State of West Bengal namely, North 24 Parganas, South 24 Parganas and Hooghly.

It is alleged that a security deposit/bank guarantee was maintained with the appellant and was to be refunded/returned to the dealer on expiry

or in the event of termination of the dealership agreement after adjusting an outstanding payment due to the appellant/petitioner, but despite the agreement expiring on March 31 2018, the said security deposit/bank guarantee was not returned to KBCN nor any amount has been adjusted against the impugned outstanding dues claimed by the appellant from KBCN.

Ere the expiry of the agreement the appellant used to raise credit notes from time to time in favour of KBCN, in order to pass on the discounts, rebates and other accrued benefits in course of its business to the channel partner. Such credit notes were non-convertible accounting instruments which had never been converted into money. The benefits of credit notes were always adjusted by the appellant in the next transaction by and between the parties. In the event, excess credit notes were issued and passed on by the appellant in favour of KBCN the same were adjusted by raising debit notes by KBCN and similarly excess amount of credit notes were adjusted too. It is therefore, contended that debit notes were used to be raised only when there were accounting errors committed by the appellant. While credit notes were *de jure* benefits passed by the appellant to KBCN, debit notes were considered to be an instrument of correcting accounting errors committed on the part of the appellant.

The learned Counsel argued that several correspondence and/or emails were exchanged by and between the parties and throughout the aforementioned communications KBCN had maintained that the alleged claim of the appellant was erroneous, and reconciliation was mooted in

view of the longstanding relationship between the parties. Several documents which are materials for the purpose of adjudication of the instant disputes had been suppressed before the learned Single Judge in the injunction application filed by the appellant. The relevant documents would be the reply of KBCN dated November 27, 2017, email communications dated January 16, 2018, January 28, 2018, January 29, 2018 and the letter dated May 2, 2018. The appellant had never replied to the aforesaid emails. The email communication dated June 4, 2018 issued by the appellant discloses the total account position in respect of the three districts wherefrom it would appear that, after considering the entire accounts a sum of Rs.3.30 crores was actually receivable by KBCN and that the said documents were allegedly suppressed before the learned Single Judge but handed over to the learned Single Judge on June 24, 2019 by KBCN and was subsequently disclosed in the affidavit in opposition by the respondent.

After institution of the police complaint by the appellant there was an extension of credit notes to the tune of Rs.29,53,89,000/- in favour of KBCN by the appellant resulting in a situation where KBCN would stand to receive a sum of Rs.3,30,88,402/- from the appellant. These facts would clearly establish that the claim of the appellant is unsustainable and whole issue is an outcome of mal-accounting practices on the part of the appellant and different unilaterally instituted audit arrived at different amounts allegedly receivable by the appellant from KBCN.

The Learned Counsel for the parties have submitted that the entire litigation is arising out of an accounting mismatch and the account was kept and maintained unilaterally having conducted unilateral audits. This had forced KBCN and ASA to comply with the same denouncing the basic principles of natural justice and without an opportunity of being heard. Despite such being the situation, on April 26, 2018, the appellant had filed a police complaint with the Shakespeare Sarani Police Station against KBCN and its partners and ASA. TATA had raised an alleged claim of Rs. 31.81 Crores against KBCN and later such complaint was converted into a First Information Report bearing No. 112 of 2018 dated April 26, 2018. Curiously this sum got inflated into a sum of Rs. 34.36 crore following the audit by B.D.O. India L.L.P. which was engaged by the appellant on October 10, 2018 and despite the complaint of the appellant, there was an extension of credit note to the tune of Rs. 29,53,89,000 in favour of KBCN by the appellant resulting in the situation that KBCN stood to receive a sum of Rs. 3,30,88,402 from the appellant and the same has already been claimed by KBCN from the appellants. It is argued that the accounting practices used by the appellant and its associates were archaic, unilateral and primitive and during conducting the audits, no opportunity of hearing was provided nor KBCN was allowed to peruse the accounts presented before the said auditors. The learned Counsel has emphatically submitted that the appellant had not placed the latest credit notes sent by them to KBCN before its auditors resulting in the latter's claim of Rs. 3,30,88,401 from KBCN.

The allegation of fraud and collusion between KBCN and the employee of TATA are baseless without any single document being produced in support of such grave allegation. The laptop of the employee seized by the appellant and the materials collected therefrom were not within the knowledge or notice of KBCN and ASA and cannot form the basis of injunction and attachment. Moreover the indenting value of such materials are to be assessed of the trial as such materials cannot be accepted as sacrosanct and cannot be treated as conclusive since KBCN is yet to examine its correctness through the process of a cross-examination on the said issue.

It is also submitted that the alleged reports of KPMG and B.D.O. India L.L.P. are the expert's unilateral opinion based upon facts, figures, records, documents and submissions which were presented before the auditors by TATA without giving any opportunity to KBCN. Moreover, KPMG in its report has given a disclaimer which would clearly show that the said report cannot be considered as sacrosanct. The said alleged reports are hence rebuttable in nature. The said auditors clearly did not consider the fresh credit notes issued on June 4, 2018 which principally forms the counter claim of KBCN against the appellant in the suit. The minutes of the meeting dated November 14, 2017 could not also be relied upon as KBCN had never signed the said minutes nor had agreed to the contents of the said minutes. It is alleged that the said document is fabricated and manufactured.

It is submitted that the two handwritten letters both dated of February 9, 2018 were obtained by undue influence, duress and coercion upon the partners of its KBCN and one of the partners of KBCN being respondent no. 3 by the letter dated February 14, 2018 immediately retracted from the aforesaid admissions and refuted the contents of the two documents relied upon by the appellants. The amounts mentioned in the letter dated February 9, 2018 as due and payable were obtained by coercion despite KBCN being willing to reconcile.

The learned Counsel has argued that it is an unsecured money claim simplicitor, besides being unascertained, un-crystallized and contains glaring variations in the two audit reports. Regard being had to such facts, it is submitted none of the claims of any of the parties shall be quantified, unless the claims are assessed or evaluated on evidence at the trial. It is submitted that the suit is essentially a suit for accounts and requires a detailed trial. The Learned Counsel in furtherance of his arguments also stated that in case of an unsecured claim simpliciter no injunction can be granted unless it satisfies the tests of Order 39 Rule 1 (b) read with Section 94 of the CPC.

The Counsel for the employee Mr Ovik Sengupta, Advocate has emphasised the very necessary fact that TATA had continued to do business with the distributors even after discovery of the alleged fraud in 2017 would show that no impropriety or dishonesty was found in the dealings and transactions between TATA and its distributors. He further submits that the record pertaining to SKS assets show no relationship

between the suspected kickback money and the assets. He further argues that the appellant's claim is in the nature of a money decree for unascertained and un-liquidated damages because the appellant merely demands damages from the employee.

In his submission he refers to the letter dated June 25, 2018 issued in reply to the letter dated April 30, 2018 where it is evident from the nomenclature of the post that his work was being supervised by higher authorities and he did not have any subordinate under him. TATA has admitted that 'Accounts Manager' and not 'Deputy Manager' were involved in intimating the sales executive about the price circulars and that it is evident that the SAP system was open to all the accounts managers to see as to what credit notes were being issued to the various dealers; supplementary to the same, there were timely audits carried out.

The Learned Counsel argued that the decision of making payment of excess rebates was not that of the employee. The appellant reportedly stated that price circulars were issued, containing the discounts available for different products and these were furnished to the sales manager of the team.

SKS also raised question as to why only in July 2017 verification of the accounts was made with regard to credit notes issued and how it could be alleged that SKS had issued credit notes to respondent no. 1 above its entitlement where credit notes were found to be issued in excess of the entitlement of the respondents in October 2016 by the Regional Accounts

Team and had been reversed in December 2016. Thus, the said team did not find any anomaly in the credit notes issued in excess till December 2016 and only in July 2017 the same was verified.

SKS contends that TATA had a separate agreement, same being the minutes of the meeting, with Khitish wherefrom it would appear that Tata had agreed to grant instalment for return of money from KBCN. It is also argued that there has been no dispute concerning the admission that ASA also shall be refunding the excess credit passed on to him and that this present case is in a guise of excessive coercion exercised by the appellant on SKS.

It is also the case of the employee that the appellants scrutinized the laptop of the said employee without providing any notice to the said employee. Thus, the Learned Counsel for the employee pray that since the appellant has not made a case for breach of contract, there is no occasion or basis to claim damages.

SKS further asserts that no notice of the KPMG and the BDO report was given to him, the report having been prepared without providing the employee an opportunity to object to the same, and instead on February 8, 2018, his statements were coerced to be recorded at the office of KPMG. This incident has been recorded in the letter dated June 25 2018, which the appellants have reportedly suppressed.

SKS contended that the appellant had got purported information from the employee's bank accounts without the consent of SKS. Although such

an act could be construed as an offense, it was utilized as a basis for the allegation that the employee had received kickbacks from the dealers.

The said employee contends that TATA's annual reports are all available in the public domain for the years 2014-15 and 2015-16 and that the audit reports of TATA state that no material fraud on the Company has been noticed during the year.

Additionally, it is asserted that the appellant has made out the interlocutory application primarily like an application under **Order 38 Rule 5** and that an application under **Order 38 Rule 5** is available where the matter involved is a claim for a liquidated sum of money like a money suit. Furthermore, the case under **Order 38 Rule 5** has to be on a very high footing which has been mentioned and discussed in several judgments passed by the Hon'ble Supreme Court of India and the Hon'ble High Court at Calcutta.

The sum and substance of the argument advanced by the learned Advocate for the parties is that a fair adjudication is not possible at the interlocutory stage because of the complex nature of the dispute and the claim for damages are an un-liquidated claim and the appellant in the applications seeks to transform its claim for damages into a money claim and unless the Court quantifies the damages which the appellant is entitled to, no orders could be passed **under Order 38 Rule 5** or under **Order 39 Rule 1(b)**. Mr. Chowdhury has argued that there has to be a liquidated amount due and payable in both the aforesaid situations or

either. In this case, the appellant is not the creditor of the respondents. The appellant has claimed on account of loss and damages alleged to have been suffered which are yet to be quantified. TATA as of now is not a creditor in relation to the respondents.

The essential dispute is with regard to the nature of the dispute and the claim. If the claim is in essence on account of damages the discretion exercised by the Learned Single Judge in recalling and vacating an interim order passed by another single judge at the initial stage after hearing the respondents whether was justified or warranted by the facts and circumstances of the case.

We need to address first the nature and essence of the claim made in both the suits. In both the suits TATA claim money decree for the excess credit note issued in favour of its dealers. For understanding the nature of the claim we may refer to some of the paragraphs mentioned in C.S. 50 of 2019, Tata Chemicals Limited vs. M/s. Kshitish Bardhan Chunilal Nath & Ors.

The relevant paragraphs forming the basis of the claim are:

“36. The plaintiff had issued letters dated March 27, 2018 to the various addresses of the defendant no.1, addressed to the defendant no.3, inter alia, intimating reversal of excess credit issued to the defendant no.1 and for repayment of gains made illegally by the defendant no.1. After preliminary reconciliation of the ledger statements in respect of the defendant no.1 firm for the financial years 2014-15, 2015-16, 2016-17 and

2017-18 (till June 2017), the defendant no.1 was called upon to repay/refund the amount which had been received illegally and unjustifiably by way of excess credit notes received by the defendant no.1 from the plaintiff, through the defendant no. 5, which is as follows:

a) North 24 Paraganas: Excess credit to the tune of Rs.8,83,44,035, out of which a sum of Rs.1,50,00,000/- had been repaid/refunded in three instalments on January 9, January 11 and February 9, 2018.

b) South 24 Paraganas: Excess credit to the tune of Rs.12,00,37,798/- received.

c) Hooghly: Excess credit to the tune of Rs.8,82,64,096/- received.

Copies of three letters all dated March 27, 2018 along with enclosures thereto, are annexed and marked 'R1', 'R2' and 'R3' respectively.

48. The defendants have jointly and severally, and in collusion and conspiracy with each other, perpetrated fraud upon the plaintiff, the particulars whereof are as under:

i) The defendant nos. 1 to 5 have acted in concert and collusion with each other in order to unjustly and illegally enrich themselves at the cost of the plaintiff, inter alia, in the financial years 2014-15, 2015-16, 2016-17 and 2017-18, till June 2017.

ii) The defendant no.5 had illegally and wrongfully issued credit notes in excess of the entitlement of the defendant no.1 in the financial years 2014-15, 2015-16, 2016-17 and 2017-18, till June 2017 to the extent of

Rs.8,00,10,965/-, Rs.12,35,57,149/-, Rs.9,16,05,289/- and Rs.2,25,49,155/- respectively knowing that the defendant no.1 was not entitled to the same and the defendant nos. 1 to 4 knowing that the said defendants were not entitled to the same, took benefit of the same and made secret profit and illegal gain at the expense of and to the detriment of the plaintiff.

iii) The defendant no.5 had admittedly received kick backs from the defendant no.1 and/or the defendant nos.1 to 4 to the extent of 25% of the value of excess credit notes issued by the said defendant to the defendant no.1 in the financial years 2014-15, 2015-16, 2016-17 and 2017-18 (till June 2017) of around Rs.9 crores and thereby made secret profit and illegal gain at the expense of and to the detriment of the plaintiff.

iv) The defendant nos. 1 to 4 had entered into a conspiracy with the defendant no.5 to obtain excess credit notes than that to which they were entitled in the financial years 2014-15, 2015-16, 2016-17 and 2017-18 (till June 2017).

v) The defendants have actively concealed the fact that excess credit note was being issued in respect of the account of the defendant no.1 by the defendant no.5 with full knowledge that the defendant nos. 1 to 4 were not entitled to the benefit of such credit notes.

vi) The defendant nos. 1 to 5 have cheated the plaintiff so as to obtain for the defendant no.1 excess credit on account of the sale and purchase of fertilizers by the defendant no.1 from the plaintiff. The defendant nos. 1 to

4 in collusion and conspiracy with the defendant no.5 have illegally retained for themselves moneys which they were not entitled to by way of excess credit.

vii) The defendant have connived with each other with an intention to deceive the plaintiff on account of actual credit, which was to be received by the defendant no.1 in connection with sale and purchase of fertilizers from the plaintiff.

viii) The defendants, in collusion and conspiracy with each other, have caused to be and/or the defendant no.5 has made entries in the digital accounting records and systems of the plaintiff to suggest that the defendant no. 1 was entitled to be issued and/or had been validly issued credit notes for Rs.9,55,46,012/-, Rs.15,66,37,130/-, Rs.12,79,53,767/- and Rs.2,31,10,546/- for the year 2014-15, 2015-16, 2016-17 and 2017-18 (till June 2017) respectively.

ix) The defendants have acted in a manner fitted to deceive.

x) The plaintiff has suffered losses and damages due to such conduct on the part of the defendants in issuing and receiving excess credit notes than to which they were entitled to and taking the benefit of the same for the years 2014-15, 2015-16, 2016-17 and 2017-18 (till June 2017) respectively and thus made suggestions of fact which are not true and not believed to be true by such defendants and thereby acted to the detriment to the plaintiff.

xi) The defendants have acted in breach of trust and of the obligations placed upon them.

xii) The defendants have otherwise committed several other acts of fraud. The plaintiff reserves its right to give further and fuller particulars of the fraud committed by the defendants upon full discovery being made.

Such acts of fraud have been committed at the office of the plaintiff at Bishop's House, 51, Chowringhee Road, Kolkata- 700 071, and at the place of business of the defendant nos. 1 to 4 at 27/1 Armenian Street, Kolkata- 700 001, both within the aforesaid jurisdiction.

54. The plaintiff states that the defendants are jointly and severally liable to compensate the plaintiff for the entire sum as mentioned in paragraph 55 hereinbelow. The plaintiff prays for a decree for the aforesaid sum as against the defendants along with agreed interest thereon at the rate of 18% per annum. The transaction was a commercial transaction and the plaintiff has lost the use of such money, which was paid by way of excess credit to the defendant nos. 1 to 4. The interest at the rate of 18% per annum is a reasonable rate of interest.

55. The defendants had jointly and severally defrauded the plaintiff in the sum of Rs.31.77 crores. Upon making adjustments, including of the repayments made by the defendants, the plaintiff is entitled to a principal sum of Rs.28,25,48,558/-. By reason of the aforesaid the plaintiff is entitled to and claims the following sums, as per particulars hereunder:

Principal	Rs.28,25,48,558/-
Interest at the rate of 18% per annum on the principal sum till March 05, 2019	Rs.17,10,74,848/-
Total	Rs.45,36,23,406/-

The plaintiff is also entitled to further interest at the rate of 18% per annum on the above sum till realisation thereof.”

In the said suit the plaintiff has prayed for a decree for a sum of Rs.45,36,23,406/- against the defendants jointly and severally as stated in paragraph 55 of the plaint along with interest and other consequential reliefs.

Similar averments with the necessary changes have been made in C.S. 51 of 2019 (Tata Chemicals Limited vs. Ashok Kumar Saha & Anr.). The decree prayed for was for a sum of Rs.3,02,46,742/-. In the aforesaid background the nature of the claim has to be assessed.

“Damages” as loosely understood connote the sum of money payable by way of compensation, the issue being the amount of money to be paid as compensation for the legally recoverable, pecuniary and non-pecuniary losses. Damage has been frequently used to describe the losses for which compensation is payable. It is based on the extent of the plaintiff’s losses (pecuniary and non-pecuniary) consequent on his injury and whether such losses are recoverable at law. It is an award in money for a civil wrong. It is a pecuniary loss suffered due to wrongful acts and conduct of the parties in relation to the contract for sale of fertilizers. It is more in the nature of acting

in breach of faith and loss suffered due to manipulation of accounts by the respondents. However, money claim is computed on the basis the amount paid in excess by issuing credit notes. It represents the differential amount by way of benefit actually receivable and had been received by way of excess rebate/discount. If this additional benefit in terms of money is not to which the dealers are entitled in terms of money it is a price deficit for the goods sold and delivered. It may not be a clear case for a price of goods sold and delivered strictu sensu although in effect it would be an amount representing the differential price required to be paid to a vendor. The vendor would stand in the position of an unpaid seller if the aforesaid approach is adopted. This differential amount could be treated as a sum due, a sum for which there is an existing obligation to pay and which is presently payable. A claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicating authority. Where there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of contract has is the right to sue for damages [See. ***Union of India v. Raman Iron Foundry & Ors.***, reported at **1974(2) SCC 231: AIR 1974 SC 1265**]

In the instant case the amount due can be objectively assessed.

The excess credit notes is the differential amount between the price of goods receivable and actually received. The amounts are clearly ascertainable and have been duly quantified by the plaintiff being the

aforesaid differential amount. There may be a dispute with regard to the liability to pay such sum or not at all. This is not a claim on account of any unliquidated damage. It is not arising out of a breach of contract. This is in fact a claim of an unpaid vendor for the remaining part of the consideration amount receivable for the goods sold and supplied. Merely because a claim of the plaintiff is required to be adjudicated on the basis of the excess credit notes for determination of amount actually receivable towards the price of goods sold and delivered it does not become a claim for unliquidated damages or a claim for an unascertained sum. In view thereof we are unable to accept the submission made on behalf of the respondent that the claim is on account of unascertained sum and sounds in damages.

Now we require to consider the prayer for injunction. The learned Counsel for the appellants has fairly submitted that they did not insist for attachment before judgment and for the present would be satisfied with an order of injunction which was passed on 17th July, 2019 and continued until it was vacated on 16th March, 2021. At the time of admission of the appeal on April 30, 2021 the earlier interim order was restored and is still in force.

It is clear from the order dated 17th July, 2019 that the interim order was passed in favour of the appellant after the parties were extensively heard on points that are now being urged before us. The documents that are now relied by the appellants were part of the record of the interlocutory proceedings. The respondents in the affidavits have not come out with any material document to contradict the findings arrived by KPMG and later on

BDO during forensic audit. Both the reports would show that the respondents have knowledge of the irregular transactions and they were consulted before the reports were prepared. The e-mail exchanged between SKS and the dealers during the period of investigation are not seriously disputed. In the affidavit all the respondents have the opportunity to deny the existence and contents of the e-mails exchanged between the parties during the aforesaid period. SKS had created a separate Id with password for the aforesaid transactions which clearly go to show that the said mechanism was consciously adopted to benefit the parties. The acquisition of assets by SKS during the aforesaid period of time without the source being disclosed faithfully in the affidavits, is a clear pointer to such interfere and a strong presumption of unscrupulous dealings. There was no necessity for the dealers or SKS to admit receiving excess credit contemporaneously. They were in the know of things. They were not at all surprised having received the accounts showing excess credit during reconciliation. The immediate reaction was conciliation and not denial. Their stand in the affidavit was of confession and avoidance. They cannot go together. We have repeatedly asked the learned Counsel for the dealers whether for the earlier periods they had received credits over and above the maximum cap earmarked for credit or rebates in the price circulars. We did not receive any satisfactory answer. In fact, the respondents did not disclose any document to show that prior to 2014 and for the undisputed period they were receiving excess credit over and above the highest cap mentioned on accounts of rebates for such period for the goods sold and delivered. Both the reports have meticulously analysed the price circulars

for the aforesaid period and calculated the excess credit extended by SKS to both the dealers for the aforesaid period. In fact, for the subsequent period after unearthing the gross irregularities goods were supplied on the basis of the rebates clearly specifying each of the price circulars on cash basis. SKS could not offer any explanation for such excess rebate being offered to the said two dealers. The defence of lack of knowledge of the said price circulars or determination of the price based on such price circulars is clearly not acceptable. All the respondents have either volunteer to furnish securities or admitted to payment of differential amounts in instalment and in furtherance thereof have either furnished securities or made some payments until they subsequently retracted their statement. It is submitted that the confessional statements were unusual, tailor made and obtained under coercion. We are unable to accept such submission at this stage since all of them could have contemporaneously lodged criminal complaints against the officials of TATA for extracting such statement by force. It is true that both the dealers have filed their written statement with counter claim but that by itself, in our view, is not a factor for not granting the order of injunction on a comparative analysis of the relative merits of the case. On the basis of the materials on record we feel that the plaintiff is entitled to some protection till the suit is decided. Interlocutory applications are decided on affidavit evidence. The quality of the claim and merits of the defence are decided on the material disclosed in the pleadings. Ordinarily trial on evidence is not followed at the interlocutory stage.

The growth of economic activities in its myriad forms have resulted in significant changes in the Commercial Law. The commercial transactions are primarily based on utmost good faith and confidence. It is important that in a commercial relationship like any other relationship there must be mutual trust, faith and respect. The evolution of granting credit for goods supplied was a mercantile practice developed over the years based on such trust and faith between the sellers and buyers. This was precisely what has happened in the instant case. The business relationship between the appellant and its dealers continued for a considerable period of time and transactions between the parties are admitted and transactions were never doubted by the appellant until the discovery of benefits of excess credit/rebate/discounts being passed on to such dealers over and in excess of price circulars with the active connivance of one of its employees. It is not unusual for an organisation like TATA to repose complete faith and confidence on one of its employees in relation to its dealings and transactions with the buyers and authorising him to pass on such admissible benefits on the basis of price circulars. Similarly good faith and trust is reposed on dealers. However, truth has the ugly habit of raising its head and eventually it raised its head in or around 2016 which led to the appointment of two auditors in quick succession to verify the dealings and transactions between the appellant and its two dealers.

At the interlocutory stage the court is not required to hold a mini trial.

An injunction is not a cause of action, like a tort or a breach of contract but a remedy. "Injunctions are a supplementary remedy, granted

to protect the efficacy of court proceedings, domestic or foreign” (**Lord Bingham in Fourie vs. Le Rocex 2007 (1) W.L.R 320: 2007(1) All E.R. 1087**).

In **Harleen Jairath** (*supra*) a Division Bench of our court had considered this aspect in some detail. The relevant observations are:

“30. Order 39 deals with temporary injunction and interlocutory orders. Temporary or perpetual injunction is in the nature of preventive relief granted to a litigant *quia timet*, i.e., because he fears future possible injury. An injunction is a judicial proceeding operating in *personam* where-under a party is required to do, or refrain from doing, any particular act. It is a remedy in the form of an order of the Court addressed to a particular person that either prohibits him from doing or continuing to do a particular act (*prohibitory injunction*); or orders him to carry out a certain act (*mandatory injunction*). (See. *Food Corporation of India v. Sukh Deo Prasad* reported at (2009) 5 SCC 665: AIR 2009 SC 2330).

31. According to Wade & Forsyth: *Administrative Law* (2009), injunction is the standard remedy of private law for forbidding the commission of some unlawful act, e.g. a tort or breach of contract. Its sanction is imprisonment or fine for contempt of court, or attachment of property. Historically, it is an equitable remedy, since it derives from the former courts of Chancery, and accordingly it has a discretionary character. Now, even in England, it is statutory. In India, it is statutory in nature.

32. The need for such protection, however, has to be judged against the corresponding need of the defendant to be protected against injury resulting from exercising his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power. (See. *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.* (1999) 7 SCC 1: AIR 1999 SC 3105).

33. The discretion of the Court to grant a temporary injunction is subject to the fulfilment of the following considerations as stated in paragraph 30 in *Seema Arshad Zaheer (supra)* it is stated:

"30. (i) existence of a prima facie case as pleaded, necessitating protection of plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's rights is compared with or weighed against the need for protection of defendant's rights or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands."

34. In the leading case of *Polini v. Gray* reported at (1879) 12 Ch D 438 : 41 LT 143, the principle behind grant of interim relief has been explained succinctly by Cotton, L.J. thus:

"It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruits of that litigation, and not obtain merely a barren success."

35. While Order 39 Rule 1(a) and 1(c) refer to the property in dispute, Order 39 Rule 1(b) does not put any such restriction as it uses the phrase "to remove or dispose of his property with a view to divert his creditor." The property contemplated under Order 39 Rule 1(b) may not be the property in dispute in the suit. An injunction can also be granted by the court to restrain a threatened removal or disposal of property with a view to defrauding creditors. If the court is satisfied that the defendant intends to remove or dispose of his property and his intention in doing so is to defraud his creditors, injunction under Rule 1(b) can be granted (*Padam Sen v. State of U.P.* AIR 1961 SC 218). Such property may be movable or immovable. Unlike clause (a) the applicability of clause (b) is not restricted or limited to the "property in dispute in a suit." Hence, clause (b) can be invoked even if the property is wholly outside the subject matter of the suit. (*Albert Judah Judah v.*

Rampada Gupta, AIR 1959 Cal 715). Only thing is that threat or intention to remove or dispose of property to defraud creditors must be supported by sufficient particulars. (Anand Prasad Agarwalla v. Tarkerhwar Prasad, (2001) 5 SCC 568).

38. *There is distinction between the provisions of Order 38, Rule 5 and Order 39, Rule 1(b) in that the former is intended to prevent a decree that may be passed being rendered infructuous while the latter is invoked where the defendant threatens to dispose of his property with a view to defraud creditors.*

39. *In decision of a Division Bench decision of our Court in Santosh Promoters (supra), the relative scope of both the sections have been lucidly discussed. It is stated:-*

"Let us now try to find out the distinction between the provisions under order 39 Rule 1(b) of Civil Procedure code and the provision contained in Order 38 Rule 5 of the Code of Civil Procedure. At the very outset, we like to mention here that those two provisions operate in different fields altogether. Order 38 Rule 5 of the Civil Procedure Code contemplates post decree consequences. While dealing with such an application, the Court is required to find out first as to whether there is strong possibility of passing a money decree in favour of the plaintiff. If the court is satisfied that there is every possibility of passing a money decree in favour of the plaintiff, then only the court can pass any order of attachment before judgment provided the Court is satisfied that the defendant is either trying to dispose of whole or any of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, with an intent to obstruct or delay the execution of any decree that may be passed against him. Reading the said provision as a whole, we are of the view, that order of attachment before judgment cannot be passed by any Court unless the Court is satisfied about the conditions as mentioned above.

Simultaneously if we consider the provisions contained in Order 39 Rule 1(b), of the Civil Procedure Code we find that while passing an order of injunction, the Court is not required to find out as to whether there is every possibility of passing a decree in favour of the plaintiff in the suit. While considering the application for temporary injunction, the Court is only required to ascertain as to whether a prima facie case has been made out by the plaintiff in the suit. Prima facie case means an arguable case meaning

thereby that a reasonable dispute is raised before the Court which the Court is required to resolve ultimately in the suit. A prima facie case is distinguishable from a full-proof case. When the Court finds that a prima facie case is made out by the plaintiff then the Court passes an order of injunction so that the ultimate relief which is claimed by the plaintiff in this suit is not frustrated and the decree which may be passed in the suit will remain unexecutable.

Apart from making out a prima facie, the plaintiff is also required to prove that if the balance of convenience and inconvenience is weighed, that will be in favour of grant of injunction, and if injunction is not granted, the plaintiff will suffer irreparable loss and injury.

Again the order of attachment before judgment will continue even after the suit is decreed in favour of the plaintiff and re-attachment of the attached property in execution is not needed in view of Order 38 Rule 11 & 11A of the Civil Procedure Code. However, the order of attachment before judgment will stand withdrawn on furnishing security by the defendant or with the dismissal of the suit as per the provision contained in Order 38 Rule 9 of the Civil Procedure Code.

Order of temporary injunction is essentially different from the order of attachment before the judgment as it loses its force with the disposal of the suit, be it decreed or dismissed. Its operation cannot be extended beyond the disposal of the suit.

Thus, we hold that the Court's power to grant temporary injunction cannot be treated at par with its power to pass an order of attachment before judgment under Order 38 Rule 5 of the Code of Civil Procedure. Thus, while passing an order of temporary injunction, post decree consequences need not be considered by the Court, but while passing an order of attachment before judgment, the Court has to consider the post decree consequences. As such the standard of proof in case of attachment before judgment is higher than the standard of proof necessary to be discharged in case temporary injunction is sought for." (emphasis supplied)

Section 151 of CPC empowers the court to invoke its inherent jurisdiction to prevent miscarriage of justice or to prevent abuse of process. The purpose of Section 151 CPC is to ensure that substantive justice is not defeated by hyper technicalities. The law courts are required to interpret to

the provisions to advance the cause of justice. The interpretation of such an omnibus provision should not be crippled by a myopic vision as the provision is intended to embrace all situations not specifically conferred on the court by the code.

In ***Padam Sen v. State of U.P.***, reported in **AIR 1961 SC 218** the Apex Court had observed:

“8.The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the puposes mentioned in section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.” (emphasis supplied)

In ***Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*** reported at **AIR 1962 SC 527** it was observed that:

“courts have inherent jurisdictions to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 CPC... It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them ... The court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so.” (emphasis supplied)

In issuing temporary injunctions, the tests to be applied are (i) whether the plaintiff has a prima facie case, (ii) whether the balance of convenience is in favour of the plaintiff, and (iii) whether the plaintiff would

suffer an irreparable injury if his prayer for temporary injunction is disallowed.

The interlocutory remedy is intended to preserve in status quo the rights of parties which may appear on a prima facie case.

The prima facie case at the ad interim stage not in the sense of convincing the court that on the evidence before it the petitioner is more likely than not to obtain a final injunction at trial. In ***American Cyanamid Co. V. Ethicon Ltd. (1975) A.C. 396*** has explained the law in this regard. It is stated:

“The evidence available to the court at the hearing of the application for an interim injunction is complete. It is given on affidavit and has not been tested by oral cross examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the claimant’s ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent there is no such rule The court no doubt must be satisfied that there is a serious question to be tried.....” (American Cyanamid at 406 G-407G)

“If the extent of the uncompensatable disadvantage to each party would not differ widely it may not be improper to take into account in tipping the balance the relative strength of each party’s case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute, that the strength of one party’s case is disproportionate to that of the other party. The court is not justified in embarking on anything like a trial of the action on conflicting affidavits in order to evaluate the strength of either party’s case.” (emphasis supplied) [American Cyanamid at 409B]

In the passing off case of *Gurdina Group v. Associated Newspapers* (CA, 20 January 2000, unreported) Robert Walker LJ said that in applying the

America Cyanamid principles the court may give “proper weight to a clear view which the court can form at the time of the application for interim relief (and without the need for a mini-trial or copious affidavit evidence) as to the likely outcome at trial.” (emphasis supplied) (See. **Injunctions by David Bean, Isabel Parry, Andrew Burns**)

At the stage of deciding the application for temporary injunction, the Court is not required to go into the merits of the case in detail. What the Court has to examine is (i) the plaintiff has a prima facie case to go for trial; (ii) the protection is necessary from that species of injuries known as irreparable before his legal right can be established; and (iii) that the mischief of inconvenience likely to arise from withholding injunction will be greater than what is likely to arise from granting it. [See **Harleen Jairath** (*supra*)]

There cannot be an absolute proposition that in a money claim no order of injunction or attachment or receiver could be made. Order 38 to Order 40 of the Code of Civil Procedure does not restrict the power of the court to pass any order that a court is empowered to pass just because it is a money claim. We have already discussed the circumstances when the court can exercise any of such power.

If there were doubts about exercising power under any of the aforesaid provisions, it can be safely stated that the court has inherent power to pass an order of injunction or attachment upon an unimpeachable liquidated claim being demonstrated and upon it being established that the respondents are taking steps to improperly deny the realization of the claim. When a huge sum of money is claimed and the plaintiff prima facie

establishes such amount he would be entitled to secure his interest keeping in view the amount involved in the suit. (See. **Rajendran & Ors. v. Shankar Sundaram & Ors.** reported at **2008 (2) SCC 724** (paragraphs 12 and 13) and **Sourav Ganguly v. Mahuaa Media Pvt. Ltd.** reported at **2015 (4) CHN (Cal) 509** (paragraph 43))

The very basis of an interlocutory relief is establishing a *prima facie*, case, balance of convenience and comparative hardship. These are the three pillars on which the claim for interlocutory reliefs are to be assessed.

The irretrievable damage likely to be caused is another factor which could scale the balance of the final order that may be passed at the interlocutory stage.

The plaintiff first has to cross the hurdle of *prima facie* case before the other factors are taken into consideration. Undoubtedly, the facts disclosed in the petition read with the initial admission of the dealers and SKS and the two detailed reports clearly establish a strong *prima facie* case. The confessional statement read with two reports and the acquisition of properties by SKS holistically viewed lead to an inference of an unholy nexus amongst the parties to make wrongful gain. It also *prima facie* established the claim of the appellant in the nature of an unpaid vendor to the extent of excess credit and/or unauthorised rebate dehors the price circulars. The claim is quite substantial. Although there cannot be any doubt that both the reports are expert opinion and such reports per se are not admissible in evidence unless proved in accordance with law, for the

purpose of the interlocutory proceedings, the court can always look into such expert opinion to satisfy its conscience about the merits of the claim. A view on such reports at the interlocutory stage is permissible.

The appellate court will not lightly interfere with the discretion exercised by the trial court in matters concerning interlocutory reliefs.

Ordinarily a discretion exercised by the trial court ought not to be interfered with by the appellate court unless it is *ex facie* perverse, unreasonable or contrary to law. In other words no reasonable person conversant with the facts and law on the basis of the materials on record could have passed such an order. It has to be demonstrably unjust, unfair and arbitrary. When the interlocutory application was heard before the another learned single Judge what appears to have impressed the learned Single Judge was that the claim in the suit is in the nature of unascertained sum and no order of injunction could be granted to secure a claim of an unascertained sum. There cannot be any two opinion on the issue that if there are serious questions to be tried for ascertaining the amount that has become due and payable or if it is an unascertained sum the court might be reluctant to pass any order securing such claim. Ordinarily as a matter of prudence the court does not grant an order of injunction in a money claim, although in exceptional circumstances such power may be exercised, if it comes within the purview of order 38 Rule 5 and Order 39 Rule 1 and 2 of the Code of Civil Procedure. The court may in appropriate cases in exercise of its inherent jurisdiction can pass injunction at the interlocutory stage if the situation so demands.

We may briefly indicate the reasons that are discernible from the judgment passed by the learned Single Judge on 17th July, 2019 granting an order of injunction in favour of the appellant.

The Learned Single Judge had considered all the emails exchanged between SKS and the distributors as the key documents since they lucidly revealed the modus operandi adopted by the respondents. The discounts due to distributors, the actual discounts extended to distributors, and the difference/excess credit paid to distributors are all disclosed in the interlocutory proceeding. The Single Judge had admonished the omission of the counsel's reference to the same and decided to consider the emails while adjudicating the case at the interim stage.

The second set of documents considered to be relevant by the learned Single Judge was the admissions by Respondent no. 3 dated February 9, 2018, admission of distributor no. 2 dated 19th February, 2018, the admission of the employee on July 25, 2017 and in the two letters dated February 8, 2018 and the offer of employee to secure the plaintiff by a letter handed over on February 12, 2018. It should be noted that the respondent no. 3's admissions in APO 128 of 2021 were withdrawn by an email written by the respondent no. 3 on February 14, 2018. The respondent no. 3 indicated in this letter that the distributor no. 1 was unaware of the pricing circulars in which the appellant provided the method of computation or distribution of cash discounts, freights, and other headings. In a meeting on November 14, 2017, he requested specific of the extra credits so that he could reconcile them at his end, according to

the letter. The letter went on to detail the ad hoc payments of Rs. 1,50,00,000/- paid on various dates, as well as the fact that both of the February 9, 2018 letters were given under duress and threat by respondent no. 3. There is no retraction of the acknowledgment made by ASA on February 19, 2018.

The third set of documents considered by the Learned Judge was the two reports submitted by KPMG and BDO. The Learned Judge had carefully examined both reports and concluded that they clearly revealed and laid bare the respondents' method of operation in the alleged fraud, as well as quantified the precise amount of extra credit passed on by the employee to the distributors. Both of these reports were based on documents recovered from the employee's computer and were categorical in their conclusion that the appellant had been defrauded of a substantial amount of money by way of excess credit passed on to the distributors by the employee through a mechanism of fraud and collusion between the distributors and the employee.

The Learned Single Judge observed that collusion and fraud highlighted by the given documents were unimpeachable. These documents were prima facie relied on by the forensic auditors and It was also observed that ASA had never retracted his statement from February 19, 2018, but the employee retracted his admission four months later, after his service was terminated. It was the observation of the learned Judge that the employee's retraction was a clear afterthought and hold no water. The Court was of the opinion that ASA's confessions were withdrawn after five

days. However, the Court very pertinently observed that this retraction does not explain the November 14, 2017 meeting. According to the Learned Judge it was inconceivable in the commercial world that a dealer who has been working with the appellant and receiving discounts and rebates for almost two decades is not aware of the basis of the said discount/s. The Learned Judge was of the view that fraud had been committed by the respondent on the petitioner.

The observation of the learned Single Judge in this regard are:

“....The irregular manner in which the respondents have sought to hand over documents before this Court to obfuscate the case of the plaintiff has further strengthened my view. Mr. Jishnu Chowdhury appearing on behalf of the distributor no. 2 handed over a customer ledger for the period of February 1, 2018 to February 28, 2018 of the petitioner company in relation to the distributor no. 2 that showed that the outstanding closing balance was Rs. 25,71,639.62/-. He, however, could not explain the letter issued by the petitioner to the distributor no. 1 on March 27, 2018 (Annexure 'T' of G.A. No. 733 of 2019) wherein the petitioner had clearly indicated the excess credit for the relevant years to the tune of Rs. 2,49,87,636/-. The distributor no. 2 was unable to produce any document that was written in reply to the letter of the petitioner dated March 27, 2018. In relation to the distributor no. 1, Mr. Aniruddha Roy filed a bunch of documents that I have considered in great detail. The emails dated November 27, 2017, January 16, 2018, January 28, 2018 and January 29, 2018 (Annexure 'A', 'B', 'C' and 'D' of the list of documents) only indicates that the distributor no. 1 was seeking more time to reconcile the accounts with the petitioner. These emails only demonstrate different excuses made by the distributor no. 1 explaining his inability to reconcile the accounts. Annexure 'E' in the list of documents contains undated documents wherein the distributor no. 1 has disputed the balance payable by them to the petitioner. These documents being undated and containing no proof that the same were even sent to the petitioner cannot be relied upon by me at this stage. The other documents annexed to the list of documents filed by Aniruddha Roy also do not throw any light on the matter in hand. The documents produced by the respondents clearly bear no substance whatsoever and were easily explained by Mr. S. N. Mookherjee in his reply. In fact on closer examination of these documents, I am of the view that the respondents have made their case far worse. The documents that have been handed over to this Court clearly indicate that the respondents have attempted to muddy the waters and befuddle the Court as these documents do not assist them in any manner. This attempt of the respondents to create a cumulonimbus cloud to confuse this Court was not expected and amounts to a churlish act, to put it euphemistically. The

above acts, in my view was nothing but legal boondoggling, if one may use an American expression, and has consequently boomeranged on the respondents.

...In view of the fact that the petitioner has been able to prove a prima facie case of collusion and fraud by the respondents, the conduct of the respondents and the irreparable loss and injury that would be caused to the petitioner, I am of the view that the three tests for grant of ad interim temporary injunction are satisfied in the instant case, and accordingly, distributor no. 1 and distributor no. 2 are restrained from transferring and/or alienating and/or creating any third party interest in the properties mentioned in Annexure 'DD' in G.A. No. 725 of 2019 and Annexure 'R' in G.A. No. 733 of 2019 respectively.

45. In relation to the employee, I find that the employee was bound by the terms and conditions of his appointment letter as also the Tata Code of Conduct (Annexure 'B' of G.A 725 of 2019) that required him to function in a honest and ethical manner. It is to be noted that an employee in a responsible position owes a kind of fiduciary duty to the employer and the employer would have proprietary rights over ill gotten gains of the said employee. Even if one were not to follow the standards as indicated above, an employee would be liable for losses and damages the employer incurs due to the fraud committed by the employee. In the instant case, the admission of the employee on various occasions starting from July, 2016 to February 2018 leave no room for doubt that the employee has committed fraud on the petitioner in this case. His own admission that he received 25 per cent as kickback by way of his letter dated February 8, 2018 speaks volumes and the same is accentuated by the offer by the employee by letter dated February 9, 2018 to secure the petitioner by offering a flat owned by him. In light of the same, I restrain the employee from transferring the property mentioned in Annexure 'M' at page 515 of G.A. 725 of 2019. Keeping in mind the quantum of damages, I further restrain the employee from transferring the shares, mutual funds and fixed deposits lying in his own name. Keeping the balance of convenience and inconvenience in mind, the above ad interim injunction restraining the respondents from transferring the properties as indicated above shall be restricted to the extent of Rs. 10 crores for the distributor no. 1, Rs. 1 crore for the distributor no. 2 and Rs. 1 crore for the employee. In my view, the above amounts are required to be secured in favour of the petitioner by the respondents respectively. The respondents shall be at liberty to file appropriate application to secure the above amounts as indicated above, and upon such security being given, the restraining order against the party concerned may be lifted, subject to satisfaction of this Court. I make it clear that the ad interim orders passed above shall continue till disposal of the interlocutory applications or till passing of any modification order, whichever is earlier." (emphasis supplied)

It is thus clear that the findings are based upon consideration of the conflicting affidavits and documents and on a *prima facie*, satisfaction that the plaintiff has comparative advantage over the defendants. It is on

consideration of and evaluation of comparative strength of the parties that the discretion was exercised in favour of the plaintiff.

The facts are overwhelmingly in favour of the appellant to justify an interim order that continued for a considerable period of time and again restored on April 30, 2021.

An unimpeachable claim for money being established the court in our view is entitled to pass an order of injunction so that the decree passed ultimately may not be rendered nugatory. It, however, shall depend upon the facts and circumstances of each case.

Commercial morality has changed over a period of time and various devices and mechanism are now being adopted to defraud creditors and in our view the law must be interpreted to protect the interest of a creditor when there is every likelihood that in the events the claim is not secured the creditor might suffer irreparable loss and prejudice.

In **Raa Projects Ltd.** (supra) the application in the nature of attachment before judgment was disallowed on the ground that it is preposterous to suggest a high order in the nature of attachment before judgment can be claimed in support of an unliquidated claim in damages. The learned Single Judge doubted the form of the claim and was of the view that the plaintiff had barked up a wrong tree in chasing them. The relevant facts are stated in paragraph 3 to 5, the said paragraphs are:

“3. It is the plaintiff's case that the plaintiff shipped shrimps on board the vessel M.V. Tiger Creek. The plaintiff has relied on the relevant bill of lading which

is signed by the second defendant on behalf of the third defendant. According to the plaintiff, before the goods reached the discharge port of Southampton in the United Kingdom, the plaintiff's buyers declined to accept the goods; whereupon, the plaintiff obtained another contract from a party in Scotland. The plaintiff says that it advised the defendants (the use of the expression 'defendants' is loosely made in the plaint without always specifying the particular defendant involved) to carry the goods to Felixstowe rather than Southampton, without referring to the minor formalities that were required to be complied with upon the bill of lading indicating that the goods were to be discharged in Southampton.

4. The goods reached Southampton. The plaintiff abandoned its earlier demand that the goods be carried to Felixstowe. The plaintiff wanted the goods to be sent back to Calcutta. Correspondence followed between some of the parties and it is the general refrain in the plaint that the plaintiff made demands on the first and second defendants whether for the preservation of the goods or for expeditious steps to be taken for the return of the goods.

5. Finally, the plaintiff relies on a proforma bill of lading allegedly issued by the defendant No. 4. The plaintiff says that notwithstanding such proforma bill of lading, which, according to it, demonstrates a concluded contract, the goods were ultimately destroyed by the authorities in the United Kingdom for which a two-day notice was received from the defendants by the plaintiff. The plaintiff complains that it was due to the acts and conduct of the defendants that the plaintiff lost its goods and not only lost its investment of about Rs. 50,00,000/- but was also slapped with a demand to pay a sum in excess of £ 8,000 as costs of destruction of the goods."

The reason for denying such reliefs are on the facts stated above.

In the instant case, the facts are clearly distinguished.

In **Karam Chand Thapar & Bros** (supra) the claim was for unliquidated damages against the appellant on account of alleged inferior goods supplied by the appellant. The trial court directed furnishing of securities. The appeal was allowed with the following observations:

“It is elementary that a claim in damages is, ordinarily, not secured by an order in the nature of attachment before judgment. A claim in unliquidated damages can scarcely call for an order of attachment. There are good reasons for such legal principle. For an order in the nature of attachment to be obtained, the party seeking such order should demonstrate an almost unimpeachable claim and the likelihood of the claim remaining unsatisfied unless security was furnished at the initial stage.

The allegation in this case is of supply of inferior goods. It has to be assessed whether such allegation would stand and, if so, to what extent. There can be no measure of assessing, at least at the interlocutory stage, the quantum of money that the claimant may be entitled to, if at all. In such circumstances, there is no possibility of any unimpeachable claim being demonstrated for an order in the nature of attachment being earned.” (emphasis supplied)

In **Jai Balaji Industries Ltd.** (*supra*) the petitioner prayed for an order in the nature attachment before judgment and contended that the conduct of the respondent demands that the respondent be restrained from dealing with or disposing of its only known immovable property in Hyderabad. The agreement is with regard to fuel handling contract for a captive power plant. The agreement recorded that the time was essence of the contract and clause 2.11 provided for payment of liquidated damages for delay in delivery. The petitioner under such clause was entitled to deduct from the contract price a sum equivalent to 0.5% of the total contract price for each week of delay until actual performance upto a maximum deduction of 5% of the total contract price. The right to deduct such amount by way of liquidated damages was without prejudice to the other remedies to which the petitioner was entitled.

In the respondent’s affidavit the basis of the plaint was questioned. The respondent contended that it was forced to accept the repudiation of the contract by reason of the conduct of the petitioner, particularly, in the

petitioner making delayed payments or refusing to make payment of the amounts that had fallen due to the respondent.

It was on that backdrop the following observation was made:

“The claim in damages has to be ascertained. Apart from the amount indicated by way of liquidated damages, which may have been a genuine pre-estimate that was recorded by the parties, the rest of the claim has to be assessed. Even the amount claimed by way of liquidated damages, which is less than one per cent of the total claim, may overlap with the other claims, particularly as this is not a case where the work has been completed after a delay but where the work has been abandoned altogether if the petitioner’s version is believed; or the contract has been repudiated if the respondent’s version is believed.

For a claim which is essentially for an unliquidated amount in damages no order in the nature of attachment before judgment is ordinarily passed. It is not necessary to consider the petitioner’s contention that the respondent has not dealt with the statements contained in paragraph 20 of the petition. A strong prima facie case in support of the claim has first to be made out before the respondent’s conduct can be gone into or any allegation as to the respondent’s impecuniosity can be taken into consideration. Here, the petitioner’s claim is for an unliquidated amount in damages which requires to be assessed and ascertained and it cannot be said that a strong prima facie case has been made out. In any event, the respondent has denied in its affidavit that it is in the process of selling any of its assets; that would imply that the respondent has denied that the respondent seeks to sell its office in the immediate future.

A very strong prima facie case is an essential first step to an order in the nature of attachment before judgment. Unless a near unimpeachable claim in money is apparent, there is no need to proceed to the second stage of assessing the conduct or financial capability of the respondent.” (emphasis supplied)

In **Board of Trustees for the Port of Kolkata** (*supra*) the learned Single Judge came to a findings that the ports claim is for damages of an

unliquidated sum upon the perceived abandonment of the agreement by the contractor. However, significantly it was observed:

“..... A claim in damages ordinarily does not excite a court to consider a prayer for security or attachment, though there may not be any express law to prohibit an order of such nature. Unlike several other causes of action where a prima facie assessment may be more easily made, a claim in damages is rather more difficult to assess on mere affidavit evidence. The Port has first to establish that it is entitled to damages and then have the quantum thereof ascertained. It is possible that there could come a case where the claimant’s entitlement to damages is apparent. The Port’s claim in the present case is not of such exalted quality. On the evidence now presented by the parties, it can safely be said that both the Port and the contractor have suffered upon the agreement having been terminated. But the fact that the Port has suffered loss does not imply that it is entitled to recover it from the contractor. If such is the prima facie assessment on the basis of the material now brought by the parties, the Port falls well short of the quality of claim that it has to demonstrate to be entitled to the high order that it seeks. Further, the balance of convenience does not warrant that the contractor’s machinery and equipment be either left to rot and wither in value or be directed to be sold in distress.” (emphasis supplied)

In the instant case the appellant has not prayed for attachment before judgment. The aforesaid judgments are to be read contextuary and it cannot be read as a statute or an Euclid’s Theorem. In fact, in the last referred judgment the learned Single Judge has indicated the circumstances where an order for security can be allowed. It would depend upon the quality of the claim and the quality of the defence.

We have elaborately discussed the conduct of the parties and the relevant facts which in our view justified the restoration of the interim order as the refusal to pass any such order would cause greater hardship. The appellant has fulfilled all the cardinal tests for an interim order which now

need to be restored and was allowed to continue by the appellate court on 31st April, 2021.

In a fairly recent judgment the Hon'ble Supreme Court in **Rahul S. Shah v. Jinendra Kumar Gandhi & Ors.** reported in **2021(6) SCC 418** quoted with approval the anxiety expressed by the privy council in **General Manager of the Raj Durbhunga v. Coomar Ramaput Sing** reported in **1872 SCC Online PC 16** in which it was observed that the actual difficulties of a litigant in India begin when he has obtained a decree. [See. Paragraph 9 of Rahul S. Shah (supra)] In the same paragraph the Hon'ble Supreme Court noted similar observation made in **Shub Karan Bubna v. Sita Saran Bubna** reported in **2009 (9) SCC 689** where the Hon'ble Supreme Court recommended that the Law Commission and Parliament should bestow their attention to provisions that enable seamless successful execution. It was on consideration of the various provisions of the Code of Civil Procedure and the likelihood of prejudice and inconvenience that a decree holder may likely to face certain mandatory directions have been given in paragraph 42 which reads:

“42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions:

1. In suits relating to delivery of possession, the court must examine the parties to the suit Under Order X in relation to third party interest and further exercise the power Under Order XI Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.

2. *In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.*
3. *After examination of parties Under Order X or production of documents Under Order XI or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.*
4. *Under Order XL Rule 1 of Code of Civil Procedure, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.*
5. *The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.*
6. *In a money suit, the Court must invariably resort to Order XXI Rule 11, ensuring immediate execution of decree for payment of money on oral application.*
7. *In a suit for payment of money, before settlement of issues, the Defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers Under Section 151 Code of Civil Procedure, demand security to ensure satisfaction of any decree. (emphasis supplied)*

For the present purpose the observation in paragraph 42.6 and 42.7 are relevant.

What matters is whether there is sufficient likelihood that a judgment will be obtained and it will be rendered ineffective unless the court grants an injunction.

The order impugned considered the claim to be an unascertained sum ignoring the fact that it is claimed towards realisation of amount that in the ultimate analysis had remained unpaid. The plaintiff has quantified the sum on the basis of the reports which clearly establish excess rebate/discount granted to the respondents dealings. The reports are based on primary documents and data recovered from the computer of SKS. SKS has not seriously disputed the authenticity of the materials and data recovered from his computer. The appellant's entitlement to such differential sum is apparent. It is significant to mention that the dealers as well as employees had admitted that they are the beneficiary of excess credit. The acquisition of disproportionate assets by SKS coupled with the admission of the dealers receiving excess credit in lieu of kickbacks complete the circle of complicity of all the three persons in engineering a mechanism to make unjust gain. The dealers received excess credit over and above their entitlement. The argument on behalf of the dealers that they were not informed of any price circular at any point of time since the business relationship developed is extremely difficult to believe, having regard to the fact that none of the dealers after the accounts are being disclosed had contemporaneously taken any such plea. They developed this defence after disclosure of the accounts and the reports. In a quagmire of despondency unsustainable plea of lack of knowledge of price circulars and inadmissibly of the two reports are now being raised without making any genuine attempt to clear the cobweb of transactions and dealings between SKS and the dealers. The said reports prima facie establish complicity and unholy nexus between them. The respondent dealer had the opportunity to establish unworthiness of such

reports. On the contrary the dealers have admitted to have received excess credit. This admission read with the other materials on record *prima facie* clearly suggest that they were aware of the price circulars. The plaintiff is able to make out a strong *prima facie* case.

The argument of Mr. Chowdhury that a dealer is entitled to discount starting from freight charges to cash discounts and such discounts are variable also cannot be accepted at this stage for the reason that they were unable to show that even for the period when the circulars were admittedly in force they have received credit over and above the maximum cap or the kind of benefit that they enjoyed during the period in question. We have put repeated questions to the learned Counsel for the dealers to disclose whether they had received at any given point of time prior to the period in question such extra benefits as the present but we did not receive any satisfactory reply. The learned Single Judge in its order dated 17th July, 2019 also had taken note of this fact.

Under such circumstances, both the appeals and the applications being APO. No. 128 of 2021 with IA G.A. No. 1 of 2021 and APO. No. 129 of 2021 with IA G.A. No. 1 of 2021 are allowed.

The interim order passed on July 17, 2019 is restored and the interim order passed at the time of admission of the appeal on April 30, 2021 is confirmed. It is needless to mention that the views expressed and observation made in this judgment shall not influence the learned Single Judge in deciding the suit on merits and shall not influence the trial.

However, there shall be no order as to costs.

I Agree,

(Soumen Sen, J.)

(Siddhartha Roy Chowdhury, J.)